NO. 30845-6

**COURT OF APPEALS, DIVISION III**
**OF THE STATE OF WASHINGTON**

In re the Detention of:

STEVEN RITTER,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

# RESPONDENT'S OPENING BRIEF

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## II. FACTS

In February of 1996, 8-year-old S.A. was at her church for choir practice. 1/18/2012 RP at 640-41. The group, including 14-year-old[1] Steven Ritter whom S.A. knew from church, initially gathered around a piano adjacent to the choir practice room. *Id.* at 640. When it was time to begin practice, the others had left the piano room, but S.A stayed behind to

[1] Ritter was born on March 9, 1981. CP at 3.

play the piano. *Id.* at 641. After the others had left, Ritter suddenly grabbed S.A from behind, dragging her out of the room into another room. *Id.* at 642. As he did so, he put his hand over her mouth so that she could not scream for help, and put his other hands down her pants, touching her vaginal area under her underpants. *Id.* at 642-43. Although S.A struggled, she was overcome by his superior size and strength. *Id.* at 644. He then dragged her out of the room in which this assault occurred and threw her down a small staircase. *Id.* at 644-45. Although at this point S.A thought that she might be able to get away, Ritter again grabbed her, this time shoving her, face down, into a snow bank as he pulled her pants down. *Id.* at 644-45. As she lay there, she could feel him "humping" her from behind. *Id.* at 645. At trial, S.A. described the incident:

> He had his body completely over mine. He was using one of his hands to push my face into the snow so I couldn't make any noise or get away. Then he was using one of his hands, pulling my hands down or keeping my pants like where it is and then was forcibly humping me at the same time.

*Id.* S.A managed to get away from Ritter. *Id.* at 646. As she ran from him, he grabbed her leg, and said that if she ever told anyone, he would kill her. *Id.* She immediately ran to the choir room, sopping wet and crying, and told the choir director what had happened. *Id.* Her father, concerned that testifying would be harmful to S.A., did not press charges.

RP 1/19/2012 at 731. Ritter's next known offense appears to have been against his 46-year-old aunt, who was reputed to have the mental capacity of a ten year old child. *Id.* at 732. After this incident, Ritter spent roughly two and a half years in sex offender treatment in Oklahoma. He was released into the community in approximately April of 1999. *Id.*

Less than a year after his release, on January 20, 2000, nine-year-old T.B. was at the Summitview Library in Yakima, Washington. She had gone there with her mother, her older sister, and her infant brother. 1/18/2012 RP at 629-30. She and her mother sat down at one of the library computers, looking for books she wanted to read. As they sat there, Ritter approached, politely saying that he was very familiar with the library and could help T.B find a book, if it was OK with her mother. *Id.* at 630. T.B's mother indicated that she left to go to the adult section. *Id.* at 631. As soon as T.B's mother had left, Ritter scooted his chair closer to T.B's, asking what she was interested in looking for. *Id.* She said that she wanted to learn Japanese. He scooted closer to her, putting his hand on her knee. *Id.* Thinking it was not "abnormal" because it was something her father would do with her, T.B thought little of this action. *Id.* Ritter then began moving his hand very slowly up T.B's thigh. *Id.* at 632. Feeling uncomfortable as his hand moved closer and closer to her crotch, T.B repeatedly pushed his hand off her leg. *Id.* Each time, Ritter would put it

back. *Id.* Ritter then said that he knew where to find the audio book T.B was looking for, and led her to the language section of the library. As she looked for the book, he sat down next to her, and began telling her how beautiful she was. *Id.* at 633. As he did, he began moving his hand up her shirt and fondling her chest. *Id.* As he continued to tell her how pretty she was, he assured her that this was "OK," and that adults did this, and that they would not get into trouble. *Id.* at 633-34. T.B testified that, as this was happening, she thought, "[w]here's my mommy? Am I going to get into trouble for this? Is this my fault that this is happening? I just had this really uncomfortable feeling like this is the no-no my parents told me about. This wasn't something that was supposed to happen." *Id.* As he continued to touch her, he repeatedly commented on what a nice chest she had. *Id.* T.B testified that, at that time, her breasts had not begun to develop at all. *Id.* Ritter then instructed T.B. to get on her hands and knees because her pants were unbuttoned. *Id.* at 635. T.B. told him that they were fine; they were not unbuttoned. *Id.* He then began to unbutton her pants and unzip them, and it was at this point that T.B. recognized that this was a "big no-no," asked him to stop, and got up, stepping over him and looking for her mother and thinking, "Mom. Come around the corner. Mom, come around the corner." *Id.* at 635. T.B. didn't want to scream because they were in a library. *Id.* She walked away from him and hid

behind a shelf in the area reserved for very young children. *Id.* As she hid, she thought, "[w]hat do I do? I'm going to get in trouble. I'm going to get grounded." *Id.* Finally she saw her mother, and ran to her, begging to leave but saying nothing about Ritter. She then noticed Ritter standing next to her 11-year old sister Dora. She screamed, "Dora! Let's go! Mom says let's go." *Id.* at 637.

This incident came to light roughly two months later when T.B., playing truth or dare with her friend, was asked to name the worst thing she had ever done. *Id.* at 638. She told her friend about Ritter. *Id.* Her friend immediately called her own mother, who contacted T.B.'s mother. *Id.* Ritter was ultimately convicted for First Degree Child Molestation for this offense. Exhibit 9.[2] Ritter, later discussing this incident with Dr. Arnold, blamed T.B. for the incident, saying that she was promiscuous and had "come on" to him. RP 1/19/2012 at 742. Calling her a "damn little slut," he said that she had grabbed his hand and walked him down the aisle, which made him want to have sex with her. *Id.*

Shandra Carter, a sex offender treatment provider, treated Ritter when he was at Twin Rivers Sex Offender Program at Monroe, Washington between June of 2005 and June of 2006. 1/18/2012 RP at

[2] The numbering of the exhibits in the clerk's exhibit list is not entirely clear; it is also possible that this is Exhibit 1.9.

654- 657. She described Ritter as a "challenging client." *Id.* at 659. He came to her with a history of infractions and difficulties getting along with other inmates. *Id.* at 660. Group therapy for sex offenders, Ms. Carter explained, involves, in part, both identifying and working to manage various factors associated with a heightened risk of reoffense. *Id.* at 662. Despite 12 months of working with Ritter, Carter explained, and despite some progress in managing his explosive emotions, "I never got to that place where we could actually discuss his sexual deviance." *Id.* at 664. He denied completely, for example, his offense against his developmentally disabled aunt. *Id.* There were other concerns: Although Ms. Carter wanted to help with make arrangements for a release address, Ritter refused to sign forms necessary in order to permit Ms. Carter to communicate with his foster father on that topic. *Id.* at 674. Nor could Ms. Carter "make sense" out of Ritter's sexuality: While he adamantly insisted that he was homosexual, he admitted to at least one of his known attacks on a female. *Id.* at 668-669. Also inconsistent with his alleged homosexuality, she believed, was a relationship with a transgender individual named Darlene who had male genitalia but had had surgery to create female breasts. *Id.* Ultimately, Ms. Carter concluded, "I wasn't given any information to let me help him address anything." *Id.* at 669. When asked, however, at one point to describe his issues to the group, Ritter identified one of those as

pedophilia. *Id.* at 670. Ritter's treatment relationship with Ms. Carter came to an end when, toward the end of his treatment period and despite explicit rules prohibiting such conduct, Ritter engaged in a sexual relationship with a younger adult male. *Id.* at 668, 680, 686. Because of this behavior, Ritter was not permitted to formally complete treatment with his group. *Id.* at 686.

Ritter himself seemed to, at times, be aware of both the nature and extent of his problems. In 2002, he filled out a form asking to be admitted to a sex offender treatment program. RP 1/25/2012 at 1141-42. On that form, asked to state why he was seeking treatment, he wrote, "I need help." *Id.* at 1142. This, incidentally, was what he had told police when apprehended after his assault on T.B. in the library. *Id.* In 2005, when finally in the SOTP program at Monroe, he was given an assignment in which he was asked to identify his deviancies to the group. *Id.* at 1143. He reported homosexuality and pedophilia. *Id.* As his time in the program came to an end, he told others that SOTP was "a joke" and that he was worried that he would re-offend if released. *Id.* at 1144.

As Ritter's sentence for the assault on T.B. was nearing an end, the State asked Dr. Dale Arnold to conduct an evaluation of Ritter to determine whether he met criteria as a Sexually Violent Predator (SVP) pursuant to RCW 71.09. As part of his assessment, Dr. Arnold reviewed

in excess of 1300 pages relating to Ritter's social, sexual, psychological and criminal history. 1/19/2012 RP at 717-19. He met with and interviewed Ritter twice, first at Monroe in 2006, and then again in 2006 after the State's SVP petition had been filed. *Id.* In addition, he interviewed both treatment providers and Ritter's case manager at the Special Commitment Center (SCC), where Ritter was being held prior to trial.

Ritter, when he met with Dr. Arnold, minimized the extent to which he was sexually attracted to children. RP 1/19/2012 at 741. He denied having had fantasies about children, and denied three of the four offenses Dr. Arnold knew about "even though the records document how he admitted to those same offenses in the past." *Id.* at 742. Notwithstanding these statements, Dr. Arnold diagnosed Ritter as suffering from pedophilia, sexually attracted to males and females, nonexclusive type, and an antisocial personality disorder (ASPD) with paranoid and narcissistic traits. *Id.* at 723-24. The "nonexclusive type" descriptor in the paraphilia diagnosis means that Ritter is attracted to both children and adults.[3] *Id.* at 739. In concluding that Ritter suffered from

[3] Ritter, Dr. Arnold testified, is "sexually indiscriminate," attracted "to children, both genders, male and female, but also he's sexually attracted to adults, male and females. So he hasn't gotten a really firm handle on a primary object of sexual attraction." RP 1/19/2012 at 740.

pedophilia, Dr. Arnold relied upon the Diagnostic and Statistical Manual-IV-R published by the American Psychiatric Association. *Id.* at 727-29. This information included Ritter's own statements to the effect that, at age 10-11, he was able to reach orgasm through sexual relations with same-aged peers (*Id.* at 731); Ritter's assault on S.A. (*Id.*); his sexual contact, at age 15, with a 7-year-old boy (*Id.* at 732); and his assault, at roughly the same age on his 46-year-old aunt, who was described as having the mental capacity of a 10-year-old child. *Id.*[4] He also considered the fact that, within a year of his release from treatment following his assault against his aunt and after two and a half years in sex offender treatment, Ritter offended against 9-year-old T.B. *Id.* at 732-33. The assault against T.B., Dr. Arnold explained, makes Ritter's sexual interest in prepubescent children very clear. *Id.* at 733. While his earlier offense against S.A. was very violent and perhaps a response to the violence in his own life, the pedophilic aspect of the offense against T.B. is clearer "because he's telling her that she's beautiful...he's telling her that she has nice breasts...so it's very clear that there's [sic] urges to have sexual contact with a prepubescent child at that time and that he found her a sexual object

[4] In this assault, which Dr. Arnold understood to have occurred on Christmas day in 1996, Ritter snuck into his aunt's room, pulled down her panties, fondled her vagina, and penetrated her vagina with his finger. Id. at 754. The incident was reported by his parents and prosecuted. RP 1/19/2012 at 755. Although Arnold conceded that this incident would not support a diagnosis of pedophilia, it was clearly a sign of "sexual dysregulation." RP 1/19/2012 at 732.

meaning he's almost 19 years old and he's sexually aroused by this nine-year-old girl." *Id.* at 733. The other "really clear piece of data," Dr. Arnold explained, consists of writings from 2003 (when Ritter was 21 or 22) in which Ritter describes sexual contact between 15-year-old and 6-year-old boys. *Id.* at 734; RP 1/23/2012 at 866. This, Dr. Arnold explained, is evidence of "ongoing fantasies to have sex with children." RP 1/19/2012 at 734. This information, combined with the fact that there were interventions after each of the incidents, supports the diagnosis of pedophilia. *Id.*

In explaining his diagnosis of ASPD, Dr. Arnold testified that he relied both upon Ritter's behaviors as a young man and as an adult. RP 1/19/2012 at 751-58. A diagnosis of ASPD, Dr. Arnold explained, requires evidence of a conduct disorder prior to age 15. *Id.* at 752. Ritter, he testified, had a history of severe abuse until he was adopted at age five and a half. *Id.* Once in school, he was "fairly consistently" placed in special education classes because of severe behavior disturbances. *Id.* Many efforts were made to cope with these behavior disturbances, and Ritter, Dr. Arnold testified, had had "a lot of intervention on his behalf" in order to give him "every opportunity possible to overcome his very abusive early childhood." *Id.* at 753. As a schoolchild, for example, there was very frequently an aid assigned to him at recess with the specific task

of watching Ritter in order to intervene if he was "becoming inappropriate" with other children. *Id.* Throughout his childhood and extending into juvenile placement between 15 and 18, Ritter was prescribed various medications (such as Ritalin and Adderall) for his attention deficit disorder and attention deficit hyperactivity disorder symptoms, as well as a mood stabilizer to help him to manage his impulsivity and his anger. *Id.* at 754. Ritter, however, had "difficulty bonding with people." *Id.*

This problematic behavior—characterized by a failure to conform to social norms with respect to lawful behaviors, deceitfulness, and impulsivity—has continued into adulthood. 1/19/2012 at 756. While in prison custody as an adult, Ritter, "on a fairly regular basis," got into trouble for threatening, possession of obscene materials, or violating rules by having sexual contact with other inmates. *Id.* at 759. He was "very frequently" placed in the intensive management unit while in prison and had, indeed, generally been housed in the most intensive management unit available while in DSHS custody at the SCC. *Id.*

Even when being interviewed by Dr. Arnold, Ritter's attitudes about earlier conduct revealed his anti-social bent: During his interview, Ritter defended or rationalized behaviors he had engaged in as a boy, such as punching and biting his sixth grade teacher or kicking a dentist and a soccer

coach in the testicles, laughing and saying that "these guys deserved it," and saying, for example, that his sixth grade teacher deserved to be punched "because he was an asshole." RP 1/19/2012 at 753, 762. Discussing a fight in 2010 in which he had assaulted someone, Ritter blamed the other person for the sense of harassment that he himself felt. *Id.* at 758.

Ritter, Dr. Arnold testified, was at high risk to reoffend. RP 1/19/2012 at 780, 782. Ritter's impulsivity, combined with his deviant sexual attraction to kids, "is really dangerous. Because if you have the deviant sexual attraction to kids and you suddenly have the opportunity, he's the kind of person who would act on the opportunity impulsively." *Id.* at 757. This condition results in Ritter's having serious difficulty controlling his sexually violent behavior. *Id.* at 744, 757, 762-63; RP 1/23/2012 at 834; 916-22.

After a five-day trial, a unanimous jury determined that Ritter was a sexually violent predator, and an order of commitment was entered. Ritter timely appealed. CP at 999, 1000.

## III. ARGUMENT

### A. Civil Commitment Of An Adult Who Committed Sexual Offenses Both As A Juvenile And As An Adult Does Not Violate Due Process

Ritter argues that his civil commitment as a sexually violent predator violates due process "because it is premised on conduct occurring

before he developed mature volitional control." App. Br. at 10. Substantive due process, he argues, requires a showing of "***sustained*** impairment of volitional control." App. Br. at 10 (emphasis added). This, he argues, cannot be demonstrated by evidence of behavior when the person is a juvenile because such behavior occurs when the person "was in a state of continuing development" when his or her lack of volitional control "likely resulted from that temporary state rather than a more permanent impairment." App. Br. at 11.

Ritter's challenge under the due process clause fails. Substantive due process requires that those civilly committed under the sexually violent predator law be demonstrated to be both mentally ill and dangerous. *Kansas v. Hendricks,* 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Commitment must be supported by proof that the person has serious difficulty controlling his or her sexual behavior. *Kansas v. Crane.* 534 U.S. 407, 122 S.Ct. 867, 868, 151 L.Ed 856 (2002); *In re Detention of Thorell*, 149 Wn.2d 724, 753-58, 72 P.3d 708 (2003). The constitutionality of Washington's statute has been repeatedly upheld against various due process challenges. *In re Young,* 122 Wn.2d 1, 857 P.2d 989 (1993); *Thorell*, 149 Wn.2d 724; *In re McCuistion*, 174 Wn.2d 369, 275 P.3d 1092 (2012). Ritter does not directly address this body of case law, but appears to attempt to add an additional requirement to due

process: Not only must the State demonstrate "serious difficulty controlling behavior," as required by *Crane;* it must demonstrate "***sustained*** impairment of volitional control." App. Br. at 10. Because human brains continue to develop until an individual's mid-twenties, Ritter appears to reason, evidence of impaired volitional control before that time should not be considered. This logic would essentially prevent the State from acting to protect the public and incapacitate and treat dangerous sex offenders until some "sustained impairment" occurring after the brain's full maturation could be developed. Due process does not require this.

Although he does not appear to frame it as such, Ritter's challenge is essentially a challenge to the constitutionality of the sex predator statute. The Legislature has included juvenile sex offenders in the group subject of commitment as sexually violent predators. RCW 71.09.025[5]; 030.[6] By

[5] RCW 71.09.025 provides in pertinent part as follows:

(1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in *RCW 71.09.020(16), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county in which an action under this chapter may be filed pursuant to RCW 71.09.030 and the attorney general, three months prior to:

(ii) The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile...

[6] RCW 71.09.030 provides in pertinent part as follows:

(1) A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that:... (b) a person found to

arguing that his commitment violates due process, Ritter effective argues that these portions of the statute are unconstitutional, in that they explicitly permit commitment in cases not only where much of the underlying conduct occurred when the person was a juvenile, but also in cases where, because the person is a juvenile at the time of filing, all such conduct must by definition have occurred before the age of 18. Because Ritter fails to meet the high burden required in order to invalidate a portion of a statute as unconstitutional, his challenge fails.

"A court will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." *State v. Glas,* 147 Wn.2d 410, 422, 54 P.3d 147 (2002). The presumption of constitutionality is overcome only in exceptional cases. *City of Seattle v. Eze,* 111 Wn.2d 22, 28, 759 P.2d 366 (1988). Ritter does not meet this high standard.

Ritter begins with the now widely-accepted premise that the juvenile brain is not fully formed, and indeed appears to continue to develop until a person's mid-twenties. He then turns to three recent cases from the United State Supreme Court and argues that, because juvenile

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have committed a sexually violent offense as a juvenile is about to be released from total confinement...

offenders cannot be sentence to death (*Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1(2005)), given mandatory life-without-parole sentences (*Miller v. Alabama,* ___ U.S. ___, 132 S. Ct. 2455, 183 L.Ed. 2d 407 (2012)), or receive a life-without-parole sentence where the juvenile offender did not commit homicide (*Graham v. Florida,* ___ U.S. ___, 130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010)), the State "should refrain from indefinitely confining individuals whose predicate conduct derives from the period of time when their volitional capacity was immature or continuing to develop." App. Br. at 19. This enormous leap is unwarranted logically and unsupported by law.

First, Ritter was not a juvenile at the time of his commitment; indeed, he was not a juvenile at the time of his most recent crime: He was 18 when he attacked nine-year old T.B; he was 19 when he was convicted, and he was 30 when he was committed as a sexually violent predator. Second, there was overwhelming evidence that Ritter was both mentally ill and dangerous, and as such due process was satisfied. Arguments relating to the effects, if any, of his age on his volitional capacity would appropriately have been made to the jury.[7] Ritter now asks this Court to

[7] It does not appear that Ritter made this argument at trial. While his expert, Dr. Halon, disputed both his diagnosis and his risk, he did not appear to argue that his volitional capacity was related to his age, and Ritter cites the reader to nothing in the record to the contrary.

conclude that the civil commitment of a dangerously anti-social pedophile whose predatory behaviors have continued into adulthood violates principles of fundamental fairness which the Due Process Clause protects. Such a conclusion would be without precedent and entirely unwarranted.

### B. Antisocial Personality Disorder Is An Established And Generally Accepted Diagnosis

Ritter appears to argue that any commitment based entirely or in part on ASPD violates due process because that diagnosis is "too imprecise" to provide a basis for his commitment. App. Br. at 24-34. He also argues that, because no unanimity instruction was given, "there is insufficient record to determine the diagnosis or combination thereof upon which the jury determined commitment was justified." *Id.* at 34. Both of these arguments lack merit and must be rejected.

Ritter contends that *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) "strongly implies" that civil commitment cannot be based on ASPD (App. Br. at 28), and that *Hendricks* and *Crane* suggest this as well. Ritter, however, reads these cases far too broadly, and fails to point to a single case in which the appellate courts of any state have found that this diagnosis is an improper basis for civil commitment. Moreover, this argument has repeatedly been rejected by the appellate courts, and indeed was rejected in the first case in which the

constitutionality of the SVP scheme was considered. In *Young,* appellants argued that the SVP scheme ran afoul of *Foucha* because it permitted the civil commitment of someone who has an "antisocial personality." *Id.,* 122 Wn.2d at 38, n. 12. Rejecting this argument, the Court specifically stated that, unlike the "antisocial personality" with which Foucha had been diagnosed, "an 'antisocial personality disorder' is a recognized mental disorder which is defined in the DSM-III-R."[8] *Id.*

Since *Young,* numerous courts have rejected challenges to the diagnosis of ASPD as a basis for civil commitment. *See, e.g. Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003) (*Foucha* does not preclude civil commitments based on a diagnosis of ASPD); *Hubbart v. Superior Court*, 19 Cal.4th 1138, 969 P.2d 584, 599 (Cal. 1999). Indeed, the *Hubbart* Court flatly rejected the same argument Ritter raises here:

> Nothing in . . . *Foucha* as a whole, purports to limit the range of mental impairments that may lead to the "permissible" confinement of dangerous and disturbed individuals. Nor did *Foucha* state or imply that antisocial personality conditions and past criminal conduct play no proper role in the commitment determination. The high court concluded only that Foucha's due process rights were violated because the State had sought to continue his confinement as an insanity acquittee without proving that he was *either* mentally ill *or* dangerous.

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[8] The DSM-III-R is the Diagnostic and Statistical Manual III-Revised, a compendium of mental disorders published by the America Psychiatric Association. The current iteration of this manual is the DSM-IV-R.

*Id.,* 969 P.2d at 599 (internal citations omitted; emphasis in original). *See also In re G.R.H.*, 711 N.W.2d 587, 595 (N.D. 2006) (under both *Hendricks* and *Crane,* sufficient evidence in the record established nexus between G.R.H.'s ASPD and his difficulty controlling his sexually violent behavior); *In re Detention of Sease*, 149 Wn. App. 66, 201 P.3d 1078, 1085 (2009) (affirming civil commitment based on diagnoses of ASPD and at least one other personality disorder, where each constituted an alternative means for establishing a mental disorder); *In re Commitment of Adams*, 588 N.W.2d 336, 341 (Wis.App. 1998); *In re Shafer*, 171 S.W.3d 768, 771 (Mo.App. S.D. 2005); *Murrell v. State*, 215 S.W.3d 96, 108 (Mo. 2007); *In re Detention of Barnes*, 689 N.W.2d 455, 459-60 (Iowa 2004) (concluding that neither *Hendricks* nor *Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L.Ed. 2d 856 (2002) precluded commitments based on ASPD) .

While numerous courts have rejected this argument, the most thorough treatment of this issue is found in *Brown v. Watters*, 599 F.3d 602 (2010). Brown, like Ritter, had been diagnosed with both a paraphilia, or sexual disorder,[9] and an antisocial personality disorder. 599 F.3d at 611-12. He argued, like Ritter, that the diagnosis of ASPD is "constitutionally insufficient to support civil commitment." *Id.* Citing both

[9] Brown was diagnosed with Paraphilia Not Otherwise Specified (NOS): Nonconsent.

*Foucha* and *Crane*, the court soundly rejected this argument. While acknowledging that "the diagnosis of [ASPD] is the subject of some significant professional debate," the court stated that "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. The court also rejected Brown's argument, identical to that made by Ritter, that, because a significant percentage of the male prison population is diagnosable with ASPD, the diagnosis "does not distinguish a subgroup of offenders for whom preventative detention is appropriate." *Id.* at 614. Commenting that this argument "misses the mark," the court went on to cite to *Crane*:

> [T]here 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 between 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.* at 614, citing *Crane,* 534 U.S. at 413. If, the court continued, "the condition of [ASPD] is serious enough to cause an inability to control sexually violent behavior, the standards set by the Supreme Court would be satisfied." *Id.,* 699 F.3d at 615.

Ritter does not argue that the evidence at trial was insufficient to demonstrate this connection between his diagnos[es] and serious difficulty controlling behavior, and indeed there was significant testimony to that effect. *See* RP 1/19/2012 at 744, 757, 762-63; RP 1/23/2012 at 834; 916-22. Ritter's argument that ASPD is "too imprecise to distinguish the truly mentally ill from those who must be dealt with by criminal prosecution alone" (App. Br. at 25) fails.

### C. No Unanimity Instruction Was Required

Ritter also argues that, "if the diagnosis of antisocial personality disorder is held invalid," his commitment must be vacated. App. Br. at 34. As there is no basis for this Court to so hold, this argument fails. Where there is testimony at trial to the effect that the offender suffers from both a mental abnormality and a personality disorder, and where substantial evidence supports each, these two conditions "are alternative means for making the SVP determination." *In re Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006). As Ritter does not allege that there was not substantial evidence to support both diagnoses, and he presses his argument only if the diagnosis of ASPD is invalidated by this Court, it is unnecessary to address this argument. Ritter's claim must be rejected.

## D. The Trial Court Properly Admitted Testimony Related To The Results Of The SRA-FV

Ritter next argues that the trial court abused its discretion by admitting statistical theories and actuarial instruments "that are not generally accepted, have not been subject to peer review, are not helpful to the finding of fact, and are not reasonably relied upon by experts in the field." App. Br. at 35. He identifies three specific "statistical theories and actuarial instruments" as failing to meet these standards: the SRA-FV,[10] the Static-99R, and the MnSOST-R. App. Br. at 38-43. This argument fails. First, Ritter's motion before the trial court discussed only the SRA-FV and did not ask the trial court to hold a *Frye*[11] hearing or otherwise limit discussion of the Static-99R and the MnSOST-R at trial. CP at 633-670. As such, Ritter cannot raise these issues at this juncture. Second, Dr. Arnold did not rely upon MnSOST-R at trial, and as such the argument that this evidence was improperly admitted is without basis. Finally, even if Ritter had objected to those instruments, that request would have been properly denied, as the arguments Ritter now presents have been soundly rejected by the appellate courts of this State.

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[10] SRA-FV stands for Structured Risk Assessment-Forensic Version. RP 1/23/2012 at 809. The SRA-FV is a tool that lists a variety of researched "stable dynamic risk factors," or long-term vulnerabilities that, while they can change over time, will not change quickly. RP 1/19/12 at 783.

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

### 1. Standard Of Review

Generally, all relevant evidence is admissible and all irrelevant evidence is inadmissible. ER 402. Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even relevant evidence will be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent manifest abuse of that discretion. *State v. Swan,* 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). Discretion is abused when based on untenable grounds or in a manifestly unreasonable manner. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93,107, 864 P.2d 937 (1994). "An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (internal citations omitted).

Because Ritter fails to show that the trial court abused its discretion by permitting testimony regarding various actuarial instruments, his arguments fail.

### 2. Ritter Cannot Attack The MnSOST Or The Static-99 For The First Time On Appeal

Ritter now asks this Court to find that the trial court abused its discretion by admitting testimony related to the Static-99 and the MnSOST-R. Because Ritter never raised this issue below, this argument should not be considered by this Court.

Shortly before trial, Ritter filed a motion entitled "Motion To Exclude Opinion Testimony By SVP Evaluator Based on *Frye*, ERs 702-703, 401-403 And/Or Hearing On Scope Of Testimony If Permitted." CP at 633-70. The motion, when originally filed, was unsupported by any declarations, and at no point during the hearing on that motion did Ritter refer to any supporting declarations. *Id.*; RP at 572-597.[12] Ritter's written motion referred only to the SRA-FV, and at no point in the motion or the hearing on that motion suggested exclusion of or a *Frye* hearing on the Static-99R or the MnSOST-R. CP at 633-670; RP 1/17/12 at 590-97. Although he now cites to portions of the record that purportedly support his argument that discussions of these instruments should have been prohibited, there was in fact no request to do so and, as Ritter concedes,

[12] The trial court's docket indicates that, on the day that the *Frye* motion was heard (Jan. 17, 2012), Ritter filed a document entitled "Documents in Support of Respondent's 702, 703 Motion." CP at 1212. This submission includes an unsigned, undated 6-page declaration, purportedly by Dr. Richard Wollert. CP at 820-26. These documents were filed at 4:02 PM (CP at 820), apparently after the hearing on the subject, which appears have to have begun sometime after 2:30 PM (RP 1/17/2012 at 572).

the State's expert, Dr. Arnold, did not even rely on the MnSOST-R in his final assessment of Ritter. RP at 1/19/2012 at 766; 836-837. Nor was there any request to preclude reliance on the Static-99, and Ritter's cites to the record (App. Br. at 40-41) actually refer to arguments made in support of a different motion argued on a different day.[13] As such, he cannot raise these issues at this juncture. RAP 2.5(a). This Court should decline to consider any claims relating to the MnSOST-R or the Static-99R.

### 3. The Appellate Courts Of This State Have Soundly Rejected All Of Ritter's Arguments

Even if this Court were to consider the admissibility of all three methods at this time, Ritter's argument fails. Each of Ritter's arguments for exclusion of testimony relating to clinical or actuarial risk assessments in SVP cases has previously considered and rejected by the Washington Supreme Court. *See In re Young*; *In re Det. of Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999); and *In re Thorell*.[14] The Supreme Court in *Thorell* makes clear that neither clinical predictions of future dangerousness or risk assessments based on risk assessment instruments

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[13] Ritter filed two different motions, both related to use of methods of risk assessment at trial. In addition to his SRA-FV motion, Ritter filed a motion entitled "Motion to Exclude Percentile Rankings And Identifiers As High, Medium And Low." CP at 725-35. This was argued on January 11. RP 1/11/2012 at 89-95.

[14] The *Thorell* court was addressing the admissibility of the MnSOST, the RRASOR (Rapid Risk Assessment for Sexual Offense Recidivism) and the VRAG (Violence Risk Appraisal Guide), a predecessor of the SORAG (Sexual Offense Risk Assessment Guide). *See Detention of Strauss*, 106 Wn. App 1, 7-8, 20 P.3d 1022 (2001).

require a separate hearing under *Frye* because the scientific principles used to construct actuarial instruments are well-accepted in the scientific community. *Thorell*, 149 Wn.2d at 755. Thus, the *Frye* standard has been satisfied in SVP cases. *Id.* at 756.

Likewise, the use of dynamic risk factors in SVP evaluations, such as those included within the SRA-FV, has long been accepted as part of a broader assessment of risk for sex offenders.[15] *See e.g. In re Detention of Jacobson*, 120 Wn. App. 770, 86 P.3d 1202 (Div. 1, 2004); *In re Detention of Danforth*, 153 Wn. App. 833, 840, 223 P.3d 1241 (2009); *In re Detention of Reimer*, 146 Wn. App. 179, 196, 190 P.3d 74 (2008); *In re Detention of Jones*, 149 Wn. App. 16, 22, 201 P.3d 1066 (2009). Ritter's argument fails.

#### 4. Ritter's Argument Goes to the Weight of the Evidence and Not Its Admissibility

Ritter further argues that Dr. Arnold's testimony based on his use of the SRA-FV should not have been admitted pursuant to ER 702-703 and ER 401-403. His argument fails because Washington authority has already rejected this argument and indicated that these criticisms of Dr. Arnold's risk assessment go to its weight and not admissibility.

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[15] It should be noted that Ritter's expert, Dr. Robert Halon, testified that he has also used the SRA-FV. RP 1/25/12 at 1115.

In rejecting arguments like those Ritter makes here, the Washington Supreme Court in *Campbell* cited its own precedent in *Young*, as well as United States Supreme Court precedent in *Barefoot v. Estelle,* 463 U.S. 880, 896-903, 103 S.Ct. 3383 (1983):

> [i]n determining that predictions of future dangerousness do not offend the United States Constitution, the United States Supreme Court noted 'the rules of evidence generally extant at the federal and state levels anticipate that relevant [sic], unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross-examination and contrary evidence by the opposing party.'

*Campbell*, 139 Wn.2d at 358, n. 3. The Washington Supreme Court has acknowledged that predictions of future dangerousness, "despite the inherent uncertainties of psychiatric predictions," are sufficiently accurate and reliable to submit to the fact finder for consideration. *Young*, 122 Wn.2d at 56.

The Supreme Court in *Young* considered the two-part test for ER 702 issues: (1) whether the witness qualifies as an expert, and (2) whether the expert testimony would be helpful to the trier-of-fact, and concluded that testimony regarding the likelihood that an offender would reoffend was admissible under ER 702. *Id.* at 57-58. The Court then considered whether the expert testimony was admissible under ER 703 as the type of materials reasonably relied upon by experts in the particular field and

concluded that the materials, including psychological reports and criminal histories were proper materials to consider in reaching their opinions about an offender's mental abnormality and likelihood of reoffense. *Id.* at 59.

In considering a challenge to the use of actuarial instruments in *Thorell*, the Supreme Court cited its holdings in *Young* and *Campbell* to reject arguments that clinical or actuarial risk assessments were inadmissible pursuant to *Frye*, ER 403, ER 702 or ER 703. 149 Wn.2d at 757-58. Ritter' criticism of Dr. Arnold's risk assessment in this case goes to the weight of the evidence and not its admissibility. At trial, he was free to cross-examine Dr. Arnold about his decision to use the SRA-FV in this case, and did so. RP 1/24/2012 at 976-997.

Because Ritter has failed to provide the Court with any relevant authority that would distinguish Dr. Arnold's risk assessment from those conducted in *Young, Campbell*, or *Thorell*, his motion was properly denied. This Court should likewise reject his argument.

## E. Washington's Statute Requires Proof Beyond A Reasonable Doubt

Ritter argues that the statute's requirement that the State prove, beyond a reasonable doubt, that the offender is "likely" to reoffend cannot pass constitutional muster. Although he acknowledges that the Washington State Supreme Court rejected this argument in *In re Brooks,*

145 Wn.2d 275, 36 P.3d 1034 (2001) (reversed on other grounds by *Thorell*), he argues that this argument should be reexamined in light of *Crane* and *Thorell*'s requirement that the offender have "serious difficulty" controlling his dangerous sexual behavior.

This argument fails. The Kansas statute at issue in *Crane* contained virtually identical language to that identified by Ritter as problematic.[16] Nowhere in that opinion does the Supreme Court indicate that that use of the term "likely" prevents a determination by a fact finder that the individual in question has "serious difficulty" controlling his or her sexually dangerous behavior. Nor did the *Thorell* Court suggest that this language was at odds with the *Crane* Court's "serious difficulty" language. This argument is frivolous and must be rejected.

**F. Ritter Has Not Demonstrated Error, Cumulative Or Otherwise**

Finally, Ritter argues that reversal is merited on the basis of cumulative error. The State does not disagree with his statement of the applicable law. App. Br. at 49. He has not, however, demonstrated that this case should be reversed. The overwhelming evidence at trial

[16] Referring to Kansas' sex predator act, the Court wrote: "That Act permits the civil detention of a person convicted of any of several enumerated sexual offenses, if it is proven beyond a reasonable doubt that he suffers from a "mental abnormality"-a disorder affecting his "emotional or volitional capacity which predisposes the person to commit sexually violent offenses"-or a "personality disorder," either of "which makes the person likely to engage in repeat acts of sexual violence." Kan. Stat. Ann. §§ 59-29a02(a), (b) (2000 Cum.Supp.) ."

demonstrated that Ritter is a remorseless pedophile who has no insight into his history of brutal assaults. The combination of his entrenched sexual deviance and his antisocial personality disorder cause him to have serious difficulty controlling his dangerous sexual behavior, and, if released, he is highly likely to reoffend. The State proved this beyond a reasonable doubt, and his commitment should be affirmed.

## IV. CONCLUSION

For the reasons set forth above, this Court should affirm Ritter's commitment as a sexually violent predator

RESPECTFULLY SUBMITTED this 5th day of February, 2013.

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NO. 30845-6

**COURT OF APPEALS, DIVISION III**
**OF THE STATE OF WASHINGTON**

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| In re the Detention of:<br><br>Steven Ritter,<br>Appellant. | DECLARATION OF SERVICE |

I, Allison Martin, declare as follows:

On February 5th, 2013, I deposited in the United States mail, and sent by e-mail, true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

MARLA ZINK
Washington Appellate Project
1511 3rd Avenue, Suite 701
Seattle, WA 98101
marla@washapp.org

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 February, 2013, at Seattle, Washington.

Allison Martin
ALLISON MARTIN