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No. 50573-8-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Detention of  
**Michael Canty,**  
Appellant.

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Clark County Superior Court Cause No. 16-2-01450-3  
The Honorable Judge Derek Vanderwood

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court infringed Mr. Canty's right to due process under the Fourteenth Amendment and Wash. Const. art. I, §3.
2. The trial court erred by admitting Del La Torre's 1996 statements as substantive evidence.
3. The erroneous admission of Del La Torre's hearsay statements violated ER 802, ER 804, and Mr. Canty's right to due process.
4. The trial court erred by finding Del La Torre "unavailable" within the meaning of ER 804.
5. The trial court erred by finding that Mr. Canty had a similar motive to cross examine Del La Torre at a 1996 preliminary hearing in California.

**ISSUE 1:** At a civil commitment proceeding, due process prohibits the admission of hearsay as substantive evidence unless the patient has had a prior opportunity for cross-examination on issues relevant to the commitment proceeding. Did the trial court violate Mr. Canty's right to due process by admitting as substantive evidence Del La Torre's 1996 statements at a California preliminary hearing?

**ISSUE 2:** Former testimony is only admissible as substantive evidence where the declarant is unavailable, and the opponent had an opportunity and similar motive to develop the testimony through cross examination at the prior proceeding. Should the court have excluded Del La Torre's former testimony, given the State's failure to prove her unavailability and the lack of evidence showing similarity of motive for cross examination at the 1996 preliminary hearing?

6. The order committing Mr. Canty violated his Fourteenth Amendment right to due process because it was not based on a finding that he is currently dangerous.
7. The court's instructions failed to make the relevant legal standard on Mr. Canty's likelihood of committing predatory sexual violence manifestly apparent to the average juror.
8. The trial court erred by refusing to instruct jurors on the availability of a Recent Overt Act ("ROA") Petition.
9. The trial court erred by refusing Mr. Canty's proposed "likely to engage" instruction.

**ISSUE 3:** The possibility of civil commitment based on a “recent overt act” following release is relevant to a sexually violent predator determination. Should the trial judge have told jurors that Mr. Canty, if released, could be committed based on a “recent overt act” that did not amount to a new crime?

**ISSUE 4:** Due process requires that civil commitment be reserved for those who are mentally ill and currently dangerous. Does the commitment order violate due process because the court’s instructions allowed jurors to conclude Mr. Canty meets commitment criteria even absent proof of current dangerousness?

**ISSUE 5:** At a civil commitment trial, jurors must decide if the person before them is likely to engage in predatory acts of sexual violence if not confined in a secure facility. Did the court’s instructions fail to make the relevant standard manifestly clear to the average juror?

10. The court’s instructions infringed Mr. Canty’s due process right to a decision based on the evidence rather than passion and prejudice.
11. The trial court erred by instructing jurors using statutory language calculated to inflame the jury’s passions and prejudices.
12. The trial court erred by denying Mr. Canty’s motion to substitute neutral language for the phrase “sexually violent predator.”

**ISSUE 6:** The phrase “sexually violent predator” has been shown to create bias unrelated to evidence that a person is dangerous. Did the trial court violate Mr. Canty’s right to due process by refusing to substitute neutral language for the phrase “sexually violent predator” in the instructions?

13. The commitment order violated due process because the evidence was insufficient to prove that Mr. Canty was likely to engage in predatory acts of “sexual violence,” as defined in the court’s instructions.
14. The State failed to prove that Mr. Canty was more than 50% likely to commit indecent liberties by forcible compulsion, first degree or residential burglary with sexual motivation, or unlawful imprisonment with sexual motivation.

**ISSUE 7:** The sufficiency of the evidence required for commitment is measured against the court’s instructions. Did the court’s instructions permit commitment only if the State proved that Mr. Canty is likely to commit one of several specific enumerated offenses?

**ISSUE 8:** The State must prove beyond a reasonable doubt all facts necessary for commitment, as reflected in the court’s instructions. Did the State fail to prove that Mr. Canty is likely to engage in predatory acts of “sexual violence”?

15. The trial judge improperly commented on the evidence in violation of Wash. Const. art. IV, §16.
16. Mr. Canty’s civil commitment infringed his right to due process because the court’s instruction relieved the State of its burden to prove an element required for commitment.
17. The trial court improperly directed jurors to find that Mr. Canty had previously been convicted of a “crime of sexual violence.”
18. The trial court erred by instructing jurors that Mr. Canty’s prior convictions were *per se* “crimes of sexual violence.”
19. The trial court erred by giving Instruction No. 4.
20. The trial court erred by giving Instruction No. 8.
21. The court’s instructions failed to make the relevant standard manifestly clear to the average juror.

**ISSUE 9:** A judge may not comment on the evidence. Did the trial judge comment on the evidence and relieve the State of its burden of proof by telling jurors that Mr. Canty’s prior offenses were *per se* “crimes of sexual violence” as a matter of law?

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Michael Canty finished his prison sentence in August of 2014, and the State filed a Petition for Commitment. CP 1-2. That Petition alleged that Mr. Canty had been convicted of a sexually violent offense, that he has a mental abnormality or personality disorder which causes serious difficulty in controlling his behavior and makes future predatory acts of sexual violence likely. CP 1. The case went to trial. The attorney for the State

acknowledged to the court that its case was a “pretty close case for an initial commitment”. RP 5.

One of the prior incidents the State wanted the jury to consider stemmed from a 1996 allegation. CP 69-70. The claim was that Mr. Canty attacked a stranger in her yard, dragged her inside, and tried to rape her. RP 622-626.

The state did not call the alleged victim, Zenaida Del la Torre, at Mr. Canty’s commitment trial. RP 93-94. They did not subpoena her, interview her, or even talk to her. The State used investigator Dwain Sparrowk to attempt to find her. CP 92. He looked for the name “Zenaida Banuelos (de la Torre).” CP 92. In Del la Torre’s testimony in 1996, she gave two different spellings – “Banuelos” and “Banulos.” CP 97. The assistant attorney general conducting Mr. Canty’s commitment trial spelled her last name “Del La Torre,” and this spelling was used in the court’s Order on Motions in Limine. CP 334, 362. The court reporter at the California hearing transcribed her alternate last name as “de la Torre,” but neither the witness nor the interpreter provided the proper spelling for that name. CP 97.<sup>1</sup>

To locate Banuelos/Banulos/de la Torre/Del La Torre, the State’s investigator “sent correspondence” to her “last known Post Office Box address” and to “Rudy Banuelos possibly related and named as a witness on the 1996 police report.” CP 91-92. He did not indicate how he obtained

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<sup>1</sup> This was the spelling used in the California Information. CP 242-244.

the P.O. Box address and did not claim he'd searched for the physical address associated with that P.O. Box. CP 91-92. Nor did he provide details regarding how he attempted to locate "Rudy Banuelos," other than the reference to the 1996 police report. CP 91-92. The State did not provide any details regarding the "correspondence," did not state if or how Sparrowk instructed the recipient(s) to contact him, and did not indicate whether the letters were returned unclaimed.

The investigator also "us[ed] social media" and "[s]earched for leads to her using law enforcement databases," but provided no details on how he conducted these searches, what databases he consulted, or how he spelled her name in conducting each search. CP 91-92. It does not appear that he conducted a general internet search, or that he used social media or law enforcement databases to search for Rudy Banuelos at all.

The State sought to use Del la Torre's testimony from a 1996 preliminary hearing and asked the court to find her unavailable. CP 69-70.

Mr. Cauty objected, noting that he'd had no opportunity to cross examine the witness on issues relating to the commitment trial, and that the purpose of the 1996 preliminary hearing was quite different from the purpose of a civil commitment trial.<sup>2</sup> RP 96, 99, 549-552. The defense

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<sup>2</sup> Del La Torre had testified at that hearing using an interpreter. There was no indication that the interpreter had taken an oath, and the court reporter only transcribed the hearing's English portions. RP 549-552; CP 94-133. In his objection to her testimony, Mr. Cauty pointed out that the evidence was provided through an interpreter, who may not have been placed under oath. RP 549-552.

team also pointed out that Mr. Canty had been acquitted of the primary charge in the California prosecution. RP 890, 892.

The court found the witness unavailable and admitted the testimony as substantive evidence. RP 99-100, 606, 620-627; CP 362. During closing argument, the State emphasized Del la Torre's testimony, arguing that Mr. Canty acts without regard for consequences. RP 960-962.

Mr. Canty proposed a jury instruction informing jurors of the availability of a "recent overt act" (ROA) petition. CP 139, 213, 218. He planned to argue that he would face civil commitment upon release if he committed a recent overt act not amounting to a new crime, and that this reduced his likelihood of engaging in predatory sexual violence.<sup>3</sup> CP 139; RP 779-796. The State persuaded the court that the argument should only be allowed if Mr. Canty testified that he understood the law and that it would deter him from future acts of sexual violence. RP 118, 780. Mr. Canty eventually decided not to testify. RP 814. The jury was not instructed on the issue. Court's Instructions, Supp. CP.

Mr. Canty asked the court to substitute the phrase "criteria for commitment" in place of "sexually violent predator" in its instructions to the jury. RP 54, 118-120. Noting that the phrase is emotionally loaded and easily changed to the more neutral "criteria for civil commitment", the defense proposed a set of instructions based on this request. RP 54, 118-120; CP 200-208. The defense cited a study showing that the inflammatory

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<sup>3</sup> The defense also wanted to bring out, through expert testimony, the availability of an ROA petition. CP 139; RP 779-796.

phrase “sexually violent predator” created bias unrelated to evidence of dangerousness. RP 119-120, 123. The court denied the motion and instructed jurors using the phrase “sexually violent predator.” RP 118-124, 816; CP 140-143, 201, 326.

Both the State and the defense presented expert testimony. The experts generally agreed on the outcome of various test instruments, including both actuarial instruments applied. Neither expert was asked what crimes Mr. Canty may commit in the future if he were released from confinement. RP 271-558, 656-813.

The defense proposed an elements instruction that required proof that he’d been “convicted of a crime of sexual violence” but did not tell jurors that his prior offenses automatically qualified. CP 219, 226. The court declined to give the requested instruction. Instead, the court instructed jurors that the State was required to prove that Mr. Canty “has been convicted of a crime of sexual violence, namely Indecent Liberties with Forceable Compulsion and/or Burglary in the First Degree with Sexual motivation.” Instruction No. 4, Supp. CP.<sup>4</sup>

The parties contested Mr. Canty’s level of risk—whether he was “likely to engage in predatory acts of sexual violence” if released from detention. The State proposed an instruction that did not give a general definition of “sexual violence” but instead enumerated eleven specific felonies

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<sup>4</sup> The court also defined the phrase “sexual violence” to include the two offenses and indicated that “[a]n attempt to commit [either] of these offenses is also a crime of sexual violence.” Instruction No. 8, Supp. CP.

(or attempts to commit those crimes) as crimes of sexual violence. State’s Proposed Instruction No. 8, Supp. CP. After significant discussion, the court narrowed the list to four crimes (or attempts to commit those crimes): indecent liberties by forcible compulsion, first-degree burglary with sexual motivation, residential burglary with sexual motivation, and unlawful imprisonment with sexual motivation. Instruction No. 8, Supp. CP; RP 861-914.

The jury returned a verdict of “yes” to the question of whether the State had proven that Mr. Canty is a sexually violent predator. CP 371. Mr. Canty timely appealed. CP 377.

### **ARGUMENT**

#### **I. THE TRIAL JUDGE VIOLATED MR. CANTY’S RIGHT TO DUE PROCESS BY ALLOWING JURORS TO CONSIDER INADMISSIBLE HEARSAY AS SUBSTANTIVE EVIDENCE.**

Two decades before Mr. Canty’s commitment trial, Zenaida Del La Torre testified at a preliminary hearing in California, claiming that Mr. Canty had attacked her.<sup>5</sup> RP 620-627. The court admitted her testimony as substantive evidence in Mr. Canty’s commitment trial. RP 93-100, 620-627; CP 70, 94-133, 362. Mr. Canty had no opportunity to cross-examine Del la Torre on issues relating to his commitment. Because the State failed to establish a proper foundation under ER 804(b)(1), the evidence should not have been admitted. The trial judge violated ER 802, ER 804, and Mr.

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<sup>5</sup> The State offered only the evidence from the preliminary hearing; it did not offer Del La Torre’s trial testimony (including cross-examination by the defense). RP 97, 620-627. Mr. Canty was later acquitted of the main offense charged. RP 97, 890, 892.

Canty's right to due process by admitting the hearsay and allowing jurors to consider it as substantive evidence.

- A. The Court of Appeals should review this constitutional claim *de novo*.

Appellate courts review constitutional claims *de novo*. *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 820, 389 P.3d 543 (2017); *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373 (2017). The *de novo* standard applies to discretionary decisions alleged to violate constitutional rights. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). This is so because a court necessarily abuses its discretion by violating an accused person's constitutional rights. *Jones*, 168 Wn.2d at 719.

For example, in *Jones* the court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719. Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court pointed out that review would have been for abuse of discretion had the defendant not argued a constitutional violation. *Id.* See also *United States v. Lankford*, 955 F.2d 1545, 1548 (11<sup>th</sup> Cir. 1992).

However, the Supreme Court has not applied this rule consistently. To take another example, one month prior to its decision in *Jones*, the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*—the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). But such inconsistency should not be taken as a repudiation of the rule: cases applying the abuse-of-discretion standard have not articulated any rationale for reducing constitutional rights to matters of discretion. *See, e.g., State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017).

And consider the *Dye* court, which indicated that merely alleging a violation of the right to a fair trial “does not change the standard of review.” *Id.*, at 548. However, the *Dye* court did not cite *Iniguez* or *Jones*. *Id.*, at 548. Nor did it address the reasoning outlined in those decisions. Furthermore, the petitioners in *Dye* did not ask the court to apply a *de novo* standard. *See Dye* Petition for Review<sup>6</sup> and Supplemental Brief.<sup>7</sup> As the *Dye* court noted, the petitioner “present[ed] no reason for us to depart

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<sup>6</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf> (last accessed 7/11/17).

<sup>7</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf> (last accessed 7/11/17).

from [an abuse-of-discretion standard].” *Id.*<sup>8</sup> There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones*. *Id.*

In *Clark*, the court announced it would “review the trial court's evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court.” *Id.* (internal quotation marks and citations omitted). Upon finding that the lower court had excluded “relevant defense evidence,” the reviewing court would then “determine as a matter of law whether the exclusion violated the constitutional right to present a defense.” *Id.*

Although the *Clark* court cited *Jones*, it did not suggest that *Jones* was incorrect, harmful, or problematic, and did not overrule it. *See, e.g., Armstrong*, 188 Wn.2d at 340 n.2 (“For this court to reject our previous holdings, the party seeking that rejection must show that the established rule is incorrect and harmful or a prior decision is so problematic that we must reject it”). The *Clark* court did not even acknowledge its deviation from the standard applied by the *Jones* court. *Id.* Nor does the *Clark* opinion mention *Iniguez*. Furthermore, as in *Dye*, the Respondent in *Clark* argued for the abuse-of-discretion standard, and Petitioner did not ask the court to apply a different standard. *See* Respondent’s Supplemental Brief,

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<sup>8</sup> By contrast, the Respondent did argue for application of an abuse-of-discretion standard. *See Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20brief.pdf> (last accessed 7/11/17).

p. 16;<sup>9</sup> Petitioner's Supplemental Brief.<sup>10</sup>

This court should follow the reasoning in *Iniguez* and *Jones*. This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye* and *Clark*.

Constitutional errors should be reviewed *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. Rights secured by the constitution should not be subject to judicial discretion. *Jones* and *Iniguez* set forth the proper standard. Given the Supreme Court's inconsistency on this issue, review here should be *de novo*. *Id.*; *Iniguez*, 167 Wn.2d at 281.

B. Due process guarantees a patient facing civil commitment the right to cross-examine adverse witnesses who provide substantive evidence.

1. The Supreme Court left this issue open in *Stout* and *Coe*.

The Supreme Court has determined that a patient facing civil commitment does not have a right to face-to-face confrontation with an adverse witness where counsel has cross-examined the witness in a deposition. *In re Det. of Stout*, 159 Wn.2d 357, 368, 150 P.3d 86 (2007). But that court explicitly reserved ruling on whether due process guarantees the right to cross-examine adverse witnesses, where the patient had no opportunity to cross-examine at some point in the commitment proceeding. *Id.*

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<sup>9</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (last accessed 2/10/17).

<sup>10</sup> Available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (last accessed 2/10/17).

In *Stout*, the patient’s attorney participated in two telephonic depositions, one of which was videotaped. *Id.* Thus, as the Supreme Court noted, the patient “had two separate opportunities to cross-examine [the victim.]” *Id.* Accordingly, the court was presented with “[n]o controversy... as to cross-examination.” *Id.* Because of this, the court “re-view[ed] only Stout’s *confrontation* claim.” *Id.* (emphasis added).

The *Stout* court premised its discussion “on whether any purpose is served in recognizing a *due process* right to confrontation *where cross-examination has been achieved.*” *Id.*, at 368 n. 9 (emphasis in original). The court went on to balance a patient’s right to a face-to-face encounter—not the right to cross-examination—with the risk of error and the State’s countervailing interests. *Id.*, at 370-374 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Following *Stout*, where cross-examination *has* been “achieved,” there is no due process right to a face-to-face encounter with adverse witnesses. *Id.* However, as noted, this leaves open the question of a constitutional right to cross-examination: *Stout* did not determine if such a right exists. *Id.*, at 368.

Likewise, the Supreme Court did not resolve the issue in *Detention of Coe*, 175 Wn.2d 482, 509, 286 P.3d 29 (2012). There, the court found no right to cross-examine where the victim’s statements were not admitted as substantive evidence. *Id.*, at 509-512. In *Coe*, the substance of each victim’s statement was “admitted only to show the underlying basis for

Dr. Phenix's opinion.” *Id.* The court pointed out that this limitation “favors the State under the second [*Mathews*] prong,” and “reduces the probable value of requiring an opportunity for confrontation.” *Id.*, at 511. Furthermore, the transcripts of the victims’ prior statements were *not* offered in *Coe*; instead, Dr. Phenix “testified that she relied on the reports of [the victims], which included the victims’ statements.” *Id.*, at 509.

Here, Del La Torre’s statements were admitted as substantive evidence, and the transcript of her testimony was read to the jury. RP 620-627. The court imposed no limitation on the evidence, and jurors were permitted to consider it for any purpose. RP 620-627. Mr. Canty’s case thus presents issues left unresolved by *Stout* and *Coe*.

2. Under *Mathews*, Mr. Canty had a due process right to cross-examine Del La Torre on issues relating to his civil commitment before her statements could be admitted as substantive evidence.

The federal and state constitutions prohibit the deprivation of liberty or property without due process of law. U.S. Const. Amend. XIV; Wash. Const. art. I §3. Civil commitment for any purpose is a significant deprivation of liberty that requires due process protections. *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

The “fundamental requisite” of due process is the “opportunity to be heard . . . in a meaningful time and in a meaningful manner.” *Goldberg*

*v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (internal quotation marks and citations omitted)). Cross-examination is an integral part of this guarantee: “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Id.*, at 269.

Courts determine the constitutional requirements of procedural due process by balancing “(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.” *Stout*, 159 Wn.2d at 370 (citing *Mathews*, 424 U.S. at 335). The *Mathews* balance weighs in favor of cross-examination when a witness provides substantive evidence supporting commitment. Were this not true, a patient could constitutionally be committed based solely on an expert’s written report.<sup>11</sup>

**Factor one.** The Supreme Court has already determined that the first *Mathews* factor “weighs heavily in [Mr. Canty’s] favor.” *Id.* Furthermore, the possible length of the deprivation is an important consideration under *Mathews*. *Gourley v. Gourley*, 158 Wn.2d 460, 468, 145 P.3d 1185

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<sup>11</sup> The rules of evidence would likely bar such a result; however, absent a constitutional right, the legislature has authority to determine the kind of evidence used to support commitment. See, e.g., *State v. McCuiston*, 174 Wn.2d 369, 397, 275 P.3d 1092 (2012) (“[I]t is not unusual for the legislature to enact legislation mandating the exclusion of certain types of otherwise admissible evidence.”)

(2006) (plurality); *Mathews*, 424 U.S. at 341-342. Because civil commitment is indefinite, it involves a “massive” deprivation of liberty deserving of the highest protection. *McCustion*, 174 Wn.2d at 387 (addressing substantive due process).

**Factor two.** The second factor—the risk of error absent a right to cross-examine, and the value of allowing cross-examination—also weighs heavily in a patient’s favor. Cross-examination has been characterized as “the greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (*Green I*) (internal quotation marks and citation omitted).

Cross-examination helps ensure the accuracy of the factfinding process; this is true in both civil and criminal cases. *Green v. McElroy*, 360 U.S. 474, 496-97, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (*Green II*); *State v. Rohrich*, 132 Wn.2d 472, 477-478, 939 P.2d 697 (1997).<sup>12</sup> Courts prefer live testimony over hearsay because it requires the witness to relate the facts under oath and face cross-examination in the presence of the jury. *Coy v. Iowa*, 487 U.S. 1012, 1016-20, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); *Rohrich*, 132 Wn.2d at 477-478.<sup>13</sup>

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<sup>12</sup> As the *Stout* court noted, cross examination is the principle means by which the believability of a witness and truth of her or his testimony may be tested. *Stout*, 159 Wn.2d at 368 n. 9 (citing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)).

<sup>13</sup> Thus, for example, in parole revocation cases, due process guarantees the right to cross examine witnesses unless the hearing officer specifically finds good cause for not permitting confrontation. *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *State v. Abd-Rahmaan*, 154 Wn.2d 280, 288, 111 P.3d 1157 (2005); *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999). Cross examination helps ensure the revocation “is based upon verified facts and accurate behavior.” *Abd-Rahmaan*, 154 Wn.2d at 286. Good cause may only be found where the proffered hearsay is demonstrably reliable. *Id.*, at 290; *Dahl*, 139 Wn.2d at 686-687. This due process right to cross-examine (subject to a good

Where hearsay is admitted as substantive evidence without an opportunity for cross-examination, the risk of erroneous deprivation is elevated. The absence of cross-examination in this proceeding differentiates Mr. Canty’s case from *Stout*. The admission of Del La Torre’s statements as substantive evidence distinguishes his case from *Coe*.

The jury was permitted to rely on her 1996 statements, given at a preliminary hearing in California, even though Mr. Canty had no opportunity to pose questions relating to the basis for his impending civil commitment. Furthermore, Dr. North relied on Del La Torre’s account in reaching his opinion. Jurors could not meaningfully evaluate his testimony without determining the truth of her prior statements.

Although Mr. Canty retains the “comprehensive set of rights,” outlined in *Stout* and *Coe*, those rights do not provide adequate protection here, because cross-examination has not been “achieved” in this proceeding and because the out-of-court statements were admitted as substantive evidence.<sup>14</sup> *Stout*, 159 Wn.2d at 368 n. 9 (emphasis omitted), 370; *Coe*, 175 Wn.2d at 509-511.

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cause exception) applies to deprivations far less severe than that faced by Mr. Canty. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 565-67, 100 S.Ct. 552, 63 L.Ed.2d 552 (1980) (decision to transfer prisoner to mental facility); *Mansour v. King Cty.*, 131 Wn. App. 255, 269, 128 P.3d 1241 (2006) (noting that pet owner’s ability to cross-examine witnesses in a proceeding to remove a pet from within King County was improperly limited by refusal to allow discovery).

<sup>14</sup> The issues in a commitment trial are complex, and the Legislature has already signaled its sensitivity to the risk of erroneous deprivation of liberty by providing the right to a jury trial, a unanimous verdict, and proof beyond a reasonable doubt. RCW 71.09.060(1); *Young*, 122 Wn.2d at 48.

**Factor three.** The third *Mathews* factor also weighs heavily in favor of cross-examination when statements are admitted as substantive evidence. The State has a “compelling interest both in treating sex predators and protecting society from their actions.” *In re Det. of Morgan*, 180 Wn.2d 312, 322, 330 P.3d 774 (2014) (quoting *Young*, 122 Wn.2d at 26.<sup>15</sup>

These compelling State interests are premised on an accurate identification of those who need treatment and pose a risk to the community. Thus, the State’s interest is not to avoid cross-examination at all costs; rather it is to achieve community protection and to treat patients when civil commitment is warranted. The State’s interests thus align with the patient’s: cross-examination—the “greatest legal engine” for discovering the truth—ensures that commitment is limited to those patients who are mentally ill and currently dangerous. *Green I*, 399 U.S. at 158.

The State has no interest in wrongful commitment. Ensuring cross-examination of witnesses who provide substantive evidence supports the State’s interests in protecting the community and providing treatment. *Morgan*, 180 Wn.2d at 322.

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<sup>15</sup> Any concurrent administrative interest in streamlining proceedings should not contribute to the analysis, given the massive deprivation of liberty at stake and the importance of the State’s substantive interests.

- C. The admission of testimony from a 1996 California preliminary hearing violated ER 802, ER 804, and Mr. Canty's due process right to cross-examine adverse witnesses.

Hearsay is generally inadmissible. ER 802. Under limited circumstances, hearsay may be admitted as substantive evidence when the declarant is "unavailable." ER 804. A person is unavailable as a witness, when, *inter alia*, she "[i]s absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance...by process or other reasonable means." ER 804(a)(5).

When a witness is legally unavailable, testimony is admissible if certain conditions are met. ER 804(b)(1). Prior testimony is only admissible "if 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." ER 804(b)(1).

Here, the evidence should have been excluded because the State failed to prove the declarant's unavailability and the similarity of Mr. Canty's "motive to develop the [former] testimony." ER 804(b)(1).

**Unavailability.** Before a witness can be declared unavailable, the State must show reasonable efforts to secure the witness's attendance at

trial.<sup>16</sup> ER 804(a); *see, e.g., United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007).<sup>17</sup> The State failed to do so here.

The State tasked an investigator named Dwain Sparrowk with locating Del La Torre. He understood her name to be “Zenaida Banuelos (de la Torre).” CP 92. In Del la Torre’s testimony (given through an interpreter), she explicitly provided two different spellings – “Banuelos” and “Banulos.” CP 97. The State’s attorney spelled her name “Del La Torre,” and this spelling was used in the court’s Order on Motions in Limine. CP 334, 362. The court reporter at the California hearing transcribed her alternate last name as “de la Torre,” but neither the witness nor the interpreter provided the proper spelling. CP 97.<sup>18</sup>

To locate Banuelos/Banulos/de la Torre/Del La Torre, the State’s investigator “sent correspondence” to her “last known Post Office Box address” and to “Rudy Banuelos possibly related and named as a witness on the 1996 police report.” CP 91-92. He did not indicate how he obtained the P.O. Box address and did not claim he’d searched for the physical address associated with that P.O. Box. CP 91-92. Nor did he provide details

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<sup>16</sup> Washington Courts have held that the confrontation clause imposes a higher “good faith” burden upon the government than that imposed by the rule. *State v. Beadle*, 173 Wn.2d 97, 115, 265 P.3d 863 (2011). Federal courts consider the constitutional standard “identical to the unavailability inquiry” under the rule. *United States v. Tirado-Tirado*, 563 F.3d 117, 123 n. 4 (5th Cir. 2009). Under any standard, the minimal efforts here failed to meet the State’s burden.

<sup>17</sup> It is “proper to look at federal law” where the federal rule of evidence is identical to the Washington rule. *State v. DeSantiago*, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003). Washington’s ER 804 is identical in substance to FRE 804. *Id.*

<sup>18</sup> This was the spelling used in the California Information. CP 242-244.

regarding how he attempted to locate “Rudy Banuelos,” other than the reference to the 1996 police report. CP 91-92. The State did not provide any details regarding the “correspondence,” did not state if or how Sparrowk instructed the recipient(s) to contact him and did not indicate whether the letters were returned unclaimed.

The investigator also “us[ed] social media” and “[s]earched for leads to her using law enforcement databases,” but provided no details on how he conducted these searches,<sup>19</sup> what databases he consulted, or how he spelled her name in conducting each search. CP 91-92. It does not appear that he conducted a general internet search, or that he used social media or law enforcement databases to search for Rudy Banuelos.

The evidence provided does not show an attempt to secure Del La Torre’s attendance “by process or other reasonable means.” ER 804(a). It does not appear that the investigator even googled her name,<sup>20</sup> which should be the absolute minimum standard for a search conducted in 2017.

Furthermore, the State should have indicated how the investigator obtained the P.O. Box, how he determined it was her last known address, and what steps he took to find the physical address with which it had been associated. The State should have indicated which social media sites the investigator searched, which databases he’d consulted, and how he spelled

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<sup>19</sup> It is unclear, for example, if he searched Myspace.com, which was the largest social networking site worldwide until it was surpassed by Facebook in 2008. *See* Myspace, in *Wikipedia, The Free Encyclopedia* (2018), available at <https://en.wikipedia.org/w/index.php?title=Myspace&oldid=824997875> (last accessed 2/20/18).

<sup>20</sup> Or that he used any other general internet search engine.

her name when conducting his searches. The State should also have provided more information on the investigator's efforts to locate Rudy Banuelos, beyond using the address provided in the 20 year old police report.

By any measure, the State's efforts were inadequate. It failed to show Del La Torre's unavailability. The former testimony should not have been admitted as substantive evidence. ER 802; ER 804; *State v. Aaron*, 49 Wn.App. 735, 741, 745 P.2d 1316 (1987).

**Motive to develop the testimony.** Former testimony is only admissible as substantive evidence if the opponent had "similar motive to develop the testimony" during a prior opportunity for examination. ER 804(b)(1). By itself, an opportunity to cross examine is insufficient; the opponent's motive to develop the testimony in the prior proceeding must be similar to the opponent's motive in the current proceeding.<sup>21</sup>

The inquiry is "inherently factual." *United States v. Geiger*, 263 F.3d 1034, 1038 (9th Cir. 2001). It "requires scrutiny of the factual and procedural context of each proceeding to determine both the issue in dispute and the intensity of interest in developing the particular issue by the party against whom the disputed testimony is offered." *United States v. Bartelho*, 129 F.3d 663, 672 (1st Cir. 1997). Differences in purpose or in

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<sup>21</sup> Thus, for example, the Supreme Court found that addition of a criminal charge prior to retrial "creates a close[ ] question" on the similarity of a criminal defendant's motive to cross examine a state witness. *DeSantiago*, 149 Wn.2d at 413. According to the court, a "new charge arguably produce[s] a new or stronger motive to cross-examine... which was lacking in the first trial." *Id.* The *DeSantiago* court noted that "courts have been justifiably concerned where the defendant had little incentive to cross-examine on a particular point." *Id.*, at 414.

the burden of proof may be significant. *United States v. DiNapoli*, 8 F.3d 909, 913 (2d Cir. 1993).

In *Bartelho*, for example, the government's motive in examining one defendant at his own suppression hearing differed from its motive to cross-examine him at a codefendant's subsequent trial. *Bartelho*, 129 F.3d at 672. In *DiNapoli*, the court found a difference between the government's motive at a grand jury proceeding and in the subsequent trial. *DiNapoli*, 8 F.3d at 913;<sup>22</sup> see also *United States v. Salerno*, 505 U.S. 317, 325, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992); *United States v. Carson*, 455 F.3d 336, 380 (D.C. Cir. 2006).<sup>23</sup>

Mr. Canty's motive to cross-examine at the preliminary hearing in California were not sufficiently similar to his motivation at this civil commitment proceeding. A preliminary hearing "is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber v. Page*, 390 U.S. 719, 725, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

The 1996 preliminary hearing had no issues in common with Mr. Canty's civil commitment trial. The difference in purpose and in the bur-

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<sup>22</sup> According to the court, "the absence of similar motive is not rebutted by the limited cross-examination undertaken" by a party at the prior proceeding. *Id.*, at 915.

<sup>23</sup> See also *In re C.R.B.*, 62 Wn. App. 608, 619, 814 P.2d 1197 (1991) ("the purpose of the dependency hearings was not to terminate Brown's parental rights, and the evidence presented at those hearings may not have been subjected to the rigors of an adversarial proceeding.")

den of proof is significant. *DiNapoli*, 8 F.3d at 913. The “intensity of interest” is not even remotely the same. *Bartelho*, 129 F.3d at 672. Mr. Canty’s undoubtedly mixed motivations at the preliminary hearing (obtaining discovery from the complainant, avoiding a trial) differ substantially from his motivation in developing Del La Torre’s testimony at his civil commitment trial twenty years later.

The trial court did not scrutinize “the factual and procedural context of each proceeding to determine both the issue in dispute and the intensity of interest in developing the particular issue.” *Id.* The evidence should not have been admitted as substantive evidence. *Id.*

D. The error was not harmless beyond a reasonable doubt.

When an evidentiary ruling violates constitutional rights, the State bears the burden of showing beyond a reasonable doubt that the error is harmless. *State v. DeLeon*, 185 Wn.2d 478, 487–88, 374 P.3d 95 (2016). The court must find “beyond a reasonable doubt—that *any reasonable jury* would have reached the same result, despite the error.” *Id.* (emphasis in original; internal quotation marks and citation omitted).

The State cannot make this showing here. As AAG Choate noted to the trial judge,

this is a pretty close case for an initial commitment in an SVP matter. And I mention that because I think this is a case where the jury is going to have to dig deep into the opinions and the evidence that they're presented with in order to make a decision in this case and it's hard to know what piece or pieces are going to tip a particular juror in one direction or the other.

RP (6/9/17) 5.

Choate went on to describe how a single piece of evidence (Mr. Canty's proposed transition plan)<sup>24</sup> could, by itself, sway jurors. RP 10.

Del La Torre's former testimony was the only evidence offered describing an offense that might qualify as a predatory act of sexual violence. The State did not offer testimony regarding the details of Mr. Canty's indecent liberties conviction from 2001.<sup>25</sup>

Under these circumstances, the State cannot argue, much less prove beyond a reasonable doubt, that the error here was harmless. Mr. Canty's commitment order must be reversed, and the case remanded for a new trial. *Id.*

**II. THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE CURRENT DANGEROUSNESS AND INCORPORATED LANGUAGE CALCULATED TO INFLAME JURORS' PASSIONS AND PREJUDICES.**

At a civil commitment trial, due process requires the State to persuade jurors the patient is currently dangerous under placement conditions that will exist upon release. A "recent overt act" (ROA) falling short of a new crime may trigger commitment following release; this fact "is relevant and is a condition that would exist upon placement in the community." *In re Det. of Post*, 170 Wn.2d 302, 316, 241 P.3d 1234 (2010). The

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<sup>24</sup> Which was ultimately excluded by the judge. RP 45-49; CP 375-376.

<sup>25</sup> The only witness to provide live testimony about a prior offense was Miller, who described the unwanted touching that took place in the Pasadena library. RP 231-249. The State did not allege that this act qualified as sexually violent offense.

court's refusal to instruct on this issue violated Mr. Canty's Fourteenth Amendment right to due process.

Furthermore, research has shown that use of the phrase "sexually violent predator" creates bias unrelated to evidence of a person's dangerousness. The court's refusal to use an accurate but neutral phrase to describe criteria for commitment inflamed the jury's passions and prejudices, resulting in a verdict based on improper factors. This, too, violated Mr. Canty's right to due process.

A. This court should review the court's instructions *de novo* to ensure that they made the relevant standards manifestly apparent to the average juror.

Courts review constitutional errors and jury instructions *de novo*. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596 (2017); *Armstrong*, 188 Wn.2d at 339. In criminal cases, instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Because civil commitment involves a "massive"<sup>26</sup> deprivation of liberty, the "manifestly apparent" standard should apply here as well. Procedural and substantive due process require application of the "manifestly apparent" standard in civil commitment cases. *See Matter of Det. of M.W. v. Dep't of Soc. & Health Servs.*, 185 Wn.2d 633, 654, 374 P.3d 1123 (2016) (analyzing substantive and procedural due process challenges to

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<sup>26</sup> *See, e.g., In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) ("massive" deprivation of liberty requires narrow construction of statute).

RCW 71.05.320(3)(c)(ii); *McCuiston*, 174n.2d at 387 (analyzing substantive and procedural due process challenges to RCW 71.09.090(4)).

**Procedural due process.** As noted above, courts resolve procedural due process claims by balancing the individual interest at stake, the risk of error posed by the available procedures, and the State’s interest in a particular procedure. *M.W.*, 185 Wn.2d at 653-54 (citing *Mathews*, 424 U.S. at 335). Because civil commitment involves a massive curtailment of liberty, the first factor weighs in favor of more rigorous procedural protections. *Id.*, at 654.

The second factor supports the “manifestly apparent” standard as well. Instructions may be clear “to the trained legal mind” without adequately communicating an important legal standard to the average juror. *State v. Fischer*, 23 Wn.App. 756, 759, 598 P.2d 742 (1979) (cited with approval by *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). Any miscommunication regarding the correct legal standard has the potential to result in an erroneous finding. This potential for error supports the “manifestly apparent” standard in the criminal context. *Id.*; see *Kyllo*, 166 Wn.2d at 864; see also *State v. Borsheim*, 140 Wn.App. 357, 366, 165 P.3d 417 (2007). No lesser standard should apply in the civil commitment context, where the massive curtailment of liberty is based on predictions of the future rather than proof of past criminal conduct.

Finally, the third factor also weighs heavily in favor of applying the *Kyllo* standard here. The State’s compelling interest (in treating patients and protecting society)<sup>27</sup> is furthered by jury instructions that are manifestly clear. Jurors who misinterpret their instructions may well release a predator who should be confined.<sup>28</sup> There are no additional costs associated with ensuring that jury instructions are manifestly clear.

Under *Mathews*, procedural due process requires application of the “manifestly apparent” standard for jury instructions in civil commitment cases. All three *Mathews* factors favor application of this standard.

**Substantive due process.** Civil commitment is constitutional if it is narrowly drawn to serve compelling state interests. *McCustion*, 174 Wn.2d at 387. Our civil commitment statute is constitutional because it requires proof that the detainee is “mentally ill and currently dangerous.” *In re Det. of Moore*, 167 Wn.2d 113, 124, 216 P.3d 1015 (2009) (citing, *inter alia*, *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)). Where jury instructions are not manifestly clear, jurors might erroneously find that a detainee qualifies for civil commitment, even in the absence of sufficient evidence. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (due process violated where reasonable juror “could have interpreted” instruction as mandatory presumption relieving state of its burden to prove intent).

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<sup>27</sup> *Morgan*, 180 Wn.2d at 322.

<sup>28</sup> Furthermore, jurors who misunderstand their instructions may erroneously commit someone who should be released, resulting in unnecessary costs for detention and treatment of someone who should be at liberty.

Civil commitment violates substantive due process if the jury misreads the court’s instructions to allow commitment of someone who is not mentally ill and currently dangerous. *Moore*, 167 Wn.2d at 124; *Foucha*, 504 U.S. at 77. A procedure allowing erroneous detention is not narrowly tailored to the State’s compelling interest in confining those who are mentally ill and currently dangerous. The “manifestly apparent” standard should apply in civil commitment cases to ensure that the statute is implemented in a manner that complies with substantive due process. *Foucha*, 504 U.S. at 77; *McCuiston*, 174 Wn.2d at 387.

- B. The trial court erroneously refused to tell jurors that Mr. Canty can be indefinitely committed following release even if he does not commit a new crime.

One critical issue at Mr. Canty’s trial was his level of risk—whether he was “likely to engage in predatory acts of sexual violence” if released from detention. Instruction No. 4, Supp. CP; *see* RCW 71.09.020(7) and (18). This element ensures that the statute complies with due process, which requires proof of current dangerousness. U.S. Const. Amend. XIV; *Moore*, 167 Wn.2d a 124; *Foucha*, 504 U.S. at 77.

Here, the trial court’s “likely to engage” instruction failed to inform jurors that Mr. Canty could be committed following release, even absent a new offense. This relieved the State of its burden to prove dangerousness, in violation of Mr. Canty’s constitutional right to due process. U.S. Const. Amend. XIV; *Foucha*, 504 U.S. at 77.

When determining if a person is likely to engage in predatory sexual violence, jurors may consider “placement conditions... that would exist for the person if unconditionally released.” RCW 71.09.060(1). The fact that an offender released from prison may face commitment based on statements or acts that create apprehension of harm is relevant to this issue. *Post*, 170 Wn.2d at 316–17.

In *Post*, the Supreme Court reversed a commitment order based on the erroneous exclusion of evidence relating to the availability of a “recent overt act” (ROA) petition. *Id.* The *Post* court reasoned that “[e]vidence that a respondent in an SVP proceeding who is subsequently released could be subject to another SVP proceeding if he commits a recent overt act<sup>[29]</sup> is relevant and is a condition that would exist upon placement in the community.” *Id.*, at 316. The court’s decision was based (in part) on the fact that “[t]he possibility of a recent overt act petition... is, in a literal sense, a condition to which [the patient] would be subject if released.” *Id.*, at 317.<sup>30</sup>

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<sup>29</sup> The phrase “recent overt act” is defined to include, *inter alia*, “any act, threat, or combination thereof that... creates a reasonable apprehension” of “harm of a sexually violent nature” RCW 71.09.020(12); *see also* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 365.15 (6th ed.) (“Sexually Violent Predators—Recent Overt Act—Definition”).

<sup>30</sup> The court also based its decision on the deterrent effect that applies to offenders who are familiar with the statutory scheme. *Id.* The availability of an ROA petition serves another important function as well. Juries are understandably reluctant to release detainees who are potentially dangerous, even if they do not qualify for commitment. Jurors should be informed that a new petition can be filed following release even absent a new criminal offense. Allowing jurors to know this would ameliorate their reluctance to release a potentially dangerous person.

In this case, the trial judge refused to instruct jurors that “the state may file a new Petition charging Michael Canty with meeting criteria for commitment if it learns he has committed a ‘recent overt act.’” CP 218.<sup>31</sup> This was error. As in *Post*, the availability of an ROA petition is (as a matter of law) “a condition to which [Mr. Canty] would be subject if released.” *Id.* The error requires reversal. *Id.*

Although *Post* addressed the admissibility of evidence, its reasoning applies to the instructional issue raised here. Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Cardenas-Flores*, 189 Wn.2d 243, 267, 401 P.3d 19 (2017). Jury instructions are improper if they do not permit a party to argue his theories of the case. *State v. Erhardt*, 167 Wn.App. 934, 939, 276 P.3d 332 (2012).

As a matter of law, Mr. Canty would be subject to a new petition based on any “recent overt act” committed after release. RCW 71.09.020(7) and (12); RCW 71.09.030(1)(e); RCW 71.09.060(1). The proffered instruction was a correct statement of the law. It was not misleading, and it would have allowed Mr. Canty to argue his theory of the case. *Id.* Without it, he was unable to explain to jurors that even a non-criminal act could subject him to future commitment, thereby increasing the likelihood he’d be incapacitated before he had a chance to engage in predatory acts of sexual violence.

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<sup>31</sup> The proposed instruction also defined “recent overt act” in accordance with RCW 71.09.020(12). CP 218.

The court's failure to give Mr. Canty's proposed instruction relieved the State of its burden to prove that he is currently dangerous. Without the instruction, jurors were unable to make an accurate assessment of his dangerousness, and thus could not determine if he was "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(7)

The court should have given the instruction. *Id.* Mr. Canty's commitment order must be reversed and the case remanded for a new trial. Upon retrial, the court must instruct jurors regarding the "conditions" to which Mr. Canty will be subject upon release, including the possibility that the State may file a new petition based on a "recent overt act" that falls short of a new criminal offense. *Id.*; *Post*, 170 Wn.2d a 316–17.

- C. The inflammatory phrase "sexually violent predator" created incurable prejudice in the minds of jurors and infringed Mr. Canty's constitutional right to due process.

Substantive due process prohibits indefinite civil commitment except in the narrowest of circumstances. *See Kansas v. Hendricks*, 521 U.S. 346, 364, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). The State must prove that the person is both mentally ill and currently dangerous. *Addington*, 441 U.S. at 426-433; *Foucha*, 504 U.S. at 75-86. In civil commitment cases such as this one, the State must submit "proof 'sufficient to distinguish [patients subject to commitment] from the dangerous but typical recidivist convicted in an ordinary criminal case.'" *In re Det. of Thorell*, 149

Wn.2d 724, 732, 72 P.3d 708 (2003) (quoting *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)).

The phrase “Sexually Violent Predator” is neither a medical classification nor a phrase with inherent legal significance. *See, e.g.* Deirdre M. Smith, *Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment*, 67 Okla. L. Rev. 619, 623 (2015). It is, however, calculated to strike terror into the heart of the average person, an effect which is undoubtedly magnified for those who have children. While such language has political benefits for legislators and other policy makers, it has little to do with the jury’s “constitutional role” of determining the facts without passion or prejudice. *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005).

Research has shown that the language itself is unfairly prejudicial. Using the phrase “sexually violent predator” in legal proceedings affects juror decisions. *See* Scurich, Gongola, & Krauss, *The Biasing Effect of the “Sexually Violent Predator” Label on Legal Decisions*, 47 International Journal of Law and Psychiatry, 109 (2016) (“Scurich”). In the Scurich study,

[Jurors] were asked to decide whether an individual who had been incarcerated for 16 years should be released on parole. The individual was either labeled as a) a sexually violent predator or b) a convicted felon, and all other information was identical between the conditions. Jurors were over twice as likely to deny parole to the SVP compared to the felon, even though they did not consider him any more dangerous or any more likely to reoffend.

Scurich, p. 109 (Abstract).

The trial court judge refused Mr. Canty's request to substitute the phrase "criteria for civil commitment" in place of "sexually violent predator." RP 54, 118-124, 816; CP 140-143, 201, 326. This was error, because it encouraged jurors to decide the case on impermissible factors rather than on the evidence.

Instructions that are clear "to the trained legal mind" may not adequately communicate an important legal standard to the average juror. *Fischer*, 23 Wn.App. at 759. Statutory language is not always adequate to convey the jury's task. *See State v. Watkins*, 136 Wn.App. 240, 243, 148 P.3d 1112 (2006).

Such is the case here. The inflammatory language used by the court diverted jurors from their task – determining, without passion or prejudice, whether Mr. Canty met criteria for commitment.

The court repeatedly used the phrase "sexually violent predator" throughout the proceedings. The prejudicial, inflammatory language appeared in the court's introductory instruction, in the court's instructions at the end of the case, and in the verdict form. CP 326, 371; Instructions Nos. 3, 4, Supp. CP. As research shows, this language created a probability that jurors would ignore the evidence and vote in favor of commitment based on passion and prejudice. Scurich, p. 109.

The phrase "sexually violent predator" is legally devoid of content. The proper standard is provided by the criteria required for civil commitment, as outlined in RCW 71.09.020 and Instruction No. 4. The court should have granted Mr. Canty's motion and substituted the "criteria for

commitment” language in place of the inherently prejudicial language chosen by the Legislature.

The inflammatory language may serve a political purpose, but it has been shown to create distortions in the minds of average people. Scurich, p. 109. It has no place in jury deliberations.

Mr. Canty’s commitment order must be reversed, and the case remanded for a new trial. Upon retrial, the court should use the phrase “criteria for commitment” rather than the inflammatory term “sexually violent predator.” *See Watkins*, 136 Wn.App. at 243.

**III. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT MR. CANTY IS LIKELY TO ENGAGE IN PREDATORY ACTS OF “SEXUAL VIOLENCE,” AS DEFINED BY THE COURT.**

The quantum of evidence required to meet the State’s burden in a civil commitment case is the same as that required in criminal cases.<sup>32</sup> *Thorell*, 149 Wn.2d at 744. The State must therefore prove beyond a reasonable doubt all facts necessary for commitment. *Id*; *see State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014).

The sufficiency of the evidence is reviewed “in light of the instructions given.” *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 313, 372 P.3d 111 (2016); *see also State v. Johnson*, 188 Wn.2d 742, 756–762, 399 P.3d 507 (2017). Absent a proper objection, jury instructions become the law of the case. *Millies*, 185 Wn.2d at 313.

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<sup>32</sup> A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

Here, the State was obligated to prove that Mr. Canty’s personality disorder made him “likely to engage in predatory acts of sexual violence.” Instruction No. 4, Supp. CP; RCW 71.09. The phrase “predatory acts of sexual violence” is not defined by statute. *See* RCW 71.09.020.<sup>33</sup>

The State did not propose—and the court did not give—an instruction defining “sexual violence” in general terms. State’s Proposed Instructions (filed 5/31/17), Court’s Instructions, Supp. CP. Instead, the State proposed an instruction defining “sexual violence” by enumerating eleven specific felonies (or attempts to commit those crimes). State’s Proposed Instruction No. 8, Supp. CP. The proposed instruction was drawn from the statutory definition of “sexually violent offense.” RCW 71.09.020.

After discussion, the court narrowed the definition to four crimes (or attempts to commit those crimes): indecent liberties by forcible compulsion, first-degree burglary with sexual motivation, residential burglary with sexual motivation, and unlawful imprisonment with sexual motivation. Instruction No. 8, Supp. CP; RP 861-930.

The evidence was insufficient to prove that Mr. Canty was likely to engage in predatory acts of “sexual violence” under the court’s instructions. Neither expert opined that Mr. Canty would likely attempt any of

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<sup>33</sup> The statute does define the phrase “sexually violent offense.” RCW 71.09.020(17). As argued elsewhere in this brief, this phrase applies only to the specific prior convictions that authorize a civil commitment petition or trigger certain notice requirements. *See* RCW 71.09.025; RCW 71.09.030; RCW 71.09.140. Presumably, the Legislature intended the phrase “predatory acts of sexual violence” to be broader than the specific crimes listed as sexually violent offenses.

the enumerated crimes. Indeed, given the impulsive and opportunistic nature of Mr. Canty's prior offenses, it may well be impossible for any expert to predict with certainty the specific acts he might commit.

The State should have proposed an instruction defining the phrase "sexual violence" in general terms. It failed to do so. State's Proposed Instructions, Supp. CP. It is therefore stuck with the limitation imposed by the law of the case.

The sufficiency of the evidence must be measured against "the instructions given." *Millies*, 185 Wn.2d at 313. Under the instructions given, the State failed to meet its burden. *Id.* The commitment order must be reversed, and the case remanded for dismissal of the petition. *State v. Smith*, 155 Wn.2d 496, 505-506, 120 P.3d 559 (2005).

**IV. THE TRIAL COURT VIOLATED MR. CANTY'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY COMMENTING ON THE EVIDENCE AND RELIEVING THE STATE OF ITS BURDEN TO PROVE A PRIOR CONVICTION FOR A "CRIME OF SEXUAL VIOLENCE."**

Mr. Canty could only be committed if the jury found that he'd previously been convicted of a "crime of sexual violence." RCW 71.09.020(18); RCW 71.09.060(1); *see also* Instruction No. 4, Supp. CP. The court explicitly directed jurors to find that Mr. Canty's prior convictions qualified as crimes of sexual violence as a matter of law. Instruction No. 4, Supp. CP.

This amounted to a comment on the evidence in violation of Wash. Const. art. IV, §16. It also relieved the State of its burden to prove that

Mr. Canty’s prior convictions qualified him for commitment, in violation of his Fourteenth Amendment right to due process.

- A. The Court of Appeals should review *de novo* this manifest constitutional error and must reverse unless the record affirmatively shows that no prejudice could have resulted from the error.

Under the state constitution, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. art. IV, §16. A court may not “instruct the jury that matters of fact have been established as a matter of law.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

Judicial comments invade a fundamental right, and thus can always be raised for the first time on review. RAP 2.5(a)(3);<sup>34</sup> *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136, 140 (2006), *as corrected* (Feb. 14, 2007); *Becker*, 132 Wn.2d a 64.. Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017).

Judicial comments are presumed prejudicial. *Jackman*, 156 Wn.2d at 743. A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.*, at 743, 745. This is a higher standard than normally applied to constitutional errors. *Cf.*

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<sup>34</sup> To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

*State v. DeLeon*, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (outlining constitutional standard for harmless error).

B. RCW 71.09 differentiates between “sexually violent offenses” and “crimes of sexual violence.”

Involuntary civil commitment involves a “massive curtailment of liberty.” *In re Detention of Anderson*, 166 Wn.2d 543, 556, 211 P.3d 994 (2009) (citations and internal quotation marks omitted). Because of this, a civil commitment statute such as RCW 71.09 must be strictly construed to its terms. *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008).

A court construing RCW 71.09 must choose a “narrow, restrictive construction” over a “broad, more liberal interpretation.” *Id.* at 510.<sup>35</sup> Civil incarceration achieved by means other than strict compliance with RCW 71.09 deprives a person of liberty without due process. *Id.* at 511; U.S. Const. Amend. XIV.

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<sup>35</sup> The rule derives from the rule of lenity applicable in criminal cases: “It is a familiar rule of statutory construction, needing no citation of authority, that a criminal statute will not be extended beyond its plain terms by construction or implication.” *State v. Youngbluth*, 60 Wash. 383, 384, 111 P. 240 (1910). Although the word “strict” is used in stating the rule, courts adopt the interpretation favoring the party whose liberty is at issue. Thus, in criminal cases, the rule of lenity requires courts to interpret statutes “strictly *in favor of the defendant*.” *State v. Weatherwax*, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017) (emphasis added). However, a more liberal interpretation applies where necessary to protect a person’s liberty; courts “will not resort to a rule of strict construction where the liberty or property of a citizen is put at hazard.” *State v. Superior Court of King Cty.*, 74 Wash. 689, 691, 134 P. 178 (1913). Whether characterized as strict or liberal, the proper interpretation is the one most favorable to the patient who is facing civil commitment. *Id.*

Where the legislature uses different language in the same statute, different meanings are intended.<sup>36</sup> *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004). Principles of statutory interpretation require a “comprehensive reading” of RCW 71.09, deriving legislative intent from “ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *In re Det. of Strand*, 167 Wn.2d 180, 188, 217 P.3d 1159 (2009) (internal quotation marks and citations omitted).

A person’s prior offenses play a significant role in commitment proceedings under RCW 71.09. The statute uses two different phrases to describe a predicate offense under RCW 71.09: “sexually violent offense” and “crime of sexual violence.” See RCW 71.09.020(17) and RCW 71.09.020(18). Since the legislature used different language, it necessarily intended different meanings. *Costich*, 152 Wn.2d at 475-476.

The phrase “sexually violent offense” is used repeatedly throughout the statute; however, the phrase “crime of sexual violence” occurs only once: in the definition of sexually violent predator. RCW 71.09.020(18); see also RCW 71.09.020(17), RCW 71.09.025; RCW 71.09.030; RCW 71.09.060; RCW 71.09.140.

“Sexually violent offense” has a specific and concrete meaning assigned by the legislature. RCW 71.09.020(17). It is defined with reference

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<sup>36</sup> Statutory construction is a question of law reviewed *de novo*. *Strand*, 167 Wn.2d at 186. The primary objective of statutory construction is to ascertain and carry out the intent of the legislature. *Id.* at 188.

to a limited list of qualifying offenses. RCW 71.09.020(17).<sup>37</sup> A person who has been convicted of a “sexually violent offense”<sup>38</sup> and who appears to meet criteria for commitment will be referred to the Office of the Attorney General and relevant prosecuting attorney(s) three months prior to release. RCW 71.09.025(1)(a). These officials may file a petition for civil commitment when it appears that such a person—one who has been convicted of a “sexually violent offense”—is about to be released from total confinement or has previously been released and has since committed a recent overt act. RCW 71.09.030(1). Jurisdiction for filing such a petition is based on where the “sexually violent offense” (or subsequent overt act) occurred. RCW 71.09.030(2). Notice must be provided to certain people upon the discharge (or escape) of a person who has committed a “sexually violent offense.” RCW 71.09.140.<sup>39</sup>

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<sup>37</sup> Under the statutory definition,

“Sexually violent offense” means ... rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; [an equivalent offense under a prior statute, federal law, or from another jurisdiction]; an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act [was done with sexual motivation]; or... an attempt, criminal solicitation, or criminal conspiracy to commit [one of the listed offenses].” RCW 71.09.020(17).

<sup>38</sup> Or who has been found incompetent to stand trial for such an offense, or who has been found not guilty by reason of insanity for such an offense. RCW 71.09.025.

<sup>39</sup> RCW 71.09.060’s two references to “sexually violent offenses” impose additional requirements where the offense was a crime that was sexually motivated or where the person charged with a sexually violent offense has been found incompetent.

In contrast to the phrase “sexually violent offense,” the statute does not define the phrase “crime of sexual violence.” See RCW 71.09.020. This phrase appears only in the definition of sexually violent predator. RCW 71.09.020(17). The trier of fact in a civil commitment trial must determine whether a person qualifies as a sexually violent predator, which requires it to determine if the detainee has been convicted of a “crime of sexual violence.” RCW 71.09.020(18); RCW 71.09.060(1). This is one element of the criteria for commitment. RCW 71.09.020(18); RCW 71.09.060(1).

Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006).

Applying this rule and the requirement that RCW 71.09 be strictly construed, the phrase “crime of sexual violence” must be given the most restrictive definition derived from the ordinary meaning of each word. Assuming a detainee’s predicate offenses qualify as sexual crimes, only the meaning of the word “violence” must be examined. The dictionary definitions of violence include “swift and intense force,” or “rough or injurious physical force.” *Dictionary.com*, Random House, Inc. (2018).<sup>40</sup> In other words, a “crime of sexual violence” is a sex offense accomplished through

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<sup>40</sup> Available at <http://www.dictionary.com/browse/violence> (last accessed 2/19/18).

the application of “swift and intense force” or “rough and injurious physical force.”

If a person is to be civilly committed, he (or she) must have a prior conviction (or finding of incompetence or insanity) that meets two separate tests. First, the conviction must be for one of the enumerated offenses in RCW 71.09.020(17) (defining “sexually violent offense). Such an offense will trigger a 3-month notice to the prosecuting agency (and the attorney general’s office), establish the proper jurisdiction for a civil commitment petition, and allow the appropriate agency to file a petition. RCW 71.09.025(1)(a); RCW 71.09.030.

Second, the trier of fact must find that the offense was a “crime of sexual violence.” Such a finding must be based on evidence that the crime was accomplished through “swift and intense force” or “rough and injurious physical force.” RCW 71.09.020(18); *Dictionary.com*.

The reason for the two separate definitions is apparent when the phrases are examined in context, as required. *Strand*, 167 Wn.2d at 188. Questions involving screening, jurisdiction, and notice rest on the defined list of crimes that qualify as “sexually violent offenses.” No factfinding is required to perform these functions. Instead, decisions can be made simply by referring to the list of offenses. RCW 71.09.020(17).

By contrast, indefinite civil commitment following trial requires a factual determination that the predicate offense qualifies as a “crime of sexual violence.” RCW 71.09.020(18); RCW 71.09.060(1). The factfinder must decide whether the predicate offense was in fact accomplished

by “swift and intense force,” or “rough or injurious physical force.” RCW 71.09.020(18); *Dictionary.com*. When the State seeks to confine someone indefinitely, the jury may not rely on a list of offenses but must examine the underlying facts and determine whether the offense involved actual violence.

This reading is consistent with the statute’s purpose: to address the risks posed by the “small but extremely dangerous group of sexually violent predators”—those who are likely to engage in “repeat acts of predatory sexual violence”—and not the larger pool of sexual predators who are not violent. *See* RCW 71.09.010.

In this case, the State alleged that Mr. Canty had been convicted indecent liberties by forcible compulsion and first-degree burglary with sexual motivation. CP 1. The question for the jury was whether these prior offenses qualified as “crime[s] of sexual violence.” RCW 71.09.020(18). This, in turn, required jurors to determine if this offense was violent “in fact”—that is, accomplished by physical force that was rough, injurious, swift, and/or intense. RCW 71.09.020(18); *Dictionary.com*.

The court’s instructions removed this question from the jury.

- C. The court’s instructions improperly directed jurors to find that Mr. Canty’s prior convictions qualified as “crimes of sexual violence.”

In its elements instruction, the court instructed jurors that the State was required to prove that Mr. 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.*” Instruction No. 4, Supp. CP (emphasis added).<sup>41</sup>

This contrasted with the instruction proposed by Mr. Canty, which required proof that he’d been “convicted of a crime of sexual violence” but did not tell jurors that his prior offenses automatically qualified. CP 219, 226. The court did not give Mr. Canty’s proposed instruction.

As given, Instruction No. 4 amounted to an unconstitutional judicial comment on the evidence.<sup>42</sup> It erroneously told jurors that the State’s obligation to prove a “crime of sexual violence” had been met as a matter of law. Instruction No. 4, Supp. CP.

The instructions took an issue from the jury. This was an unconstitutional comment on the evidence. *Becker*, 132 Wn.2d at 64; *see also State v. Brush*, 183 Wn.2d 550, 556-560, 353 P.3d 213 (2015). The two crimes *are* “sexually violent offenses,” triggering certain requirements and permitting the State to file a civil commitment petition; however, the jury was required to determine if either crime also qualified as a “crime of sexual violence.” RCW 71.09.020 (17) and (18).

The jury question required a factual determination regarding the physical force used to accomplish the prior offenses. RCW

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<sup>41</sup> The court also defined the phrase “sexual violence” to include the two offenses and indicated that “[a]n attempt to commit [either] of these offenses is also a crime of sexual violence.” Instruction No. 8, Supp. CP.

<sup>42</sup> The same is true, to a lesser extent, of Instruction No. 8.

71.09.020(18); *Dictionary.com*. Under Instruction No. 4, the jury was directed to return a “yes” verdict. The instruction was “tantamount to a directed verdict.” *Becker*, 132 Wn.2d at 65.

D. *Jackman* and *Levy* require reversal because the record does not affirmatively show an absence of prejudice.

Judicial comments are presumed prejudicial. *Jackman*, 156 Wn.2d at 743; *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725.

This is a higher standard than normally applied to constitutional errors. *Id.* The State does not meet its burden merely because the comment addressed an undisputed element supported by testimony and corroborating evidence. *Jackman*, 156 Wn.2d at 745.

The defendant in *Jackman* was charged with crimes against four minor boys. *Id.*, at 740. The children provided their birth dates in testimony, the State introduced corroborating evidence for three of the four boys, and the defendant did not contest the children’s ages at trial. *Id.*, at 740, 743, 745. To link each count with a specific child, each “to-convict” instruction included the minor victim’s initials and date of birth. *Id.*, at 740-741.<sup>43</sup> The defendant did not object to these instructions. *Id.*, at 741.

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<sup>43</sup> The operative language for each instruction told jurors that conviction required proof (for example) that the defendant “(1) ...aided, invited, employed, authorized, or caused B.L.E., DOB 04/21/1985 to engage in sexually explicit conduct; [and] (2) That B.L.E., DOB 04/21/1985, was a minor.” *Id.*, at 741 n. 3.

Despite the undisputed evidence and the absence of any objection, the Supreme Court reversed. The court found the date-of-birth references improperly commented on the evidence:

[T]he court conveyed the impression that those dates had been proved to be true. Absent the instructions, the jury would have had to consider whether it believed the evidence presented at trial with respect to the victims' birth dates.

*Id.*, at 744.

The Supreme Court also noted that the defendant had not “challenged the *fact* of [the boys’] minority.” *Id.*, at 745 (emphasis in original). Even so, the court found that the State had failed to meet its burden of affirmatively showing that no prejudice could have resulted from the error:

Nevertheless, it is still conceivable that the jury could have determined that the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions.

*Id.*, at 745.

Likewise, in this case the record does not affirmatively show an absence of prejudice. *Id.* As in *Jackman*, “it is still conceivable that the jury could have determined that” Mr. Canty’s prior offenses did not qualify as “crimes of sexual violence.” *Id.*

The court improperly commented on the evidence. The instructions relieved the State of its burden to prove the elements required for commitment and violated Mr. Canty’s Fourteenth Amendment right to due process. *Martin*, 163 Wn.2d at 509. Accordingly, the commitment order must be vacated, and the case remanded for a new trial with proper instructions. *See Brush*, 183 Wn.2d at 561.

- E. This court should decline to follow Division I’s decision in *Coppin*, which ignored established Supreme Court precedent.

Division I previously found the phrase “crime of sexual violence” to mean the same thing as the phrase “sexually violent offense.” *In re Det. of Coppin*, 157 Wn.App. 537, 553, 238 P.3d 1192 (2010).<sup>44</sup> This court is not bound by *Coppin*, and should not follow Division I’s reasoning. *See Matter of Arnold*, No. 94544-6, Slip Op. at \*1, 6-9 (Wash. Feb. 15, 2018) (repudiating a rule of “horizontal stare decisis.”)

The *Coppin* court ignored well-settled rules of statutory interpretation: “[i]t is firmly established... that where the legislature uses different language in the same statute, differing meanings are intended.” *Costich*, 152 Wn.2d at 475–76. This is a “basic rule” of statutory construction. *Durland v. San Juan Cty.*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014) (internal quotation marks and citation omitted).

In addition, the *Coppin* court ignored constitutional principles applicable to RCW 71.09. Because it involves a deprivation of liberty, the statute must be strictly construed against the State. *Martin*, 163 Wn.2d at 508; *see also In re Det. of Fair*, 167 Wn.2d 357, 376, 219 P.3d 89 (2009); *Hawkins*, 169 Wn.2d at 801.

For all these reasons, the phrase “crime of sexual violence” cannot mean the same thing as the phrase “sexually violent offense.” A “sexually

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<sup>44</sup> *See also In re Det. of Taylor-Rose*, 199 Wn. App. 866, 876, 401 P.3d 357 (2017), *review denied*, 94900-0, --- Wn.2d --- (Wash. Feb. 7, 2018) (“[W]e agree with the analysis in *Coppin*. A crime that is expressly listed in the definition of ‘sexually violent offense’ in RCW 71.09.020(17) necessarily also qualifies as a ‘crime of sexual violence.’”)

violent offense” is one enumerated by the statute. RCW 71.09.020(17). A “crime of sexual violence” is a sexual offense accomplished by “swift and intense force” or by “rough or injurious physical force.” *Dictionary.com*. The state may petition for civil commitment based on an offense that qualifies under RCW 71.09.020(17); however, to prevail at trial, it must prove that the offense qualifies as a “crime of sexual violence.” RCW 71.09.020(18).

*Coppin* was wrongly decided and should not be followed by this court. Because the trial judge commented on the evidence, Mr. Canty’s commitment order must be reversed and the case remanded for a new trial. *See Brush*, 183 Wn.2d at 561.

### **CONCLUSION**

For the foregoing reasons, the order committing Mr. Canty must be reversed and the petition dismissed. In the alternative, the case must be remanded for a new trial.

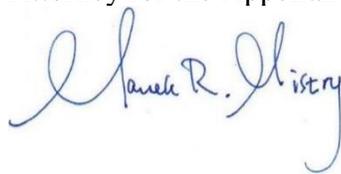
Respectfully submitted on February 20, 2018,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 20, 2018.



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