NO. 28167-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re Detention of Rolando Reyes

STATE OF WASHINGTON,

Respondent,

v.

ROLANDO REYES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Craig J. Matheson, Judge

BRIEF OF APPELLANT

HARLAN R. DORFMAN
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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court violated constitutional requirements to hold open and public trials.

2. Insufficient evidence supported the court's finding that appellant was a pedophile.

3. Insufficient evidence supported the court's finding that appellant qualified for commitment under RCW 71.09.

4. The court erred when it found "The Respondent currently suffers from Pedophilia, Exhibitionism, Frottuerism, Polysubstance Dependence, Cognitive Disorder, Not Otherwise Specified (NOS), ADHD and Antisocial Personality Disorder as diagnosed by Dr. Tucker. Respondent's Pedophilia, Exhibitionism and Frottuerism constitute 'mental abnormalities'" because insufficient evidence supports the finding that appellant was a pedophile. CP 308 (Finding of Fact 9).

5. The court erred when it found "The methodology used by Dr. Tucker in rendering his diagnosis of the Respondent, including the use of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV TR), is generally accepted by other mental health professionals who evaluate and assess sex offenders, including those subject to commitment as SVPs" because both expert

witnesses acknowledged a legitimate controversy in the way mental health professionals use the DSM-IV TR. CP 308-09 (Finding of Fact 11).

6. The court erred when it found "The Respondent suffers from a mental abnormality as that term is defined in RCW 71.09.020(8), namely Pedophilia, Exhibitionism and Frottuerism" because insufficient evidence supports either a finding or conclusion that appellant suffers from pedophilia. CP 310 (Conclusion of Law 4).

7. The court erred when it concluded "The Respondent's mental abnormality causes him serious difficulty controlling his sexually violent behavior" because this conclusion was not supported by the findings of fact. CP 310 (Conclusion of Law 5).

8. The court erred when it found "The Respondent's mental abnormality makes him more likely than not to engage in predatory acts of sexual violence unless he remains confined to a secure facility, consistent with RCW 71.09.020(7)." CP 310 (Conclusion of Law 6).

9. The court erred when it concluded "The evidence presented at the Respondent's trial proves beyond a reasonable doubt that the Respondent is a sexually violent predator, as that term is defined by RCW 71.09.020(16)." CP 310 (Conclusion of Law 7).

Issues Pertaining to Assignments of Error

1. Under Washington and federal constitutional guarantees, all trials are to be conducted in open and before the public. Court proceedings cannot be closed to the public unless the court follows strict mandatory procedures. The remedy for closure without such procedures is a new trial. The record shows the court below held a hearing on appellant's motion to dismiss for want of jurisdiction in chambers with a court reporter. Because there is no record of the requisite closure procedures, is a new trial required?

2. The court found appellant suffered from three paraphilias – pedophilia, Frottuerism, and exhibitionism – in addition to other mental health issues. A diagnosis of pedophilia requires the appellant have recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child, and be at least 16 years and at least five years older than the child or children referenced in the first criterion. No evidence of recurring intense fantasies or sexual urges was presented, and the court and the State's expert based their findings solely on appellant's behavior. Evidence was presented of only two instances of behaviors relevant to pedophilia – one when appellant was 14, and one when he was 17. No evidence was presented of recurrent behaviors, fantasies or urges after appellant became 16 years old, and the

two offenses appear to have been isolated incidents. Is the evidence of pedophilia insufficient?

B. STATEMENT OF THE CASE

1. Procedural History

On March 14, 2004, the Attorney General filed a petition in Benton County to have appellant Rolando Reyes committed under Chapter 71.09 RCW (2004 petition). CP 3. The Honorable Craig Matheson found probable cause to hold Reyes and he was sent to the Special Commitment Center (SCC) on McNeil Island for evaluation. CP 3-4, 43-44. While there Reyes engaged in conduct which resulted in his conviction in Pierce County Superior Court on two charges of custodial assault with sexual motivation. CP 4. Reyes was sentenced to concurrent 36-month terms and the 2004 petition was dismissed without prejudice. CP 4, 46.

On January 2, 2008, two days prior to Reyes's scheduled release on the Pierce County matters, the Attorney General re-filed its Chapter 71.09 RCW petition in Benton County (the 2008 petition). CP 1-2, 4. Reyes, through his attorney, stipulated to probable cause and waived the probable cause hearing. CP 283-85.

Because Reyes had a severe brain injury from a motorcycle accident, the court appointed a Guardian Ad Litem (GAL). CP 286-87.

The GAL filed a motion to dismiss for lack of jurisdiction, which was denied. CP 58-78; 1RP[1] 16-17.

Reyes waived a jury trial, and the Honorable Judge Matheson conducted a bench trial. CP 79; 1RP18. At the start of trial, the court determined Reyes was competent and did not require the services of a GAL. 1RP 24-25. The GAL remained in the case as second counsel. 1RP 24-25. Following trial, the court found Reyes met the criteria for commitment as a sexually violent predator beyond a reasonable doubt, and ordered him committed to the SCC.[2] 3RP 561-65.

This appeal timely follows. CP 280-81.

2. Substantive Facts

Reyes was born on June 11, 1983. As a child, Reyes was sexually abused by a much older cousin. CP 24-25. This abuse started when Reyes was between 9-and-11-years old and continued until he was 18. . CP 24-

[1] The Verbatim Report of Proceedings are referenced as follows: 1RP - 5/22/09 and 6/1/09; 2RP - 6/2/09 and 6/3/09; and 3RP - 6/4/09 and 6/5/09.

[2] The court's oral opinion was given the afternoon of the last day of trial. 3RP 561-64. The court spent "a couple of hours reviewing all the exhibits and [his] notes on the testimony, [and] law on the case" before rendering its decision. 3RP 561. While the written Findings and Conclusions were filed on July 10, 2010, that document was misfiled and was not available when this brief was originally prepared. The Findings and Conclusions document was subsequently located and has been designated as Clerk's Papers. CP 307-311. This Court has requested this Amended Brief to address the written Findings and Conclusions.

25. At 13, Reyes was diagnosed with attention deficit disorder and was taking Ritalin when arrested for his first sexual offense at 14.[3] CP 26.

When Reyes was 16, he was involved in a motorcycle accident, which left him in a coma for approximately six weeks and required hospitalization for five months. CP 28. A toxicology screen taken at the time of the accident was positive for cocaine. CP 28. As a result of the accident, Reyes suffered a brain injury that left him partially paralyzed in his right arm and leg, with a severe gait and balance impairment, a significant right foot drop, and a speech impediment. CP 28. Reyes subsequently developed seizures, for which he was being medicated at the time of his evaluation. CP 28. The accident is also associated with a finding of mild mental retardation. CP 26. Following the accident, Reyes's full-scale IQ was reported to be 66. CP 26.

a. Predicate Offenses.

The certifications for both the 2004 and 2008 petitions alleged two predicate offenses: a 1997 first-degree child rape and a 2002 residential burglary. CP 4-6, 12-14. The burglary was initially alleged to have been committed with sexual motivation, but Reyes pled to the offense without the sexual motivation component. CP 5-6, 14.

[3] This offense is discussed below.

i. 1997: First-Degree Child Rape.[4]

On October 5, 1997, two cousins – 9-year-old SA and 8-year-old JM – neighbors, but not related to Reyes, came to Reyes's home to show him a stink bomb they had purchased. CP 19. Reyes was 14. CP 19. According to the boys, Reyes said, "let me see your dick, fool," and "c'mon pal, don't be down." CP 19. Reyes opened his pants and pulled his penis and testicles out from his boxers. CP 19. SA and JM then pulled their penises out. CP 19. Reyes told the boys to suck his penis and said he would have his pit bull attack the boys if they refused. CP 19-20. According to the boys, both of them sucked his penis. CP 20. Reyes also masturbated SA. CP 20. Reyes told SA not to tell anyone, and followed him home to ensure he did not tell. CP 20. SA, however, immediately told his 15-year-old sister who confronted Reyes. CP 20. Reyes initially denied the accusation. CP 20. He was arrested the following day, and eventually pled guilty to one count of first-degree child rape. CP 19-20. Reyes was sentenced under the SSODA option to 80 days incarceration with three-to-five months suspended, community supervision, community service, sex offender therapy, and sex offender registration. CP 20.

In his interview with the State's expert witness, Reyes acknowledged telling the boys to suck his penis and attributed this conduct

[4] Benton/Franklin County Juvenile Division, Cause No. 97-8-50376-5.

to his earlier abuse by his older cousin. CP 20. Reyes denied being attracted to the boys, expressing dismay about their age, and acknowledging he had acted selfishly, without thinking about the effect his conduct would have on them. CP 20. He also denied fantasizing about them. CP 20. Rather, Reyes expressed an interest in their older sister, whose breasts he used to touch. CP 20. She was older than Reyes, and Reyes said she liked it when he touched her breasts. CP 20.

ii. 2002: Residential Burglary.[5]

On March 5, 2002, when he was 18, Reyes went to the home of an adult female neighbor, rang the bell, and pushed his way in when she answered. CP 21. The neighbor noticed Reyes had a cut on his arm. CP 21. Reyes went into the living room, grabbed the woman by her shoulders, and then grabbed both of her breasts. CP 21. The woman became frightened and ran out the front door. CP 21. Reyes went into the kitchen and began using one of the woman's knives to cut himself. CP 21. In the meantime, the woman had reentered the home through the back sliding door. CP 21. Reyes pointed the knife at his heart and stomach and said he wanted to kill himself. CP 21. The woman asked Reyes to put the knife down, but he began approaching the woman. CP 21. The woman

[5] Benton County Cause No. 02-1-00255-6. As noted above, this offense was cited by the State as a predicate crime of sexual violence. CP 5-6, 14. In his evaluation, however, the State's expert treated this case as a "non-qualifying sexual offense[]." CP 21-22.

went into the back yard, with Reyes following her. CP 21. Once Reyes was outside the home he was taken into custody by police. CP 21.

Reyes was initially charged with residential burglary with a sexual motivation allegation. CP 21. The sexual motivation allegation was dismissed as part of the plea negotiations. CP 21. Reyes entered a guilty plea and was sentenced to 12 months in the county jail. CP 21.

During his interview with the State's expert, Reyes said he had gotten into trouble at school for eating a granola bar and had started cutting his wrists on the way home. CP 22. Reyes said he had gone to the neighbor's house because he wanted to grab her breasts. CP 22. Reyes said he had done this before by putting his arm around her neck and grabbing her breast for about five seconds. CP 22. He denied forcing his way into the house. CP 22. He also denied grabbing both of her breasts and said that would not have been possible because his right arm was paralyzed. CP 22. Reyes also said he went to her house because he wanted someone to call the police and paramedics. CP 22.

b. Other Sexual Offense Convictions.[6]

i. December 2000: Communicating with a Minor for Immoral Purposes.[7]

In December 2000, when he was 17, Reyes was at the home of a distant relative, who had two daughters aged five and nine. CP 20. The older girl said Reyes asked her to sit on his lap, which she did. CP 20. The older girl said she had been sitting on his lap for a few minutes when she felt something hard. CP 20. She turned and found Reyes's pants unzipped, with his erect penis rubbing against her backside. CP 20. The younger girl said Reyes had her sit on his lap, and he reached inside her pajama bottoms with his hands, rubbing the outside of her vagina. CP 20.

Reyes acknowledged committing both acts on the same evening with intent to achieve sexual gratification. CP 20-21. The case was initially charged as first-degree child molestation, but was reduced to communication with a minor for immoral purposes as part of the plea negotiation. CP 21.

During the interview with the State's expert, Reyes initially denied offending against the younger girl. CP 21. Once he was confronted with

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[6] In addition to his sexual offenses, Reyes other offenses include: a November 17, 1997 conviction for misdemeanor tampering with fire alarm equipment; a December 11, 1998 conviction for driving without a license; an arrest for failure to comply on August 24, 2002, and a February 9, 2003 conviction for felony attempting to elude a police vehicle.

[7] Adams County Cause No. 01-1-00124-8.

the police statements and witness reports, however, Reyes acknowledged conduct with both girls. CP 21. Reyes said the girls' mother would regularly let him drape his arm around her neck and touch her breasts. CP 21. He said she also helped him shower following his motor cycle accident, and twice touched his genitals in the process. CP 21. Reyes said he became sexually excited during the visit and told the older girl to "suck my you know what," which led her to report his conduct to her mother. CP 21. Reyes denied feeling sexually aroused by the girls and said he had been thinking about the mother while rubbing against the girls. CP 21. Reyes told the State's expert, "It's not my style to think sexually about kids. I don't feel sexual about children, just about other things that lead up to it. I just want the sexual feeling, like with the boys, to have them suck on my thing. In Othello I would get sex every night with Daniel [Reyes's older abusive cousin], but in the tri-Cities there was nobody to have sex with." CP 21.

ii. 2004 and 2005: SCC Custodial Assaults With Sexual Motivation.[8]

These two offenses occurred while Reyes was confined at the SCC awaiting trial on the 2004 petition. CP 4. These cases were joined at trial and sentenced concurrently. CP 7-8.

The 2004 assault arose from an incident after Reyes had received dental services in a bus parked behind the SCC medical building on October 16, 2004. CP 48. When the dental work was completed, Reyes got up to leave, but "acted like he tripped on something," moving towards the dental manager and attempting to grab her right breast in the process. CP 48. As he was leaving the bus, Reyes succeeded in cupping her breast in the palm of his hand. CP 48. The manager said this was deliberate. CP 48. She grabbed Reyes's hand, placed it on the rail, and told him not to grab her breast. CP 48-49. A corrections officer witnessed the incident. CP 49. Reyes denied the accuracy of the report. CP 49. He said he was leaving without difficulty, but the manager tried to help anyway. CP 49.

The 2005 assault arose from an incident while Reyes was in the SCC weight room being assisted by a recreational rehabilitation counselor

[8] These cases were joined at trial and sentenced concurrently. The 2004 case was filed as Pierce County Cause No. 04-1-05679-1. The 2005 case was filed as Pierce County Cause No. 05-1-04313-1.

on May 14, 2005. CP 49. The counselor reported Reyes touched her buttocks as she bent over to move an exercise mat.[9] CP 49.

Following a bench trial, Reyes was found guilty of both assaults. CP 49. The court gave Reyes an exceptional sentence of 36 months, below the standard range (51-60 months), based on Reyes's low IQ, his significant impairment (from the head trauma) to understand the wrongfulness of his acts, and the court's preference for a treatment program rather than a correctional facility in this case.[10] CP 49-50.

c. The State's Expert: Dr. Douglas E. Tucker, M.D.

The State presented Douglas E. Tucker, M.D., a psychiatrist, as its expert witness.[11] Tucker prepared an evaluation of Reyes on February 24,

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[9] The substance of this offense is addressed below in section B.2.f detailing the testimony of Wendy Ehlers.

[10] In addition to Reyes's convictions, the court heard testimony from Dr. Douglas Tucker, the State's expert, about an allegation of rape Reyes was supposed to have committed against Harry Fox, another inmate at the SCC. 1RP 166. That inmate's allegation was supported by another inmate who claimed to have witnessed the rape, but who Tucker acknowledged had had some conflict with Reyes. 1RP 167-68. Tucker acknowledged he had not interviewed Fox, but based solely on the incident reports, Tucker said he had "a "reasonable medical certainty that it actually happened." 1RP 167. The rape allegation asserted forcible anal penetration, but there was no physical evidence supporting this, including no report of bruising or bleeding around Fox's anus. 1RP 169-70.

Reyes was placed into segregation for a period, which may have been for protective custody, but no formal institutional procedures were brought against him as a result of the allegation. 1RP 202-03; 3RP 409-11. By the time of the trial, more than seven months after the alleged rape, no criminal charges were filed arising from this allegation. 1RP 174; 3RP 410. Ultimately, Tucker acknowledged it was possible the alleged rape never occurred. 1RP 203.

[11] This explication of Tucker's presentation is based on his evaluations, augmented by his testimony. See CP 18-41, 48-56; 1RP 38-219; 2RP 223-317.

2004, based in part on his three-hour-ten-minute interview of Reyes at the SCC on January 29, 2004. CP 18.

During the interview, Tucker noted Reyes demonstrated obvious paralysis on his right side, including constant right elbow flexion and dragging his right foot in a very slow and awkward gait. CP 31. Tucker noted Reyes was generally calm, cooperative and polite, and easily maintained good eye contact and rapport throughout the interview. Id. During the interview, Reyes's mood and affect were normal, although he did make some inappropriate sexual jokes. Id. Tucker found Reyes's thought process to be goal-directed, with appropriate concern about the civil commitment process. Id. Tucker also found no evidence of current suicidal or homicidal ideation, hallucinations, delusions, paranoia, or any other psychotic content. Id.

Tucker administered the Mini Mental State Exam (MMSE), which assesses potential cases of dementia, and the Frontal Assessment Battery, which assesses the executive functioning of the frontal lobes. 1RP 50-51. On the MMSE, Tucker scored Reyes just above the cutoff used for dementia. 2RP 51. On the Frontal Assessment Batter, Tucker found evidence of frontal lobe impairments in conceptualization, sensitivity to interference (conflicting instructions) and inhibitory control. CP 31-32;

2RP 51. Following the interview, Tucker also scored Reyes on the Psychopathy Checklist Revised (PCLR). 1RP 50.

In regard to the commitment criteria, Tucker found Reyes had been convicted of a qualifying predicate offense – the 1997 first-degree rape of a child, committed when Reyes was 14 years of age. CP 19-20.

Tucker also found Reyes had a mental abnormality and diagnosed him on Axis I with three paraphilias: pedophilia (both males and females); Frottuerism; and exhibitionism. CP 32; 1RP 54-55, 61, 65, 68. Tucker also found Axis I diagnoses of polysubstance dependence (alcohol, marijuana, and intranasal cocaine), attention deficit/hyperactivity disorder (combined type) (ADHD), and cognitive disorder not otherwise specified (NOS). CP 32; 1RP 55. The cognitive disorder NOS referred to Reyes's intellectual impairment resulting from his traumatic brain injury. 1RP 55. On Axis II, Tucker diagnosed Reyes with antisocial personality disorder. CP 32; 1RP 55. Tucker testified the antisocial personality disorder contributed to Reyes's behavior, but was not sufficient in itself to constitute the mental abnormality required by statute. 1RP 76.

Tucker opined the paraphilia diagnoses indicated a predisposition to commit sexual crimes. CP 34; 1RP 80-83. Tucker also opined Reyes's volitional capacity had been affected, reasoning the drive to act on these paraphilia had overcome obvious barriers, including victim protests and

prior experiences of detection and punishment. CP 34; 1RP 79-80. Tucker further opined Reyes's ADHD, cognitive disorder NOS, antisocial personality disorder, and polysubstance dependence acted to disinhibit his deviant sexual urges, and reduced his volitional control and emotional responsiveness to his victims. CP 34; 1RP 79-80. Tucker said none of Reyes's diagnoses alone qualified as a mental abnormality, but opined Reyes met the statutory criteria for qualifying mental abnormality based on his multiple psychiatric diagnoses. 1RP 122.

Tucker applied a clinically adjusted actuarial approach to assess Reyes's risk of reoffending. 1RP 96. In support of his opinion, Tucker presented the results of two actuarial tests.[12] CP 35.

In Tucker's initial evaluation, he scored Reyes on the Static-99 – a "moderate predictor" of sexual re-offense – as a 7, which Tucker said placed him in the highest risk category for conviction on another sexual offense. CP 35. Based on this result, the instrument predicted: a five-year risk of sexual re-offense of 39 percent; a ten-year risk of 45 percent; and a fifteen-year risk of 52 percent. CP 35. In the 2007 addendum and in his

[12] On November 29, 2007, Tucker presented an addendum to his 2004 evaluation, which addressed the two custodial assaults with sexual motivation at the SCC, SCC clinical notes and DOC segregation notes. CP 48-56. While Tucker did not change any of his basic opinions, he did re-score Reyes on the actuarials. CP 48. When cross-examined about the alleged rape of Fox at the SCC, which had never been prosecuted either by the SCC formal disciplinary system or the criminal justice system, Tucker testified the truth of that allegation was irrelevant to Reyes's Static-99 scoring. 2RP 293.

testimony, Tucker increased Reyes's Static-99 score from seven to eight based on the dental manager's status as a stranger victim and the increased number of sex offenses following his custodial assault convictions. CP 48; 1RP 97-98. This kept Reyes in the highest risk category for sexual recidivism, with a five-year risk for sexual recidivism of 22-to-38 percent and a 10-year risk of 31-to-48.5 percent.[13] CP 48; 1RP 103.

On cross, however, Tucker acknowledged the norm for Static-99 had to be adjusted because recidivism rates were lower than a given score would indicate. 2RP 251. Tucker also acknowledged a decline in recidivism, both generally and for sexually violent offenses, "for reasons we don't understand." 2RP 281.

On the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R), Tucker initially scored Reyes as a +11. CP 35. This represents the high risk category for sexual recidivism with a predicted 70 percent risk of sexual re-offense within six years of release. CP 35. In the 2007 addendum and in his testimony, Tucker re-scored Reyes as a +16 on the MnSOST-R, based on the facts of the custodial assaults. CP 48; 1RP 105-06. According to Tucker, this scoring indicated an 88 percent predicted risk of sexual re-offense within six years. CP 48; 1RP 88.

[13] At trial, Tucker also reported Reyes's score on the Static-2002, a new instrument, which is recommended to be used in conjunction with the Static-99. 1RP 106-08. Tucker scored Reyes at 11, a very high score. 1RP 107-08.

Tucker did acknowledge the MnSOST-R looked at arrest rates rather than charging or conviction rates. 2RP 294. In addition, Tucker acknowledged new norms for the MnSOST-R were expected. 2RP 294.

Applying his clinically adjusted actuarial approach, Tucker also considered a number of static and dynamic factors he felt were not adequately addressed in the Static-99 and MnSOST-R. CP 35-38; 1RP 108-16. Included in this analysis was Tucker's scoring of Reyes on the Psychopathy Checklist-Revised (PCLR). 1RP 109. That score was 33.7, which Tucker characterized as "the top small percentage." 1RP 109-10. Based on this analysis, Tucker opined Reyes's risk of re-offending was underestimated by the Static-99 and MnSOST-R scoring. CP 38. Ultimately, Tucker opined Reyes's mental abnormalities made it likely he would engage in predatory acts of sexual violence if not confined in a secure facility. CP 35-38; 1RP 123.

d. Reyes's Expert: Dr. Robert L. Halon, Ph.D.

Dr. Robert L. Halon, Ph. D., a forensic psychologist, testified at trial and his video deposition was published and used in cross-examination, but was not played to the court. [14] CP 181-278; 3RP 346-47,

[14] The record suggests the court reviewed Halon's deposition in some form. In summary before pronouncing judgment, the court said all of the exhibits had been reviewed, and Halon's video deposition and transcript were included in the State's list of exhibits, admitted as part of a binder containing 48 tabbed exhibits. CP 288-91; 1RP 53. The video of Halon's deposition had not been played for the court prior to the court's recess

487-88. Halon met with Reyes on three separate occasions for approximately six-and-one-half hours. 3RP 348-49.

On Halon's recommendation, Reyes was examined by a neuropsychologist. 3RP 349. Halon reviewed the neuropsychologist's records and explained Reyes was handicapped with a form of "spasticity," an inability to isolate individual fine motor movements without the whole body becoming involved. 3RP 349-50.

Halon performed two tests on Reyes: the Shipley Institute of Living Scale; and the Rorschach ink blot test. 3RP 412. The Shipley test is intended to estimate the kinds of cognitive damage done to persons with brain injuries. 3RP 417. Reyes's results on that test indicated his overall intelligence was above the mental retardation range, but in the borderline range of functioning. 3RP 418-19. Halon's opined Reyes needed assistance to take care of himself. 3RP 419. While Reyes could feed himself, Halon said, "I would hate to see him try to cook for himself." 3RP 419.

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after closing arguments – at 11:05 a.m. – and the court said it had until 1:30 p.m. to review the case. CP 292-304; 3RP 558. The court said it had other hearings starting at 1:30 p.m., and expected to be done with them by 3:00 p.m. 3RP 558. Court was back in session in this matter at 3:38 p.m. CP 304; 3RP 561. The court had two and a half hours to review the case, including Halon's 96-page deposition. CP 181-278. The video of the deposition would take approximately two hours and fifty minutes to view. CP 181, 276.

Regarding the use of the Rorschach test, Halon said the test is most applicable to assessments of volitional control, cognitive dysfunction, the conduct of interpersonal relationships, and the presence or absence of empathy, and no other instrument is available. 3RP 419-20. Halon also said the Rorschach was so complex it is impossible for a subject to fake the results. 3RP 420. On voir dire, Halon said the Rorschach was used in the scientific community by people who are looking for problems with self control. 3RP 422. On the other hand, Halon noted, the community of professionals appointed by the states rarely uses it. 3RP 422.

Halon said the Rorschach results showed Reyes's cognitive dysfunction, that he knows right from wrong, and that he has a very serious impairment in reality testing, i.e., that is an impairment in perceiving the meaning of events and in reading people. 3RP 433. Halon said this result was consistent with Reyes's records from the SCC. 3RP 433. On cross-examination, Halon explained Reyes has very little capacity for conversational disagreements and interruptions. 3RP 486-87. Once verbally confronted, Reyes's whole body goes into motion and he has to act to vindicate his feeling of self-worth. 3RP 487. This results in Reyes appearing aggressive. 3RP 487.

In regard to Reyes's volitional control, Halon relied on the opinions of three doctors at Eastern State Hospital, where Reyes stayed for

five months while being assessed for competency to stand trial. 3RP 416-17. Those doctors concluded there was no element of a mental disorder making him do anything or eroding his competence. 3RP 416-17. Rather, they concluded Reyes acted with volitional control. 3RP 417.

Asked about Tucker's diagnosis of three paraphilias – Frottuerism, pedophilia and exhibitionism – Halon said he saw evidence Reyes touched people, molested children, and masturbated when people sometimes saw him, but did not find any evidence he was driven to do any of this behavior by sexually deviant arousal - that is the fantasies and sexual urges to do those particular things. 3RP 463. The basic diagnostic criterion for a paraphilia diagnosis is the recurrent intense sexually arousing fantasies and sexual urges for the deviant sex, and Halon said there was no evidence of that criterion in Reyes's records. 3RP 398-99.

On cross-examination, Halon stressed the importance of distinguishing between those sexual urges, which everybody gets periodically and paraphilic urges. 3RP 496. Thus, Halon said it was important to distinguish the urge Reyes experienced just before he raped the boys and a paraphilic urge. 3RP 495-96. In that instance, the urge was not the product of fantasizing about raping kids. 3RP 495-96.

Halon criticized Tucker because he never presented any evidence to support fantasies or sexual urges to act on fantasies as a cause of

Reyes's behavior. 3RP 383-84. Halon said Tucker's assertion that fantasy or urges could be established by the presence of an erection during the act was "ridiculous." 3RP 383-84. Rather, Halon said, it was normal for a rapist to keep an erection during the rape. 3RP 384. "Erections have lives of their own," Halon said, and mental disorders cannot be determined by the presence of an erection. 3RP 384. Halon said Tucker committed the logical fallacy of affirming the consequence by observing the behavior and assuming the causation. 3RP 402-03.

As Halon observed, this problem arose with inclusion of the phrase "or behavior" as part of the DSM-IV-TR's first criterion in the definitions of paraphilias – "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors" – which eliminates the inner psychological processes from the analysis and converts the criminal history into a diagnosis.[15] 3RP 378-81. This phrase was included in the DSM prior to the passage of

[15] Halon took his concerns to the editor of the DSM-IV, and the two of them co-authored an article alerting practitioners to the problem of using behaviors alone to apply a DSM-IV-TR diagnostic label when addressing statutory language. See 3RP 378-86, 434-35 (discussing Michael B. First, MD, and Robert L. Halon, PhD, Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases, 36 Journal of the American Academy of Psychiatry and the Law 443 (2008)). In particular, this article noted the United States Supreme Court requirement for SVP proceedings to distinguish between those whose offending was the result of "mental illness, abnormality, or disorder" from those who simply recidivated was the sole reason psychiatrists and psychologists were necessary witnesses in such proceedings. 3RP 382. In addition to alerting the community to the "or behavior" diagnostic error, the paper outlined a valid way of making a DSM-IV paraphilia diagnosis, and explained that even a valid paraphilia diagnosis was not equivalent to the statute's definitions of mental abnormality or mental disorder. 3RP 434-35.

Chapter 71.09 RCW when it was strictly a clinical, not a forensic, instrument. 3RP 384-86. The recurrent intense sexually arousing fantasies and sexual urges, however, are the necessary elements of a paraphilia, and the diagnosis cannot be made without recurrent fantasizing to sexual urges. 3RP 386. Halon observed, all pedophiles who act out are child molester, but not all child molesters are pedophiles. 3RP 392.

Halon said evidence of paraphilic sexual fantasies or urges could be found in arousal patterns indicating the person is using a script for all of their sexual offenses and the script is played out with each victim. 3RP 435-36. Evidence could also be gleaned from reports by wives or girlfriends of role playing paraphilic acts, from similar victim accounts of grooming and handling during the molestations, or from use of child pornography. 3RP 435-36.

Halon found no evidence of pedophilia in Reyes's record. 3RP 386-87. There was no evidence Reyes preferred sex with children or he had recurrent intense sexually arousing fantasies of sex with children. CP 217-19; 3RP 386-87. Neither was there any evidence of a pattern or scenario being played out with the children. 3RP 436-37. Rather, the evidence pointed to a young man who had been prematurely sexualized by an older cousin. 3RP 387. Halon said, Reyes's sexual acting out was "all kind of knee-jerk reactions, kind of immaturity, trying to have sexual

contact on the spur of the moment if somebody was available." 3RP 436. At the time of the molestations, the children were available. CP 219.

Halon also said Reyes's ADHD and antisocial personality disorder fell outside the framework of a Chapter 71.09 RCW proceeding. 3RP 463. There is no evidence Reyes was pervasively antisocial, and his behavior could be accounted for by his awkwardness, immaturity, naiveté, poor social skills, and his need to be macho. 3RP 463-64.

Halon also said he could find no connection between Reyes's brain damage and his acting out sexually. 3RP 464. If that connection did exist, the acting out would happen all the time. 3RP 464. In Reyes's case, the results of the brain damage are constant and obvious, and include difficulty in understanding complex issues and inability to interact quickly to clarify situations. 3RP 464.

Discussing the potential impact of the brain damage Reyes suffered in the motorcycle accident, Halon said hyper sexuality caused by organic brain damage was typified by non-stop sexual behavior. 3RP 350-53. Halon said a cessation in sexual behavior would mean either: the brain had magically been cured; the behavior had not been caused by the brain damage; or the behavior was the result of joking or being generally sexual. 3RP 353. Given Reyes's history of falling into people and grabbing breasts, Halon said the absence of this behavior since January 2008, was

proof it was not produced by the brain damage. 3RP 395-96, 464-65. Halon credited this change in his behavior to guidance Reyes had received – when he returned to the SCC from his incarceration for the custodial assaults – from an older resident at the SCC who acted as Reyes's mentor. CP 203-07, 233-36; 3RP 393-94, 505-09.

Halon said it was normal for Reyes to masturbate while he was alone in his room. 3RP 395. Halon also said some of Reyes's rule-breaking and confrontational attitude towards other SCC residents was a defensive response to being in an institutional setting, exacerbated by his physical impairments. 3RP 396-98.

In regard to testing instruments, Halon explained the significance of the base rate for an event to understanding the utility of a particular instrument when applied to a particular population. 3RP 362-64. In particular Halon said an understanding of the base rates was critical for proper use of the actuarial instruments used to predict risks of sex offense recidivism. 3RP 363-64. Halon said the base rates were inflated from the start, did not apply to specific populations, and were based mostly on Canadian and English samples without Washington data. 3RP 363-64. Halon said all of the data, including Washington data, show the base rate for sex offense recidivism has "dropped through the floor." 3RP 365. As a result, the actuarial designers have applied a patch job with the 2008

norms, but this patch still fails because it lacks local norms. 3RP 365. Further, Halon explained none of the actuarials have developed norms for populations of physically and cognitively disabled persons. 3RP 366, 408-09. Thus, even if the instruments were absolutely perfect, they would not apply to a person like Reyes. 3RP 366, 407-09.

Halon also pointed out the actuarial instruments were intended to assist parole officers, supervisors, doctors, or prison guards when designing individualized treatment-protection programs for sex offenders. 3RP 406. They were never intended to attach a specific risk to a specific person in order to make judgments about that person's life and future. 3RP 407. Further, Halon explained that any judicial assessment of risk to the beyond a reasonable doubt standard should be made at the bottom of the confidence interval, because the majority of persons captured in the range will fall below the top of the interval. 3RP 447-48.

In regard to Tucker's use of dynamic factors to alter the results of the static assessment instruments, Halon said the developers of the Static 99 have specifically instructed practitioners not to modify the results. 3RP 457. Halon told the court there was no scientific means for modifying the risk estimates and these attempts amounted to "futzing with the data." 3RP 457. Halon explained the use of clinical judgment requires feedback from the patient to permit a clinician to adjust the initial assessments. 3RP

461. Thus, application of clinical judgment is inappropriate in a forensic setting where such give-and-take was unavailable. 3RP 461-62.

Halon criticized Tucker's application of the PCL-R to Reyes. 3RP 367 et seq. The PCL-R was normed on prisoners, without data on whether any of that population was known to be brain damaged. 3RP 372. The brains of cognitively disabled persons in general, and Reyes in particular, however, are very similar to adolescent brains, and much of the behavior captured by the adult version of the test is considered normal for adolescent brains. 3RP 367. Thus, the PCL-R scores applied to someone like Reyes would be unreliable and invalid. 3RP 373. Ultimately, Halon said Reyes falls outside the framework of all actuarials except intelligence tests. 3RP 374.

Halon critiqued Tucker's opinion as to whether Reyes fit the statute's criteria for the sexually violent predator designation, explaining this determination was entirely up to the trier of fact, with the expert role limited to providing information to the fact-finder. 3RP 355. Halon also explained forensic opinions are expressed in terms of probabilities and critiqued Tucker for offering his opinions as a matter of medical certainty. 3RP 356. Rather, Halon told the court, medical or psychological certainties are legal terms with no correlates in either field. 3RP 356.

Halon felt Reyes should continue under court supervision when released. 3RP 516. Halon also opined the SCC was an inappropriate facility for Reyes, being too threatening an environment and denying him needed therapeutic relationships and mentoring. 3RP 519-21.

e. Reyes's Deposition.

In his deposition, Reyes said he grew up with his mother, brothers and sister, first in Othello and later in the Tri-Cities. CP 92. Reyes's father died when Reyes was eight or nine years old. CP 88-89. Reyes described his early childhood as "all right until [he] started getting raped and molested by [his] cousin Daniel." CP 93.

Reyes attended high school but left needing three credits to graduate. CP 97. He had disciplinary problems with fighting and was suspended for grabbing a teacher's breast. CP 98. This occurred after coming out of the coma from his motorcycle accident. CP 98.

Reyes said he first learned about sex in sex education classes at school. CP 109. His first sexual experience, however, occurred when his cousin raped him. CP 109-10. Reyes reported having sexual relations with five women during high school, all his age or older. CP 100. His first relationship occurred when he was 14 or 15 with a woman two years older. CP 101-02. He also reported living for two-to-four months with a woman who had a seven-year-old daughter. CP 102-03.

Regarding his 1997 child rape conviction, Reyes said he knew the boys from the neighborhood and had met them when he called on their older brother. CP 111-12. Reyes said it was difficult to talk about because "that was two innocent little kids' lives that I fucked up." CP 112. Reyes attributed his act to the fact he had been molested by his cousin and an uncle. CP 112-13. Reyes appeared to have difficulty recalling the details, but he acknowledged his previous statements about the incident. CP 113-15. Reyes denied having any sexual attraction to the boys and said he did it because of his history of being sexually molested when he was younger. CP 173. Reyes also denied having sexual contact with any other children prior to his motorcycle accident. CP 117-18.

Reyes acknowledged using marijuana and cocaine at the time of his motorcycle accident, but said the accident was caused by the lack of signs warning of a change from a paved to a gravel road. CP 119. As a result of the accident Reyes was in a coma for a month and a half. Reyes reported the long-term repercussions from the accident were right-side paralysis and short-term memory problems. CP 120.

In regard to his communicating with a minor conviction, Reyes said he was visiting his cousin's family. CP 121-22. He acknowledged having an erection when the girls were sitting on his lap, but denied being sexually aroused by the girls. CP 123-24. Reyes further denied being

sexually attracted to the girls and explained the fact he had an erection was a response to recently coming out of his coma and had nothing to do with sexual attractions. CP 174.

In regard to the residential burglary, Reyes denied forcing his way into the woman's house or locking her out. CP 124-25. Reyes said, she held the door open, and he groped her breast twice. CP 126-28. Reyes said that when she called police he picked up a knife and started cutting his wrist because he knew he was in the wrong. CP 126-27, 129.

Reyes also acknowledged groping female patients and staff when he was sent to Eastern State Hospital for an evaluation. CP 131-34. Reyes attributed this behavior to the way he was socialized to perceive women. CP 133. Reyes said he guessed he had an "urge" to grope when he did it and was probably sexually aroused when he was doing so. CP 133-34. Reyes said, however, that urge was controllable, but he did not see the use of trying to control it. CP 134.

Reyes acknowledged the events of November 9, 2002, which led to his attempting to elude conviction. CP 134-39. Reyes's incarceration on that conviction marked the last time he was in the community. CP 139.

Reyes denied being charged with voyeurism. CP 140-41. Reyes also denied being involved in sex offender treatment and denied needing such treatment. CP 142, 164. Reyes explained he could see the value of

sex treatment in the community to deal with his early experiences of molestation. CP 169-70. Reyes felt, however, the social pressures at SCC would interfere with treatment there. CP 169-70.

Reyes acknowledged the infractions on his record including rubbing up against staff, sexual harassment, groping, and exposing himself both at prison and at the SCC. CP 142-43, 149, 153-54, 160-61, 164. In regard to incidents where he was observed masturbating in his cell, Reyes acknowledged masturbating, but denied he intentionally planned on being observed. CP 144-47. Reyes also acknowledged both groping incidents that led to his custodial assault convictions, but said the incident in the dental appointment was an accident. CP 155-56, 158-60. Reyes did acknowledge being sexually aroused by the sight of Wendy Ehler's breasts. CP 158-60. Reyes, however, denied performing oral sex on another SCC resident and, while acknowledging stealing hand cleaner, he denied it was for masturbatory purposes. CP 154-55, 160.

At the time of the deposition, Reyes was in the IMU after he reported having been hit in the face with a closed fist by another detainee. CP 166. Reyes reported he was barred from the weight room, which he considered necessary for his physical therapy. CP 107-08. Reyes also

recounted an incident where he attacked James LaBrahm[16] because LaBrahm had been threatening to rape Reyes's mother and his family. CP 108-09. Reyes also acknowledged hitting a staff member named Richard May in the face at May's request because May wanted paid leave. CP 161-62.

If released from the SCC, Reyes said he would live with his mother and have the support of this family. CP 168. Reyes also denied being sexually attracted to children and said he would not be a risk to children if allowed to live in the community. CP 171-73. Reyes said he was a different person from the little kid impacted by his experiences of molestation, which he had to re-learn following his coma. CP 175. Reyes also said he had learned from the other inmates, and had stopped sexually infracting. CP 176-77. In essence, Reyes said the treatment he had received as part of his child rape disposition had been effective, but the coma had disrupted that process. CP 177. Given his current state of awareness, Reyes said he had no concerns about reoffending. CP 174-76.

f. Other Witnesses.

The State presented the testimony of Wendy Ehlers, a recreational rehabilitation counselor at the SCC. 2RP 323 et seq. Ehlers was the

[16] LaBrahm appears to be the same person as James Lebon, the SCC inmate who said he witnessed the alleged rape of James Fox. 1RP 167-68.

complainant in the May 2005 custodial assault with sexual motivation charge. CP 84. Ehlers said Reyes was on a treadmill when she contacted him in the rec center. 2RP 325-26. At that time, Ehlers noted Reyes's pants kept slipping down because he was so thin. 2RP 325-26. When Reyes finished with the treadmill, he moved to a weight apparatus, and asked Ehlers to adjust the weights for leg lifts. 3RP 327. Ehlers said Reyes reached to grab at her chest area when she bent over to put on the weights. 3RP 327. Ehlers stood up and admonished Reyes not to grab for her, and Reyes "kind of laughed," and said he was sorry. 2RP 328.

Reyes then moved to a pull-down bar, and Ehlers adjusted the weights again. 2RP 329. This time, when she turned back to Reyes, his pants and underwear were down and he was standing with an erect penis. 2RP 329. Ehlers told him to pull his pants up and turned to allow him to do that. 2RP 329. When she turned back, Reyes had his pants up and asked her for assistance to adjust his belt. 2RP 330. Ehlers declined this request, and Reyes adjusted his own belt. 2RP 330. Ehlers then bent over to straighten a mat needed to use the pull-down, and Reyes took a step towards her and touched her rear. 2RP 330. Ehlers stood up and again admonished Reyes, who again said he was sorry with a giggle. 2RP 331. After Reyes worked the pull-down bar, Ehlers directed him back to the unit, and as they returned, Reyes kept apologizing and asking her not to

tell anybody. 2RP 331-32. Ehlers did report, however, and Reyes use of the weight room was restricted for a considerable time. 2RP 332.

Ehlers also described the SCC "count" procedures, which occur five times a day, require the detainees to be retained – either in a day room or inside their cells – and during which the staff makes visual contact and accounts for each inmate. 2RP 332-33. Each detainee has a private cell, and when they are in their cells, the count is made by staff members lifting a flap in the cell door to make visual contact with the detainee. 2RP 340. Ehlers recalled seeing Reyes twice in 2006 lying fully exposed on his bed with the lights on as she did the 9:45 p.m. count. 2RP 333-34, 340.

Reyes's mother, Rebeca Reyes, testified she lives in a two-bedroom home with her husband and a 17-year old son. 3RP 525. Rebeca said her husband knows Reyes and had a good relationship with him. 3RP 525-26. Rebeca said, if Reyes was released, he could live with her and her husband. 3RP 526. Rebeca does not work outside of the home, and her intention is to dedicate her time to Reyes's needs, and she would be available to take him to counseling. 3RP 527.

C. ARGUMENT

1. A NEW TRIAL IS REQUIRED BECAUSE THE COURT'S IN-CHAMBERS HEARING ON REYES'S JURISDICTIONAL CHALLENGE VIOLATED CONSTITUTIONAL REQUIREMENTS FOR OPEN AND PUBLIC PROCEDURES

The hearing on Reyes's motion to dismiss for lack of jurisdiction was conducted in the judge's chambers, with counsel for the State appearing telephonically. 1RP 2-21. In addition to that motion, the State waived its jury trial demand. 1RP 18-19. The hearing was reported, but there is no record of any motion to hold the hearing in chambers. Neither is there any record of the court conducting the required procedures for closing the proceedings. This in-chambers hearing violated the constitutional requirements for, and protections of, open and public trials.

Both civil and criminal judicial proceedings are constitutionally required to be open to the public. In re Detention of Campbell, 139 Wn.2d 341, 355, 986 P.2d 771 (1999), cert. denied, 531 U.S. 1125 (2001). Article I, section 10 of the Washington Constitution commands "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision gives the public and the press a right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (citing Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The First Amendment implicitly protects the same right.

Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Criminal defendant's also have a constitutional right to a "speedy public trial" under article I, section 22 of the state constitution. Although the public's right to open access to the courts differs from a criminal defendant's right to a public trial, article I, sections 10 and 22 serve "complementary and interdependent functions in assuring the fairness of our judicial system." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

This constitutional access to the courts applies with full force to involuntary commitment proceedings under RCW 71.09. Closure of these proceedings requires an affirmative statutory mandate or a showing of a serious and imminent threat to some important issue. Campbell, 139 Wn.2d at 355. This follows from the constitutional right of the people to enter open courtrooms and freely observe the administration of justice. Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); see also Cohen v. Everett City Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975) (noting city council's claim that public trial right applied only in criminal proceedings "overlooks article 1, section 10[.]").

Indeed, our Supreme Court has emphasized the "undeniably serious interest" the public has in access to information about sex

offenders. Campbell, 139 Wn.2d at 356. Thus, in In re Detention of Turay, 139 Wn.2d 379, 413, 986 P.2d 790 (1999), cert. denied, 531 U.S. 1125 (2001), our Supreme Court rejected Turay's claim of error in the trial court's denial of his motion to seal the Chapter 71.09 RCW commitment proceedings. Rather, the Court invoked Washington's "long tradition of keeping courtrooms open[.]" Turay, 139 Wn.2d at 413; see also State v. Williams, 135 Wn. App. 915, 924, 146 P.3d 481 (2006) (convicted sex offenders have reduced expectation of privacy because of the interests of public safety), rev. denied, 162 Wn.2d 1001 (2007).

The requirements for protecting the public's right to open courtrooms in civil cases are the same as those used in criminal proceedings. Easterling, 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in Bone-Club and second, entering specific findings justifying the closure order." Easterling, 157 Wn.2d at 175 (citing Bone-Club, 128 Wn.2d at 258-59; Ishikawa, 97 Wn.2d at 37).[17] Although the Bone-Club

[17] The Bone-Club requirements are:

> 1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right. 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure. 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests. 4. The court must weigh the competing interests of the proponent of closure and the public. 5. The order must be no broader in its application or duration than necessary to serve its purpose.

factors have been discussed in recent criminal appeal decisions, those factors were first articulated in Seattle Times Co. v. Ishikawa, a civil case, under article 1, section 10. Ishikawa, 97 Wn.2d at 37-39.

In the criminal context, courts have repeatedly overturned convictions when a trial court, as in Reyes's case, have closed only a portion of a trial. See, e.g., Easterling, 157 Wn.2d at 179-180 (closure of co-defendant's severance hearing); State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (jury selection); In re Personal Restraint of Orange, 152 Wn.2d 795, 802, 812, 100 P.3d 291 (2004) (closure of voir dire to family members and public); Bone-Club, 128 Wn.2d at 257 (closure of pretrial suppression hearing during testimony of undercover police officer); State v. Erickson, 146 Wn. App. 200, 208, 189 P.3d 245 (2008) (questioning of prospective jurors in chambers without first applying Bone-Club factors); State v. Duckett, 141 Wn. App. 797, 801, 173 P.3d 948 (2007) (questioning of several venire members in jury room); State v. Frawley, 140 Wn. App. 713, 719-21, 167 P.3d 593 (2007) (trial court's private portion of jury selection).

As the reasoning of these cases demonstrates, the constitutional public trial rights guaranteed by article 1 sections 10 and 22 are inextricably intertwined. Cf. State v. Strode, 167 Wn.2d 222, 217 P.3d

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Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers, 121 Wn.2d at 210-

310 (2009) (four justice plurality holding conducting portion of voir dire in chambers without conducting Bone-Club inquiry was structural error; two justice concurrence agreeing to results but disagreeing with lead opinion's conflation of rights of defendants, the media, and the public). The solid basis in civil precedent supporting Bone-Club and its progeny cannot be seriously disputed. Furthermore, Chapter 71.09 RCW proceedings share other characteristics of a criminal trial, such as application of the "beyond a reasonable doubt" standard and the jury unanimity requirement. RCW 71.09.060(1); In re Det. of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006).

It is well established that commitment trials are not criminal in nature. In re Detention of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). But Washington's constitutional doctrine governing open and public trials has evolved from both civil and criminal cases. This Court should recognize the interdependence of the civil and criminal open and public trial protections because both ultimately protect the same interests of maintaining the fairness of our judicial system, regardless of whether the case arises from a criminal information or a civil petition. See Erickson, 146 Wn. App. at 205-06 n.2 (noting the interdependence of the civil and criminal mandate for open and public trials). This Court should note the

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decisions in Campbell, Turay, Williams, Allied Newspapers, Ishikawa, et. al., and apply the same remedy for unjustified closure here that Bone-Club and its progeny applied. That remedy is reversal with remand for a new trial. Orange, 152 Wn.2d at 814.

2. EVIDENCE OF THE PEDOPHILIA DIAGNOSIS WAS INSUFFICIENT TO SATISFY THE DEMANDS OF THE SUBSTANTIAL EVIDENCE REQUIREMENT.

A person cannot be committed under Chapter 71.09 RCW unless the court or jury finds that person is a sexually violent predator beyond a reasonable doubt. RCW 71.09.020(18);[18] RCW 71.09.060(1); see In re Det. of Young, 122 Wn.2d 1, 38, 857 P.2d 989 (1993) (the State must satisfy the highest burden of proof to civilly commit a sex predator). In order to uphold a commitment, the record must provide sufficient evidence to support each of the following elements:

> (1) That the respondent had been convicted of or charged with a crime of sexual violence; and
>
> (2) That the respondent suffers from a mental abnormality or personality disorder; and
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> (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility.

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[18] RCW 71.09.020(18) provides:

> "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

In re Det. of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006).

In addition, constitutional due process requires a link between the mental abnormality and a serious difficulty in controlling behavior, which distinguishes persons committed under Chapter 71.09 RCW from dangerous but typical criminal recidivists. In re Det. of Thorell, 149 Wn.2d 724, 736, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990 (2004) (discussing Kansas v. Crane, 534 U.S. 407, 412-13, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)).

In a sufficiency challenge, the evidence is viewed in the light most favorable to the State, with all reasonable inferences drawn in favor of the State and interpreted most strongly against the respondent. Audett, 158 Wn.2d at 727. A commitment will be upheld only if any rational trier of fact could have found the essential elements beyond a reasonable doubt. Id. at 727-28.

At issue here is whether there was sufficient evidence to support Tucker's diagnosis of pedophilia, and if not, whether any of the remaining mental abnormalities or personality disorders would satisfy the requirement that Reyes was likely to engage in predatory acts of sexual violence.

Tucker acknowledged none of Reyes's diagnoses alone qualified as a mental abnormality. 1RP 122-23. For example, Tucker said the antisocial personality disorder was not sufficient to constitute the required mental abnormality. 1RP 76. According to Tucker, that disorder, along with the ADHD, cognitive disorder, and the polysubstance dependence merely acted as disinhibitors, while the paraphilias drove the sexual to commit sexual crimes. CP 34; 1RP 79-83. Rather, Tucker cited the multiple psychiatric diagnoses as the basis for the qualifying mental abnormality. 1RP 122-23. One of those paraphilias, however, – exhibitionism – does not predispose to acts of sexual violence as defined by the statute; while Frottuerism may lead to an act of sexual violence, Reyes's history does not indicate a connection between his groping behavior and recurring acts of sexual violence as defined by the statute; and there is insufficient evidence to support the diagnosis of pedophilia.

RCW 71.09.020(8) defines "mental abnormality" as

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."

In order to qualify a person for commitment under Chapter 71.09 RCW, however, that mental abnormality must make it likely the person will "engage in predatory acts of sexual violence." RCW 71.09.020(18).

A diagnosis of exhibitionism – recurring, intense sexually arousing fantasies, urges, or behaviors involving the exposure of one's genitals to an unsuspecting stranger[19] – does not predispose a person to predatory acts of sexual violence, as indecent exposure is not defined as a crime of sexual violence under RCW 71.09.020(17).[20] While a diagnosis of frotteurism – recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the touching or rubbing against non-consenting persons for sexual gratification[21] – could predispose to crimes of sexual violence, such as indecent liberties by forcible compulsion, indecent liberties against a

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[19] 1RP 66.

[20] RCW 71.09.020(17) provides:

> "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as 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; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) 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, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

[21] 1RP 57-58.

child under age fourteen, or child molestation in the first or second degree, Tucker's diagnosis was based solely on Reyes's behavior, and that behavior did not exhibit a recurring pattern sufficient to indicate a predisposition to commit those specified offenses.

While the court below found Reyes's Residential Burglary was committed with sexual motivation,[22] the court entered no finding equating that behavior with any of the specified "sexually violent offenses" in RCW 71.09.020(17). Reyes's Communications with a Minor conviction may have supported a finding of a sexually violent form of frotteurism, but there was no evidence that this behavior – frotteurism directed at children -- was anything other than an isolated act. In like manner, no finding was entered to establish the custodial assault convictions rose to the level of indecent liberties by forcible compulsion, and such a finding would be difficult to sustain. See State v. Ritola, 63 Wn. App. 252, 817 P.2d 1390 (1991) (juvenile facility resident squeezed counselor's breast and instantaneously removed his hand; brief surprise sexual contact without application of force to overcome resistance not sufficient to support finding of indecent liberties by forcible compulsion). Further, much of the evidence supporting Tucker's frotteurism diagnosis was lesser

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[22] CP 308; Finding of Fact No. 4.

behavior, with no indication of escalating behavior. Thus, under Crane and Thorell, there is no link between the mental abnormality and difficulty in controlling behaviors that would rise to the level of sexually violent offenses.

The only diagnosis, which necessarily fulfills the statutory requirement of a mental abnormality that predisposes to acts of sexual violence, is the pedophilia diagnosis. That diagnosis, however was not supported by substantial evidence in the record.

Tucker's written basis for his pedophilia diagnosis was:

> The Diagnostic and Statistical Manual, Fourth Edition, Text Revision of the American Psychiatric Association (DSM-IV-TR) defines Pedophilia as recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger), occurring over a period of at least six months. The person must have acted on these sexual urges or fantasies, or they must have caused marked distress or interpersonal difficulty. In addition, the person must be at least age 16 years, and at least five years older than the child victim(s). The legal and mental health record has established that Mr. Reyes was convicted of two sexual offenses involving two underage boys (ages 8 and 9) and two underage girls (ages 5 and 9), with the offenses separated by more than three years (from 1997 to 2000, when Mr. Reyes was ages 14 and 17, respectively). Based on the facts established in the official record, therefore, Mr. Reyes is diagnosed with Pedophilia.

CP 32; see also 1RP 54 (reliance on DSM to diagnose Reyes's mental condition).

Thus, the DSM-IV-TR requires a finding of "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors" involving children by a person over the age of 16. CP 32 (emphasis added). Here, there is only one instance of behavior occurring after the age of 16 – the molestation of Reyes's cousins. Even if one were to ignore the age requirement of the diagnosis, as Tucker did, and include the rape of a child committed when Reyes was 14, there is no evidence to show recurrence – that is, there is nothing to suggest that these incidents were in any way connected, or part of a paraphilic pattern. Thus, under the terms of the DSM-IV-TR definition, Reyes's behaviors alone do not support the pedophilia diagnosis.

At trial, Tucker acknowledged he did not have much information regarding Reyes's sexual fantasies or sexual urges. 1RP 61. He initially attributed this lack of knowledge to Reyes not being forthcoming about his thoughts or fantasies. 1RP 61. But Tucker then testified Reyes acknowledged acting on an urge when he rubbed his exposed penis against the back of the nine-year-old girl. 1RP 61. Tucker said he asked Reyes whether he had fantasized about the boys involved in the 1997 rape of a child case, and Reyes denied such fantasies. 1RP 64. Tucker testified the evidence indicating Reyes was attracted to the boys was the fact he had sustained an erection during the incident. 1RP 61, 65.

Tucker said he could not specify when Reyes became a pedophile, although he opined arousal to children had developed by the time Reyes was 14. 1RP 158. This assessment, however, was based solely on the 1997 incident with the two boys. 1RP 158. When asked whether the molestation of the girls in 2000 meant Reyes was then a pedophile, Tucker responded, "Well, again you're using the DSM as sort of a checklist or a cookbook, and I would not use it in that fashion." 1RP 159.

The problem is, there is no other evidence to support a diagnosis of pedophilia. Tucker acknowledged on cross that despite Reyes's long involvement with the legal and mental health systems, there were no records in his files of any paraphilia, or sexual disorder, diagnoses prior to Tucker's evaluation. 1RP 127-30. And, as Tucker acknowledged in his evaluation, no phallometric assessment of Reyes was done. CP 36.

When asked about Halon's critique of basing paraphilia diagnoses solely on behavior, Tucker acknowledged the validity of the premise. 1RP 120. In particular, Tucker testified:

> I don't disagree with the premise, which is that the DSM is not a cookbook, and the fact that we say fantasies urges or behaviors might lend someone who's not trained to say, "Oh." Or "behaviors" means if he's molested kids two times more than six months apart, he's a pedophile. I would say that's an inappropriate use, and this article tries to clarify that. So I really wouldn't disagree with that actually.

1RP 120.

Despite acknowledging the significance of a person's fantasies and urges to a paraphilia diagnosis, Tucker did not find Halon's Rorschach testing to be particularly relevant. 1RP 119.

> Well, I think the Rorschach is not very relevant to these kind of proceedings. It has some potential utility in clinical settings if we're looking at the level of psychosis, for example, or if we're looking at, you know, what's going on in terms of characterizing a person's inner world. It's basically a projective test, so it's a blank. You know, it's sort of an ambiguous stimulus, and you just see in it you're going to see [sic]. And so that often tells you what a person is projecting onto the world. But in terms of the three criteria we look at for SVP commitment, it has very little relevance really.

1RP 119.

It is precisely that "inner world," however, which distinguishes a person driven by a mental abnormality to commit sexually violent offenses from an ordinary criminal with multiple prior offenses. See Crane, 534 U.S. at 412-13 (discussing the constitutional importance of distinguishing dangerous sexual offenders subject to civil commitment from other dangerous persons dealt with through criminal proceedings).

Without any indication of recurring, intense sexual fantasies or sexual urges, Reyes's behaviors are insufficient to establish a diagnosis of pedophilia, and the behaviors that form the sole bases for his other paraphilia diagnoses do not indicate a predisposition to commit offenses

that rise to commitment under RCW 71.09. Because the evidence is insufficient to support a link between the asserted mental abnormalities or personality disorders and a predisposition to commit acts, which constitute sexually violent offenses, this Court should reverse and dismiss.

Further, the court's findings fail to make a direct link between the diagnosed mental abnormalities and personality disorder and difficulty in controlling behavior. None of the court's findings specify a necessary link between an asserted abnormality or disorder and the commission of a "sexually violent offense" as defined in RCW 71.09.020(17) except the pedophilia diagnosis. As discussed above, the evidence presented for that diagnosis is insufficient under the DSM-IV-TR definition presented by the State's expert at trial. Thus, the court's fifth Conclusion of Law – "The Respondent's mental abnormality causes him serious difficulty controlling his sexually violent behavior" – is not supported by sufficient evidence to support commitment. Reyes's behavior fails to distinguish him from "the dangerous but typical criminal recidivist." Thorell, 149 Wn.2d at 736.

This Court should reverse.

D. CONCLUSION

Because the court violated the constitutional requirements for open procedures, reversal is required. Moreover, because the evidence was insufficient to support a finding of pedophilia, and no other mental abnormality or personality disorder made it more likely than not that a new sexually violent offense would occur, this Court should reverse and dismiss.

DATED this 15th day of June, 2010.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re the Detention of:	)	
	)	
ROLANDO REYES,	)	
	)	
Appellant,	)	
	)	
v.	)	COA NO. 28167-1-III
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT (SECOND AMENDED)** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JUNE, 2010.

x Patrick Mayovsky