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NO. 64226-0-I

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

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IN RE THE DETENTION OF:

JOHN WARREN BERRY

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

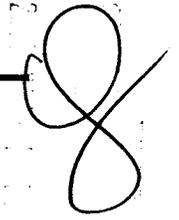
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**RESPONDENT'S BRIEF**

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**ORIGINAL**

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## I. ISSUES PRESENTED

- A. **Whether the trial court abused its discretion by denying Berry's motion to substitute counsel, where Berry's temporary refusal to speak to his attorneys did not constitute an irreconcilable conflict.**
- B. **Whether the trial court abused its discretion by admitting expert opinion testimony about Berry's rape disorder diagnosis, where that diagnosis is generally accepted within the relevant scientific community.**

## II. STATEMENT OF FACTS

### A. Procedural History

On February 24, 2003, the State filed a petition alleging that John Warren Berry (Berry) is a sexually violent predator (SVP). CP at 1123-25. That same day, the trial court made an initial *ex parte* probable cause finding that Berry met the SVP statutory criteria, issued a warrant for his arrest and set a date for a contested probable cause hearing. CP at 1082-86.

The contested probable cause hearing was held on August 14, 2003. 8/14/03RP. The court affirmed its prior probable cause finding and ordered that Berry be evaluated by a qualified SVP expert. CP at 1006-7.

A jury trial was held in the Snohomish County Superior Court on September 14-18 and 21-23, 2009. The jury returned a verdict finding that Berry is a sexually violent predator. CP at 66. The court ordered that Berry be civilly committed as an SVP. CP at 31.

**B. Facts Relevant to Motion to Substitute Counsel**

The first issue addressed at the August 14, 2003 probable cause hearing was Berry's request for new counsel. 8/14/03RP at 3. Berry alleged that he had received ineffective assistance from his counsel, Martin Mooney (Mooney) of the Snohomish County Public Defender's Association. *Id.* at 4. He alleged that Mooney had engaged in "unprofessional conduct" and was of "unethical character." *Id.* at 4-5. Berry alleged that Mooney had prevented him from participating in his own defense. *Id.* at 5. He alleged that Mooney's arguments at the probable cause hearing were a "façade." *Id.* at 6. He alleged that Mooney had withheld discovery, and had lied to and deceived him. *Id.* at 6-7. He alleged that Mooney's supervisor, William Jaquette (Jaquette), the Director of the Public Defender's Office, had also lied to Berry. *Id.* He further alleged that there existed "a complete breakdown in communications in the client relationship[.]" *Id.* at 9. He stated that he would "no longer speak with Mr. Martin Mooney or Mr. William Jaquette[.]" *Id.*

Mooney told the Court that he had not lied to Berry and had forwarded to him all discovery he had received. *Id.* at 13. As to Berry's allegation of a "complete breakdown in communications," Mooney told the Court:

Second, was there a breakdown in communication, Mr. Berry seems to indicate there is. He won't talk to me. He

won't communicate with me. I'm willing to. However, if he doesn't want to, it makes my efforts fruitless.

*Id.* at 20.

After hearing from Berry and counsel, the trial court did not believe that Mooney or Jaquette had lied to Berry. *Id.* at 29. The court found that Mooney and Jaquette were both experienced attorneys who understood the scope of SVP proceedings. *Id.* at 32. The Court concluded:

The breakdown in communication appears to be one-sided initiated by your stated belief that Mr. Mooney has lied to you . . . and your decision not to communicate with Mr. Mooney and Mr. Jaquette. . . . It does appear Mr. Mooney has adhered to proper standards and representation in representing you in this matter. If you choose not to communicate with Mr. Mooney and Mr. Jaquette, that is your choice. The Court does not believe you are entitled to other counsel. Mr. Mooney is capable of representing you. The Court will deny your request to discharge Mr. Mooney.

*Id.* at 32-33.

Four weeks later, the State brought a motion to compel because Berry refused to meet with the psychologist conducting his court-ordered evaluation. CP at 981-1004; 9/10/03RP at 2. The court compelled Berry's participation. CP at 979-80; 9/10/03RP at 10. Berry told the court he would "stand in contempt of that order." 9/10/03RP at 11.

On January 30, 2004, Mooney moved to withdraw. CP at 1144-47. Mooney informed the court that, in June, 2003, berry told him not to speak with individuals Mooney wanted to interview. *Id.* at 1145. In

October, 2003, Berry had informed Mooney that he would not speak with him or anyone else from his office. *Id.* Berry said that, as far as he was concerned, Mooney was not his lawyer. *Id.* Berry had threatened Mooney with bar complaints and federal lawsuits. *Id.* at 1146. As an alternative to withdrawal, Mooney requested permission to contact witnesses he believed were "necessary to an adequate defense" including expert witnesses. *Id.* at 1147. The trial court permitted Mooney to withdraw and appointed Harvey Chamberlin (Chamberlin) as counsel for Berry. CP at 1143.

In October, 2004, the trial court held Berry in contempt for refusing to meet with the psychologist performing the court-ordered evaluation. CP at 1140-42. The court ordered Berry jailed as a remedial sanction. *Id.* at 1142.

On January 21, 2005, Berry requested a 14-month continuance of the trial date so that he could undergo treatment for his hepatitis. 1/21/05RP at 6. The court granted a continuance. *Id.* at 11.

In April, 2006, attorney Michael Kahrs (Kahrs) associated with Chamberlin and filed a motion to dismiss the State's petition. CP at 914-78. After that motion and a subsequent appeal were denied, Kahrs withdrew. CP at 1132-33.

Attorney Tom Cox (Cox) associated with Chamberlin on May 4, 2007. CP at 1130-31. Chamberlin withdrew as counsel on

October 19, 2007, for health reasons. CP at 1128-29; 12/13/07RP at 6. Kahrs then re-joined Berry's legal team as co-counsel with Cox. 12/13/07RP at 2.

On December 13, 2007, Berry appeared in court with his attorneys, Cox and Kahrs. 12/13/07RP. In Berry's presence, the court and his counsel discussed the fact that Chamberlin had withdrawn for health reasons and was closing down his practice. *Id.* at 6. The court asked Berry whether he believed that Cox and Kahrs were competent trial counsel. Berry answered, "I do. I do." *Id.* at 10.

Trial was continued to October 27, 2007. *Id.* at 15. After further delays, it was continued to March 16, 2009. CP at 1127. Shortly before that trial date, Berry requested another continuance, representing through his counsel that he personally was "unprepared to present his case at trial." 2/27/09RP at 30. Over the State's objection, the trial was continued again, due to the illness of Cox's mother-in-law, to September 14, 2009. *Id.* at 30-36; CP at 1126.

On March 10, 2009, Berry wrote the trial court judge, alleging that no depositions other than his own had been taken and that he could not get his attorneys to contact him. CP at 625. He asked why Chamberlin was no longer representing him. CP at 626.

Berry's counsel set a hearing for April 15, 2009. 4/15/09RP. All

counsel attended and Berry appeared telephonically. *Id.* at 2. Cox explained that he had set the hearing because Berry had issues with his counsel. *Id.*

Berry told the court that no one had informed him that other counsel had substituted in for Chamberlin. *Id.* at 5. He then alleged that Kahrs had been taken off of his case "because of some issues with some dishonesty on his behalf." *Id.* at 6. The court reminded Berry that he had attended a hearing where Cox and Kahrs were present as his counsel, and Berry had not objected. *Id.* at 6. Berry insisted that Kahrs had never been on his SVP case. *Id.* at 7.

Kahrs then recounted for the court how he had initially appeared to litigate a motion to dismiss the SVP petition, had subsequently withdrawn and then appeared again as co-counsel with Cox. *Id.* at 7-8. Kahrs stated that he had no idea what Berry was talking about when Berry alleged that Kahrs had been removed for dishonesty. *Id.* at 8. The court agreed that there was nothing in the record supporting Berry's allegation. *Id.*

Berry next alleged that he still had not received full discovery, including a copy of his deposition. *Id.* at 8-9. Cox stated that they had sent Berry all discovery, as well as a transcript of his deposition, and were in the process of getting Berry a copy of the videotape of the deposition. *Id.* at 9.

Berry told the court he was going to file a motion to have his

attorneys removed. He stated:

I'm just not happy with the way they're representing me and handling this situation at all, because they're putting stuff off on each other and a lot of stuff isn't getting done, so. That's what I'm going to do. . . . As far as I'm concerned, we're not speaking anymore. So I'll deal with it.

*Id.* The court told Berry that his case had been litigated as aggressively as any other SVP case that the court had presided over and the court had no concerns with the quality of his representation. *Id.* at 9-10.

Berry filed a motion to substitute counsel. CP at 618-23. He alleged, generally, that he and his attorneys had "a long history of conflicts and disagreements concerning Respondent not receiving copies of motions, past court proceedings, rulings, and other aspects of the scope of Respondent's representation." CP at 619. Specifically, Berry alleged:

Though Mr. Cox and Mr. Kahrs have obtained expert evaluators in the matter, they have not attempted to get the petition dismissed, have not obtained an investigator who will work with Respondent in defense of the petition, and though they have contacted an investigator, he has not stayed in contact with Respondent concerning his case, and did not respond to Respondent's numerous communications attempting to get in touch with him. . . . In addition to not taking any steps whatsoever to obtain his release from SCC when his case is ripe for dismissal, current counsel have withheld documents from Respondent, and are not allowing him to be part of his defense strategy.

CP at 620.

The State responded, opposing substitution. CP at 578-617. Regarding Berry's allegation that his counsel had not moved to dismiss the

petition, the State pointed out that Berry's counsel had indeed moved to dismiss the SVP petition. CP at 583, 885-95, 902-13, 914-78. Then, when that motion was denied, they had petitioned unsuccessfully for review by the Washington State Supreme Court. CP at 1134-39. Additionally, just four months previously, Berry's counsel had argued and lost a motion for summary judgment or a *Frye*<sup>1</sup> hearing. CP at 583, 631-32, 724-846; 2/27/09RP.

Regarding Berry's complaints about the defense investigator, the State noted Berry's history of thwarting investigation by prohibiting Mooney from contacting witnesses and threatening him with litigation if he did. CP at 584, 1144-47. In any event, the State argued, dissatisfaction with a defense investigator was not grounds for substitution of counsel. CP at 584.

The State argued that Berry's allegation that his counsel had failed to provide him documents was an old and unsubstantiated one he had made repeatedly over the years. CP at 584, 591, 595, 601-2; 4/15/09RP at 8-9. Based on his writings, Berry apparently viewed "discovery" as including any document he wanted, regardless of whether it was in the custody of one of the SVP parties:

Discovery includes and is not limited to, All full Certified

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<sup>1</sup> *Frye v. United States*, 293 F. 1013 (D.C Cir. 1923).

Police Reports, F.B.I. files and all reports, Military Records, Case No. Transcripts to each and every Court Proceeding Containing the Certified Seal of the Courts, and every Court Document in the files. Every Subpoena of anticipated Witness for the State, and every paper, document, Record from the Department of Correction.

CP at 591.

Berry alleged that his "appointed counsel have not performed any of the duties competent defense counsel must ordinarily perform in a typical SVP case." CP at 621.

The State informed the court that Berry's counsel had:

- 1) Obtained a second forensic expert evaluation of Berry concluding that he did not meet the commitment criteria;
- 2) obtained a defense investigator;
- 3) moved to dismiss the petition through summary judgment;
- 4) moved for a *Frye* hearing;
- 5) deposed the State's expert witness;
- 6) deposed all of the State's non-expert witnesses, including Berry's victims;
- 7) defended Berry when he was deposed by the State;
- 8) filed witness lists for trial; and
- 9) served the State with interrogatories.

CP at 585-86; 6/22/09RP at 15. Depositions of the State's victim witnesses and expert by Berry's attorneys had been vigorous and informed.

*Id.* at 15-16.

The court heard Berry's motion on June 22, 2009. 6/22/09RP. Asked whether he had anything to add to his written motion, Berry claimed that Kahrs had been taken off of his case previously because of "issues we had between ourselves[.]" *Id.* at 2. He further alleged: "[T]here's something going on here." *Id.* He also again alleged that his attorneys had not provided him documents and that there was "a lot of dishonesty in this case, and I just refuse to deal with them anymore." *Id.* at 3. He claimed he was unfamiliar with the circumstances of Chamberlin's withdrawal and how Cox and Kahrs had become his attorneys. *Id.* at 6. Referring to counsel, he stated: "I'm not going to even talk to these people." *Id.* at 6. He said, "I'm not working with these two gentlemen. I'm not going to do it. There's been too many discrepancies, too many lies." *Id.* at 7. He added, "My intent is to tell you that I'm not going to work with them. I'm not going to talk with them, period." *Id.* at 7-8.

Cox told the court that he had visited Berry at the Special Commitment Center (SCC) on McNeil Island half a dozen times. *Id.* at 9. When Cox went to the SCC to prepare Berry for his deposition, Berry refused to meet with him. *Id.* Every time Berry called Cox, Cox "made a point to either answer the phone or call him right back." *Id.* Berry's attorneys had provided him with transcripts from every deposition they had

conducted. *Id.* at 22. Cox represented that he and Kahrs had "vigorously pursued his case within the bounds that Mr. Berry has allowed us to." *Id.* at 10. In the same manner he restricted Mooney, Berry would not permit Cox and Kahrs to contact important witnesses. *Id.* While his attorneys had done the best they could, Berry's insistence that they not contact witnesses had hindered the case. *Id.*

Kahrs recounted how he had appeared as co-counsel with Chamberlin for a motion to dismiss the SVP petition. *Id.* at 11. When that motion and a subsequent appeal were denied he withdrew, but later re-joined the team at Cox's request. *Id.* He denied having conflicts with Berry in his previous work on the case. *Id.*

The court's oral ruling found that Berry had indeed received discovery and other documents from his counsel but was unhappy with their content. *Id.* at 23. Based on the court's experience, the court found that Berry's counsel had represented him "at least as vigorously, if not more so," than had other counsel in other SVP cases. *Id.* at 23-24. The court found counsel to be competent and knowledgeable. *Id.* at 24. The court noted that, even up to two weeks before the prior trial date, when the motion to continue had been heard, Berry had raised no concerns about his counsel. *Id.* at 24-25. The court found that "there is just nothing wrong with the counsel that Mr. Berry has." *Id.* at 25. The court also found that a

substitution of counsel at that point likely would cause delay. *Id.* The court concluded Berry was simply refusing to cooperate with his counsel. *Id.* The court would not permit Berry to "create the conflict by just saying, I'm not going to participate in my defense." *Id.* The court found that Berry's motion was not well-founded and refused to appoint new counsel. *Id.*; CP at 576-77.

On September 10, 2009 – four days before trial – the parties appeared for motions by Berry's counsel to withdraw, or for appointment of a guardian ad litem (GAL) for Berry and a continuance of the trial. 9/10/09RP at 2. Cox told the court that Berry was still refusing to talk to his attorneys or respond to their communications. *Id.* at 3-4. He and Kahrs believed it was their ethical duty to move to withdraw. *Id.* at 4.

Berry again told the court that his attorneys had not provided him with all of the depositions. *Id.* at 13-14. He again stated that he had not been informed of Chamberlin's withdrawal. *Id.* at 21. Regarding Cox and Kahrs, he said:

We've had our troubles, and I think it's best that we part. You know what I'm saying? I really do. I'm not trying to downgrade these gentlemen for the work that they've done, but we've had some issues.

*Id.*

The State argued that there was no new information before the court since the June 22, 2009 order denying substitution. *Id.* at 27-28. The court

found that Berry "has historically had conflicts with attorneys appointed to represent him," and "that's nothing particularly new in this case." *Id.* at 43. The court denied the motion to withdraw. *Id.* at 47.

The majority of the September 10<sup>th</sup> hearing was devoted to Berry's representations that he was seriously ill – an issue he first raised *ex parte* on August 31, 2009. *Id.* at 5-6. Berry did not provide notice of that hearing to the State and the State was not present. *Id.* at 2-3. At that August 31<sup>st</sup> hearing, Berry had claimed he was suffering from late-stage Hepatitis C as well as "Chlamydia syndrome" which had "affected his mind." *Id.* at 5. Now, at the September 10<sup>th</sup> hearing, Berry's attorney said that Chlamydia could "[p]ossibly bring on early onset Alzheimer's" (*Id.* at 7) and had also been linked with heart disease (*Id.* at 10).

Berry said his Chlamydia had been "diagnosed many years ago, and there's also a case of Giardinella (sic)" for which he had been treated. *Id.* at 10-11. He said that Hepatitis could cause sclerosis of the liver and brain cancer, and noted that cancer "runs rampant in my family on my father's side." *Id.* at 11-12. He said he had "had cancer removed from my body in small parts, even on my face, years ago." *Id.* at 16. He also said that he had suffered "issues with migraines all my life[.]" *Id.*

Berry then informed the court that, since arriving at the county jail from the SCC, he had been "throwing up body parts from the inside of my

body[.]" *Id.* He told the court:

My concern right now is my health. I've lost two sections of meat out of the inside of my body in the last ten days. One, the night I got here, was five inches long, about three-quarters inch wide, and about a quarter inch thick. And had I caught it in time to get it out of the toilet, I would have saved it for the nurses, but they won't even answer my kites.

And one here about four days ago, four and a half days ago. It's coming from somewhere between my throat and my stomach. And I don't know if it will come back up through the tubes after it digests through the stomach or not or through the liver.

But I've had it happened [sic] before, once before, and I don't recognize any leakage into the body itself from the vital organs. Because if there is, there would definitely be some kind of staph infection or something going on right now.

And I happen to know that for a fact. Any time you have body organs leave, you will have an infection inside your body. And that's a proven fact. There's no--There's no way around it.

*Id.* at 21-22. Berry told the court, "I'm dying here, and I understand that."

*Id.* at 20.

The State presented testimony from Patricia Pendry, the records manager at the Snohomish County Jail. *Id.* at 37. She had not seen Berry's medical records but there were no indications in the jail floor notes – as there should have been – that he had made any medical complaints to jail staff. *Id.* at 38-39.

The court found that Berry's medical records from July 2009 showed "no need for treatment for Hepatitis C apparently and no complaints by Mr. Berry at that time." *Id.* at 6. The court also observed: "Other than

the statement by Mr. Berry at the August 31<sup>st</sup> hearing, we don't have any documentation that he's ever had Chlamydia." *Id.* at 10. The court found that Berry did not appear to have any physical impairment justifying delay of the trial. *Id.* at 44.

The court also denied a motion for appointment of a GAL. *Id.* at 43. Berry's attorneys argued a GAL was required because of indications that Berry had mentally deteriorated. *Id.* at 4, 30. Berry, however, had refused to meet with an evaluator appointed by the court at the August 31<sup>st</sup> *ex parte* hearing. *Id.* at 1. He also denied that he was incompetent, stating, "I understand full well what's going on here." *Id.* at 15.

The case went to trial as scheduled on September 14, 2009. After the jury returned a verdict finding Berry to be a sexually violent predator, the State asked the court on the record whether it had observed Berry's interactions with his attorneys during trial, and his apparent lack of physical distress:

[Counsel for Petitioner]: Your Honor, throughout this trial, the State has observed that Mr. Berry appears to have been fully engaged with at least Mr. Cox, has routinely and regularly consulted with him, despite his claims before the trial that he was done talking to him and would not talk to him. He appears to have been consulting regularly throughout the trial, and that there also have been no other complaints or any apparent indications of any physical distress, such as were made before the trial. I'm just wondering if the Court would mind noting for the record that the Court also observed that.

THE COURT: The same times that I have been out here, I have observed Mr. Berry interacting with counsel, and it appears he has had issues that counsel have brought to the attention of the Court a couple times. Mr. Berry appears to have been alert throughout these proceedings in my observations.

[Counsel for Petitioner]: Thank you, Your Honor.

THE COURT: Mr. Cox?

[Counsel for Berry]: Nothing further, Your Honor.

9/23/09RP at 916-17.

**C. Relevant Expert Diagnostic Testimony**

**1. Dr. Amy Phenix**

At trial the State presented the expert testimony of Dr. Amy Phenix. Dr. Phenix is a clinical psychologist specializing in forensic psychology. 9/17/09RP at 305-6. Dr. Phenix began providing treatment to sex offenders in 1989 for the California Department of Corrections. *Id.* at 307. She has conducted SVP evaluations of sex offenders since 1995 and that is currently her exclusive practice. *Id.* at 308. She has conducted approximately 250 to 275 SVP evaluations California and approximately 35 SVP evaluations in Washington State. *Id.* at 313. She has also completed SVP evaluations in Arizona, Florida, Massachusetts, New Hampshire, Illinois Wisconsin and Iowa. *Id.* She has testified in SVP trials approximately 150 times. *Id.* at 314.

Since 1996, Dr. Phenix has trained mental health workers, law

enforcement officers, attorneys and others on sex offender risk assessment. *Id.* at 309. She developed the protocol for evaluating alleged SVPs in California, when that state passed an SVP law on January 1, 1886, and trained the 45 doctors on the state panel who conduct those evaluations. *Id.* at 312. Dr. Phenix has written published articles on sex offender evaluation and a chapter in an instruction book for clinical psychologists. *Id.* at 308.

Dr. Phenix performed an SVP evaluation of Berry. *Id.* at 315. She assigned him three diagnoses: Paraphilia, Not Otherwise Specified (NOS), non-consenting persons, with sadistic traits; alcohol dependence; and Anti-Social Personality Disorder. *Id.* at 325. She also determined that he is a psychopath. 9/18/09RP at 426.

Dr. Phenix testified that paraphilias are defined in the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, (4th ed. Text Revision 2000) (DSM). 9/17/09RP at 322, 326. *Id.* at 323. All paraphilias are defined by three elements. First, the person has recurrent, intense, sexually-arousing fantasies, sexual urges, or behaviors toward non-human objects, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting persons. *Id.* at 326-27. Second, the condition persists for at least six months. *Id.* at 327. Third, the condition causes the person to have "impairment or distress in important

areas of their life," such as being incarcerated. *Id.* at 327-28.

While some paraphilias are specifically defined, "you can never list every expression of a mental disorder in a manual such as the DSM." *Id.* at 328. Therefore, as with other categories of mental disorders, non-defined paraphilias fall within an NOS subset. *Id.*

The paraphilia assigned to Berry by Dr. Phenix is not explicitly defined in the DSM and falls within the NOS subset. *Id.* at 329. Dr. Phenix explained that, historically, a DSM work group had proposed inclusion of a specific rape diagnosis called "Paraphilic Coercive Disorder." *Id.* at 329. There was political pressure, however, to keep it out of the DSM. *Id.* Some were concerned that specifically including such a diagnosis would mean rape defendants would be able to avoid prison. *Id.*; 9/21/09RP at 575. The APA, therefore, decided it would not be explicitly defined and would instead fall within the NOS category. 9/17/09RP at 329.

Editors of the DSM thereafter contributed to a case book that is widely used in training psychologists and psychiatrists how to diagnose from the DSM criteria. 9/17/09RP at 330; 9/18/09RP at 492-93. The case book is published by the American Psychiatric Press and is described as a companion to the DSM. 9/21/09RP at 653. It has a case example that trains professionals to code rape disorders as "Paraphilia Not Otherwise Specified." 9/21/09RP at 653-56; CP at 733-36. Berry's diagnosis of

Paraphilia (NOS), non-consenting persons is commonly used and accepted by experts such as Dr. Phenix. 9/17/09RP at 332. Berry, in fact, had first been diagnosed with a rape paraphilia at least 25 years ago. *Id.* The diagnosis indicates that he has "recurrent, intense, sexually-arousing fantasies, sexual urges, or behaviors toward non-consenting persons." *Id.* at 331.

In forming her diagnostic opinions, Dr. Phenix noted that Berry had previously reported having fantasies about sexual assault and rape. *Id.* at 335. His sexual offense history also supported the diagnosis. *Id.* Dr. Phenix also found support in Berry's abnormal sexual development. *Id.* at 335-36. Berry had reported having anal intercourse with a niece when he was age ten and sexual intercourse with two nieces when he was in his teens. *Id.* at 336. He had reported raping other boys in a juvenile facility. *Id.* He also had reported that it was while he was in the juvenile facility that he first began to experience rape fantasies. *Id.* at 337. As an older teenager, Berry engaged in acts of voyeurism and exhibitionism. *Id.* Then he became an adult, Berry had a "consistent pattern of reoffending very quickly" after he had been released from confinement. *Id.* at 342-43.

Dr. Phenix believed it possible that Berry suffered from the paraphilia Sexual Sadism, but thought the Paraphilia NOS diagnosis "with sadistic traits" to be more appropriate. *Id.* at 333-34. Sexual Sadism

involves sexual arousal to a victim's physical or psychological suffering, including their humiliation. *Id.* at 334-35. Dr. Phenix found clear indications that Berry was sadistically aroused in his offending pattern. *Id.* at 333-34. In one rape, Berry humiliated the victim, telling her to put her own fingers in her vagina. *Id.* at 341-42. He called her "my good little girl" and a "fucking little whore" and told her she was going to work for him as a prostitute. *Id.* at 342. He put a leather belt around another victim's neck and used it to force her to orally copulate him. *Id.* at 344. While raping another victim, he inserted a wine cooler bottle into her vagina. *Id.* Dr. Phenix found further evidence of Sexual Sadism in Berry's anal rapes of victims – an act both painful and humiliating. *Id.* at 343-44.

## **2. Dr. Richard Wollert**

Berry presented the expert testimony of Dr. Richard Wollert. Dr. Wollert testified that over a span of 30 years he had treated 3000 sex offenders and evaluated over 1000. 9/21/09RP at 15. He conducts SVP evaluations but has never been retained to do one for the state. *Id.* at 20-21.

Dr. Wollert diagnosed Berry as suffering from antisocial personality disorder. *Id.* at 557, 597. He believed that Berry was "driven" by that condition to commit sexual crimes:

Driving down the street, he sees a girl with friends. Obviously, there is not this compulsion, but all the sudden [sic] the idea comes to mind that I could get laid, and he follows through with those plans and insists on having sex

and commits a crime. That's what happens. It is not driven by a deviant arousal system. It's driven by his character disorder, his personality disorder.

9/21/09RP at 581.

Dr. Wollert did not believe that the diagnosis of Paraphilia NOS, non-consenting persons could be given to a reasonable degree of psychological certainty. *Id.* at 570. He testified: "[W]e don't know what people mean when they say Paraphilia, Not Otherwise Specified, Non-consent." *Id.* at 573. He himself, however, had assigned that diagnosis in the past. *Id.* at 652. He agreed with Dr. Phenix that one reason a rape diagnosis was not explicitly defined in the DSM was because the APA "feared that criminals would use the DSM to argue that they were not responsible for their crimes." *Id.* at 575. He testified on cross-examination that even if someone committed 1000 rapes, that would not be enough to diagnose that person with a paraphilia. *Id.* at 662. He did not diagnose Berry with a paraphilia. *Id.* at 596-97.

Dr. Wollert also did not see any evidence that Berry had sadistic characteristics. For example, though he acknowledged Berry inserted a bottle into a victim's vagina, he "couldn't find a description of pain associated with that" and it "did not permanently disfigure or disable her." *Id.* at 591.

### III. ARGUMENT

#### A. **The Trial Court Did Not Abuse Its Discretion By Denying Berry's Motion to Substitute Counsel Because Berry Did Not Establish An Irreconcilable Conflict With His Attorneys**

Berry argues that the trial court violated his statutory right to counsel by denying his September 10, 2009 motion to substitute new counsel for Cox and Kahrs. The trial court, however, did not abuse its discretion because Berry's temporary refusal to speak with his attorneys was not an irreconcilable conflict. Once Berry's attempts to further delay his trial failed, he re-engaged with his attorneys and received effective representation from them.

##### 1. **Applicable Legal Standards**

###### a. **Standard of review**

A trial court's decision denying a motion to substitute appointed counsel is reviewed under the abuse of discretion standard. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A trial court abuses its discretion when its ruling is based on untenable reasons or on untenable grounds. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

###### b. **Right to counsel**

A respondent to a sexually violent predator petition has a statutory right to counsel at all stages of the proceedings. RCW 71.09.050(1); *In re*

*Detention of Kistenmacher*, 163 Wn.2d 166, 173, 178 P.3d 949 (2008). A respondent does not have a Fifth or Sixth Amendment right to counsel, however, because SVP proceedings are civil rather than criminal. *In re Detention of Stout*, 128 Wn. App. 21, 28 n.11, 114 P.3d 658 (2005) (citing *In re Detention of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999)).

Though Berry does not have a constitutional right to counsel, Washington courts reviewing SVP commitment cases have applied Sixth Amendment standards to, for example, ineffective assistance of counsel claims, which are reviewed under the *Strickland*<sup>2</sup> criteria. *See In re Detention of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). The State will assume for purposes of this appeal that Sixth Amendment standards apply to Berry's request to substitute counsel.

**c. The Sixth Amendment standard**

A person alleging dissatisfaction with appointed counsel "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 723, 16 P.3d 1 (2001) (*Stenson II*). A trial court deciding that motion considers the following factors: (1) the reasons given for dissatisfaction, (2) the trial court's own

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<sup>2</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

evaluation of counsel, and (3) the effect of any substitution upon the proceedings. *Id.* Additionally, because Berry claims he had an irreconcilable conflict with his attorneys, this Court, after reviewing the trial court's evaluation of the foregoing factors, must consider: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion. *Id.* at 723-24.

Under Sixth Amendment standards, Berry did not have an absolute right to choose specific counsel. *Varga*, 151 Wn.2d at 200 (citing *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) (*Stenson I*) cert. denied 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998)). The goal is "to guarantee an effective advocate . . . rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A loss of confidence or trust is not enough to warrant new counsel. *Varga*, 151 Wn.2d at 200.

Reviewing courts have stressed the need for a careful inquiry by trial judges regarding motions to withdraw or substitute. There is a distinction between mere communication problems versus an irreconcilable conflict. *State v. Hegge*, 53 Wn. App. 345, 351, 766 P.2d 1127 (1989). A lack of rapport between attorney and client or disagreement over legal strategy does not justify substitution of counsel, even where the attorney and client agree

to counsel's withdrawal. *State v. Peele*, 75 Wn.2d 28, 32-33, 448 P.2d. 923 (1968). A person's Sixth Amendment right to effective counsel is not violated unless the relationship between the attorney and his client "completely collapses." *United States v. Moore*, 159 F.2d 1154, 1158 (9th Cir. 1998) (citing *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970)). Trial courts are advised to examine "both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." *Stenson II*, 142 Wn.2d at 724. Trial courts may also consider "the defendant's prior proclivity to substitute counsel[.]" *State v. Jordan*, 39 Wn. App. 530, 541, 694 P.3d 47 (1985).

## **2. The Trial Court's Exercise of Discretion**

The trial court properly considered the applicable factors and did not abuse its discretion when it denied Berry's June 22, 2009 motion to substitute counsel. When Berry and his counsel resurrected that motion on September 10, 2009, the trial court conducted an appropriate inquiry by permitting both Berry and his counsel to state their grounds for relief. When they merely reiterated old claims and failed to present sufficient grounds for granting the motion the trial court correctly denied it.

### **a. The June 22, 2009 Hearing**

#### **(1) The reasons given for dissatisfaction**

The trial court heard Berry's first motion to substitute counsel for Cox and Kahrs on June 22, 2009. CP at 618-23; 6/22/09RP. Through his written motion and oral presentation Berry alleged that his attorneys:

1. Had not provided him with copies of documents (CP at 619);
2. had not moved to dismiss the petition and obtain his release (CP at 620);
3. had not obtained an investigator who would work with Berry (*Id.*);
4. were not allowing him to be part of defense strategy (*Id.*);
5. had not performed the duties required of competent defense counsel (*Id.* at 621);
6. had been dishonest and had lied to him (6/22/09RP at 3, 7);  
and
7. that Kahrs had previously been removed from the case because of an issue with Berry (*Id.* at 2).

Berry told the trial court that he would neither work with nor talk to his attorneys. 6/22/09RP at 6-8.

The trial court considered evidence presented by the State and Berry's counsel and found that Berry had been provided discovery and other documents but was unhappy with their content. 6/22/09RP at 23. The court further found that counsel had represented Berry vigorously. *Id.* at 23-24. Even up to two weeks before the prior trial date, when a motion to continue had been heard, Berry had raised no concerns about his counsel. *Id.* at 24-25. Based on the evidence, the court concluded Berry

was simply refusing to cooperate with his counsel. *Id.* at 25. The court determined that Berry could not "create the conflict" by refusing to cooperate. *Id.*

**(2) Evaluation of counsel's performance**

In its response to Berry's motion and orally at the June 22<sup>nd</sup> hearing, the State informed the trial court about the numerous trial tasks Berry's counsel had ably completed. CP at 585-86; 6/22/09RP at 15-16. Berry's counsel also refuted Berry's allegations that they had been unresponsive to him and had failed to provide him documents. 6/22/09RP at 9-11, 22.

The trial court found that Berry's counsel had represented him "at least as vigorously, if not more so," than had other counsel in other SVP cases. *Id.* at 23-24. His counsel, the court found, were competent and knowledgeable. *Id.* at 24. The court concluded that "there is just nothing wrong with the counsel that Mr. Berry has." *Id.* at 25.

**(3) The effect of substitution upon the trial**

At the June 22<sup>nd</sup> hearing the State noted that the case had languished for six years. 6/22/09RP at 16. The State argued that granting Berry's motion would significantly delay trial further because new counsel would be appointed two or three months prior to the trial date and could not be ready in that amount of time. *Id.*

The court concluded that there was no reason to consider whether

granting Berry's motion would unduly delay trial because Berry had not established a reason to substitute counsel and so "the Court does not even get there[.]" 6/22/09RP at 25. The court nevertheless found that a substitution of counsel would cause delay. *Id.*

**b. The September 10, 2009 hearing**

By oral motion, Berry again requested substitution of counsel on September 10, 2009. 9/10/09RP at 21. The trial court allowed Berry time to state his reasons for wanting new counsel, but he provided no new information for the court to consider. He merely repeated his allegation that his counsel had not provided him documents. *Id.* at 13-14. His only other reason for requesting substitution was that he and his counsel had "had our troubles." *Id.* at 21.

Berry's counsel also orally moved to withdraw. *Id.* at 3-4. They too were permitted to state the bases for their request. Their motion, however, was based solely on the fact that Berry was still not speaking to them. *Id.* Under the circumstances they believed they had an ethical duty to move to withdraw. *Id.*

The trial court noted Berry's history of conflicts with his attorneys. *Id.* at 43. The court stated:

The fact that Mr. Berry is uncooperative does not bar the matter proceeding to trial. It's clear that Mr. Berry doesn't want to have a trial in this case. And it appears to me, from my prior experience, that Mr. Berry would sooner not have a

trial ever in this case. But the matter has been pending six years, and I think it's time we got the issue before a jury.

*Id.* at 44-45. The court concluded that there was "nothing particularly new" before the court and denied the motions. *Id.* at 43, 47.

### **3. This Court's Review of the Trial Court's Decision**

Berry alleges that the trial court erred when it denied his September 10, 2009 motion because he and his counsel had an irreconcilable conflict. Brief of Appellant at 10-13. He further alleges that the trial court failed to fully inquire about the bases for his motion. *Id.* at 13-15.

Because Berry alleges an irreconcilable conflict, this Court considers: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion. *Stenson II*, 142 Wn.2d at 723-24. In examining the first of these criteria, the court also looks at the adequacy of the representation:

In examining the extent of the conflict, this court considers the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. If the representation is inadequate, prejudice is presumed. If the representation is adequate, prejudice must be shown. Because the purpose of providing assistance of counsel is to ensure that defendants receive a fair trial, the appropriate inquiry necessarily must focus on the adversarial process, not only on the defendant's relationship with his lawyer as such.

*State v. Schaller*, 143 Wn. App. 258, 270, 177 P.3d 1139 (2007) (citing *Stenson II*, 142 Wn.2d at 723-24; *State v. Cross*, 156 Wn.2d 580, 132 P.2d 80 (2006)).

**a. The Extent of the Conflict**

The June 22, 2009 hearing established that there was no truth to Berry's allegations against his attorneys. *See supra* at 7-12. On appeal, Berry claims that his refusal to communicate with counsel was a sufficient basis for substitution:

Mr. Berry repeatedly stated his distrust of his appointed counsel and refused to communicate with them at all. Counsel agreed that any communication between them and Mr. Berry was non-existent and appropriately moved to withdraw.

Brief of Appellant at 13.

A loss of confidence or trust is not enough to warrant new counsel. *Varga*, 151 Wn.2d at 200. Furthermore, Berry's refusal to communicate had already been considered by the trial court on June 22<sup>nd</sup> and the court properly concluded that Berry could not "create the conflict" by refusing to speak with his attorneys. 6/22/09RP at 25. The trial court was correct:

It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys.

*Schaller*, 143 Wn. App. at 271 (citing *Harding v. Davis*, 878 F.2d 1341, 1344 n.2 (11th Cir.1989)).

The fact that Berry was still refusing to speak to his attorneys on September 10th did not elevate his lack of cooperation to an "irreconcilable

conflict." For that matter, neither was it a "complete breakdown in communications," as it was unilateral – Berry's counsel were always willing to work with him. The trial court on September 10<sup>th</sup>, therefore, correctly concluded that the "fact that Mr. Berry is uncooperative does not bar the matter proceeding to trial." *Id.* at 44.

In any event, Berry's alleged conflict vanished after his September 10<sup>th</sup> motion was denied and he fully engaged with his attorneys throughout the trial. 9/23/09RP at 916-17. The result was that Berry received excellent representation. In examining the extent of the alleged conflict, this Court considers the "effect on the representation actually presented." *Schaller*, 143 Wn. App. at 270. Where representation is adequate, the appellant must show prejudice. *Id.* Here, there was no adverse effect on the representation because the alleged conflict ceased when trial began. Furthermore, an examination of the record reveals that Berry received a vigorous and effective defense. *See e.g.* 9/18/09RP at 443-543. Berry has not shown, or even alleged, that he was prejudiced.

This Court should therefore find – as did the trial court after a careful inquiry – that no irreconcilable conflict existed between Berry and his attorneys, and that Berry's refusal to cooperate was an attempt to create conflict in order to delay the trial.

**b. The Adequacy of the Trial Court's Inquiry into the Conflict**

Berry argues that the trial court's inquiry was "entirely inadequate." Brief of Appellant at 13. He fails to note that the court conducted a full inquiry on June 22<sup>nd</sup> and there was no new information presented on September 10<sup>th</sup>. In any event, the court did conduct an adequate inquiry on September 10<sup>th</sup>, at which Berry chose to focus on his alleged illnesses.

"[A] trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." *Schaller*, 143 Wn. App. at 271 (citing *Varga*, 151 Wn.2d at 200-01; *Stenson II*, 142 Wn.2d at 731). Here, the trial court permitted Berry and his counsel time to state their concerns on the record. *See* 9/10/09RP at 3-4, 13-14, 21. Neither presented any new facts to support substitution and Berry chose to focus on his physical health: "My concern right now is my health." *Id.* at 21. "Formal inquiry is not always essential where the defendant otherwise states his reasons for dissatisfaction on the record." *Schaller*, 143 Wn.2d at 271 (citing *United States v. Willie*, 941 F.2d 1384, 1391 (10th Cir.1991); *United States v. Padilla*, 819 F.2d 952, 956 n. 1 (10th Cir.1987)).

Here, the trial court conducted a sufficient inquiry by permitting Berry and his counsel to state their concerns. The court's inquiry established that the only reason given for substitution was Berry's continuing refusal to speak to his attorneys – a reason that ceased to exist

when the motion was denied.

**c. The Timeliness of the Motion**

Berry asserts that "his motion to substitute counsel was timely made." Brief of Appellant at 15. He provides no argument or citations to the record supporting his assertion and this Court should reject it because the motion at issue occurred on the eve of trial.

The focus of Berry's appeal is the September 10<sup>th</sup> hearing, at which the trial court noted, "We now have two court days from the time to start the trial with motions in limine." 9/10/09RP at 47. The court's concern was appropriate: "[W]here the request for change of counsel comes during the trial, or on the eve of trial, the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel and therefore may reject the request." *Stenson II*, 142 Wn.2d at 732 (quoting *United States v. Williams*, 594 F.2d 1258, 1260-61 (9th Cir.1979)). Granting Berry's request would have caused further extensive delay in a case that had languished for six years. The trial court properly rejected Berry's request for new counsel.

**B. The Trial Court Did Not Abuse Its Discretion By Admitting Expert Testimony About Berry's Rape Disorder Because That Diagnosis Is Generally Accepted In The Relevant Scientific Community**

Berry argues that one of the mental disorders assigned to him by the State's expert – Paraphilia NOS, non-consenting persons – is "invalid."

Brief of Appellant at 22. He alleges that testimony about this diagnosis deprived him of his right to due process. Berry's argument is an old one that has been rejected by the Washington Supreme Court. As the evidence showed, Berry's diagnosis is generally accepted in the field in which Drs. Phenix and Wollert practice.

**1. Standard of Review**

At issue is the trial court's decision to admit expert opinion testimony about Paraphilia NOS, non-consenting persons. The trial court has broad discretion when deciding whether to admit evidence. *In re Detention of Bedker*, 134 Wn. App. 775, 777, 146 P.3d 442 (2006). The court's rulings on such matters are reviewed for an abuse of discretion. *State v. Young*, 89 Wn.2d 613, 628, 574 P.2d 1171, *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). A trial court abuses its discretion when its ruling is based on untenable reasons or on untenable grounds. *Darden*, 145 Wn.2d at 619. Expert opinion testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" ER 702.

**2. Berry's Diagnosis of Paraphilia NOS is a DSM-Defined Disorder**

Berry claims that the diagnosis of Paraphilia NOS, non-consenting persons violates due process because it is not generally accepted by mental health professionals, specifically claiming that the American Psychiatric

Association (APA) does not recognize it and it is not found in the DSM. Brief of Appellant at 23. Berry's claim lacks merit.

Berry's diagnosis *is* in the DSM. For most disorders there are too many variants to be explicitly listed in the DSM. 9/17/09RP at 328. Additional diagnoses beyond those explicitly defined fall into the NOS category. *Id.* As both Dr. Phenix and Dr. Wollert testified, the APA bowed to concerns about including a specific rape diagnosis and did not explicitly define one in the DSM. *Id.* at 329; 9/21/09RP at 575. The APA decided "it would be diagnosed as paraphilia not otherwise specified." 9/17/09RP at 329. Editors of the DSM and others thereafter authored a training case book as a companion to the DSM that instructed mental health professionals to code rape disorders as Paraphilia NOS. 9/17/09RP at 330; 9/18/09RP at 492-93; 9/21/09RP at 653-56; CP at 733-36. The diagnosis is now commonly accepted and used. 9/17/09RP at 332.

Berry's diagnosis – Paraphilia NOS – is most certainly in the DSM. *See* DSM at 576. The NOS category includes any paraphilia that "do[es] not meet the criteria for any of the specific categories." *Id.* All paraphilias involve, first, recurrent, intense, sexually-arousing fantasies, sexual urges, or behaviors toward non-human objects, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting persons. 9/17/09RP at 326-27. Second, they persist for at least six months.

*Id.* at 327. Third, they cause the person to have "impairment or distress in important areas of their life," such as being incarcerated. *Id.* at 327-28.

Because paraphilias involve deviant arousal to, e.g., children, nonconsenting persons and inanimate objects, clinicians and evaluators use the Paraphilia NOS diagnosis, combined with a descriptor, to communicate the specific type of person or object that is the stimulus for deviant arousal. DSM at 566; 4RP at 521. The fact that the DSM provides some examples of diagnoses that belong in the NOS category does not mean those not mentioned are invalid. *See* DSM at 576.

Berry, by his history and his admissions, is clearly aroused to "nonconsenting persons" - the descriptor Dr. Phenix used for his particular Paraphilia NOS. 9/17/09RP at 329. Berry's primary diagnosis, however, is Paraphilia NOS, which means that (1) he experiences recurrent, intense sexually arousing fantasies, sexual urges, or behaviors (2) for a period of more than six months (3) that cause him clinically significant distress or impairment in his social, occupational and other important areas of functioning. DSM at 566. The fact that Berry's diagnosis is not explicitly listed in the DSM as a Paraphilia NOS did not preclude Dr. Phenix from assigning that diagnosis in order to accurately describe Berry's deviant arousal system. *See In re Detention of Young*, 122 Wn.2d 1, 28, 857 P.2d 989 (1993) (lack of specifier in DSM for Paraphilia NOS, rape

does not invalidate the diagnosis).

**3. Washington State has the Authority to Define the Mental Conditions Relevant to Commitment Under RCW 71.09**

Berry places great significance on the fact that the DSM has not explicitly identified rape as a paraphilia. His arguments imply that a mental condition is invalid for civil commitment under RCW 71.09 unless it is specifically identified in the DSM. The Supreme Courts of the United States and of Washington State have rejected the same argument.

The United States Supreme Court has rejected the contention that due process requires states to define "mental disorder" or similar terms in their civil commitment statutes in such a way that they are consistent with the standards of the mental health community. *Kansas v. Hendricks*, 521 U.S. 346, 358-59, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Hendricks had challenged his civil commitment under Kansas' SVP law, which was modeled after RCW 71.09. The Kansas SVP law also permits civil commitment of persons who, due to a "'mental abnormality' or a 'personality disorder' are likely to engage in 'predatory acts of sexual violence.'" *Hendricks*, 521 U.S. at 350 (quoting Kan. Stat. Annot. § 59-29a01 et seq. (1994)). The Court concluded that the Kansas SVP law was constitutional because it complied with earlier cases upholding civil commitment statutes that required both a finding of dangerousness and the presence of mental illness. *Id.* at 358.

The Court specifically rejected Hendricks' claim that the use of the term "mental abnormality" by the Kansas SVP law did not comport with earlier cases requiring a finding of "mental illness," because "mental abnormality" is a term adopted by the Kansas Legislature and not the psychiatric community. *Id.* at 358-59. The Court found that "the term 'mental illness' is devoid of any talismanic significance." *Id.* at 359. It further noted that "'psychiatrists disagree widely and frequently on what constitutes mental illness'" and that the Court itself had never used consistent terms in its cases involving civil commitments. *Id.* (quoted source omitted). The Court observed:

Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. See, e.g., Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 Rutgers L.Rev. 377, 391-394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). *Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession.* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* xxiii, xxvii (4th ed.1994).

**a. The Extent of the Conflict**

The June 22, 2009 hearing established that there was no truth to Berry's allegations against his attorneys. *See supra* at 7-12. On appeal, Berry claims that his refusal to communicate with counsel was a sufficient basis for substitution:

Mr. Berry repeatedly stated his distrust of his appointed counsel and refused to communicate with them at all. Counsel agreed that any communication between them and Mr. Berry was non-existent and appropriately moved to withdraw.

Brief of Appellant at 13.

A loss of confidence or trust is not enough to warrant new counsel. *Varga*, 151 Wn.2d at 200. Furthermore, Berry's refusal to communicate had already been considered by the trial court on June 22<sup>nd</sup> and the court properly concluded that Berry could not "create the conflict" by refusing to speak with his attorneys. 6/22/09RP at 25. The trial court was correct:

It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys.

*Schaller*, 143 Wn. App. at 271 (citing *Harding v. Davis*, 878 F.2d 1341, 1344 n.2 (11th Cir.1989)).

The fact that Berry was still refusing to speak to his attorneys on September 10th did not elevate his lack of cooperation to an "irreconcilable

conflict." For that matter, neither was it a "complete breakdown in communications," as it was unilateral – Berry's counsel were always willing to work with him. The trial court on September 10<sup>th</sup>, therefore, correctly concluded that the "fact that Mr. Berry is uncooperative does not bar the matter proceeding to trial." *Id.* at 44.

In any event, Berry's alleged conflict vanished after his September 10<sup>th</sup> motion was denied and he fully engaged with his attorneys throughout the trial. 9/23/09RP at 916-17. The result was that Berry received excellent representation. In examining the extent of the alleged conflict, this Court considers the "effect on the representation actually presented." *Schaller*, 143 Wn. App. at 270. Where representation is adequate, the appellant must show prejudice. *Id.* Here, there was no adverse effect on the representation because the alleged conflict ceased when trial began. Furthermore, an examination of the record reveals that Berry received a vigorous and effective defense. *See e.g.* 9/18/09RP at 443-543. Berry has not shown, or even alleged, that he was prejudiced.

This Court should therefore find – as did the trial court after a careful inquiry – that no irreconcilable conflict existed between Berry and his attorneys, and that Berry's refusal to cooperate was an attempt to create conflict in order to delay the trial.

**b. The Adequacy of the Trial Court's Inquiry into the Conflict**

Berry argues that the trial court's inquiry was "entirely inadequate." Brief of Appellant at 13. He fails to note that the court conducted a full inquiry on June 22<sup>nd</sup> and there was no new information presented on September 10<sup>th</sup>. In any event, the court did conduct an adequate inquiry on September 10<sup>th</sup>, at which Berry chose to focus on his alleged illnesses.

"[A] trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." *Schaller*, 143 Wn. App. at 271 (citing *Varga*, 151 Wn.2d at 200-01; *Stenson II*, 142 Wn.2d at 731). Here, the trial court permitted Berry and his counsel time to state their concerns on the record. *See* 9/10/09RP at 3-4, 13-14, 21. Neither presented any new facts to support substitution and Berry chose to focus on his physical health: "My concern right now is my health." *Id.* at 21. "Formal inquiry is not always essential where the defendant otherwise states his reasons for dissatisfaction on the record." *Schaller*, 143 Wn.2d at 271 (citing *United States v. Willie*, 941 F.2d 1384, 1391 (10th Cir.1991); *United States v. Padilla*, 819 F.2d 952, 956 n. 1 (10th Cir.1987)).

Here, the trial court conducted a sufficient inquiry by permitting Berry and his counsel to state their concerns. The court's inquiry established that the only reason given for substitution was Berry's continuing refusal to speak to his attorneys -- a reason that ceased to exist

when the motion was denied.

**c. The Timeliness of the Motion**

Berry asserts that "his motion to substitute counsel was timely made." Brief of Appellant at 15. He provides no argument or citations to the record supporting his assertion and this Court should reject it because the motion at issue occurred on the eve of trial.

The focus of Berry's appeal is the September 10<sup>th</sup> hearing, at which the trial court noted, "We now have two court days from the time to start the trial with motions in limine." 9/10/09RP at 47. The court's concern was appropriate: "[W]here the request for change of counsel comes during the trial, or on the eve of trial, the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel and therefore may reject the request." *Stenson II*, 142 Wn.2d at 732 (quoting *United States v. Williams*, 594 F.2d 1258, 1260-61 (9th Cir.1979)). Granting Berry's request would have caused further extensive delay in a case that had languished for six years. The trial court properly rejected Berry's request for new counsel.

**B. The Trial Court Did Not Abuse Its Discretion By Admitting Expert Testimony About Berry's Rape Disorder Because That Diagnosis Is Generally Accepted In The Relevant Scientific Community**

Berry argues that one of the mental disorders assigned to him by the State's expert – Paraphilia NOS, non-consenting persons – is "invalid."

Brief of Appellant at 22. He alleges that testimony about this diagnosis deprived him of his right to due process. Berry's argument is an old one that has been rejected by the Washington Supreme Court. As the evidence showed, Berry's diagnosis is generally accepted in the field in which Drs. Phenix and Wollert practice.

**1. Standard of Review**

At issue is the trial court's decision to admit expert opinion testimony about Paraphilia NOS, non-consenting persons. The trial court has broad discretion when deciding whether to admit evidence. *In re Detention of Bedker*, 134 Wn. App. 775, 777, 146 P.3d 442 (2006). The court's rulings on such matters are reviewed for an abuse of discretion. *State v. Young*, 89 Wn.2d 613, 628, 574 P.2d 1171, *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978). A trial court abuses its discretion when its ruling is based on untenable reasons or on untenable grounds. *Darden*, 145 Wn.2d at 619. Expert opinion testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" ER 702.

**2. Berry's Diagnosis of Paraphilia NOS is a DSM-Defined Disorder**

Berry claims that the diagnosis of Paraphilia NOS, non-consenting persons violates due process because it is not generally accepted by mental health professionals, specifically claiming that the American Psychiatric

Association (APA) does not recognize it and it is not found in the DSM. Brief of Appellant at 23. Berry's claim lacks merit.

Berry's diagnosis *is* in the DSM. For most disorders there are too many variants to be explicitly listed in the DSM. 9/17/09RP at 328. Additional diagnoses beyond those explicitly defined fall into the NOS category. *Id.* As both Dr. Phenix and Dr. Wollert testified, the APA bowed to concerns about including a specific rape diagnosis and did not explicitly define one in the DSM. *Id.* at 329; 9/21/09RP at 575. The APA decided "it would be diagnosed as paraphilia not otherwise specified." 9/17/09RP at 329. Editors of the DSM and others thereafter authored a training case book as a companion to the DSM that instructed mental health professionals to code rape disorders as Paraphilia NOS. 9/17/09RP at 330; 9/18/09RP at 492-93; 9/21/09RP at 653-56; CP at 733-36. The diagnosis is now commonly accepted and used. 9/17/09RP at 332.

Berry's diagnosis – Paraphilia NOS – is most certainly in the DSM. *See* DSM at 576. The NOS category includes any paraphilia that "do[es] not meet the criteria for any of the specific categories." *Id.* All paraphilias involve, first, recurrent, intense, sexually-arousing fantasies, sexual urges, or behaviors toward non-human objects, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting persons. 9/17/09RP at 326-27. Second, they persist for at least six months.

*Id.* at 327. Third, they cause the person to have "impairment or distress in important areas of their life," such as being incarcerated. *Id.* at 327-28.

Because paraphilias involve deviant arousal to, e.g., children, nonconsenting persons and inanimate objects, clinicians and evaluators use the Paraphilia NOS diagnosis, combined with a descriptor, to communicate the specific type of person or object that is the stimulus for deviant arousal. DSM at 566; 4RP at 521. The fact that the DSM provides some examples of diagnoses that belong in the NOS category does not mean those not mentioned are invalid. *See* DSM at 576.

Berry, by his history and his admissions, is clearly aroused to "nonconsenting persons" - the descriptor Dr. Phenix used for his particular Paraphilia NOS. 9/17/09RP at 329. Berry's primary diagnosis, however, is Paraphilia NOS, which means that (1) he experiences recurrent, intense sexually arousing fantasies, sexual urges, or behaviors (2) for a period of more than six months (3) that cause him clinically significant distress or impairment in his social, occupational and other important areas of functioning. DSM at 566. The fact that Berry's diagnosis is not explicitly listed in the DSM as a Paraphilia NOS did not preclude Dr. Phenix from assigning that diagnosis in order to accurately describe Berry's deviant arousal system. *See In re Detention of Young*, 122 Wn.2d 1, 28, 857 P.2d 989 (1993) (lack of specifier in DSM for Paraphilia NOS, rape

does not invalidate the diagnosis).

**3. Washington State has the Authority to Define the Mental Conditions Relevant to Commitment Under RCW 71.09**

Berry places great significance on the fact that the DSM has not explicitly identified rape as a paraphilia. His arguments imply that a mental condition is invalid for civil commitment under RCW 71.09 unless it is specifically identified in the DSM. The Supreme Courts of the United States and of Washington State have rejected the same argument.

The United States Supreme Court has rejected the contention that due process requires states to define "mental disorder" or similar terms in their civil commitment statutes in such a way that they are consistent with the standards of the mental health community. *Kansas v. Hendricks*, 521 U.S. 346, 358-59, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Hendricks had challenged his civil commitment under Kansas' SVP law, which was modeled after RCW 71.09. The Kansas SVP law also permits civil commitment of persons who, due to a "'mental abnormality' or a 'personality disorder' are likely to engage in 'predatory acts of sexual violence.'" *Hendricks*, 521 U.S. at 350 (quoting Kan. Stat. Annot. § 59-29a01 et seq. (1994)). The Court concluded that the Kansas SVP law was constitutional because it complied with earlier cases upholding civil commitment statutes that required both a finding of dangerousness and the presence of mental illness. *Id.* at 358.

The Court specifically rejected Hendricks' claim that the use of the term "mental abnormality" by the Kansas SVP law did not comport with earlier cases requiring a finding of "mental illness," because "mental abnormality" is a term adopted by the Kansas Legislature and not the psychiatric community. *Id.* at 358-59. The Court found that "the term 'mental illness' is devoid of any talismanic significance." *Id.* at 359. It further noted that "'psychiatrists disagree widely and frequently on what constitutes mental illness'" and that the Court itself had never used consistent terms in its cases involving civil commitments. *Id.* (quoted source omitted). The Court observed:

Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. See, e.g., Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 Rutgers L.Rev. 377, 391-394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). *Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession.* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* xxiii, xxvii (4th ed.1994).

*Id.* (emphasis added). See also *Kansas v. Crane*, 534 U.S. 407, 413-14, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (reaffirming that psychiatric and legal standards do not and need not be identical).

Washington's definition of "mental abnormality" meets constitutional requirements and does not place the limitations on acceptable diagnoses that Berry would have this Court impose. It defines a "sexually violent predator" as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(16). RCW 71.09 then defines "mental abnormality" in a way that distinguishes mentally ill offenders from non-mentally ill recidivists:

"Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

RCW 71.09.020(8).

As *Hendricks* makes clear, the Washington Legislature is free to craft its own meaning of "mental illness" and it was up to the fact-finder to determine whether Berry's mental condition fit the definition of "mental abnormality" in RCW 71.09.020(8).

The DSM itself recognizes the limitations of diagnostic constructs in forensic settings. *See* DSM at xxxiii (noting the imperfect fit between "questions of ultimate concern to the law and the information contained in a clinical diagnosis."). The DSM also cautions that, while it reflects a consensus about classification of mental disorders, new knowledge based on research and clinical experience will undoubtedly lead to further understanding of the listed disorders, the inclusion of new ones and the removal of others.<sup>3</sup> *Id.*

In part due to these limitations of the DSM, the Washington Supreme Court has previously rejected the very challenge Berry makes against the diagnosis, which is frequently assigned to serial rapists in SVP cases:

The fact that pathologically driven rape, for example, is not yet listed in the *DSM-III-R* does not invalidate such a diagnosis. The *DSM* is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities.

*Young*, 122 Wn.2d at 28 (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L.Rev. 709, 733 (1992)). In rejecting the

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<sup>3</sup> In fact, a specific rape diagnosis is currently under consideration for inclusion in the forthcoming DSM V. *See* "Paraphilic Coercive Disorder" at: <http://www.dsm5.org/ProposedRevisions/Pages/SexualandGenderIdentityDisorders.aspx>.

challenge to the paraphilic rape diagnosis, the *Young* court also noted that the "specific diagnosis" was Paraphilia NOS:

The specific diagnosis offered by the State's experts at each commitment trial was "paraphilia not otherwise specified." This is a residual category in the *DSM-III-R* which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the *DSM-III-R*. *DSM-III-R*, at 280. . . .

*Young*, 122 Wn.2d at 29. It was as clear then as it is now that the "[t]he weight of scientific evidence, therefore, supports rape of adults as a specific category of paraphilia." *Id.* Since *Young*, the appellate courts of this state have upheld numerous commitments based on diagnoses of paraphilia NOS by many qualified professionals.<sup>4</sup> As in *Young* and these other cases, Berry's primary diagnosis is Paraphilia NOS, which is generally accepted and found in the DSM.

**4. Dr. Phenix's Use of a Descriptor With a DSM Diagnosis is Not Subject to *Frye* Because it is Not a Novel Scientific Methodology**

Berry argues that the trial court erred by not holding a *Frye* hearing.

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<sup>4</sup> See e.g. *In re Detention of Stout*, 159 Wn.2d 357, 363, 150 P.3d 86, 90 (2007); *In re Detention of Halgren*, 156 Wn.2d 795, 800-01, 132 P.3d 714 (2006); *In re Detention of Marshall*, 156 Wn.2d 150, 155, 125 P.3d 111, 113 (2005); *In re Detention of Campbell*, 139 Wn.2d 341, 357, 986 P.2d 771, 779 (1999). *In re Detention of Paschke*, 136 Wn. App. 517, 520, 150 P.3d 586, 587 (2007); *In re Detention of Taylor*, 132 Wn. App. 827, 832, 134 P.3d 254, 257 (2006); *In re Detention of Broten*, 130 Wn. App. 326, 332, 122 P.3d 942, 945 (2005); *In re Detention of Skinner*, 122 Wn. App. 620, 633, 94 P.3d 981, 987 (2004); *In re Detention of Hoisington*, 123 Wn. App. 138, 143, 94 P.3d 318, 320 (2004); *In re Detention of Strauss*, 106 Wn. App. 1, 6, 20 P.3d 1022, 1024 (2001); *In re Detention of Mathers*, 100 Wn. App. 336, 336, 998 P.2d 336, 337 (2000); *In re Detention of Aqui*, 84 Wn. App. 88, 94, 929 P.2d 436, 441 (1996).

Brief of Appellant at 30-32. But Paraphilia NOS is not a novel psychiatric diagnosis and Dr. Phenix's use of the descriptor "non-consenting persons" is not subject to *Frye*.

In Washington, the standard for assessing allegedly novel scientific procedures is set out in *Frye*, 293 F. at 1014. *In re Detention of Thorell*, 149 Wn.2d 724, 754; 72 P.3d 708 (2003). Pursuant to *Frye*, the trial court determines whether a scientific theory or principle is generally accepted within the relevant scientific community. *Thorell*, 149 Wn.2d at 754. "*Frye* requires only general acceptance, not *full* acceptance, of novel scientific methods." *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). If the methodology is generally accepted, the possibility of error in the expert opinions can be argued to the jury. *Id.*

As argued *supra*, Berry's diagnosis is Paraphilia NOS. This diagnostic category is found in the DSM and is generally accepted. Berry has not shown, or argued, that Paraphilia NOS is a novel scientific methodology. *Frye* does not apply.

Nor does Dr. Phenix's use of the descriptor "non-consenting persons" implicate *Frye*, in that it merely describes the stimulus that is the object of Berry's deviant sexual interests. It does not transform Paraphilia NOS into a novel diagnosis.

Berry argues, however, that the diagnosis is subject to *Frye*,

pursuant to *State v. Greene*, 139 Wn.2d 64, 72, 984 P.2d 1024 (1999) (dissociative identity disorder (DID) evaluated under *Frye* test). In *Greene*, a criminal defendant sought to introduce evidence that he suffered from DID, as an insanity defense. 139 Wn.2d at 67-68. *Greene* reversed the trial court, concluding that DID met the *Frye* test. *Id.* at 72-73. *Greene*, however, does not stand for the proposition that mental disorders diagnosed in RCW 71.09 cases are subject to *Frye*. Contrary to a criminal proceeding, the State must present expert testimony that a respondent suffers from a "mental abnormality" or personality disorder. RCW 71.09.020(16). "Mental abnormality," as discussed supra, is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). In adopting this definition, the Washington Legislature exercised its considerable authority to fashion the criteria that would subject a person to civil commitment, criteria that need not "fit precisely with the definitions employed by the medical community" and that "need not mirror those advanced by the medical profession." *Hendricks*, 521 U.S. at 359; *Crane*, 534 U.S. at 413-14. *Greene* did not address whether a condition that meets the definition of "mental abnormality" in RCW 71.09.020(8) is subject to *Frye*.

Persuasive authority holds that diagnostic testimony is not subject to *Frye*. See, e.g., *Logerquist v. McVey*, 1 P.3d 113, 123 (Ariz. 2000) ("*Frye* is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior"); *Commonwealth v. Dengler*, 843 A.2d 1241, 1244 (Pa.Super. 2004) ("psychological or psychiatric testimony of an expert at an SVP proceeding is not novel scientific evidence subject to *Frye*").

In a case involving California's SVP law, the appellate court rejected a claim that the expert psychiatric or psychological testimony in that case was novel scientific evidence, holding that *Frye* standards do not apply to "expert medical testimony, such as a psychiatrist's prediction of future dangerousness or a diagnosis of mental illness." *People v. Ward*, 71 Cal.App.4th 368, 373 (1999). The *Ward* court explained why a psychologist's expert opinion testimony is not subject to *Frye*:

The threshold question is whether expert psychiatric or psychological testimony in this case is scientific evidence subject to *Kelly-Frye*. We hold it is not. California distinguishes between expert medical opinion and scientific evidence; the former is not subject to the special admissibility rule of *Kelly-Frye*. (*People v. McDonald* (1984) 37 Cal.3d 351, 372-373 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011].) *Kelly-Frye* applies to cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist's prediction of future dangerousness or a diagnosis of mental illness. (37 Cal.3d at pp. 372-353; *People v. Mendibles* (1988)

199 Cal.App.3d 1277, 1293-1294 [245 Cal.Rptr. 553].)

Similarly, the testimony of a psychologist who assesses whether a criminal defendant displays signs of deviance or abnormality is not subject to *Kelly-Frye*. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1159 [265 Cal.Rptr. 111, 783 P.2d 698].) In the latter case, the court observed: "No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior." (*Id.*, at p. 1154.) It also described a psychological evaluation as "a learned professional *art*, rather than the purported exact 'science' with which *Kelly/Frye* is concerned. . . ." (*Id.*, at p. 1159.)

*Ward*, 71 Cal.App.4th at 373.

Assuming *arguendo* that *Greene* also applies to diagnoses under RCW 71.09, the rationale behind the persuasive cases above should still apply to Dr. Phenix's use of the descriptor "Nonconsent." Berry's primary diagnosis, Paraphilia NOS, unquestionably meets *Frye*. Because Berry meets the general criteria of a Paraphilia, i.e. recurrent, intense sexually arousing fantasies, urges or behaviors for more than six months that cause him clinically significant distress or impairment (DSM at 566), Dr. Phenix's analysis of the specific stimuli to which Berry is aroused is application of "a learned professional art," not application of novel scientific methodology. *Ward*, 71 Cal.App.4th at 373. *Frye* does not invalidate the diagnosis Dr. Phenix assigned to Berry.

##### **5. Criticisms of the Use of Paraphilia NOS, Non-Consenting Persons Do Not Invalidate the Diagnosis**

In attempting to show that Paraphilia does not meet the *Frye* test,

Berry cites to some criticisms of the diagnosis and concludes that the disorder is not generally accepted. Brief of Appellant at 26-28. But the critics Berry cites do not establish that the diagnosis is not generally accepted. *Frye* requires "general acceptance," not "full acceptance." *Russell*, 125 Wn.2d at 41. Opposition from some members of the mental health community does not establish a lack of general acceptance.

Berry relies in part on the criticisms of his trial expert, Dr. Richard Wollert. Brief of Appellant at 27. Dr. Wollert's criticisms, however, carry little or no weight because of his many other ideas that are demonstrably novel and, at times, absurd. For example, at trial Dr. Wollert eschewed use of the Hare Psychopathy Checklist Revised (PCL-R), claiming it is unreliable. 9/21/09RP at 630. The PCL-R is commonly accepted and used by mental health professionals to measure a person's psychopathic traits. *See* 9/18/09RP at 419-24. Dr. Wollert, who has used and relied on the PCL-R in the past, now will not use it in SVP cases because of a Texas study he read. 9/22/09RP at 716-17. Instead, as brought out on cross-examination, Dr. Wollert relies on the "hair on the back of the neck test," which he describes as a "clinical test." *Id.* at 719-20. Dr. Wollert claims that a clinician can detect psychopaths because, when in their presence, a clinician will feel his/her neck hair stand up. *Id.* at 720. For examples of other ideas Dr. Wollert has adopted and discarded over the years,

*see* 9/22/09RP at 724-37.

Berry also relies upon Dr. Thomas Zander. *See* 1 Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, *Journal of Sexual Offender Civil Commitment: Science and the Law* 17, 46 (2005) (Zander article); Brief of Appellant at 26-27. Dr. Zander unquestionably criticizes the use of Paraphilia NOS for rapists. Zander article at 41-42. But Dr. Zander is a critic of all non-psychotic civil commitments and is clearly opposed to sexual predator civil commitment laws. *Id.* at 1 ("civil commitments that are based on diagnoses of such nonpsychotic disorders [paraphilias and personality disorders] have a weak foundation."). He is highly critical of the United States Supreme Court's decisions upholding those laws. *Id.* at 25 ("[T]he court engaged in very little analysis of the issues [raised by opponents of the Kansas SVP law]"). He criticizes the use of all Paraphilia NOS diagnoses. *Id.* at 41-42. He also finds validity problems with diagnoses of personality disorders. *Id.* at 50.

Dr. Zander's diagnostic criticisms are not limited to the Paraphilia NOS category; he also discusses the "conceptual validity" of Pedophilia. *Id.* at 37-40. Citing several sources that question the validity of the diagnosis without criticism, he then criticizes the commentators who defend pedophilia as a mental disorder. *Id.* at 39 ("This attempted distinction

ignores the reality that social judgments about whether a sexual orientation is harmful to self and others vary depending on changing cultural values"). Dr. Zander notes that "adult-child sexual behavior does not always result in harm to the child[.]" *Id.* (citation omitted). Dr. Zander's article and views on diagnostic practices are clearly not the products of professional consensus.

Berry has not established that the trial court abused its discretion by admitting Dr. Phenix's diagnostic testimony. Berry's diagnosis of Paraphilia NOS, non-consenting persons is generally accepted by experts in the field in which Dr. Phenix and Dr. Wollert practice.

#### IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the order civilly committing Berry as an SVP.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of June, 2010.

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NO. 64226-0-I

**WASHINGTON STATE COURT OF APPEALS, DIVISION I**

In re the Detention of:

JOHN WARREN BERRY,

Respondent.

DECLARATION OF  
SERVICE

I, Kelly Hadsell, declare as follows:

On June 1, 2010, I deposited in the United States mail true and correct cop(ies) of Respondent's Brief and Declaration of Service, postage affixed, addressed as follows:

Thomas Kummerow  
Washington Appellate Project  
1511 Third Avenue, Suite 701  
SEATTLE, WA 98101

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

DATED this 1st day of June, 2010, at Seattle, Washington.

  
KELLY HADSELL

2010 JUN -1 PM 4:56  
CLERK OF COURT  
STATE OF WASHINGTON