

NO. 49881-2-II

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

IN RE THE DETENTION OF
JOEL REIMER,
Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

The former superintendent of the Special Commitment Center believes that Joel Reimer can no longer be held in total confinement at that facility. He testified in support of Mr. Reimer at Mr. Reimer's indefinite civil commitment trial. The State nevertheless secured Mr. Reimer's indefinite civil commitment after Mr. Reimer was denied his right to testify, the prosecutor bolstered its expert's opinion with inadmissible opinion testimony from nontestifying witnesses, and an unconstitutionally low burden of proof was applied.

B. ASSIGNMENTS OF ERROR

1. Joel Reimer was denied his right to testify under Fifth, Sixth and Fourteenth amendments to the United States Constitution and article I, sections 3 and 22 of the Washington Constitution.

2. The admission of opinion evidence from nontestifying witnesses violated ER 401, 402, 703, 705, and 801(c).

3. The prosecutor committed misconduct by eliciting testimony in violation of a pretrial ruling excluding opinions from nontestifying witnesses.

4. The prosecutor committed misconduct by using the opinions of nontestifying witnesses to bolster its own expert's diagnoses.

5. Mr. Reimer was denied a fair trial when the jury was informed of diagnoses made by nontestifying witnesses. U.S. Const. amend. XIV; Const. art. I, § 3.

6. The trial court abused its discretion by denying Mr. Reimer's motion for a mistrial.

7. RCW 71.09.020 violates due process because it allows for commitment based on a showing that a respondent will "likely" or "more probably than not" reoffend, which is less than the clear and convincing evidence standard required. U.S. Const. amend. XIV; Const. art. I, § 3.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to testify is a fundamental due process guarantee that can only be waived knowingly, intelligently, and voluntarily. Mr. Reimer waived his right to be present for much of his civil commitment trial, but did not waive his right to testify. He was not present when his attorneys presented his case, which rested without testimony from Mr. Reimer despite his requests to testify. Was Mr. Reimer's right to testify denied?

2. Opinions from nontestifying witnesses are inadmissible hearsay if admitted for the truth of the matter asserted and irrelevant if

not. It is improper to cross-examine a witness regarding unrelayed-upon opinions of witnesses who are not called to testify. Was Mr. Reimer denied a fair trial where the State inquired into years of opinions by witnesses who were not called to testify about the central issue in the case: Mr. Reimer's psychological diagnoses?

3. A prosecutor commits flagrant and ill-intentioned misconduct by violating a pretrial ruling and bolstering the State's witnesses. Did the prosecutor commit flagrant and ill-intentioned misconduct when it cross-examined a witness on a topic excluded during pretrial rulings, the diagnoses of nontestifying witnesses, and thereby bolstered its own witness's diagnoses?

4. Due process requires the State prove a person is mentally ill and dangerous by at least clear and convincing evidence. Does RCW 71.09.020 violate due process by allowing for the involuntary commitment of a person who is merely "likely" to reoffend, which is the lesser "more probable than not" standard?

D. STATEMENT OF THE CASE

Joel Reimer has been totally confined at the Special Commitment Center (SCC) since its inception over 25 years ago. RP 509, 701-05. He earned a full evidentiary hearing to determine whether

he still met the criteria for commitment after, in 2014, the State could not sustain its prima facie burden. CP __ (Sub 784).

Licensed psychologist Henry Richards, the superintendent of the SCC from 2004 to 2009, testified in support of Mr. Reimer's release. RP 920, 933-34. Dr. Richards has known Mr. Reimer since 2004 and testified to his positive change over time. RP 969-72, 976-85, 1012-36, 1129-34, 1169. Evaluating Mr. Reimer specifically for this case, Dr. Richards diagnosed Mr. Reimer with narcissistic personality disorder and cyclothymic disorder, which is an affective disorder that is milder than bipolar disorder. RP 1095-96, 1169. Dr. Richards concluded Mr. Reimer did not satisfy the criteria for commitment—he does not suffer from a mental abnormality or personality disorder that makes him likely to commit sexually predatory acts unless confined. RP 1095-96, 1114-15, 1192. Since leaving the SCC, Dr. Richards has testified for the State in about 35 cases, but Mr. Reimer's was the only defense case in which he had appeared. RP 958-59.

The State presented only two witnesses: licensed psychologist Harry Hoberman and Joel Reimer. RP 464-66, 773, 919.¹ Dr.

¹ The State also presented deposition testimony from two witnesses, the complaining witnesses from prior criminal trials. RP 748-56, 764-71.

Hoberman opined that Mr. Reimer is characterized by sexual sadism, antisocial personality disorder and high psychopathy, and alcohol use disorder. RP 556-59. He testified that these diagnoses rendered Mr. Reimer likely to reoffend unless totally confined. RP 654. Dr.

Hoberman conceded Mr. Reimer had engaged in no sexually-related incidents while confined to the SCC for the last 25 years. RP 707-08.

In addition to presenting the testimony of Dr. Richards, Mr. Reimer proved he had rented an apartment in Tacoma, Washington and had interviewed with a service provider who would help him find employment if released. RP 1201-07, 1216-17, 1220-21. Mr. Reimer also presented testimony by the custodial maintenance supervisor at the SCC, who supervises Mr. Reimer's employment, and the swing-shift supervisor at the SCC. RP 1235-40, 1241-47.

The jury returned deadlocked, and the presiding juror reported the discourse had been deep and rich but votes had not changed since the prior afternoon. RP 1390-92. The court called the entire jury into court and proposed trying further deliberations. RP 1393-94. After lunch, the jury returned a verdict, committing Mr. Reimer indefinitely to the SCC. RP 1396; CP 1268.

E. ARGUMENT

1. **Where Mr. Reimer explicitly declined to waive his right to testify, was not present in the courtroom during his case-in-chief, and was not called as a witness in the respondent's case, he was denied his constitutional right to testify in his own defense.**
 - a. The state and federal constitutions strongly protect the right to testify at a trial where one's liberty is at stake.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution guarantee the accused the right to testify in his own defense. *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Article I, section 22 of the Washington Constitution also explicitly guarantees the accused's right to testify. "Even more fundamental to a personal defense than the right to self-representation . . . is an accused's right to present his own version of events in his own words." *Rock*, 438 U.S. at 52. This fundamental right cannot be abrogated by defense counsel or by the court. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).

Involuntary commitment is a massive curtailment of liberty. *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007).

Accordingly, an indefinite commitment trial incorporates the strict protocol used in criminal cases. Due process protections guaranteed by the Fourteenth Amendment and article I, section 3 apply to those facing

indefinite commitment under Chapter 71.09 RCW. *In re Det. of Young*, 122 Wn.2d 1, 42-49, 857 P.2d 989 (1993), *superseded by statute on other grounds as recognized in In re Det. of Thorell*, 149 Wn.2d 724, 746, 72 P.3d 708 (2003). As in a criminal trial, the prosecuting agency in a civil commitment trial bears the burden of proof beyond a reasonable doubt, the jury must unanimously agree to each essential element of commitment, and the person facing commitment has the right to court-appointed counsel if indigent. *See Young*, 122 Wn.2d at 48 (statutory scheme shows Legislature’s “acute awareness of the need for heightened procedural protections in these proceedings”); *In re Det. of Halgren*, 156 Wn.2d 795, 809, 132 P.2d 714 (2006) (same “constitutionally prescribed unanimity requirement” as criminal cases); RCW 71.09.050 (granting rights to attorney, expert witnesses, and 12-person jury for RCW 71.09 trials); RCW 71.09.060 (State bears burden of proving essential elements of commitment beyond a reasonable doubt).

The Legislature implicitly recognizes the accused’s right to testify at commitment proceedings. RCW 71.09.060(2) provides procedures for the court to undertake when the charged person is found incompetent to stand trial. One of the court’s obligations is to

determine the effect of the person's incompetence on his or her "ability to testify on his or her own behalf." RCW 71.09.060(2). If the charged person did not have the right to testify at an indefinite commitment trial, the Legislature would not require the court to consider it when weighing the effect of the accused's incompetence.

A balancing of the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) further supports the right to testify in Chapter 71.09 indefinite commitment trials. First, the massive curtailment of liberty at stake "weighs heavily" in favor of Mr. Reimer. *Stout*, 159 Wn.2d at 370. Second, the existing procedures at RCW 71.09.060(2) indicate the Legislature presumed the accused's right to testify. Moreover, it would be illogical to grant the right to counsel and to present evidence without also affording the right to testify in one's own case. The right to testify is "essential to due process of law in a fair adversary system." *Faretta v. California*, 422 U.S. 806, 819 n.15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Finally, the government's interest in protecting the public from those who satisfy the criteria for commitment aligns with second factor here. That is, because the State has no legitimate interest in confining people who do not satisfy the criteria, the State's interest is in ensuring fair trials

with sufficient procedural safeguards. The administrative burden of honoring an accused's right to testify is also minimal.

Thus, under the statutory scheme and pursuant to constitutional due process guarantees, Mr. Reimer had the right to testify at his commitment trial.

b. Waiver of the right to testify cannot be presumed.

The right to testify is fundamental in nature and “so crucial to the accused's fate” that only he can decide whether to waive it. *State v. Humphries*, 181 Wn.2d 708, 725, 336 P.3d 1121 (2014) (internal quotation marks omitted). Although an attorney may inform the client in making the decision whether to take the stand, the decision whether to testify should ultimately be made by the client. *State v. Robinson*, 138 Wn.2d 753, 763, 982 P.2d 590 (1999).

A waiver of this fundamental right must be made knowingly, intelligently and voluntarily. *Thomas*, 128 Wn.2d at 558-59. “If the decision [not] to testify is made against the will of the defendant, it is axiomatic that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify.” *Robinson*, 138 Wn.2d at 763. An accused's constitutionally protected right to testify is violated if the final decision not to testify is made against his will. *Id.*

Every reasonable presumption is indulged against waiver of a fundamental right. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (citing *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). The prosecution bears the burden of establishing a valid waiver. *E.g.*, *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014).

A waiver of the right to testify need not be made on the record, and it can be presumed from an accused's conduct if the accused is present at trial. *Robinson*, 138 Wn.2d at 759. An attorney's advisement that his or her client should not take the stand does not call into question the validity of the client's silent waiver of the right to testify. *Id.* (discussing *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 316, 868 P.2d 835 (1994)). However, an accused who is present but "who remains silent at trial may be entitled to an evidentiary hearing if he alleges that his attorney actually prevented him from testifying." *Id.* (citing *Thomas*, 128 Wn.2d 553; *State v. King*, 24 Wn. App. 495, 601 P.2d 982 (1979)); *see Thomas*, 128 Wn.2d at 557. "Defendants must show some particularity to give their claims sufficient credibility to warrant further investigation." *Robinson*, 138 Wn.2d at 760.

c. Mr. Reimer did not waive his right to testify.

Mr. Reimer was not present at trial during his case-in-chief.

Before trial commenced, he waived his right to be present for much of the trial, in part because he could more reliably receive his medication at the SCC and because he had back and neck pain. CP 1227-31; RP 41-49, 55-59; *see* CP 1144-55 (motion by respondent's counsel articulating bases for waiver of presence). But, Mr. Reimer did not waive his right to testify; he preserved this right. CP 1229; RP 74-75. The court also made plain that Mr. Reimer could revisit his waivers at any point during trial by notifying his attorney. RP 78-79. During presentation of his case on October 19, Mr. Reimer sent a message from jail through the court that he wanted to talk his attorneys. RP 1050. But his attorneys apparently did not contact him, and they rested his case. Because he was not present and because he had not knowingly, intelligently, and voluntarily waived his right to testify, waiver cannot be presumed from Mr. Reimer's conduct.

Likewise, Mr. Reimer presented the trial court with specific factual evidence supporting his decision not to waive his right to testify. CP 1270-77 (counsel's motion to reconsider). Mr. Reimer filed a declaration in support of his pro se motion for a new trial, declaring

his strategy was to testify about his Native American spirituality during his case-in-chief. CP __ (Sub 927 (post verdict motion 3 and declaration in support)). At the post-trial hearing, Mr. Reimer attested he was supposed to be in court on October 19 and had a right to testify according to the waiver he signed. RP 1403-05. He called his attorneys collect to effectuate his rights. RP 1405-06. He also sent messages through the jail. *Id.* In fact, one message did reach the court, who advised Mr. Reimer's attorneys that he was trying to contact them. RP 1050. Therefore, the trial court and this Court can be assured Mr. Reimer did not voluntarily waive his right to testify during his case.

d. The constitutional violation requires reversal of the commitment order and remand for a new trial.

Denial of the right to testify affects the entire framework in which the trial proceeded, requiring reversal. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The extent of the prejudice cannot be measured. Because Mr. Reimer was denied the right to testify in his own defense, the content,

tenor, and effect of Mr. Reimer's would-be testimony is not of record.²

Accordingly, this structural error requires remand for a new trial.

2. In violation of a pretrial ruling and over Mr. Reimer's objection, the jury heard that nontestifying experts had repeatedly diagnosed Mr. Reimer with sexual sadism.

- a. Opinions from nontestifying expert witnesses are inadmissible.

It violates ER 401, 402, 703, 705, and 801(c) to admit the diagnoses of a nontestifying witness. "Cross-examination that attempts to impeach by slipping in unrelayed opinions and conclusions without calling the experts to testify is improper." *State v. Hamilton*, 196 Wn. App. 461, 464, 383 P.3d 1062 (2016) (quoting Robert H. Aronson & Maureen Howard, *The Law of Evidence in Washington* § 8.03[8][b], at 8-67 (5th ed. 2016)). Because the expert did not rely on the opinion, ER 703 does not justify the admission of such testimony. *Hamilton*,

² Reversal is also required even if the Court applies the constitutional harmless error standard set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Such non-structural constitutional errors require reversal unless the State proves beyond a reasonable doubt that the error did not contribute to the verdict. The jury's initial deadlock demonstrates the closeness of the evidence absent Mr. Reimer's testimony. The State cannot show beyond a reasonable doubt that Mr. Reimer's testimony, including about the therapeutic and rehabilitative effects of Native American spirituality, would not have affected the verdict.

196 Wn. App. at 464. It is also not admissible as facts and data subject to ER 705. *Id.* To the extent it is impeachment evidence in an effort to show the testifying witness should have relied on the opinion, it is elicited for its truth and therefore inadmissible hearsay under ER 801(c). *Id.*

- b. The trial court granted Mr. Reimer's pretrial motion to exclude the opinions of nontestifying expert witnesses.

Mr. Reimer moved pretrial to preclude the State from eliciting testimony about diagnoses made by nontestifying experts and which were not current. CP 983-85 (motions in limine 3 and 4). In addition to the above evidentiary principles, in this case such testimony would also impermissibly vouch for the State's expert diagnosis, by indicating to the jury that Dr. Hoberman's opinion is reliable because it is supported by a long line of evaluations. The trial court agreed that the evidence was inadmissible, ruling that while the experts could base their opinions on facts set out for them by nontestifying witnesses, the experts could not testify to opinions of nontestifying witnesses. RP 131.

- c. The prosecutor violated the pretrial ruling when it questioned Dr. Richards about the opinions of prior evaluators.

Despite the pretrial ruling, the State asked Dr. Richards about the diagnosis of sexual sadism in prior evaluations of Mr. Reimer. The prosecutor first questioned Dr. Richards about his general practice overseeing evaluations while he was superintendent of the SCC. RP 1176-79. The State then asked about prior evaluations of Mr. Reimer, conducted by nontestifying witnesses. The prosecutor knew this questioning entered forbidden territory, because he had previewed it in his deposition of Dr. Richards. RP 1186-87 (prosecution's argument to the court that this line of questioning was utilized in Richards's deposition and Reimer still decided to hire Richards). The court, however, was unaware, so when Mr. Reimer objected, the court overruled the objection. RP 1179-80, 1185-90 (court did not realize where questioning would lead when it overruled Reimer's objection). Dr. Richards then confirmed, in response to the prosecutor's question, that while Dr. Richards was superintendent, Mr. Reimer was diagnosed with several paraphilias, including sexual sadism, and that all prior evaluators diagnosed Mr. Reimer with antisocial personality disorder and high psychopathy. RP 1179-80. Dr. Richards also confirmed he

never wrote a letter “correcting” the diagnoses because his procedure was only to review evaluations that found a committee no longer met the criteria for commitment. RP 1180.

Mr. Reimer moved for a mistrial. RP 1185-90. The court denied the motion, and it attempted to cure the error by instructing the jury it could not consider prior evaluations conducted by nontestifying witnesses.

THE COURT: Ladies and gentlemen, previously, there was a ruling that we were not going to discuss or consider prior evaluations of Mr. Reimer by people who were not brought in here as witnesses for a variety of reasons, including the fact that they’re not subject to cross-examination. It wouldn’t be proper to consider that evidence in this case. To the extent that there’s any discussion about that, I’m asking you now or ordering you now to disregard that evidence and not consider it in your deliberations.

RP 1190-91. The court provided similar information in the written instructions. CP 1249 (instruction 4). Post-trial, Mr. Reimer unsuccessfully moved to reconsider the court’s denial of his motion for a mistrial. CP 1270-77.

In *Hamilton*, the accused relied on a diminished capacity defense at his trial for second degree assault while confined at the Monroe Correctional Complex. 196 Wn. App. at 465. He presented a single expert witness, psychiatrist Dr. Stuart Grassian, to testify to

Hamilton's mental illnesses at the time of the assault and the effect of incarceration on his mental health. *Id.* at 465-67. Over Hamilton's objections, the prosecutor attempted to impeach Hamilton's expert with the opinions of nontestifying experts that—generally speaking—Hamilton did not suffer from mental illness, which were contained in Hamilton's voluminous medical records. *Id.* at 466, 468-73. Grassian did not rely on the opinions elicited, the records were not admitted into evidence, and none of the authors of the opinions testified. *Id.* at 474.

The Court of Appeals reversed the ensuing conviction, finding Hamilton's right to a fair trial had been violated by the evidentiary violations. 196 Wn. App. at 474-85. The evidence was inadmissible hearsay if the State relied on the opinions for the truth of the matter asserted. *Id.* at 474-75. If the State did not rely on the opinions for their truth, the entries were irrelevant as Hamilton's expert had not relied upon them in formulating his opinion. *Id.* at 475, 483-84. The evidence was also not admissible under ER 703 or 705 because it was not facts or data and was not relied upon by the testifying expert. *Id.* at 477-81.

The inadmissible evidence concerned the central issue in Hamilton's case: his mental state at the time of the assault. 196 Wn.

App. at 485. The prosecutor's elicitation of opinions of nontestifying experts undermined Hamilton's sole expert and, consequently, his ability to assert his diminished capacity defense. *Id.* Accordingly, the Court held the trial was unfair. *Id.*

The same is true here. As in *Hamilton*, the prosecution elicited opinions from nontestifying experts to undermine the opinion of Mr. Reimer's sole expert that Mr. Reimer does not suffer from sexual sadism and is not likely to reoffend unless subject to total confinement.

d. The prosecutor committed misconduct by inquiring into a topic forbidden by the court's pretrial ruling.

The error, however, is not only evidentiary but also constitutes prosecutorial misconduct. Every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); accord *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Prosecutors must ensure justice is done and the accused receive a fair and impartial trial. *E.g.*, *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

A prosecutor improperly vouches for the credibility of a witness by indicating that evidence not presented to the jury supports that

witness's testimony. *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010); *State v. Jones*, 144 Wn. App. 284, 293-94, 183 P.3d 307 (2008). A prosecutor commits misconduct that is flagrant and ill-intentioned if it violates the rules established to govern the parties' conduct at trial. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

As discussed, the court had ruled pretrial that opinions of nontestifying experts were inadmissible. RP 131. Yet, the prosecutor questioned Dr. Richards about the diagnoses of prior evaluators and continued despite Mr. Reimer's objection. RP 1179-80. The prosecutor was not unaware of what he was doing—he had followed the same line of questioning in his deposition of Dr. Richards. RP 1186-87. The prosecutor's violation of the pretrial ruling was flagrant and ill-intentioned misconduct that vouched for the State's expert, as Dr. Hoberman diagnosed Mr. Reimer with sexual sadism, antisocial personality disorder and high psychopathy—the same opinions the State “offered” on cross-examination through the nontestifying experts.

- e. The admission of years of diagnoses from nontestifying witnesses and prosecutorial misconduct requires reversal.

Reversal was required in *Hamilton* after medical diagnoses of nontestifying experts were admitted. 196 Wn. App. at 485. Similar

evidence of years of opinions of nontestifying experts was admitted here. Because the State's method of cross-examination also vouched for its own expert's testimony, the prejudice here extends even further than that in *Hamilton*.

The court's limiting instruction could not cure the prejudice caused by bolstering the State's experts' diagnoses. Such evidence, on the key issue in the case, was a bell that could not be unrung. Moreover, the limiting instructions followed, but did not reference, the court's overruling of Mr. Reimer's objection, which lent the questioning an undeserved aura of authority. *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (court lends "an aura of legitimacy" by overruling improper argument); *State v. Swanson*, 181 Wn. App. 953, 964, 327 P.3d 67 (2014) (overruling a proper objection may increase the likelihood that erroneous evidence or argument affects the verdict).

The admission of this testimony jeopardized Mr. Reimer's right to a fair trial and requires reversal. *See Hamilton*, 196 Wn. App. at 485.

3. The statutory preponderance of the evidence standard is constitutionally insufficient .

A person may not be committed indefinitely unless the State proves beyond a reasonable doubt he is a sexually violent predator. RCW 71.09.060. A “sexually violent predator” is a 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) (emphasis added). “‘Likely to engage in predatory acts of sexual violence if not confined in a secure facility’ means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition.” RCW 71.09.020(7) (emphasis added). The issue clearly presented to the jury in this case was whether Mr. Reimer was more likely than not to reoffend; in other words whether his chance of reoffense if not confined was greater than 50 percent. *E.g.*, CP 1251 (to-commit instruction); RP 1327-28, 1361-62 (closing arguments emphasizing the standard). This is the preponderance of the evidence standard.

This statutory standard conflicts with the constitutionally required standard of proof in civil commitment proceedings. “[T]he

individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). The Constitution requires proof of present dangerousness by at least clear and convincing evidence. *Id.* at 433. "Clear and convincing evidence" means the fact in issue must be shown to be "highly probable." *In re Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973). Thus, civil commitment is unconstitutional absent a finding that it is "highly probable" the person will reoffend. The statutory "more probable than not" standard violates due process.

Though our Supreme Court rejected this argument in *In re Det. of Brooks*, that opinion should be reexamined in light of subsequent case law. *See In re Det. of Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001). Since *Brooks* was decided, both the U.S. Supreme Court and the Washington Supreme Court have held that involuntary commitment is unconstitutional absent a showing that a defendant has "serious difficulty" controlling dangerous, sexually predatory behavior. *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002);

Thorell, 149 Wn.2d at 735. The evidence must be sufficient to distinguish a sexually violent predator “from the dangerous but typical recidivist convicted in an ordinary criminal case.” *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 731.³

The “serious difficulty” standard of *Crane* and *Thorell* is akin to the “highly probable” standard, not the “more likely than not” standard outlined in the statute. *See Thorell*, 149 Wn.2d at 742; *see also In re Commitment of Laxton*, 254 Wis.2d 185, 203, 647 N.W.2d 784 (2002) (upholding Wisconsin’s civil-commitment statute following *Crane* because statute required showing of “substantial probability that the person will engage in acts of sexual violence,” and “substantially probable” means “much more likely than not”).

The elevated standard of proof is necessary to support the “requirement that an SVP statute substantially and adequately narrows the class of individuals subject to involuntary civil commitment.” *Thorell*, 149 Wn.2d at 737 (internal citation omitted). The State must “demonstrate[] the cause and effect relationship between the alleged SVP’s mental disorder and a high probability the individual will

³ In *In re Det. of Mulkins*, 157 Wn. App. 400, 237 P.3d 342 (2010), this Court rejected a similar argument. For the reasons stated herein, that opinion was wrongly decided and should not be followed.

commit future acts of violence.” *Id.* at 737 (emphasis added); *cf.* Sentencing Guidelines Commission, *Recidivism of Adult Felons 2007* at 1 (recidivism rate among adult male felons generally is 63.3 percent).

Thorell is consistent with the Washington Supreme Court’s earlier pronouncements regarding the due process rights of those subject to civil commitment. In the seminal case of *In re Harris*, for example, the Court required “demonstration of a substantial risk of danger” to satisfy due process and “protect against abuse.” *In re Det. of Harris*, 98 Wn.2d 276, 654 P.2d 109 (1982). “[I]nvoluntary commitment requires a showing that the potential for doing harm is ‘great enough to justify such a massive curtailment of liberty.’” *Id.* at 283 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). Thus, “[t]he risk of danger must be substantial . . . before detention is justified.” *Id.* at 284. Chapter 71.09 RCW violates due process because it requires only that the risk of danger be “likely” or “probable”—not substantial.

The fact that the statute mandates a “beyond a reasonable doubt” standard in one clause cannot save it because the standard is severely weakened in another clause by allowing for commitment only where it is “likely” a person will reoffend. A finding beyond a

reasonable doubt that it is merely “likely” or “probable” that a person will reoffend creates a standard which, in the aggregate, is a mere preponderance standard.

To pass constitutional muster, the statute must mandate a showing by clear and convincing evidence that the defendant will reoffend if not confined to a secure facility—not a showing that he “might” reoffend, will “probably” reoffend, or is “likely” to reoffend. *See Addington*, 441 U.S. at 420 (trial court properly instructed jury it had to find, by clear and convincing evidence, that the defendant required hospitalization in a mental hospital for his own welfare and protection or the protection of others—not that he probably needed hospitalization). This Court should hold that the “likely” and “more probably than not” standards of RCW 71.09.020 are unconstitutional.

F. CONCLUSION

The commitment order should be reversed and the matter remanded for a new trial because Mr. Reimer was denied his right to testify, the prosecutor’s elicitation of inadmissible opinion evidence prejudiced his right to a fair trial, and an unconstitutionally low standard of proof was applied.

DATED this 30th day of August, 2017.

Respectfully submitted,

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

IN RE THE DETENTION OF)	
)	
)	
JOEL REIMER,)	NO. 49881-2-II
)	
)	
APPELLANT.)	

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