NO. 90401-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

Ernesto Leyva,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Ernesto Leyva is a sex offender with an extensive history of offenses against both young children and teenagers. The trial court entered an order committing Leyva as a sexually violent predator following a unanimous jury verdict. The Court of Appeals affirmed with an unpublished opinion. *In re Detention of Leyva*, 2014 WL 1852740. Leyva's Petition for Review should be denied because he fails to establish any of the criteria prerequisite to review by this Court, and the Court of Appeals correctly affirmed his commitment as a Sexually Violent Predator.

II. COUNTERSTATEMENT OF ISSUES

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

A. Has Leyva demonstrated that the definition of "mental abnormality," as applied to him, is unconstitutionally vague?

B. Where the State presented testimony that Leyva suffered from only one mental abnormality, was a unanimity instruction required?

III. COUNTERSTATEMENT OF THE CASE

A. Factual History

Ernesto Leyva was born on December 11, 1990. CP at 6. His first sexual contacts were with his sisters. Leyva appears to have been only six when he and his older sister, A., then seven, began to engage in what he

described as "sex play." RP 4/5/12 at 107.[1] This sexual contact with his sister continued until she was 13, and eventually included sexual intercourse roughly once per month. *Id.* at 107-08. Leyva also admitted to sexual contact with a younger sister, A., who was five when Leyva was 11. *Id.* at 109. This sexual contact included digital penetration as well as attempted vaginal and anal intercourse. *Id.*109-11.[2] He also admitted that he had exposed his erect penis several times to his youngest sister, X., but did not attempt further sexual contact with her, explaining that he "was already doing it with his other sisters." *Id.* at 114-16.

By the age of 10, Leyva's sexual contacts began to expand beyond his immediate family. It was then that he began having sexual contact with five-year-old C., the daughter of one of his parents' friends. RP 4/5/12 at 92. This included digital penetration and sexual intercourse and continued for five years, until Leyva was 15 and C. was 10. *Id.* at 92-93. Leyva also admitted that, between his ages of 11 and 13, he had anal sex with a six or seven year old boy, D. *Id.* at 102-103. Leyva, who described these incidents as consensual, indicated that they occurred roughly every two months for approximately two years. *Id.* at 104. Leyva also admitted that he had had D.'s younger brother, approximately five when Leyva

[1] The majority of these facts came into evidence through the testimony of Donald King, who interviewed Leyva several times following his 2006 arrest for Child Molestation.

[2] By the time Leyva interviewed with Dr. Brian Judd, the State's expert at trial, he was no longer admitting aspects of his sexual contact with his sisters. RP 4/9/12 at 183-84.

was 13, fellate him, but said that the child had refused Leyva's instructions to remove his own pants. *Id.* at 105.

Between the ages of 12 and 14, Leyva had sexual contact with V., a female child, who was between five and seven. RP 4/5/12 at 116. This contact consisted of exposing his erect penis to her, touching her buttocks, and rubbing his penis against her. *Id.* On one occasion, he attempted to pull V.'s pants down, but she refused. *Id.* Leyva indicated that V. was "upset" by these sexual contacts, which he described as having occurred once every three weeks for two years. *Id.* at 117.

Leyva's deviant sexual behavior extended to his school, and school officials were developing concerns about Leyva's behavior. He was suspended from school in the seventh grade following allegations that, after having been dropped off at his home by the school bus, he had walked in front of one of his windows in his underwear, and had then gone outside, put his hand down his pants and partially unbuttoned his pants. RP 4/5/12 at 43, 48. He admitted to this allegation and, after he agreed to seek mental health counseling, was ultimately suspended for five days. *Id.* at 49. The following year, in November of 2005 when Leyva was in the eighth grade, he pulled down his pants while on the school bus and exposed himself to J.B., an eight-year-old girl. *Id.* at 50; Ex. 4. When questioned regarding this incident, Leyva admitted that he had urges that he did not know how to control. *Id.* at 51. He was charged and pled guilty to the crime of Indecent Exposure on the basis of this incident, receiving six months of

community supervision. Ex. 4 and 5. Because it was the fourth sexual incident in his school district in three years, he was also expelled. RP 4/5/12 at 52. Very shortly after he had exposed to J.B., Leyva exposed himself again, this time entering into a diversion with community service. Ex. 6.

Leyva also acted out sexually at his church. During roughly the same period of time, Leyva was engaging in a series of assaults against two girls at his church, R.C. seven, and her sister, D.C. These assaults occurred over a period of several months, beginning in June of 2005. RP 4/5/12 at 77-78, 82; Ex. 1. Leyva, when interviewed after charges were filed, admitted that he had walked by R.C. and touched her buttocks with his hand, and also described once having accosted R.C. outside the boys' bathroom and exposing his erect penis to her. RP 4/5/12 at 77-82. Leyva also admitted to taking R's sister, D.C, into the boy's bathroom, exposing his penis to her, digitally penetrating and licking D.C.'s vagina, and attempting vaginal intercourse. *Id.* at 84. He admitted that he "knew it was wrong," when he did it, but that he had "wanted to do it." *Id.* at 88. Although originally charged with Child Molestation for the offenses against both sisters, Leyva pled guilty to one count of Child Molestation First Degree for the assaults on D.C. Ex. 1-3. Leyva was also attracted to the girls' mother, and admitted having both exposed himself to her and having touched her breast. RP 4/5/12 at 95. Leyva admitted that he wanted to have sex with Mrs. C., and admitted to masturbatory fantasies about her and his other victims. *Id.* at 97.

In addition to these incidents, Leyva admitted to numerous other incidents while in elementary school in which he had touched the buttocks of young girls while he had an erection (RP 4/5/12 at 89), as well as an incident in which he exposed himself to an unknown teenage girl in a Goodwill store in Wenatchee in 2006, when he was 15. *Id.* at 94. Finally, on October 8, 2007, Leyva sexually assaulted E.R., a 16-year-old girl. Ex. 7-9; RP 4/9/12 at 207, 220. He was arrested and charged with Rape in the Second Degree, and ultimately pled guilty to rape in the third degree on January 15, 2009. Ex. 7-9.

At trial, the State presented the testimony of three witnesses: Scott Ramsey, who was the principal of Quincy Junior High School when Leyva was in seventh and eighth grades (RP 4/5/12 at 35-54), Donald R. King, who had interviewed Leyva several times following his arrest for child molestation relating to the assaults on R.C and D.C. (*Id.* at 55-129), and Dr. Brian Judd, Ph.D. RP 4/9/12 at 148-316; RP 4/11/12 at 548-572. The State also presented the testimony of Leyva via video deposition. RP 4/5/12 at 132-134; CP at 293-385. Dr. Judd, relying on the factual history described above, testified that he had assigned three diagnoses to Leyva: Paraphilia not otherwise specified (NOS) non-consent with consideration and a rule out of pedophilia, a provisional diagnosis of exhibitionism, and frotteurism. RP 4/9/12 at 194, 202-05. He testified that, in Leyva's case, the diagnosis of paraphilia NOS non-consent constituted a mental abnormality, and that Leyva was more likely than not to reoffend if not confined to a secure facility. RP 4/9/12 at 225-227.

Leyva presented two witnesses: Dr. Richard Wollert, Ph.D. (RP 4/10/12 at 354-514; RP 4/11/12 at 521-547) and his father, Ernesto Leyva Sr. RP 4/19/12 at 339-353. After hearing all the evidence and closing arguments, the jury returned a unanimous verdict to commit Leyva as a sexually violent predator. CP at 713. Leyva sought review.

B. Court of Appeals' Decision

The Court of Appeals affirmed. Rejecting his argument that Dr. Judd's "compound diagnosis" was unconstitutionally vague, the court noted that "legal standards for civil commitment are not rendered vague by controversies over medical diagnoses that inform the fact finder," and held that Dr. Judd's having rendered a "rule out" diagnosis of pedophilia "did not take Dr. Judd's otherwise sufficient diagnosis of paraphilia NOS (Nonconsent) across the due process violation line." 2014 WL 1852740 at *6. The court also rejected Leyva's argument that a *Petrich*[3] instruction was required because Dr. Judd testified to both his primary diagnosis of paraphilia NOS: Nonconsent, and his provisional diagnoses *Id.* at *14.[4] Leyva now seeks review by this Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Leyva argues the review is warranted under RAP 13.4(b)(1) and (3). Because Leyva does not demonstrate that the issues presented in his petition involve

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[3] *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

[4] The Court of Appeals also rejected three other arguments by Leyva unrelated to those he raises in his Petition for Review. In the interests of brevity, they will not be discussed here.

any "significant question of law under the Constitution," or are in conflict with another decision of this Court, this Court should deny review.

A. The Definition Of "Mental Abnormality" Is Not Unconstitutionally Vague As Applied To Leyva

Leyva asserts that the term "mental abnormality"[5] is unconstitutionally vague if the term is interpreted as embracing the diagnosis assigned Leyva by the State's expert, Dr. Brian Judd. Pet. at 3-12. This argument is without merit. As Dr. Judd's extensive trial testimony demonstrated, the term "mental abnormality," as applied to Leyva's particular sexual deviance and the way that deviance expressed itself in criminal behavior, has real meaning and withstands constitutional challenge.

Various unsuccessful vagueness challenges to the sex predator statute have been raised since the statute's inception. In *In re Young*, the Washington State Supreme Court rejected vagueness challenges to several statutory terms, including "mental abnormality." 122 Wn.2d 1, 49, 857 P.2d 989 (1993). Rejecting the challenge to the term "mental abnormality," the Court held that "the experts who testified at the commitment trials adequately explained and gave meaning to this term within a psychological context." *Id.* at 49-50. Because the record clearly demonstrates that Dr. Judd "adequately explained and gave

[5] "Mental abnormality" means 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).

meaning to this term within a psychological context" in this case, Leyva's challenge fails.

Dr. Judd diagnosed Leyva with "paraphilia not otherwise specified [NOS] with the consideration and the rule-out of pedophilia, sexually attracted to both, nonexclusive type." RP 4/9/12 at 224. Leyva takes issue with this diagnosis on several levels. First, he asserts that "'paraphilia NOS non-consent' was not defined as a paraphilia in the DSM-IV..."[6] Pet. at 5. He then goes on to argue that Dr. Judd, apparently by adding the descriptor of "consideration and the rule-out of pedophilia" to his diagnosis of paraphilia NOS, has created a "novel, compound diagnosis," "a creature of his own devising," lacking "any specificity as to paraphilic focus beyond describing simple recidivism." *Id.*

These arguments lack merit. To begin with, Leyva has long since lost his argument that paraphilia NOS is an invalid diagnostic category and, as such, cannot form the basis for commitment. Indeed, Leyva appears to concede this point in his citation to Division I's conclusion to the contrary in *In re Detention of Berry*, 160 Wn. App. 374, 379, 248 P.3d 592 (2011). Pet. at 8. The *Berry* Court, in rejecting the argument that the diagnosis of paraphilia

[6] All references to the DSM refer to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, published by the American Psychiatric Association in 2000. In the profession, the text is sometimes referred to as the DSM-IV-TR. For the sake of simplicity, this brief will use the shorthand "DSM."

NOS is invalid because it is not explicitly included in the DSM, pointed to language in the seminal case of *Young* in which the Court observed:

> The fact that pathologically driven rape, for example, is not yet listed in the DSM-III-R does not invalidate such a diagnosis. The DSM is, after all, an evolving and imperfect document. Nor is it sacrosanct. ... *What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.*

122 Wn.2d at 28, 857 P.2d 989 (emphasis added) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Sexually Violent Predators,* 15 U. PUGET SOUND L. REV. 709, 733 (1991-92)). The *Berry* Court went on to observe that "paraphilia NOS" in fact "does appear in the DSM-IV-TR." 160 Wn. App. at 381. The *Berry* Court noted that the DSM defines paraphilia as "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner, or (3) children or other non-consenting persons that occur over a period of at least 6 months." The Court then observed that "paraphilia not otherwise specified" is a "residual category...which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the DSM-III-R." *Id.* at 381 (citing to *Young*, 122 Wn. 2d at 29). The DSM-IV-TR, the court noted, provides a number of examples of paraphilia NOS, but clearly

states that the category is "not limited to" that list.[7] The omission of the term "non-consent" from this list does not prove it is an invalid diagnosis.

Although Leyva appears to grudgingly concede this point, he argues that Dr. Judd's "compound diagnosis" "wanders far afield even from the controversial diagnosis of basic paraphilia NOS non-consent." Pet. at 9-10. His underlying concern appears to be that Dr. Judd's "novel" diagnosis runs afoul of *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) because it is not "medically recognized" and as such does not "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist in an ordinary criminal case" as required by *Kansas v. Hendricks*, 521 US 346, 360, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Pet. at 9. He then asserts that Dr. Judd's diagnosis "dramatically exceeded, in both imprecision and in lack of medical recognition, the already highly controversial diagnosis of paraphilia NOS non-consent..." *Id.* at 5.

Neither the United States Supreme Court nor the appellate courts of other jurisdictions share Leyva's fixation on the semantics of particular diagnostic classifications. The Supreme Court has, for decades and in a variety of contexts, repeatedly acknowledged "the uncertainty of diagnosis in

[7] DSM at 576 ("This category is included for coding Paraphilias that do not meet the criteria for any of the specific categories. Examples include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine).").

this field and the tentativeness of professional judgment" (*Greenwood v. United States,* 350 U.S. 366, 375, 76 S. Ct. 410, 100 L. Ed. 412 (1956)). Reported cases, the Court has noted, "are replete with evidence of the divergence of medical opinion in this vexing area." *O'Conner v. Donaldson,* 422 U.S. 563, 579, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) (C.J. Burger, concurring). Psychiatry, the Court has noted, "is not... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma,* 470 US 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Likewise, the Washington Supreme Court has noted that "the DSM-IV-TR candidly acknowledges...that each category of mental disorder is not a completely discrete entity." *State v. Klein,* 156 Wn.2d 103, 120, 124 P.3d 644 (2005). For that reason, "the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it." *Id.* 156 Wn.2d at 120. Construing the law to mandate release "based on mere semantics would lead to absurd results and risks to the patient and public beyond those intended by the legislature." *Id.* at 121.

The United States Supreme Court's decision in *Crane* reflects and is entirely consistent with this approach. There, the Court was asked to clarify the "lack of control" requirement articulated in *Hendricks.* Contrary to

Leyva's assertion, there is nothing in *Crane* that requires that the underlying mental abnormality must be "medically recognized." While the *Crane* Court acknowledged "[t]he presence of what the "psychiatric profession itself classifie[d] . . . as a serious mental disorder" "helped to make" the distinction between those appropriate for civil commitment and the "typical recidivist" (*Crane,* 534 U.S. at 413), nowhere did the Court state that such "classification" by the psychiatric profession was mandated, nor did it state that, in order to justify commitment, the diagnosed condition must be "medically recognized." Consistent with its remark in *Hendricks* that the term "mental illness" was "devoid of any talismanic significance" (*Hendricks*, 521 U.S. at 358-59), the *Crane* Court steered clear of semantic mandates, noting that "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." 534 U.S. at 413. The Court went on to observe that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Id.* Noting that it had not, in *Hendricks,* given the phrase "lack of control" "a particularly narrow or technical meaning," the Court observed that, "where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision." *Id.* Rather,

> [i]t is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the

> psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Id.

Nor do the two Wisconsin cases that Leyva cites help him. Pet.at 9. (citing *McGee v. Bartow*, 593 F.3d 556 (7th Cir 2010) and *Brown v. Watters*, 599 F.3d 602 (7th Cir, 2010), cert. denied 131 S. Ct. 293, 178 L. Ed. 2d 192, (Oct. 4, 2010)). In both cases the Seventh Circuit, while acknowledging the controversy surrounding the diagnosis of paraphilia NOS: non-consent, rejected due process challenges to that diagnosis. In doing so, the court emphasized both the uncertainty of psychiatric diagnosis and the critical role of the factfinder. The fact that a particular diagnosis "is not accepted or is explicitly rejected by the DSM or other authoritative sources...is a highly relevant consideration for the factfinder." *McGee,* 593 F.3d at 577. In either situation, however, "the factfinder has the ultimate responsibility to assess how probative a particular diagnosis is on the *legal* question of the existence of a 'mental disorder'" and "the status of the diagnosis among mental health professionals is only a step on the way to that ultimate legal determination." *Id.* This point was again made in *Brown,* where the court, rejecting the challenge to the diagnosis of paraphilia NOS: non-consent, noted that, in that case, "able assistance of counsel *actually did expose* the professional debate to the jury

and substantial contrary professional opinions were offered." *Brown,* 599 F.3d at 612 (emphasis in original). The court went on to say that "[t]he the existence of a professional debate about a diagnosis or its use in the civil commitment context does not signify its insufficiency for due process purposes, particularly where, as here, that debate has been evaluated by the factfinder." *Id.* at 614.

Here, as in *Brown*, the jury had ample opportunity to "evaluate that debate" by listening to the "substantial contrary professional opinions" that were presented at trial. Dr. Judd explained the basis for his diagnosis at length, discussing the factual basis for diagnosis of paraphilia NOS: non-consent (a 2007 assault against E.R., who was described in the records as having resisted the attack; one adjudicated minor victim, D.C., and six additional child victims all of whom were more than five years younger than Leyva). RP 4/9/2012 at 207-08. All of these assaults were against children and might ordinarily form the basis for a diagnosis of pedophilia. Dr. Judd explained, however, that he had assigned a "rule out" diagnosis of pedophilia because the diagnosis of pedophilia, as set forth in the DSM, requires that the assailant be at least 16 years of age, and Leyva had been between 10 and 15 years old at the time of all but one of these offenses. *Id.* at 210-11. As such, there was "some deviation from the criteria in some specific way" that did not permit making the full diagnosis of pedophilia. *Id.* at 209. Despite this deviation, Dr. Judd believed that, "based on the consistency of his behaviors, based upon his report of fantasizing and masturbating to fantasies of children," including two of his

victims, Leyva met criteria for pedophilia "in large part." *Id.* Dr. Judd went on to explain that it was important to make this "rule out" diagnosis in order "to clarify that there's consideration of a full range of diagnoses..." *Id.* at 211.

Dr. Judd's diagnosis is of a type entirely anticipated by the DSM, whose authors freely admit that, "[b]ecause of the diversity of clinical presentations, it is impossible for the diagnostic nomenclature to cover every possible situation." DSM at 4. Such NOS diagnoses are appropriate where "the symptomatic picture does not meet the criteria for any of the specific disorders. This situation would occur either when the symptoms *are below the diagnostic threshold* for one of the specific disorders or when there is an atypical or mixed presentation." *Id.* (emphasis added).

Dr. Judd also explained both what he understood by the term "mental abnormality" (RP 4/9/12 at 186-187) and why that term applied to Leyva: He suffers from a "congenital or acquired condition" in the form of "paraphilia not otherwise specified, non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type." *Id.* at 224.This condition "affects his emotional or volitional capacity:" Dr. Judd explained that Leyva, discussing the 2005 exposure incidents, made statements to the effect that he "had difficulty with his sexual urges and didn't know how to control or couldn't control them." *Id.* at 225. Leyva had made other statements in 2005 to the effect that "when he gets tempted, he can't seem to help himself" and that, "his mind goes blank when he is tempted and it just happens." *Id.* Further, the fact that

Leyva continued to offend after having been sanctioned by the courts contributed to Dr. Judd's conclusion that his volitional control was impaired. *Id.* at 225-26. Finally, this mental condition "predisposes" Leyva "to the commission of criminal sexual acts in a degree constituting ...a menace to the health and safety of others." *Id.* at 227. As noted by Dr. Judd, despite having been sanctioned, expelled, criminally charged, and then briefly incarcerated, Leyva continued to sexually offend. *Id.* at 228. This testimony both gave meaning to the term mental abnormality "within a psychological context" as required by *Young,* and provided an ample basis from which the jury could conclude that Leyva had "serious difficulty" controlling his sexually violent behavior as required by *Crane.* Leyva's challenge fails.

B. No Unanimity Instruction Was Required Where The State Provided Evidence Of Only One Mental Abnormality

Leyva asserts that, under *State v. Petrich,* 101 Wn.2d 566, 572, 683 P.2d 173 (1984),[8] he was entitled, because the State's expert assigned three different paraphilia diagnoses, to an instruction specifying which of the "multiple, 'distinguishable' factual allegations" formed the basis of his commitment. Pet. at 13. Leyva's argument is supported by neither the facts of this case nor law.

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[8] *Petrich,* a criminal case, holds that where the State alleges that several distinct criminal acts have been committed by a defendant who is not charged for each act, the prosecutor must elect the acts she is relying upon, or the jury must receive a unanimity instruction. 101 Wn.2d at 572-73.

Leyva's assertion of "multiple, 'distinguishable' factual allegations" in this case requiring a unanimity instruction is an attempt to create ambiguity where none exists. At trial, the State made it clear that the mental abnormality in this case was the diagnosis of paraphilia NOS: non-consent. RP 4/9/12 at 224. Asked specifically whether Leyva had a congenital or acquired condition that "relates to a mental abnormality," Dr. Judd responded that he believed that "that the congenital or acquired condition in this case would be paraphilia not otherwise specified. Non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type." *Id.* That this was the only diagnosis to which the term "mental abnormality" was assigned was made clear by the AAG in closing when she stated, "[n]ow, Dr. Judd indicated that Mr. Leyva does have a mental abnormality. This is Dr. Judd's diagnosis of paraphilia not otherwise specified, non-consent. And Dr. Judd told you that he reached this conclusion because it was clear that Mr. Leyva has strong sexual urges to engage in sexual contact with non-consenting persons." RP 4/11/12 at 593, 646. Indeed, it is apparent from defense counsel's closing argument that Levya understood that the mental abnormality alleged was paraphilia NOS. *See Id.* at 615 ("Dr. Judd testified Monday that the way to diagnose or consider a mental abnormality, the only way to do it was to see if someone qualifies for a disorder in the manual. Do you remember what we read? About paraphilia NOS?"); 617-18 ("All right. Mental abnormality. Let's get back. Any of you notice that when he had a chance to back up his diagnosis of paraphilia NOS

on rebuttal he didn't touch it."); and 619 ("Mental abnormality diagnosis. Okay. Paraphilia NOS, that's the only one that he actually diagnoses, he gives us several rule-outs."). Indeed, Leyva appears to concede this fact, writing that "the State told that jury that it should be clear that the mental abnormality was the particular diagnosis of paraphilia NOS." Pet. at 16.

Moreover, even if Leyva were correct that the State made "multiple, 'distinguishable' factual allegations" in support of its contention that he suffered from a mental abnormality, no unanimity instruction would be required. As Leyva notes, a virtually identical question was addressed in *In re Sease*, 149 Wn. App. 66, 210 P.3d 1078 (2009), *review denied* 166 Wn.2d 1029, 217 P.3d 337 (2009). In *Sease*, there was no dispute that Sease suffered from one or, possibly, two personality disorders. *Id.*, 149 Wn. App. at 78. This did not, however, mean that a unanimity instruction was required. Rather, the court determined, the jury "need only have unanimously found that the State proved that Sease suffered from a personality disorder that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. The jury need not have unanimously decided whether Sease suffered from borderline personality disorder or antisocial personality disorder." *Id.*

While Leyva argues at length that *Sease* was wrongly decided (Pet. at 18-19), he presents no persuasive basis for this Court to diverge from that established holding. In cases in which this and related arguments have been considered, the courts of this state have been clear that they understand the complexity of human

nature and hence of psychological diagnosis. In *In re Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006), this Court considered an SVP's argument that, where there is testimony at trial to the effect that the offender suffers from both a mental abnormality and a personality disorder, a *Petrich* instruction was required. Rejecting this argument, this Court held that, where substantial evidence supports each, these two conditions "are alternative means for making the SVP determination." 156 Wn.2d at 810. As Division I noted in its earlier decision in that case, "[t]o force the State to elect or the jury to rely on only one...would unnecessarily introduce a requirement that is not present in the statute. It would also compromise the value of the clinical judgments of expert witnesses in this difficult area. Neither the constitution nor the statute requires this." *In re Halgren* 124 Wn. App. 206, 215, 98 P.3d 1206 (2004). Affirming the Court of Appeals' decision on this issue, this Court noted that, "because both mental illnesses are predicates for the SVP determination, the two mental illnesses are closely connected..." and that "these two means of establishing that a person is an SVP may operate independently ***or may work in conjunction.***" *Halgren,* 156 Wn.2d at 810 (emphasis added). *Accord In re Ticeson,* 159 Wn. App. 374, 246 P.2d 550 (2011).

That Leyva's paraphilias were intertwined and all contributed to his offending was clear from Dr. Judd's testimony. After identifying each of Leyva's paraphilias, he agreed that "each of these mental disorders relate(s) in some way" to his opinion that Leyva suffers from a mental abnormality. RP

4/9/12 at 195. Indeed, no highly specialized knowledge of the subtleties of psychological diagnosis is required to understand that, where an offender has, since the age of six, displayed deviant sexual interest in the form of exposing, peeping, groping, and ultimately rape, all of the underlying psychological conditions will contribute to any conclusion that the offender has serious difficulty controlling his sexual behavior and that he is likely to reoffend. The law does not require juries to force human beings into separate and discreet classifications that do not exist in the real world.

V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 12th day of August, 2014.

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NO. 90401-4

WASHINGTON STATE SUPREME COURT

In re the Detention of: ERNESTO LEYVA, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On August 12, 2014, I sent via electronic mail and United States mail true and correct cop(ies) of State's Answer to Petition for Review and Declaration of Service, postage affixed, addressed as follows:

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

DATED this 12 day of August, 2014, at Seattle, Washington.

Allison Martin
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Sent: Tuesday, August 12, 2014 3:08 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Sappington, Sarah (ATG); oliver@washapp.org
Subject: In re the Detention of Leyva 90401-4

Attached, please find State's Answer to Petition for Review and Declaration of Service for the above titled case and cause number.

Filed on behalf of: SARAH SAPPINGTON
Senior Counsel, WSBA #14514
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