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NO. 71292-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF:

MARK BLACK

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

The State sought to indefinitely commit Mark Black at a trial marred by errors. The court conducted jury selection in his absence and over his objection when he was inadvertently not brought to court. After a *Frye* hearing, the court ruled that the scientific community had not accepted the methodology or premise of the diagnosis of "hebephilia" as a basis to commit Mr. Black but then said these same scientific failings did not apply if the psychologist called the diagnosis a different name. The State's evaluator was unable to articulate a reason why Mr. Black has serious difficulty controlling his behavior caused by a certain mental abnormality or personality disorder, a critical element of commitment. These errors undermine the verdict.

B. ASSIGNMENTS OF ERROR.

1. The court violated Mr. Black's right to be present during jury selection, contrary to the Fourteenth Amendment and article I, sections 3 and 21.

2. The court improperly admitted as expert opinion testimony that Mr. Black suffered from "paraphilia not otherwise specified, persistent sexual interest in pubescent females," even though it is not a generally accepted diagnosis in the relevant scientific community.

3. The court deprived Mr. Black of his ability to meaningfully challenge the State's allegations by ruling that the scientific controversy surrounding the validity and reliability of hebephilia did not extend to paraphilia not otherwise specified, persistent sexual interest in pubescent females.

4. The court erroneously entered unnumbered Findings of Fact that distinguished "hebephilia" from "paraphilia not otherwise specified, persistent sexual interest in pubescent females," and found this purported paraphilia is based on commonly accepted science. CP 1413.

5. The State did not prove and the jury did not unanimously find Mr. Black had a mental abnormality or personality disorder causing him serious difficulty controlling his sexually offending behavior.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A person facing involuntary confinement has the right to be present during jury selection so he may personally test the fitness of the jurors. When the jail failed to bring Mr. Black to court for jury selection, the court continued meeting with prospective jurors about their fitness to serve and excused numerous jurors from the case even though Mr. Black's lawyers told the court he did not waive his

presence. Did the court allow significant portions of jury selection to occur in Mr. Black's absence in violation of his right to be present?

2. Novel scientific evidence is inadmissible when it is not generally accepted in the relevant scientific community. The court ruled that "hebephilia" is an inadmissible diagnosis because it is not generally accepted in the scientific community, but it admitted a diagnosis premised on the same scientific evidence when given a different name. Did the court improperly use the guise of a different name to admit scientific evidence that was inadmissible due to its lack of general acceptance in the relevant scientific community?

3. A person facing civil commitment has the right to meaningfully challenge the evidence against him. The court ruled that "hebephilia" is a different diagnosis from "paraphilia not otherwise specified, persistent sexual interest in pubescent females," and barred Mr. Black from using the scientific controversy surrounding "hebephilia" to cast doubt on the State's case. Did the court deny Mr. Black his ability to meaningfully contest the State evaluator's diagnosis?

4. When the State presents alternative means that could independently meet the criteria for commitment but the jury's verdict

does not explain the means on which it agreed, each alternative must be supported by sufficient evidence. The State claimed Mr. Black had two distinct mental abnormalities and a personality disorder. It did not present sufficient evidence for the jury to rationally conclude that any disorder caused him serious difficulty controlling his behavior. Does the inadequate evidence of an essential element of commitment undermine the verdict?

D. STATEMENT OF THE CASE.

While in prison, Mark Black completed the lengthy and intensive sex offender treatment program at the Twin Rivers Correctional Center. 7RP 740-41; 10RP 1194, 1196.[1] Although initially reluctant to participate, he became deeply engaged in the treatment program, actively participated, developed close ties with others in the program, and relied on the group collaborative approach to change his behavior. 7RP 772-75; 10RP 1205, 1249; 11RP 1302, 1316, 1327, 1360. However, before he finished serving his sentence, the State filed a petition to commit him indefinitely under RCW ch. 71.09. CP 1-2.

[1] The verbatim report of proceedings (RP) of the trial proceedings are referred to by the volume number assigned to the consecutively paginated transcripts. All other transcripts are referred to by the date of the proceeding.

Before Mr. Black's jury trial, the court held a *Frye*[2] hearing on the admissibility of "hebephilia" as a psychological condition premised on 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. She described the debate among psychologists and psychiatrists who, as a scientific community, excluded hebephilia from the DSM-V.[3] 9/13/13RP 56-57, 60, 71-72. It was excluded because the only study of its validity had never been replicated and used faulty methodology. *Id.* at 60. It was also excluded because paraphilias involve deviant sexual interests, but it is common for adults to find young teenagers sexually attractive. *Id.* at 62, 93, 98. In some places, it remains common for a girl to marry at 13 years old. *Id.* at 68. Dr. Franklin explained that the scientific community has questioned both the methods used by those who believe hebephilia should be a recognized psychological condition and the theory that sexual attraction to young teenagers is a sexually deviant disorder. *Id.* at 74.

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

[3] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.2013).

Based on Dr. Franklin's testimony and lengthy documentation filed by both parties, the superior court ruled that hebephilia is not an admissible psychological diagnosis because it is not generally accepted in the relevant scientific community. CP 1412-13. However, the court ruled that hebephilia is different from paraphilia NOS, persistent sexual interest in pubescent females, with which the State's evaluator Dr. Arnold diagnosed Mr. Black. CP 1413. Dr. Arnold said his diagnosis was premised on the same science as that underlying hebephilia and he admitted he created this label to describe Mr. Black's mental status because hebephilia is not in the DSM-V. CP 839, 841-43; 9RP 944-45.

At the start of his jury trial, Mr. Black waived his right to be present for the first day of jury selection. 10/21/13RP 4. He requested to be brought to court to participate in the rest of jury selection and the trial, but the jail did not bring him to court due to an administrative oversight. 2RP 11-12. Even though his lawyers objected, the court continued with jury selection in Mr. Black's absence. 10/22/13RP 3-89. The judge individually questioned multiple jurors and dismissed 11 that day before adjourning so that Mr. Black could be present for the remainder or jury selection. 10/22/13RP 5-8, 22, 26-32, 34-43, 49-50, 61-69, 77.

During the trial, the jury heard conflicting accounts of whether Mr. Black had a mental abnormality or personality disorder causing him serious difficulty controlling his sexually violent behavior. Dr. Joseph Plaud testified that Mr. Black did not have a psychological condition meeting the criteria for commitment. 9RP 932-33, 838. He believed that while Mr. Black committed illegal acts and made bad choices, he did not display the necessary underlying sexual deviance required for a mental abnormality or personality disorder. 9RP 946, 951, 969-70.

Mr. Black committed sex offenses resulting in criminal convictions during two time periods. In the fall of 1995, he had non-forcible intercourse with a 13-year-old, Heather Paul, who was 5'8" and well-developed for her age, and sexual contact with a 14-year-old girl, Valerie Foster, who lied about her age. 4RP 212, 215, 219, 246, 249, 251, 257-58. Mr. Black was convicted and sentenced to prison. In the spring of 2003, he touched the chests of two girls, the 13-year-old daughter of his girlfriend and her friend. 6RP 682, 7RP 799, 801. He was convicted of two counts of child molestation and one count of attempted child molestation for these incidents. After serving his prison

sentence, the State filed a petition for civil commitment and he has not been released from confinement since his 2003 arrest.

The State's evaluator Dr. Arnold claimed Mr. Black had the mental abnormalities sexual sadism[4] and paraphilia not otherwise specified (persistent sexual interest in pubescent females), and personality disorder not otherwise specified (antisocial and narcissistic traits). 5RP 382. He said these disorders independently caused Mr. Black the inability to control his commission of sex offenses because he went to prison for such conduct yet committed another offense after his release. 5RP 445-46. It was undisputed that Mr. Black did not have pedophilia, which involves prepubescent children. 10/17/13RP 38; DSM-V at 697.

Mr. Black contended the knowledge he gained through sex offender treatment, along with three years of close monitoring by the Department of Corrections under threat of penal sanctions and his plans to live in a strictly run housing program would ensure community safety if released, but the jury found he met the criteria for commitment. 10 RP 1151-52, 1161; CP 1411.

E. ARGUMENT.

1. **The court denied Mr. Black his right to be present at trial and participate in a critical stage of proceedings.**

a. *Mr. Black had the right to be present during jury selection.*

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). Choosing a jury "is the primary means by which [to] enforce a 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). An accused person must be given the opportunity to tender advice or make suggestions to his or her lawyer when assessing potential jurors. *United States v. Gordon*, 829 F.3d 119, 124 (D.C. Cir. 1987). This right is particularly important when a person's "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, 13 S.Ct. 136, 36 L.Ed. 1011 (1892).

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[4] Mr. Black was never charged or convicted for any acts on which this diagnosis was based. The diagnosis is discussed in more detail in argument section 3(b)(i).

Because an indefinite commitment trial involves a substantial deprivation of liberty, it incorporates stricter protocols from criminal cases. Similar to a criminal case, the prosecuting agency bears the burden of proof beyond a reasonable doubt, the jury must unanimously agree to each essential element of commitment, and the person facing commitment has the right to court-appointed counsel if indigent. *See In re Detention of Young*, 122 Wn.2d 1, 48, 857 P.2d 396 (1993) (statutory scheme shows Legislature's "acute awareness of the need for heightened procedural protections in these proceedings"); *In re Detention of Halgren*, 156 Wn.2d 795, 809, 132 P.2d 714 (2006) (same "constitutionally prescribed unanimity requirement" as criminal cases); RCW 71.09.050 (granting rights to attorney, expert witnesses, and 12-person jury for RCW 71.09 trials); RCW 71.09.060 (burden of proving essential elements of commitment on State beyond a reasonable doubt).

The Fourteenth Amendment's due process clause provides litigants the "right to be present at a proceeding 'whenever [their] presence has a relation, reasonably substantial, to the fullness of [their] opportunity to defend against the charge.'" *State v. Irby*, 170 Wn.2d 874, 881, 246 P.3d 796 (2011) (quoting *Snyder v. Massachusetts,* 291

U.S. 97, 105–06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)); U.S. Const. amend. 14; Const. art. I, § 3.

Additionally, article I, section 21 broadly protects the right to trial by jury in criminal and civil cases. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 655, 771 P.2d 711 (1989). This right "carries with it the privilege to be present at the selection of the jury." *Harrington v. Decker*, 134 Vt. 259, 261, 356 A.2d 511, 512 (1976) (finding right to be present during jury selection in civil case based on state and federal constitutions); *see also Rozbicki v. Huybrechts*, 22 Conn.App. 131, 134-35, 576 A.2d 178, 179-80 (1990), *aff'd*, 218 Conn. 386, 589 A.2d 363 (1991) (right to be present during jury selection "applies with equal force to civil cases" because it is "equally important that a party be at his attorney's elbow during examination of prospective jurors").

In *Irby*, the attorneys and judge discussed the qualifications of several potential jurors in an email exchange occurring outside the defendant's presence and without him waiving his right to be present. 170 Wn.2d at 877-78. The judge and lawyers agreed to dismiss seven prospective jurors: four had been dismissed by the court administrator, two had scheduling concerns, and one appeared biased due to personal experiences based on questionnaire answers. *Id.* at 878. The Supreme

Court held that defendants have a right to be present when testing jurors' "fitness to serve as jurors in this particular case." *Id.* at 882. By discussing and dismissing potential jurors for substantive reasons without including Mr. Irby, he was denied his right to participate in a critical stage of the proceedings even though his lawyers participated in the selection process without objection. *Id.* at 883-84. A similar error occurred in the case at bar.

b. *The court held jury selection in Mr. Black's absence even though he requested to be present.*

Mr. Black was not brought to the courtroom for the second day of jury selection because the jail had not retained enough staff and refused to bring him. 2RP 11-12. At the start of that day's proceedings, Mr. Black's attorney informed the court that Mr. Black was not present and, although he had earlier waived his presence for the first day of jury selection, he had not "waived his presence from this point forward." CP 1430.

The court continued with jury selection despite Mr. Black's absence by individually questioning and dismissing jurors while waiting for the jail to provide more information about its failure to bring Mr. Black to court. *Id.* Mr. Black's attorney moved to recess the

proceedings until Mr. Black was brought to court but the court reserved ruling on this request. *Id*. The judge pressed Mr. Black's attorneys to waive his presence but his lawyers refused, 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.

After additional discussion, the judge told the jury panel that they were "not able to proceed" as she "had hoped and as everyone had expected." 10/22/13RP 60. 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*. She told the jurors that the delay was not the fault of "the people in the room" *Id*. at 60-61. Despite dismissing the majority of prospective jurors, the court continued individual voir dire, questioning four potential jurors and removing one for bias and two due to limited language skills. CP 1430; 10/22/13RP 64-89.

Mr. Black was brought to court the following day where he participated in the final day of jury selection. 10/23/13RP 3.

Mr. Black had the right to be present when the work of empanelling the jury began. *Irby*, 170 Wn.2d at 882. He did not waive

his right to be present during the process of jury selection on October 22, 2014. 10/22/13RP 51-52. By individually questioning and dismissing multiple jurors without Mr. Black's presence and despite his request to be present, the court violated his right to attend and participate in jury selection. *Irby*, 170 Wn.2d at 882. "[C]onducting jury selection in [Mr. Black's] absence was a violation of his right under the due process clause of the Fourteenth Amendment to the United States Constitution to be present at this critical stage of trial." *Id*. at 884.

c. *Denying Mr. Black his right to be present for jury selection prejudiced his ability to participate in choosing jurors.*

A violation of a person's right to be present is a constitutional error; "the burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt." *Irby*, 170 Wn.2d at 886.

In *Irby*, the Supreme Court reversed a murder conviction because several jurors had been dismissed by agreement of the lawyers and judge but without consulting the defendant. For the jurors excused in Irby's absence, "their alleged inability to serve was never tested by questioning in Irby's presence.... Had [those jurors] been subjected to questioning in Irby's presence ... the questioning might have revealed that one or more of these potential jurors were not prevented by reasons

of hardship from participating on Irby's jury." *Id.* Failing to let Mr. Irby participate in this part of jury selection was not harmless because the right to be present includes the right to personally test the fitness of the jurors. *Id.*

Mr. Black had not waived his presence when the court had detailed conversations with numerous potential jurors whose ability to serve was not tested in Mr. Black's presence. *See Irby*, 170 Wn.2d at 886. Two jurors dismissed in Mr. Black's absence had learned English as a second language. 10/22/13RP 79-82. The judge took both aside at the same time and said she was "concerned" that the parties would speak quickly. *Id.* at 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.[5] Without finding either juror's English skills disqualified them from service, and rather than wait and see how the jurors handled jury selection or get Mr. Black's perspective, the court concluded, "it might be too hard" 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

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

report to the administrator to see if there was another case on which they could serve. *Id.* at 82-83.

Three other jurors were dismissed based on their feelings about the allegations and a fourth juror was dismissed the following day based in part on her remarks during the voir dire session conducted in Mr. Black's absence. 10/22/13RP 5-8, 26-32, 34-43, 77; 10/23/13RP 51-57. Other jurors gave detailed descriptions of their feelings toward the case during individual questioning, particularly Juror 48, who was not dismissed despite Mr. Black's attorney's cause challenge. 10/22/13RP 22, 49-50. Additional jurors were dismissed jurors due to scheduling concerns. 10/22/13RP 58, 61, 65-66, 68-69.

A significant and substantive portion of jury selection occurred in Mr. Black's absence even though his lawyers told the court he wanted to be present and refused to waive his presence. The fundamental purpose of a litigant's right to be present during jury selection is to allow him or her to give advice or suggestions to counsel or even to supersede counsel's decisions. Here, because Mr. Black was not brought to court for this portion of jury selection, he was unable to exercise that right.

Mr. Black's absence also detrimentally affected the jurors' perception of him. At the outset of jury selection, the judge had highlighted Mr. Black's decision not to come to court that day and assured them he would be in court the next day. The judge told the prospective jurors that Mr. Black "did not want to be present today but he will be present tomorrow." 10/21/13RP 10. She reminded the jurors, "you haven't seen him yet," when asking all prospective jurors whether they knew him. *Id.* at 38. She repeated that Mr. Black was someone the jurors had "not met yet," when discussing how jurors would predict his likelihood of reoffending. *Id.* at 81.

Despite the court's promise that Mr. Black would be "present tomorrow," Mr. Black did not come to the courtroom the following day. After several hours of waiting, the judge told the jurors the "[v]ery bad news" that they could not conduct the planned proceedings. 10/22/13RP 60; *see also* 10/21/13RP 80 (directing all jurors to return at 8:45 a.m. for on-going jury selection); CP 1431 (clerk's minutes at 11:38 a.m., releasing jury panel "for the day . . . due to the inability of the jail to bring the Defendant to the courtroom").

The judge ambiguously told the jurors the unwanted delay was not the fault of any person "in the room." 10/22/13RP 60-61. Mr. Black

was conspicuously absent from the room despite the court's promise he would be present. The jurors would reasonably blame Mr. Black given the judge's obvious annoyance with an unnamed entity who was not present and who had "not responded in the way that I expected." *Id.*

During the trial, the jurors heard that Mr. Black had a personality disorder exemplified by a pattern of disregarding rules and being severely indifferent to the feelings of others. 5RP 391-93. The State claimed he was irresponsible and prided himself on acting deceitfully. 10/23/13RP 148; 5RP 385, 387, 391, 405. Jurors likely viewed his unexplained absence from court as a demonstration of his disregard for the impact his actions had on others.

Given the nature of the accusations against Mr. Black, the court unreasonably and prejudicially continued with jury selection in Mr. Black's absence. Failing bring him to court after promising to the jury that he would appear, conducting significant substantive portions of jury selection in his absence, and implying that his absence disrupted the ability of the trial to proceed, together show that the violation of his right to be present for jury selection was not harmless and requires reversal.

2. **The court correctly ruled the diagnosis of "hebephilia" was inadmissible due to insufficient scientific support but illogically admitted the same diagnosis under a different name based on the same faulty science**

a. *Scientific evidence is inadmissible when it does not have the general scientific acceptance required by Frye.*

In determining the reliability and admissibility of scientific evidence, Washington courts apply the *Frye* standard. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 600-01, 260 P.3d 857 (2011); *see Frye*, 293 F. at 1014. The trial court acts as gatekeeper, assessing the reliability and admissibility of expert testimony before permitting its admission. *Id*. at 600.

> Under *Frye,* expert testimony is admissible where: (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn.App. 168, 175, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014) (quoting *State v. Sipin,* 130 Wn.App. 403, 414, 123 P.3d 862 (2005)). "Both the theory underlying the evidence and the methodology used to implement the theory must be generally accepted

in the scientific community for evidence to be admissible under *Frye.*" *Id.* The court does not decide the correctness of the proposed expert testimony, but "whether the theory has achieved general acceptance in the appropriate scientific community." *Id.* at 175-76 (quoting *State v. Riker,* 123 Wn.2d 351, 359-60, 869 P.2d 43 (1994)).

"[T]he core concern . . . is only whether the evidence being offered is based on established scientific methodology." *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993). The reliability of the scientific methods "depends upon three factors: (1) the validity of the underlying principle, (2) the validity of the technique applying that principle, and (3) the proper application of the technique on a particular occasion." *Sipin*, 130 Wn.App. at 414-15 (citing *inter alia* Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half–Century Later,* 80 Colum. L.Rev. 1197, 1201 (1980)).

For example, in *Sipin*, the defendant moved to exclude the State's accident reconstruction expert's opinion about who was driving the car based on a computer generated simulation of the occupant's movements during the crash. 130 Wn.App. at 408. At a *Frye* hearing, the expert said he had used this same computer program for his testimony in other trials. The program was premised on established

laws of physics and mathematical equations. *Id.* at 408, 415. This Court held that for the results of a computer-generated simulation program to be admissible, it must be "generally accepted by the appropriate community of scientists to be valid for the purposes at issue in the case." *Id.* at 416.

Reviewing the evidence, the court found insufficient proof the program "has been validated, or is universally accepted by the relevant scientific community, as an accurate predictive model for the accident reconstruction used at trial." *Id.* at 419. While the State argued the evidence should be admitted and the jury could weigh the expert's testimony based on cross-examination, this Court held that the inadequate support among the scientific community rendered the expert testimony inadmissible under *Frye*. "[T]the relevant group of scientists have not reached consensus" as to the reliability of the method the expert used for his opinion on how the accident occurred. *Id.* at 420.

The reliability of the expert's method may not be based on his own practice. "It makes little sense to conclude that an expert could avoid the application of *Frye* simply by eschewing the use of any particular methodology or technique and purporting to rely only on their knowledge and experience." *Lake Chelan Shores Homeowners*,

176 Wn.App. at 181. Additionally, "the relevant inquiry is general acceptance by the scientists, not the courts." *Id.* at 176.

Full acceptance of a process in the relevant scientific community obviates the need for a *Frye* hearing. *Sipin*, 130 Wn.App. at 415. 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). (citing *Cauthron*, 120 Wn.2d at 887). The diagnosis of hebephilia is a matter of substantial dispute among the psychological community, with a disagreement extending to its name as well as its validity.

In addition, ERs 702 and 703 limit the introduction of expert testimony. Under rule 702, expert evidence may be admitted only if "helpful to the jury in understanding matters outside the competence of ordinary lay persons." *Anderson*, 172 Wn.2d at 600. Rule 703 requires that the facts or data relied on by an expert must be admissible into evidence unless they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

This court reviews a lower court's evidentiary rulings for an abuse of discretion. *E.g.*, *State v. George*, 150 Wn.App. 110, 117, 206

P.3d 697 (2009). However, admissibility of evidence under *Frye* is a mixed question of law and fact subject to de novo review. *Anderson*, 172 Wn.2d at 600 (citing *State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996)).

b. *The court correctly found that the State evaluator's diagnosis of hebephilia is not a reliably diagnosed psychological condition recognized by the scientific community.*

After a contested *Frye* hearing, the 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.

Hebephilia as a condition of sexual deviancy is "extremely novel and controversial" according to testifying psychologist Karen Franklin, whom the court found to have "considerable expertise" in "an area not

much studied." 9/13/13RP 39-40, 149; Supp. CP _, sub. no. 129[6] (Franklin Dec. at 1). It is called different names by different practitioners,[7] but whatever the label, as a mental disorder it has been "soundly rejected by the mainstream of organized psychiatry and forensic psychiatry." Franklin Decl. at 1. These failings apply to the name hebephilia as well as the label paraphilia not otherwise specified sexual interest in pubescent females. 9/13/13RP 35. The court illogically barred evidence of hebephilia under *Frye* but admitted the same evidence if called a novel type of paraphilia.

The diagnosis is novel. 9/13/13RP 39-40, 52. Dr. Franklin knew of no peer reviewed articles on hebephilia other than her article critiquing it. *Id.* at 37. The "construct" was formally rejected by the American Psychological Association in May 2013. Franklin Decl. at 15 It was excluded from the authoritative diagnostic manual, the DSM-V. Its controversial nature was conceded by the State's evaluator and extends to the field of psychologists and psychiatrists who work with

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[6] The Declaration of Karen Franklin, PhD., is attached as Exhibit 3 to the Motion to Exclude Evaluator's Diagnosis of "Hebephilia" and his Use of the SRA-FV. It will be referred to herein as "Franklin Decl."

A supplemental designation of clerk's papers was filed on November 3, 2014 but the superior court has not assigned page numbers to date.

sex offenders and those who work in forensic settings. Franklin Decl. at 18; CP 374. During academic conferences for the American Academy of Psychiatry and Law and International Association for the Treatment of Sexual Offenders, symbolic votes were taken regarding whether the DSM-V should include pedohebephilia, and in both cases an overwhelming majority voted against this. Franklin Decl. at 18.

The underlying methodology is novel and dubious. There have been no successful efforts to replicate the single study cited as evidence of the condition. 9/13/13RP 40, 69. Replication is a benchmark of reliable science, as well as a requirement under *Frye*. *Id.*; *see Sipin*, 130 Wn.App. at 414-15. The diagnosis "came out of left field" in 2009, when a group of psychologists measured sexual attraction to pubescent females by using the penile plethysmograph (PPG) but this single study has been condemned as "not reliable." 9/13/13RP 46, 60, 64-66; Franklin Decl. at 11-12; *see* Joseph Plaud, "Are There Hebephiles Among Us? A Response to Blanchard et al," Arch. Sex Behav. (2008) (critiquing methods used in study of hebephilia, including lack of

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[7] Different names used by professionals for the concept of attraction to pubescent children include epehebephilia, pedohebephilia, and paraphilia NOS (hebephilia). *See* Franklin Decl. at 5-8.

control group, lack of testing for sexual interest in older teenagers, absence of physiological measurements for comparison).

The lack of general acceptance is demonstrated by the sound rejection of hebephilia, under any name, as a reliably diagnosable condition after a concerted effort by some to include this disorder in the DSM-V. Although formal proposals to include hebephilia in the DSM-V were considered, the drafters of the DSM-V rejected any inclusion of hebephilia as a mental disorder. Franklin Decl. at 20-21. Its inclusion in the DSM-V was explicitly rejected when the psychologists and psychiatrists who work with sexual deviancies considered it. *Id.*; Allen Frances, M.D., DSM 5 in Distress, *Psychology Today* (Feb. 22, 2013). The subgroup of psychologists and psychiatrists authoring the sexually deviancy section of the DSM-V did not even relegate the psychological condition to the appendix for further study, as it did for other disorders meriting additional attention. Franklin Decl. at 20.

While an adult in this state acts illegally by engaging in sexual contact with an adolescent, psychologists generally agree that no reliable, valid scientific method shows this criminal behavior is the result of a mental disorder. Franklin Decl. at 6. Once a girl is maturing through puberty, she is not a prepubescent child and "attraction to that

child is not deviant." 9/13/13RP 67-68. Historically and culturally, girls were eligible to marry after the onset of puberty. *Id*. Social mores have shifted so women marry at older ages but this "cultural attitude shift" does not render sexual interest in a minor as a mental disorder. *Id*.

Scientists also criticize the lack of finite criteria which could define the parameters of the purported condition. 9/13/13RP 74. Even its proponents recognize that attraction to pubescent girls commonly occurs among adult males, but they say it is the degree of attraction that could change a common occurrence into a deviancy. Franklin Decl. at 22-23. But those proponents have no concrete definition of when commonplace sexual interest or attraction to girls of this level of maturity crosses the threshold of becoming deviant, beyond the fact that a person commits a crime. *Id*. at 23. Committing a crime may not be the defining criteria for a mental disorder, because that definition collapses the distinction between the civil and criminal realms that it critical to the constitutionality of civil commitment. *See Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (dangerousness alone insufficient basis for involuntary commitment).

Consensus in the courts is not the relevant consideration under *Frye*. *Lake Chelan Shores Homeowners*, 176 Wn.App. at 176. The

debate over hebephilia and similarly named disorders has also occurred in the courts. Some courts have refused to commit an individual on the basis of hebephilia. *United States v. Abregana*, 574 F. Supp. 2d 1145, 1154, 1159 (D. Haw. 2008) (finding government failed to prove diagnosis of paraphilia NOS (hebephilia) was a serious mental disorder). The Illinois Court of Appeals reversed a commitment order where the trial court had denied the detainee's motion for a *Frye* hearing on the admissibility of a hebephilia diagnosis. *In re Detention of New*, 992 N.E.2d 519, 529 (Ill.App.Ct. 2013). The highest court in New York issued a closely divided decision narrowly affirming involuntary commitment based on hebephilia where no *Frye* challenge was raised. *State v. Shannon S.*, 20 N.Y.3d 99, 107, 110-12, 980 N.E.2d 510 (2012), *cert. denied*, 133 S. Ct. 1500 (2013).[8]

Based on extensive evidence of recent disputes about the validity of hebephilia as a mental disorder and the lack of reliable methodology for diagnosing it, the court below correctly concluded that it was a controversial diagnosis lacking sufficient scientific support and

[8] In a recent ruling, the New York Court of Appeals emphasized that it did not decide in *Shannon S.*, "whether the diagnosis of paraphilia NOS, as testified to by the State's experts, has received general acceptance in the psychiatric community [because] no *Frye* hearing was requested or held." *State*

was therefore inadmissible under *Frye*. But the court admitted the evidence under a different name which undermined its ruling and left Mr. Black unable to meaningfully challenge the State's evaluator's methods and diagnosis.

c. *The State's evaluator agreed that paraphilia NOS interest in pubescent girls is a different name for hebephilia and is based on the same scientific theory*

The State's evaluator Dr. Arnold admitted he used the term "paraphilia NOS" with the specifier of sexually attracted to pubescent-aged females "because hebephilia is not listed in the DSM." CP 830. The labels were interchangeable to him and "the underlying concept is the same." CP 827, 830. As a methodology, he said "the underlying construct is the same." CP 843. Dr. Arnold relied on the same research that was unsuccessfully presented to the DSM authorities when they rejected its inclusion as a listed paraphilia in the DSM-V. CP 841. Because they are premised on the same claims, Dr. Arnold's testimony referred to the condition at times as "hebephilia" and admitted the "interest in pubescent girls" specifier he attached had not been studied in the literature. 5RP 380, 381; 6RP 521.

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v. Donald DD., _ N.Y.3d _, 2014 WL 5430562, Slip op. at 17 (N.Y. 2014).

Dr. Arnold conceded that there was no research based on the "interest in pubescent girls" descriptor he used to turn his diagnosis into a paraphilia. CP 839. His diagnosis was not premised on any different scientific evidence or methods other than the criticisms the court heard of hebephilia. CP 842-43. He admitted he personally and uniquely created this diagnostic label for Mr. Black. CP 839. As this Court explained in *Lake Chelan Shores Homeowners*, an expert's method does not withstand the *Frye* test when based on his own practice. 176 Wn.App. at 181. Dr. Arnold's diagnosis was based on the same science the judge found insufficient under *Frye* wrapped in Dr. Arnold's uniquely created label, which is not enough to satisfy *Frye*'s requirements.

The court conclusorily found that Dr. Arnold used methods reasonably relied upon by the professional community without specifying what those methods are or how they are distinct from the inadequacy of hebephilia, which the court found to be marred by "insufficient testing, re-testing and peer reviewed journals." CP 1413. The court denied Mr. Black's motion to reconsider when he pointed out the incongruity of the court's ruling. CP 823-24, 830, 832, 834-35.

The court's ruling seemed to be based on a flawed comparison with pedophilia, which is a recognized, accepted diagnosis involving "recurrent, intense" sexual activities or fantasies "with a prepubescent child or children (generally age 13 years or younger)." DSM-V at 697. Pedophilia is a paraphilic disorder in the DSM-V. *Id*. The onset of a child's puberty distinguishes pedophilia from other disorders. *Id*. The court illogically decided if pedophilia is generally accepted and reliably diagnosed, so should other conditions involving older children. CP 1413. But whatever the name, hebephilia or paraphilia not otherwise specified (pubescent females) suffer from the same methodological inadequacies and lack of scientific acceptance. CP 1412-13.

Mr. Black did not have pedophilia. 10/17/13RP 38. There was no evidence he was attracted to prepubescent children, which is an essential component of pedophilia. DSM-V at 697. Although there may be age overlap between the listed criteria for pedophilia and hebephilia, this overlap only occurs because children reach puberty at different ages. Regardless of whether a child enters puberty at nine or 13 years old, Mr. Black was not alleged to have a persistent sexual interest in any child who had not entered puberty. The reliability of hebephilia cannot be bootstrapped onto the reliability of pedophilia when Mr.

Black did not have pedophilia and hebephilia is widely criticized as unreliable and of questionable validity as a mental disorder.

d. *The court's erroneous Frye ruling undermined the fairness of the proceedings.*

When a judge erroneously admits evidence, a new trial is necessary "where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French,* 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). The heightened procedural protections accorded a person facing long term civil commitment under RCW 71.09 reflect the massive curtailment of liberty at stake and the corollary importance of ensuring a full and meaningful opportunity to defend against the allegations. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); *In re Detention of Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. 14; Wash. Const. art, I, § 3.

Due to the court's illogical and incorrect *Frye* ruling, the State claimed Mr. Black had a psychological disorder that is not generally accepted in the relevant scientific community and turned it into a mental abnormality under RCW 71.09. Not only did the diagnosis fail

the *Frye* test for admissibility, it was not helpful to the jury as required by ER 702 and ER 703.

The court's ruling hampered Mr. Black's ability to challenge the State evaluator's diagnosis, which was essential to his ability to defend against the allegations he met the criteria for commitment. He could not attack the diagnosis as "hebephilia" because the court had ruled they were different diagnoses and the latter did not suffer the reliability failings of the former. CP 1413-14. The State moved to exclude the mere mention of hebephilia based on the court's *Frye* ruling, which constrained Mr. Black's cross-examination and sheltered the State from having its diagnosis challenged based on the lack of general consensus for hebephilia. CP 662 (moving to prohibit Mr. Black from "mentioning" hebephilia, "cross-examining Dr. Arnold regarding Hebephilia or suggesting that Dr. Arnold was trying to 'back door' in such a diagnosis through his diagnosis of paraphilia NOS"); 6RP 520-21 (State objected as violation of "pretrial order" when Mr. Black asked Dr. Arnold if there was "professional debate" about regarding this disorder).

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. Cross-examination would have been effective, as demonstrated by Mr. Black's ability to convince the court to exclude hebephilia by presenting evidence that the scientific community had rejected its validity and reliability.

The State plainly relied on the claimed mental abnormality of paraphilia not otherwise specified (sexual interest in pubescent females) as the basis of its commitment and made it a focal point of its case. 5RP 379-81, 429-35, 441-42; 12RP 1539-40, 1543-44. Had the court found the diagnosis inadmissible, it would have changed the tactics and substance of the evidence before the jury. Mr. Black should have been able to challenge the State's principal witness based on his controversial diagnosis and the unreliable science surrounding hebephilia when the evaluator admitted the same science underlied both labels. The court's *Frye* ruling materially affected the outcome of the case and denied Mr. Black the ability to meaningfully challenge a key

aspect of the State's case, which requires a new trial. *See In re Det. of Post*, 170 Wn.2d 302, 314, 241 P.3d 1234 (2010).

3. The State did not prove and the jury did not unanimously find that the claimed psychological disorders caused Mr. Black serious difficulty controlling his behavior

a. *Mr. Black had the right to a unanimous jury verdict based on proven mental disorders*

"[A] unanimous jury verdict in an SVP case is both a constitutional and a statutory right." *In re Det. of Aston*, 161 Wn.App. 824, 840, 251 P.3d 917 (2011) (citing *Halgren,* 156 Wn.2d at 809-11); *see also Schad v. Arizona*, 501 U.S. 624, 635 n.5, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (unanimity required by principles of due process); RCW 71.09.060(1) (fact-finder "shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.... When the determination is made by a jury, the verdict must be unanimous").

Whether an accused person has a mental abnormality and personality disorder "are two distinct means of establishing the mental illness element" in RCW 71.09 commitment cases. *Halgren*, 156 Wn.2d at 811. Where the State alleges both a mental abnormality and a personality disorder, the constitutional right to jury unanimity requires the State to obtain a unanimous jury verdict as to either distinct means.

See Halgren, 156 Wn.2d at 811. If the State has not presented evidence from which a rational juror could conclude one of the alternative means was proven beyond a reasonable doubt, reversal is required. *In re Det. of Pouncy*, 144 Wn. App. 609, 620, 184 P.3d 651 (2008), *aff'd on other grounds*, 168 Wn.2d 382, 229 P.3d 678 (2010).

b. *The State did not prove each of the alternative means caused the lack of volitional control constitutionally required for civil commitment*

The constitutionality of involuntary commitment hinges on a person having a mental abnormality resulting in "an individual's inability to control his dangerousness." *Hendricks*, 521 U.S. at 360. Proof of "serious difficulty controlling sexually violent behavior" is an essential element. *Kansas v. Crane*, 534 U.S. 407, 414-15, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

Mental abnormality is defined 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.

RCW 71.09.020(8). A mental abnormality must cause a person "serious difficulty in controlling his sexually violent behavior." CP 1385.

The State's evaluator claimed Mr. Black had two distinct "mental abnormalities" predicated on different conduct. He claimed that Mr. Black's conduct toward adolescent girls showed "hebephilia," also called "paraphilia not otherwise specified sexual interest in pubescent females"; and his occasional conduct toward some adult women showed the separate disorder of sexual sadism. 5RP 382. He also believed Mr. Black had a "personality disorder not otherwise specified, with antisocial and narcissistic traits." 5RP 382. He said each alone caused Mr. Black serious difficulty controlling his sexually violent behavior. 5RP 444-45.

The jury did not specify the basis of its verdict. CP 1411. It was instructed its verdict must be unanimous, but it

> need not be unanimous as to whether a mental abnormality or personality disorder has been proven beyond a reasonable doubt so long as each juror finds at least one of these alternative means has been proved beyond a reasonable doubt.

CP 1385 (Instruction 5). Based on this instruction and the absence of a special verdict form explaining the jury's verdict, there must be substantial evidence in the record supporting the alternative means of mental abnormality and personality disorder. While unanimity is not required for the multiple mental abnormalities alleged, there must be

evidence from which a rational trier of fact could have concluded at least one mental abnormality was established in order for the State to satisfy its due process obligation. *See 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).

i. *The sexual sadism allegation did not meet the essential elements of a mental abnormality causing serious difficulty controlling sexually violent behavior.*

Dr. Arnold diagnosed Mr. Black with sexual sadism premised on incidents of "rough sex" with four age-appropriate adult women whom Mr. Black dated. Sexual sadism requires: (1) recurrent and intense sexual arousal from the physical or psychological suffering of another person, and (2) acting on these urges against a "nonconsenting person" or having urges that cause clinically significant distress in important areas of functioning. *DSM-V* at 695.

Dr. Arnold agreed that if consensual, Mr. Black's acts would not constitute a mental disorder. 6RP 496. Pinching, slapping, threats of violence, even asphyxiation can be consensual activity that is not a sexual disorder. 6RP 498-99. The disorder is, however, premised on a person's intense interest in another person's suffering, which is

nonconsensual or causes significant distress. 5RP 505; 9RP 9951, 954-55. Mr. Black's partners had either tried to please Mr. Black by not objecting or remained silent. 5RP 437-38. Because Mr. Black's partners did not clearly communicate their lack of consent, Dr. Arnold concluded that sexual sadism only applied to Mr. Black under the more nebulous prong of causing him distress in his life. 5RP 439; 6RP 500. Dr. Arnold reasoned that because his aggressive sexual acts resulted in conflict with his partners, it caused the distress required to diagnose this disorder. 5RP 439; 6RP 500.

But even if Mr. Black could be diagnosed with sexual sadism, this diagnosis only meets the requirements of a mental abnormality necessary for commitment if it caused him serious difficulty controlling this behavior. *Crane*, 534 U.S. at 414-15; *Thorell*, 149 Wn.2d at 735 ("*Crane* requires" jury finding that person has "serious difficulty controlling dangerous, sexually predatory behavior" to be committed).

Dr. Arnold could not explain how this disorder caused Mr. Black serious difficulty controlling his sexually sadistic behavior. 5RP 442-45. Mr. Black had consensual relationships lasting several months with Michelle Black and Dawn Thompson but both recalled only two instances when he acted roughly, which occurred toward the end of

their relationships. 4RP 169-70, 293, 296, 298. He did not try to repeatedly engage them in acts of nonconsensual suffering. His relationship with Brenna Denkinger lasted several months before he engaged in any physically rough acts toward her. 4RP 321, 340. Although he was violent with her on more than one occasion, she pretended to enjoy it and had encouraged it at the outset. 4RP 345.

Dr. Arnold's explanation of how the largely isolated past acts underlying the alleged sadism caused Mr. Black serious difficulty in keeping himself from committing future sexually violent, predatory acts was factually incorrect. He said Mr. Black showed lack of volitional control by having done the same thing after getting convicted of it, yet Mr. Black was never charged or convicted of acts involving sexual sadism. 5RP 442-43, 445. There is no factual support for Dr. Arnold's claim. Without competent evidence that sexual sadism caused Mr. Black serious difficulty controlling this behavior, this alternative mental abnormality may not be a basis for commitment.

ii. *Mr. Black's actions toward teenaged girls did not constitute a mental abnormality over which he lacked volitional control.*

Alternatively, if the diagnosis of paraphilia NOS sexual interest in pubescent females is admissible, the State did not prove that Mr.

Black lacked the ability to control his interest in young teens as required to establish a mental abnormality under the statute. While he took advantage of teenagers who trusted him, he exhibited control over these behaviors. He did not compulsively view child pornography, lurk near children's hangouts, or indiscriminately grope teenagers as might be hallmarks of uncontrollable urges. 6RP 524-25. Instead of uncontrollable urges, Mr. Black's conduct shows he selected teenagers he thought would be easier to manipulate due to youth and naivety and with whom he identified because he was immature and they liked the same videogames. 6RP 525; 9RP 1082; 10RP 1103-04; 11RP 1342.

Dr. Arnold claimed Mr. Black lacked volitional control because he committed crimes against girls after being released from prison for sexual conduct with two teenagers. 5RP 442-43, 445. But a mental disorder must cause a person such difficulty controlling his behavior that it distinguishes him "from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413. "This distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'" which are functions of criminal law and not civil commitment. *Id.* at 412 (quoting *Hendricks*, 521 U.S.

at 573 (Kennedy, J., concurring)). Criminal recidivism alone is an invalid basis for civil commitment.

Dr. Arnold's opinion was also based on a fundamental misunderstanding of the lack of volitional control required for civil commitment. He said this disorder affected Mr. Black's volitional control because his "sexual wants" interfered with his plans to be out of custody, which showed the disorder was "interfering with his volitional control in that capacity." 5RP 445. Employing circular logic, Dr. Arnold believed that going to prison showed Mr. Black lacked volitional control. *Id*. But going to prison is the repercussion imposed for a crime, not proof of an internal inability to control one's behavior. By failing to prove the purported mental abnormality caused Mr. Black serious difficulty controlling this offending behavior, the State did not prove the essential elements of commitment based on this alternative means.

iii. *The alleged personality disorder did not predispose Mr. Black to have serious difficulty controlling his sexually dangerous behavior.*

Personality disorders are common among people in prison because they are largely based on a person's failure to follow rules, impulsivity, and disregard for societal behavioral norms. 6RP 533. Civil

commitment is unconstitutional if it is premised on person whose danger is merely because he is a recidivist in a criminal case. *Crane*, 534 U.S. at 413.

Assuming that Mr. Black had a "personality disorder not otherwise specified (antisocial and narcissistic traits)," as Dr. Arnold claimed, this disorder is an insufficient basis for civil commitment unless it caused Mr. Black serious difficulty controlling his commission of sexually dangerous behavior.

A personality disorder is not a sexual disorder and does not alone show a predisposition to commit a sex offense. *In re: Donald DD*, Slip op. at 22. Antisocial personality disorder "simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary case." *Id.* It shows "a general tendency toward criminality, and has no necessary relationship to a difficulty in controlling one's sexual behavior." *Id.* at 24. A serious difficulty controlling sexually offending conduct "cannot consist of such meager material as that a sex offender did not make efforts to avoid arrest and reincarceration." *Id.* at 19.

In *Donald DD*, the highest court in New York reversed a sex offender civil commitment based on antisocial personality disorder

because it is not a condition that predisposes a person to lack control over committing sex offenses. *Id.* at 20-21, 24. It also reversed the commitment in the consolidated case of Kenneth T. who was diagnosed with antisocial personality disorder and paraphilia NOS (nonconsent). In Kenneth T.'s case, the court found insufficient evidence he had serious difficulty controlling his behavior when the State merely alleged he had committed similar crimes despite being arrested and incarcerated between the offenses and he had not hidden his identity from his victims. *Id.* at 18-19. The court held that a person's knowledge of the risk of imprisonment would "rarely if ever" be enough to conclude that the perpetrator lacked control over his behavior as opposed to simply deciding to run the risk of arrest. *Id.* at 19.

Dr. Arnold offered no explanation of how the personality disorder he said Mr. Black had caused an inability to control sexually dangerous behavior. He only said that because Mr. Black had been incarcerated for acts against pubescent girls and reoffended, he must lack control. 5RP 444-45. Merely committing similar offenses more than once does not show the offender is unable to control predatory sexual conduct due to a personality disorder, as explained in *Crane* and affirmed in *Donald DD*. It is unconstitutional to involuntarily commit a

person simply because he reoffends and is caught. The State's failure to provide a rational basis to conclude that the personality disorder caused Mr. Black to lack control over his commission of sex offenses undermines this alternative means of his commitment.

c. *The inadequate proof of valid alternative means justifying civil commitment requires reversal.*

In order to prove Mr. Black could be committed under RCW 71.09, the State had to show he suffered from either a mental abnormality or a personality disorder. *Pouncy*, 168 Wn.2d at 391. "We have no way of knowing from the verdict whether the jury found" that Mr. Black "suffered from a mental abnormality or a personality disorder." *Id*. at 391-92. Dr. Arnold claimed that all three purported conditions would separately meet the criteria for commitment, while Dr. Plaud did not believe Mr. Black had either any mental abnormality or personality disorder. The State did not elect any particular basis for commitment in its closing argument. The jury was told it need not be unanimous in finding one particular mental abnormality or personality disorder caused Mr. Black to be unable to control his offending behavior and it is impossible to guess the basis of the jury's verdict.

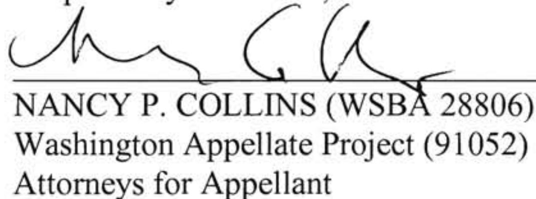
The State did not offer adequate evidence that Mr. Black had serious difficulty controlling his sexually offender behavior caused by a mental abnormality or personality disorder, which requires reversal of his commitment. Even if any of the alternative means could justify commitment, the insufficient evidence of any of the means presented to the jury requires a new trial because the jury did not specify the basis of its verdict. *See Pouncy*, 168 Wn.2d at 391-92.

F. CONCLUSION.

Mr. Black's commitment should be reversed and the petition dismissed due to insufficient evidence that a legally valid disorder caused the inability to control his behavior, or alternatively, a new trial ordered.

DATED this 14th day of November 2014.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

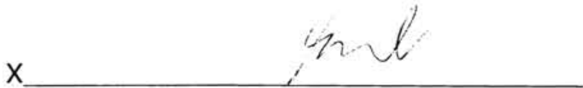
IN RE THE DETENTION OF	)	
	)	
	)	
MARK BLACK,	)	NO. 71292-6-I
	)	
	)	
APPELLANT.	)	
	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREA VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE SVP UNIT KING COUNTY ADMINISTRATION BLDG. 500 FOURTH AVENUE, 9TH FLR SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________
[X] MARK BLACK SPECIAL COMMITMENT CENTER PO BOX 881000 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF NOVEMBER, 2014.



X____________________________

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