NO. 72306-5-I

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

CALVIN MALONE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE'S ANSWER TO PETITION FOR REVEIW

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I. INTRODUCTION

Calvin Malone is a compulsive predatory sex offender who organized his life around gaining access to young victims. Over a period of roughly 22 years, Malone victimized more than 50 children ranging in age from 11 to 16. Malone was committed as a Sexually Violent Predator in 2014 by a unanimous jury. Malone now seeks review of the May 30, 2017, unpublished decision of the Court of Appeals, *In re Det. of Malone,* No. 72306-5, 2017 WL 2335811 (Wash. Ct. App. May 30, 2017) (hereafter, opinion) affirming his commitment.

Malone fails to demonstrate that the Court of Appeals' decision warrants review under any of the considerations listed in RAP 13.4(b). The Court of Appeals properly analyzed each of Malone's claims using guidance provided by this Court's authority. Malone first argues the Court of Appeals erred by failing to consider the merits of his claim that his diagnosis of Otherwise Specified Paraphilic Disorder, Nonconsent[1] was not admissible under *Frye.*[2] Yet, he is unable to properly demonstrate how the Court of Appeals' decision that he failed to preserve the issue is in conflict

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[1] Malone erroneously refers to Dr. Phenix's diagnosis as Hebephilia throughout the briefing. Though Dr. Phenix acknowledges that researchers have called this pathology Hebephilia, Dr. Phenix assigned Other Specified Paraphilic Disorder, Nonconsent in accord with the guidelines found in the DSM-V when the disorder is not one of eight specific categories. Trial RP at 266-67; Trial RP at 496.

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

with any prior decision of this Court warranting review under RAP 13.4(b)(1).

Because this Court has previously provided significant guidance regarding the admissibility of psychological opinions in the sexual predator context, Malone's next claim that further guidance is needed regarding the admissibility of Otherwise Specified Paraphilic Disorder also fails as he is unable to demonstrate that his petition involves an issue of substantial public interest warranting review under RAP 14.3(b)(4).

The Court of Appeals also properly analyzed Malone's claim of ineffective assistance of counsel using the test provided by this Court. Though Malone disagrees with the Court of Appeals' decision, he is unable to show how its decision is in conflict with prior decisions of this Court or the Court of Appeals to warrant review under RAP 13.4(b)(1) or (b)(2).

Malone also claims the trial court erred by failing to give a jury instruction defining a "recent overt act," and that the Prosecutor committed prosecutorial misconduct by disparaging opposing counsel. In petitioning this Court for review, he claims these issues are of significant constitutional magnitude and of substantial public interest. However, his petition fails to demonstrate how the issues rise to a level warranting review under RAP 13.4(b)(3) or (b)(4).

The remaining issues under which Malone petitions are not properly before this Court. Malone fails to demonstrate why this Court should grant review under RAP 13.4.

II. COUNTERSTATEMENT OF THE ISSUES

There is no basis for this Court's review of the Court of Appeals' decision pursuant to RAP 13.4. If review were to be granted, the issues on appeal would be:

A. **Was the testimony of the State's expert properly admitted where that expert has extensive expertise in the diagnosis of sex offenders and the evaluation of persons under RCW 71.09, and where she testified regarding an established diagnostic category in the DSM-V?**

B. **Has Malone shown ineffective assistance of counsel for failing to raise a *Frye* challenge where trial counsel properly moved to exclude the expert's testimony pursuant to ER 702 and 703, and where he fails to show any prejudice because he suffers from another mental disorder that forms the basis of his commitment?**

C. **Did the trial court err by not giving a specific definitional instruction of a "recent overt act" when it was not an element of the case, Malone was fully able to argue his theory of the case based on the given jury instructions, and no other theories regarding recent overt acts were supported by the evidence?**

D. **Where Malone failed to object at trial, has he shown that the prosecutor's comments in closing argument correcting several misstatements by opposing counsel were so flagrant and ill-intentioned that that no instruction could have cured any resulting prejudice?**

III. COUNTERSTATEMENT OF THE CASE

Calvin Malone is a 66-year old compulsive child molester whose sexual interests include boys ranging from roughly 11 to age 16. He began offending against young boys when he himself was only 19, and continued until 1993, when he was convicted of 1st Degree Rape of a Child and Child Molestation based on his numerous sexual assaults of an 11-year old boy. Trial RP at 247.[3]

At trial, in addition to various lay witnesses including Malone's victims, the State presented the testimony of Amy Phenix, Ph. D. (Trial RP 225 – 398, 432 – 503, 560 – 602, 612 – 810, 816 - 865). Dr. Phenix testified that Malone suffered from two different paraphilic, or sexual, disorders: Pedophilic Disorder Sexually Attracted to Males, Non-Exclusive; and Other Specified Paraphilic Disorder, Nonconsent. Trial RP at 249. The term "paraphilia" comes from the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V)[4], a classification manual of psychiatric and psychological disorders. Trial RP at 250. Paraphilias, she explained, generally involve intense, recurrent, sexually arousing fantasies, urges, and

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[3]The eight volumes of trial VRPs are numbered from 1 to 1486, but the post-trial hearings are each numbered anew and begin on the first day of the relevant proceeding. For example: the trial VRP cited as "Trial RP at ____" number but the post-trial VRP by date and the page number for that day, e.g. "9-5-2014 RP at ___".

[4]American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.) (DSM-V-TR)

behaviors that are abnormal, that persist for more than six months (Trial RP at 255) and involve children or other non-consenting persons. Trial RP at 251-52. Malone, in addition to these paraphilic disorders, also suffered from Opioid Use Disorder. Trial RP at 271-72. While in the military, between 1971 and 1974, Malone was injecting heroin. Trial RP at 271. He also used alcohol, marijuana, amphetamines, and "almost everything that was available." Trial RP at 271.

Dr. Phenix testified that Malone's Pedophilic Disorder involves intense, sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child, generally defined as a child under 13. Trial RP at 257. This disorder, she explained, relates very specifically to children who have no secondary sexual characteristics, which, in the case of boys, refers to pubic hair and the enlargement of the testes and penis. Trial RP at 257-58. Dr. Phenix also testified that Malone suffers from another sexual disorder, Other Specified Paraphilic Disorder. Trial RP at 265. This, too, is a category included in the DSM-V. Trial RP at 265 - 66. As Dr. Phenix explained, not every individual with abnormal sexual arousal fits neatly into the specific categories under a paraphilia in the DSM-V. Thus, "when there is an individual with an abnormal sexual arousal pattern over at least a six-month period of time and there's no specific descriptor in the paraphilia chapter," this category would be used. Trial RP at 266. While

Pedophilic Disorder applies exclusively to sexual arousal to prepubescent children, "it's quite common for individuals who have pedophilic disorder to also be sexually aroused to young teenage boys and boys going through and just reaching pubescence." Trial RP at 267.

In assigning her diagnoses, Dr. Phenix considered Malone's own statements to the effect that he is aroused to boys as young as 11 and his extensive history of sexual offenses against boys ages 11-15. Trial RP at 262. In addition, his pattern of offending, she testified, provides "conclusive evidence "that he is aroused not only to prepubescent boys, but to pubescent boys of 13 and 14, and to post pubescent boys of 15 and 16." Trial RP at 263. Sometimes, she noted, "the victim choice depended upon what boys were available." Trial RP at 263. To this diagnosis, Dr. Phenix added the descriptor "nonconsent," indicating that his arousal was to non-consenting victims. Trial RP at 267-68. These victims were regarded as non-consenting both because, as children, they cannot legally consent, and because they did not engage in sexual activity "because that's something that they decided that they wanted to do." Trial RP at 268. Malone, Dr. Phenix explained, "would groom them, desensitize them to sexual activity, and use his authority, authority that he was knowledgeable in karate or things that could hurt them. So fear and authority to essentially force these children into sexual activity." Trial RP at 268.

In explaining the relationship of Malone's diagnoses to his sexual offending, Dr. Phenix explained that the two paraphilias diagnosed—Pedophilic Disorder Sexually Attracted to Males, Non-Exclusive; and Other Specified Paraphilic Disorder, Nonconsent – function as the "driving force" behind his sexual offending, "creating sexual urges and fantasies to act out those particular behaviors." Trial RP at 272. The Opioid Disorder, on the other hand, serves as a "disinhibitor," allowing Malone to act on his deviant impulses. Trial RP at 272. All of these conditions are mental abnormalities under RCW 71.09.020(8). Trial RP at 291-92.

Prior to closing arguments, Malone asked that the jury be instructed as to the definition of "recent overt act."[5] At trial, there was no evidence offered from either party, including Malone's testimony, that Malone had ever even heard the term "recent overt act," much less that it would somehow affect his actions or decision-making in the community. The only evidence admitted at trial regarding "recent overt acts" was admitted during the State's *rebuttal* case, and even then only the actual definition was mentioned. Trial RP at 1193. The court declined to provide the definition of "recent overt act" in the jury instructions, but did instruct the jury that

[5] Because Malone was in custody on a sexually violent offense at the time the State filed the SVP petition, a "recent overt act" allegation was not required. RCW 71.09.030(1)

evidence that bears upon release conditions can be considered when assessing future dangerousness. CP 111. Malone argued his theory about "recent overt acts" in his closing arguments at least two separate times. Trial RP 1434; 1438-1439.

Additionally, during closing arguments, Malone argued a number of points that were not supported by the record. Trial RP at 1421-1430. Many of these arguments pertained to the testimony of expert witnesses, learned treatises and scientific data that was presented to the jury. Trial RP at 1421-1430.

The State argued that Malone's closing argument misdirected the jury from the admitted evidence. In support, the State directed the jury to the actual evidence in the record. Trial RP at 1444.The prosecutor tied every allegation of misdirection and omission of key facts to specific points in the record. Trial RP at 1444-1450. Malone did not object to any of the portions of the rebuttal closing that he now claims are reversible misconduct.

The jury returned a verdict that Malone is a sexually violent predator. Trial RP at 1481. On appeal, Malone argued that Dr. Phenix's diagnosis of Other Specified Paraphilic Disorder should have been excluded under *Frye* or in the alternative, Malone's counsel was ineffective for failing to request a *Frye* hearing. He also argued in the alternative to the first two, that the diagnosis should have been excluded under ER 702 and 703.

Properly applying guidance and decisions previously provided by this Court, the Court of Appeals affirmed, holding that Malone failed to preserve the *Frye* challenge for appeal. *Opinion* at 8. Distinguishing Malone from *Post*[6], the Court of Appeals also held that the admission of the diagnosis did not prejudice Malone. *Opinion* at 12.

On appeal, Malone also argued that even though he did not testify that his behavior in the community would be restrained by the recent overt act law, or that he was even aware of the doctrine, the jury should have been instructed as to the definition of "recent overt act." The Court of Appeals found the issue involved a question of fact and properly applied prior decisions of this Court in analyzing the issue.

Malone also argued that the prosecutor committed prosecutorial misconduct by disparaging the defense in rebuttal. However, Malone did not object to any of the portions of rebuttal at issue. Trial RP at 1444-63. By failing to object to an improper remark, the issue is waived unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Thorgerson,* 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The Court of Appeals properly determined that had Malone objected an instruction could have cured any potential prejudice

[6] *In re Det. of Post,* 170 Wn.2d 32, 241 P.3d 1234 (2010)

and affirmed his conviction. *Opinion* at 20. Malone has failed to show there is an issue of constitutional magnitude present to warrant review under RAP 13.4(b)(3), and review should be denied.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Malone Fails to Demonstrate that Further Review Regarding the Admissibility of the Diagnosis of Otherwise Specified Paraphilic Disorder is Warranted Under RAP 13.4.

In the Court of Appeals, Malone made multiple claims of error related to the admissibility of the diagnosis of Otherwise Specified Paraphilic Disorder, Nonconsent. The Court of Appeals properly applied this Court's prior guidance to each of Malone's claims. Malone now fails to show why this Court should accept review under RAP 13.4(b).

1. The Court of Appeals Properly Concluded That Malone Failed to Preserve the *Frye* Issue, Consistent with Prior Decisions of this Court.

The Court of Appeals correctly declined to address Malone's claim that Dr. Phenix's diagnosis of Other Specified Paraphilic Disorder, Nonconsent should have been excluded under *Frye* because Malone failed to seek a *Frye* hearing below and thus failed to preserve the issue for appeal. *Opinion* at 8. This decision is consistent with prior decisions of this Court, as well as the Court of Appeals. *E.g.*, *Johnston-Forbes v. Matsunaga,* 181 Wn.2d 346, 356, 333 P. 3d 388 (2014); *In re Det. of Post,* 145 Wn. App. 728, 755, 187 P.3d 803 (2008), *aff'd* 170 Wn.2d 32, 241 P.3d 1234 (2010);

In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006), *rev. denied,* 159 Wn.2d 1006, 153 P.3d 196 (2007). There is no basis for this Court's further review.

In *Johnston-Forbes,* this Court affirmatively approved the lower appellate court's reliance on *In re Det. of Post* for the proposition that a party who fails to seek a *Frye* hearing below does not preserve the issue for appeal. *See Johnston-Forbes*, 181 Wn.2d at 356 (citing *Johnston–Forbes*, 177 Wn. App. 402, 407–08, 311 P.3d 1260 (2013)). In *Post*, the offender had argued for the first time on appeal that the diagnosis of paraphilia Not Otherwise Specified[7] - rape "is not based on sound scientific principles," and as such, admission of evidence of this diagnosis violated his right to substantive due process. *Post,* 145 Wn. App. at 754. The Court of Appeals declined to review the challenge, noting that Post, "improperly attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal", and rejected Post's "attempt to sidestep the fact that he did not seek a *Frye*

[7] The American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, (Fifth Edition) (DSM-V) uses the label Other Specified Paraphilic Disorder when referring to paraphilic disorders that are not explicitly named in the manual. The DSM-IV (American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.) (DSM-IV-TR)) used the label Paraphilia Not Otherwise Specified to describe this same set of paraphilias.

hearing in the trial court" *Id.* at 755. As a result, the court determined that he had not preserved an evidentiary challenge for review. *Id.* at 756.

Like *Post,* Malone here argues that though he failed to request a *Frye* hearing before the trial court, the Court of Appeals should have analyzed the admissibility of Otherwise Specified Paraphilic Disorder, nonconsent under the *Frye* standard. The Court of Appeals correctly rejected Malone's argument, following the controlling *Johnston-Forbes* decision which endorsed the *Post* analysis.

Malone also argues that the Court of Appeals decision is in conflict with *State v. Black,* 108 Wn.2d 336, 745 P.2d 12 (1987). But he is wrong.

The record is clear that Malone's sole basis of his objection to the admissibility of Dr. Phenix's diagnosis was under ER 702 and 703. CP 185 – 201. The trial court ruled on that challenge alone and denied the motion to exclude under ER 702 and703. Trial RP at 89. The trial court observed that *In re Personal Restraint of Young*, 122 Wn.2d 1, 28-29, 857 P.2d 989 (1993) and *In re Detention of Berry*, 160 Wn. App. 374, 248 P.3d 592 (2011) "seem to indicate that this type of diagnosis is allowable[,]" and, noting that Dr. Phenix's testimony regarding her diagnosis "will be subject, I'm sure, to significant cross examination." Trial RP at 89.

In *Black,* defense counsel objected to the admissibility of testimony regarding "rape trauma syndrome" but did not specify the grounds under

which they were objecting. *Id. at* 339. On appeal, the State argued that defense counsel did not specifically object to the scientific reliability or acceptance of the syndrome, and was thereby precluded from raising the issue on appeal. *Id.* at 340. This Court held that consistent with ER 103(a)(1) "[a]lthough counsel did not specifically raise a challenge to the reliability of rape trauma syndrome as a means of proving rape, this ground for objection is readily apparent from the circumstances." *Id.*

Unlike *Black*, Malone *did* specify the grounds for which he was objecting, which did not include a *Frye* challenge. The motion was specifically made to exclude the testimony pursuant to ER 702 and 703. Trial RP at 82-89. An evidentiary hearing pursuant to *Frye* would necessitate holding an extensive testimonial hearing prior to the beginning of trial. The fact that Malone did not raise an objection to the diagnosis prior to the first day of trial, further indicates that he did not anticipate testimony on the issue, and was making a motion under ER 702 and 703 only.

Malone now argues before this Court that although trial counsel did not "explicitly" request a *Frye* hearing, trial counsel's reference to certain standards such as "has never been and is not currently accepted as a legitimate diagnosis in the scientific community" was *effectively* a request for a *Frye* hearing. App. Brief. at 10. However, when a party is clear regarding the grounds under which they are objecting, the trial court cannot

be expected to further guess at what the party may also intend. Malone made the basis of his objection very clear, and it did not include a request for a *Frye* hearing. CP 185 – 201. He cannot be found to have preserved an issue that he obviously failed to reference. The Court of Appeals decision is not in conflict with *Black* or any decision by the Supreme Court. Malone's petition for review under RAP 13.4(b)(1) should be denied.

2. Further Guidance is Not Needed as to Whether the Diagnosis of Otherwise Specified Paraphilic Disorder, Non-consent Should be Subject to a *Frye* Hearing.

For decades, this Court has provided clear guidance to the lower courts to determine if a *Frye* hearing is necessary for the admission of psychological opinions. Further guidance is not needed in this case.

A trial court must first determine "'if the evidence in question has a valid, scientific basis.'" *In re Young,* 122 Wn.2d 1 (1993), 56, 857 P.2d 989 (1993), (citing, *State v. Cauthron,* 120 Wn.2d 879, 889, 846 P.2d 502 (1993)). "Under *Frye*, '[t]he core concern…is only whether the evidence being offered is based on established scientific methodology.'" *In re Young,* 122 Wn.2d at 56, 857 P.2d 989 (1993), (citing, *Cauthron,* 120 Wn.2d at 889, 846 P.2d 502 (1993)). However, the *Frye* test is unnecessary if the evidence does not involve new methods of proof or new scientific principles. *State v. Baity,* 140 Wn.2d 1, 10-11, 991 P.2d 1151 (2000).

Here, no "novel method of proof" or "new scientific evidence" was implicated. The science at issue is not the specific diagnosis, but standard psychological analysis. See also *In re Det. of Berry,* 160 Wn. App. 374, 378, 248 P.3d 592 (2011), *rev. denied,* 172 Wn.2d 1005, 257 P.3d 665 (2011).

> The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial.

In re Young, 122 Wn.2d at 57.

While there may be disagreement regarding the diagnosis of Otherwise Specified Paraphilic Disorder, Nonconsent, there is substantial literature in support of it as a valid distinct diagnostic category. Conflicting opinions on the acceptance of the diagnosis do not demonstrate unreliability of an expert's testimony, but go "to the weight of the evidence rather than to its admissibility." *In re Det. of Thorell,* 149 Wn.2d 724, 756, 72 P.3d 708 (2003). As Dr. Phenix explained, not every individual with abnormal sexual arousal fits neatly into the specific categories under a paraphilia in the DSM-V. Thus, "when there is an individual with an abnormal sexual arousal pattern over at least a six month period of time and there's no specific descriptor in the paraphilia chapter," this category would be used. Trial RP at 266.

In *In re Young,* both appellants were diagnosed with a rape paraphilia, described at trial as "Paraphilia Not Otherwise Specified" or Paraphilia NOS. 122 Wn.2d at 29. This Court explained that the concept of a "mental abnormality" encompasses a larger variety of disorders than just those listed in the DSM. *Id.* at 28. This Court also noted that the DSM is not sacrosanct and found appellants' rape paraphilias to be valid mental abnormalities. *Id.* at 30. See also *Berry*, 160 Wn. App. at 379.

Most recently, this Court upheld its previous opinions in *Matter of Det. of Belcher,* No. 93900-4, 2017 WL 3526856 (Wash. August 17, 2017). Belcher petitioned for his release from civil commitment. At a bench trial, the Court determined he still met the criteria of an SVP. The State's expert psychologist, Dr. Brian Judd, diagnosed Belcher with antisocial personality disorder (ASPD) with high levels of psychopathy. He also gave him a "rule out" paraphilia diagnosis stating that he exhibited certain paraphilic traits in the past but did not exhibit enough now for a full diagnosis. Judd opined that the ASPD was significant enough to qualify as a "mental abnormality." *Id.* at 3.

Belcher, among other challenges, claimed that his "ASPD" diagnosis was insufficient to prove lack of control for due process purposes." *Id.,* at p. 5. This Court disagreed. "The law recognizes that psychiatric medicine is an imprecise science and is subject to differing

opinions as to what constitutes mental illness." *Id.,* at 14 (citing, *Kansas v. Hendricks,* 521 U.S. 346, 358 – 59, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).) "Because of this, there is no "talismanic significance" to any particular diagnosis. Rather, it is the 'diagnosis of a mental abnormality, coupled with a history of sexual violence, which gives rise to a serious lack of control' and creates a likelihood for re-offense that renders a person an SVP." *Id.,* (citing *In re Det. Thorell,* 149 Wn.2d 724, 762, 72 P.3d 708 (2003).)

"[T]here is no particular diagnosis that renders someone an SVP." *Id.,* at 15 (citing *Thorell,* 149 Wn.2d at 762). "Rather, it is a finding that a person's diagnosis affects his or her ability to control his or her actions and thereby renders him or her a danger if not confined." *Id.* Contrary to Malone's argument, it is not significant *what* Dr. Phenix labeled her diagnosis; what is important is that the fact finder properly found that the disorder affected his likelihood of re-offense. *See Belcher,* No 93900 at 15.

This Court has provided sufficient guidance to the lower courts as to when a *Frye* hearing should be held. Respondent's petition for review under RAP 13.4(b)(4) should be denied.

3. The Court of Appeals Decision Finding No Cause for Reversal Based on Malone's Claim of Ineffective Assistance of Counsel Is Consistent with Prior Decisions of this Court and the Court of Appeals.

Malone argues that the Court of Appeals decision regarding ineffective assistance of counsel was in conflict with prior decisions of this Court and the Court of Appeals. Again, he is wrong.

a. The Court of Appeals Consistently Applied the Test Established by this Court's When It Determined Malone's Counsel Was Not Ineffective.

First, Malone argues that the Court of Appeals did not consider the totality of the evidence by failing to consider evidence he presented at trial. Pet. Brief at 18. The Court of Appeals, however, analyzed Malone's claim primarily under *State v. Nichols* and *State v. McFarland.* "In order to establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice." *State v. Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (cites excluded). There is a strong presumption that counsel's representation was effective. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To satisfy his burden, defendant must show counsel's performance fell below an objective standard of reasonableness. *Id.* Even if counsel was deficient, defendant must also show prejudice, which requires him to show "that there is a reasonable probability that, but for counsel's unprofessional

errors, the outcome of the proceeding would have been different." *Id.* Malone failed to meet this test.

The Court of Appeals decision is also consistent with the United States Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). When *Strickland* is read in its totality, the Court of Appeals decision is directly in line with the standards articulated by the United States Supreme Court, as well as this Court. "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the error." *Strickland,* 466 U.S. at 696. Similarly, in *Nichols,* this Court has more recently held "[p]rejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Nichols,* 161 Wn.2d at 8.

Using the standard set by this Court, the Court of Appeals concluded that even if a *Frye* hearing had been requested, and the diagnosis excluded, there was not a reasonable probability that the outcome would have been different. *Opinion* at 10.

> [T]he State presented abundant evidence that Malone suffered from pedophilia, which is a basis to make an SVP finding. Malone was not prejudiced by counsel's failure to request a Frye hearing, because even without Dr. Phenix's

> other specified paraphilic disorder, nonconsent diagnosis, the jury could have found that Malone was an SVP.

Id.

The Court of Appeals looked to *In re Meirhofer,* for guidance. *Id.* at 10 (citing, *In re Personal Restraint of Meirhofer,* 182 Wn.2d 632, 343 P.3d 731 (2015).) Malone argues that by citing to *Meirhofer*, the Court of Appeals incorrectly applied a sufficiency of the evidence standard. To the contrary, the Court of Appeals acknowledged, "[w]hile the procedural posture of this case differs from Meirhofer, we consider it instructive." *Opinion* at 10.

In *Meirhofer,* the State's expert diagnosed Meirhofer with paraphilia Not Otherwise Specified (NOS) hebephiliac, paraphilia NOS nonconsent, and personality disorder NOS with antisocial and borderline traits. *Meirhofer,* at 640. Similar to Malone, Meirhofer argued that Paraphilia NOS was not a legitimate diagnosis. *Meirhofer,* 182 Wn.2d at 644. This Court declined to decide that issue, noting that "regardless of whether hebephilia is an accepted diagnosis in the relevant scientific community (a question we need not decide), the State presented sufficient prima facie evidence that Meirhofer has consistently suffered from paraphilia NOS nonconsent and a personality disorder" and affirmed his continued detention on that basis. *Id.* at 736-37. The Court of Appeals relied on the *Meirhofer* analysis for guidance in determining that even if there is a

reasonable probability that any error was committed, the outcome of the proceeding would not have been different.

b. The Court of Appeals properly distinguished the Mistrial in *Post* from Malone

The Court of Appeals also thoroughly analyzed *Post* as it related to Malone's claims of prejudice and found Malone's trial distinguishable from *Post.* "Here, Dr. Phenix's diagnosis of other specified paraphilic disorder, nonconsent was not the only difference between the trials." *Opinion* at 11.

In response to comments by the jury in the first trial, during Malone's second trial, the State focused on his release plan. In addition, the experts were different, with different credentials and experience. The Court of Appeals was unable to determine which of these differences was significant to the jury. *Id.* at 11 – 12. "Unlike in Post, we cannot say that the second jury would not have found Malone to be an SVP but for Dr. Phenix's additional diagnosis. Malone has not established that any error in admitting this evidence was prejudicial." *Id.* at 12.

The Court of Appeals' decision regarding Malone's claim of ineffective assistance of counsel is consistent with prior decisions by this Court and the Court of Appeals. The Court did not need to first determine if "counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland,* 466 U.S. at 697. "When a defendant

challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. The Court of Appeals determined that regardless of any possible error, the fact finder would not have found reasonable doubt.

The Court of Appeals properly applied prior decisions by this Court and the Court of Appeals. Respondent's petition for review under RAP 13.4(b)(1) and (b)(2) should be denied.

4. Malone Fails to Articulate A Basis For Review of His ER 703 Challenge to the Admissibility of Dr. Phenix's Diagnosis and Does Not Comply with RAP 10.3(a)(6) and 13.4(c)(7).

Alternatively, Malone seeks review of the admission of Dr. Phenix's diagnosis of Other Specified Paraphilic Disorder under ER 702. However, he fails to identify under which consideration governing acceptance of review RAP 13.4 he is petitioning, and he does not comply with RAP 13.4(c)(7) and RAP 10.3(a)(5).

In his petition, Malone includes only a brief, one paragraph summary of his argument for review stating "Malone includes this brief discussion of ER 702 here in order to preserve the issue should this Court grant review." Pet. Brief at 22. He does not reference under which consideration listed in RAP 13.4 this Court is to consider his petition. He

also fails to provide a sufficient argument in support of the claimed error as required by RAP 10.3(a)(6) and 13.4(c)(7).

RAP 10.3(c)(6) "requires an appellate brief to contain argument in support of the issues presented for review, together with citation to legal authority . *See also* RAP 13.4(c)(7). Consequently, this assigned error will not be considered" *Kagele v. Aetna Life and Cas. Co.,* 40 Wn. App. 194, 196, 698 P.2d 90 (1985), (citing, *Orwick v. City of Seattle,* 103 Wn.2d 249, 256, 692 P.2d 793 (1984).

By failing to state a basis for review, Malone is not in compliance with RAP 13.4(b) (failing to cite to legal authority.) Malone also fails to comply with RAP 10.3(c)(6) and 14.3(c)(7) by failing to provide sufficient argument in support of the issue presented.

B. Malone Fails to Demonstrate that Review of the Court of Appeal's Decision Upholding the Trial Court's Exclusion of His Proposed Jury Instruction is Warranted Under RAP 13.4(b).

Malone seeks review of the Court of Appeal's decision upholding the trial court's exclusion of his proposed jury instruction defining a "recent overt act," claiming two assignments of error. Yet, Malone fails to demonstrate that review is warranted under RAP 13.4(b)(3) or (b)(4).

1. The Court of Appeals Applied the Proper Standard of Review to Malone's Claim of Error Regarding the Trial Court's Exclusion of His Proposed Jury Instruction, No

Issue of Substantial Public Interest or Significant Question of Law Still Exists.

At trial, Malone did not offer any evidence that he was aware he might be subject to a new commitment petition if he were released and then committed a "recent overt act." Nor did he offer any testimony that his knowledge of the law would deter him from committing another act of predatory sexual violence, yet Malone argues that because the *Post* court recognized the potential relevance of "recent overt act" *evidence*, the denial of a specific jury instruction is a question of law warranting de novo review. He is wrong.

The failure to provide a specific instruction is not manifest constitutional error warranting *de novo* review. This Court has held that only specific types of jury instructional errors constitute manifest constitutional error. *State v. O'Hara,* 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Those include: directing a verdict, *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); shifting the burden of proof to the defendant, *State v. McCullum*, 98 Wn.2d 484, 487–88, 656 P.2d 1064 (1983); failing to define the "beyond a reasonable doubt" standard, *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); failing to require a unanimous verdict, *State v. Carothers,* 84 Wn.2d 256, 262, 525 P.2d 731 (1974); and omitting an element of the crime charged, *State v. Johnson*, 100 Wn.2d 607,

623, 674 P.2d 145 (1983), overruled on other grounds by *State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985). None of those situations arises here.

The Court of Appeals properly applied an abuse of discretion standard to Malone's assignment of error citing *State v. Walker,* 136 Wn.2d 767, 771 - 72, 966 P.2d 863 (1998), which held that a trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *Opinion,* at 12. As this Court has noted elsewhere,

> Whether to give a certain jury instruction is within a trial court's discretion and so is reviewed for abuse of discretion. The propriety of a jury instruction is governed by the facts of the particular case. Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law.

Fergen v. Sestro, 182 Wn.2d 794, 802-03, 346 P.3d 708 (2015) (citations omitted).

In *Post,* this Court only recognized the potential relevance of "recent overt act" *evidence* insofar as such evidence relates to a respondent's likelihood of committing another predatory act of sexual violence. *Post* 170 Wn.2d at 316-317. Contrary to Malone's assertions, *Post* did not hold that the evidence is *always* relevant merely because "recent overt acts" exist, and cannot be read to mean that the jury should be given a definitional instruction. *Id.* This is particularly true where the SVP does not offer actual

evidence about how it relates to his likelihood of committing another predatory act of sexual violence.

Indeed, the *Post* rule is merely that "recent overt act" *evidence* is only relevant when the respondent knows of the existence of the "recent overt act" statute, and where his knowledge of a possible recent overt act action being taken against him makes him less likely to reoffend if released. *Id.* at 316-17. At trial, there was no evidence from any source, including Malone's testimony, that Malone had ever heard the term "recent overt act," much less that it would somehow affect his actions or decision-making in the community.

Additionally, Malone was not prohibited from presenting any defense. Malone was also able to, and in fact did, argue that possible "recent overt act" detection would deter him from committing another act of sexual violence. Trial RP at 1434. Additionally, the jury was instructed:

> ...In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, *you may consider all evidence that bears on the issue*.

CP 111 (*emphasis added*).

The Court of Appeals analyzed whether the trial court's refusal to give Malone's proposed jury instruction was based on law or fact. *Opinion* at 12. The Court of Appeals properly determined that it was a question of

fact and correctly applied the abuse of discretion standard, finding that because Malone presented no evidence that the possibility of a "recent overt act" petition would be a deterrent, the trial court did not abuse its discretion. *Opinion* at 15. Additionally, the court found that Malone was not prohibited from still arguing this possibility to the jury, and did. *Id.*

The Court of Appeals properly applied existing guidance from this Court. There is no further question of law or issue of substantial public interest. Malone's petition for review under RAP 13.4(b)(3) and (b)(4) should be denied.

2. Malone Failed to Raise the Issue of Prosecutorial Misconduct Based on a Misstatement of the Law Below, and He Now Fails to Establish that the Alleged Error is a Manifest Error Affecting a Constitutional Right.

Malone petitions this Court for review arguing that the Prosecutor committed prosecutorial misconduct by misstating the law as it applies to the conditions under which Malone would be released. Specifically, Malone claims the Prosecutor committed misconduct when he argued that the only conditions that would be placed on Malone if released were those included in the judgment and sentence, which did not include the possibility of a "recent overt act" petition. Pet. Brief at 29. Malone acknowledges he did not raise this claim of misconduct in his opening brief. Pet. Brief at 30 – 31.

Under RAP 2.5(a), an appellate court may deny review of a claim of error which was not raised in the trial court. *State v. O'Hara,* 167 Wn.2d 91, 97 – 98, 217 P.3d 756 (2009) (citing, *State v. Lyskoski,* 47 Wn.2d 102, 108, 287 P.2d 114 (1955).) An assignment of error does not need to be preserved when the error is a "'manifest error affecting a constitutional right.' RAP 2.5(a)." *Id.* To raise an error for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (citing, *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007).)

"In analyzing the asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude." *Id.,* (citing, *State v. Scott,* 110 Wn.2d 682, 687, 757 P.2d 492 (1988).) "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review." *State v. McFarland,* 127 Wn. 2d 322, 333, 899 P.2d 1251 (1995), (citing *Scott,* 110 Wn.2d at 688, 757 P.2d 492; *State v. Lynn,* 67 Wn. App. 339, 346, 835 P.2d 251(1992).)

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Stenson,* 132 Wn. 2d 668, 718, 940 P.2d 1239 (1997), (citing, *State v. Brett,* 126 Wn. 2d

136, 174, 892 P.2d 29 (1995), *State v. Lord,* 117 Wn.2d 829, 887, 822 P.2d 177(1991).)

Malone makes unsupported claims that the prosecutor misstated the law, but he does not provide this Court with the required analysis of the issue. Furthermore, the prosecutor's argument was not a misstatement of the law, because the potential filing of a "recent overt act" petition is not a condition, but a speculative possibility, at best.

Malone is unable to show how the error, if any, is manifest. He fails to support his claim of a constitutional error and does not show how in the context of the trial the alleged error actually affected his rights. Malone fails to satisfy RAP 2.5(a) and the two prong test as established by this Court. His petition on this issue should be denied.

C. The Court of Appeals Properly Analyzed Malone's Claim of Prosecutorial Misconduct Claiming the Prosecutor Disparaged Opposing Counsel Using Guidance Previously Provided by this Court, Thus Further Review is Not Warranted.

In analyzing Malone's claim of prosecutorial misconduct based on a claim the prosecutor disparaged opposing counsel, the Court of Appeals properly applied the two-part test established by this Court in *State v. Lindsay*, 180 Wn.2d 423, 326 P.3e 125 (2014) and *State v. Thorgerson,* 172 Wn.2d 438, 442, 258 P.3d 43 (2011), as well as cases before them. *Opinion* at 19.

As noted by the Court of Appeals, Malone did not object to the statements he now raises on appeal. *Opinion* at p. 18. If the defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Thorgerson,* 172 Wn.2d at 443. *See* also *Lindsay*, 180 Wn.2d at 431. When analyzing prejudice, "we do not look at the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Yates,* 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied,* 554 U.S. 922 (2008).

The prosecutorial misconduct inquiry therefore consists of two prongs: (1) whether the prosecutor's comments were improper; and (2) if so, whether the improper comments caused prejudice. *Lindsay,* 72 180 Wn.2d. at 431 (citing, State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940(2008).) "The burden to establish prejudice requires the defendant to prove that 'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *Thorgerson,* 172 Wn.2d at 442-43.

The Court of appeals analyzed the statements made by the Prosecutor and determined that they "suggested that defense counsel herself was dishonest." *Opinion* at 20. In considering the first prong of the test, the Court of Appeals determined that "[t]his called counsel's integrity into

question, and was likely improper." *Id.* However, the Court of Appeals then moved to the second prong and found "[h]owever, these statements were not prejudicial. The AAG's 'misdirection' and 'selective listening' comments do not raise to the same level as calling defense counsel's argument a 'crock' or 'bogus.'" *Id.* The Court of Appeals found that given the wealth of evidence against Malone they could not "conclude that these comments affected the verdict. Had Malone objected, an instruction could have cured any potential prejudice." *Id.*

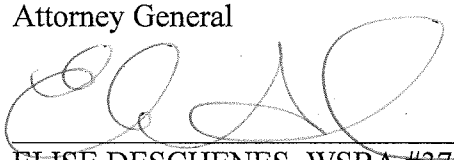
The Court of Appeals analyzed the question of prejudice using the existing standard as established by this Court in *Thorgerson* and *Lindsay.* In neither *Thoregerson* nor *Lindsay* did this Court require an analysis of the case presented by defense as Malone suggests. Instead, to prevail on a claim of prosecutorial misconduct, the defendant must show the prosecutor's conduct was improper and prejudicial. *Thorgerson,* 172 Wn.2d at 442. The Court of Appeals properly applied prior guidance provided by this Court and found that the Prosecutor's statements here did not meet the latter requirement. There is no further significant question of law. Respondent's petition for review under RAP 13.4(b)(3) should be denied.

V. CONCLUSION

For the reasons set forth above, this Court should deny review.

RESPECTFULLY SUBMITTED this_ day of October, 2017.

ROBERT W. FERGUSON
Attorney General



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NO. 94812-7

WASHINGTON STATE SUPREME COURT

In re the Detention of: CALVIN MALONE, Petitioner.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On October 5, 2017, I sent via electronic mail, per service agreement, true and correct copies of State's Answer to Petition for Review, Petitioner's Motion for Leave to File an Overlength Answer to Petition for Review, and Declaration of Service, addressed as follows:

Mary Swift
Nielsen Broman & Koch
sloanej@nwattorney.net

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

DATED this 5th day of October, 2017, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

October 05, 2017 - 3:56 PM

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