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NO 64606-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Detention of:

WILLIAM GASTON.

Appellant.

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STATE OF WASHINGTON

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

BRIEF OF APPELLANT

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A. INTRODUCTION

The merits of a campfire ghost story are measured by the fright of the campers and not the truth of the tale. So too, the State's case in this RCW 71.09 proceeding. Just like a good ghost story the State had its monster and sought to maximize the juror's fear with little regard for whether its tale met the basic requirements due process demands of commitment under RCW 71.09. The State spun a story of William Gaston's past sex crimes, his diagnosis with Antisocial Personality Disorder, and his likelihood to new commit new crimes. Despite the fear it struck in the jury, missing from the state's case is any proof that Mr. Gaston's risk to reoffend is caused by the his inability to control his behavior due to a personality disorder. Because that causative link is a required element to support commitment, Mr. Gaston's indefinite commitment under RCW 71.09 must be reversed.

B. ASSIGNMENT'S OF ERROR

1. The State did not offer sufficient proof to support commitment of Mr. Gaston under RCW 71.09.
2. The trial court deprived Mr. Gaston of his right to a unanimous jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment Due Process Clause Due process requires the State prove each element necessary to commit a person under RCW 71.09 beyond a reasonable doubt. Due process also requires that such commitment be predicated upon proof that, unlike other dangerous potential recidivists, the person's risk of recidivism stems from a mental abnormality or disorder. Where the State did not prove Mr. Gaston's risk of reoffense stemmed from a mental disorder was there sufficient proof to commit him?

2. Commitment under RCW 71.09 is limited to circumstances in which the State can prove a person has a recognized psychiatric diagnosis. A person may be diagnosed with Antisocial Personality Disorder only if there is evidence of the separate diagnosis of Conduct Disorder prior to age 15. The State's expert diagnosed Mr. Gaston with Antisocial Personality Disorder despite his acknowledgement that there was no objective evidence of Conduct Disorder prior to age 15. Did the State prove beyond a reasonable doubt Mr. Gaston has a recognized psychiatric diagnosis?

3. The jury may not commit a person under RCW 71.09.060 unless it finds the person is suffering from a mental abnormality or personality disorder which makes the person more likely to engage in future acts of sexual violence if not confined in a secure facility. In making the determination of whether the person suffers from a mental abnormality or personality disorder, the jury must be unanimous as to the abnormality or disorder suffered. Where expert witnesses offered diagnoses that Mr. Gaston had possibly two personality disorders, and there was disagreement among the experts as to which disorders could be diagnosed in Mr. Gaston, was the jury required to be unanimous as to what disorder caused Mr. Gaston difficulty controlling his behavior?

D. STATEMENT OF THE CASE

Prior to Mr. Gaston's release from confinement the State petitioned to have him committed pursuant to RCW 71.09. CP 1424-25. The State relied upon an evaluation of Mr. Gaston by Dr. Kathleen Longwell in which she diagnosed Mr. Gaston with Paraphilia Not Otherwise Specified (NOS) as well as Antisocial Personality Disorder. CP 1369-70, 1414-15. Although Paraphilia NOS specifically requires a sexual arousal resulting from the paraphiliac activity, in this case nonconsensual sexual activity, Dr.

Longwell opined a Paraphilia NOS diagnosis was appropriate in any case in which a person has previously been convicted of rape. CP 1414; 1333, 1340, 1344, 1350, 1352. In short, Dr. Longwell reached the fantastic conclusion that every rapist can be diagnosed with a mental disorder.

Mr. Gaston sought Frye hearing on the questions of whether Paraphilia NOS generally, and Dr. Longwell's personal application of the diagnosis, were generally accepted in the relevant scientific community. CP 983-86. When the court agreed that there was significant doubt, and perhaps a complete lack of support, among the scientific community for Dr. Longwell's unique application of the Paraphilia NOS diagnosis, the State retracted Dr. Longwell as a witness. Supp. CP __Sub No 83. In her place, the State endorsed Dr. Christopher North as the State's expert. Id.

Dr. North diagnosed Mr. Gaston with Antisocial Personality Disorder. Dr. North acknowledged that diagnosis applies to more than half of all male prisoners, perhaps up to 70%. RP 518. Dr. North had previously testified in other matters that a diagnosis of Antisocial Personality Disorder by itself was insufficient to support commitment under RCW 71.09. RP 700. Nonetheless, he testified

the disorder caused Mr. Gaston serious difficulty controlling his behavior and warranted Mr. Gaston's commitment. RP 438-39.

A jury found Mr. Gaston met the criteria for commitment under RCW 71.09. CP 11.

E. ARGUMENT

1. THE STATE DID NOT OFFER SUFFICIENT PROOF TO JUSTIFY COMMITMENT OF MR. GASTON.

a. Due process requires proof that a person's risk of reoffending stems from a mental disorder. Before the State may commit an individual under RCW 71.09, a unanimous jury must conclude the State has proved the elements RCW 71.09.020(1) beyond a reasonable doubt. In re Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1995); RCW 71.09.050; RCW 71.09.060.

Thus, the State must prove a person

has been convicted of or charged with a crime of sexual violence and . . . 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(18). The Supreme Court has concluded such a commitment comports with the requirements of due process only where the state can establish the person has a mental abnormality that makes it "difficult, if not impossible, for the person to control his

dangerous behavior.” Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

The Court subsequently clarified this constitutional requirement saying

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.” That distinction is necessary lest “civil commitment” become a “mechanism for retribution or general deterrence”—functions properly those of criminal law, not civil commitment. cf. also Moran, The Epidemiology of Antisocial Personality Disorder, 34 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999) (noting that 40%–60% of the male prison population is diagnosable with Antisocial Personality Disorder).

Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). This narrowing requirement is consistent with the plurality decision in Foucha v. Louisiana:

[T]he state asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct..., he may be held indefinitely. This rationale would permit the State 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.

504 U.S. 71, 86-87, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

Thus, to narrow the class of individuals subject to indefinite incarceration, due process requires more than mere proof of a risk to reoffend but rather proof of a risk to reoffend which stems from a mental disorder. See e.g. In re the Detention of Thorell, 149 Wn.2d 724, 715-16, 72 P.3d 708 (2003). Crane requires the State's proof distinguish the person who is likely to reoffend because of their mental condition from the normal recidivist who may not be constitutionally committed no matter how great the likelihood of reoffending. Thorell concluded the Washington statute is consistent with these constitutional requirements. Thus, RCW 71.09.060 required the State to prove Mr. Gaston falls within the former category. The State did not meet this burden.

b. The State did not prove beyond a reasonable doubt that Mr. Gaston suffers from a personality disorder that make his likely to reoffend. Due process allows involuntary commitment only for those diagnoses which "the psychiatric profession itself classifies . . . as [s]erious mental disorders." Crane, 534 U.S. at 410.

i. Because it is descriptive rather than causative Antisocial Personality Disorder cannot justify commitment under RCW 71.09. Because a personality disorder is merely a

description of a person's pattern of behaviors the disorder does not predispose a person to any behavior; the disorder does not cause behavior it merely describes it. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p. xxiii, 4th ed. (1994) (Hereafter DSM-IV). The DSM-IV cautions against the misuse of a diagnosis in a forensic setting:

. . . the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself; does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

Id.

Consistent with this caution, and due to The American Psychiatric Association (APA), the publisher of the DSM-IV, has condemned the use of Antisocial Personality Disorder as a basis for commitment under laws such as RCW 71.09. APA Final Action Paper, Eliminating the Use of Antisocial Personality Disorder as a Basis for Civil Commitment (APA Assembly, May 19-21, 2006). Attached as Appendix)¹ The APA rejected Antisocial Personality

¹ The Final Action Paper was adopted by the May 2006 APA Assembly (see, Assembly, Board Pass Statement on Detainee Interrogations, 41 Psychiatric

Disorder as a basis for involuntary commitment because 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.

A person diagnosable with antisocial personality disorder will choose to engage in conduct without regard to consequences. 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, 52-62 (2005) (summarizing studies and scholarly opinion).² Because the ability to choose their actions remains, the subsequent act is not the result of an inability to control their behavior but rather the choice not to. That is the fundamental nature of the disorder and no matter how much the state pays its experts to say otherwise, nor how frightened the jury is, due process does not permit indefinite commitment for diagnoses that will not cause future behavior. While the likelihood of reoffense based upon a choice may scare listeners of the campfire tale just as would the

News, no 12 at 1, 10 (June 16, 2006), available at <http://pn.psychiatryonline.org/content/41/12/1.1.full>.

² Available at <http://www.socjournal.org/archives>.

likelihood of reoffense based on an inability to control behavior there is constitutionally mandated distinction between the two.

Crane, 534 U.S. at 413.

Simply attaching a diagnosis to criminal history does nothing more than allow continued indefinite confinement for past crimes. This is precisely what Foucha and Crane rejected because it fails to differentiate the run-of-the-mill recidivist from the person whose recidivism is a product of a disorder. That requirement of due process cannot be circumvented simply by making recidivism itself the disorder.

Moreover, the reliance upon the diagnosis to opine a predisposition to again commit the very acts which give rise to the diagnosis is contrary to the DSM-IV itself. It would be illogical to dismiss that cautionary statement and still credibly rely upon the DSM-IV as the basis for the diagnosis.

It might be true that people who have committed a crime before are more likely to commit crimes in the future as compared to people who have never committed a crime. It may also be true that a person with antisocial personality disorder is more likely to reoffend than someone without diagnosis, a fact readily illustrated by its application to nearly three-quarters of prison inmates. But the

truth of those facts do not permit the indefinite commitment of those people absent a showing that their risk of reoffense stems from a mental condition. Crane, 534 U.S. at 413; Thorell, 149 Wn.2d at 715-16; RCW 71.09.050. Foucha specifically rejected the State of Louisiana's 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." 504 U.S. at 82-83. The State's effort to commit Mr. Gaston in this case mirrors Louisiana's, contending that Mr. Gaston's antisocial personality alone is sufficient to justify his indefinite commitment.

The critical distinction between dangerous recidivists who choose to reoffend and those who will reoffend due to a mental disorder is that the disorder causes the risk of reoffense by limiting the person's ability to control their behavior. Because a person diagnosed with Antisocial Personality Disorder retains the ability to control behavior - they simply chose not to - the diagnosis does not result in a limitation of volitional control and it does not provide the causal link required by due process and RCW 71.09.020.

Foucha has already established that Antisocial Personality Disorder is constitutionally insufficient to support indefinite

commitment. 504 U.S. at 82-83. Because the only diagnosis the State put forward to justify commitment was Antisocial Personality Disorder the State did not offer sufficient proof to support Mr. Gaston commitment.

ii. Even assuming Antisocial Personality

Disorder can support commitment under RCW 71.09, the State did not offer sufficient proof that it does so here. Setting aside the constitutional inadequacy of Antisocial Personality Disorder as a bases for commitment, even Dr. North could not say that Mr. Gaston's personality disorder made him likely to reoffend in this case. Instead, Dr. North qualified his conclusion, saying the disorder coupled with what he termed Mr. Gaston's hypersexuality made him likely to again commit crimes of sexual violence. RP 576-604. Hypersexuality, as Dr. North acknowledged, is not a recognized diagnosis either. RP 710. Thus, even in its most favorable light, the State's evidence established Mr. Gaston's personality disorder makes him likely to reoffend only if coupled with a characteristic that is neither a mental abnormality nor personality disorder. Put another way, but for his subjective conclusion that Mr. Gaston has a high sex drive, Dr. North does not believe Mr. Gaston meets the definition of RCW 71.09.020. That

evidence does not even meet the criteria of RCW 72.09.020(18) much less due process.

Dr. North's reluctance to rely entirely upon Antisocial Personality Disorder is consistent with his testimony in prior cases that the diagnosis cannot by itself support commitment. RP 700-01. It also reflects the lack of professional support for such a diagnosis. See RP 702 (Dr. North testifying Association for Treatment of Sexual Abusers, of which he is a member, has filed briefs in United States Supreme Court asserting Antisocial Personality Disorder is insufficient by itself to support commitment).

The State's own doubt in the sufficiency of the Antisocial Personality diagnosis is further illustrated in Instruction 6, the "to commit" instruction. CP 20. That instruction required the jury find only that Mr. Gaston suffered from a "personality disorder which causes serious difficulty in controlling his sexually violent behavior." Id. Mr. Gaston, however, proposed an instruction requiring the jury to find Mr. Gaston suffered "from a personality disorder, namely: Antisocial Personality Disorder which causes serious difficulty in controlling his sexually violent behavior." CP 57. Despite the fact that was the only diagnosis it had presented which could arguably

support its case, the State argued Mr. Gaston's proposed instruction was a comment on the evidence. RP 984.

An instruction is a comment on the evidence only if it instructs the jury that a disputed question of fact has been established as a matter of law. State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006). Here, Antisocial Personality Disorder was the lone diagnosis offered by the State to support commitment. Neither the State nor Mr. Gaston offered any evidence of any other personality disorder which caused him difficulty controlling his behavior.³ Because the proposed instruction did not direct the jury to find Antisocial Personality Disorder required commitment, it did not comment on the evidence. Rather than direct the jury's resolution of a factual matter, the instruction required the State to stand or fall on the merits of its case.

The State's objection, then, was nothing more than a hedge on its bet. Concerned that the jury might not be sufficiently frightened to overlook the absence of a causative link between its proffered diagnosis and the risk of reoffense, the State wanted to permit the jury freedom to rely on whatever it wanted to commit Mr.

³ While Dr. Looman testified he diagnosed Mr. Gaston as a psychopath, RP 837, he was careful to state that diagnosis did not cause a risk of reoffense. RP 843-44.

Gaston. There is no better expression of the weakness of the State's case than the State's own reluctance to allow the jury to address its merits.

Due process limits involuntary commitment those whose risk of reoffense stems from a recognized psychiatric diagnosis. Crane, 534 U.S. at 410. Moreover, RCW 71.09.060 requires the risk of reoffense stem from a disorder or abnormality. Thorell 149 Wn.2d at 715-16. That link is mandated by due process. Id. Based upon the State's evidence, Mr. Gaston's risk of reoffense does not. Neither the plain language of the statute nor due process allow commitment of Mr. Gaston based on the risk created by the combination of his disorder and supposed hypersexuality.

iii. The State did not prove the diagnosis of Antisocial Personality Disorder beyond a reasonable doubt. Among the diagnostic criteria of Antisocial Personality Disorder is evidence of conduct disorder with onset prior to age 15. DSM-IV at 650. Conduct Disorder in turn requires a child exhibit at least 3 of 15 criteria grouped as: Aggression to People of Animals, Destruction of Property, Deceitfulness or Theft, Serious Violations of Rules. DSM-IV at 90.

Dr. North acknowledged the record establishing a diagnosis of conduct disorder prior to age 15 “was fairly limited.” RP 510. Dr. North candidly admitted this limited record provided no “objective information” of such a diagnosis. Id. Instead, Dr. North testified that because the record demonstrated pre-15 behavior suggestive of Mr. Gaston not following rules and because Mr. Gaston engaged in improper and unlawful activity after age 16 on, one could “assume” he was diagnosable with conduct disorder prior to age 15. RP 513. Among the facts Dr. North included in his speculative diagnosis of not following rules was that Mr. Gaston, based on his self report, used drugs and alcohol beginning at age 10, viewed adult magazines at age 5, ran away from home at age 13, and was enrolled in anger management classes at age 13. RP 510-11. Dr. North, when pressed, acknowledged, the pornography, drugs and alcohol, were provided to Mr. Gaston by adults, including his step-father, who sexually and physically abused him. RP 678. Dr. North further acknowledged the timing of the anger management classes and Mr. Gaston’s leaving his abusive home followed shortly after the abduction and murder of Mr. Gaston’s brother. RP 680-81.

Based upon speculation alone, Dr. North opined that Mr. Gaston’s horrific childhood was really a diagnosable personality

disorder. That degree of speculation and subjectivity provides further illustration of the constitutional frailty of Antisocial Personality Disorder as a basis for involuntary commitment. But in any event, such speculation does not satisfy the State's burden of proof under RCW 71.09.060.

2. THE LACK OF A UNANIMITY INSTRUCTION DEPRIVED MR. GASTON OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT

a. The requirements of *Petrich* apply to RCW 71.09 trials. Based on principles of due process as well as the state constitutional right to a unanimous jury trial, a defendant in a criminal case has a constitutional right to a conviction only by a jury which unanimously agrees that the crime charged has been committed beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); U.S. Const. amend. XIV; Const. art 1, § 22. Likewise, involuntary detention in RCW 71.09 proceedings is governed by the due process protections that apply in a criminal proceeding. *Young*, 122 Wn.2d at 48. Specifically, RCW 71.09.060, requires a jury unanimously conclude the State has proved each element necessary for commitment beyond a reasonable doubt.

In re the Detention of Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006), the Court concluded the unanimity requirements announced in State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), apply to RCW 71.09 proceedings. The Court said “[g]iven that the ultimate due process concern is in ensuring that the jury unanimously agrees on the basis for confinement, we hold that unanimity rules are applicable in SVP cases.” Halgren, 156 Wn.2d at 720. Petrich requires that where the State alleges a defendant has committed multiple acts, each of which could independently establish the charge, either the prosecutor must elect which act it is relying on or the jury must be instructed they must unanimously rely on a single act in assessing the defendant’s guilt. Petrich, 101 Wn.2d at 572. This requirement, however, does not apply to alternative means cases, that is cases in which the State alleges a single act which may satisfy alternative statutory means of committing a single offense. See e.g. State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997) (holding second degree murder has alternative means – intentional murder and felony murder).

b. A unanimity instruction must be given where the jury is presented with alternative evidence of more than one personality disorder which might cause the risk of reoffense. Unlike

the petitioner in Halgren, Mr. Gaston does not contend the jury was required to unanimously agree that he suffered a “mental abnormality” as opposed to a “personality disorder.” In fact, the trial court purposefully omitted the term “mental abnormality” from the instruction setting forth the elements in this case. CP 20. Instead, where the State offers multiple diagnoses to support its claim that a person suffers a personality disorder the unanimity requirement of Petrich, adopted in Halgren, requires the jury unanimously agree as to which diagnosis made him committable under RCW 71.09.

Continuing the criminal-law analogy employed by Halgren, if the terms “mental abnormality” and “personality disorder” are the equivalent of alternative means in a criminal case, then multiple diagnoses offered to prove one of these alternative means must be the equivalent of alternative acts in the criminal setting. As the “unanimity requirements” of Petrich apply in RCW 71.09 cases, Halgren, 156 Wn.2d at 720, the State must either elect a diagnosis or the trial court must provide a unanimity instruction.

In this case, neither course was followed. In fact, the State did precisely the opposite. The State objected to the defense proposed “to commit” instruction which would have required the jury to find a causative effect of a single diagnosis on Mr. Gaston’s risk

of reoffense. RP 983-84; CP 57. By requiring the jury to unanimously agree on a single diagnosis, which happened to be the only one the State offered, that instruction would have resolved the unanimity problem. Thus, rather than require the jury to unanimously agree as to a single disorder which caused Mr. Gaston's likelihood of reoffense, the State specifically invited the jury to consider that diagnosis along with Dr. Looman's diagnosis that Mr. Gaston is a psychopath. RP 1182. Rather than hewing to the constitutional requirement, the State's argument coupled with the State's objection to the defense proposed instruction, was an effort to circumvent unanimity.

Two decisions of the Court of Appeals have analyzed this issue in a way which effectively renders Halgren meaningless. In each case, the court concluded that multiple diagnoses of personality disorders were not akin to alternative acts, but rather were merely "mean within means." In re the Detention of Pouncy, 144 Wn.App. 609, 184 P.3d 651, affirmed in part and reversed in part on other grounds, 168 Wn.2d 382 (2008);⁴ In re the Detention

⁴ This Court reversed the commitment in Pouncy finding the trial court had improperly admitted evidence regarding a witness' testimony in another matter. On review the Supreme Court affirmed that holding, but reversed this Court's conclusion that the term "personality disorder" need not be specifically defined to the jury.

of Sease, 149 Wn.App. 66, 77-78, 201 P.3d 1078, review denied, 166 Wn.2d 1029 (2009).

Each of these cases relied upon the In re the Personal Restraint Petition of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988). Pouncy, 144 Wn.App. at 618-19; Sease, 149 Wn.App. at 77-78. Jefferies affirmed a conviction of first degree aggravated murder finding the jury was not required to unanimously agree as to which clause in the definition of an aggravating factor a defendant's acts satisfied. 110 Wn.2d at 339-40. Because the included alternative definitions of the aggravating factor set forth alternative legal theories by which the State could establish the element, unanimity was not required. Id. This analysis has been termed "means within means." See, Pouncy, 144 Wn.App. at 619. Thus, Jefferies holds only that that unanimity is not required where alternative legal theories establish a single element of a crime. Jefferies does nothing more than recognize the rule that unanimity is required as to the facts the State relies upon to prove an element, but not on legal questions. 110 Wn.2d at 336 (citing State v. Arndt, 87 Wn.2d 374, 377-78, 553 P.2d 1328 (1976)),

A personality disorder is:

an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment.

RCW 71.09.020(9). Unlike the defendant in Jefferies, who sought to parse the definition of the aggravator to require unanimity as to whether the murder was to “conceal the commission of a crime” or “to protect the identity of the person committing the crime” or “to conceal the identity of any person committing a crime,” Mr. Gaston does not argue the court was required to parse the legal definition of personality disorder.

Unlike the constituent clauses in the definition of the aggravating factor, the diagnoses of personality disorders do not provide alternative legal theories supporting a single element. If in fact they were legal theories as opposed to factual theories, the experts could not have testified to the jury as to the diagnosis, as the court alone may instruct the jury on the law. These diagnoses are plainly alternative factual theories.

If personality disorders and mental abnormalities establish the alternative means of commitment, Halgren, 156 Wn.2d at 721, and multiple diagnoses of personality disorders are merely means within means, Sease, 201 P.3d at 1084, there are no

circumstances in which an RCW 71.09 jury will ever be held to the standard announced in Petrich. But a “jury [must] unanimously agrees on the basis for confinement.” Halgren, 156 Wn.2d at 720. Due process and RCW 72.09.060 limit commitment to circumstances in which a jury unanimously agrees that a personality disorder causes the respondent serious difficulty controlling his behavior. Crane, 534 U.S. at 413; Thorell, 149 Wn.2d at 715-16. The unanimity requirement of Halgren is given meaning only if it requires the jury to unanimously agree which personality disorder causes Mr. Gaston serious difficulty controlling his behavior.

c. Mr. Gaston was denied a unanimous jury verdict.

In limited situations, the right to a unanimous verdict is not violated despite the lack of unanimity instruction in a case where the State validly proved different factual grounds for a conviction. If the State can prove the violation was harmless beyond a reasonable doubt, the failure to give a “unanimity” instruction does not require reversal. State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990). The failure to give a unanimity instruction requires reversal if any rational juror could have a doubt as to whether each alternative separately established the crime beyond a reasonable

doubt. Kitchen, 110 Wn.2d at 411; State v. King, 75 Wn.App. 899, 903, 878 P.2d 466 (1994). In the context of a RCW 71.09 trial, the inquiry must be whether a reasonable juror could disagree that one or more of the alternative diagnoses causes a serious lack of control.

Here, in addition to the purported diagnosis of Antisocial Personality Disorder, Dr. North opined Mr. Gaston's psychopathy increased his risk of reoffense. Dr. Looman rejected that diagnosis due to the absence of evidence of Conduct Disorder prior to age 15. RP 858. Dr. Looman testified that by inferring that diagnosis based upon Mr. Gaston's post-age 16 behavior, Dr. North had gone beyond clinical judgment and was "making something up." RP 858-59. Dr. North preemptively offered, that assuming it was clinically improper to infer such a diagnosis, he would have instead offered a diagnosis of personality disorder not otherwise specified with antisocial features. RP 513-14. Dr. Looman testified, that while Mr. Gaston could not be diagnosed with Antisocial Personality Disorder, he was a psychopath. Dr. Looman cautioned however that psychopathy, like Antisocial Personality Disorder, does not cause an inability to control behavior. RP 844

In closing argument, and consistent with its objection to the defense proposed instruction, the State told the jurors it could rely on either Dr. North or Dr. Looman's diagnosis. RP 1182. Based on the contradictory diagnoses a reasonable juror could have a doubt as to whether the Antisocial Personality Disorder diagnosis was sufficient to commit Mr. Gaston under RCW 71.09. Thus, the State cannot prove the absence of an election or unanimity instruction was harmless. Kitchen, 110 Wn.2d at 411. This Court must reverse Mr. Gaston's commitment.

F. CONCLUSION

For the reasons above, the Court must reverse Mr. Gaston's commitment.

Respectfully submitted this 30th day of September, 2010.



GREGORY C. LINK – 25228
Washington Appellate Project – 91052
Attorney for Appellant

APPENDIX

FINAL
ACTION PAPER

SUBJECT: Eliminating the use of Antisocial Personality Disorder as a Basis for Civil Commitment

INTENTS: To dissuade psychiatrists from utilizing Antisocial Personality Disorder as the clinical basis for applying to have an individual civilly committed for involuntarily treatment.

To inform legislative and judicial bodies of the profession of psychiatry's strong conviction that Antisocial Personality Disorder never warrants consideration as a mental disorder, disease, defect or abnormality for this purpose.

PROBLEM: During the last two decades, 16 states and the District of Columbia have enacted statutes that extend the use of civil commitment to involuntarily confine sexual offenders to treatment facilities after those offenders have completed the prison terms to which they were sentenced. Several other jurisdictions are considering adopting similar statutes, and the governor of one state, Vermont, proposed legislation that would have permitted the civil commitment of all violent offenders, not only those convicted of sex crimes.

Sex offender (or sexually violent predator [SVP]) statutes differ from the statutory provisions of "traditional" civil commitment in a number of ways, among the most prominent of which is the articulation of a different definition of what comprises a mental illness. Several sex offender commitment statutes state that an individual deemed to be suffering from a "mental abnormality" or "personality disorder" could be eligible for civil commitment. The definition of "mental abnormality" has been construed by some forensic psychiatric experts to correspond at least in part to the paraphilias. "Personality disorder," used in this statutory context, clearly includes Antisocial Personality Disorder (ASPD).

Some forensic experts have proposed that while paraphilias ought to be considered clinical bases for SVP civil commitment, ASPD should not. This is a significant distinction in that a sizable subset of those who commit sexually violent offenses (e.g., raping adult victims) are not found to warrant any psychiatric diagnosis other than ASPD. Several cogent arguments support the exclusion of ASPD as a basis for civil commitment:

ASPD 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. Indeed, one of the DSM-IV criteria is "failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest," which makes plain that the relationship between ASPD and criminal behavior is tautological (i.e., People commit crimes due to ASPD, which is defined in part by committing crimes).

ASPD "does not readily fit into assumptions of the medical model of involuntarily civil commitment—that is, the necessity to protect individuals when they are unable to recognize their need for treatment because of a serious mental illness." (Sreenivasan, Weinberger, and Garrick)

There is no clearly recognized, efficacious treatment for ASPD. In fact, many consider therapy interventions to be contraindicated for those who fall on the psychopathic end of the ASPD spectrum as those interventions have the effect of enhancing the psychopathy.

The law has already established a precedent for discounting ASPD for consideration as a mental illness in that "Not Guilty by Reason of Insanity" statutes in many states explicitly exclude ASPD from being considered a mental disease or defect for that purpose.

The psychiatric profession has generally remained silent about the utilization of clinical concepts in the law rather than articulating its ideas in legislative and jurisprudential spheres. As one example, several editions of the DSM have contained a cautionary statement that the establishment of a diagnosis therein "does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability." While such a strategy safeguards against errors of commission it leads to errors of omission. The absence of an infusion of psychiatric clinical knowledge with respect to the properties of ASPD has led to the promulgation of bad law.

ALTERNATIVES:

1. Determine that the profession of psychiatry does in fact deem ASPD to be a legitimate basis for civil commitment and take no further action.
2. Raise awareness among psychiatrists, especially those who evaluate individuals for civil commitment to post-sentence sex offender treatment institutions, that the standard of psychiatric care is incompatible with the use of ASPD as a basis for civil commitment.
3. Inform legislative bodies and courts that the diagnosis of Antisocial Personality Disorder, which was conceptualized by the psychiatric profession, does not comprise a mental disorder, disease, defect or illness for the purpose of civil commitment.

RECOMMENDATION: Alternative 2

IMPLEMENTATION:

Refer to the Council on Psychiatry and Law to draft a Position Statement on eliminating the use of ASPD as a basis for civil commitment, which would then be sent to the Assembly and Board of Trustees for approval, and to advise on specific strategies for implementation, including submitting amicus curiae briefs in pertinent legal cases;

Refer to the Division of Government Relations to provide direction and support to District Branches in opposing the establishment of ASPD as a mental condition sufficient to civilly commit an individual in the absence of a qualifying comorbid condition;

Refer to the Committee on Psychiatric Diagnosis and Assessment, the Task Force on DSM-V, and APPI to include a statement in DSM-V and subsequent editions of the DSM that the diagnosis of Antisocial Personality Disorder has been conceptualized such that it does not comprise a basis for civil commitment in the absence of a qualifying comorbid condition;

Refer to the Ethics Committee to advise as to whether it would be unethical for an APA member to testify that a person was civilly committable on the basis of ASPD should the APA have determined that such a condition is insufficient to serve as the basis for civil commitment.

ESTIMATED COST:

Author: none

APA: \$31,265 per state per year

SUBMITTED BY:

Jonathan L. Weker, M.D., Rep., Vermont Psychiatric Association

ENDORSED BY: Area 1, Ohio Psychiatric Association District Branch

KEY WORDS: Civil Commitment; Antisocial Personality Disorder; Sex Offender, Sexually Violent Predator

APA STRATEGIC GOAL: Defining and Supporting Professional Values

**American Psychiatric Association
Action Paper Cost-Estimate Worksheet**

1. **Title of Action Paper:** Eliminating the use of Antisocial Personality Disorder as a basis for civil commitment.

2. **Authors of Action Paper:** Jonathan L. Weker, MD, Representative, Vermont Psychiatric Association

3. **Authors' cost estimate of Action Paper:** none

Note: The final Action Paper cost estimate will be assigned by APA Finance staff in consultation with appropriate APA Staff Liaisons to Components and Departments who would likely be involved with the work of the proposed action(s). The more detail that authors can provide on this worksheet, the better able staff can estimate the costs.

4. **Could the proposed action(s) be undertaken by an existing APA Component or Department? Yes**

1. Which Component(s)/Department(s)?

- i. Council on Psychiatry and Law
- ii. Division of Government Relations
- iii. Committee on Psychiatric Diagnosis and Assessment
- iv. Task Force on DSM-V
- v. APPI
- vi. Ethics Committee

Note: a copy of your action paper may be forwarded to the Components and Departments you identify, for input into the cost-estimate process.

5. **Will a new component be required? No**

1. Number of members?

Note: a Council = 8 members; a Committee = 6 members + 2 corresponding members; and a Task Force = 4 members + 1 corresponding member

2. Number of staff?

6. **Will the action require a face to face meeting? None** in addition to regularly scheduled meetings of those components?

1. Number of meetings per year?

2. Est. number of participants (including guest and staff)?

7. **Will the action require a conference call? No;** business can be conducted during the existing meeting/conference call schedule of existing components

1. Est. number of participants?

2. Est. number of conference calls per year?

8. **Will the action require a mailing? No**

1. Est. number of regular, first class mailings per year?

2. Est. number of overnight mailings per year?

9. **Will the action require any other tasks that may have associated costs? No.**

Publicizing information regarding this action to psychiatrists can be accomplished through *Psychiatric News* and existing APA-published journals.

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

IN RE THE DETENTION OF)

WILLIAM GASTON,)

APPELLANT.)

NO. 64606-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 30TH DAY OF SEPTEMBER, 2010, 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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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2010.

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