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NO. 71292-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE DETENTION OF:

MARK BLACK

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. A person facing indefinite total confinement under RCW 71.09 has the right to be present during and participate in jury selection

a. A party has the right to be present during jury selection.

It is widely established that a party in a civil case "is entitled to be present in the courtroom and be represented by counsel at all stages during the actual trial of the action." *Carlisle v. County of Nassau,* 64 App.Div.2d 15, 18, 408 N.Y.S.2d 114, 117 (1978). The right to be present "cannot be denied" to a party. *Id*.; *see, e.g., Green v. N. Arundel Hosp. Ass'n, Inc.*, 366 Md. 597, 618, 785 A.2d 361, 373 (2001) ("In concert with courts throughout the country, we have made clear that a party to civil litigation has a right to be present for and to participate in the trial of his/her case."). There is no question that a healthy non-disruptive litigant may not be denied his right to be present. *Helminski v. Ayerst Labs., A Div. of A.H.P.C.,* 766 F.2d 208, 214 (6th Cir.1985).

This long-standing rule applies to civil and criminal cases as a matter of due process. *See Kulas v. Flores,* 255 F.3d 780, 786 (9th Cir. 2001) (relying on criminal cases to determine disruptive, *pro se* civil litigant's right to be present). The Supreme Court has held (in a civil case) that there is "no doubt" that "the orderly conduct of a trial by jury,

essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81, 39 S.Ct. 435, 63 L.Ed. 853 (1919). The impaneling of the court occurs when the oath is given at the beginning of voir dire. RCW 4.44.120; *State v. Crafton*, 72 Wn.App. 98, 103 n.4, 863 P.2d 620 (1993); *see also Carlisle*, 64 A.D.2d at 19 ("generally speaking a trial begins when the veniremen are called for examination as to their qualifications").

The presence of counsel is not a substitute for a party's right to be present, because the attorney is a representative and not an "alter ego." *Helminski*, 766 F.2d at 214.

In all cases in Washington, the "right of trial by jury shall remain inviolate." Art. I, § 21. The jury function that "receives constitutional protection from article 1, section 21" includes factual questions arising in civil cases. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 648, 771 P.2d 711 (1989). The "inviolate" nature of the right to trial by jury "connotes deserving of the highest protection." *Id*. at 656.

The State cites no cases denying a person facing life-long confinement the right to be present and participate in jury selection. It mistakenly claims the Connecticut decision in *Rozbicki v. Huybrechts*, 22 Conn.App. 131, 134-35, 576 A.2d 178, 179-80 (1990), *aff'd*, 218 Conn. 386, 589 A.2d 363 (1991), is far afield from the law in Washington because Connecticut's constitution bestows to the parties the right to ask questions to jurors in civil cases. Resp. Brief at 19. But CR 47 sets forth the process of jury selection in civil cases in this state. It similarly mandates that the court "shall permit the parties or their attorneys to ask reasonable questions" of prospective jurors. CR 47 shows that the party involved in the lawsuit is expected to personally participate in jury selection unless he or she waives that right. *See generally Maziar v. Washington State Dep't of Corr.*, __ Wn.2d _, 2015 WL 1955403, n.2 at *3 (2015) (using court rule to support party's jury trial right).

The right to have a properly selected jury has long been strictly enforced in civil and criminal cases in this state. In *Oregon R. & Nav. Co. v. McCormick*, 46 Wash. 45, 47-48, 89 P. 186 (1907), the jury was not properly drawn under the statute in effect. However, the defendant in this civil case had not attended the trial or even requested a jury trial.

Id. But even though the defendant never complained about the improper jury selection, the court reversed the verdict because the jury was not "selected in a lawful manner." *Id*. at 48. In Mr. Black's case, the prosecution filed a jury demand and it was required to afford Mr. Black a fundamentally fair trial in accordance with his statutory and constitutional rights. *Id*.; Supp. CP _, sub. no. 5 (demand for jury trial).

The acceptability of prospective jurors is a "vital and often crucial aspect of any trial. It has aptly been described as the cornerstone of the right to a trial by impartial jury." *Carlisle*, 64 A.D.2d at 20, 408 N.Y.S.2d at 117. Mr. Black did not waive his right to be present during jury selection because he wanted to participate in the process, which even the court agreed would be important and the court promised his presence, yet it conducted a portion of jury selection without him.

b. The right to be present in jury selection for a RCW 71.09 commitment trial is equivalent to the right to be present in a criminal case.

The State acknowledges there is no Washington precedent addressing whether a person facing indefinite commitment under RCW 71.09 has the right to be present during jury selection. Resp. Brief at 17. It describes several rights that criminal defendants have which do not apply equally to persons facing total confinement under RCW 71.09.

Yet showing the one-sided nature of its analysis, it never mentions the fundamental rights that are accorded to detainees in RCW 71.09 proceedings identically to criminal defendants.

To be sure, RCW 71.09 proceedings are not the same as a criminal trial in terms of the evidence that will be offered and the nature of the fact-finder's decision. Some fundamental rights in a criminal case such as the right to reasonable bail or the right to *Miranda* warnings before custodial questioning are not co-extensive. However, most fundamental procedural protections of a criminal case govern due to the gravity of the deprivation of liberty at stake. *See In re Det. Young*, 122 Wn.2d 1, 45-46, 857 P.2d 989 (1993) (assessing constitutionality of procedural protections in RCW 71.09 cases).

For example, the right to court-appointed counsel for an indigent person accused under RCW ch. 71.09 applies "[a]t all stages of proceedings," as does the right to demand a trial before a 12-person jury, to have an immediate probable cause hearing with the opportunity to appear in person, and to receive a unanimous verdict based on proof beyond a reasonable doubt. RCW 71.09.050(1), (3); RCW 71.09.060; *Young*, 122 Wn.2d at 46. These rights do not apply in civil cases generally.

While RCW ch. 71.09 does not mention the right to be present during a commitment trial, it implicitly confers that right. During post-commitment review hearings, the legislature explicitly stated that at show cause hearings, the committed person "is not entitled to be present" in person. RCW 71.09.090(2)(b). Taken in context, this demonstrates the presumption that the accused person is entitled to be present in person during all other stages of the proceedings. Indeed, the parties presumed Mr. Black had that right and did not proceed without his explicit waiver of his presence during the pre-trial proceedings. *See* 9/13/13RP 3 (noting Mr. Black waived his presence); 9/26/13RP 4 (same); 10/17/13RP 113 (court asks whether written waiver of presence required for start of jury selection).

The State asserts that there is no right to be present during a commitment trial because it is civil and only quasi-criminal in nature. But relying on criminal cases, this Court implicitly held the opposite in *In re Det. of Morgan*, 161 Wn.App. 66, 74, 253 P.3d 394 (2011), *aff'd on other grounds*, 180 Wn.2d 312, 330 P.3d 774 (2014). In *Morgan*, the detainee facing commitment complained on appeal about an in-chambers conference held in his absence, albeit with the presence of his guardian ad litem. *Id*. at 74-75. The court found his right to be present

did not extend to a discussion of "purely legal questions" when no ruling was made during this meeting. *Id*. at 74. *Morgan* is instructive because it relies solely on legal standards from criminal cases to determine whether a person facing commitment has the right to be present during court proceedings.

This reliance on criminal law standards is appropriate because a person facing commitment under RCW 71.09 must be held in custody once there is a finding of probable cause. RCW 71.09.050. The State maintains total control over the person's location. Here, the state failed to bring Mr. Black to court for jury selection due to its own shortcomings, not any fault of Mr. Black's. 2RP 11-12.

Like a criminal case, the consequences of being committed are devastating to personal liberty. Long-term confinement is assured to follow, and the order a committed establishes a legal "verity" that the person meets the criteria for indefinite confinement. *State v. McCuistion*, 174 Wn.2d 369, 385, 275 P.3d 1092 (2012). Given the stakes, an individual's interest in participating in all proceedings is at its highest, including selection of the jury. *See, e.g.*, *Sofie*, 112 Wn.2d at 656 ("'inviolate' [under art. I, § 21] connotes deserving of the highest protection"). A person facing commitment has a personal interest in the

selection of jurors just as much as a person facing prison. As even the court acknowledged before jury selection, this case is "unusual" and "does require a lot of care" in selecting a jury. 10/17/13RP 77.

The purpose of voir dire is "discovering any basis for challenge for cause and to permit the intelligent exercise of peremptory challenges." RCW 4.44.120. Mr. Black was denied his right to participate in a critical part of this process, during a proceeding at which numerous jurors were excused and absent his consent.

c. Mr. Black did not waive his right to be present.

The State's contention that Mr. Black did not object when he was not brought to court is specious. At the start of the jury selection proceedings on the day that he was not brought to court, even though the court had promised the jury he would be present, Mr. Black's attorney informed the court that Mr. Black was not present and, although he had earlier waived his presence for the first day of jury selection, he had not "waived his presence from this point forward." CP

1430[1]; 10/21/13 RP 4 (promising jury Mr. Black "is coming tomorrow" to court).

Mr. Black's attorney gave the court the specific information needed to understand the problem and correct the error, which is the purpose of the preservation rule. *See State v. Leavitt,* 49 Wn.App. 348, 357, 743 P.2d 270 (1987) ("An objection must be made *as soon as the basis of the objection becomes known* and at a time when the trial judge may act to correct the error." (emphasis added.)). "It is the duty of counsel to call to the court's attention, either during the trial or in a motion for new trial, any error upon which appellate review may be predicated, in order to afford the court an opportunity to correct it." *City of Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960). Mr. Black called the court's attention to the error at the beginning of the proceedings but the court continued in Mr. Black's absence, pressing the attorneys to waive Mr. Black's right to be present and complaining about the inconvenience to the jurors. This violated Mr. Black's unwaived and personal right to be present.

[1] Although Mr. Black ordered transcripts of jury selection and trial, the court reporter inexplicably separated jury selection from other proceedings in two volumes, in a piecemeal fashion. The court's minutes therefore are a better explanation of the proceedings, putting the day's occurrences in context.

d. Conducting significant substantive portions of jury selection in Mr. Black's absence and despite his expressed desire to be present requires a new trial.

The State's brief does not address the harmful effect of Mr. Black's absence. Not only were jurors stricken without a valid waiver of his presence, the court implied to the jury that the delay was Mr. Black's fault. 10/22/13RP 60. Not only did Mr. Black lose his opportunity to participate in jury selection, his absence and the resulting delay was presented to the jurors in a way that left them likely to blame Mr. Black. In any event, the error cannot be harmless when many jurors were excused when Mr. Black was not able to test their qualifications and he had not waived his presence, as explained in *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011). Although a criminal case, *Irby* rests in part on the due process right to be present for critical components of a trial under the Fourteenth Amendment and its explanation of the importance of an individual's involvement in jury selection is equally applicable to a case where an individual's liberty is at stake in a civil context.

Finally, if the due process test applies, it requires Mr. Black's participation in jury selection. Under *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the court examines (1)

the private interest at stake, (2) the risk of an erroneous deprivation of this interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Because involuntary commitment constitutes a massive curtailment of liberty, the first criterion "weighs heavily" in Mr. Black's favor. *In re Detention of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). The second *Mathews* factor requires the Court to consider the risk of erroneous deprivation through existing procedures and the probable value of additional safeguards. 424 U.S. at 335. Striking jurors without giving Mr. Black the chance to participate carries a substantial risk of erroneous deprivation for the reasons that make his personal participation is critical. The additional safeguards of allowing him to attend jury selection and be heard "in a meaningful manner" entail no unexpected costs and administrative burdens. The government expected to bring Mr. Black to court but failed to do so, which creates no undue burden on the state. The established value of personally participating in jury selection for a trial involving Mr. Black's liberty for what may be

the rest of his life is not outweighed by the state's interest is having the jail fail to honor the order transporting Mr. Black to court. His unnecessary exclusion from a substantive part of jury selection violated due process and the remedy is a new trial.

2. The State's attempt to re-diagnose Mr. Black on appeal demonstrates the fundamentally flawed trial proceedings premised on an invalid diagnosis.

a. The State mischaracterizes the testimony below.

Dr. Arnold conceded he was creating a diagnosis for Mr. Black that was without precedent. CP 827, 830, 839. This is the epitome of novel science. And even though the court credited the expert who criticized the State's diagnosis and it ruled that the underlying science related to hebephilia did not meet the requirements of *Frye*[2] due to "insufficient testing, re-testing and peer reviewed journals," it allowed the State's evaluator to proffer this other novel diagnosis absent supporting scientific consensus. CP 1413.

Having a serious mental disorder widely recognized by the psychiatric community as the underling condition is essential to the constitutionality of civil commitment. *Kansas v. Hendricks,* 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). In *Hendricks*, the

court emphasized that the disorder on which the state's authority to civilly confine a person rested was a "condition the psychiatric profession itself classifies as a serious mental disorder." *Id.* at 360.

When recently revising the DSM, psychological professionals "explicitly rejected" adding hebephilia "because it was based on imprecise and incomplete research." *In re Det. of Meirhofer*, 182 Wn.2d 632, 658, 343 P.3d 731 (2015) (Wiggins, J. dissenting, citing Allen Frances & Michael B. First, *Hebephilia Is Not* a *Mental Disorder in DSM–IV–TR and Should Not Become One in DSM–5,* 39 J. Am. Acad. Psychiatry & L. 78, 82–84 (2011)).

To be admissible under *Frye*, "[b]oth the theory underlying the evidence and the methodology used to implement the theory must be generally accepted in the scientific community*." Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn.App. 168, 175, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014). The court does not decide the correctness of the proposed expert testimony, but "whether the theory has achieved general acceptance in the appropriate scientific community." *Id.* at 175-76 (quoting *State v. Riker*, 123 Wn.2d 351, 359-60, 869 P.2d 43 (1994)).

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

Dr. Arnold's diagnosis does not pass this test, as evidenced by Dr. Arnold's concession of the novelty of his approach and lack of consensus in the community. The court's admission of Dr. Arnold's diagnosis is contrary to the gatekeeping role accorded the court under *Frye* when Dr. Arnold created the label without general consensus in the community and based on science that the court found insufficient.

b. An appellate attorney is not an expert capable of giving a credible, novel diagnosis in a response brief.

No one testified at trial that the "ICD-10" provided a reliable and valid diagnosis of a mental condition applicable to Mr. Black. *See* World Health Organization, International Statistical Classification of Diseases and Related Health Problems § F65.4 (10th rev. ed. 2015) (ICD–10). As a lay person, the appellate prosecutor offers an alternative diagnosis. Resp. Brief at 32-33.This assertion in an appellate brief should be disregarded.

The international classification of disorders may be a tool used in some venues, but it is not used in forensically. 9/13/13RP 130-31. It has not been cited as the basis for reliably diagnosing any condition in any published decision.

As Dr. Franklin explained in the *Frye* hearing, one problem with the ICD-10 is that it merely lists potential conditions without offering any explanation for obtaining a reliable diagnosis. It has not been accepted in forensic psychology. 9/13/13RP 125.

The entire entry for the disorder on which the State relies in its brief, "paedophilia" is "[a] sexual preference for children, boys or girls or both, usually of prepubertal or early pubertal age." ICD–10, § F65.4; 9/13/13RP 131. A related document available on-line lists the relevant criteria as including a "persistent or a predominant preference for sexual activity with a prepubescent child or children," *without* mentioning the "early pubertal" language on which the State's appellate diagnosis rests. ICD-10 Classification of Mental and Behavioral Disorders, Diagnostic Criteria for Research, WHO (1993), http://www.who.int/classifications/icd/en/GRNBOOK.pdf.

The State's effort to revisit Mr. Black's mental condition on appeal, proffering a disorder never presented to the jury, is unreasonable and unfair.

c. The court's inconsistent Frye ruling undermined Mr. Black's ability to fairly contest the State's evidence.

After its confusing *Frye* ruling barring hebephilia as insufficiently reliable but approving of the same science when used under the label paraphilia NOS "persistent sexual interest in pubescent aged females," the court granted the State's motion prohibiting Mr. Black from "mentioning or making any reference to Hebephilia" at trial. Supp. CP _, sub. no. 134. Mr. Black was barred from even suggesting that the flaws pertaining to hebephilia also applied to Dr. Arnold's diagnosis. *Id*.

This ruling made it impossible for Mr. Black to meaningfully challenge an essential component of the State's case. He could not present evidence that the scientific community had rejected the validity and reliability of the closely related, if not identical disorder, hebephilia. *Id*. This unreasonable ruling further impaired Mr. Black's right to a fair trial. He could not even ask the jury to weigh the flaws in the State evaluator's diagnosis based on this ruling. Both the erroneous *Frye* ruling and the court's implementation of that ruling by prohibiting the mere mention of hebephilia require reversal.

3. The jury did not unanimously agree Mr. Black had a valid disorder authorizing civil commitment.

As explained at length in Appellant's Opening Brief, the jury did not specify the basis of its commitment order, yet there was insufficient evidence of the various alternatives presented as the disorder on which commitment may be constitutionally predicated. Opening Brief at 37-46. Absent adequate evidence that Mr. Black had serious difficulty controlling his sexually offender behavior caused by a mental abnormality or personality disorder, reversal is required. If any of the alternative means could justify commitment, the insufficient evidence of any of the means presented to the jury requires a new trial because the jury did not specify the basis of its verdict.

B. CONCLUSION

The commitment order should be reversed and a new trial ordered due to the numerous flaws undermining Mr. Black's right to a fair trial and verdict from a unanimous jury. Furthermore, the commitment must be dismissed due to the insufficient evidence of a scientifically accepted and valid diagnosis authorizing commitment.

DATED this 3rd day of June 2015.

. Respectfully submitted,

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

IN RE THE DETENTION OF	)	
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MARK BLACK,	)	NO. 71292-6-I
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APPELLANT.	)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF JUNE, 2015, 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF JUNE, 2015.

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