NO. 45512-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

MICHAEL SEASE,

Petitioner.

OPENING BRIEF OF RESPONDENT

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A. Did the State meet its prima facie burden pursuant to RCW 71.09 when it presented evidence that Sease continues to suffer from a personality disorder that makes him likely to commit an act of criminal sexual violence if not confined?

B. Where Sease, a repeat sex offender who has participated in only minimal treatment since his commitment in 2007, failed to present evidence of a substantial change in his mental condition as a result of continuing participation in treatment, and where his own expert was able to report only modest gains and limited progress in treatment, did the trial court properly deny Sease's request for a new trial?

II. STATEMENT OF THE CASE

Michael Sease has a history of raping and attempting to rape women and young girls. Prior to his first sexual offense, however, Sease's mental instability was already abundantly clear. Sease presents with a complex array of mental disorders, reflected in his behavioral history, beginning as early as the 9th or 10th grade, when he dropped out of school and was placed in foster care after stealing beer. CP at 264.

Sease's first known sexual offense was in 1980, when he was 19. CP at 266. On November 27, 1980, Sease attacked and raped a 31-year-old woman he had met in a bar. *Id.* Sease left the bar with the victim and three others, another woman and two men, all of whom appear to have been friends of the victim. At some point, the victim asked the driver to stop the car so that she and her girlfriend could get out. The driver

stopped, leaving the victim, her girlfriend, and Sease behind. *Id.* Sease had apparently been hit over the head by the two men; he told the victim that her friends had robbed him and he was going to take it out on her. *Id.* The victim's girlfriend fled, and Sease proceeded to beat the victim to unconsciousness. *Id.* When she awoke, her pants and panties had been removed and were down around one of her legs. *Id.* Sease was subsequently arrested and charged with Second Degree Rape. *Id.* Because the victim did not want to go to court in this matter, he ultimately pled guilty to Third Degree Assault. *Id.*

Following the 1980 assault, his involvement with law enforcement continued, with a 1981 conviction for shoplifting, followed by numerous other arrests or charges for such things as Driving While Intoxicated (1982), Obstructing a Public Servant and Liquor Violation (1982). CP at 268. At age 25, he was admitted to Western State Hospital after having been discovered preparing to jump from the Narrows Bridge. *Id.* at 268-69. His problematic behaviors continued: He was arrested or charged with Simple Assault and Hit and Run in 1986, Driving While License Suspended (for which he failed to appear) in 1987, and another Simple Assault in 1987. *Id.* at 268.

On November 3, 1987, Sease kidnapped and attempted to rape 15 year-old M.A., a child previously unknown to Sease. CP at 266. As

M.A. stood outside her high school during the school lunch hour, Sease approached her in his car and tried to strike up a conversation with her. *Id.* When M.A. turned and walked away from Sease, he approached her from behind, grabbed her, and forced her into his vehicle. *Id.* While Sease was driving, M.A. began to struggle with him. *Id.* Sease threatened to kill M.A. if she continued to struggle, and attempted to put his hand up M.A.'s skirt. *Id.*

At some point Sease stopped and pushed M.A. out of the car, forced her to the ground and climbed on top of her. CP at 266. He attempted to remove the girl's panties, but she continued to struggle and ultimately was able to kick Sease off and run away. *Id.* At the time of the investigation into this incident, there was another report from a 14-year-old girl from the same school. *Id.* She reported that she had also been followed by Sease, but that she was able to run away. *Id.* Sease had apparently been seen around the school, raising concerns that he had been stalking the girls. *Id.* Sease was ultimately convicted of Kidnapping in the First Degree relating to the offense against M.A. and sentenced to 78 months. *Id.*

On November 25, 1987, Sease raped and assaulted A.H, an adult female previously unknown to Sease. Sease approached A.H., who was waiting for her husband to donate blood at the local plasma center. CP at 267. Sease asked A.H. if she wanted to have sex for $100. She turned Sease

down, indicating that she was married and had a young child. *Id.* Sease asked A.H. to go with him to his car so he could retrieve something from the glove box. *Id.* He opened the passenger door, and A.H. sat in the car with her legs out of the opened passenger side door. *Id.* Sease grabbed her legs, pulled her into the car, and pulled out a knife. Sease put the knife to her side, and told her if she did anything that he could cut her. *Id.*

Sease then drove A.H. to an open field. CP at 267. Once there, Sease threw her onto the ground, put the knife to her chest, and told her to undress. *Id.* A.H. was frightened and unable to disrobe, angering Sease. *Id.* He began to scrape A.H. with the knife, saying he would continue to cut deeper until she removed her clothes. *Id.* A.H. removed one leg from her pants, and Sease proceeded to remove her panties and rape her vaginally. *Id.* While raping her, Sease lifted up her shirt and licked her breast. Sease then ejaculated on her stomach, and told her that he had AIDS, and now she had AIDS. *Id.* at 268. Sease then laughed and ran from the scene, leaving A.H. lying in the middle of a field. Sease was apprehended, convicted of Rape in the First Degree and was given an exceptional sentence of 240 months. *Id.*

Sease was ultimately incarcerated for roughly 16 years. CP at 266-268. He had about 250 infractions while incarcerated, 200 of which were characterized as "major infractions." *Id.* at 265. These infractions

include but are not limited to destruction of property, theft, setting fires, possessing weapons, throwing objects, lying, assault, strong arming, making drugs, self-mutilation, and sexual harassment. *Id.* He engaged in frequent parasuicidal behaviors, often in an attempt to move to housing he thought he would prefer. *Id.* He "expressed open contempt" for other DOC inmates, "setting up altercations with other inmates in such a way that they threaten him," and then claiming the need for protective custody. *Id.* He was generally either unwilling and/or unable to participate in educational, recreational and treatment opportunities offered at DOC, and his ability to work was often hampered by his self-mutilating behaviors or lock-downs due to infractions. *Id.* at 266. While in prison, he consistently denied any sexual offending. *Id.*

On March 31, 2005, shortly before Sease was scheduled to be released on his conviction for the rape of A.H., the State filed a petition alleging that Sease was an SVP. CP at 1-2. Sease was committed by a unanimous jury in 2007, and his commitment was affirmed by this Court. *In Re Detention of Sease*, 149 Wn. App. 66, 201 P.3d 1078 (2009). He has been detained at the Special Commitment Center (SCC) since that date, and his detention has been reviewed annually pursuant to RCW 71.09.070. This appeal marks the fourth time in six years that Sease has petitioned for a new trial pursuant to RCW 71.09.090(2). Those requests have been

denied by the trial court and, where he has sought review, review has been denied by this Court.[1]

On September 20, 2013, Dr. Kirk Newring, Ph.D., a psychologist retained by the Special Commitment Center (SCC), issued his report examining Sease's current mental condition and concluding that he continued to meet criteria for commitment. CP at 245-88. Sease submitted a report by his own expert and moved for an evidentiary hearing pursuant to RCW 71.09.090. *Id.* at 289-332. After a contested hearing, the trial court entered an order finding that the State had met its prima facie burden, that Sease had failed to make a prima facie showing of change, and continuing Sease's commitment as an SVP. *Id.* at 359-61. Sease sought discretionary review, which was granted.

III. ARGUMENT

A. The Trial Court Properly Determined That The State Had Made A Prima Facie Case For Continued Confinement

Sease's argument that he is entitled to a new trial based on a minor adjustment in diagnosis fails for at least three reasons: First, as a factual matter, Sease mischaracterizes Dr. Newring's report, which clearly sets forth facts sufficient to establish the State's prima facie case. Second,

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[1] *See In re Sease*, COA No. 39165-1-II, Ruling Denying Review dated June 19, 2009; COA No. 41524-1-II, Ruling of Dismissal dated October 3, 2012; COA No. 43212-9- II; Ruling Denying Review dated September 4, 2012.

Washington precedent establishes that a diagnosis of mental illness need not be perfectly static to justify continued civil commitment. Third, United States Supreme Court authority recognizes that a diagnosis of mental illness justifying civil commitment is necessarily subject to change, but that such changes do not affect the constitutionality of a continued civil commitment.

Sease asserts that the State's experts "agree Mr. Sease no longer suffers from either mental condition which led to his commitment." App. Br. at 2. He further asserts that "the State's experts now opine that he suffers only from narcissistic personality disorder" (*Id.* at 4) and that this demonstrates that Sease's "condition has changed." *Id.* at 7. This argument is misleading because it ignores the fundamental similarity between the diagnoses assigned at the time of trial and those assigned by Dr. Newring, and because it suggests that the SCC psychologist assigned different diagnoses because he believed Sease has "changed." In fact, the only thing that has changed is the psychologist performing the evaluation, and the "change" in diagnoses demonstrates only something that the courts have long recognized: That reasonable minds can differ regarding the way in which to best conceptualize complex mental conditions. Dr. Newring's report contains all of the necessary components to establish the State's prima facie case, and the trial court's order should be affirmed.

1. Purpose and Procedure of the RCW 71.09.090 Show Cause Hearing

A person committed as an SVP to the custody of the Department of Social and Health Services ("DSHS") is entitled to an annual review of his mental condition by DSHS. RCW 71.09.070. DSHS's annual review evaluation must address whether the committed person continues to meet the definition of an SVP.[2] The SVP may also submit his own expert evaluation to the court. *Id.* At the show cause hearing that follows these submissions, the State must "present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator..." RCW 71.09.090(2)(c). If the State fails to meet its burden, the court must order a new trial. RCW 71.09.090(2)(c).

Once the State has made its prima facie case, a new trial will be granted only upon a showing that there is probable cause to believe that evidence exists, since the person's last commitment trial, that: 1) there has been a "substantial" change in the respondent's condition; and 2) the change results from either a permanent physiological event such as a stroke or dementia rendering the committed person unable to reoffend, or from a "positive response to continuing participation in treatment." RCW

[2] The Statute also mandates consideration of the propriety of placement in an LRA, or Less Restrictive Alternative. Because this case does not involve consideration of LRAs, statutory reference to LRAs will be omitted.

71.09.090(4)(c). A change in a single demographic factor—such as age, marital status, or gender of the committed person—without more, does not establish probable cause. *Id.* These requirements have withstood repeated challenge in the appellate courts of this State, most recently in *State v. McCuistion*, 174 Wn.2d 369, 275 P.3d 1092 (2012).

2. Dr. Newring's Report Establishes The State's Prima Facie Case

Dr. Newring, applying the diagnostic criteria in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* ("DSM-IV-TR"), rendered diagnoses of Alcohol Dependence, In a Controlled Environment; Cognitive Disorder, NOS; a Rule-Out diagnosis of Paraphilia, Not Otherwise Specified, Nonconsent; Narcissistic Personality Disorder with Borderline, Antisocial, Sadistic and Paranoid features; and Borderline Intellectual Functioning. CP at 256. "There is little doubt," he wrote, "that Mr. Sease presents with a significant overall pattern of personality dysfunction that has severely impacted his ability to function without substantial difficulties both in the community and within institutional settings." *Id.* at 257. Noting that Dr. Saari, in his 2008 and 2009 reviews, had "asserted that Mr. Sease's overall pattern of personality dysfunction was essentially narcissistic although he had prominent borderline and

antisocial features" as well, Dr. Newring pointed to "specific indicators of personality disorder," including Sease's "acknowledged history of manipulation of others for personal gain, tenuous and chaotic interpersonal relationships, interpersonal entitlement, poor showing of empathy, verbal and physical behavior that appears intended to cause harm or hurt to others (*e.g.* victim A.H./AIDS, denigrating peers at SCC), grandiose self-worth, and difficulty following rules." *Id.* Dr. Newring ultimately concluded that Sease "continues to present with a mental condition(s) that seriously impairs his ability to control his sexually violent behavior." *Id.* at 263.

Dr. Newring also conducted a comprehensive risk assessment. As part of that assessment, he scored Sease on the Static-99R, a widely-used actuarial tool that measures a sex offender's risk of being charged or convicted with another sexual offense. CP at 257. While his score most closely resembles scores of those who reoffend at a rate of 27.7 percent over a period of 10 years, Dr. Newring noted that Sease's score is higher than 81.4 to 89.7 percent of sex offenders, and that his relative risk of re-offense is 2.23 times higher than the average sexual offender. *Id.* at 258. 102. Nor, he emphasized, was Sease's actuarial score dispositive of his overall risk: The Static-99R score, he wrote, "is only one measure of risk for reoffending" and "should be considered with other sources of clinical information for purposes of an individualized assessment." *Id.* Such scores

"may under-represent true prevalence rates" because of under-reporting and because Static-99R estimates are limited to 10 years "even though research suggests that a 15- year risk estimate can be helpful." *Id.*

In addition to the "static," or unchanging, factors considered in the actuarial instrument, Dr. Newring also considered numerous "dynamic" risk factors. Sex offender treatment, Dr. Newring wrote, is intended "to address those risk factors that can be modified through intervention (dynamic risk factors) so that Mr. Sease's risk can be managed to a point that he can safely be transitioned to a less restrictive alternative." CP at 258. Dr. Newring identified dynamic factors that increase Sease's risk: He experiences general social rejection, and continues to experience a "high degree of negative emotionality and hostility much of the time." *Id.* at 259. This "negative emotionality" is not simply a problem in his relationships with peers. Records also indicate that "distinct episodes of negative emotionality in his relationship with his girlfriend were followed by sexual offending" and indeed, Sease himself has shown "increasing awareness of some of the emotional precursors to one of his sexual offenses." *Id.*

Sease has also demonstrated a history of poor relations with people in positions of authority and, in relation to therapists at the SCC, has been demanding and entitled, threatening self-harm in order to coerce others to

conform to his wishes. CP at 259. Sease was expelled from his treatment group, and Dr. Newring notes that this factor "will be pertinent for the foreseeable future." *Id.* Sease also continues to have problem-solving deficits, "apparent in behaviors such as difficulties in acknowledging negative consequences even when these are pointed out, repeatedly making poor decisions, and failing to recognize obvious problems." *Id.* at 259-60. In Sease's case, Dr. Newring sees "a comingling of these primary risk factors." *Id.* at 260.

> Mr. Sease appears to struggle with negative emotionality, perhaps exacerbated by feelings of social isolation. Rather than address these concerns prosocially and effectively, he verbally harangues others, perhaps in an effort to alleviate his own discomfort, resulting in discomfort for those he castigates. Lacking the skills or motivations to tolerate his own distress, he has engaged in behaviors to make himself feel better, at least temporarily, at the expense of others. ***...Mr. Sease's pattern of behaviors appears consistent with his sexual offense behavior, and may aptly be described as offense-analogue behaviors.***

Id. (emphasis added).

Dr. Newring also addressed so-called "secondary" risk factors. These include several factors more intuitively associated with sexual offending, such as sexual pre-occupations/sex drive, sexualized coping, deviant sexual interests. CP at 260-61. While Sease has a history of kidnap, rape, and frequenting prostitutes, Dr. Newring repeatedly notes that, because Sease has never talked openly and transparently with

treatment providers, little is known about the cognitive factors and sexual emotions that drove his offending. *Id.* at 261. Sease continues, however, to have problems with impulsivity, acting "without considering the far-reaching negative consequences of his conduct." *Id.* Nor does he appear to have ever made use of potentially prosocial relationships, and has failed to follow the advice of reportedly close friends and his sister to engage in sex-offender specific treatment. *Id.* at 262. Finally, while he showed some capacity for a stable relationship in the past, having lived with a girlfriend for a number of years, "the relationship was tumultuous, [and] involved allegations of abuse and infidelity." *Id.* Nor did that relationship prevent Sease, who committed his most recent offenses while in that relationship, from sexually offending. *Id.* In conclusion, Dr. Newring notes that, while Sease has made "incremental progress," he "continues to demonstrate offense-analogue behaviors while in total confinement," and remains "a challenging individual" with "significant barriers to overcome before he should be considered ready for a less restrictive setting." *Id.*

Sease argues that, because Dr. Newring did not specifically state that he continues to meet criteria for commitment, or that is he is more likely than not to reoffend, his report is insufficient to support the State's prima facie case. App. Br. at 4-5. This argument lacks merit. Noting that Sease had been civilly committed and that that commitment was to

continue "until his condition has changed such that he no longer meets the definition of sexually violent predator" or can be released to a less restrictive alternative, he concludes that Sease "continues to present with a mental condition(s) that seriously impairs his ability to control his sexually violent behavior" and is not appropriate for release to a less restrictive alternative. CP at 263. It is clear from Dr. Newring's report that 1) he believes that appellant suffers from mental disorders that make him likely to reoffend; 2) considering both his scores on actuarial instruments and dynamic risk factors, he is more likely than not to be; and 3) he continues to meet criteria as a sexually violent predator. The show cause hearing is intended as a "summary proceeding" in which the trial court determines whether there is probable cause for a new trial. When the evaluating expert's opinion is abundantly clear from the context, and where the report provides a sufficient factual basis for the conclusions reached, the expert's failure to use certain magic words does not invalidate the report or strip it of its value for purposes of the states prima facie case.

B. An Adjustment In Diagnosis Does Not Entitle Sease To A New Trial

Sease essentially argues that, because his personality disorder was once described as Narcissistic, Borderline, and Antisocial, but is *now* described as: Narcissistic with Borderline, Antisocial, and Sadistic

features, he is entitled to a new trial. This Court should reject this argument, in that neither the statute nor the Constitution requires that that continued confinement be predicated on the identical diagnosis rendered at the time of the initial commitment. A minor adjustment of diagnosis that simply reflects a slightly different conceptualization of the underlying pathology that drives an individual to offend in a sexually violent manner does not require a new trial.

1. There Has Been No "Change" In Sease's Mental Condition

Over the years, different psychologists, confronted with Sease's myriad problems, have conceptualized Sease's mental disorders in different ways. When he was seen at Western State Hospital after having been discovered preparing to jump from the Narrows Bridge when he was 25, he was assigned diagnoses of Adjustment Disorder with Mixed Emotions and Dependent Personality Traits. CP at 268-69. In 1990, DOC psychologist Dr. Thomas Foley was asked to assess Sease in response to his self-mutilating behaviors. *Id.* at 269. Dr. Foley assigned Sease diagnoses of Antisocial Personality Disorder[3] and Borderline Personality

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[3] Several editions of the APA's Diagnostic and Statistical Manual of Mental Disorders ("the DSM") have been published since Sease's first known psychological evaluation: the DSM III-R (1987); the DSM IV(1994), and the DSM IV-TR (2000). The definition of Antisocial Personality Disorder has remained largely unchanged throughout this period. The DSM-IV-TR defines antisocial personality disorder as follows:

Disorder.[4] *Id.* Testing later administered by Dr. Foley[5] yielded scores similar to those of people "who have a great deal of difficulty

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A) There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three or more of the following:

1. failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;
2. deception, as indicated by repeatedly lying, use of aliases, or conning others for personal profit or pleasure;
3. impulsivity or failure to plan ahead;
4. irritability and aggressiveness, as indicated by repeated physical fights or assaults;
5. reckless disregard for safety of self or others;
6. consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations;
7. lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another;

B) The individual is at least age 18 years.

C) There is evidence of conduct disorder with onset before age 15 years.

D) The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or a manic episode.

[4] The DSM IV-TR defines Borderline Personality Disorder as follows:

A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

(1) frantic efforts to avoid real or imagined abandonment. Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5.

(2) a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation

(3) identity disturbance: markedly and persistently unstable self-image or sense of self

(4) impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, Substance Abuse, reckless driving, binge eating). Note: Do not include suicidal or self-mutilating behavior covered in Criterion 5.

incorporating the values and standards of society into their lives." *Id.* at 271. Such people often engage in a wide range of antisocial activities, including excessive alcohol use and sexual acting out. *Id.* Such high scorers "do not usually learn from past mistakes or experiences and find in the same difficulties over and over again." *Id.* at 272. Individuals with this profile, he noted, "are often described as being self-centered, narcissistic, egocentric, and selfish." *Id.* They are insensitive to the needs and feelings of other people, often hostile and aggressive, displaying "aggressive and/or assaultive behavior without any signs of guilt or empathy for others." *Id.* In 1994, another DOC psychologist, Dr. Edward Goldenberg, was asked to assess Sease after another period of threats to self-mutilate

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(5) recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior

(6) affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days)

(7) chronic feelings of emptiness

(8) inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights)

(9) transient, stress-related paranoid ideation or severe dissociative symptoms

[5] Dr. Foley administered the MMPI, or Minnesota Multiphase Personality Inventory, to Sease. CP at 271.

and assigned diagnoses of Paraphilia Not Otherwise Specified,[6] Alcohol Abuse, Antisocial Personality Disorder, Borderline Personality Disorder, and Mild Mental Retardation. *Id.*

Two years later, after an attempted suicide, DOC psychiatrist Dr. Edward Grosskopf noted Sease had been psychiatrically hospitalized at DOC's Special Offender Center six times, had attempted suicide or mutilated himself over 60 times, and diagnosed Sease with Alcohol Dependence, and a Borderline Personality Disorder with antisocial features.[7] CP at 272. In 2002, DOC psychologist Dr. Savio Chan, noting that Sease showed no remorse or concern for his victims and denied any mental disorders, assigned a "rule out"[8] diagnosis of Paraphilia Not Otherwise Specified ("NOS"). *Id.* at 270. In 2004, DOC psychologist Dr. Kerry Clark, when assigning a diagnosis of Personality Disorder NOS

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[6] The DSM-IV-TR describes paraphilias as "recurrent, intense sexually arousing fantasies, sexual urges or behaviors generally involving (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner, or (3) children or other nonconsenting persons that occur over a period of 6 months" (Criterion A), which "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning" (Criterion B). The descriptor "not otherwise specified" is a residual category which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the DSM. DSM-IV-TR at 576. *See also In re Young*, 122 Wn.2d 1, 29, 857 P.2d 989 (1993)

[7] The terms "features" or "traits," as the names suggest, are used when an individual presents with aspects of specified disorders, but does not meet the diagnostic criteria for the full diagnosis.

[8] The phrase "rule out," although commonly used, does not appear in the DSM-IV-TR. It is typically used to identify an alternative diagnosis that is being actively considered, but for which sufficient data has not yet been obtained. House, Alvin E. *DSM-IV Diagnosis in the Schools*, Gilford Press, 2002, at 33.

with narcissistic, antisocial and borderline features, noted the "complex mixture" of those components. *Id.* at 270-71. Finally, in 2005, Dr. Dennis Doren, who testified on behalf of the State at Sease's SVP trial, diagnosed Sease as suffering from Alcohol Dependence, Borderline Personality Disorder, Narcissistic Personality Disorder,[9] and Antisocial Personality Disorder. *Id.* at 271.

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[9] The DSM-IV-TR defines Narcissistic Personality Disorder as follows:

A pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

> (1) has a grandiose sense of self-importance (e.g., exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements)
>
> (2) is preoccupied with fantasies of unlimited success, power, brilliance, beauty, or ideal love
>
> (3) believes that he or she is "special" and unique and can only be understood by, or should associate with, other special or high-status people (or institutions)
>
> (4) requires excessive admiration
>
> (5) has a sense of entitlement, i.e., unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations
>
> (6) is interpersonally exploitative, i.e., takes advantage of others to achieve his or her own ends
>
> (7) lacks empathy: is unwilling to recognize or identify with the feelings and needs of others
>
> (8) is often envious of others or believes that others are envious of him or her
>
> (9) shows arrogant, haughty behaviors or attitudes

Subsequent evaluators, including Dr. Newring, have conceptualized Sease's mental disorder slightly differently than did Dr. Doren. In Sease's 2008 annual review, the first submitted by the SCC after Sease's 2007 commitment, Dr. Robert Saari goes to considerable length to describe his diagnosis and the interplay of Sease's various disorders. Sease's condition, he writes, is best conceptualized as a case of *malignant narcissism at a borderline level of personality organization."* CP at 57. Such persons "maintain their self-esteem by employing aggression (either toward other people or toward the self)." *Id.* Sease's narcissistic personality disorder is characterized "by severe dysfunction at the level of morality and prosocial values." *Id.* at 58. Although Sease describes himself as a moral man, "his aggressive behavior and exploitation of other people indicates a serious pathology at the level of conscience (i.e. internalization of pro-social values that inhibit him from harming other people and violating the law)." *Id.* Not only does Sease "lack normal inhibitions toward harming other people to gratify his needs," but he is also likely "to take pleasure in dominating other people." *Id.* This "callousness and lack of empathy" are apparent in his sex offending, in particular his most recent offense, involving "gratuitous violence by torturing her with the knife," and "taunting" her by telling her that he had given her AIDS. *Id.* His severe narcissism, he writes, involves various

defense mechanisms Sease employs in order to maintain his favorable self-image. *Id.* His sex offending, for example, involves what Dr. Saari refers to as "omnipotent control," a phenomenon involving treating other people "as an extension of the self without empathizing with their motivations, needs and desires." *Id.* "Importantly," he writes, "his sexual offending can easily be understood in terms of omnipotent control, as his wished [sic] for gratification of sexual desire overrode any concern he may have had" about his victims. *Id.* at 58-59. Sease's narcissistic personality disorder, Dr. Saari concluded, "is the primary mental disorder that places him at risk for future sexual violence." *Id.* at 61. The psychodynamics of using aggressive self-assertion to regulate self-esteem, in combination with his known pattern of sexual offending, and very poor impulse control, is sufficient to predispose him to future predatory acts of sexual violence." *Id.* His disorder of malignant narcissism "is characterized by aggressive acting out, and one of the forms of aggressive acting out associated with his personality disorder is sexual aggression." *Id.,* N. 11. As noted above, Dr. Saari concluded that Sease suffers from a Narcissistic Personality Disorder with Antisocial and Borderline traits. *Id.* at 62. Although Sease has many features of an Antisocial Personality Disorder, he explained, he did not believe that he fully met the diagnostic criteria because he did not show evidence of certain forms of acting out

before age 15 required to assign a formal diagnosis of Antisocial Personality Disorder. *Id.* Indicating that Sease met all the diagnostic criteria for a Narcissistic Personality Disorder, however, he stated that he suffered from a "complex array" of symptoms from the other two disorders:

- Narcissistic Personality Disorder: a) grandiose sense of self-importance; b) strong sense of entitlement; c) interpersonally exploitive and manipulative; d) lack of empathy; e) arrogant, haughty behaviors.

- Antisocial Personality Disorder: a) failure to conform to social norms with respect to lawful behaviors; b) some degree of deceitfulness; c) impulsivity; d) irritability and aggressiveness; e) lack of remorse.

- Borderline Personality Disorder: a) some degree of abandonment sensitivity and abandonment fears; b) recurrent suicidal behaviors, gestures, threats, and self-mutilating behaviors; c) affective instability; d) inappropriate, intense anger.

Id.

Subsequent evaluators at the SCC have referenced and agreed with Dr. Saari's thoughtful and thorough assessment, and have continued to conceptualize Sease's complex array of mental disorders in a similar fashion. CP at 87 (2009 Annual Review ("AR")); CP at 138 (2010 AR); CP at 166 (2011 AR); and CP at 202 (2012 AR). All of these reports had, over the years, been submitted to the trial court, the same judge who had presided over Sease's 2007 jury trial (*see* CP at 33-34) and who denied

Sease's 2013 request for a new trial. [10] These records were undoubtedly part of the "pleadings filed in this matter" considered by the trial court when entering its October 11, 2013 Order. CP at 359. Likewise Dr. Newring, in his 2013 evaluation, made frequent reference to Dr. Saari's 2008 report, and assigned a diagnosis very similar to that assigned by Dr. Saari. *E.g.* CP at 247; App. at 93, 100.

These reports make clear that nothing about Sease has "changed," nor do any of those reviewing his case believe that he "no longer" suffers from the conditions diagnosed at the time of trial. Indeed, the distinction between Dr. Doren's trial diagnosis and that of Dr. Saari and subsequent SCC evaluators is in fact a very small and, arguably, very technical one. In order to diagnose an Antisocial Personality Disorder, there must be evidence of what is called a "conduct disorder" prior to age 15. *See* n.3, supra. While Dr. Doren apparently found such evidence in the record, Dr. Saari did not and, in his 2008 report, wrote that Sease "would meet the full criteria for Antisocial Personality Disorder if he more clearly had symptoms of Conduct Disorder prior to the age of 15 years." CP at 62, N.13. To order a new trial because two different professionals disagree on how to interpret (presumably very limited) information related to the

[10] The Hon. Brian Chushcoff presided over both Sease's commitment trial and has retained his case for purposes of annual review hearings.

subject's conduct before age 15 is absurd, and the trial court correctly rejected this argument.

2. There Is No Requirment That All Subsequent Diagnoses Be Identical To That Assigned At The Time Of Trial

Neither the SVP statute nor the Constitution require that all subsequent evaluators submit evaluations identical to that submitted at the time of the commitment trial. Indeed, such a requirement would effectively strip the annual evaluation process of any meaning, essentially reducing it to a single question: "Do you believe that X continues to suffer from precisely the same mental disorder that was diagnosed at the time of trial? Yes or no." Under Sease's theory, if the answer is "no, I conceptualize it slightly differently," the required result would be an entirely new trial. Such a requirement would eliminate the potential for meaningful assessment of an individual's mental condition, fly in the face of well-established jurisprudence in this area, and produce absurd results.

The sexually violent predator statute requires an annual review that includes "consideration of whether the committed person currently meets the definition of a sexually violent predator... " RCW 71.09.070. "Sexually violent predator" is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from ***a*** mental abnormality or personality disorder which makes the person likely to

engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18) (emphasis added). By statute, then, the evaluator must determine whether the SVP currently suffers from "a" mental abnormality or "a" personality disorder, not "the" mental abnormality or personality disorder that was assigned at the time of trial.

Nor does the Constitution require that the current diagnosis be identical to that assigned earlier. Due Process requires that the State demonstrate that Sease suffers from a mental condition that makes him likely to reoffend. *Kansas v. Hendricks,* 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Washington's SVP commitment statute "comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous." *McCuistion,* 174 Wn.2d at 388. The statute requires the State to prove that the SVP is mentally ill and dangerous at the initial commitment hearing, and it requires the State to justify continued incarceration through an annual review. *Id.* This condition, however, need not be identical to the condition diagnosed at the time of his initial commitment.

Indeed, our supreme court has rejected precisely this argument in *State v. Klein,* 156 Wn.2d 103, 124 P.3d 644 (2005). There, an insanity acquittee argued that, because her current diagnosis ("psychoactive

substance induced organic mental disorder") was not identical to that diagnosed at the time of her initial commitment ("polysubstance dependence"), she no longer suffered from a "mental disease or defect" and was entitled to release. *Id.* at 112. The court rejected this argument, noting that "Klein's construction of the statute would require difficult, if not impossible, comparisons between the original and present mental conditions of an acquittee," and noted that the "feasibility of such comparisons is doubtful" in light of the "uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Id.* at 120 (citing *Jones v. United States,* 463 U.S. 354, 365 n.13, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)). Noting that the DSM-IV-TR "candidly acknowledges" "that each category of mental disorder is not a completely discrete entity," the court observed that "the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it." *Id.* at 120-21. "[R]elease based on mere semantics," the Court continued, "would lead to absurd results and risks to the patient and public..." *Id.* Citing *Foucha v. Louisiana,* 504 U.S. 71, 79, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) for the proposition that "due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed," the *Klein* Court found that such a "reasonable relation" existed between

Klein's original and subsequent diagnoses, "both of which derive from Klein's continued addiction to controlled substances." *Id.* at 120. This conclusion, the court went on, "is also strengthened by the fact that 'the purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society form his potential dangerousness." *Id.* (citing *Jones,* 463 U.S. at 368).

> If our sole inquiry focused on whether the release candidate continued to suffer from the exact same condition, one of the central purposes of commitment, the protection of society, could be undermined. For it is quite conceivable that an insanity acquittee could "partially recover" from the originally diagnosed condition, yet maintain a related condition that manifests itself in equally dangerous behavior.

Id.

This conclusion is consistent with Supreme Court precedent. After initial commitment, the constitution requires that continued detention be "subject to periodic review of the patients' suitability for release." *Jones,* 463 U.S. at 368. As noted by the *Klein* Court, however, there is no requirement that that condition be precisely the same condition diagnosed at the time of his initial commitment, and the United States Supreme Court has never relied on the semantics of particular diagnostic classifications. Rather, the Court has repeatedly acknowledged "the

uncertainty of diagnosis in this field and the tentativeness of professional judgment" (*Greenwood v. United States,* 350 U.S. 366, 375, 76 S. Ct. 410, 100 L. Ed. 412 (1956)) and has noted that reported cases "are replete with evidence of the divergence of medical opinion in this vexing area." *O'Conner v. Donaldson*, 422 U.S. 563, 579, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) (C.J. Burger, concurring). Psychiatry "is not. . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). More recently and in the SVP context, the Court has observed that the term "mental illness" is "devoid of any talismanic significance," *Hendricks,* 521 U.S. at 358-59, and that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane,* 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

The debate here, like that in *Klein,* is one of form, not substance, and the result in *Klein* controls. As is apparent from the varying diagnoses that have been assigned over the years, reasonable professionals can and have differed as to precisely how best to characterize Sease's pathology,

one that involves brutal sexual attacks on women, an absence of empathy and indifference to the suffering of others, a sense of entitlement and willingness to exploit others to meet his own needs, resistance to supervision or authority, extreme interpersonal difficulties, and self-mutilation. All agree, however, that there is an interplay between his alcohol abuse, his cognitive impairment, and the various personality disorders, or personality-disordered traits, with which he has been diagnosed. The various diagnoses assigned over the years notwithstanding, nothing about the underlying facts of Sease's sexual offending has changed. Rather, different evaluators simply disagree as to the way to most accurately capture the pathology that drives Sease's offending. Thus, just as in *Klein*, "the subjective and evolving nature of psychology" has led to "different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it." *Klein,* 156 Wn. 2d at 120-121.

Even with a slightly adjusted diagnosis, there is no doubt that the nature of Sease's commitment continues to bear a reasonable relation to the purpose for which he was committed. The original purpose of Sease's commitment was to protect the public and offer treatment for his many mental disorders, conditions that, regardless of the order in which they are listed, clearly constitute a pathology that makes him likely to sexually offend. His continued commitment is based on the continued presence of

a dangerous constellation of conditions. As such, the nature of his continued commitment does not violate the constitution.

Sease argues that *Klein* does not support the State's position because of certain procedural distinctions. Sease, however, interprets the broad language of *Klein* far too narrowly. The *Klein* Court's discussion of the problems inherent in attempting compare diagnoses is no less true or relevant in this context than in the context of Klein's appeal. Nor is Sease correct when he attempts to distinguish *Klein* on the basis of the NGRI statute's use of the term "a" mental disease or defect rather than "the" mental disease or defect. App. Br. at 12. While it is true that, on one page in the *Young*[11] decision, the court referred to "the" mental illness that led to commitment, this is the only point in that decision at which the definite article is used in this way, and, as explained above, is neither representative of the statutory requirements in general nor dispositive of this issue.

C. Sease Failed To Establish Probable Cause Of A Relevant Change In Mental Or Physical Condition

Sease next argues that the report of Dr. Abbott demonstrated that Sease had so changed through treatment such that a new trial was merited. This argument also fails. As amended in 2005, RCW 71.09.090 requires a

[11] *In re the Pers. Restr. of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993).

very specific showing in order to justify a new trial that reopens Sease's indefinite commitment. Although Dr. Abbott concluded that Sease had "so changed through treatment" that he was no longer an SVP, the trial court was charged with examining those conclusory statements for an underlying factual basis. The trial court's examination revealed that, in reality, Sease's minimal participation and resolutely unsuccessful foray into the treatment realm did not supply the requisite evidentiary basis for Dr. Abbott's conclusions. Because the materials presented by Sease failed to make the requisite showing, the trial court properly denied his request for a new trial.

1. The "Evidence" Presented By Sease Did Not Support An Order For A New Trial

Sease argues that "Dr. Abbott's evaluation contains his professional opinion that as a result of treatment Mr. Sease no longer meets the definition of a sexually violent predator." App. Br. at 17. The trial court properly looked behind this conclusory opinion and rejected Sease's request for a new trial.

Sease, after more than 20 years of denying that he has ever committed a sex offense or that he is a sex offender, has recently begun to participate in treatment at the SCC. His desultory progress is described at some length both in Dr. Newring's and Dr. Abbott's reports. CP at 245-

88; 308-312. Sease, Dr. Newring writes, was "generally described as 'baseline' or not showing much progress" in his Barriers to Discharge/Power to Change group. CP at 254. He was described as "defensive," and refused to discuss/explore his thoughts." *Id.* Although at some point in 2011 Sease asked to be assigned to a sex offender-specific therapy group, or "cohort" group, he "does not appear to have participated in this group during the current review period." *Id.* He continued to struggle with the label of "sex offender." *Id.* He was described as minimizing aspects of his offense history, indicating that sobriety was his main risk factor. *Id.* He declined to meet with senior clinical staff at the SCC. *Id.* He was expelled from his Barriers to Discharge/Power to Change group, re-admitted, and then again expelled. *Id.* at 255. Dr. Abbott reports many of the same problems. *Id.* at 308-12. In Dr. Newring's view, Sease's Personality Disorder and Cognitive Disorder "appear to be primary barriers to his progress in sexual offense behavior specific treatment," and are "preventing him from returning to sexual offense behavior specific treatment at this time." *Id.* at 262.

Sease was terminated from treatment, and that fact alone removes him from the required "continuing participating in treatment" required by the statute. CP at 255. Notwithstanding this fact, and lacking evidence of real treatment participation, Dr. Abbott's report instead focused in his

"participation" in the "SCC therapeutic milieu." CP at 314-16. In essence, Sease argues that by simply residing at the SCC, he is participating in treatment and thereby entitled to a new trial under RCW 71.09.090(4). This position, however, is at odds with both the language and intent of the Statute, and renders moot both the legislative intent in not only RCW 71.09.090(4), but the entire Sexually Violent Predator ("SVP") Act. It also undermines the recent Washington State Supreme Court opinion in *McCuistion*, which upheld the 2005 amendments to RCW 71.09.090(4) and found that the State had a substantial interest in incentivizing participation in sex offender treatment and limiting new trials only to those who had participated in treatment. 174 Wn.2d at 394. Under Sease's theory, every SVP would be entitled to a new trial each year simply by being present at the SCC and therefore "participating" in the "behavior modification program." The Court should not interpret this statute in a manner that would render it meaningless.

Washington case law interpreting and enforcing the legislative intent in enacting the SVP Act make clear that the purpose of the Act is to address the very long-term treatment needs of violent sexual predators and to incentivize participation in treatment by limiting new trials to those who have participated in treatment. *See e.g. McCuistion*, 174 Wn.2d at 394; RCW 71.09.010. In upholding the requirement of treatment, the

McCuistion Court took note of the "the 'very long-term' needs of the sexually violent predator population for treatment and the equally long-term needs of the community for protection from these offenders.'" *Id.* at 389-90. The legislature, the court continued, "wanted to ensure that the statutory focus remains on treatment and did not want to remove the incentive for successful treatment participation." *Id.* The court further noted the State's "substantial interest in encouraging treatment, preventing the premature release of SVPs, and avoiding the significant administrative and fiscal burdens associated with evidentiary hearings." *Id.* at 394. The McCuistion Court's decision re-affirms a long line of cases dating back to 1993 in *Young*, in which the Supreme Court acknowledged that "the ultimate goal of the statute is to treat, and someday cure those whose mental condition cause them to commit acts of sexual violence....." 122 Wn.2d at 10. *See also In re Det. of Thorell*, 149 Wn.2d 724, 749, 72 P.3d 708 (2003) ("SVP treatment needs are long term and the treatment modalities for the SVP population are very different from the traditional treatment modalities for people better treated under chapter 71.05.")

Sease asks this Court to disregard years of case law and legislative findings and accept Dr. Abbott's novel theory of the SCC as a "behavioral modification program" and a "therapeutic milieu." This theory renders RCW 71.09.090(4) meaningless. If every SVP were deemed to be

"continuously participating in the behavior modification program that comprises the SCC therapeutic milieu" simply by residing at the SCC, the interest of the State described in *McCuistion* in avoiding the administrative and fiscal burdens of annual evidentiary hearings and incentivizing participation in treatment as the only viable avenue to a release trial would be irrelevant. No SVP would have to participate in the sex offender treatment program in order to obtain a new trial.

Sease has clearly not "continuously participated in treatment of any sort, nor has he made any "substantial" progress towards change as the legislature intended. The trial court properly rejected his request for a new trial on that basis.

IV. CONCLUSION

For the aforementioned reasons, this Court should affirm the trial court's order denying Sease's request for a new trial.

RESPECTFULLY SUBMITTED this 5th day of September, 2014.

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: MICHAEL SEASE, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On September 5, 2014, I deposited in the electronic mail and United States mail true and correct cop(ies) of Opening Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

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

DATED this 5th day of September, 2014, at Seattle, Washington.

Allison Martin
ALLISON MARTIN