NO. 30845-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

IN RE: DETENTION OF:

STEVEN RITTER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Because Mr. Ritter's involuntary commitment is premised almost exclusively on conduct occurring before he developed mature volitional control, it violates his substantive due process rights.

As set forth at length in Mr. Ritter's opening brief, his involuntary commitment is unconstitutional because it is based almost exclusively on conduct that occurred before he naturally developed volitional control. The State may indefinitely civilly commit an individual only if it shows a mental condition or personality disorder inhibits his volitional control to such an extent that it is more likely than not he will commit a sexually violent offense if released. We now know that volitional control is the last part of the brain to develop. Thus the State cannot adequately prove whether an immature individual's conduct derives from the natural, but fleeting, predisposition of juveniles to lack volitional control or from an entrenched mental abnormality. Mr. Ritter's commitment was premised on pre-maturity conduct. It should be reversed.

As it must, the State recognizes the "now widely accepted premise that the juvenile brain is not fully formed, and indeed appears to continue to develop until a person's mid-twenties." Resp. Br. at 15.

From there, however, the State's response to Mr. Ritter's argument is unfounded.

First, Mr. Ritter does not add a new requirement to the State's burden. The State relies on a single quote from Mr. Ritter's opening brief to argue "sustained impairment of volitional control" is a new standard invented by Mr. Ritter. Resp. Br. at 14. However, Mr. Ritter merely argues that the State cannot prove a respondent has "serious difficulty controlling behavior" where the evidence of lack of control predates the age of maturity. The "serious difficulty" cannot have been a static past occurrence; rather, the State is required to show a lack of volition control stems from a mental abnormality or personality disorder, and thus is a sustained condition.

Second, Mr. Ritter does not contend that the State can never rely on pre-maturity conduct. *See* Resp. Br. at 14, 15. Rather, a substantive due process violation occurs when the evidence derives solely from conduct occurring prior to mature brain development. As discussed in Mr. Ritter's opening brief, that is precisely the situation presented here. Mr. Ritter was confined at 19 years old based on a predicate offense committed when he was only 18. Exhibit 1.9 (judgment and sentence). Moreover, the State relied nearly exclusively on conduct from age 18

and prior to show Mr. Ritter was a pedophile with antisocial personality disorder and volitional impairment. Op. Br. at 19-21.

Further, as made clear in the opening brief, the legal definition of "juvenile" does not correspond with the extensive science on brain development. *See, e.g.*, Op. Br. at 10 n.3, 14, 22; Resp. Br. at 16 (arguing Mr. Ritter was not a juvenile when committed). Though in Washington an individual crosses a limited legal threshold when he or she turns 18, his or her brain does not instantly reach maturity on that date as well. Thus it is immaterial for purposes of substantive due process that Mr. Ritter had just turned 18 when he committed the predicate crime and was 19 when he was confined. Although he was not a juvenile in the eyes of the law, his brain had not fully matured. Critically, his capacity to exert volitional control remained physiologically impaired. He was a juvenile in the lay sense.

2. Mr. Ritter's involuntary commitment violates due process because it is premised upon a personality disorder diagnosis that is overbroad and insufficiently precise.

Mr. Ritter relies on his opening brief to demonstrate the antisocial personality disorder diagnosis is overbroad and insufficiently precise, requiring reversal of his unconstitutional commitment. Op. Br. at 24-34. By way of reply, Mr. Ritter notes that he was not diagnosed

with paraphilia NOS; the State's unsupported statement to the contrary is incorrect. *Compare* Resp. Br. at 19, n.9 *with* CP 965; RP 610-11, 723-24.

3. Statistical theories and actuarial instruments that are not generally accepted, have not been subject to peer review, are not helpful to the finder of fact, and are not reasonably relied upon by experts in the field should not have been admitted.

The State incorrectly asserts that Mr. Ritter waived any challenge to the admission of the State's statistical theories and actuarial instruments. The State appears to recognize that Mr. Ritter challenged the admission of the SRA: FV and requested a *Frye* hearing.[1] *See* Resp. Br. at 24-25. Indeed, by written motion, Mr. Ritter requested a *Frye* hearing and moved to exclude "any mention" of the SRA: FV assessment tool pursuant to *Frye* and Evidence Rules 401, 402, 403, 702, and 703. CP 633-70. Although cited in the opening brief, the State apparently ignores Mr. Ritter's written motion to exclude Dr. Arnold from testifying as to his assessment of Mr. Ritter's risk pursuant to the Static-99R and Static-2002R assessment tools. CP 725-35. In this motion, Mr. Ritter moved for exclusion under Evidence Rules 403, 404, 702, 703, and 704. Mr. Ritter also filed documents in

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

support of these motions from defense expert Dr. Richard Wollert, demonstrating the unreliability of the SRA: FV, the Static-99R and Mn-SOST-R. CP 820-43. Accordingly, Mr. Ritter adequately preserved his challenge to the State's reliance on the SRA: FV, the Static-99R and the MnSOST-R.

As it did at trial, the State argues *In re Det. of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003), forecloses Mr. Ritter's argument that the actuarial instruments and statistical theories do not satisfy *Frye*. Resp. Br. at 25-26. In *Thorell*, the Washington Supreme Court considered whether actuarial instruments may be admitted at commitment trials to aid in the prediction of future dangerousness. 149 Wn.2d at 753. The Court held the tests are generally admissible and not subject to *Frye* but are still subject to the strictures of ER 403, 702 and 703. *Id.* at 725-26. While the Court's holding is not explicitly limited, the decision cannot stand for the overly broad proposition that any statistical analysis deemed by its authors or subsequent users to be an "actuarial test" is per se not subject to *Frye*. Such a broad interpretation of *Thorell* would allow a plethora of unreliable evidence to come in under the guise of a generally accepted actuarial test. The tests and theories at issue here are not generally accepted in the field

and should be subject to *Frye*'s reliability standards. This Court should decline to apply *Thorell* as broadly as the State requests.

Because the trial court abused its discretion in admitting the SRA: FV, the Static-99R, and the MnSOST-R, Mr. Ritter's commitment should be reversed.

4. The preponderance of the evidence standard is constitutionally insufficient.

In Mr. Ritter's opening brief, he argued the commitment order should be reversed because it is premised on an unconstitutional preponderance of the evidence standard. *See* RCW 71.09.020(7) (emphasis added). The State implies in response that *Kansas v. Crane* forecloses this argument. Resp. Br. at 29; *Kansas v. Crane*, 534 U.S. 407, 412, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). The State's implication is misplaced. In *Crane*, the United States Supreme Court did not consider whether holding the State to a mere more likely than not standard as to one prerequisite for indefinite commitment unconstitutionally dilutes the burden of proof. That issue was neither before the Court nor addressed by it. *Crane* does not control.

Moreover, as set forth in Mr. Ritter's opening brief, the *Crane* Court's holding that involuntary commitment is unconstitutional absent a showing that a defendant has "serious difficulty" controlling

dangerous, sexually predatory behavior, strongly implies Washington's statute is deficient. *See Crane*, 534 U.S. at 413; *see also Thorell*, 149 Wn.2d at 735. The "serious difficulty" standard of *Crane* and *Thorell* is akin to the "highly probable" standard, not the "more likely than not" standard outlined in our statute. Consequently, this Court should hold that the "likely" and "more probably than not" standards of RCW 71.09.020 are unconstitutional.

B. CONCLUSION

Based on the numerous grounds set forth above and in Mr. Ritter's opening brief, whether viewed collectively or individually, Mr. Ritter's indefinite commitment violates due process and should be reversed.

DATED this 29th day of April, 2013.

Respectfully submitted,

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	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 30TH DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARAH SAPPINGTON, AAG OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] STEVEN RITTER SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF APRIL, 2013.

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