

NO. 40827-9-II

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

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IN RE THE DETENTION OF MANUEL LOPEZ, JR.

STATE OF WASHINGTON,  
Respondent,

v.

MANUEL LOPEZ, JR.  
Appellant.

10 DEC 22 PM 12:25  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

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

The Honorable Kitty-Ann van Doorninck, Judge

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BRIEF OF APPELLANT

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CATHERINE E. GLINSKI  
Attorney for Appellant

CATHERINE E. GLINSKI  
Attorney at Law  
P.O. Box 761  
Manchester, WA 98353  
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove a recent overt act as required by due process.

2. The trial court erred in denying appellant's motion for a Frye<sup>1</sup> hearing.

Issues pertaining to assignments of error

1. Although appellant was incarcerated at the time the sexually violent predator petition was filed, he had recently been released into the community while working for the Department of Natural Resources. Where appellant had the opportunity to re-offend, does due process require the State to prove a recent overt act?

2. Did the trial court err in denying appellant's motion for a Frye hearing on whether the paraphilia, not otherwise specified, diagnosis attributed to appellant was generally accepted in the scientific community?

B. STATEMENT OF THE CASE

Manuel Lopez was convicted of third degree rape in 1976; first degree burglary with intent to commit rape and assault with intent to commit rape in 1978; and second degree rape by forcible compulsion in

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<sup>1</sup> Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C.Cir.1923).

1994. RP (Deposition)<sup>2</sup> 55, 70, 100. The 1994 offense constitutes a sexually violent offense as defined by statute. Lopez was released from prison on that offense in 2001, and in 2002 he was convicted of residential burglary, bribery, and possession of cocaine. RP (Deposition) 101; 4RP 412. He was sentenced to 102 months in prison. CP 114.

In 2003 through 2005, and again in September 2006, under the supervision of the Department of Corrections and the Olympic Corrections Center, Lopez worked with the Department of Natural Resources (DNR) fighting fires and maintaining public roads. CP 196, 202, 210; 4RP 439-40. When his assignment with the DNR was complete, Lopez returned to a correctional facility for the remainder of his sentence. CP 210. He was incarcerated when the State filed a petition for involuntary commitment under RCW 71.09 in April 2007. RP (Deposition) 110; CP 1-2.

In its petition, the State alleged that Lopez was a sexually violent predator in that he had previously been convicted of a sexually violent offense, he currently suffers from a mental abnormality that causes him serious difficulty controlling his behavior such that he is likely to engage in predatory acts of sexual violence if not confined in a secure facility, and he committed a recent overt act. CP 1-2. The act relied on by the State as

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<sup>2</sup> The Verbatim Report of Proceedings is contained in ten volumes, designated as follows: RP (10/10/08); RP (11/21/08); RP (5/7/10); 1RP—5/24 & 25/10; RP (Deposition)—video-taped deposition published at trial 5/25-26/10; 2RP—5/26/10; 3RP—5/27/10; 4RP—6/1/10 (a.m.); 5RP—6/1/10 (p.m.); 6RP—6/2/10.

a recent overt act was the offense for which Lopez was incarcerated in 2002. CP 5, 114.

Although the crimes for which he was convicted were not sex offenses, the court<sup>3</sup> ruled the offense constituted a recent overt act, given the circumstances of the offense, Lopez's criminal history, and the diagnosis of paraphilia, not otherwise specified (non-consent), by the State's expert. RP (10/10/08) 19-20; CP 113-18. Lopez argued, however, that because he had been released into the community while working for the DNR, and thus had the opportunity to reoffend, the State was required to prove a recent overt act during that time. RP (5/7/10) 2-7; CP 195-201. In a declaration in support of his motion, Lopez stated that he did several jobs with the DNR, including forestry, fire fighting, sign making, and public road maintenance. He stated that he was not confined in any way while working on public roads and as a firefighter, he sometimes ate in restaurants and used public restrooms, and he came into contact with members of the community. He also worked beside both male and female firefighters and interacted with them. CP 202-03.

The State opposed the motion, submitting a declaration from a DNR assistant camp manager. CP 209-20. The DNR employee stated that inmates who worked for DNR were assigned to crews that were

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<sup>3</sup> The Honorable Kitty-Ann van Doorninck.

overseen by foremen, they wore red hats and shirts with OCC printed on them, and they were supervised when they dined in public restaurants and used public restrooms. CP 219-20. He acknowledged that inmates assigned to DNR came into contact with female firefighters, although socializing was prohibited, and he did not dispute that Lopez worked on public roads. CP 219-20.

The court found that since Lopez was under supervision by the Department of Corrections during his assignment to DNR, he was incarcerated at that time. 1RP 21. It denied Lopez's motion to dismiss and ruled that Lopez's 2002 conviction for residential burglary constituted a recent overt act, and the State was relieved from the burden of proving a recent overt act at trial. 1RP 23; CP 270.

The State's allegation that Lopez suffered the statutorily required mental abnormality was based on the diagnosis of paraphilia, not otherwise specified (non-consent), made by Dr. Richard Packard after his evaluation of Lopez. CP 6-7. Prior to trial, Lopez moved for a Frye hearing on the diagnosis, but the court summarily denied the motion. 1RP 24<sup>4</sup>.

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<sup>4</sup> Trial counsel's statement was transcribed as a request for a Frye hearing on the issue of "hermaphilia." 1RP 24. This is clearly a transcription error. The only diagnosis in the record to which counsel could have been referring is "paraphilia" NOS (non-consent).

At trial, Packard testified that he reviewed Lopez's DOC file, police reports, victim statements, previous evaluations, medical history, and treatment information, as well as trial and deposition transcripts. 2RP 105-06. He interviewed Lopez in June 2009 and administered psychological testing. 2RP 106. Packard diagnosed Lopez with paraphilia, not otherwise specified (non-consent), and polysubstance dependency in a controlled environment. 2RP 116-17. Packard testified that paraphilia is a mental disorder characterized by recurrent intense sexually arousing fantasies, urges, or behaviors which cause clinically significant distress or impairment. 2RP 120-22. He stated that there are hundreds of paraphilias, and only eight are specifically defined in the current edition of the Diagnostic and Statistical Manual (DSM). 2RP 124. Paraphilias that do not fit within any of the defined disorders are designated NOS, and the nature of the disorder is specified in parentheses. 2RP 126. Thus, a diagnosis of paraphilia NOS (non-consent) would involve recurrent intense sexually arousing fantasies, urges, or behaviors involving non-consenting persons. 2RP 127.

Packard testified he found evidence of this disorder in Lopez's criminal history, and it was his opinion Lopez continued to suffer from that condition. 2RP 128, 156. He gave his opinion that the paraphilia NOS (non-consent) fit within the statutory definition of mental

abnormality. 2RP 165. Packard also opined that Lopez's condition causes him serious difficulty controlling his behavior, and based on a risk assessment, that Lopez was likely to engage in predatory acts of sexual violence if not confined in a secure facility. 2RP 166; 3RP 214, 238.

On cross examination, Packard acknowledged that there was a substantial group of people in the psychological profession who do not believe that paraphilias should be included in the DSM as a mental disorder. 3RP 258-59. Moreover, the current version of the DSM was currently under revision. 3RP 259.

Dr. Robert Halon then testified that there has never been a diagnosis of paraphilia NOS (non-consent) included in the DSM, because rape itself is not a mental disorder but a behavior. 3RP 318-19. While some evaluators have used that diagnosis in sexually violent predator cases, it is a source of controversy in the field of psychology. 3RP 319-20.

After his evaluation of Lopez, Halon did not find sufficient evidence to say that Lopez suffered from a mental disorder or volitional impairment. 3RP 324. Halon acknowledged Lopez's criminal history but explained there was no evidence that a mental disorder compelled him to commit those offenses. 3RP 324-25. Moreover, a mental disorder which affects a person's volitional capacity will express itself periodically, no

matter what the circumstances, even during incarceration. Halon found no evidence that Lopez had been anything but a model prisoner and resident since his last incarceration and thus no evidence he was unable to control himself. 3RP 327. Halon concluded that Lopez does not suffer from a mental abnormality as defined by statute. 3RP 333.

The jury found Lopez to be a sexually violent predator, and the court ordered him committed to the Special Commitment Center. CP 305. Lopez filed this timely appeal. CP 306-09.

C. ARGUMENT

1. THE STATE'S FAILURE TO PROVE A RECENT OVERT ACT AS REQUIRED TO SATISFY DUE PROCESS NECESSITATES REVERSAL AND REMAND FOR A NEW TRIAL.

Under Chapter 71.09 RCW, the State may petition for involuntary commitment of sexually violent predators, defined 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(18). To obtain an order of commitment, the State must prove beyond a reasonable doubt that the person is a sexually violent predator (SVP). RCW 71.09.060(1). If, on the date that the petition is filed, the person is living in the community, the

State has the additional burden of proving beyond a reasonable doubt that the person had committed a recent overt act. *Id.*

The Supreme Court has established that civil commitment constitutes a deprivation of liberty which requires due process protections. *Addington v. Texas*, 441 U.S. 418, 425, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979). Thus, a person must be both mentally ill and currently dangerous to be committed consistent with constitutional guarantees. *In re Person Restraint of Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993) (citing *Addington v. Texas*). Although the statute excuses the State from proving a recent overt act when a petition is filed against an incarcerated individual, the commitment must still satisfy due process. *In re Henrickson*, 140 Wn.2d 686, 694, 2 P.3d 473 (2000) (citing *Young*, 122 Wn.2d at 27).

The Washington Supreme Court clarified the role of due process in SVP cases in *In re Detention of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002). Albrecht had served a sentence for child molestation and was released on community placement. He was serving jail time for a violation of his placement conditions when the State filed a sexually violent predator petition. The trial court allowed the commitment without requiring the State to prove a recent overt act. *Albrecht*, 147 Wn.2d at 5-6. On appeal, the Supreme Court agreed that due process does not require

the State to prove a recent overt act when the alleged SVP has not been released into the community since his last conviction. Albrecht, 147 Wn.2d at 10. But “[a]fter the offender has been released into the community, proof of a recent overt act is no longer an impossible burden for the State to meet.” Albrecht, 147 Wn.2d at 10. “[O]nce the offender is released into the community, as Albrecht was, due process requires a showing of current dangerousness.” Albrecht, 147 Wn.2d at 10. The State is only relieved of its burden of proving a recent overt act if the offender has not been released from total confinement since he was convicted. Albrecht, 147 Wn.2d at 10.

This Court applied Albrecht in In re Detention of Broten, 115 Wn. App. 252, 62 P.3d 514, review denied, 150 Wn.2d 1010 (2003). In Broten, the respondent was convicted of child rape. He served his sentence and was released on community custody. After numerous violations, his community custody was revoked. Broten was serving the remainder of his original sentence when the State filed a sexually violent predator petition. Broten, 115 Wn. App. at 254. In appealing his commitment, Broten argued that the State was required to prove a recent overt act, and this Court agreed. Although Broten was serving a sentence for a sexually violent offense at the time the petition was filed, he had spent time in the community and had the opportunity to overtly act.

“Thus, ‘proof of a recent overt act [was] no longer an impossible burden for the State to meet.’” Brotten, 115 Wn. App. at 257 (quoting Albrecht, 147 Wn.2d at 10). This Court held that due process required the State to prove Brotten committed a recent overt act. Brotten, 115 Wn. App. at 257.

Like Brotten, Lopez was released into the community under supervision of the Department of Corrections and then returned to prison to serve the remainder of his original sentence. Although he was not on community custody, neither was Lopez under total confinement as that term is defined by statute. See Albrecht, 147 Wn.2d at 9. Under RCW 9.94A.030(50),

“Total confinement” means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

Work camps or temporary branch institutions allowing inmates to work in farming, forestry, food processing, and fire fighting constitute total confinement under RCW 72.64.050, but this does not apply to work along public roads other than access roads to forestry lands. RCW 72.64.060. It is undisputed that Lopez worked on public roads during his service with DNR, and also that he ate in public restaurants, used public restrooms, and worked alongside female firefighters. CP 202-03, 219-20. Like Brotten, Lopez had the opportunity to reoffend, and thus proof of a recent overt act

was not an impossible burden for the State to meet. Due process requires that the State meet that burden. See Albrecht, 147 Wn.2d at 10; Brotten, 115 Wn. App. at 257.

The State argued below that it was excused from pleading a recent overt act under the Supreme Court's recent decision in In re Detention of Fair, 167 Wn.2d 357, 219 P.3d 89 (2009). Contrary to the State's claim, Fair does not address the circumstances in this case.

Fair was convicted of second degree child molestation, but his sentence was suspended under a SSOSA<sup>5</sup>. Fair failed to comply with the requirements of his supervision, and the State moved to revoke his suspended sentence. Before the revocation hearing, however, Fair fled to New Mexico, where he committed several other offenses and was incarcerated. Fair, 167 Wn.2d at 360. Upon completion of his New Mexico sentence, Fair was returned to Washington, where he began serving an 87-month sentence for robbery, along with the reinstated 20-month sentence for child molestation. Fair, 167 Wn.2d at 361. Days before his scheduled release, the State filed a petition to commit Fair as an SVP, not alleging a recent overt act. Fair, 167 Wn.2d at 361.

Fair was committed, and the Court of Appeals affirmed. On review by the Washington Supreme Court, Fair argued that the State

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<sup>5</sup> See RCW 9.94A.670.

should be required to prove a recent overt act because he had been released into the community between his child molestation conviction and the filing of the SVP petition, relying in Albrecht. Fair, 167 Wn.2d at 365. The Supreme Court disagreed, noting that the holding in Albrecht applied only to a recent release from confinement, not a prior release into the community followed by a lengthy incarceration. Fair, 167 Wn.2d at 366. Since Fair had been in continuous confinement for 12 years before the petition was filed, evidence of his acts while he was in the community would not be recent and would not address the question of current dangerousness. Fair, 167 Wn.2d at 366.

Here, by contrast, Lopez's release into the community falls within the five-year period recognized as "recent." See In re Detention of Anderson, 166 Wn.2d 543, 550, 211 P.3d 994 (2009) ("overt acts occurring up to five years before the petition's filing may be 'recent.'"). Undisputed evidence shows Lopez was first released to DNR service in 2003, and his most recent assignment was September 2006, just seven months before the SVP petition was filed in April 2007. CP 196, 202-06. Unlike Fair, Lopez's release into the community was not followed by a lengthy period of incarceration. The State was therefore not excused from its burden of proving a recent overt act. The order of commitment must be

theory or principle in a manner capable of producing reliable results. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). "The core concern of Frye is whether the evidence being offered is based on an established scientific methodology." State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994).

Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under Frye. State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). While unanimity is not required, scientific evidence is inadmissible "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." Gore, 143 Wn.2d at 302.

The Frye inquiry is unnecessary if the proffered evidence does not involve new methods of proof or new scientific principles. State v. Sipin, 130 Wn. App. 403, 415, 123 P.3d 862 (2005). "This is because full acceptance of a process in the relevant scientific community obviates the need for a Frye hearing." Sipin, 130 Wn. App. at 415. A Frye hearing cannot be avoided on lack of novelty grounds, however, where the record reflects there is currently no definitive acceptance of the challenged methodology. Grant v. Boccia, 133 Wn. App. 176, 180, 137 P.3d 20 (2006).

A de novo standard of review is applied to a trial court's decision not to conduct a Frye hearing. State v. Gregory, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006). A reviewing court will undertake a searching review that is not confined to the trial record. Grant, 133 Wn. App. at 179. Review may involve consideration of scientific literature, secondary legal authority, law review articles, and cases from other jurisdictions. State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996); State v. Cauthron, 120 Wn.2d 879, 887-88, 846 P.2d 502 (1993), overruled on other grounds, State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997)).

c. The Frye Standard Is Applicable Here.

Expert opinions in SVP cases remain subject to challenge for admissibility under Frye. State v. McCuiston, 169 Wn.2d 633, 645 n. 8, 238 P.3d 1147 (2010); see also In re Detention of Post, 145 Wn. App. 728, 756 n.16, 187 P.3d 803 (2008) (noting nothing prevented appellant from requesting a Frye hearing on remand to challenge paraphilia NOS diagnosis).

In 1993, the Supreme Court determined the sciences of psychology and psychiatry are not novel and the level of acceptance is sufficient to merit consideration at trial. In re Pers. Restraint of Young, 122 Wn.2d 1, 57, 857 P.2d 989 (1993). The science of psychiatry, however, is an ever-

advancing science. Kansas v. Crane, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). The state of the science is not frozen in time.

Once the Supreme Court has made a determination that the Frye test is met as to a specific novel scientific theory or principle, trial courts can generally rely upon that determination as settling such theory's admissibility in future cases. Cauthron, 120 Wn.2d at 888 n.3. But even where the particular theory has been previously accepted, "trial courts must still undertake the Frye analysis if one party produces new evidence which seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community." Id.

No court since Young has addressed on its merits the issue of whether a paraphilia NOS diagnosis meets the Frye standard. See, e.g., Post, 145 Wn. App. at 755-56 (not addressing Frye claim on merits because raised for first time on appeal). While a number of appellate courts have upheld commitments based on diagnoses of paraphilia NOS rape or non-consent, the Frye issue was neither raised nor decided in any of those cases.<sup>6</sup> Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

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<sup>6</sup> See Post, 145 Wn. App. at 756-57 (listing cases).

Similarly, an appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that theory. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

Furthermore, the relevant Frye inquiry is whether the science is generally accepted by the scientists, not by the courts. Cauthron, 120 Wn.2d at 888. The fact that appellate courts have upheld commitments based on a diagnosis that was never challenged under the Frye standard on appeal tells us nothing of whether the diagnosis is currently accepted in the relevant scientific community.

d. There Is A Significant Debate In The Relevant Scientific Community Regarding The Paraphilia NOS Diagnosis.

The Diagnostic and Statistical Manual of Mental Disorders (DSM) is the standard nosological system used by all mental health professionals and is typically relied on in SVP hearings. 2RP 115. The DSM-IV (TR) describes paraphilia as "recurrent, intense sexually arousing fantasies and sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner or 3) children or other non-consenting persons that occur over a period of at least six months." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, at 566 (2000). The

DSM-IV (TR) lists eight specific paraphilias in addition to a "residual" category called "Paraphilia Not Otherwise Specified," which includes less frequently encountered paraphilias. Id. at 566-67.

After reviewing the professional literature, the Seventh Circuit recently acknowledged "the existence of a *significant debate* about the validity, from a psychiatric standpoint, of a paraphilia NOS nonconsent diagnosis." Brown v. Watters, 599 F.3d 602, 611 (7th Cir. 2010) (emphasis added) (citing McGee v. Bartow, 593 F.3d 556 (7th Cir. 2010), cert. denied, 130 S.Ct. 3396 (2010)), cert. denied, 131 S.Ct. 293 (2010). The Frye test bars scientific evidence "[i]f there is a significant dispute among qualified scientists in the relevant scientific community." Gore, 143 Wn.2d at 302. Lopez was entitled to a Frye hearing for this reason.

The McGee court recognized even its most ardent advocates acknowledge a paraphilia NOS (non-consent or rape) diagnosis is "probably . . . the most controversial among the commonly diagnosed conditions within the sex offender civil commitment realm." McGee, 593 F.3d at 579 (quoting Dennis M. Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond 63 (2002)).

The DSM does not include a distinct rape-related paraphilia as a diagnosis. McGee, 593 F.3d at 579-80. The professional literature supports the argument that this rejection by the DSM demonstrates the

consensus professional view that a paraphilia NOS (non-consent or rape) diagnosis is invalid. McGee, 593 F.3d at 580 (citing Thomas K. Zander, Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis, 1 J. Sex. Offender Civ. Commitment 17, 41-47 (2005); Holly Miller et al., Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions, 29 L. & Hum. Behavior 29, 39 (2005) ("Numerous evaluators have utilized the diagnosis 'paraphilia not otherwise specified' to apply to rapists. However, the definition of this appellation is so amorphous that no research has ever been conducted to establish its validity (in fact the word rape is not even mentioned in the Paraphilia NOS diagnostic description)."); Robert A. Prentky et al., Sexually Violent Predators in the Courtroom: Science on Trial, 12 Psychol. Pub. Pol'y & L. 357, 367 (2006) (noting the possibility that the category is "a wastebasket for sex offenders," and thus "taxonomically useless.").

"A frequently cited difficulty in accepting a rape-related paraphilia diagnosis is that the lack of generally accepted standards results in poor diagnostic reliability; that is, different evaluators may be likely to reach different conclusions with respect to the same individual at unacceptably high rates." McGee, 593 F.3d at 580 (citing Brett Trowbridge & Jay Adams, Sexually Violent Predator Assessment Issues, 26 Am. J. Forensic

Psychol. 29, 44 (2008) ("NOS diagnoses have the worst levels of inter-rater reliability . . . [T]he diagnosis of paraphilia NOS had an inter-rater reliability so low . . . that it fell well into the poor category.").

The converse view also has support in the literature. McGee, 593 F.3d at 580 (citing sources). The professional views on the matter are conflicting. Id.

The McGee and Brown courts addressed a due process challenge to a paraphilia NOS (non-consent) diagnosis. Both found the diagnosis was "minimally sufficient for due process purposes." Brown, 599 F.3d at 612; McGee, 593 F.3d at 580-81. The Seventh Circuit noted a state's mental health predicate for civil commitment may become unconstitutional if it becomes "too imprecise a category." McGee, 593 F.3d at 581 (quoting Kansas v. Hendricks, 521 U.S. 346, 373, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (Kennedy, J., concurring)). "The existence of a heated professional debate over a particular diagnosis does not indicate that such a line has been crossed here." McGee, 593 F.3d at 581.

The existence of a "heated professional debate" takes on new significance in the Frye context. McGee recognized a court's reliance on a particular diagnosis to satisfy the "mental disorder" prong of the statutory requirements for commitment could violate due process if the diagnosis

was devoid of content or was subject to "near-universal" rejection by mental health professionals. McGee, 593 F.3d at 577.

That imposing due process standard is the near opposite of the Frye standard, which in Washington only requires lack of consensus as shown by significant debate in the scientific community. Gore, 143 Wn.2d at 302; Grant, 133 Wn. App. at 180. In the Frye context, the court's task is to determine whether the appropriate scientific community has generally reached consensus that the method or theory is reliable. Sipin, 130 Wn. App. at 419-20 (citing Cauthron, 120 Wn.2d at 887).

An American Psychiatric Association task force reports "Whether any rapist has a paraphilia represents a controversial issue in the literature. DSM-IV has not classified paraphilic rape as a mental disorder. Some researchers believe that a small group of rapists have diagnostic features similar to those other paraphilias. The ability to make the diagnosis with a sufficient degree of validity and reliability remains problematic." American Psychiatric Association, Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association, 194 at 176 (1999).

Dr. Frances, chairman of the task force for the DSM-IV revision, has written the wording of the paraphilia in the DSM-IV was not thought out carefully and has led to much misinterpretation. Allen Frances et al., Defining Mental Disorder When It Really Counts: DSM-IV-TR and

SVP/SDP Statutes, J. Am. Acad. Psychiatry Law 36:375-84 at 380 (2008). That misinterpretation included diagnosis of a paraphilia based on acts alone. Id. The behaviors were meant to signify the culmination of urges and fantasies. Id. "This distinction is necessary to separate paraphilia from opportunistic criminality." Id. The DSM-IV also misleadingly referenced non-consent in relation to paraphilia when the term non-consenting persons was meant only to apply to exhibitionism, voyeurism and sadism. Id. The term was not meant to signify rapism specifically; rape was not included as a coded diagnosis nor as an example of NOS. Id. The discussion regarding paraphilic coercive disorder was not widely promulgated to the general clinical community, resulting in confusion regarding paraphilia NOS. Id.

In addition to the APA's rejection of a rape-related paraphilia NOS diagnosis, a number of professionals and commentators in the field conclude the diagnosis is invalid and diagnostically unreliable. See, e.g., Stephen D. Hart & Randall Kropp, Sexual Deviance and the Law, Sexual Deviance Theory, Assessment and Treatment 557 at 568 (Richard Laws and William T. O'Donohue ed., 2008) (Paraphilia NOS (non-consent) is an "idiosyncratic diagnosis . . . that is not generally accepted or recognized in the field."); Miller et al., Sexually Violent Predator Evaluations at 39 ("Numerous evaluators have utilized the diagnosis 'paraphilia not

otherwise specified' to apply to rapists. However, the definition of this appellation is so amorphous that no research has ever been conducted to establish its validity (in fact the word rape is not even mentioned in the Paraphilia NOS diagnostic description). How such a diagnosis would differentiate a class of rapists who suffer from a mental abnormality is very unclear."); Benjamin J. Sadock and Virginia A. Sadock, Kaplan and Sadock's Comprehensive Textbook of Psychiatry, Vol. I at 1970-71 (8th ed. 2005) ("Although some clinicians consider rape to be a paraphilia, most do not. For most rapists, rape is neither the preferred sexual activity nor a consistent fantasy preoccupation, and these remain the hallmarks requisite to the diagnosis of paraphilia.").

Because of the significant debate in the relevant scientific community regarding the diagnosis of paraphilia NOS, the issue of whether Lopez should be committed as an SVP based on that diagnosis was not properly presented to the jury. The order of commitment should be reversed and the case remanded for a Frye hearing.

D. CONCLUSION

The State's failure to prove a recent overt act requires reversal of the commitment order and remand for a new trial. Moreover, Lopez's request for a Frye hearing on the diagnosis of paraphilia NOS hearing should be granted.

DATED this 20<sup>th</sup> day of December, 2010.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski", written in black ink.

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CATHERINE E. GLINSKI  
WSBA No. 20260  
Attorney for Appellant

Certification of Service by Mail

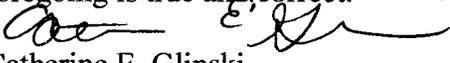
Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

*In re the Detention of Manuel Lopez, Jr.*, Cause No. 40827-9-II, directed to:

Kent Y. Liu  
Assistant Attorney General  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104-3188

Manuel Lopez, Jr.  
PO Box 88600  
Steilacoom, WA 98388

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

  
Catherine E. Glinski  
Done in Port Orchard, WA  
December 20, 2010

STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II