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STATE OF WASHINGTON

No. 39785-4-II

BY



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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IN RE THE DETENTION OF:

THOMAS PAUL WILLIAMS,

Appellant.

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

The Honorable Jeanette Dalton

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BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Thomas Williams was involuntarily committed pursuant to RCW 71.09 following a jury trial. The commitment order should be reversed and his case remanded for a new trial because the trial court violated his right to privacy when it ordered him to undergo a mental health examination in the absence of statutory authority. In addition, his right to due process was violated when the court admitted evidence and expert opinion regarding the invalid diagnosis of paraphilia not otherwise specified (NOS) nonconsent, a diagnosis that is not accepted by the psychiatric community.

## B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Williams' right to privacy under Article I, section 7 of the Washington Constitution when it ordered Mr. Williams to undergo a pre-commitment mental health examination.

2. Mr. Williams' right to due process was violated where his commitment was based partially on a diagnosis of an unreliable mental abnormality of paraphilia NOS nonconsent.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutionally protected right to privacy bars compelled mental examinations except in certain limited circumstances. By statute, a person facing involuntary commitment under RCW 71.09 may be compelled to undergo a mental examination prior to the probable cause finding and post-commitment, but not as part of pretrial discovery. Mr. Williams was ordered by the court to undergo a mental examination following the probable cause determination and during pretrial discovery. Did the trial court violate Mr. Williams' right to privacy requiring reversal of his involuntary commitment?

2. Due process is violated when an involuntary civil commitment is based upon a diagnosis that is not accepted in the scientific community. Paraphilia NOS nonconsent is not included in the DSM-IV-TR and is not widely accepted in the psychological community. Mr. Williams' involuntary commitment was based primarily on the diagnosis of a State retained psychologist as suffering from paraphilia NOS nonconsent. Was Mr. Williams' commitment based upon an invalid diagnosis, thus violating his right to due process and requiring the reversal of the jury's verdict involuntarily committing him?

#### D. STATEMENT OF THE CASE

Thomas Williams was confined as a result of his convictions for sexually violent offenses as defined by RCW 71.09.020 (11)(a), (c). CP 1-2. Prior to his release from confinement in the Department of Corrections at the conclusion of his sentence, the State filed a petition to involuntarily civilly commit Mr. Williams pursuant to RCW 71.09. CP 1-2.

At the commitment trial, the State presented the testimony of Dr. Richard Packard, a psychologist who is a certified sex treatment provider and who evaluated Mr. Williams to determine he met the criteria for commitment under RCW 71.09. 9/2/09RP 83-106. Dr. Packard opined that Mr. Williams suffered from two mental abnormalities (paraphilia NOS nonconsent and pedophilia non-exclusive), and a personality disorder with antisocial personality and narcissistic traits that caused him serious difficulty controlling his behavior. 9/3/09RP 128, 220-21. Dr. Packard stated that the diagnoses rested in a large part on Mr. Williams' past criminal offenses. 9/3/09RP 135-46. Dr. Packard admitted that the paraphilia diagnosis was not defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) but was a

relatively common diagnosis for those who met the criteria for involuntary commitment under RCW 71.09. 9/3/09RP 131.

Dr. Theodore Donaldson, also a clinical psychologist who testified on behalf of Mr. Williams, disagreed with Dr. Packard's diagnosis of paraphilia and pedophilia. 9/8/09RP 524, 532-45. Dr. Donaldson opined that without a diagnosis of paraphilia, Mr. Williams did not meet the criteria for involuntary commitment under RCW 71.09. 9/8/09RP 546. Dr. Donaldson did agree with Dr. Packard that Mr. Williams suffered from a personality disorder not otherwise specified (NOS) with antisocial and narcissistic features. 9/8/09RP 579.

A jury subsequently found Mr. Williams should be involuntarily, civilly committed under RCW 71.09. CP 474. On September 15, 2009, the trial court ordered Mr. Williams civilly committed. CP 475.

## E. ARGUMENT

1. THE TRIAL COURT'S ORDER COMPELLING MR. WILLIAMS TO UNDERGO A PRETRIAL MENTAL HEALTH EXAMINATION VIOLATED HIS CONSTITUTIONALLY PROTECTED RIGHT TO PRIVACY

Prior to trial, the State sought a court order compelling Mr. Williams to submit to a mental examination under CR 35. CP 52. The court entered such an order. CP 69-70. Subsequently, a decision of the Washington Supreme Court ruled such orders pursuant to CR 35 were invalid. The trial court ordered any evidence that resulted from the court ordered mental examination to be suppressed.

Several years later, the State sought a court order compelling Mr. Williams to again undergo a mental examination, pursuant to RCW 71.09.040(4). CP 183-206. Mr. Williams vehemently opposed the entry of such an order, but the trial court overruled Mr. Williams' objections and entered the order. CP 207-12.

Over Mr. Williams' objection at the commitment trial, Dr. Packard was allowed to testify regarding the results of this court-ordered mental health examination. 9/3/09RP 111.

a. Courts have limited authority to order mental health examinations in light of the fact they invade an individual's right to privacy. Washington holds an individual's right to privacy in particularly high regard and protects a person's private affairs from unlawful governmental intrusion. Const. art. I, § 7. This provision of the Washington Constitution is broader than the federal constitution, as it "clearly recognizes an individual's right to privacy with no express limitations" and places greater emphasis on privacy. *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999), quoting *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

The right to privacy is "fundamental" and personal in nature. *State v. Meecham*, 93 Wn.2d 735, 737-38, 612 P.2d 795 (1980). An individual has a constitutional interest in avoiding disclosure of intimate personal matters. *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Peninsula Counseling Center v. Rahm*, 105 Wn.2d 929, 934, 719 P.2d 926 (1986) (law requiring disclosure of psychotherapy records constitutionally permissible only if carefully tailored to valid interest and no broader than necessary).

Additionally, substantive due process guarantees protect a citizen against unwarranted state intrusions into private affairs. *Planned Parenthood v. Casey*, 505 U.S. 833, 846-57, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

Thus, an erroneous court-ordered mental health examination violates a person's right to privacy.

b. RCW 71.09.040 bars court-ordered pretrial mental health examinations. The trial court here relied upon RCW 71.09.040 in ordering Mr. Williams to undergo a mental health examination. RCW 71.09.040(4) states in relevant part:

If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections.

In *In re the Detention of Williams*, the Supreme Court ruled that "the mental health examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to

evaluation required under RCW 71.09.040(4).” 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

In *Williams*, following the court’s determination of probable cause, the State hired an expert to evaluate whether Mr. Williams’ met the criteria for finding he was a sexually violent predator. The expert reviewed Mr. Williams’ records then sought a mental health examination. The trial court ordered the mental health examination under CR 35. Mr. Williams refused to comply and was found in contempt. In determining that pretrial discovery barred such examinations, the Court compared RCW 71.09.040(4) with the statute controlling *post-commitment* proceedings, RCW 71.09.050. Under this statute, “[t]he prosecuting agency or attorney general if requested by the county shall represent the state and shall have a right . . . *to have the committed person evaluated by experts chosen by the state.*” *Williams*, 147 Wn.2d at 490, *citing* former RCW 71.09.050(2)(1995) (italics in original). From this the Court concluded:

The Legislature has expressly provided that evaluations by experts are allowed in the proceeding following commitment as a sexually violent predator. In the absence of such statutory language for pretrial discovery, it can be inferred that the Legislature did not intend for the State to conduct such evaluations before commitment. Under a canon of statutory

construction, to express one thing in a statute implies the exclusion of the other. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). Omissions are deemed to be exclusions. *State v. Williams*, 29 Wn.App. 86, 91, 627 P.2d 581 (1981).

The statute expressly provides for postcommitment evaluation, but it makes no mention of evaluations during pretrial discovery. CR 35 is inconsistent with the special proceedings set out in chapter 71.09 RCW.

*Id.* at 491.

Since the only evaluation conducted in *Williams* besides the erroneous mental health examination conducted pursuant to CR 35 was a records review by the State's expert, *Williams* implicitly held that this records review was the only "evaluation" that was authorized to be conducted pursuant to RCW 71.09.040(4). Accordingly, that is the only "evaluation" the court here was authorized to order. The court's order going beyond this records review and ordering a full mental health examination of Mr. Williams was contrary to *Williams* and without statutory authorization.<sup>1</sup>

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<sup>1</sup> The Court's subsequent decision in *In re the Detention of Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006) does not alter the analysis.

The issue in *Audett* was whether or not this court's decision in *Williams* was to apply retroactively. *Id.* at 715, 147 P.3d 982. *Williams* addressed only whether or not a prosecutor could compel an examination under CR 35 during SVP proceedings under chapter 71.09 RCW. *Williams*, 147 Wn.2d at 486, 55 P.3d 597. It did not address the use of voluntary examinations that

c. The trial court's error in ordering the mental health examination was not harmless and requires reversal of Mr. Williams' commitment. By ordering Mr. Williams to submit to a compelled mental health examination which the court lacked authority to order, the admission of the mental examination at trial violated Mr. Williams' rights to privacy and due process of law.<sup>2</sup> Where an error infringes a constitutional right, the State bears the burden of proving the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

In a proceeding pursuant to RCW 71.09, the State is required to prove that the individual suffers from a mental abnormality and/or personality disorder which causes him serious difficulty controlling his sexually violent behavior and making him

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took place prior to the commencement of SVP proceedings. Indeed, in *Williams* this court was presented with multiple instances of prefiling and pre-probable-cause-hearing mental health examinations and did not find any reason to question their validity. See *id.* at 480-84, 55 P.3d 597.

*In re Detention of Strand*, 167 Wn.2d 180, 190, 217 P.3d 1159 (2009).

<sup>2</sup> See *In re Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003), *cert. denied*, 124 S.Ct. 2015 (2004) (based on liberty interests at stake and statutory commitment requirements, due process protections apply in RCW 71.09 proceedings).

likely to engage in sexual acts if not confined. RCW 71.09.020;  
RCW 71.09.060.

Dr. Packard, the State's expert, diagnosed Mr. Williams with paraphilia NOS non-consent, pedophilia non-exclusive, and a personality disorder NOS with antisocial personality and narcissistic traits. 9/3/09RP 128. Dr. Packard was the only witness to tie the diagnosis to the legal requirements of RCW 71.09. The other witnesses who testified on behalf of the State merely provided the facts necessary to support Dr. Packard' diagnosis and expert opinion. Thus, had Dr. Packard not testified, the State would have been unable to prove its case-in-chief. As a consequence, the error in allowing Dr. Packard to examine Mr. Williams and testify about the results of that examination was not a harmless error. Mr. Williams is entitled to reversal of his involuntary commitment.

2.        PREDICATING MR. WILLIAMS'  
             COMMITMENT ON THE UNRELIABLE  
             DIAGNOSIS OF "PARAPHILIA NOT  
             OTHERWISE SPECIFIED NONCONSENT"  
             VIOLATED DUE PROCESS

Dr. Packard diagnosed Mr. Williams as suffering from, among other things, the mental abnormality of paraphilia NOS nonconsent. 9/3/09RP 128-31, 147. Dr. Packard conceded during his testimony that the paraphilia NOS diagnosis is not found in the DSM. 9/3/09RP 131.

a. To satisfy due process, involuntary commitment as a sexually violent predator must be based upon a valid diagnosis.

The federal and Washington state constitutions guarantee the right to due process of law. U.S. Const. amend XIV; Const. art. I, § 3. A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause.

*Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, the State may only commit people who are *both* currently dangerous *and* suffer from a mental abnormality. *Kansas v. Hendricks*, 521 U.S. 346, 357-58, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *In re Detention of Thorell*, 149 Wn.2d 724, 731-32, 72

P.3d 708 (2003). Current mental illness is a constitutional requirement of continued detention. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).

The United States Supreme Court has established that involuntary civil commitment may not be based upon a diagnosis that is either medically unrecognized or too imprecise to distinguish the truly mentally ill from typical recidivists, who must be dealt with by criminal prosecution alone. *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); *Hendricks*, 521 U.S. 346; *Foucha*, 504 U.S. 71.

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

The Court explained that the State’s “rationale [for commitment] would permit [it] to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality

disorder that may lead to criminal conduct. The same would be true for any convicted criminal, even though he has completed his prison term.” *Id.* at 82-83. The Court reasoned that if a supposedly dangerous person with a personality disorder “commit[s] criminal acts,” then “the State [should] vindicate [its interests through] the ordinary criminal processes . . . , the use of enhanced sentences for recidivists, and any other permissible ways of dealing with patterns of criminal conduct” – i.e., “the normal means of dealing with persistent criminal conduct.” *Id.* at 82.

In *Hendricks*, the Court reaffirmed that “dangerousness standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment;” rather, “proof of dangerousness [must be coupled] with the proof of some additional factor, such as ‘mental illness’ or ‘mental abnormality.’” 521 U.S. at 358. The Court upheld Mr. Hendricks’ commitment under Kansas’ Sexually Violent Predator Act, noting that “[t]he mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder.” *Id.* at 260. Thus, “Hendricks’ diagnosis as a pedophile . . . suffice[d] for due process purposes” and, further, his admitted inability to control his

pedophilic urges “adequately distinguish[e] [him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.” *Id.*

In his concurrence, Justice Kennedy, who provided the fifth vote for the majority opinion in *Hendricks*, emphasized that Mr. Hendricks’ “mental abnormality – pedophilia – is at least described in the DSM-IV.” *Id.* at 372 (Kennedy, J., concurring). He was quick to add, “however, . . . if it were shown that mental abnormality,” as defined by state law, “is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.” *Hendricks*, 521 U.S. at 373.

In *Crane*, the Court revisited the Kansas statute and held that due process required that “there must be proof of serious difficulty in controlling behavior” in order to support involuntary civil commitment. *Crane*, 534 U.S. at 413. In reinforcing its decision in *Hendricks*, that civil commitment is reserved for dangerous sexual offenders as opposed to just dangerous persons, the Court cited to a study finding that forty to sixty percent of the male prison population is diagnosable with antisocial personality disorder (APD). *Id.* at 412, citing Paul Moran, *The Epidemiology of*

*Antisocial Personality Disorder*, 34 *Social Psychiatry & Psychiatric Epidemiology* 231, 234 (1999).

Following these decisions, the Washington Supreme Court has similarly recognized that in sexually violent predator proceedings, due process requires the State to prove the detainee has a serious, diagnosed, mental disorder that causes him difficulty in controlling his sexually violent behavior. *Thorell*, 149 Wn.2d at 736. “Lack of control” requires proof “ ‘sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist in an ordinary criminal case.’ ” *Id.* at 723, quoting *Crane*, 534 U.S. at 413.

Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for involuntary civil commitment as a sexually violent predator, see *Crane*, 534 U.S. at 413, diagnosis must nonetheless be medically justified. *Hendricks*, 521 U.S. at 358; *Thorell*, 149 Wn.2d at 732, 740-41.

b. Dr. Packard's diagnosis of paraphilia NOS

nonconsent violates due process because it is an invalid diagnosis that has not been accepted by the medical profession. The State expert's diagnosis of paraphilia NOS nonconsent is invalid, and its use as a predicate for Mr. Williams' involuntary civil commitment therefore violates due process. The United States Supreme Court has upheld civil commitment only in cases in which the diagnosed disorder was one that "the psychiatric profession itself classifies as a serious mental disorder." *Crane*, 534 U.S. at 410-12; *Hendricks*, 521 U.S. at 360.

Expert testimony is necessary to make a diagnosis of a mental abnormality as defined by the statute. "Mental abnormality" 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). Determining whether a particular person possesses a mental abnormality "is based upon the complicated science of human psychology and is beyond the ken of the average juror." *In re Bedker*, 134 Wn.App. 775, 779, 146 P.3d 442 (2006). When an essential element in the case is best established by an opinion

which is beyond the expertise of a layperson, expert testimony is required. *Berger v. Sonneland*, 144 Wn.2d 91, 110, 26 P.3d 257 (2001).

The disorder “paraphilia NOS nonconsent” fails the Court’s “medical recognition” or “medical justification” test, because it is not recognized by either the psychiatric profession in general, the American Psychiatric Association (APA), or the DSM-IV. Put simply, it is a wholly unreliable and invalid diagnosis that fails to distinguish Mr. Williams from any “dangerous but typical recidivist” who cannot be civilly committed under the Dupe Process Clause. *Crane*, 534 U.S. at 413.

The term “paraphilia” describes mental disorders characterized by deviant sexual arousal. The DSM-IV-TR is organized in diagnostic classes and contains a general category of diagnoses for paraphilias. According to the DSM-IV-TR, “[t]he essential features of a Paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months.” *Diagnostic And Statistical*

*Manual Of Mental Disorders* (4th ed., text rev.) (2000) (DSM-IV-TR).

The DSM-IV-TR lists eight separate paraphilia diagnoses: exhibitionism (deviant arousal to public exposure of one's genitals), fetishism (deviant arousal to objects), frotteurism (deviant arousal involving touching and rubbing against a non-consenting person), pedophilia (deviant arousal to prepubescent children), masochism (deviant arousal to being humiliated, beaten, bound, or otherwise made to suffer), sadism (sexual excitement from the psychological or physical suffering and humiliation of others), transvestic fetishism (deviant arousal to cross-dressing), and voyeurism (deviant arousal to observing individuals unaware of the observation naked or engaged in sexual activity). *Id.*

Though the DSM-IV-TR does not contain a specific diagnosis for sexual arousal to nonconsensual sex, the State maintains that it is appropriate to consider such behavior as a Paraphilia Not Otherwise Specified ("NOS"). 9/17/09 RP 331-32. Every category of diagnosis in the DSM-IV-TR contains an "NOS" diagnosis. The DSM-IV-TR, in explaining the purpose of "NOS" diagnoses, states "[n]o classification of mental disorders can have a sufficient number of specific categories to encompass every

conceivable clinical presentation. The Not Otherwise Specified categories are provided to cover the not infrequent presentations that are at the boundary of specific categorical definitions.” DSM-IV-TR at 576.

With respect to the Paraphilia NOS diagnosis, the DSM-IV-TR provides:

This category is included for coding Paraphilias that do not meet the criteria for any of the specific categories. Examples include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine).

*Id.*

The first “essential feature” of a paraphilia, namely the presence or absence of recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving nonhuman objects, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting persons, read broadly, would apply to all repeat rapists as they exhibit “behaviors involving ... nonconsenting persons.” *Id.*

The diagnosis of paraphilia NOS nonconsent was essentially invented by Dr. Dennis Doren, a Wisconsin psychologist who is the evaluation director for Wisconsin's SVP commitment program. See

Dennis Doren, *Evaluating Sex Offenders: A Manual For Civil Commitments And Beyond* (2002). Doren has acknowledged, though, that the DSM has “no separately listed paraphilia of this type.” *Id.* at 63. Further, the APA trustees have rejected the diagnosis, in part because of the preliminary nature of the data and the difficulty physicians have in differentiating the disorder from other disorders. Thomas K. Zander, *Civil Commitment Without Psychosis: The Laws Reliance on the Weakest Links in Psychodiagnosis*, 1 *Journal of Sexual Offender Civil Commitment: Science and the Law*, 17, 46 (2005). A subsequent APA task force similarly concluded, “[t]he ability to make such a diagnosis with a sufficient degree of validity and reliability remains problematic.” Howard V. Zonna, et al., *Dangerous Sex Offenders: A Task Force Report Of The American Psychiatric Association*, 170 (1990).

In addition to the APA’s rejection of the diagnosis of paraphilia NOS nonconsent, a number of professionals and commentators in the field continue to conclude that it is invalid and diagnostically unreliable. See e.g., Richard Wollert, *Poor Diagnostic Reliability, the Null-Bayes Logic Model, And Their Implications For Sexually Violent Predator Evaluations*, 13 *Psychology, Public Policy, and Law*, 167, 185 (2007) (concluding,

based on analysis of results of independent evaluations in 295 SVP cases, that “psychologists who undertake [SVP] evaluations should no longer diagnose any [individual] as suffering from [Paraphilia NOS (nonconsent)]” because the diagnosis is “so unreliable . . . that it is impossible to attain a reasonable degree of certainty as to [its] presence” and therefore its “only function” is to provide a “pretext” for “preventive detection”); Robert A. Prentky, et al., *Sexually Violent Predators In The Courtroom*, 12 *Psychology, Public Policy And Law*, 357, 370 (2006) (“because by definition all victims of sexual crimes are nonconsenting, all sexual offenders with multiple offenses . . . could be diagnosed with paraphilia NOS-nonconsent,” thus, the “category becomes a wastebasket for sex offenders” and is “taxonomically useless”); Holly A. Miller, et al., *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies For Professionals And Research Directions*, 20 *Law and Human Behavior*, 29, 39 (2005) (“[T]he definition of [Paraphilia NOS (nonconsent)] is so amorphous that no research has ever been conducted to establish its validity”); Stephen D. Hart & Randall Kropp, *Sexual Deviance And The Law*, *Sexual Deviance Theory, Assessment And Treatment*, 557, 568 (Richard Laws & William T. O’Donohue editors, 2d ed. 2008) (Paraphilia NOS

(nonconsent) is “an idiosyncratic diagnosis . . . that is not generally accepted or recognized in the field”); Jill S. Levenson, *Reliability Of Sexually Violent Predator Civil Commitment in Florida*, 28 Law and Human Behavior, 357, 365 (2004) (“Since none of [Doren’s] criteria [for diagnosing Paraphilia NOS (nonconsent)] are stated or implied in the DSM-IV, it is not surprising that, in practice, the diagnosis is . . . widely variable”); Zander, *supra*, at 44-45, 49-50 (summarizing research studies and academic opinion).

The diagnosis of paraphilia NOS nonconsent invented by a single psychiatrist, explicitly rejected by the APA, and roundly criticized within the profession, lacks medical recognition and due process prohibits its use as a predicate for involuntary commitment.

c. Mr. Williams is entitled to reversal of the jury’s verdict. “Personality disorder” and “mental abnormality” are alternative means of establishing whether a person meets the criteria for involuntary commitment under RCW 71.09. *In re the Detention of Halgren*, 156 Wn.2d 795, 810, 132 P.3d 714 (2006). This determination by the jury must be reversed where there is not substantial evidence to support all of the alternative means. *Id.* at 811; *citing State v. Arndt*, 87 Wn.2d 374, 367-77, 553 P.2d 1328 (1976).

Mr. Williams was diagnosed as suffering from a mental abnormality (paraphilia NOS nonconsent) and a personality disorder (antisocial personality disorder). Dr. Packard put great emphasis on the mental abnormality prong of RCW 71.09, specifically the paraphilia NOS non-consent diagnosis, opining that mental abnormality caused Mr. Williams to have serious difficulty in controlling his behavior. 9/3/09RP 220-21. In addition, Dr. Donaldson testified that without the diagnosis of paraphilia NOS, Mr. Williams does not fit within the definition of a sexually violent predator, a claim not countered by the State. Further, there was no special verdict delineating which of the alternative means the jury relied on in finding Mr. Williams should be involuntarily committed.<sup>3</sup> As discussed *supra*, paraphilia NOS nonconsent is an invalid diagnosis that violates due process, and thus, cannot be the basis of the jury's finding of commitment. Since it is impossible to determine upon which mental abnormality the jury relied on in reaching its verdict, the jury's verdict must be reversed. Mr. Williams is entitled to reversal of his commitment.

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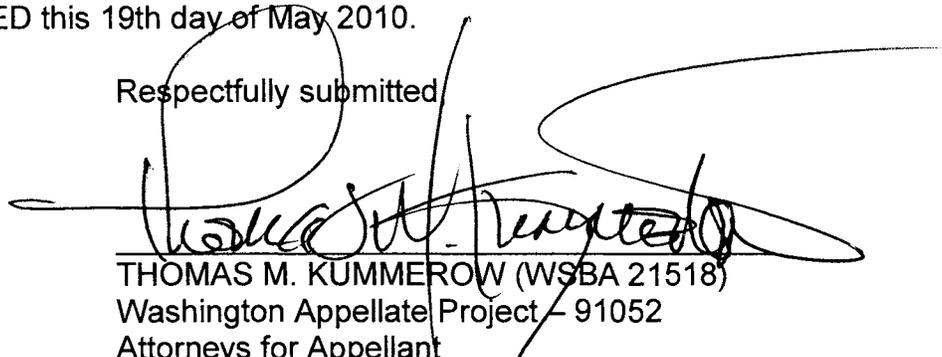
<sup>3</sup> The verdict merely asked the jury if the State had proven beyond a reasonable doubt that Mr. Williams was a sexually violent predator. CP 474.

F. CONCLUSION

For the reasons stated Mr. Williams submits the jury's verdict requiring he be involuntarily committed pursuant to RCW 71.09 must be reversed.

DATED this 19th day of May 2010.

Respectfully submitted



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Attorneys for Appellant

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

IN RE THE DETENTION OF )

THOMAS WILLIAMS, )

APPELLANT. )

NO. 39785-4-II

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 19<sup>TH</sup> DAY OF MAY, 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 19<sup>TH</sup> DAY OF MAY, 2010.

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