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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of
Michael Canty,
Appellant.

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

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT..... 1

I. The trial court violated Mr. Canty’s due process right to cross-examine a critical against him. 1

A. The Court of Appeals should review this constitutional claim *de novo*. 1

B. Mr. Canty had a due process right to cross-examine Del La Torre because her testimony was admitted as substantive evidence. 3

C. The trial court violated due process, as well as ER 802 and ER 804..... 6

D. The error was not harmless beyond a reasonable doubt. 9

II. Instructional errors require reversal. 10

A. The Court of Appeals should review the instructions *de novo* to ensure that they are manifestly clear. 10

B. The trial court should have told jurors that the Mr. Canty may face commitment if released, even absent a new crime. 13

C. The trial court should not have used inflammatory language in its instructions..... 17

III. Under the law of the case, the State did not prove a risk of “sexual violence.”..... 19

IV. The trial court commented on the evidence. 20

A. The legislature used two different phrases describing prior crimes, differentiating between the initiation of commitment proceedings and the adjudication of a commitment petition. 20

B. This court should revisit *Taylor-Rose* and reject the *Coppin* court’s reasoning. 24

CONCLUSION 26

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Barber v. Page</i> , 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)....	8
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	5
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). 3, 4	
<i>United States v. Bartelho</i> , 129 F.3d 663 (1st Cir. 1997).....	8, 9
<i>United States v. DiNapoli</i> , 8 F.3d 909 (2d Cir. 1993)	8
<i>United States v. Geiger</i> , 263 F.3d 1034 (9th Cir. 2001)	8
<i>United States v. Yida</i> , 498 F.3d 945 (9th Cir. 2007).....	6

WASHINGTON STATE CASES

<i>Acord v. Pettit</i> , 174 Wn. App. 95, 302 P.3d 1265 (2013).....	8
<i>Det. of Coppin</i> , 157 Wn.App. 537, 238 P.3d 1192 (2010)	22, 24
<i>Detention of Coe</i> , 175 Wn.2d 482, 286 P.3d 29 (2012).....	4
<i>Durland v. San Juan Cty.</i> , 182 Wn.2d 55, 340 P.3d 191 (2014)	24
<i>Fergen v. Sestero</i> , 182 Wn.2d 794, 346 P.3d 708 (2015).....	14
<i>In re Det. of Allen</i> , 142 Wn. App. 1, 174 P.3d 103 (2007).....	5
<i>In re Det. of Fair</i> , 167 Wn.2d 357, 219 P.3d 89 (2009)	24
<i>In re Det. of Herrick</i> , 198 Wn. App. 439, 393 P.3d 879 (2017).....	5
<i>In re Det. of Post</i> , 170 Wn.2d 302, 241 P.3d 1234 (2010)	13, 14, 15, 16
<i>In re Det. of Pouncy</i> , 168 Wn.2d 382, 229 P.3d 678 (2010) ..	13, 14, 15, 17

<i>In re Det. of Stout</i> , 159 Wn.2d 357, 368, 150 P.3d 86 (2007)	3, 4, 5
<i>In re Det. of Strand</i> , 167 Wn.2d 180, 217 P.3d 1159 (2009).....	25
<i>In re Det. of Taylor-Rose</i> , 199 Wn. App. 866, 401 P.3d 357 (2017). 12, 14, 16, 22, 24	
<i>In re Det. of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	19
<i>In re Detention of Martin</i> , 163 Wn.2d 501, 182 P.3d 951 (2008) 22, 24, 25	
<i>In re Pullman</i> , 167 Wn.2d 205, 218 P.3d 913 (2009).....	5, 24
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	22
<i>Millies v. LandAmerica Transnation</i> , 185 Wn.2d 302, 372 P.3d 111 (2016)	19, 20
<i>Sluman v. State</i> , -- Wn.App. ---, 418 P.3d 125 (2018).....	15, 16
<i>State v. Aaron</i> , 49 Wn.App. 735, 745 P.2d 1316 (1987)	7
<i>State v. Applin</i> , 116 Wn. App. 818, 67 P.3d 1152 (2003).....	12
<i>State v. Arlene's Flowers, Inc.</i> , 187 Wn.2d 804, 389 P.3d 543 (2017).....	11
<i>State v. Armstrong</i> , 188 Wn.2d 333, 394 P.3d 373 (2017).....	11
<i>State v. Aumick</i> , 126 Wn.2d 422, 894 P.2d 1325 (1995)	13, 14, 15
<i>State v. Becker</i> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	23
<i>State v. Benn</i> , 161 Wn.2d 256, 165 P.3d 1232 (2007).....	8
<i>State v. Blair</i> , ---Wn. App. ---, 415 P.3d 1232 (2018).....	1, 2, 3
<i>State v. Borsheim</i> , 140 Wn. App. 357, 165 P.3d 417 (2007).....	12
<i>State v. Brush</i> , 183 Wn.2d 550, 353 P.3d 213 (2015).....	23, 25
<i>State v. Cantabrana</i> , 83 Wn. App. 204, 921 P.2d 572 (1996).....	12
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	21, 24

<i>State v. DeLeon</i> , 185 Wn.2d 478, 374 P.3d 95 (2016)	9, 10
<i>State v. DeSantiago</i> , 149 Wn.2d 402, 68 P.3d 1065 (2003)	6, 7, 8
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	18
<i>State v. Fisher</i> , 185 Wn.2d 836, 374 P.3d 1185 (2016).....	11
<i>State v. Harris</i> , 141 Wn. App. 673, 174 P.3d 1171 (2007)	16
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	19, 20
<i>State v. Horn</i> , ---Wn. App. ---, 415 P.3d 1225 (2018).....	1, 3
<i>State v. Iniguez</i> , 167 Wn.2d 273, 217 P.3d 768 (2009)	2
<i>State v. Israel</i> , 113 Wn. App. 243, 54 P.3d 1218 (2002).....	8
<i>State v. Johnson</i> , 188 Wn.2d 742, 399 P.3d 507 (2017).....	19, 20
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	1, 2
<i>State v. LeFaber</i> , 128 Wn.2d 896, 913 P.2d 369 (1996)	17
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	23, 24, 25
<i>State v. Mohamed</i> , 132 Wn. App. 58, 130 P.3d 401 (2006)	8
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	17
<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006)	18
<i>State v. Perez-Valdez</i> , 172 Wn.2d 808, 265 P.3d 853 (2011).....	10
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158 (2012).....	18
<i>State v. Rivers</i> , 96 Wn. App. 672, 981 P.2d 16 (1999).....	18
<i>State v. Smith</i> , 174 Wn. App. 359, 298 P.3d 785 (2013) (<i>Smith II</i>).....	12
<i>State v. W.R., Jr.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014).....	19
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976 (2015), <i>cert. denied</i> , 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015)	11

<i>State v. Watkins</i> , 136 Wn. App. 240, 148 P.3d 1112 (2006)	12, 19
<i>State v. Watkins</i> , 136 Wn.App. 240, 148 P.3d 1112 (2006)	17

CONSTITUTIONAL PROVISIONS

Wash. Const. art. IV, §16.....	23
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WASHINGTON STATE STATUTES

RCW 43.185.010	22
RCW 71.09.020	9, 13, 16, 21, 22, 24, 25
RCW 71.09.025	21
RCW 71.09.030	13, 14, 21
RCW 71.09.060	13
RCW 71.09.140	21

OTHER AUTHORITIES

<i>Dictionary.com</i> , Random House, Inc. (2018).....	22
ER 401	1
ER 802	6, 7
ER 804	6, 7
Scurich, Gongola, & Krauss, <i>The Biasing Effect of the “Sexually Violent Predator” Label on Legal Decisions</i> , 47 International Journal of Law and Psychiatry (2016)	17, 18, 19

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. CANTY’S DUE PROCESS RIGHT TO CROSS-EXAMINE A CRITICAL AGAINST HIM.

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

The standard for review of an evidentiary decision affecting a constitutional right remains unsettled. This court should review such errors *de novo*. See Appellant’s Brief, pp. 9-12.

Recently, this court has addressed the issue in two decisions filed on the same day. *State v. Horn*, ---Wn. App. ---, 415 P.3d 1225 (2018); *State v. Blair*, ---Wn. App. ---, 415 P.3d 1232 (2018). Although neither *Horn* nor *Blair* adequately protects constitutional rights, the *Horn* decision is more in line with Supreme Court precedent. *Horn* involved the exclusion of evidence offered by the defense, *Blair* a limitation on cross-examination. Each case produced a majority opinion and a concurrence addressing the proper standard of review.

In *Horn*, the majority applied a “three-step test” designed “to preserve both our *de novo* review of constitutional claims and the review of evidentiary rulings for an abuse of discretion.” *Horn*, --- Wn. App. at ____, ____ (citing *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010)). Relying on the Supreme Court’s decision in *Jones*, the *Horn* majority first evaluated evidence excluded for “minimal relevance.” *Id.* This standard, drawn from *Jones*, is the standard applied by trial courts under ER 401. *Id.* Recognizing the constitutional significance of the issue, the *Horn* majority

went on to review *de novo* the risk of prejudice to the State and the defendant's need for the excluded evidence.¹ *Id.*

The *Blair* majority sought to distinguish *Jones* and related cases. *Blair*, ---Wn. App. at _____. It applied a more deferential standard of review, determining only whether the trial court abused its discretion by restricting cross-examination. *Id.* In its evaluation of the alleged confrontation error, the *Blair* majority did not consider the relevance of the excluded testimony. *Id.* Instead, the majority affirmed based on the trial judge's discretion "to control the exact scope of questioning." *Id.* (citing ER 611).

The *Blair* concurrence argued that *Jones* and other Supreme Court precedent require more: "We should not apply a mere abuse of discretion standard of review in contravention of express decisions to the contrary." *Id.*, at ____ (Worswick, J., concurring) (citing, *inter alia*, *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009)). Judge Worswick opined [R]eviewing the trial court's decision merely for an abuse of the trial court's discretion does not fulfill our duty to address constitutional claims. In these types of cases, our Supreme Court considers constitutional concepts in determining abuse of discretion. *Id.*, at ____ (Worswick, J., concurring).

Only *de novo* review adequately protects constitutional rights. Although the State argues for an abuse of discretion standard, Respondent admits that "[i]f there is a constitutional issue involved... review is de

¹ A concurring opinion argued in favor of the analytical framework contained in *Blair*. *Id.*, at ____ (Melnick, J. concurring).

novo.” Respondent’s Brief, p. 12.² The approach outlined by *Blair* makes constitutional issues a matter of judicial discretion. Even the *Horn* decision provides insufficient protection of constitutional rights.

This court should review the error *de novo*. Alternatively, the court should adopt the approach taken by Judge Worswick, and consider relevant “constitutional concepts” when determining whether the trial court made the proper decision. *Id.*, at ___ (Worswick, J., concurring).

B. Mr. Canty had a due process right to cross-examine Del La Torre because her testimony was admitted as substantive evidence.

Due process protects Mr. Canty’s right to cross-examine a critical witness whose testimony is admitted as substantive evidence. Appellant’s Brief, pp. 14-18 (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). This right stems from the balance of interests and the risk of error absent cross-examination.

The Supreme Court has not addressed this issue, except where the patient has had a prior opportunity to cross-examine the witness on issues relating to commitment. *In re Det. of Stout*, 159 Wn.2d 357, 368, 150 P.3d 86 (2007). In *Stout*, the patient “had two separate opportunities to cross-examine [the witness],” so *Stout* presented “[n]o controversy... as to cross-examination.” *Id.* The court “review[ed] only Stout’s confrontation claim.” *Id.* It premised its discussion on “whether any purpose is served in recognizing a *due process* right to confrontation *where cross-examination*

² Respondent suggests that constitutional arguments are not reviewed *de novo* when the alleged violation rests on questions of admissibility. Respondent’s Brief, p. 13.

has been achieved.” Id., n. 9 (emphasis in original).

By contrast, this case presents a “controversy... as to cross-examination.” *Id.*, at 368. Mr. Canty’s only chance to cross-examine Del La Torre came twenty years before at a preliminary hearing in a California criminal case. RP 93-100, 620-627; CP 70, 94-133, 362. Unlike the patient in *Stout*, there was no opportunity to cross-examine on civil commitment issues. The State erroneously suggests that “*Stout* is dispositive.” Respondent’s Brief, p. 15. The patient in *Stout* had two prior opportunities for cross-examination in the commitment proceeding itself. Unlike in this case, there was “[n]o controversy” on the issue of cross-examination in *Stout*: the patient did not argue that he was denied his due process right to cross-examination. *Id.*

But here Mr. Canty *does* argue that he was deprived of his due process right to cross-examine a critical state witness. The *Stout* court’s analysis does not answer the question posed here, as the Supreme Court itself pointed out. *Id.* Respondent makes no mention of this.

Nor does *Coe* control Mr. Canty’s case. *Detention of Coe*, 175 Wn.2d 482, 286 P.3d 29 (2012). In *Coe*, the victim’s statements were not admitted as substantive evidence. *Id.*, at 509-512. This limitation impacted the court’s evaluation under *Mathews* because it “reduce[d] the probable value of requiring an opportunity for confrontation.” *Id.*, at 511.³

³ In addition, transcripts were not admitted in *Stout*; instead, the State’s expert testified that she had relied on the victims’ out-of-court statements. *Id.*, at 509. Here, by contrast, a transcript of Del La Torre’s testimony was read to the jury verbatim. RP 620-627.

No such limitation applied in this case. The testimony was admitted as substantive evidence. RP 620-627. Again, Respondent does not address the distinction. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009).

The third case relied upon by Respondent is also inapplicable. Respondent's Brief, pp. 16-17 (citing *In re Det. of Allen*, 142 Wn. App. 1, 174 P.3d 103 (2007)). In *Allen*, the patient argued that "*Crawford* protections should apply to civil commitment proceedings." *Allen*, 142 Wn. App. at 4 (citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). The Court of Appeals pointed out that *Crawford* applies only to criminal proceedings. *Id.* It went on to note that the disputed evidence consisted of non-testimonial hearsay, which would have been admissible under *Crawford*, if that case applied. *Id.*

The *Allen* court viewed "confrontation" and "cross-examination" as interchangeable. *Id.* Relying on *Stout*, the court concluded that the patient did not have "a due process right to confront" the witness. *Id.* But the *Allen* court failed to note the distinction raised by the Supreme Court in *Stout*. *Id.* There, the court addressed "whether any purpose is served in recognizing a *due process* right to confrontation *where cross-examination has been achieved.*" *Stout*, 159 Wn.2d at 368 n. 9 (emphasis in original).

The court in *Allen* conducted no further analysis. *Allen*, 142 Wn. App. at 4. Because it based its holding on a misreading of *Stout*, this court should not accept *Allen's* conclusion. Instead, the court should balance the interests as outlined in Appellant's Opening Brief.

C. The trial court violated due process, as well as ER 802 and ER 804.

A witness is only unavailable if the proponent of hearsay evidence “has been unable to procure the declarant's attendance...by process or other reasonable means.” ER 804(a)(5). The proponent must show reasonable efforts to secure the witness’s attendance at trial. ER 804 (a); *United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007). Here, it does not appear that the State’s investigator even conducted a google search for the missing witness.⁴ CP 91-92. Nor did he search using the alternate spellings outlined in the record.⁵ *See* CP 92, 97, 242-244, 334, 362.

The investigator provided few details about the minimal steps taken. For example, he wrote to a P.O. Box address but did not say how he obtained the address, or if he’d searched for a physical address. CP 91-92. He didn’t even disclose what he’d written to Del La Torre, or if he provided any way for her to contact him.⁶ CP 91-92.

The investigator’s paltry efforts cannot be compared to the robust attempts made in *DeSantiago*. There, the State did far more to locate missing witnesses. *State v. DeSantiago*, 149 Wn.2d 402, 409, 68 P.3d 1065 (2003). In that case, a detective spoke with relatives and family friends,

⁴ Instead, he apparently limited his internet search to social media. CP 91-92. He also searched unspecified law enforcement databases for “leads.” CP 91-92.

⁵ Respondent misrepresents the record, ignoring the four different surname spellings that likely complicated a search. Respondent’s Brief, p. 18 n. 11. These included “Banuelos,” “Banulos,” “de la Torre,” and “Del La Torre.” CP 92, 97, 242-244, 334, 362.

⁶ His actions cannot be described as “numerous efforts and means;” nor did he “exhaust[] all available resources.” *See* Respondent’s Brief, p. 18 (citing CP 92).

determined that the witnesses had moved to Mexico but had also considered moving to Texas, attempted contact with relatives in Texas, and made multiple attempts to get more information from the family member, who “persistently refused to reveal the family’s location.” *Id.*

The investigator’s efforts in this case fell far short of those undertaken by the detective in *DeSantiago*. *Id.* Information that Del La Torre had left the country may have excused further attempts, especially if contacts “persistently refused to reveal” her location. *Id.* But the investigator did not even try to find evidence to justify abandoning the search. The State failed to make reasonable efforts. ER 804(a); *Id.* The testimony should have been excluded. ER 802; ER 804; *see State v. Aaron*, 49 Wn.App. 735, 741, 745 P.2d 1316 (1987).⁷

The testimony was also inadmissible because Mr. Canty did not have “similar motive to develop the testimony” two decades earlier when the witness testified at a preliminary hearing in a criminal case in California. *See* ER 804 (b)(1). Absent similar motive, the mere opportunity for prior cross-examination is insufficient to justify admission.⁸ ER 804(b)(1).

In the California preliminary hearing, Mr. Canty had “little incentive to cross-examine on [any] particular point” relating to his civil com-

⁷ Mr. Canty does not suggest that the State made “no effort’ to obtain the witness’s presence at trial.” Brief of Respondent, p. 19 (quoting *Aaron*). Instead, Appellant cites *Aaron* as that case holds that failure to make reasonable efforts requires exclusion of hearsay evidence. *Id.*

⁸ Respondent appears to misunderstand Mr. Canty’s argument on this point. Brief of Respondent, p. 20. Appellant does not claim that a failure to take advantage of the opportunity to cross-examine renders evidence inadmissible. Instead, an opportunity to cross-examine is insufficient unless accompanied by a “similar motive” to develop the testimony. Appellant’s Brief, pp. 22-24.

mitment. *See DeSantiago*, 149n.2d at 414. The “issue[s] in dispute and the intensity of interest in developing [them]” differed significantly. *See United States v. Bartelho*, 129 F.3d 663, 672 (1st Cir. 1997); *see also United States v. Geiger*, 263 F.3d 1034, 1038 (9th Cir. 2001).

The California preliminary hearing and the civil commitment trial served different purposes. *Cf. United States v. DiNapoli*, 8 F.3d 909, 913 (2d Cir. 1993). This distinguishes Mr. Canty’s case from those cited by Respondent. In each of those cases, the prior opportunity to cross-examine arose earlier in the same criminal proceeding. *See* Brief of Respondent, pp. 20-21 (citing *State v. Benn*, 161 Wn.2d 256, 165 P.3d 1232 (2007); *State v. Israel*, 113 Wn. App. 243, 54 P.3d 1218 (2002); *State v. Mohamed*, 132 Wn. App. 58, 130 P.3d 401, 403 (2006)). These cases involved evidence developed earlier in the proceedings offered at a subsequent trial *in the same case*.⁹ But here the prior testimony was offered in a civil proceeding that commenced decades after the original criminal prosecution.

Mr. Canty also lacked “similar motivation” because the prior testimony occurred at a preliminary hearing in the unrelated criminal case. A preliminary hearing is a “much less searching exploration into the merits of a case” than a trial. *Barber v. Page*, 390 U.S. 719, 725, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). Its function is only to determine “whether proba-

⁹ The sole exception is *Acord v. Pettit*, 174 Wn. App. 95, 302 P.3d 1265 (2013). In that case, prior testimony from an unavailable witness was admitted even though the earlier adverse possession suit “was over an east west boundary whereas [the current] suit was over a north south boundary.” *Id.*, at 100. The issues in each suit were nearly identical, allowing admission of the testimony. *Id.* The *Acord* case would be analogous here if Mr. Canty were facing criminal prosecution for a related crime arising out of the California incident. Instead, he faced civil commitment, based on factors unrelated to the California prosecution.

ble cause exist[ed] to hold the accused for trial.” *Id.*

At the California preliminary hearing, Mr. Canty was not attacking the foundation of an expert opinion regarding his mental condition. Nor was he concerned about facts bearing on the likelihood that he would commit predatory acts of sexual violence in the future. The civil commitment trial presented these issues. *See* RCW 71.09.020(18). Cross-examination in the civil commitment proceeding may have revealed more than just credibility issues. Mr. Canty did not have a “similar motive” to develop the testimony at the California preliminary hearing.

The trial court erred by admitting the prior testimony. It 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.” *Bartelho*, 129 F.3d at 672. The prior testimony should not have been admitted as substantive evidence. *Id.*

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

Because this was “a pretty close case for an initial commitment in an SVP matter,”¹⁰ the State cannot prove the error harmless beyond a reasonable doubt. *See State v. DeLeon*, 185 Wn.2d 478, 487–488, 374 P.3d 95 (2016). Respondent does not address the constitutional standard for harmless error. Although the trial court’s ruling violated the rules of evidence, Mr. Canty *also* argues a violation of his due process right to cross-

¹⁰ RP (6/9/17) 5.

examine adverse witnesses. Appellant’s Brief, pp. 24-25. Respondent apparently agrees that it cannot meet the stringent constitutional standard for harmless error. Respondent’s Brief, p. 24.

Even under the more lenient standard for evidentiary error, this court must reverse. The court must reverse unless the error was “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Perez-Valdez*, 172 Wn.2d 808, 828–29, 265 P.3d 853 (2011) (internal quotation marks and citations omitted). It cannot be harmless “[i]f a reasonable possibility exists that in the absence of the error the verdict might have been more favorable to [Mr. Canty.]” *Id.*

Del La Torre provided vivid detail that was highly prejudicial. RP 620-627, 952-977. Her prior testimony also provided a basis for Dr. North’s opinion. RP 271-558. An opportunity to cross-examine would have given Mr. Canty the chance to undermine her account; it also would have permitted him to address any details that related to Dr. North’s diagnosis and risk assessment. The error cannot be described as trivial, formal, or merely academic. *Id.* Mr. Canty’s commitment order must be reversed, and the case remanded for a new trial. *Id.*; *DeLeon*, 185 Wn.2d 487–488.

II. INSTRUCTIONAL ERRORS REQUIRE REVERSAL.

A. The Court of Appeals should review the instructions *de novo* to ensure that they are manifestly clear.

The sufficiency of jury instructions is an issue of law, reviewed *de novo*. *State v. Walker*, 182 Wn.2d 463, 481, 341 P.3d 976, 986 (2015),

cert. denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015). Furthermore, 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). Review is *de novo* here because Mr. Canty raises legal arguments of constitutional dimension. Appellant's Brief, pp. 25-35.

Without explanation, Respondent argues that the instructions should be reviewed under an abuse of discretion standard. It is possible that Respondent believes the trial court rejected the proposed instructions based on "a factual determination," or that the error involves nothing more than "[t]he specific language" of the court's instructions. Respondent's Brief, pp. 25-26. Both arguments lack merit.

First, the facts underlying the requested instruction are undisputed. Even if there were a dispute, the facts are to be taken in a light most favorable to Mr. Canty as the proponent. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) (*Fisher I*). Furthermore, where refusal to instruct is based on a lack of evidence, review is *de novo*. *Id.*

Second, the court's outright refusal to instruct on the availability of a new ROA petition cannot be described as a decision about the appropriate language. The court did not instruct on the issue at all. CP 436-483.

Review should be *de novo*. Further, the instructions must be manifestly apparent to the average juror. Respondent erroneously claims the "manifestly apparent" standard applies only to self-defense instructions. Respondent's Brief, pp. 26-29. This is incorrect.

Courts have applied the “manifestly apparent” standard in many contexts unrelated to self-defense. For example, the standard has been applied to the elements instruction for an offense (*State v. Smith*, 174 Wn. App. 359, 361, 298 P.3d 785 (2013)), to instructions aimed at preventing double jeopardy violations (*State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007)), to unanimity instructions (*State v. Watkins*, 136 Wn. App. 240, 243, 148 P.3d 1112 (2006)), to instructions on insanity (*State v. Applin*, 116 Wn. App. 818, 825, 67 P.3d 1152 (2003)), and to instructions defining dominion and control in possession cases. *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

The court should not follow *In re Det. of Taylor-Rose*, 199 Wn. App. 866, 401 P.3d 357 (2017). According to the *Taylor-Rose* court, “the court in [*Kyllo*] was tasked with determining whether one incorrect instruction and one correct instruction read together made the correct standard apparent to the jury.” *Id.*, at 880 n. 2. But the instructions in *Kyllo* did not conflict, and the court made no mention of any inconsistency in its analysis. *Kyllo*, 166 Wn.2d at 859-60; 863-65. Furthermore, as is clear from a review of *Smith*, *Borsheim*, *Watkins*, *Applin*, and *Cantabrana*, *supra*, the “manifestly apparent” standard is not limited to situations involving “one incorrect instruction and one correct instruction.” *Taylor-Rose*, 199 Wn. App. at 880 n. 2.

For the reasons outlined in earlier briefing, the “manifestly apparent” standard should apply to the court’s instructions here. The relevant standard was not made manifestly apparent to the average juror, requiring

reversal. *Kyllo*, 166 Wn.2d at 863-65.

B. The trial court should have told jurors that the Mr. Canty may face commitment if released, even absent a new crime.

At a civil commitment trial, jurors may consider “placement conditions... that would exist for the person if unconditionally released.” RCW 71.09.060(1). One “placement condition” for Mr. Canty is the possibility of future commitment based on an overt but non-criminal act. *In re Det. of Post*, 170 Wn.2d 302, 316-317, 241 P.3d 1234 (2010).

As a matter of law, Mr. Canty would be subject to a new petition based on a recent overt act (ROA) committed after release. RCW 71.09.020 (7) and (12); RCW 71.09.030 (1)(e); RCW 71.09.060(1). This possibility is “a condition to which [he] would be subject if released.” *Id.*, at 317. It is therefore germane to the likelihood that he will reoffend.

The trial judge refused to instruct jurors that Mr. Canty could be subject to a new ROA commitment petition for conduct falling short of a crime. CP 218. This was error. *See* Appellant’s Brief, pp. 29-32.

Instructions are not sufficient merely because a party *can* argue its position to the jury: “lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is.”¹¹ *In re Det. of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010).

Without instruction on the availability of new ROA petition, coun-

¹¹ *See also State v. Aumick*, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995) (“A jury should not have to obtain its instruction on the law from arguments of counsel.”)

sel had no opportunity to even try “to convince [jurors] what the applicable law is.” *Pouncy*, 168 Wn.2d at 392; *see Aumick*, 126 Wn.2d at 431. Further, because the availability of such a petition is a matter of law, Mr. Canty was not under any obligation to introduce evidence proving that RCW 71.09.030 (1)(e) would authorize the State to seek commitment if he were released and committed a qualifying act.

The Supreme Court has concluded that the availability of such a petition would tend to reduce a person’s risk of recidivism.¹² *Post*, 170 Wn.2d at 317. This is in part because a patient’s “knowledge of the consequences for engaging in [a recent overt act] may well serve as a deterrent.” *Id.* However, deterrence is not the only effect of RCW 71.09.030(1)(e).

In addition to its deterrent effect, the availability of a new ROA petition has an incapacitating effect. If Mr. Canty commits a qualifying act, he may be indefinitely confined in the future. This possibility, however slim, has at least some impact on the likelihood that he will commit a predatory act of sexual violence. Mr. Canty should have been allowed to argue this point to the jury. *See Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

Respondent argues that the Court of Appeals has rejected this argument. Respondent’s Brief, pp. 29-30 (citing *Taylor-Rose*). But *Taylor-Rose* conflicts with the Supreme Court’s decision in *Post* and should not control here. The *Taylor-Rose* court agreed that “[t]he threat that the State

¹² While *Post* addressed the admissibility of evidence, its reasoning applies to the issue here.

would file a new SVP petition based on certain conduct [is] evidence relating to” a patient’s likelihood of reoffending. *Taylor-Rose*, 199 Wn. App. at 886. However, the court upheld the commitment order because the general instructions given “allowed Taylor-Rose to argue his theory without the need for more specific language.” *Id.*

This reasoning leaves trial counsel in the position decried by the Supreme Court in *Pouncy* and *Aumick*. Without a proper instruction, Mr. Canty’s attorney had “to convince [jurors] what the applicable law is.” *Pouncy*, 168 Wn.2d at 392; *see also Aumick*, 126 Wn.2d at 431.

The *Taylor-Rose* court also upheld the trial court based on a purported lack of evidence. According to the court, “there was no evidence presented at trial that Taylor-Rose would be less likely to reoffend because of the potential for new SVP petitions.” *Taylor-Rose*, 199 Wn. App. at 886. Because of this, the court concluded, the instruction was not supported by the evidence. *Id.*

This ignores the reasoning adopted by the Supreme Court in *Post*. The Court of Appeals “remains bound by a decision of the Washington Supreme Court... [and] must follow Supreme Court precedence [sic], regardless of any personal disagreement with its premise or correctness.” *Sluman v. State*, -- Wn.App. ---, ___, 418 P.3d 125 (2018).

Although *Post* addressed the admissibility of evidence, its reasoning applies here. In addition to any deterrent effect, the availability of a new petition “is, in a literal sense, a condition to which [a patient] would

be subject if released.”¹³ *Post*, 170 Wn.2d at 317.

It has at least some slight incapacitating effect – a patient who is committed following a recent overt act is less likely to commit a predatory act of sexual violence in the future.¹⁴ In keeping with this, the *Post* court recognized that a new petition is a placement condition that could impact the risk of recidivism, even absent any deterrent effect. *Id.*, at 316-317.

Respondent fails to recognize this. According to Respondent, “the evidence is only relevant because the person’s knowledge of the threat of a new SVP petition could reduce the risk.” Respondent’s Brief, p. 30.

But the *Post* court did not limit relevance in this way. *Id.* Respondent’s argument ignores the Supreme Court’s recognition that the availability of such a petition is a “condition that would exist upon placement in the community.” *Id.*, at 316. Like the patient in *Post*, the availability of a new petition “is, in a literal sense, a condition to which [Mr. Canty] would be subject if released.” *Id.* This “condition” impacts his risk of recidivism: if he is committed following a qualifying overt act, he will be less likely to commit a predatory act of sexual violence in the future.

The Supreme Court’s analysis in *Post* supersedes the decision in *Taylor-Rose*. This court should follow *Post* rather than *Taylor-Rose*. *Sluman*, --- Wn.App.at _____. Furthermore, even if Mr. Canty were ignorant of

¹³ The *Post* court rejected a Court of Appeals decision that took the opposite view. *State v. Harris*, 141 Wn. App. 673, 679-680, 174 P.3d 1171 (2007), *disapproved of by In re Det. of Post*, 170 Wn.2d 302, 241 P.3d 1234 (2010).

¹⁴ Indeed, the legislature implicitly recognized this when it authorized commitment of a person at liberty without requiring proof of a new offense. *See* RCW 71.09.020(7) and (12).

the possibility of commitment based on a “recent overt act” at the start of the trial, that ignorance was easily corrected. Trial counsel could have educated Mr. Canty during the trial. Indeed, if the court had given the proposed instruction, Mr. Canty could have learned about the law at the same time jurors did.

The trial court committed reversible error by refusing to instruct on the availability of a new petition following Mr. Canty’s release. *Id.*; *Pouncy*, 168 Wn.2d at 392. The commitment order must be reversed, and the case remanded for a new trial with proper instructions. *See Pouncy*, 168 Wn.2d at 392.

C. The trial court should not have used inflammatory language in its instructions.

Statutory language is not always appropriate for jury instructions. *See State v. Watkins*, 136 Wn.App. 240, 243, 148 P.3d 1112 (2006); *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369, 372 (1996), *abrogated on other grounds by State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009).

This is especially true here. By itself, the phrase “sexually violent predator” impacts jury decisions in a way that favors the State and prejudices the patient. *See Scurich, Gongola, & Krauss, The Biasing Effect of the “Sexually Violent Predator” Label on Legal Decisions*, 47 *International Journal of Law and Psychiatry*, p.109 (2016).

By using the phrase and rejecting the substitute language proposed by trial counsel, the lower court encouraged jurors to commit Mr. Canty for reasons other than his mental condition or current dangerousness. RP

54, 118-124, 816; CP 140-143, 201, 326, 371; CP 464-465. The inflammatory language diverted jurors from their task and increased the likelihood of a verdict based on passion and prejudice. Scurich, p. 109.

An advocate may not use inflammatory language or appeal to the passions and prejudices of the jury. *See, e.g., State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (*Fisher II*) (prosecutor’s “bald appeals to passion and prejudice constitute misconduct”); *State v. Pierce*, 169 Wn. App. 533, 555-556, 280 P.3d 1158 (2012) (discussing prosecutor’s “improper and highly inflammatory arguments”); *State v. Perez-Mejia*, 134 Wn. App. 907, 917, 143 P.3d 838 (2006) (Prosecutor’s “argument, considered in totality, was inflammatory”); *State v. Rivers*, 96 Wn. App. 672, 676, 981 P.2d 16 (1999) (discussing prosecutor’s “ill-conceived rhetoric aimed squarely at the jury’s passions.”) Such arguments deprive the opposing party of a fair trial. *Fisher II*, 165 Wn.2d at 749. A trial court’s use of inflammatory language that appeals to passion and prejudice will have an even greater impact.

Respondent does not deny the prejudicial impact of the language. Instead, the State argues that use of such language is justified. Respondent’s Brief, pp. 31-35. But this fails to address the underlying problem. The mere use of the phrase “sexually violent predator” has the potential to distort jury deliberations. Scurich, p. 109. This compounds the natural prejudice inherent in any civil commitment trial. A patient should not be required to overcome the additional bias created by judicial use of the phrase.

Neither the legislature nor the pattern instruction committee may require a court to use specific prejudicial language when it instructs the jury. Just as a prosecutor may not use inflammatory language, the court should not use a phrase that has been shown to appeal to passion and prejudice. *Id.*; Scurich, p. 109.

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.” *Id.*; see *Watkins*, 136 Wn.App. at 243.

III. UNDER THE LAW OF THE CASE, THE STATE DID NOT PROVE A RISK OF “SEXUAL VIOLENCE.”

The State must prove beyond a reasonable doubt all facts necessary for commitment. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003); see *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). The court’s instructions determine the law of the case. *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). The law of the case doctrine is “an established doctrine with roots reaching back to the earliest days of statehood.”¹⁵ *State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1998).

Respondent erroneously claims that appellant “cites no authority” for Mr. Canty’s law-of-the-case argument. Brief of Respondent, p. 44.

¹⁵ Washington retains the doctrine, even though the U.S. Supreme Court has dispensed with it. *Johnson*, 188 Wn.2d at 756.

This is incorrect. *See* Appellant’s Brief, pp. 35-37. The legal principles are clear: absent objection, the court’s instructions become the law of the case.¹⁶ *Millies*, 185 Wn.2d at 313. Evidentiary sufficiency must be measured against the instructions. *Id.*

The State bore the burden to prove Mr. Canty was “likely to engage in predatory acts of sexual violence.” CP 465; RCW 71.09. The court’s instructions—proposed by the State—defined “sexual violence” by enumerating specific felonies. CP 469; RP 819-823, 861-930. The State did not prove Mr. Canty was likely to engage in one of the enumerated crimes. Under the law of the case, the evidence was insufficient. *Millies*, 185 Wn.2d at 313; *Johnson*, 188 Wn.2d at 756–762.

Respondent’s primary argument appears to be that the evidence was sufficient to meet the statutory definition. Brief of Respondent, pp. 45-50. This ignores the law of the case. Given the court’s instructions, jurors were not tasked with determining how the evidence fit within the statute. The evidence summarized by Respondent does not show that it met its burden beyond a reasonable doubt. Because the State failed to meet its burden under the law of the case, the commitment order must be reversed. *See, e.g., Hickman*, 135 Wn.2d at 105-106.

IV. THE TRIAL COURT COMMENTED ON THE EVIDENCE.

A. The legislature used two different phrases describing prior crimes,

¹⁶ Respondent’s argument may be that appellant hasn’t cited authority discussing the law of the case in relation to the specific instructions given here. Brief of Respondent, p. 44. It is hardly remarkable that the individual set of instructions given in this case has not previously been the subject of a published opinion.

differentiating between the initiation of commitment proceedings and the adjudication of a commitment petition.

The legislature intends different meanings when it uses different language in the same statute. *State v. Costich*, 152 Wn.2d 463, 475-476, 98 P.3d 795 (2004). The legislature did so in RCW 71.09.020. The legislature enumerated specific crimes in its definition of “sexually violent offense.” RCW 71.09.020(17). This limited list provides guidance: the impending release of an offender convicted of a qualifying offense (1) triggers referral to a prosecuting agency and notification of victims; (2) authorizes the State to file a civil commitment petition; and (3) establishes the proper venue for such a petition. RCW 71.09.025; RCW 71.09.030; RCW 71.09.140.

But the legislature has taken a different approach regarding adjudicating the petition once filed. The jury must determine if the “sexually violent offense” is also a “crime of sexual violence.” RCW 71.09.020(18). The two phrases have different functions. One (“sexually violent offense”) is a guide for official action. RCW 71.09.025; RCW 71.09.030; RCW 71.09.140. The other (“crime of sexual violence”) is an element to be determined by the jury or other factfinder. RCW 71.09.020(18).

Had the legislature intended jurors to mechanically apply the same list that guides government officials, it would have provided a definition incorporating that list. It chose not to do so. Instead, the legislature requires the State to persuade jurors beyond a reasonable doubt that the patient has committed a “crime of sexual violence.” RCW 71.09.020(18). The phrase “crime of sexual violence” is not defined. *See* RCW 71.09.020.

It should be given its plain and ordinary meaning. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006). Applying dictionary definitions, a “crime of sexual violence” is a sex offense accomplished through the application of “swift and intense force” or “rough and injurious physical force.” *Dictionary.com*, Random House, Inc. (2018).¹⁷

Respondent contends that giving effect to the legislature’s choice would lead to “absurd” results. Respondent’s Brief, pp. 37-39 (citing *Det. of Coppin*, 157 Wn.App. 537, 238 P.3d 1192 (2010) and *Taylor-Rose*). This is not true. Where appropriate, the legislature defines similar or even identical phrases differently.¹⁸ Nothing restricts it from doing so.

The officials who screen cases, provide notification to victims, and file petitions serve functions that differ from those undertaken by a jury. It is not absurd to suppose that the legislature would limit the discretion of government agencies while allowing jurors to make case-by-case inquiries into a patient’s prior convictions.

Respondent’s use of the word “absurd”—taken from *Coppin* and *Taylor-Rose*— appears to reflect a misunderstanding of the judiciary’s role. Respondent’s Brief, pp. 37-39. A court may not rewrite a provision even if the legislature intended something else but failed to express it adequately. *In re Detention of Martin*, 163 Wn.2d 501, 512-513, 182 P.3d 951 (2008). Judges may only correct inconsistencies rendering statutes

¹⁷ Available at <http://www.dictionary.com/> (last accessed 7/9/18).

¹⁸ Compare RCW 43.185.010(21) (defining “secure facility”) with RCW 71.09.020(16) (defining “secure facility.”)

meaningless. *Id.* Appellate courts may not impose a correction, even if a drafting error “keeps the purpose of the statute from being effectuated comprehensively.” *Id.* (internal quotation marks and citation omitted).¹⁹

The statute here is rational. It provides one definition for officials tasked with initiating civil commitment proceedings. It provides different language to guide the factfinder at a commitment trial. It would be improper for this court to “fix” this legislative choice. *Id.*

The court erroneously instructed jurors that Mr. Canty’s prior convictions automatically qualified as crimes of sexual violence. CP 465, 469. This amounted to a comment on the evidence. Wash. Const. art. IV, §16; *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). It removed an element from the jury’s consideration. *Id.*; see also *State v. Brush*, 183 Wn.2d 550, 556-560, 353 P.3d 213 (2015).

The error is presumed prejudicial and requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Jackman*, 156 Wn.2d at 743; *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). The State has not met this burden. A judicial comment may require reversal even where an element is undisputed. *Jackman*, 156 Wn.2d at 745. The sole responsive argument presented is that Mr. Canty “never disputed the fact that he was convicted of a crime of sexual violence.” Respondent’s Brief, p. 43. Respondent makes no effort to meet the height-

¹⁹ If the statute “remains rational as a whole,” any perceived error will stand. If an error makes the statute “entirely meaningless,” appellate courts will “compensate for [the error] if it is imperatively required to make it a rational statute.” *Id.*, at 513 (internal quotation marks and citation omitted).

ened standard outlined in *Levy* and *Jackman*.²⁰ This failure may be treated as a concession that the State cannot meet its burden. *See Pullman*, 167 Wn.2d at 212 n. 4. The commitment order must be reversed. *Jackman*, 156 Wn.2d at 743; *Levy*, 156 Wn.2d at 725.

B. This court should revisit *Taylor-Rose* and reject the *Coppin* court’s reasoning.

Respondent correctly points out that Division II has adopted the analysis outlined in *Det. of Coppin*, 157 Wn.App. 537, 238 P.3d 1192 (2010).²¹ Respondent’s Brief, p. 36 (citing *Taylor-Rose, supra.*). This court should revisit *Taylor-Rose*, because the *Coppin* court ignored well-settled rules of statutory interpretation. *See* Appellant’s Brief, pp. 48-49.

The legislature’s use of different language in the same statute expresses an intent to convey different meanings. *Costich*, 152 Wn.2d at 475–76. The *Coppin* court ignored this “basic rule” of statutory construction.²² *Durland v. San Juan Cty.*, 182 Wn.2d 55, 79, 340 P.3d 191 (2014) (internal quotation marks and citation omitted). By choosing different phrases to describe a patient’s prior offense(s), the legislature signaled its intent to use a different definition for each stage of the proceedings.

Costich, 152 Wn.2d at 475-476. Prosecutors and other officials discharge their duties by referring to the listed offenses. RCW 71.09.020(17). Jurors

²⁰ Indeed, Respondent does not even refer to the applicable standard.

²¹ Appellate counsel failed to acknowledge this in the opening brief; this failure stemmed from an editing error. *See* Appellant’s Brief, p. 48.

²² Constitutional provisions also require appellate courts to strictly construe Chapter 71.09 RCW against the State. *See 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. The *Coppin* and *Taylor-Rose* courts ignored this requirement as well.

determine whether a prior offense is a “crime of sexual violence” without such a list. RCW 71.09.020(18).

The two phrases—“sexually violent offense” and “crime of sexual violence”—cannot mean the same thing. The former is defined by statute; the latter is not, and thus must be given its plain ordinary meaning. RCW 71.09.020 (17); *In re Det. of Strand*, 167 Wn.2d 180, 188, 217 P.3d 1159 (2009). By using different language, the legislature did not render the entire statute meaningless. *See Martin*, 163 Wn.2d at 512-513. There is a rational basis to use different definitions for different stages of commitment proceedings. *Id.* The Court of Appeals may not “correct” the legislature’s drafting decision. *Id.*

The jurors were not allowed to decide if Mr. Canty’s prior convictions were crimes of sexual violence. CP 469. The trial judge commented on the evidence when he conflated the phrases. *Jackman*, 156 Wn.2d at 743; *Levy*, 156 Wn.2d at 725. Mr. Canty’s commitment order must be reversed, the case remanded for a new trial. *See Brush*, 183 Wn.2d at 561.

CONCLUSION

The commitment order must be reversed, and the case remanded for dismissal or a new trial.

Respectfully submitted on July 13, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply 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 Reply 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 July 13, 2018.



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BACKLUND & MISTRY

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