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No. 61923-3-1

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

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IN RE: DETENTION OF CURTIS MARTEN

STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

CURTIS MARTEN,

Appellant.

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

The Honorable Michael J. Fox

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

Curtis Marten was civilly committed under Washington's Sexually Violent Predator law on the basis of expert testimony alleging two mental disorders: paraphilia-not-otherwise-specified (NOS)-nonconsent and personality disorder-not-otherwise-specified (NOS) with antisocial and schizoid features. The first alleged disorder has not been accepted by the psychiatric community and is not contained in the Diagnostic and Statistical Manual, IV-Text Revision (DSM-IV),<sup>1</sup> the definitive reference for mental health professionals, which reflects the consensus of the profession. The second diagnosis describes up to eighty percent of the U.S. prison population and more than seven million Americans, and the American Psychiatric Association's position is that it is an overbroad and inappropriate basis for involuntary civil commitment. Because the first diagnosis is not medically recognized and the second diagnosis is overbroad and imprecise, Mr. Marten's civil commitment violates due process.

Further, Mr. Marten's behavior in the community, as detailed during the trial, failed to rise to the level of recent overt acts as

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<sup>1</sup> Diagnostic and Statistical Manual, IV-Text Revision (4<sup>th</sup> ed.-text rev. 2000) (DSM-IV).

defined by the statute. Although certain conduct was described that could be considered annoying or even criminal, this behavior was neither of a sexually violent nature, nor was it conduct that would create a reasonable apprehension of harm in the mind of an objective person who knows Mr. Marten's history and his mental condition.

Last, the trial court issued a detailed pre-trial order that instructed prosecutors not to elicit the word "rape," regarding Mr. Marten's relationship with his wife, and to advise their witnesses not to use that word in open court, as there was no factual basis for any such conduct. Despite this pre-trial ruling, the State's expert witness blurted out that Mr. Marten had raped his own wife – a response that even the trial court remarked was unresponsive to the question asked, and could cause a mistrial. Despite the trial court's valid concern, however, the court merely struck the response and issued a curative instruction, which was insufficient to lift the taint created by the misconduct of the State's witness.

#### B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Marten's Fourteenth Amendment right to due process by upholding his civil commitment based upon the unrecognized and flawed diagnoses of paraphilia-

NOS-nonconsent and personality-disorder-NOS with antisocial and schizoid features.

2. The State failed to present sufficient evidence that Mr. Marten engaged in conduct constituting a recent overt act as defined by the statute.

3. The violation of a pre-trial ruling in limine by the State's expert witness tainted the jury and denied Mr. Marten his due process right to a fair trial.

4. The trial court erred in refusing to grant a mistrial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Considering Mr. Marten's civil commitment is premised upon diagnoses which are not medically recognized or sufficiently precise, does his commitment violate his due process rights, requiring reversal and dismissal?

2. Due process requires the State to prove that a respondent is both mentally ill and dangerous before depriving him of his liberty. Unless the respondent is currently incarcerated for a sexually violent offense, dangerousness must be evidenced by a "recent overt act." The State presented evidence of Mr. Marten's behavior in 2002, which consisted of patronizing certain nail salons and shops, but which did not rise to the level of a recent overt act.

Did the State fail to prove dangerousness by presenting sufficient evidence of a recent overt act?

3. The trial court issued pre-trial rulings in order to limit testimony that was unfounded, and that might tend to inflame the jury during a trial. Where a professional witness seemingly decided to disregard the State's preparation and the court's order, did the trial court abuse its discretion by failing to grant a mistrial due to the taint arising from this false testimony?

D. STATEMENT OF THE CASE

Curtis Marten grew up as one of three children, and enjoyed an apparently normal childhood with his parents and siblings. CP 3. Mr. Marten's first reported problems began to surface with his alcohol use, starting at age eighteen, which quickly became a daily habit. CP 3.

In 1984, when Mr. Marten was a senior in high school, he was arrested for an altercation involving a Japanese exchange student, Sayuri Hata. 5/22/08 RP 14.<sup>2</sup> Ms. Hata reported that Mr. Marten had grabbed her and taken her for a ride in his car, then held her down and straddled her while touching her breasts; her

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<sup>2</sup> The verbatim report of proceedings consists of twenty volumes of transcripts from February 4, 2003, through June 12, 2008. The proceedings will be referred to as follows: 6/12/08 RP \_\_\_\_." References to the file will be referred to as "CP \_\_\_\_."

accounts varied as to whether he had tried to remove her stockings. Id. at 25, 28, 29. Ms. Hata told Mr. Marten that if he raped her, she would kill herself; upon hearing this, he immediately stopped, and she exited the vehicle, scraping her elbow. Id. at 31-32, 35. She also stated that they had spent hours in the car together, discussing the bible and religion. Id. at 42. All charges in this matter were ultimately dismissed. 6/2/08 RP 55.

In 1994, Mr. Marten married his wife Maria, with whom he has three children, and to whom he has been married for over fifteen years. 6/10/08 RP 78; CP 4. Mr. Marten also has four additional children with other women. Id. at 110; CP 4.

In 1997, Mr. Marten pled guilty to unlawful imprisonment, for an incident involving a woman named Karen Zavala. 5/22/08 RP 183; 5/27/08 RP 11. Ms. Zavala, a 19 year-old Honduran immigrant, was a few weeks pregnant,<sup>3</sup> and was going to get a pregnancy test at a neighborhood clinic when Mr. Marten met her at a bus stop. 5/28/08 RP 117. After Mr. Marten gave a false name and asked Ms. Zavala about whether she was available for housekeeping services, he offered her a ride to her appointment,

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<sup>3</sup> Ms. Zavala testified that she was not yet visibly pregnant. 5/28/08 RP 153.

since she had missed her bus. Id. at 122-24.<sup>4</sup> Mr. Marten bought her breakfast at McDonald's, and then tried to explain that he wanted to videotape her belly, so that he could show her before- and after- pictures, once she had the baby. 5/28/08 RP 128; 5/22/08 RP 183. Ms. Zavala became alarmed when Mr. Marten pulled up her shirt, and states that he grabbed the seat and made it recline, covering her mouth with his shoulder. 5/22/08 RP 130-32. She stated that other than touching her stomach and her leg, Mr. Marten did not physically touch her; she also noted that he smelled of alcohol. Id. at 133, 160.

Mr. Marten's other offense under the SVP statute was also in 1997, when he pled guilty to indecent liberties with forcible compulsion, in resolution of a matter involving a manicurist named Tam Nguyen. 5/27/08 RP 11. A complaint was taken without a Vietnamese translator from Ms. Nguyen in January of 1997, indicating that she sought to file a complaint against Mr. Marten for fondling her breast and her buttocks at her nail salon during the business day. 5/22/08 RP 123-35. Mr. Marten was contacted by detectives and turned himself in, explaining that he had been

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<sup>4</sup> Since Ms. Zavala testified that her English at that time was not fluent, she explained that a friend had been summoned to translate this exchange between herself and Mr. Marten.

drinking, and was upset due to a no-contact order with his wife. Id. at 178.

Upon his release from incarceration in early 2000, Mr. Marten began outpatient sex offender counseling, as well as alcohol treatment and an array of additional conditions required by his Department of Corrections Community Corrections Officer (CCO). 5/29/08 RP 107. Soon after Mr. Marten's release, however, Mr. Marten's wife began calling his CCO, stating that he appeared to be drinking and that he had violated his curfew. Id. at 116. A number of violations, including apparently leaving the jurisdiction, a positive UA for cocaine, and a domestic assault, resulted in Mr. Marten being found guilty of nine of ten violations of his probation, and serving 90 additional days in jail. Id. at 129.

Following his release in 2001, Mr. Marten again struggled with his conditions of supervision, ultimately pleading guilty to a number of violations, including changing his residence, arrests for driving under the influence of alcohol, and using a car without the permission of his CCO. Id. at 153, 162-65, 167-68. Mr. Marten's repeated violations while in community custody resulted in several short stays in jail, which he completed to resolve these infractions between 2001 and 2002. Id. at 168-84. None of these violations

involved sexual offenses. Rather, all of Mr. Marten's reported infractions were of the "technical" variety – not reporting to his CCO, changing his official residence without permission, missing anger management classes, failing to attend his therapy appointments, using a car without permission – or related to his alcoholism, such as the DUI arrests and failure to attend his chemical dependency treatment program. Id. at 187.

The basis for the "recent overt act" allegations did not occur until August of 2002, when Mr. Marten, at liberty again, allegedly began visiting tanning and nail salons, including the Hot Spot Tanning Salon in Bothell, where Alexis Mayes, a 17 year-old, was employed. 5/22/08 RP 81. At trial, Ms. Mayes, age 23 at the time of trial, testified that although Mr. Marten never touched her physically in any way, his presence made her feel "uncomfortable" and that there was an "awkward silence" when he came into the store. Id. at 82, 116-18. Ms. Mayes stated that Mr. Marten made her feel nervous, and that he had commented on her necklace; he also told her that he was unsure that he wanted to buy a tan after all, and would come back and decide later. Id. at 84, 88-89. Mr. Marten left a false name on a client information card, and sat in the parking lot in his car for ten minutes, and then called Ms. Mayes

and asked her why her tan looked so good, which Ms. Mayes stated made her feel uncomfortable enough to leave her shift early. Id. at 89. Ms. Mayes acknowledged that Mr. Marten never physically or sexually touched her in any manner, and that this visit had occurred in the middle of the day. Id. at 118.<sup>5</sup>

The State also presented evidence of recent overt acts based upon deposition testimony of several manicurists and tanning salon employees, who discussed various incidents attributed to Mr. Marten – none of them sexual offenses, and none of them violent. The depositions generally described the manicurist or stylist receiving a prank phone call that her headlights were on, or that her car had a flat tire, and described her experience as she or a co-worker went to investigate the call. 6/4/08 RP 62-63. One manicurist, Ms. Ngoc Hanh Ghi Le, recalled one such call in 2002, noting how she saw a man walking back and forth, looking into the shop, and then later saw him sitting in the parking lot. Id. The man never spoke to or threatened Ms. Le, and never followed her. Id. at 73.

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<sup>5</sup> Another alleged incident was reported in a different tanning salon during the same time period; however, no charges were filed. 5/22/08 RP 73. The complaining witness in the second tanning case, Amanda Evans, was the daughter of a local police sergeant and the case was quickly investigated. Id. Ms. Evans' complaint that Mr. Marten simply "creeped [her] out" was insufficient to sustain an arrest, but may say a great deal about this case. Id.

Another deposition followed a similar pattern, with Ms. Katherine Nguyen testifying that during August of 2002, she received a phone call from a man, telling her that her car needed to be moved from the parking lot at her nail salon. Supp. CP\_\_\_\_, sub. no. 230 (Deposition of Katherine Nguyen), at 3. She also stated that the same man called on a different day to schedule an appointment for his wife. Id. at 4. Ms. Nguyen said that she saw this man, who she later identified from a police-arranged photo montage as Mr. Marten, walking back and forth near her nail salon on one day, and then on a subsequent day when she found that she had a flat tire. Id. at 5-6.

Another witness presented by the State by deposition testified that she, too, had encountered Mr. Marten in her nail salon in 2002. Supp. CP \_\_\_\_, sub. no. 234B (Deposition of My Vo Phan), at 2. Like Ms. Nguyen, Ms. Phan had no physical or sexual contact whatsoever with Mr. Marten, nor was she threatened in any manner. Id. at 4. Ms. Phan stated that Mr. Marten had stopped at her nail salon attempting to exchange food stamps for cash, in order to buy gas for his car. Id. at 3. She noted that he circled around in his car again, after she told him she could not make the exchange, and that she later received a call telling her to come

outside because her headlights were on; once thereafter she found that her car had a flat tire. Id. at 4-5.

In addition, the trial court made a pre-trial ruling prohibiting the use of the word “rape,” regarding Mr. Marten’s relationship with his wife, as there was no factual basis for any such characterization. 5/15/08 RP 144. Despite this pre-trial order, the State’s expert witness, Dr. Rawlings, blurted out that Mr. Marten had raped his own wife, 6/2/08 RP 119 – a response that even the trial court remarked was unresponsive to the question asked, and could cause a mistrial. 6/2/08 RP 126-27. This testimony even caused the court to remark that it was “disappointed, frankly, in Dr. Rawlings” for “adopting the role of an advocate rather than an expert witness.” 6/5/08 RP 3. Despite the trial court’s valid concern, however, the court merely struck the response and issued a curative instruction, which was wholly insufficient to lift the taint created by the misconduct of the State’s witness.

Following a jury trial, the jury returned a verdict that Curtis Marten is a sexually violent predator. CP 1068-69. The court ordered him committed to the Special Commitment Center. CP 1066-67.

Mr. Marten timely appeals.

## E. ARGUMENT

1. MR. MARTEN'S INVOLUNTARY COMMITMENT VIOLATES DUE PROCESS, BECAUSE IT IS PREMISED UPON DIAGNOSES THAT ARE NOT ACCEPTED BY THE PROFESSION, ARE OVERBROAD, AND ARE INSUFFICIENTLY PRECISE.

- a. Due process requires the State to prove that an involuntary civil commitment is based upon a valid, medically recognized mental disorder. The state and federal constitutions guarantee the right to due process of law. U.S. Const. amend 14; Wash. Const. art. 1, § 3. A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed.2d 437 (1992). The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, the State may only commit persons who are *both* currently dangerous *and* have a mental abnormality. Id. at 77; Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed.2d 501 (1997); In re Detention of Thorell, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Current mental illness is a constitutional requirement of

continued detention. O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S. Ct. 2486, 45 L. Ed.2d 396 (1975).

Three Supreme Court precedents are directly applicable to this case: Foucha, 504 U.S. 71; Hendricks, 521 U.S. 346; and Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). Taken together, these cases establish that involuntary civil commitment may not be based on a diagnosis that is either medically unrecognized or too imprecise to distinguish the truly mentally ill from typical recidivists who must be dealt with by criminal prosecution alone.

In Foucha, the Court held that a criminal defendant found not guilty by reason of insanity could not be held involuntarily in a state mental hospital solely "on the basis of his antisocial personality which, as evidenced by his conduct at the facility, . . . rendered him a danger to himself or others." 504 U.S. at 78; see also id. at 82 (rejecting the argument that "because [an individual] once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, . . . he may be held indefinitely").

The Court explained that the State's "rationale [for commitment] would permit [it] to hold indefinitely any other insanity

acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term." Id. at 82-83. The Court reasoned that if a supposedly dangerous person with a personality disorder "commit[s] criminal acts," then "the State [should] vindicate [its interests through] the ordinary criminal processes . . . , the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct" -- i.e., "the normal means of dealing with persistent criminal conduct." Id. at 82. In her concurring opinion, Justice O'Connor added that it was "clear that acquittees could not be confined as mental patients absent some medical justification for doing so." Id. at 88 (O'Connor, J., concurring in part and concurring in the judgment).

In Hendricks, the Court reaffirmed that "dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment; " rather, "proof of dangerousness [must be coupled] with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" 521 U.S. at 358. The Court then upheld Hendricks' commitment under the Kansas Sexually Violent Predator Act (KSVPA), noting that "[t]he

mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder." Id. at 260 (citing DSM-IV). Thus, "Hendricks' diagnosis as a pedophile . . . suffice[d] for due process purposes" and, further, his admitted inability to control his pedophilic urges "adequately distinguish[e]d [him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." Id.

In his concurrence, Justice Kennedy, who provided the fifth vote in support of the majority opinion, also emphasized that Hendricks' "mental abnormality--pedophilia--is at least described in the DSM-IV." Id. at 372 (Kennedy, J., concurring). He therefore concluded that, "[o]n the record before [the Court], [Hendricks' commitment] conform[ed] to [the Court's] precedents." Id. at 373. He was quick to add, "however, . . . [that] if it were shown that mental abnormality," as defined by state law, "is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." Id.

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, agreed that Hendricks' commitment comported with due process, but did not agree with all of the majority's analysis. Id. at

374 (Breyer, J., dissenting). Justice Breyer's opinion thus "set forth three sets of circumstances that, taken together, convince[d]" him that Hendricks' commitment did not violate due process:

First, the psychiatric profession itself classifies the kind of problem from which Hendricks suffers as a serious mental disorder. [Citing the DSM-IV]. . . . The Constitution permits a State to follow one reasonable professional view, while rejecting another. The psychiatric debate, therefore, helps to inform the law by setting the boundaries of what is reasonable. . . .

Second, Hendricks' abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions. . . .

Third, Hendricks' mental abnormality also makes him dangerous. . . .

Id. at 374-76 (emphasis added; citations omitted).

Most recently, the Court revisited the KSVPA and held that due process requires that "there must be proof of serious difficulty in controlling behavior" in order to support involuntary civil commitment. Crane, 534 U.S. at 413. The Court reemphasized that its decision in "Hendricks underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'" Crane, 534 U.S. at 412 (quoting Hendricks, 521 U.S. at 360).

Thus, an individual cannot be involuntarily committed unless he

suffers from a mental abnormality "sufficient to distinguish . . . him . . . from the dangerous but typical recidivist convicted in an ordinary criminal case." Id. at 413. In reaffirming the significance of this distinction, the Court specifically cited to a study finding that forty to sixty percent of the male prison population is diagnosable with antisocial personality disorder (APD). Id. at 412 (citing Paul Moran, The Epidemiology of Antisocial Personality Disorder, 34 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999)).

In light of these United States Supreme Court cases, the Washington Supreme Court similarly recognizes that in sexually violent predator proceedings, due process requires the State to prove the detainee has a serious, diagnosed, mental disorder that causes him difficulty controlling his sexually violent behavior. Thorell, 149 Wn.2d at 736, 740-41. "Lack of control" requires proof "sufficient to 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 convicted in an ordinary criminal case." Id. at 723 (quoting Crane, 534 U.S. at 413). Expert testimony is essential to tie a lack of control to a diagnosed mental abnormality or personality disorder.

Id. at 740-41. This proof must rise to the level of proof beyond a reasonable doubt. Id. at 744.

Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for commitment as a sexually violent person, see Crane, 534 U.S. at 413, the diagnosis must nonetheless be medically justified. See Hendricks, 521 U.S. at 358 (explaining that states must prove not only dangerousness but also mental illness in order to "limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control"); Thorell, 149 Wn.2d at 732, 740-41 (explaining that the State must present expert testimony and proof beyond a reasonable doubt that offender has serious, diagnosed, mental illness that causes him difficulty controlling his behavior).

i. Dr. Rawlings' diagnosis of paraphilia-NOS-nonconsent violates due process, because it is an invalid diagnosis that is not accepted by the profession, including the American Psychiatric Association (APA) and the DSM-IV-TR. The State expert's diagnosis of "paraphilia-NOS-nonconsent" is invalid, and its use as predicate for Mr. Marten's involuntary civil commitment therefore violates due process. The Supreme Court has upheld

involuntary civil commitment only in cases in which the diagnosed disorder was one that "the psychiatric profession itself classifies as a serious mental disorder." Hendricks, 521 U.S. at 360; id. at 372 (Kennedy, J., concurring); id. at 375 (Breyer, J., dissenting); Crane, 534 U.S. at 410, 412; see also Foucha, 504 U.S. at 88 (O'Connor, J., concurring in part and concurring in the judgment) (involuntary civil commitment requires "some medical justification"). During oral argument in Hendricks, Justice Souter drove home precisely why the Due Process Clause requires consensus "medical recognition" before it can justify involuntary civil commitment:

SOUTER: You don't take the position . . . that [a] State could say, we recognize a category of mental abnormality or mental illness. It hasn't been recognized in any medical or psychiatric literature, but we're recognizing it now, and that satisfies [due process?] . . . (emphasis added)

[KANSAS]: That would not be the argument the State would make . . . .

SOUTER: What is the function of this medical recognition . . . under Foucha? . . . Why do we . . . say that in order to satisfy the mental illness element under Foucha there has got to be a medically recognized category within which the particular individual falls?

[KANSAS]: . . . [S]o that the Court doesn't worry that we confine merely for dangerousness or merely for a class of people that we don't want to be around . . . . [T]o be able to civilly commit . . . them it has to be a medically recognized condition . . . .

SOUTER: It's less likely to be abused if there's a categorical approach rather than a purely individual approach.

Transcript of Oral Argument, Hendricks, 521 U.S. 346 (Nos. 95-1649, 95-9075), at [http://www.oyez.org/cases/1990-1999/1996/1996\\_95\\_1649/argument/](http://www.oyez.org/cases/1990-1999/1996/1996_95_1649/argument/).

The disorder referred to by Dr. Rawlings as paraphilia-NOS-nonconsent fails the Court's "medical recognition" or "medical justification" test, because it is not recognized by either the psychiatric profession in general or the APA or the DSM-IV-TR in particular. Put simply, it is a wholly unreliable and invalid diagnosis that fails to distinguish Mr. Marten from any "dangerous but typical recidivist" who cannot be civilly committed under the Due Process Clause. Crane, 534 U.S. at 413.

The DSM-IV-TR does recognize a general diagnosis of "Paraphilia Not Otherwise Specified." American Psychiatric Association, The Diagnostic and Statistical Manual of Mental Disorders, IV-Text Revision 576 (4th ed.-text rev. 2000) ("DSM-IV-TR"). This category is included for coding paraphilias that do not meet the criteria for any of the specific categories; the "specific categories" include, for example, pedophilia, exhibitionism, and sexual sadism. See id. at 566-75. The DSM-IV-TR explains that

examples of paraphilia-NOS "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)." Id. at 576.

While, by its terms, this diagnosis "is not limited to" the variants specifically listed, it would be hard to imagine that the DSM-IV-TR would list such "relatively rare" and "inherently nonviolent" disorders while omitting a valid diagnosis of paraphilia-NOS-nonconsent, which would be "more common and certainly more socially problematic" than the disorders specifically identified. Thomas K. Zander, Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis, 1 Journal of Sexual Offender Civil Commitment: Science and the Law 17 (2005) (available at <http://www.socjournal.org>), at 43; see also, e.g., Marilyn Price, et al., Redefining Telephone Scatologia: Comorbidity and Theories of Etiology, 31 Psychiatric Annals 226, 226 (2001) (describing the paraphilia-NOS category as "reserved for sexual disorders that are either so uncommon or have been so inadequately described in the literature that a separate category is

not warranted"). Rather, the logical inference is that the modifier "nonconsent" was deliberately omitted.

This inference is supported by the treatment of non-consensual sexual conduct in other sections of the DSM-IV-TR. For example, sexual abuse of a child is mentioned in the section of the DSM that covers "other conditions or problems" that may merit "clinical attention" but are not independently diagnosable mental disorders. See DSM-IV-TR at 731, 738-39; Zander, Civil Commitment Without Psychosis, *supra*, at 43-44.

In addition to the failure of the APA to recognize the disorder, numerous professionals and commentators conclude that it is invalid and diagnostically unreliable. To understand these criticisms, it is necessary to review the diagnostic criteria for paraphilias established by the APA in the DSM. Criterion A of the general diagnostic category of paraphilias in DSM-IV-TR requires that the person demonstrate "recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving (1) nonhuman objects; (2) the suffering or humiliation of oneself or one's partner, or (3) children or other nonconsenting persons that occur over a period of at least six months." DSM-IV-TR at 566. Criterion B requires that the person be distressed or have impaired functioning,

except for the diagnoses of pedophilia, voyeurism, and sexual sadism, which can be made based solely on the person having acted on his or her paraphilic urges. Id.

Here, the State's expert, Dr. Leslie Rawlings, testified that he diagnosed Mr. Marten with paraphilia-NOS-nonconsent, based upon his assessment that: 1) Mr. Marten was aroused and attracted by nonconsensual or forcible sex; 2) the behavior has continued for well over six months; and 3) it has caused him impairment, including multiple incarcerations and occupational delays, as well as personal distress, since Mr. Marten has often felt the urge to apologize to his victims. 6/2/08 RP 112, 123-26.

Commentators have identified conceptual flaws in Dr. Rawlings' theories, and even Dr. Dennis Doren, a leading proponent of the paraphilia-NOS-nonconsent diagnosis, acknowledges that "this category probably represents the most controversial among the commonly diagnosed conditions within the sex offender civil commitment realm." Zander, Civil Commitment Without Psychosis, supra, at 41. For example, it is well-known in the psychological community that the diagnosis of paraphilia-NOS-nonconsent has an interrater reliability factor in the "poor" category. Id. at 49-50. When asked about this at trial, Dr. Rawlings

acknowledged that interrater reliability is extremely low for this diagnosis. 6/3/08 RP 68-70. He further explained that this means that there is a low incidence of matching diagnoses – that is, low rates of agreement between diagnostic clinicians, and a false-positive rate of .35. Id. Dr. Rawlings agreed that was due to the lack of clarity of the criteria for paraphilia-NOS-nonconsent. Id. at 63.

If there is such lack of clarity as to the criteria for the diagnosis of paraphilia-NOS-nonconsent, and such a inaccurate rate of interrater reliability, then there is insufficient professional consensus in this diagnosis. The paucity of support for the diagnosis in the DSM-IV-TR and in the professional literature, as well as its contextual variability, strongly suggests that it lacks conceptual validity. Zander, Civil Commitment Without Psychosis, supra, at 49. The diagnosis has not even been recognized outside of the SVP commitment context. Id. Further, there are no published studies reporting interrater reliability of the diagnosis in clinical practice, research settings, or in any context other than SVP cases. Id. The psychiatric community is far from recognizing the validity or reliability of the diagnosis of paraphilia-NOS-nonconsent. Id.

In sum, absent a diagnosis that "the psychiatric profession itself classifies as a serious mental disorder," Hendricks, 521 U.S. at 360, involuntary civil commitment violates the Due Process Clause. As Justice Souter said, "medical recognition" is necessary to prevent "abuse" of civil commitment procedures. Transcript of Oral Argument, Hendricks, 521 U.S. 346 (Nos. 95-1649, 95-9075). The convenient but vague diagnosis of paraphilia-NOS-nonconsent lacks such medical recognition. It is not in the DSM or recognized by the APA. There is no consensus within the psychiatric community of its validity as a diagnosis or its appropriateness in SVP proceedings. Accordingly, due process prohibits its use as a predicate for involuntary civil commitment.

ii. The State's reliance on personality disorder-NOS with asocial and schizoid features as a basis for civil commitment violates due process, as "personality disorder-NOS" is too imprecise a diagnosis to satisfy due process. Mr. Marten's involuntary commitment also violates due process insofar as it is based on a diagnosis of personality disorder-NOS. To begin with, the Supreme Court's decision in Foucha strongly implies that due process prohibits involuntary commitment on the basis of such a diagnosis. See 504 U.S. at 78, 82-83.

Antisocial personality disorder (APD), and by implication, personality disorder-NOS, is simply "too imprecise a category to offer a solid basis for concluding that civil detention is justified." Hendricks, 521 U.S. at 373 (Kennedy, J., concurring). For this reason, the diagnosis is fatally "[in]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." Crane, 534 U.S. at 413. For example, in Crane, the Court cited a study that found that forty to sixty percent of the male prison population is diagnosable with APD. Id. at 412. In reality, this number is probably seventy-five to eighty percent. See, e.g., Eric S. Janus, Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation, 92 N.W. U. L. Rev. 1279, 1291 & n.59 (1998) (collecting studies indicating that seventy-five to eighty percent of all prisoners are diagnosable with APD). Indeed, an estimated seven million Americans -- including more than six million men -- are diagnosable with APD. Harriet Barovick, Bad to the Bone, Time, Dec. 27, 1999. Dr. Theodore Donaldson, the defense expert here, estimated that approximately 70 percent of the prison population suffers from antisocial

personality disorder, and up to 90 percent suffers from some personality disorder. 6/9/08 RP 76-77. Thus, APD certainly is not the sort of "highly unusual" disorder that at least four justices in Hendricks agreed was a constitutional prerequisite to involuntary civil commitment. See 521 U.S. at 375 (Breyer, J., dissenting).

That millions of Americans and a substantial majority of the male prison population are diagnosable with APD is not surprising. The core of an APD diagnosis is the existence of any three of the following seven behaviors:

- (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
- (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
- (3) impulsivity or failure to plan ahead
- (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
- (5) reckless disregard for the safety of self or others
- (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
- (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

DSM-IV-TR at 706.<sup>6</sup>

Far from "distinguish[ing] . . . the dangerous but typical recidivist convicted in an ordinary criminal case," Crane, 534 U.S. at 413, these criteria essentially describe a typical recidivist (as well as millions of non-criminals). During oral argument in Crane, Justice Ginsburg recognized precisely this problem and expressed significant concerns over the use of APD as a predicate for involuntary civil commitment:

[I]f you look at the definition of [APD] and they say pick three out of a list of seven, you could pick out habitually doesn't work, doesn't pay debts, is reckless, irritable. That's . . . considerably less than what is defined as an abnormality like pedophilia. There are a lot of ordinary people who would fit that description.

Transcript of Oral Argument, Crane, 534 U.S. 407 (No. 00-957), at [http://www.oyez.org/cases/2000-2009/2001/2001\\_00\\_957/argument/](http://www.oyez.org/cases/2000-2009/2001/2001_00_957/argument/).

Justice Ginsburg also noted that anyone who was "a liar" and "a malingerer" and did "not pay [his] debts" would satisfy the criteria.

Id. And when Kansas's counsel took the position that a person

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<sup>6</sup> The remaining "diagnostic criteria" of APD are that the individual must be at least 18 years of age, there must be some "evidence" of a "Conduct Disorder" before age 15, and the antisocial conduct underlying the diagnosis must not relate exclusively to schizophrenia or a manic episode. DSM-IV-TR at 706. A "Conduct Disorder" is, more or less, a juvenile version of APD. See id. at 98-99, 702; Zander, Civil Commitment Without Psychosis, supra, at 55. APD does not require an actual diagnosis of conduct disorder; rather, "a history of some symptoms of Conduct Disorder before age 15" will suffice. DSM-IV-TR at 702; Zander, Civil Commitment Without Psychosis, supra, at 55.

exhibiting such unexceptional criminal and non-criminal behaviors "could be committed," Justice Souter's only response was, "Wow." Id.; see also, e.g., Zander, Civil Commitment Without Psychosis, supra, at 54-56 (explaining how an unexceptional "parking ticket scofflaw" could be diagnosed with APD). Such concerns likely explain why, in remanding the case for further proceedings, the Crane Court specifically noted that Crane suffered from "both exhibitionism<sup>7</sup> and [APD]," 534 U.S. at 411, and then suggested, albeit obliquely, that a diagnosis of APD alone might be too imprecise and overbroad to survive constitutional scrutiny. Id. at 412.

The APA also has taken the position that APD is an over-inclusive and inappropriate basis for civil commitment. For instance, in 2006, the APA approved an Action Paper supporting the elimination of APD as a basis for the civil commitment of sex offenders. APA Final Action Paper, Eliminating the Use of Antisocial Personality Disorder as a Basis for Civil Commitment (APA Assembly, May 19-21, 2006), available at <http://tinyurl.com/6ykpxu>. The Action Paper explained that APD

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<sup>7</sup> Exhibitionism is a paraphilia that is specifically recognized by the DSM-IV-TR (at 569). It involves a serious difficulty controlling urges to "expos[e] one's genitals to an unsuspecting stranger." Id.

should not serve as a predicate for involuntary civil commitment because, inter alia, it "is a disorder largely defined on the basis of the behavior exhibited by the individual; it is not premised on any underlying disturbance of thought, mood, cognition or aberrant sexual urge." APA Final Action Paper, supra, at 1-2 (emphasis added).<sup>8</sup>

In addition to APA's opposition to the use of APD as a predicate for involuntary commitment, numerous individual mental health professionals and commentators have leveled similar criticisms. See, e.g., Daniel F. Montaldi, *The Logic of Sexually Violent Predator Status in the United States of America*, 2(1) *Sexual Offender Treatment* (2007), available at <http://www.sexual-offender-treatment.org/57.0.html>; Bruce Winick et al., *Should Psychopathy Qualify for Preventive Outpatient Commitment?*, at 8, available at <http://papers.ssrn.com/abstract=984938> (APD does not justify involuntary civil commitment because it "does not impair cognitive processes or otherwise interfere with rational decision

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<sup>8</sup> The APA opposes the use of an APD diagnosis as a basis for civil commitment despite the disorder's inclusion in the APA-published DSM-IV-TR. As the DSM explains (at xxxvii): "It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category . . . does not imply that the condition meets legal . . . criteria for what constitutes a mental disease, mental disorder, or mental disability." Thus, while consensus professional recognition, as reflected by the DSM, should be seen as a *necessary* condition for civil commitment under the Due Process Clause, it should not be viewed as a sufficient condition.

making" and "does not make it difficult for [the individual] to control [his] conduct."; Zander, Civil Commitment Without Psychosis, supra, at 52-62 (summarizing studies and scholarly opinion).

Even a prominent article espousing the minority view in the profession that involuntary commitment based on APD may be appropriate in some cases concedes that "[t]he use of [APD] to justify civil commitment is unlikely to find general acceptance among mental health professional groups." Shoba Sreenivasan et al., Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of "Mental Disorder" and "Likely to Reoffend", 31 J. Am. Acad. Psychiatry & L. 471, 477 (2003).

In sum, as the Supreme Court has twice suggested, and consistent with the APA's official position, APD is simply too imprecise and overbroad a diagnosis to survive constitutional scrutiny. See Foucha, 504 U.S. at 82-83; Crane, 534 U.S. at 412-13. The diagnosis does nothing to satisfy the State's constitutional obligation 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." Crane, 534 U.S. at 413. To the contrary, as numerous studies now indicate, it comes perilously

close to justifying the civil commitment of "any convicted criminal." Foucha, 504 U.S. at 82-83. Under Foucha and its progeny, personality disorder-NOS is not a valid basis for civil commitment, and Mr. Marten's continued detention on that ground violates due process.

b. Mr. Marten's commitment violates due process because it is based on unreliable evidence. The Due Process Clause imposes limits on the use of unreliable evidence. State v. Dahl, 139 Wn.2d 678, 686, 990 P.2d 396 (1999); State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999); accord White v. Illinois, 502 U.S. 346, 363-64, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., concurring in part and concurring in judgment).

Washington courts apply the Frye<sup>9</sup> standard in determining the reliability and admissibility of scientific evidence. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). In the context of involuntary civil commitment proceedings, where the State seeks to impose a significant deprivation of liberty solely on the basis of psychiatric testimony, the Frye standard is a practical and appropriate proxy for the reliability that due process requires.

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<sup>9</sup> Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923).

Frye directs courts to apply particular criteria in assessing the reliability and admissibility of expert testimony. Under the Frye standard, novel scientific evidence is admissible only if (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. Greene, 139 Wn.2d at 70. The Frye standard recognizes that because judges do not have the expertise to assess the reliability of scientific evidence, the courts must turn to experts in the particular field to help them determine the admissibility of the proffered testimony. Id. The inquiry turns on the level of recognition accorded to the scientific principle involved; the court "look[s] for general acceptance in the appropriate scientific community." Id. (quoting State v. Janes, 121 Wn.2d 220, 232-33, 850 P.2d 495 (1993)). "If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted." Id. (quoting State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)).

The Frye standard applies in determining the reliability and admissibility of expert testimony regarding whether an individual

suffers from a particular novel psychiatric diagnosis. Greene, 139 Wn.2d at 70. Under such circumstances, the question is whether the diagnosis is generally accepted within the psychiatric community as a recognized mental condition that is regularly diagnosed and treated. Id. at 71. In Greene, the court concluded dissociative identity disorder was generally accepted in the psychiatric community, because it was included in the DSM-IV. Id. The court explained, "The DSM-IV's diagnostic criteria and classification of mental disorders reflect a consensus of current formulations of evolving knowledge in the mental health field." Id. (quoting DSM-IV at xxvii). Further, the disorder was regularly diagnosed and treated by mental health professionals in this state. Id. at 72. For these reasons, the expert testimony regarding the disorder met the Frye standard in Greene.

In contrast to dissociative identity disorder, however, paraphilia-NOS -nonconsent has not been generally accepted in the psychiatric community. As discussed above, "there is a significant dispute between qualified experts" as to the validity of the diagnosis. Id. at 70. Therefore, expert testimony diagnosing an individual with paraphilia-NOS-nonconsent does not meet the Frye standard for admissibility.

Further, expert testimony is admissible under ER 702<sup>10</sup> only if it is helpful to the trier of fact under the particular facts of the case. Greene, 139 Wn.2d at 73. Under ER 702, expert testimony will be deemed helpful to the trier of fact only if its relevance can be established. Id. at 73. Scientific evidence that does not help the trier of fact resolve any issue of fact is irrelevant and does not meet the requirements of ER 702. Id. Unlike the Frye standard, this inquiry turns on the forensic application of the particular scientific principle or theory. Id.

Here, the relevant question to be resolved by the trier of fact was whether Mr. Marten had a serious mental disorder that caused him difficulty controlling his sexually violent behavior. Thorell, 149 Wn.2d at 736, 740-41; Crane, 534 U.S. at 413. As discussed in the previous section concerning paraphilia-NOS-nonconsent, the expert testimony regarding the diagnosis of personality disorder-NOS did absolutely nothing to satisfy the State's constitutional obligation to differentiate "the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil

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<sup>10</sup> ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." Crane, 534 U.S. at 413. To the contrary, the disorder merely describes a majority of convicted criminals and therefore is not a valid basis for civil commitment. Also as discussed, the use of the diagnosis of personality disorder-NOS in civil commitment proceedings has not found general acceptance among the relevant community. While personality disorder-NOS is recognized by mental health professionals, as well as the DSM-IV-TR, as a potentially useful diagnosis for clinical or research purposes, it is not considered a valid basis for civil commitment.

Thus, even though the diagnosis of personality disorder-NOS may have gained general acceptance in the psychiatric community as a potentially useful diagnosis for clinical or research purposes, it is not helpful to the trier of fact in sexually violent predator proceedings and was therefore inadmissible under ER 702.

2. MR. MARTEN'S COMMITMENT IS BASED UPON INSUFFICIENT EVIDENCE, AS HIS CONDUCT DID NOT RISE TO THE LEVEL OF A "RECENT OVERT ACT" UNDER THE STATUTE.

a. Due Process requires the State to prove a "recent overt act" before an individual may be committed as a sexually violent predator. Civil commitment is a "massive curtailment of liberty." In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). A law that abridges a fundamental right such as liberty comports with due process only if it furthers a compelling government interest and is narrowly tailored to further that interest. U.S. Const. amend. XIV; In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). To satisfy the narrow-tailoring requirement, the State must prove that a respondent is both mentally ill and dangerous before committing him. In re Detention of Young, 122 Wn.2d 1, 37, 857 P.2d 989 (1993). The dangerousness must be current. Albrecht, 147 Wn.2d at 7.

Because predicting dangerousness is an inexact science, courts must be especially vigilant in protecting against improper commitment. Harris, 98 Wn.2d at 281. Otherwise SVP proceedings risk becoming "an Orwellian dangerousness court."

Young, 122 Wn.2d at 60 (C. Johnson, J., dissenting). This slippery slope must be prevented by “requiring demonstration of a substantial risk of danger and by imposing procedural safeguards and a heavy burden of proof.” Harris, 98 Wn.2d at 281. Where, as here, the respondent has been living in the community, the substantial risk of danger must be evidenced by a “recent overt act.” Id. at 284 (reading “recent overt act” requirement into RCW 71.05.020); Young, 122 Wn.2d at 41-42 (reading “recent overt act” requirement into RCW 71.09.030); Laws of 1995, ch. 216, § 3 (amending SVP statute to incorporate the requirement).

In Harris and Young, the Washington Supreme Court defined what type of “recent overt act” the State must prove in order to subject an individual to civil commitment consistent with due process. The Court held the State must prove an “act” which “has caused harm or creates a reasonable apprehension of dangerousness.” Harris, 98 Wn.2d at 284-85; Young, 122 Wn.2d at 40. The Legislature subsequently amended the relevant statutes to conform to this definition, requiring the State to prove “any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm.” Laws of 1995, ch. 216, § 1.

In 2001, the Legislature again amended the statute, expanding the definition of “recent overt act” to include not only acts, but also “threats”:

‘Recent overt act’ means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

Laws of 2001, ch. 286, § 4; RCW 71.09.020(10) (emphasis added).

b. Mr. Marten’s actions do not constitute acts that either “cause harm of a sexually violent nature or create a reasonable apprehension of such harm” within the meaning of the statute. “The primary purpose of statutory construction is to give effect to the legislature’s intent.” City of Bellevue v. E. Bellevue Cmty. Council, 138 Wn.2d 937, 944, 983 P.2d 602 (1999). Legislative intent is determined mainly from the language of the statute itself. Id. If the language of a statute is plain and clear, the court must apply the language as written. In re Personal Restraint of Sappenfield, 138 Wn.2d 588, 591, 980 P.2d 1271 (1999). Because of the significant liberty interest at stake, civil commitment statutes must be strictly construed. In re Detention of LaBelle, 107 Wn.2d 196, 205, 728 P.2d 138 (1986); In re Detention of Davis, 109 Wn. App. 734, 742, 37 P.3d 325 (2002), rev. den’d, 150 Wn.2d 1002, 77 P.3d 650 (2003).

Although the word “threat” is now a part of the “recent overt act” definition in the SVP statute, “threat” itself is not separately defined. Where a statute does not define a word, courts discern its ordinary meaning from the dictionary. Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011, 1019 (2009). The dictionary defines “threat” as an “expression of an intention to inflict loss or harm on another.” Webster’s Third New International Dictionary at 2382 (2002); see also In re Detention of Anderson, 134 Wn. App. 309, 326, 139 P.3d 396 (2006), aff’d, \_\_\_ P.3d \_\_\_, 2009 WL 1956996 (Sanders, J., dissenting) (“Otherwise, a person risks civil commitment once convicted of a sexually violent offense and diagnosed with a mental illness, regardless of any causal relationship between the mental condition and the conduct in question. Persons could be subject to commitment based solely on their status as a prior sexual offender and fear of mental illness”).

Here, there was a great deal of evidence presented as to Mr. Marten’s behavior in 2002 – much of which the State argued constituted recent overt acts under RCW 71.09.020 – none of which involved incidents of violence, sexual offenses, or even physical touching of any kind. 5/29/08 RP 167-87; 5/22/08 RP 118; 6/4/08 RP 73; Supp. CP \_\_\_, sub. no. 234B, at 4 (Deposition of My Vo Phan).

Defense expert Dr. Donaldson testified that there was significant evidence that Mr. Marten was not, in fact, motivated or aroused by the nonconsensual aspect of any of his encounters with women. 6/9/08 RP 48. Dr. Donaldson noted that Mr. Marten is terribly socially inept and because of this, perhaps “a pain in the neck in society,” but essentially non-violent. Id. at 51. Foremost in this determination was the obvious evidence that with over 100 apparent sexual partners, Mr. Marten had never committed a rape. Id. at 48. Dr. Donaldson also noted the length of Mr. Marten’s interactions with women such as Sayuri Hata, Karen Zavala, and Tam Nguyen, Id. at 49-60. Dr. Donaldson testified that the slow pacing of these interactions, the attempts to read the Bible with these women (Hata), have meals with them (Zavala), or buy products from their salons (Nguyen) more clearly resembled a clumsy attempt to initiate a romance than an attempted sexual assault or an uncompleted rape. Id.

Leda Patrick, a witness called by the State, recalled that when she drafted Mr. Marten’s sentencing report for the 1997 offenses, Mr. Marten had explained that he had never wanted to take Ms. Zavala by force – that he had hoped to gain her confidence and to become romantically involved with her when he took pictures of her belly. 5/27/08 RP 22. This is the reason he let her go when she started to struggle, he explained. Id.

Annette Schiferl, Mr. Marten's sex offender therapist at Twin Rivers, testified concerning his participation in her group. She noted that far from fantasizing about nonconsenting women, Mr. Marten "was aroused to those that he victimized and was interested in developing a sexual relationship that was consenting with them." 5/27/08 RP 106.

Even Detective McLean, who ultimately arrested Mr. Marten, seemed to understand that he was not aroused by nonconsent. When Mr. Marten discussed the Karen Zavala incident with the detective, he explained that he wanted to videotape her belly because he was hoping to date her again. 5/22/08 RP 183. He explained that he was attracted to Asian and Hispanic women because he was awkward and found it was just easier to talk with them. Id. at 184-85. When the detective asked if he had been thinking of raping these women, he responded, "No, I would never rape them – that is going too far." Id.

Once Mr. Marten was released, following his various probation violations in 2000 and 2001, it is important to note that he never sexually offended again. His 2002 behavior, which allegedly involved the frequenting of nail and tanning salons, did not even purport to include threatening or aggressive conduct toward any of the women involved. 5/29/08 RP 167-87; 5/22/08 RP 118; 6/4/08 RP 73; Supp. CP \_\_\_\_, sub. no. 234B, at 4 (Deposition of My Vo Phan).

Without more, the State failed to show that Mr. Marten's behavior caused harm, or that his actions created an apprehension of harm that was reasonable under the circumstances -- even in the mind of an objective person who knows Mr. Marten's history and his mental condition. Mr. Marten's behavior may have been irritating or even harassing, but this conduct was neither of a sexually violent nature, nor was it sufficient to show dangerousness under the statute. Harris, 98 Wn.2d at 284-85; Young, 122 Wn.2d at 40.

Furthermore, construing Mr. Marten's actions to constitute a recent overt act would violate the narrow-tailoring requirement of due process. In order to pass strict scrutiny, a civil-commitment statute must require "proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); see also Kansas v. Hendricks, 521 U.S. 346, 357, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) Washington's recent overt act element -- as it has been applied to other respondents -- comports with this requirement. The statute would be unconstitutional if extended to Mr. Marten's actions, however, because Mr. Marten did control his behavior. Indeed, he did exactly what our society should be encouraging former sex offenders to do: he controlled his behavior by walking or driving away if and when he was tempted. He did not touch any of these women -- indeed, he barely spoke with any of them.

He seems to have learned from his experiences and from his therapy sessions; indeed, there is no indication that he has sexually offended since 1997.

3. THE MISCONDUCT OF THE STATE'S EXPERT WITNESS TAINTED THE JURY, AND THE COURT'S FAILURE TO GRANT A MISTRIAL WAS AN ABUSE OF DISCRETION REQUIRING REVERSAL.

Before the commencement of trial, the court made a detailed pre-trial ruling prohibiting the use of the word "rape," regarding Mr. Marten's relationship with his wife, stating that there was no factual basis for any such characterization. 5/15/08 RP 144. Dr Rawlings' own report stated that "there are no records or admissions by Mr. Marten that he has committed a rape." 6/3/08 RP 198; Supp. CP \_\_\_\_, sub. no. 222 (Exhibit List).<sup>11</sup>

The trial court's response to the State's offer of proof was to caution the prosecutor that "there is a difference between having sex with someone when she doesn't want to, and forceable sexual contact." 5/15/08 RP 141. The court continued that without something more, the conduct with Mr. Marten's wife being alleged

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<sup>11</sup> In response to the court's inquiry, Mr. Marten's defense counsel described Dr. Rawlings' report, which indicated Mr. Marten's description of his marital sexual relationship: "that he pretty much begged and pleaded and eventually there is an acquiescence of sex ... there was never, ever any suggestion on his part or [his] wife's part or anyone else that he forced his wife ever to have sex, his wife of – I think of about 14 or 15 years now – to ever have sex." 5/15/08 RP 141.

by the State would not constitute an act of rape. Id. at 144.<sup>12</sup> After listening to offers of proof from both defense attorneys and prosecutors, the trial court found no factual basis for any rape allegation, and precluded any mention of the word “rape,” stating there was simply no factual basis in the record. Id. at 146.

Despite this pre-trial ruling, midway through direct examination, the State’s expert witness, Dr. Rawlings, was asked to characterize the “nature or quality” of Mr. Marten’s sexual relationship with his wife. 6/2/08 RP 119. Dr. Rawlings blurted out that Mr. Marten “had raped her on a couple of occasions.” Id. This was testimony that even the trial court later remarked was unresponsive to the question asked, and could cause a mistrial. 6/2/08 RP 126-27.

Dr. Rawlings’ misconduct even caused the court to make the following commentary:

I was a bit disappointed, frankly, in Dr. Rawlings in his overall testimony where he consistently added things that were not called for. And I was concerned about his adopting the role of an advocate rather than an expert witness that I would expect. I certainly hope Dr. Donaldson [the respondent’s expert] does not engage in the same type of gratuitous comments that are not responsive as to questions that are asked of him.

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<sup>12</sup> The prosecutor alleged that Mr. Marten had told a detective that he had “had instances with my wife where she doesn’t want to, but I go ahead anyway, but I don’t hold her down or beat her up.”

6/5/08 RP 3 (emphasis added). Mr. Marten's defense counsel observed that Dr. Rawlings' "rape" testimony did not seem inadvertent; in response, the prosecutor stated that he had fully prepared his expert witness in accordance with the court's instructions to avoid the use of the word "rape." 6/3/08 RP 199.

Despite the trial court's valid concern, the court denied defense counsel's mistrial motion, merely striking the response and issuing a curative instruction. 6/2/08 RP 119; 6/5/08 RP 8.

This is an unusual SVP case – one in which Mr. Marten has never even been accused of committing a rape; therefore, this instruction was wholly insufficient to lift the pervasive taint created by the misconduct of the State's expert witness. Dr. Rawlings' remarks -- labeling Mr. Marten a "rapist" -- created an enduring prejudice which so infected the proceedings that the curative instruction could not have been – and was not – effective. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997); see also U.S. v. Murray, 784 F.2d 188, 189 (1986) ("Such an instruction ... is very close to an instruction to unring a bell"); Bruton v. U.S., 391 U.S. 123, 129, 88 S.Ct. 1620 (1968) (citations omitted) ("The naïve

assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction”).

The hostile tone of this witness who, as the trial court noted, took the position of an advocate, rather than an expert, magnified the impact of the misconduct, requiring a greater remedy than would a mere slip of the tongue by a civilian witness. In addition, the implication that Dr. Rawlings knowingly gave testimony that he knew to be contrary to the statements contained in his notes, 6/3/08 RP 198, and contrary to the court’s pre-trial order, requires an extreme remedy.

For these reasons, the trial court abused its discretion when it denied Mr. Marten’s mistrial motion. When a trial court’s exercise of its discretion is “manifestly unreasonable or exercised on untenable grounds, or for untenable reasons,” an abuse of discretion exists. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). Since the court’s abuse of discretion resulted in an enduring prejudice to the entire proceedings, reversal is required.

F. CONCLUSION

For the reasons set forth above, Mr. Marten respectfully requests that this Court reverse his order of commitment as a sexually violent predator.

DATED this 11<sup>th</sup> day of August 2009.

A handwritten signature in black ink, appearing to read "Jan Traesen", is written over a horizontal line.

JAN TRASEN (WSBA 41177)  
Washington Appellate Project - 91052  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 61923-3-I
v.	)	
	)	
CURTIS MARTEN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, SIMON ADRIANE ELLIS, STATE THAT ON THE 11<sup>TH</sup> DAY OF AUGUST, 2009, I CAUSED THE ORIGINAL **OPENING 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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KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

<input checked="" type="checkbox"/> CURTIS MARTEN	(X)	U.S. MAIL
PO BOX 88-600	( )	HAND DELIVERY
DSHS SPECIAL COMMITMENT CENTER	( )	_____
STEILACOOM, WA 98388		

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF AUGUST, 2009.

x 

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

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