Supreme Court No. 92332-9
(COA No. 71292-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DETENTION OF MARK BLACK

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

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT AND DECISION BELOW

Respondent Mark Black asks this Court to deny review of the Court of Appeals decision terminating review dated August 24, 2015, for which neither party filed a motion for reconsideration.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals properly ruled that Mr. Black objected to the State's failure to bring him to court for jury selection. RAP 2.5(a) is a discretionary rule that allows a court to address unpreserved issues on appeal. Does the State's assertion that the Court of Appeals misapplied RAP 2.5(a) merit review when the issue was preserved and the Court of Appeals has discretion to decide even unpreserved issues?

2. A party's right to participate in jury selection stems from article I, sections 10 and 21, and the state and federal constitutional rights to due process of law, and common law recognizes the importance of a party's personal participation in jury selection when requested. The State did not bring Mr. Black to court during jury selection as planned but now insists he had no right to participate in jury selection. Did the Court of Appeals correctly weigh the due process interests at stake and find the State impermissibly failed to bring Mr. Black to court for jury selection?

3. If this Court grants review, it should also review the issues not resolved by the Court of Appeals. Did the trial court deprive Mr. Black of a fair trial by admitting the diagnosis of "paraphilia not otherwise specified, persistent sexual interest in pubescent females," even though it also ruled that the science underlying this diagnosis was not generally accepted in the relevant scientific community, and also by prohibiting Mr. Black from challenging this diagnosis by comparing it to "hebephilia," which is not generally accepted?

4. The Court of Appeals also did not reach whether the State proved the alternative mental disorders caused serious difficulty controlling behavior as required for commitment to be constitutional. Because the case rested on alternative means with no unanimous jury finding of which alternative was proved, there must be sufficient evidence each alternative. Should this Court review whether there was sufficient proof Mr. Black lacked volitional control due to each alleged mental abnormality and personality disorder?

C. STATEMENT OF THE CASE

At the start of his jury trial on October 21, 2013, Mr. Black waived his right to be present for the first day of jury selection. 10/21/13RP 4. The judge promised the jury that they would meet Mr.

Black "tomorrow." *Id.* Mr. Black requested and expected to be brought to court to participate in the rest of jury selection, but on the following day the jail did not bring him to court. CP 1430. The jail had not retained enough staff and refused to bring him. 2RP 11-12.[1]

At the start of proceedings on October 22, 2013, Mr. Black's attorney informed the court that Mr. Black was not present and he had not "waived his presence from this point forward." CP 1430.[2] Mr. Black's attorney moved to recess the proceedings until Mr. Black was brought to court but the court reserved ruling. *Id.*[3] The judge pressed Mr. Black's attorneys to waive his presence but his lawyers declined, explaining that Mr. Black "did not feel comfortable waiving" his presence and "it would be better for the jury to see him at some point before it's actually picked." 10/22/13RP 51. They also told the court, "It's important that he give input to our selection of the jury." *Id.* at 52.

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[1] Any person awaiting trial for civil commitment as a sex offender must remain in custody until the trial is complete, without the possibility of pretrial release. RCW 71.09.040(4).

[2] Mr. Black ordered transcripts of jury selection and trial but the court reporter inexplicably separated jury selection from other proceedings in two volumes, in a piecemeal fashion. The court's minutes explain the proceedings in context of the day's occurrences.

[3] The State's petition for review erroneously quotes from the clerk's minutes. Petition at 5. The minutes state the case was "ON THE RECORD" when the defense attorneys informed the court Mr. Black was not present and had not waived his presence. CP 1430.

Despite the attorneys' objection, the court continued jury selection in Mr. Black's absence. 10/22/13RP 3-89. The judge individually questioned multiple jurors and dismissed 11 potential jurors. 10/22/13RP 5-8, 22, 26-32, 34-43, 49-50, 61-69, 77. Then the judge told the jury panel they were "not able to proceed" further as the judge "had hoped and as everyone had expected." 10/22/13RP 60. The judge ambiguously told the jury the reason for the delay was that there are "some parts of our system which have not responded in the way I had expected." *Id.* The judge said the delay was not the fault of "the people in the room" *Id.* at 60-61. The judge did not say Mr. Black was not responsible for the delay.

Even after dismissing the majority of prospective jurors in the middle of the day, the court continued individual voir dire, questioning four potential jurors and removing one for bias and two due to their language skills. CP 1430; 10/22/13RP 64-89. The judge sua sponte took two jurors aside and said she was "concerned" that the parties would speak quickly. 10/22/13RP 79. The judge did not believe either juror was unqualified to serve due to language deficits, but rather that this

trial might not be right for them. *Id.* at 82.[4] Without finding either juror's English skills disqualified them from service, the court concluded, "it might be too hard" for them to serve on this case and dismissed them without giving Mr. Black the chance to observe them or inquire. *Id.* at 81-82. The court told both jurors to report to the administrator for another case on which they could serve. *Id.* at 82-83.

Mr. Black was brought to court the following day where he participated in the final day of jury selection. 10/23/13RP 3. The Court of Appeals ordered a new trial individually questioning and dismissing multiple jurors without Mr. Black's presence and despite his request to be present violated his right to attend and participate in jury selection.

The Court of Appeals did not resolve other issues in the direct appeal. Slip op. at 19-20; Opening Brief at 19-46. These issues include the court's ruling after a *Frye*[5] hearing that "hebephilia" is inadmissible as a mental abnormality because it is not generally accepted in the relevant scientific community. CP 1412-13; 9/13/13RP 39-40. 56-57, 60, 71-74, 93, 98. Hebephilia is a psychological condition premised on

[4] A juror who is "not able to communicate in the English language" is not qualified to serve as a juror. RCW 2.36.070.

[5] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

allegedly deviant sexual attraction to pubescent or post-pubescent minors. Psychologist Karen Franklin testified that hebephilia is a novel and controversial disorder. 9/13/13RP 39-40. The court also ruled hebephilia is different from "paraphilia NOS, persistent sexual interest in pubescent females," for which the State's evaluator Dr. Arnold diagnosed Mr. Black. CP 1413. Dr. Arnold's diagnosis relied on the same science as hebephilia and he created this label for Mr. Black because hebephilia is not in the DSM-V. CP 839, 841-43; 9RP 944-45.

After finding hebephilia insufficiently reliable, the court further prohibited Mr. Black from "mentioning or making any reference to Hebephilia" at trial. CP 2116-18. The court barred Mr. Black from "suggesting" the flaws undermining hebephilia discredited Dr. Arnold's diagnosis. *Id.* Pertinent facts are further addressed below and in Appellant's Opening Brief, pages 4-8 and in the relevant argument sections.

D. ARGUMENT

1. The Court of Appeals appropriately reviewed the record and held that Mr. Black preserved for appeal the issue of his presence for jury selection, which is not an issue meriting review.

After reviewing the briefs of the parties, the record on appeal, and holding an oral argument, the Court of Appeals unanimously concluded that Mr. Black preserved his right to be present for jury selection. Slip op. at 2-4, 6, 15. The Court of Appeals rejected the State's allegation that the issue was not sufficiently preserved, concluding that, "[b]ecause he did so [object], we need not address whether he can raise this issue under RAP 2.5(a)." Slip op. at 15.

In its petition for review, the State misconstrues the record to artificially claim the lack of preservation. As the Court of Appeals correctly explained, Mr. Black preserved the issue for appeal and therefore, it is not necessary to address whether it should review the issue notwithstanding the lack of objection under RAP 2.5(a), pertaining to errors raised the first time on appeal.

Moreover, RAP 2.5(a) is a discretionary rule. Even if an issue is unpreserved, an appellate court retains discretionary authority to address it. *See, e.g*, *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d

680 (2015) ("RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right."). The State's petition for review erroneously claims RAP 2.5(a) prohibits the Court of Appeals from addressing an unpreserved issue that is not a manifest error affecting a constitutional right. Petition at 10. No such rule exists. An appellate court's decision to review constitutional error that it deems sufficiently preserved is not an issue meriting any further attention by this Court.

The State's claimed error is also specious because Mr. Black preserved the issue below, which is a manifest error affecting a constitutional right in any regard. He only waived his right to be present for only the first day of jury selection, which the judge acknowledged by promising the prospective jurors that Mr. Black would be in court "tomorrow" and they would meet him then. 10/21/13RP 4; CP 1430; Slip op. at 2-4. The State's failure to bring Mr. Black to court was not Mr. Black's fault, but was solely blamed on the jail's mismanagement. This Court should deny review of this preserved error.

2. Civil litigants facing lifetime incarceration have the right to be present at their trials, including the critical stage involving jury selection.

a. Jury selection is an important part of any trial.

Jury selection has long been recognized as a critical stage in any proceeding. *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). It is "the primary means" for enforcing the "defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Id.* (internal citations omitted). A party's personal presence is necessary for the opportunity to give advice or make suggestions to her lawyer when assessing potential jurors. *United States v. Gordon*, 829 F.3d 119, 124 (D.C. Cir. 1987). Common law dictates the importance of the litigant's role selecting an impartial, properly qualified jury, because his "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors." *Lewis v. United States*, 146 U.S. 370, 373-74, 13 S.Ct. 136, 36 L.Ed. 1011 (1892); *see also Carlisle v. County of Nassau,* 64 App.Div.2d 15, 20, 408 N.Y.S.2d 114, 117 (1978) (selecting jurors is "vital and often crucial aspect of any trial. It has aptly been described as the cornerstone of the right to a trial by impartial jury.").

b. The State undermines the constitutional and common law right to participate in jury selection when it obstructs a defendant from coming to court to participate in jury selection.

A party's right to be present at jury selection has roots in the common law and is part of the Fourteenth Amendment's broadly applicable due process clause, which applies in civil and criminal proceedings. *See State v. Irby*, 170 Wn.2d 874, 881, 246 P.3d 796 (2011); U.S. Const. amend. 14; Const. art. I, § 3. As the Georgia Supreme Court recently explained in a civil case, "the right of a natural party to be present in the courtroom when the party's case is being tried as such right, is deeply rooted in the law of this Nation" and specifically guaranteed in state constitutional provisions. *Phillips v. Harmon*, 297 Ga. 386, 389, 774 S.E.2d 596, 600 (2015).

Article I, section 21 protects the right to trial by jury in civil cases as "inviolate." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 655, 771 P.2d 711 (1989). Article I, section 10 guarantees that "justice in all cases shall be administered openly and without delay." By these provisions, our constitution embedded a justice system where individual rights are protected through open court proceedings and jury

trials, which necessarily prohibits the denial of a litigant's request to be present for and participate in the proceedings.

Other courts have similarly enforced this right. "[T]he fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, including examination the jurors' qualifications." *Carlisle*, 408 N.Y.S.2d at 116; *see also Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81, 39 S.Ct. 435, 63 L.Ed. 853 (1919) ("no doubt" civil litigant entitled to be present for entire jury trial, including its impaneling); *Green v. N. Arundel Hosp. Ass'n, Inc.*, 366 Md. 597, 618, 785 A.2d 361, 373 (2001) ("In concert with courts throughout the country, we have made clear that a party to civil litigation has a right to be present for and to participate in the trial of his/her case."). The presence of counsel is not a substitute for a party's right to be present. *Helminski v. Ayerst Labs., A Div. of A.H.P.C.,* 766 F.2d 208, 214 (6th Cir.1985).

The State's petition for review is premised on the misleading notion that the right to be present at jury selection exclusively emanates only from the Sixth Amendment and article I, section 22, which apply to criminal cases. *See* Petition at 11.As a civil litigant whose personal

liberty was a stake, Mr. Black had a right and a heightened interest in personally taking part in jury selection. The State was not free to disregard its obligation to bring him to court when he asked to appear and be present and when the jury had been instructed that he would be present.

c. The Court of Appeals decision rested on the appropriate weighing of the rights at stake under the due process clause as well as article I, sections 10 and 21.

Contrary to the State's assertion that the Court of Appeals simply borrowed from criminal cases without recognizing the different status of a civil commitment proceeding, the Court of Appeals used the appropriate due process framework. Slip op. at 6-15. Under *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the court examines (1) the private interest at stake, (2) the risk of an erroneous deprivation of this interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As the Court of Appeals ruled, it is well-established that involuntary commitment constitutes a massive curtailment of liberty

and the first *Mathews* criterion "weighs heavily" in Mr. Black's favor. *In re Detention of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007); Slip op. at 9. The State conceded this significant interest predicated on the extremely serious liberty at stake. Slip op. at 9.

The second and third *Mathews* factors require the Court to consider the risk of erroneous deprivation through existing procedures, the probable value of additional safeguards, and the government's interest in the procedure sought. 424 U.S. at 335.

The Court of Appeals acknowledged that bringing Mr. Black to jury selection entailed no unexpected costs or administrative burdens. The government expected to bring Mr. Black to court but failed to do so, which creates no undue burden on the state.

Furthermore, striking jurors without giving Mr. Black the chance to participate carries a substantial risk of erroneous deprivation for the reasons that make his personal participation is critical. The purpose of voir dire is "discovering any basis for challenge for cause and to permit the intelligent exercise of peremptory challenges." RCW 4.44.120. Mr. Black was denied his right to participate in a critical part of this process, during a proceeding at which numerous jurors were excused and absent his consent. The established value of personally

participating in jury selection for a trial involving Mr. Black's liberty for life long confinement is not outweighed by the state's interest is having the jail disregard its obligation to bring Mr. Black to court.

The Court of Appeals decision is consistent with this Court's precedent according the open administration of justice and the inviolate right to a jury trial as constitutional provisions meriting the highest of protections. In addition, the party's personal right to participate in selecting the jury who will decide whether the accused person is so dangerous that indefinite total confinement is necessary should be accorded a high priority. The right to personally participate is enforced by court rule, which gives an individual party the right to ask questions of jurors. CR 47 (court "shall permit the parties or their attorneys to ask reasonable questions" of prospective jurors).

The State's mismanagement or disregard for Mr. Black's rights resulted in its failure to bring Mr. Black to court despite his undisputed request. The court insisted that jury selection should proceed in his absence and thus conducted significant, substantive portions of jury selection without him. Meanwhile, the court implied to the jurors that Mr. Black was to blame for not appearing in court, which was decidedly prejudicial in a case resting on the jury's perception of Mr.

Black's dangerousness, including his ability to follow rules if released into the community. The Court of Appeals decision does not merit further review.

3. If this Court grants review, it must also address legal errors pertaining to the expert's diagnosis that the Court of Appeals did not resolve in anticipation of a new trial.

The Court of Appeals opted not to decide the issues raised on appeal relating to the lack of scientific support for the diagnosis of hebephilia. Slip op. at 19. It directed the parties to further develop the record in the course if the new trial ordered. *Id.* If this Court grants review and reverses the Court of Appeals ruling ordering a new trial based on the trial court's evidentiary restrictions, this Court must address, or remand the case to the Court of Appeals for it to decide, the issue that it passed to the trial court in anticipation of a new trial.

Scientific evidence is inadmissible if "the theory underlying the evidence and the methodology used to implement the theory" are not generally accepted in the scientific community. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 600-01, 260 P.3d 857 (2011); *see Frye*, 293 F. at 1014. General acceptability is not satisfied "if there is a significant dispute between qualified experts as to the validity of

scientific evidence." *State v. Kunze*, 97 Wn.App. 832, 853, 988 P.2d 977, *rev. denied*, 140 Wn.2d 1022 (2000)).

After a contested *Frye* hearing, the trial court concluded that "[h]ebephilia is not a generally accepted diagnosis in the psychological community." CP 1414. But the court ruled that the State could offer the same evidence if the State's evaluator called it "paraphilia NOS persistent sexual interest in pubescent aged females," even though the evaluator admitted this label was predicated on the same science as that underlying hebephilia. *Id.*; CP 344, 831. The court's nonsensical and erroneous ruling abdicated the court's gatekeeping role and let the jury commit Mr. Black based on novel science that is not generally accepted. The court exacerbated this incongruous ruling by prohibiting Mr. Black from mentioning "hebephilia" at trial and thus barring Mr. Black from equating the State's "paraphilia" diagnosis with hebephilia. CP 662, 1413-14; 6RP 520-21.

The court's rulings constrained Mr. Black's ability to debunk the State evaluator's opinion and credibility by drawing a parallel between hebephilia and paraphilia not otherwise specified (sexual interest in pubescent females) and using the controversy surrounding hebephilia to

cast doubt on the evaluator's expertise and validity of his opinions, even though the evaluator agreed he relied on the same studies.

The Court of Appeals declined to resolve the admissibility of the diagnosis that lacked scientific acceptance at trial and whether the trial court's ruling requires a new trial. If this Court grants review, it should also review whether the court misapplied the basic tenets of *Frye* by admitting a psychological diagnosis notwithstanding its simultaneous ruling that there was an inadequate scientific basis to admit same diagnosis if called a different name, and whether the court's ruling denied Mr. Black a fair trial.

4. If this Court grants review, it must also address the insufficient proof of the alternative means of commitment.

The Court of Appeals did not address whether the alternative means of commitment were premised on the required lack of volitional control because it was ordering a new trial on other grounds. Slip op. at 20. If review is granted, this issue also requires review.

The constitutionality of involuntary commitment hinges on a person having a mental abnormality or disorder that causes "an individual's inability to control his dangerousness." *Kansas v. Hendricks*, 521 U.S. 346, 360, 117 S. Ct. 2072, 138 L. Ed. 2d 501

(1997). Proof of "serious difficulty controlling sexually violent behavior" due to a mental disorder is essential. *Kansas v. Crane*, 534 U.S. 407, 414-15, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

Absent adequate evidence that Mr. Black had serious difficulty controlling his sexually offender behavior caused by a mental abnormality or personality disorder, reversal is required. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *In re Det. of Pouncy*, 144 Wn.App. 609, 620, 184 P.3d 651 (2008), *aff'd,* 168 Wn.2d 382, 229 P.3d 678 (2010). If an alternative means does not justify commitment, a new trial is required because the jury did not unanimously state its verdict. *In re Detention of Halgren*, 156 Wn.2d 795, 809, 132 P.2d 714 (2006).

The State's evaluator claimed Mr. Black had two distinct "mental abnormalities" based on different conduct: his conduct toward adolescent girls showed "paraphilia not otherwise specified sexual interest in pubescent females" and his conduct toward some adult women showed sexual sadism. 5RP 382. He also said Mr. Black had a "personality disorder not otherwise specified, with antisocial and narcissistic traits." 5RP 382. The jury did not specify the basis of its

verdict and was instructed it need not be unanimous as to which disorder it found. CP 1385, 1411.

Each purported diagnosis lacked the required proof that it caused Mr. Black serious difficulty controlling this behavior. *Crane*, 534 U.S. at 414-15. Even if he engaged in instances of "rough sex," he had long-term relationships with women and each recalled only two instances when he acted roughly, which does not demonstrate the necessary lack of control for sexual sadism to alone support commitment. 4RP 169-70, 293, 296, 298.

Similarly, he did not show uncontrollable urges toward young teenagers as necessary for the paraphilia diagnosis to be sufficient for the lack of volitional control. 6RP 525; 9RP 1082; 10RP 1103-04; 11RP 1342. And having a personality disorder does not predispose him to commit a sex offense, as New York's highest court held in *In re: Donald DD*, 21 N.E.3d 239, 250 (N.Y. 2014). A personality disorder only indicates "a general tendency toward criminality" without "a difficulty in controlling one's sexual behavior." *Id.* at 251. The inadequate proof of the disorders used as the alternative means to prove the necessary element of a lack of volitional control requires reversal of Mr. Black's commitment.

E. CONCLUSION

Based on the foregoing, Mr. Black respectfully requests that review be denied, or if granted, the Court also review the remaining issues not resolved by the Court of Appeals.

DATED this 3rd day of November 2015.

Respectfully submitted,

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Answer to Petition for Review and Cross-petition

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