96748-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

In re the Detention of

JOEL REIMER,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

The Court of Appeals applied well-settled law in concluding that the sexually violent predator statutory scheme satisfies due process because it requires the State to prove "beyond a reasonable doubt" that the person is likely to engage in predatory acts of sexual violence.

The Court of Appeals also applied well-settled law in determining that Joel Reimer's right to testify was not violated. It is well-established that courts may assume a waiver of the right to testify from the defendant's conduct. Reimer explicitly waived his right to be present and to assist and consult with his attorneys during trial. The trial court made arrangements to transport Reimer to court to testify for the State. Reimer testified at length at trial and answered questions from both the State and his attorney. Reimer waived his right to testify a second time by voluntarily leaving court after testifying, consistent with his written waiver. The Court of Appeals followed well-established law in concluding that Reimer failed to make the required showing that his attorneys prevented him from testifying.

Finally, the Court of Appeals' decision involving the inadmissibility of the opinions of non-testifying experts is consistent with *State v. Hamilton*, 196 Wn. App. 461, 383 P.3d 1062 (2016) and settled decisions of this Court. Reimer's petition does not raise significant constitutional issues or issues of substantial public interest that justify review. This Court should deny

discretionary review.

II. RESTATEMENT OF THE ISSUES

If this Court grants review, the issues will be:

A. Does the sexually violent predator statutory scheme violate due process by improperly lowering the State's burden of proof where it requires the State to prove "beyond a reasonable doubt" that the person is likely to engage in predatory acts of sexual violence?

B. Was Reimer's right to testify violated where Reimer testified at length at trial, waived his right to be present and to assist and consult with his attorneys during trial, and his attorneys did not prevent him from testifying?

C. Did the trial court abuse its discretion by denying Reimer's mistrial motion where the testimony involved a single question about diagnoses assigned ten years earlier from non-testifying experts and where the trial court instructed the jury on multiple occasions to disregard the testimony?

III. RESTATEMENT OF THE CASE

A. Procedural History

Joel Reimer has a history of sexually assaulting young boys and girls. RP at 486-89, 500-01, 507-26, 840-60. In 1992, a jury committed Reimer as an SVP. RP at 509. In 2014, the trial court granted Reimer an unconditional release trial. CP at 1376-79. In 2016, the trial court held a jury trial on whether Reimer continues to meet criteria as a sexually violent predator (SVP). CP at 617, 1268-69.

B. Reimer's Waiver of His Right to Testify

Prior to trial, the court held a hearing regarding Reimer's desire to

waive his right to be present at trial. *See* RP at 54-69; CP at 633, 1141-45. Because the State wanted to call Reimer as a witness at trial, Reimer's attorney requested "a date certain" for his testimony so he "could come and go, and that would be the end of it." RP at 54-61. Reimer's attorney explained, in Reimer's presence, that he needs to be "very, very clear" about the meaning of the waiver and that he cannot call his attorneys at night and expect to be attend court the next day. RP at 56-57, 62. The court requested a written, signed waiver from Reimer "indicating exactly what he's waiving, including which stages of the proceeding he wants to waive his presence at." RP at 62-63. The court stated it would then arrange to transport him when the State anticipated calling him as a witness. RP at 63-68.

The trial court subsequently received Reimer's written waiver, which explicitly waived his right to be present during all phases of the trial. CP at 1227-31. Although Reimer did not waive his right to testify, he explicitly waived his right not only to be present "during all phases of The Defense Case," but also to assist and consult with his attorneys during trial. CP at 1227, 1229. The trial court engaged in a detailed colloquy with Reimer about the waiver and advised him to notify his attorneys if he changed his mind. RP at 74-78.

During trial, Reimer was transported to court to testify as a witness in the State's case in chief. *See* RP at 737-39, 771-72. Before he began

testifying, the trial court stated that Reimer wanted to return to the Special Commitment Center (SCC) "as soon as possible when we're done." RP at 771-72. Both the State and Reimer's attorney elicited testimony from Reimer, which lasted for nearly a full day. *See* RP 772-919. During a recess, the State indicated that it planned to rest its case at the conclusion of Reimer's testimony. RP at 899. Reimer's attorney indicated that Reimer is "very concerned" about being held in the jail and that he wanted to return to the SCC when he was done testifying. *See* RP at 904.

Reimer was present in court when the parties agreed that the testimony portion of the trial would likely conclude in two days. *See* RP 919-20, 947-49.[1] Reimer's expert testified immediately after Reimer, and Reimer rested his case the same day that his expert's testimony concluded. *See* RP at 919-20, 1211-14, 1247. Despite this short timeline for the conclusion of trial, Reimer did not remain in court and instead exercised his right not to be present, consistent with his written waiver. *See* CP at 1227-31. The day before the trial concluded, the court advised Reimer's attorney that Reimer "wants to talk to you at some point before he heads back" to the SCC, but neither Reimer nor his attorneys indicated that Reimer wanted to testify a second time. *See* RP at

[1] Although the record does not explicitly state that Reimer remained in court, the record shows that he was present in court because there was no break in the proceedings and his transport to and from court required security restraints. *See* RP at 772.

1050. The evidence portion of the trial concluded just two days after Reimer testified. *See* RP at 1247-48.

Even after the trial concluded, neither Reimer nor his attorneys alleged that he wanted to testify a second time. Rather, Reimer argued that his "constitutional rights were violated by not being allowed *to be present in court*" while awaiting transport back to the SCC. RP at 1395 (emphasis added). But Reimer had previously waived his right to be present in court. CP at 1227-29. Reimer did not assert that his attorneys prevented him from testifying; rather, he argued that he was not returned to the SCC "very quickly" after he testified. *See* RP at 1395. Reimer's attorneys informed the court that they had not heard that Reimer wanted to return to court. RP at 1395-96. The trial court noted that the only information it had received was that Reimer was "most anxious to get returned to the SCC[.]" RP at 1396.

C. Expert Testimony on Reimer's Diagnoses

Prior to trial, Reimer filed a pretrial motion to prohibit the State from impeaching an expert with the opinions of non-testifying experts. CP at 984-85. The trial court noted that experts may testify to facts but not opinions under ER 705. *See* RP at 131. The court did not issue a final ruling on this issue, but stated it would use this as a "starting point" because "the field can really change...depending on the questions that are asked." RP at 130-31.

At trial, the State's expert, Dr. Harry Hoberman, diagnosed Reimer

with sexual sadism, antisocial personality disorder, alcohol use disorder, and high psychopathy. RP at 558-59; *see also* RP at 559-85, 592-612, 705. Dr. Hoberman testified that Reimer has a mental abnormality and personality disorder that cause him serious difficulty controlling his behavior and make him likely to commit predatory acts of sexual violence. RP at 623-32, 654.

Reimer's expert, Dr. Henry Richards, testified that Reimer does not meet commitment criteria and that he has never suffered from a paraphilia. RP at 1115, 1129. He did not diagnose Reimer with sexual sadism because his sexual assaults were exploitative and vindictive as opposed to sexually sadistic in the clinical sense. *See* RP at 1002-12, 1167-68.

Dr. Richards was the superintendent at the SCC from 2004 to 2007. RP 933-34, 966, 1176. As part of his duties as superintendent, if he disagreed with an SCC evaluator's opinion that the person had changed, he would write the evaluator a letter. *See* RP 1176-79. The State then asked Dr. Richards whether he wrote any letters disagreeing with Reimer's diagnoses of sexual sadism, antisocial personality disorder, and psychopathy. RP at 1179-80. At the outset of the State's question, Reimer objected based on "pretrial motions." RP at 1179-80. The court overruled the objection. RP at 1180. Reimer did not object again after the State finished the question. *See* RP at 1180. Dr. Richards agreed that he never wrote such a letter, but explained that this was because the evaluations did not undermine the basis of commitment, which would have

brought it to his attention. RP at 1180.

Reimer subsequently asked for a mistrial, arguing that the State violated the court's pretrial ruling involving the admission of diagnostic opinions from non-testifying experts. RP at 1185-86. After hearing argument from the parties, the trial court ruled that the testimony "runs squarely into the prior ruling about evaluations from people who aren't present here." RP at 1186-90. The court explained, "When the question first started, I thought it was going elsewhere than it did." RP at 1189.

The court denied the motion for a mistrial, but issued a curative instruction and immediately instructed the jury to disregard the prior evaluations of non-testifying witnesses and not consider them during deliberations. *See* RP at 1190-91. At Reimer's request, the court also issued a written instruction at the conclusion of trial informing jurors that testimony about the diagnostic opinions of the SCC evaluators is not admissible and they "must not consider it for any reason" during deliberations. CP at 1249; RP at 1190, 1263-70, 1280.[2]

D. Jury Verdict and Appeal

A unanimous jury found that the State proved beyond a reasonable doubt that Reimer continues to meet SVP criteria. CP at 1251, 1264, 1268-69.

[2] A separate jury instruction also informed jurors that they should not discuss or consider any evidence that the court instructed them to disregard. CP at 1244-45.

Reimer appealed the verdict. CP at 1288-89, 1299-1303. The Court of Appeals affirmed. *In re Det. of Reimer*, No. 49881-2-II, 2018 WL 6719853 (Wash. December 18, 2018). The court held that: (1) Reimer's right to testify was not violated, (2) the trial court did not err by denying his mistrial motion after the State impeached his expert with prior diagnoses, (3) the State did not commit misconduct in cross-examining Reimer's expert, and (4) the SVP statute satisfies due process and does not lower the State's burden of proof. Reimer now seeks discretionary review.

IV. ARGUMENT

A. Standard of Review

Reimer seeks review under RAP 13.4(b)(1), (2), (3), and (4). The decision of the Court of Appeals is consistent with well-established law and does not conflict with any decision of this Court or the Court of Appeals. Because Reimer does not demonstrate that the issues in his petition involve a significant question of constitutional law or an issue of substantial public interest, this Court should deny review.

B. It is Well Settled That the SVP Statute Does Not Improperly Lower the State's Burden of Proof

The Court of Appeals applied well-settled law in determining that the SVP statute does not improperly lower the State's burden of proof. As Reimer properly acknowledges, this Court has rejected this exact argument.

In re Det. of Brooks, 145 Wn.2d 275, 293-98, 36 P.3d 1034 (2001), *overruled on other grounds by In re Det. of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). In *Brooks*, this Court held that the SVP statute satisfies due process because it requires proof "beyond a reasonable doubt" that the person is an SVP—a standard of proof even higher than the "clear, cogent, and convincing" standard required in *Addington*.[3] *Id.* at 294-98.

The SVP statute explicitly requires the trier of fact to determine "whether, beyond a reasonable doubt, the person is a sexually violent predator." RCW 71.09.060(1). An SVP is a person who has been charged or convicted of a crime of sexual violence and who suffers from a mental disorder that makes him "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person "more probably than not will engage in such acts" if unconditionally released. RCW 71.09.020(7). The combined effect of these provisions is to require the State to prove "beyond a reasonable doubt" that the person "more probably than not" will engage in predatory acts of sexual violence if not confined. *See Brooks*, 145 Wn.2d at 296-98.

As this Court recognized, the SVP statute establishes a "beyond a

[3] *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

reasonable doubt" standard of proof. *Id.* at 295-96. Reimer's argument confuses the burden of proof, which is the degree of confidence the trier of fact should have in the correctness of its factual conclusion, with a fact to be proved that is couched in terms of a statistical probability. *Id.* at 296-98.

There is no basis to reexamine this Court's holding in *Brooks* in light of the holdings in *Thorell* and *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), which require facts showing that the person has "serious difficulty" controlling his sexually violent behavior. Neither *Crane* nor *Thorell* indicate that "serious difficulty controlling behavior" is akin to a "highly probable" standard of proof as Reimer suggests. Rather, "serious difficulty controlling behavior" involves the nexus between the mental disorder and dangerousness—the State must present "some proof" that the mental disorder has an impact on the person's ability to control his behavior. *Thorell*, 149 Wn.2d at 735-37, 742-43; *see Crane*, 534 U.S. at 413.

This Court held that this is not a new element and that the jury is not required to make a separate finding of "serious difficulty controlling behavior." *Thorell*, 149 Wn.2d at 742-45. Rather, the jury's finding of a mental disorder, coupled with a history of sexual violence, must support the conclusion that the person has "serious difficulty controlling behavior." *Id.* Thus, "serious difficulty controlling behavior" is not a standard of proof, but rather a fact that must be established at trial. As this Court held, *Crane* requires

SVP commitments "to be supported by proof beyond a reasonable doubt of serious difficulty controlling behavior." *Thorell*, 149 Wn.2d at 745.

Further, the jury instruction approved by this Court in *Thorell* includes a similar "likely to engage in predatory acts of sexual violence" element that Reimer now claims is unconstitutional. *See id.* at 742; CP at 1251. This Court held that the instruction passes constitutional muster because it requires the trier of fact to find a link between the mental disorder and the likelihood of committing predatory acts of sexual violence. *Thorell*, 149 Wn.2d at 742-43. And this link supports a determination that the person has serious difficulty controlling his behavior. *Id.*

The decision of the Court of Appeals is consistent with well-settled decisions of this Court. This Court should deny review because Reimer's petition does not raise an issue of substantial public interest or of constitutional magnitude.

C. The Court of Appeals Applied Well-Settled Law in Determining That Reimer's Right to Testify Was Not Violated

The Court of Appeals applied well-settled law in determining that Reimer's right to testify was not violated. First, he testified for nearly a full day. Second, he waived his right to testify a second time by voluntarily leaving court after he testified, consistent with his written waiver. Finally, he failed to meet his burden for an evidentiary hearing because he presented no evidence

that his attorneys "actually prevented" him from testifying.

1. It Is Well-Established That Courts May Assume a Waiver From the Defendant's Conduct

It is well-established that courts may assume a waiver of the right to testify from the defendant's conduct. *See e.g. State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014). A criminal defendant has a fundamental constitutional right to testify. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). But it is well-established that SVP proceedings are "resolutely civil in nature" and not criminal. *In re Det. of Reyes*, 184 Wn.2d 340, 347-48, 358 P.3d 394 (2015). This Court has repeatedly relied on this distinction in declining to extend certain constitutional rights from criminal law to SVP proceedings. *Id.*

Although the waiver of a defendant's right to testify must be made knowingly, voluntarily, and intelligently, the trial court is not required to obtain an on-the-record waiver by the defendant. *Robinson*, 138 Wn.2d at 758-59; *State v. Thomas*, 128 Wn.2d 553, 558-59, 910 P.2d 475 (1996). Rather, courts may assume a knowing waiver from the defendant's conduct. *Frawley*, 181 Wn.2d at 461 (citing *Thomas*, 128 Wn.2d at 559). The conduct of not taking the stand may be interpreted as a valid waiver of the right to testify. *Thomas*, 128 Wn.2d at 559.

Even assuming Reimer has a fundamental constitutional right to

testify in a civil commitment trial, he waived it through conduct before, during, and after trial. Prior to trial, Reimer explicitly waived his right to be present during all phases of the trial. CP at 1227-31; *see also* CP at 633. Although his written waiver did not waive his right to testify, he explicitly waived his right to be present "during all phases of The Defense Case," and to assist and consult with his attorneys during trial. CP at 1227, 1229.

During trial, the court accommodated Reimer's request to testify for the State on a "date certain" and allowed him to "come and go" as requested. *See* RP at 54-64, 67-68, 737-39. Reimer testified for nearly a full day, answering questions from both the State and his attorney. *See* RP at 772-919. He wanted to return to the SCC "as soon as possible" when he finished testifying and expressed concern about being held in the jail. RP at 771-72, 904.

Reimer was present in court when the parties agreed that they anticipated completing the testimony portion of the trial within two days. *See* RP at 919-20, 947-49. Reimer testified immediately prior to his expert and rested his case the same that his expert finished testifying. *See* RP at 919-20, 1211-14, 1247. Thus, if Reimer wanted to testify a second time, he would have remained in court. And although the day before trial concluded, the court advised Reimer's attorney that Reimer "wants to talk to you at some point before he heads back" to the SCC, neither Reimer nor his attorneys ever

indicated that he wanted to testify a second time. *See* RP at 1050. In fact, Reimer's attorney had previously made it clear to Reimer that by waiving his right to be present at trial, he could not expect to contact them at the last minute to attend court. *See* RP at 56-57, 62.

Even after trial, neither Reimer nor his attorneys alleged that Reimer wanted to testify a second time. On the contrary, Reimer argued that his "constitutional rights were violated by not being allowed *to be present in court*" while awaiting transport back to the SCC. RP at 1395 (emphasis added). But Reimer had previously waived his right to be present in court. CP at 1227-29. Reimer did not assert that he wanted to testify; rather, he asserted that he was not returned to the SCC "very quickly" after he testified. *See* RP at 1395. Further, Reimer's attorneys informed the trial court that they had not heard that Reimer wanted to return to court. RP at 1395-96. The trial court noted that the only information it received was that Reimer was "most anxious to get returned to the SCC[.]" RP at 1396. Thus, Reimer's conduct before, during, and after trial indicated that he was voluntarily waiving his right to testify a second time.

Contrary to Reimer's assertion, the decision of the Court of Appeals does not conflict with *Robinson*. In *Robinson*, this Court explained that an on-the-record waiver of the right to testify is not required and that if a defendant "remains silent" at trial, he must provide substantial, factual evidence that his attorney "actually prevented" him from testifying. *Robinson*, 138 Wn.2d at

759-60. Once the defendant meets this burden, he is entitled to an evidentiary hearing on whether he voluntarily waived his right to testify. *Id.* This Court held that the defendant was entitled to an evidentiary hearing because he made a sufficient showing that his attorney "actually prevented" him from testifying. *Id.* at 761. Nothing in the Court of Appeals' decision conflicts with this holding. On the contrary, the court applied well-settled law from this Court when it determined that Reimer implicitly waived his right to testify by his conduct.

The Court of Appeals' decision is consistent with *Robinson* and other decisions of this Court. Reimer's petition fails to demonstrate that this is a significant constitutional issue or an issue of substantial public interest.

2. The Court of Appeals Applied Well-Established Law in Determining That Reimer Failed to Show His Attorneys "Actually Prevented" Him From Testifying

The Court of Appeals applied well-established law in determining that Reimer failed to show that his attorneys "actually prevented" him from testifying. This Court has consistently held that a defendant who remains silent at trial must present credible evidence that his attorney "actually prevented" him from testifying in order to obtain an evidentiary hearing on whether he voluntarily waived the right to testify. *See, e.g.*, *Robinson*, 138 Wn.2d at 759-60.

Mere allegations by a defendant that his attorney prevented him from

testifying are insufficient to justify an evidentiary hearing. *Id.* at 760; *Thomas*, 128 Wn.2d at 561 (defendant must produce more than a "bare assertion" that the right was violated). He must present "substantial, factual evidence" and demonstrate, from the record, that his specific factual allegations have sufficient credibility to warrant an evidentiary hearing. *Robinson*, 138 Wn.2d at 760. If a trial has commenced in the defendant's presence, a subsequent voluntary absence operates as an implied waiver of the right to be present. *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015). This implied waiver logically extends to the right to testify.

Here, Reimer asserts that his right to testify was violated, but provides no evidence to support the assertion. He does not show that his attorneys "actually prevented" him from testifying. In fact, he voluntarily left court after testifying, consistent with his written waiver. *See* CP at 1227-31. Voluntary absence operates as an implied waiver of the right to testify. Because Reimer has not shown that his attorneys "actually prevented" him from testifying, he is not entitled to an evidentiary hearing or a new trial.[4]

[4] Because he was silent at trial, his remedy on appeal is an evidentiary hearing on whether the right to testify was violated—not a new trial. *See Robinson*, 138 Wn.2d at 759-60. If he meets his burden to obtain a hearing, he must prove by a preponderance of the evidence that his attorney refused to let him testify in the face of his unequivocal demands to testify. *Id.* at 764-65. Only after this showing is a trial court required to evaluate claims under the ineffective assistance of counsel framework set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Robinson*, 138 Wn.2d at 765-66. Because he did not do so, a *Strickland* analysis was not required.

D. The Decision Is Consistent With Established Law Regarding the Inadmissibility of the Opinions of Non-Testifying Experts

1. Denial of a mistrial was consistent with established law

The Court of Appeals applied well-established law in determining that the trial court properly denied Reimer's motion for a mistrial after the State elicited testimony that referenced old diagnostic opinions from non-testifying experts. The court held that although the testimony was improper, it was the result of a single question and the trial court instructed the jury on multiple occasions to disregard the testimony. Contrary to Reimer's assertion, the Court of Appeals' decision is consistent with *Hamilton*.

In *Hamilton*, the State repeatedly impeached the defendant's expert with the opinions and conclusions of numerous non-testifying medical experts. *Hamilton*, 196 Wn. App. at 465. The trial court allowed this cross-examination even though the opinions and conclusions were not admitted into evidence and the defendant's expert did not rely on them. *Id.* The *Hamilton* court held that it was prejudicial error to allow the State to impeach the defendant's sole expert witness with "unrelied on opinions" of inadmissible hearsay. *Id.* at 481-85.

Consistent with *Hamilton*, the Court of Appeals explained that it was improper to question Reimer's expert about the opinions of non-testifying experts. *See In re Det. of Reimer*, No. 49881-2-II, 2018 WL 6719853. But

unlike *Hamilton*, the testimony in Reimer's case was the result of a single question that did not involve any specific details about the prior evaluations or diagnoses. *See* RP at 1179-80. The trial court ruled that the testimony was inadmissible and instructed the jury to disregard it, both immediately following the testimony and again in a written instruction at the end of trial. *See* RP at 1190-91; CP at 1244-45, 1249. Thus, the testimony was not admitted into evidence, and the trial court explicitly instructed the jury to disregard it. Jurors are presumed to follow the court's instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Nothing in the Court of Appeals' decision conflicts with *Hamilton*.

2. The court applied well-settled law in rejecting Reimer's prosecutorial misconduct claim

To the extent Reimer raised a prosecutorial misconduct claim, the Court of Appeals applied well-established law in rejecting this claim.[5] To prevail on a claim of prosecutorial misconduct, the defendant must establish that the State's conduct was both improper and prejudicial in the context of the entire trial. *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *In re Det. of Sease,* 149 Wn. App. 66, 80, 201 P.3d 1078 (2009)¶ (applying standard to SVP cases). Once the defendant establishes improper conduct, he

[5] Reimer only seeks review under RAP 13.4(b)(2), arguing that the court's decision conflicts with *Hamilton*. But *Hamilton* does not address prosecutorial misconduct.

must show that it resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Emery*, 174 Wn.2d at 759-60.

The Court of Appeals applied this well-settled law and properly rejected Reimer's prosecutorial misconduct claim. First, the prosecutor's conduct was not improper because he did not violate the court's pretrial ruling. The trial court did not issue a final ruling on the motion and instead noted that any ruling may change depending on the nature of the questions. *See* RP at 130-31. Further, the trial court's limited ruling was based solely on ER 704 and ER 705, which was not the basis for the State's impeachment of the expert. *See* RP at 130-31, 1186-88; CP at 984-85.

Second, even if the State had committed misconduct, Reimer has not shown that this one question resulted in prejudice that had a substantial likelihood of affecting the verdict. Because this was an unconditional release trial, the jury knew that Reimer had been committed as an SVP for the past 24 years. RP at 509; *see* CP at 1251. At the beginning of trial, the court instructed the jury that Reimer was previously found to be an SVP, meaning that he suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory acts of sexual violence. RP at 83-84. The jury was instructed that the State must prove that he continues to suffer from a mental abnormality or personality disorder. CP at 1251. Thus, brief testimony regarding the existence of prior diagnosed mental disorders was not

prejudicial, particularly since it was ultimately excluded.

Further, unlike in *Hamilton* where the opinions of non-testifying experts were directly related to the central issue at trial, testimony about Reimer's previous diagnoses was not relevant to any issue at trial. The central issue was Reimer's *current* mental condition. *See* CP at 1251, RP at 84. The testimony from Dr. Richards involved diagnoses assigned approximately ten years earlier and was not relevant to any issue at trial. *See* RP at 1176-80; *see also* CP at 1251. Further, the testimony involved diagnoses assigned only when Dr. Richards was the superintendent, which involved only a four-year period during Reimer's 24-year commitment. *See* RP at 509, 1176-80. And the jury was immediately and repeatedly told to disregard the testimony. *See* RP at 1190-91; CP at 1244-45, 1249. Reimer has not shown prejudice affecting his trial. The Court of Appeals applied well-established law in rejecting Reimer's prosecutorial misconduct claim. This Court should deny review.

V. CONCLUSION

For the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 21st day of February, 2019.

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NO. 96748-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Detention of: JOEL REIMER, Petitioner.	DECLARATION OF SERVICE

I, Malia Anfinson, declare as follows:

On February 21, 2019, I sent via electronic mail, per service agreement, a true and correct copy of the Answer to Petition for Review, addressed as follows:

Marla Zink and Gregory Link, Attorneys for Petitioner
marla@marlazink.com
greg@washapp.org

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

DATED this 21 day of February, 2019, at Seattle, Washington.

MALIA ANFINSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

February 21, 2019 - 8:54 AM

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