COA No. 30853-7-III

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

IN RE DETENTION OF LEYVA,
STATE OF WASHINGTON,

Respondent,

v.

ERNESTO LEYVA,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF GRANT
COUNTY OF THE STATE OF WASHINGTON

The Honorable John M. Antosz

REPLY BRIEF

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A. SUMMARY OF REPLY ARGUMENTS

1. Vagueness. The State's expert diagnosed young Ernesto Leyva with a condition he called

> paraphilia not otherwise specified, non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type.

The first half of this compound diagnosis has occasionally, but barely, passed muster in the courts, and has been condemned in the medical community. The second half employs the word "pedophilia" – frightening to any lay jury -- despite Ernesto not fitting that medical criteria. If this meets the SVP definition of "mental abnormality," the statutory language has no ascertainable standards. The Respondent's argument that the entire matter, with no oversight by the Court, is left to the jury following the parties' full adversarial trial, should be rejected.

2. Right to Present a Defense. If the entire matter is left to the jury, then it was *absolutely critical* at trial below that Ernesto Leyva's expert be allowed to fully and completely testify to his psychological opinion that persons of Ernesto's age, who are not yet approaching developed volitional capacity, are incapable of having a mental condition affecting that capacity and predisposing them to dangerous sexual offending in the future. This is especially

true given the legal and medical doubt that has been and must be cast on this compound, novel diagnosis. The trial court's ruling prevented Dr. Wollert from testifying to the categorical medical opinion that he holds as a psychologist, and as an expert in his specific field. Ernesto Leyva's constitutional right to right to present a defense to the State's theory was violated, reversibly.

3. <u>Lack of Petrich Unanimity</u>. Given the doubt that defense counsel attempted to cast on the State's novel paraphilia NOS/rule-out pedophilia diagnosis, a crucial advantage was gained by the State by proffering up additional possible mental abnormalities, ones that were less complex and confusing than "NOS/rule-out pedophilia." The jury was specifically told by Dr. Judd that "frotteurism" and "exhibitionism" *were also* "mental abnormalities" of Ernesto. The prosecutor's brief passing statement in closing that NOS/rule-out pedophilia was the primary abnormality was not an election that would have removed the other abnormalities from this lay jury's consideration, given the State's trial presentation. Thus, in this close case where the State's expert proffered a highly confusing and implausible-sounding diagnosis, the State was able to offer any 'doubting' jurors a choice of instead picking one of two other, *different*, much simpler and less

controversial mental abnormalities. This is not unanimity. This is the gravamen of the absence of unanimity.

B. REPLY ARGUMENT

1. THIS COURT SHOULD CONCLUDE THAT THE SVP STATUTORY ELEMENT OF "MENTAL ABNORMALITY" IS VAGUE AS APPLIED TO MR. LEYVA IF IT IS CONSTRUED TO INCLUDE THE COMPOUND DIAGNOSIS ADVANCED BY THE STATE'S EXPERT.

Mr. Leyva is arguing that the Sexually Violent Predator Act's definition of "mental abnormality" must be vague as applied to him in this case. AOB, at pp. 8-23. The contention is: if the State's expert's putative diagnosis of "paraphilia not otherwise specified, non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type" is deemed to be a "mental abnormality" under RCW 71.09.020(18) and (8), then the SVP statute lacks any ascertainable standards for enforcement. Mr. Leyva has argued, among other factors, that this diagnosis is not listed as a "paraphilia" in the DSM-IV. AOB, at pp. 11-15; see McGee v. Bartow, 593 F.3d 556 (7th Cir. 2010); Brown v. Watters, 599 F.3d 602, (7th. Cir. 2010); AOB at pp. 18-19.

The Respondent answers by initially arguing that one particular portion of the above descriptor -- "paraphilia NOS non-consent" -- is indeed included in the DSM-IV. BOR at 8-9.

First, Mr. Leyva is not arguing that the absence of any listing of a "paraphilia NOS non-consent" in the DSM is a sole determinative factor for this Court's consideration of his Due Process challenge, and he is not contending that the absence of medical recognition categorically violates Due Process.

However, it is not listed. Mr. Leyva respectfully contends that In re Det. of Berry, 160 Wn. App. 374, 379, 248 P.3d 592 (2011), is in error on this point, because paraphilia NOS non-consent is in fact not a specified mental abnormality in that reference. AOB at pp. 12-17 and n. 13 (citing *inter alia*, American Psychological Association editor's statement that the categories of "objects," "suffering," and "nonconsenting persons" describe possible factors that render a specific sexual interest *abnormal*, but these are not types of specific paraphilic focus – they are not paraphilias).

In addition, the Supreme Court indeed has stated that the assessment of the presence of medical recognition of an illness is a necessary aspect of the Due Process analysis and the need for distinguishing a proper committee from a mere typical recidivist. Kansas v. Hendricks, 521 U.S. 346, 360, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997) (relying on Kansas v. Crane, 534 U.S. 407, 122

S.Ct. 867, 151 L.Ed.2d 856 (2002) (involuntary civil commitment may not be based upon a diagnosis that is either medically unrecognized or too imprecise to distinguish the truly mentally ill from typical criminal recidivists)).

Mr. Leyva acknowledges that a paraphilia of "NOS non-consent" has been deemed by a few appellate courts to contain enough apparent medical meaning, when explained by a conscientious qualified expert in a field, at a trial before a fact-finder. The Washington and federal courts have determined that Due Process may be satisfied in the context of predator commitment simply where battling experts at trial present a jury with the choice of believing the State's expert's claim of mental abnormality or accepting the defense expert's contrary psychological assessment. See BOR at 7-8 (citing In re Young, 122 Wn.2d 1, 49-50, 857 P.2d 989 (1993) and In re Berry, supra) (all stating that due process is satisfied if qualified clinicians adequately and in good faith describe how the person has a real abnormality).

Respondent, however, fails to acknowledge that the paraphilia of non-consent has been subject to intense academic, and judicial criticism, as set forth in the AOB. As argued, under the

very standards advanced by Respondent above, it represents at best the "floor" of what may be deemed minimally adequate to distinguish a person from mere a recidivist as a result of mental disorder.

The argument proffered by Mr. Leyva is that the diagnosis uttered by the State's expert, consisting of a paraphilia that flirts perilously with being nothing more than a descriptor of repeat sexual recidivism draped in "mental illness" clothing, is rendered even more *unreliable* as the basis for a lay jury's commitment decision when it is further modified by language of pedophilia resonating with a lay jury but in fact describing the detainee's *failure* to meet that diagnosis, is inadequate under Due Process. The State cites no case in which such a compound diagnosis, combining the marginally-accepted non-consent paraphilia with a literal rule-out of pedophilia, has been tested by any court under any type of Due Process challenge. Mr. Leyva's arguments are not a regurgitation of long-dismissed contentions quibbling about semantics.[1]

Rather, this is a new matter. To the professional and judicial

[1] BOR, at p. 11. Mr. Leyva's argument is the opposite. Semantics – the reliance on descriptors that are cloaked in the language of the statutory criteria -- are not categorically insulated from Due Process vagueness evaluation simply

equivocation regarding the idea of a paraphilia of "non-consent" is added, in this case, the language of a "pedophilia" condition the defendant is simply too young to meet. The putative diagnosis of Mr. Leyva as having the mental abnormality of "paraphilia not otherwise specified, non-consent *with* the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type" is a compound diagnosis that is less than the sum of its parts.

This Court must be willing to be a minimal arbiter, because most juries will be quite willing to commit alleged sex offenders under any legitimate-sounding rubric, particularly where the State's expert can manage to include the horrific specter of "pedophilia" in his utterance, however Orwellian such language is employed. If the requirement and statutory definition of "mental abnormality" in RCW 71.09 *et seq.* is deemed to include such a diagnosis as the State's expert uttered in this case, the SVP statute is so lacking in ascertainable standards for enforcement that it is unconstitutionally vague as applied to Ernesto Leyva.

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because they were proffered in such language through a prosecution expert with

2. MR. LEYVA'S EXPERT WAS NOT ALLOWED TO PRESENT THE DEFENSE THAT JUVENILES ARE CATEGORICALLY TOO EARLY IN BRAIN DEVELOPMENT TO POSSESS THE MEDICALLY-DRIVEN OFFENSE RISK THAT IS REQUIRED FOR SVP COMMITMENT.

Respondent contends that Due Process was not violated by the State's expert's vague diagnosis of "paraphilia NOS non-consent with rule-out pedophilia non-exclusive type," because it is for the opposing parties to expose the jury to the "professional debate" over the diagnosis of the detainee, and for *the jury* to be given the ultimate responsibility to choose whether a diagnosis does or does not meet the legal criteria for SVP status. BOR, at pp. 6-17.

Mr. Leyva agrees that cases including McGee and Brown, supra, certainly require that the factfinder be exposed to the experts' competing opinions. McGee, supra, at 577; Brown, supra, at 612 (rejecting challenge to diagnosis in part because "able assistance of counsel actually did expose the professional debate to the jury and substantial contrary professional opinions were offered."

But that did not occur in the present case. Prior to trial, the court precluded Dr. Wollert from testifying to his political or policy

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medical qualifications.

judgment that the State's sex predator classification scheme should not apply to juveniles, and barred him from stating a legal opinion that RCW 71.09 does not by its statutory language address or apply to juveniles. CP 552-558 (Order on Motions *in Limine*) (prohibiting statements of political opinion regarding predator commitment statutes or legal opinion that the Washington statutory definition requires baseline capacity as a matter of law).

However, the court's mid-trial ruling blocked Dr. Wollert from expressing his full expert opinion that juveniles simply do not have the developed volitional capacity to be assessed as medically driven to sexual offending for a durational future. 4/10/12RP at 395 (striking testimony). Particularly in an SVP proceeding predicated on a medically novel State's diagnosis, Ernesto needed to have his expert testify in any necessary detail to his *actual* professional opinion, undiluted by the view of the Assistant Attorney General that such opinion was too strictly categorical. 4/10/12RP at 388 (arguing to the court that the doctor could not say juveniles can never have volitional capacity), 4/10/12RP at 390 (agreeing, and so ruling). The fact that Dr. Wollert's opinion was that categorical definitions in his medical field ultimately require rejection of an SVP diagnosis as applied to Mr. Leyva, was not a reason to exclude his

testimony. AOB, at pp. 33-36. Certainly, expert opinion testimony is not objectionable simply because it "embraces an ultimate issue to be decided by the trier of fact." ER 704. Expert opinion testimony may encompass ultimate issues of fact if it is "otherwise admissible" and satisfies the requirements of ER 403 and ER 702. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). Here, Dr. Wollert's testimony would have been vitally helpful to the jury, unfairly prejudicial to no party, and certainly admissible as expert opinion. Whether Dr. Wollert's expert opinion should be credited, is a matter that should have been allowed for the jury to decide.

Even now the Respondent contends that a court would properly exclude a defense expert's opinion that juveniles cannot "suffer from something that affects their volitional capacity, because by definition of the developmental age, they never reached volitional capacity." BOR, at pp. 28-29 (and describing trial court's ruling deeming the foregoing could not be opined by the defense expert). But such statements are neither a political, nor a legal opinion, and excluding them fell well outside the scope of the court's pre-trial ruling, thus necessitating the new argument and Mr. Leyva's counsel's protestations that the defense was being

improperly impinged. 4/10/12RP at 385-390.

The difference between what the court allowed and what the defense sought to proffer was crucial. Ernesto was, as a matter of psychology, psychosocially immature, and thus not mature. Persons of his young developmental age, by medical definition, have not yet reached the age at which a sexual paraphilia can possibly be diagnosed, because impaired volitional capacity and a consequent medical drive to act in a given sexual manner is never developed until a much later age. 4/10/12RP at 385.

Contrary to the Respondent's arguments, BOR at pp. 29-30, Dr. Wollert was never allowed to convey this to the jury. Instead, the trial court, accepting the State's contentions that this was a policy position and a statement of law, struck the foregoing, telling the jury to disregard it. 4/10/12RP at 385, 390. As a result, Dr. Wollert testified in an edited manner (because he was instructed to hew to the court's rulings) that juveniles reach psychosocial maturity "over a protracted period." 4/10/12RP at 396.

But that is not Dr. Wollert's scientific opinion. AOB, at pp. 30-32, 33-34 (and record cites therein). The Respondent's contention that the correctness of the court's ruling is immaterial, because Dr. Wollert ultimately managed to testify that his theory

that juveniles "have a hard time growing up," and that he was allowed to describe juveniles "in general," is not tenable. See BOR, at pp. 29-30 (citing 4/10/12RP at 396-98, 494-95). Dr. Wollert was not allowed to, and did not testify, to his expert belief that juveniles as a class do not have volitional capacity for purposes of medical determination of medically-driven future sexual offending. Examination of the transcript pages cited by the Respondent confirms that Dr. Wollert did not 'manage' to testify to anything close to a semblance of this professional opinion. This curtailment of the defense presentation to the jury reversibly impinged on Mr. Leyva's right to present his defense, and did not allow the adversarial process, so crucial in close cases, to play out on the trial field. See State v. Coristine, Wash. Supreme Court No. 86145-5) (May 9, 2013) (en banc) (instructing on affirmative defense over defense objection violates defendant's right to present his defense) (citing Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (stating that the trial process's objective requires permitting "partisan advocacy on both sides of a case")).

This was a close SVP case with decision resting on evaluation of a number of controversial propositions, but the party respondent was prevented from putting his expert's defense theory

squarely before the factfinder. Mr. Leyva's right to present a defense was violated, including where his expert's attempted testimony on these points was stricken by the court's order, and the jury was therefore affirmatively led to believe that his proper, admissible scientific point of view was of inadequate merit to even be considered. U.S. Const. amends. 5, 6, 14. The error was not harmless beyond a reasonable doubt, and reversal is required. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Coristine, supra, Supreme Court No. 86145-5, at pp. 9-10 and n. 1 (citing Chapman as reversible error standard where right to present a defense violated).

3. ERNESTO LEYVA'S COMMITMENT VIOLATES DUE PROCESS BECAUSE IT WAS PREMISED ON JUVENILE CONDUCT OCCURRING BEFORE HIS BRAIN HAS REACHED VOLITIONAL DEVELOPMENT.

Mr. Leyva relies on the arguments in his Appellant's Opening Brief. Due process prohibits involuntary commitment unless predicated on a lack of volitional control. U.S. Const. amend 14; Wn. Const. art. I, § 3. Volitional impairment means serious difficulty in controlling behavior, but in this respect:

> developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.

Graham v. Florida, __ U.S. __, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825 (2010) (juvenile's actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults). Mr. Leyva urges this Court to conclude that "[d]eciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'" Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012)

4. REVERSAL IS REQUIRED UNDER STATE V. PETRICH.

The Respondent does not dispute that the State's trial case placed before the jury two additional paraphilias in addition to the paraphilia of "NOS non-consent with rule-out pedophilia." All of these conditions were labeled by the State's witness as mental abnormalities. 4/9/12RP at 194, 202-06, 213-16. The record is clear. Then, the Assistant Attorney General used language in closing stating that paraphilia NOS was specified by Dr. Judd, making clear the target of the paraphilia was non-consenting persons, and not a "general diagnosis that he didn't explain." 4/11/12RP at 646; AOB, at p. 46 However, this fails to qualify as a clear election pursuant to the standards of State v. Bland, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (closing argument identifying one particular act as basis for the

verdict supported conclusion that the State adequately made an election). When considered with the trial testimony by Dr. Judd, the sexual descriptions of these other paraphilias/abnormalities in closing argument by the State, and the absence of any unanimity-promoting instruction in the jury instructions, the State's language in closing failed to make clear in a non-confusing manner, to the lay jury, that the other possible choices were not also being advanced as support for the verdict. Even if that had been what the State intended or tried to do in closing, good intent is immaterial. See State v. Witherspoon, ___ Wn. App. ___, 286 P.3d 996, 1003 (October 16, 2012) (prosecutor's confusing attempt to make clear in closing that only one of the alternative means in the instructions was the basis advanced for the verdict did not make clear other alternatives, despite being proffered in evidence, were not sought to be the act chosen by the jury). The State placed before the jury multiple facts, each proffered to meet the element in question. Petrich applies.

The Respondent, who earlier asks this Court to reject a Due Process challenge to the compound diagnosis of paraphilia non-consent/rule-out pedophilia, by contending that the matter is one for the lay jury to gauge for itself by common-sense standards, now chides appellant for arguing that when a lay jury is told the detainee

has 3 paraphilias, each labeled a mental abnormality, there exists the identified danger that this plain language will lead some members of the jury to rely on one abnormality, and some another. Respondent asks this Court to accept Respondent's complex post-closing-argument theory regarding why the latter two paraphilias, scientifically speaking, were only discussed as mere factors operating "in conjunction" with the paraphilia NOS. None of this after-the-fact explanation was adequately made clear to the lay jury, and a unanimity instruction was required under State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

In turn, the constitutional unanimity error requires reversal. Once again in this case, the error went directly to the core controversy – whether the jury should deem Ernesto Leyva an SVP at such a young age. The absence of a unanimity instruction in this case allowed any jurors who were not persuaded by paraphilia NOS, to instead choose Frotteurism or Exhibitionism as the abnormality. These latter choices were comparatively scientifically uncontroversial – thus the risk that some jurors picked one of them is not just technical, but real. But "paraphilia NOS/rule-out pedophilia" was highly *controverted*, within the unfortunate limits of the trial court's rulings that curtailed Ernesto's defense. As argued, where one of the multiple

facts offered for the charge is controverted at trial, the Petrich error cannot be considered harmless. State v. Coleman, 159 Wn.2d 509, 511-12, 514, 150 P.3d 1126 (2007). This Court should reverse.

C. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Ernesto Leyva respectfully requests that this Court reverse the entry of judgment and commitment order.

Respectfully submitted this 9 day of May, 2013.

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

IN RE THE DETENTION OF	)	
	)	
	)	
ERNESTO LEYVA,	)	NO. 30853-7-III
	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 9TH DAY OF MAY, 2013, I CAUSED THE ORIGINAL **REPLY 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] SARAH SAPPINGTON ATTORNEY AT LAW OFFICE OF THE ATTORNEY GENERAL 800 FIFTH AVENUE, SUITE 2000 SEATTLE, WA 98104-3188	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF MAY, 2013.

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