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Division III
State of Washington

COA No. 30853-7-III

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

IN RE DETENTION OF LEYVA,
STATE OF WASHINGTON,

Respondent,

v.

ERNESTO LEYVA,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF GRANT
COUNTY OF THE STATE OF WASHINGTON

The Honorable John M. Antosz

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Ernesto Leyva's commitment under RCW 71.09 must be reversed because the Sexually Violent Predator Act's definition and use of the term of "mental abnormality" is vague as applied to him, under the Fourteenth Amendment and Article 1, section 3 of the Washington Constitution.

2. Ernesto's SVP commitment violates Due Process under the Fourteenth Amendment and Article 1, section 3, where it was predicated on juvenile conduct.

3. The trial court violated Ernesto's right to present a defense.

4. RCW 71.09.020(7), which permits SVP commitment upon a showing that the person "more probably than not" will engage in acts of sexual violence if not confined, violates the dictate of Addington v. Texas,¹ requiring that the criteria for civil commitment be proved by at least clear and convincing evidence.

5. Ernesto Leyva's right to jury unanimity was violated, requiring reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State's expert witness claimed that Ernesto Leyva suffered from the mental abnormality of "paraphilia not otherwise

¹ Addington v. Texas, 441 U.S. 418, 427, 99 S. Ct. 1804, 60 L. Ed.2d 323 (1979).

specified, non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type.” This compound diagnosis is not specified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), and was a determination of the expert’s own creation. If the statutory definition of “mental abnormality” in RCW 71.09 is deemed to include such a diagnosis, is the statute so lacking in ascertainable standards for enforcement that it is unconstitutionally vague as to Ernesto Leyva?

2. Substantive due process requires that no individual be indefinitely committed absent a showing of lack of volitional control. While he remains a juvenile, a child’s brain continues to develop into his early twenties, and volitional capacity is not fully developed until after age 18. Was Ernesto Leyva’s right to due process violated when his SVP commitment was premised on conduct that occurred prior to maturity of his volitional functioning?

3. The trial court precluded the defense medical expert, Dr. Wollert, from stating his expert opinion, in reliance on academic articles, that juveniles do not have a developed volitional capacity and cannot therefore meet the criteria of SVP status. Did these rulings violate the due process right to present a defense, which applies in SVP commitment proceedings?

4. RCW 71.09.020(7) permits SVP commitment upon a

showing that the person “more probably than not” will engage in acts of sexual violence if not confined. Does this standard violate the dictate of Addington v. Texas, which requires that the criteria for civil commitment be proved by at least clear and convincing evidence?

5. The State presented evidence and expert testimony regarding several distinct “mental abnormalities,” but the Assistant Attorney General in closing argument failed to make a clear election of the particular abnormality upon which the jury should rest its SVP verdict. The evidence as to at least one of the proffered abnormalities was not uncontroverted. Was Ernesto Leyva’s right to jury unanimity violated, requiring reversal?

C. STATEMENT OF THE CASE

(1) **Filing.** The State of Washington filed a petition for RCW 71.09 commitment of Ernesto Leyva (d.o.b. 12/11/90) on June 5, 2009, six months after his 18th birthday. At the time, Ernesto was in custody following revocation of a SSOSA imposed for his 2006 Grant County conviction for first degree child molestation, at age 15, involving multiple contacts with victims R., age 7, and D. age 6, in 2005. The incidents leading to conviction involved exposing himself and touching the victims’ genital area, near the bathroom area of a church. 4/5/12RP at 78-86. The SSOSA had been revoked in May of 2008, based on his October, 2007 arrest for third degree rape of

E., the 16 year old daughter of a family with whom he was staying during the community treatment program of his SSOSA sentence, which later resulted in conviction. 4/9/12RP at 207, 4/11/12RP at 599.

(2) Trial. An RCW 71.09 commitment trial was held in April of 2012. Ernesto had been abused sexually as a child, by a man who lived with his family, although he had no memory of this first incident. 4/5/12RP at 98-100. At the age of 5 or 7, he was touched sexually by a 16 or 17 year old girl who was a neighbor. 4/5/12RP at 101. At the age of 12, he was molested by, and had intercourse with a 16 or 17 year old boy, who made Ernesto take his clothes off. 4/5/12RP at 99-100.

Ernesto's sexual conduct was described by the State's witnesses and discussed by the expert witnesses as described infra. During his pre-teen and teenaged years, Ernesto engaged in a number of instances of sexual misconduct. In the Fall of 2005, Ernesto encountered the mother of R. and D., the children involved in the child molestation incident, and touched her breast after approaching her from behind. 4/5/12RP at 94-96. During junior high school, Ernesto was disciplined for repeated incidents of approaching girls from behind in the hallway and touching or

grabbing them. 4/5/12RP at 38-42, 88-89.²

At age 16, Ernesto touched a girlfriend of his sister's while standing behind her at a party they were attending, and he exposed himself to a teenaged girl at a Goodwill store in Wenatchee.

4/5/12RP at 94-95.

Ernesto was convicted in Grant County in 2006 for molestation arising from the incidents involving victims R., age 7, and D. age 6, in 2005. 4/9/12RP at 178. Ernesto admitted to molestation of both children. 4/9/12RP at 178-80. While on a SSOSA sentence following the 2006 conviction, Ernesto was arrested and later convicted for third degree rape of 16 year old E. in Adams County occurring in October of 2007; his SSOSA sentence was revoked. 4/9/12RP at 146-47. During this same period in 2007, Ernesto also had consensual sexual contact with multiple peer-aged teenage girls, involving "petting" and kissing. 4/5/12RP at 118-19.

(3) Experts. Dr. Brian Judd, a neuropsychologist and the State's expert witness, stated he diagnosed Ernesto with the following "paraphilia" which was a mental abnormality under Washington's SVP laws:

[P]araphilia not otherwise specified, non-consent

² The principal at Ernesto's school described the reported conduct and stated that Ernesto had to be suspended, and then expelled from the school for these incidents. 4/5/12RP at 38-42.

with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type.

4/9/12RP at 224. Dr. Judd stated this condition affected Mr. Leyva's "emotional or volitional capacity," including because of his own self-reports that he could not help himself when tempted and had difficulty controlling his urges, and because he continued to offend even after receiving judicial and non-judicial sanctions. 4/9/12RP at 225-26.

In addition to paraphilia NOS non-consent with pedophilia consideration, Dr. Judd also diagnosed Ernesto with the additional paraphilias of Exhibitionism and Frotteurism. 4/9/12 at 194, 202-04, 205-06, 216.

Dr. Richard Wollert, a clinical psychologist who conducts sex offender evaluations, determined that Ernesto did not fit either the statutory criteria of mental abnormality, or the requirements of difficulty controlling behavior and risk of re-offense as a result. 4/10/12RP at 355-60, 371-73. On the question of a mental abnormality, Dr. Wollert stated that juveniles' personalities and sexual preferences are not fully formed, and they are not only less likely to fit the criteria for paraphilias in the DSM, but are also "less likely to recidivate, no matter what their actuarial score, if one

believes that an actuarial instrument is applicable." 4/10/12RP at 373.

Dr. Wollert also relied on studies relating the psychosocial immaturity of juveniles to brain development, noting that juveniles' brains are biologically immature, in the parts of the brain that involve decision-making and emotional control. 4/10/12RP at 415-16.

Consistent with this opinion, Dr. Wollert also noted his conclusion that the recidivism rate for persons who committed their sex offenses as juveniles is significantly lower than individuals who are released from adult prison after committing sex offenses as an adult.

4/10/12RP at 419.

Specifically, Dr. Wollert concluded that Ernesto, even if he did have volitional impairment, could not be shown pursuant to any actuarial studies to be a person with a high risk to reoffend.

4/10/12RP at 434. Dr. Wollert stated that Ernesto could only be said, at best, to have a recidivism likelihood of about 7%. 4/10/12RP at 435.

Ernesto Leyva appeals from the judgment entered by the Superior Court on the jury's verdict that he was a Sexually Violent Predator under RCW 71.09. CP 123.

D. ARGUMENT

1. THE DEFINITION OF "MENTAL ABNORMALITY" SET FORTH IN RCW 71.09.020 IS VAGUE AS APPLIED TO ERNESTO LEYVA IF THE TERM IS INTERPRETED TO INCLUDE DR. JUDD'S COMPOUND DIAGNOSIS OF PARAPHILIA NOS NON-CONSENT WITH CONSIDERATION OF PEDOPHILIA.

Ernesto Leyva's SVP commitment was predicated upon a statute defining "mental abnormality." RCW 71.09.020(8). If that statutory term is interpreted to include the compound diagnosis asserted by Dr. Judd, which was fatally imprecise and accordingly is unrecognized by the medical profession, it failed to provide the jury in the present SVP trial with any ascertainable standards for rendering its commitment verdict under RCW 71.09.020(18). Ernesto's SVP judgment must be reversed because it was obtained pursuant to a statute which is vague as applied.

a. The Fourteenth Amendment and the Washington Constitution require that statutes establish ascertainable standards for application by the fact-finder. The Due Process vagueness doctrine under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires (1) that the public be provided with adequate notice of what conduct is proscribed, and, pertinent to Ernesto Leyva, (2) that the public be protected from "arbitrary" enforcement.

In re Detention of Bergen, 146 Wn. App. 515, 530-31, 195 P.3d 529 (2008) (citing State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998)); U.S. Const. amend. 14; Wash. Const, art. 1, sec. 3.

Statutes must not be framed in terms so vague that persons of common intelligence must necessarily guess at its meaning, and differ as to its application. In re Detention of Danforth, 173 Wn.2d 59, 72, 264 P.3d 783 (2011). A statute is certainly unconstitutional where its terms are “ ‘so loose and obscure that they cannot be clearly applied in any context.’ ” Spokane v. Douglass, 115 Wn.2d 171, 182 n. 7, 795 P.2d 693 (1990) (quoting Basiardanes v. Galveston, 682 F.2d 1203, 1210 (5th Cir.1982)); see also Kolender v. Lawson, 461 U.S. 352, 361, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (same); see also Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967) (void for vagueness doctrine applies to both civil and criminal statutes).

Where First Amendment rights are not involved, a vagueness challenge to statutory terms is considered “as applied.” Spokane v. Douglass, 115 Wn.2d at 182. Thus, the reviewing court must evaluate the statute as applied to the actual circumstances of the party challenging the statute. Spokane v. Douglass, at 182-83; In re Det. of Turay, 139 Wn.2d 379, 415 n. 27, 986 P.2d 790 (1999) (an as-applied challenge puts at issue the alleged unconstitutional

application of the statute to the person).³

b. Dr. Judd's compound diagnosis of "mental abnormality." Washington's SVP statute permits indefinite commitment of a person as an SVP where, *inter alia*, he has a "mental abnormality" as defined in RCW 71.09. The SVP Act allows indefinite commitment as an SVP where the jury finds the State has proved that the person has been convicted of a crime of sexual violence, and that he

suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.

RCW 71.09.020(18); see CP 687-88 (jury instruction 4 (SVP definition) and 5 ('to-commit' instruction)). Pursuant to subsection 020(8), "mental abnormality" means a

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

RCW 71.09.020(8); see CP 689 (jury instruction 6).

³ A vagueness challenge may be raised for the first time on appeal as "manifest" constitutional error, because a judgment obtained under a vague statute must be reversed. See City of Bellevue v. Lorang, 140 Wn.2d 19, 30 n. 6, 992 P.2d 496 (2000); RAP 2.5(a)(3). On appeal, a constitutional vagueness challenge to a statute is subject to *de novo* review. State v. Watson, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007); see also In re Commitment of Adams, 223 Wis.2d 60, 69, 588 N.W.2d 336 (Wis.App.1998) (reviewing *de novo* the appellant's challenge to

Below, Dr. Judd stated that he diagnosed Ernesto with “paraphilia not otherwise specified, non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type.” 4/9/12RP at 224. Although he equivocated in his answer to the question, he appeared to state that this was a diagnosis supported by the DSM-IV. 4/9/12RP at 197. Dr. Judd deemed that this diagnosis described a "mental abnormality" within the meaning of the SVP statutes. 4/9/12RP at 185-88.

However, first, “paraphilia NOS non-consent” is not defined as a paraphilia in the DSM-IV, which sets forth mental disorders recognized by the American Psychiatric Association. More importantly, Dr. Judd's diagnosis dramatically exceeded, in both imprecision and in lack of medical recognition, the already highly controversial diagnosis of paraphilia NOS non-consent, which has been deemed at best only minimally sufficient for Due Process purposes. Dr. Judd's novel, compound diagnosis was a creature of his own devising, which lacked any specificity as to paraphilic focus beyond describing simple recidivism.

constitutionality of sexual predator statute if interpreted to permit anti-social personality disorder as a basis for commitment).

i. Dr. Judd's compound diagnosis.

Dr. Judd stated that "paraphilias" are a type of sexual mental abnormality within the meaning of Washington's sexually violent predator definitions. 4/9/12 at 185-88. Paraphilias are described in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), 4/9/12 at 186-90, and they involve sexual urges, fantasies and behaviors that a person exhibits over a period of over six months, characterized by abnormal sexual fetishization of a sexual activity. 4/9/12 at 190-93.

In addition to the paraphilias that are defined in the DSM-IV, including sadism, masochism, pedophilia, and the like, Dr. Judd asserted that there is also a category in the DSM-IV which is entitled "paraphilia not otherwise specified." 4/9/12 at 194. Based on Ernesto's history of sexual conduct, Dr. Judd stated that he diagnosed him with the following non-specified abnormality:

paraphilia not otherwise specified, and then in addition with a rule out of pedophilia, sexually attracted to both, non-exclusive type.

4/9/12 at 194. Dr. Judd further clarified that the target of Ernesto's paraphilia was "non-consenting" individuals. 4/9/12RP at 191.

ii. Objection to State's exhibit 15.

During the expert's testimony, counsel for the respondent challenged the State's offer of Exhibit 15, which was a display for the

jury purporting to be a “definition” of “Paraphilia Not Otherwise Specified (NOS) Non-consent.” 4/9/12RP at 195-96.⁴

On *voir dire* questioning by counsel, Dr. Judd claimed that “non-consenting individuals” are “included as one of the paraphilias,” but at the same time appeared to concede that the DSM-IV does not include non-consent as a specific paraphilia. 4/9/12RP at 197. The State argued that Dr. Judd was stating that there is a “specific application to non-consenting persons.” 4/9/12RP at 197. The trial court did not permit the State to display Exhibit 15, but allowed testimony to go forward subject to objection. 4/9/12RP at 197.

Dr. Judd then asserted that Mr. Leyva could be diagnosed with this paraphilia, which involved “non-consenting persons.” 4/9/12RP at 199. Dr. Judd described this group as individuals “not giving consent for that individual to touch them,” such as being assaulted sexually or being groped, or other circumstances such as being ‘peep[ed]’ on without their knowledge, or a person who did not consent to having a person’s penis exposed to them. 4/9/12RP at

⁴ The proffered exhibit read as follows:

Paraphilia Not Otherwise Specified (NOS) Non-consent

- Recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving non-consenting persons
- Occurring over a period of at least 6 months
- Which cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

199, 191.

Dr. Judd also stated that the object of Ernesto's paraphilia, based on his overall assessment of his pattern of conduct during his teenage years, was child victims and non-consenting peer-aged or older individuals. 4/9/12RP at 181-84, 198-204.

Crucially, Dr. Judd asserted that by definition, children are legally incapable of consent, and therefore the presence of conduct with children demonstrated that Ernesto suffered from the paraphilia of non-consent that he diagnosed. 4/9/12RP at 212.

c. The term “mental abnormality” in RCW 71.09.020(8) and (18) is unconstitutionally vague if it comprises Dr. Judd’s compound diagnosis. If a compound diagnosis such as that proffered by Dr. Judd is deemed to meet the criteria of “mental abnormality” and the accordant definition of a sexually violent predator set forth in RCW 71.09.020(8) and (18), where this novel diagnosis fails as a diagnosis of a specific mental condition justifying commitment, and is not recognized by the medical profession, then those definitions are unconstitutionally vague.

Dr. Judd's testimony failed to identify a specific mental illness driving Ernesto Leyva uncontrollably toward commission of sexually

violent conduct. This Court recently held that a diagnosis of paraphilia NOS non-consent does not involve a novel scientific principle, and that the diagnosis does not lack validity for reason that it is not listed in the DSM. In re Det. of Berry, 160 Wn. App. 374, 379, 248 P.3d 592 (2011) (holding that Frye hearing not needed for testimony diagnosing paraphilia NOS non-consent) (Frye v. United States, 54 App.D.C. 46, 47, 293 F. 1013 (D.C.Cir.1923)). The Court also stated that paraphilia NOS non-consent does appear in the DSM-IV-TR. In re Det. of Berry, 160 Wn. App. at 381. The Court stated:

The DSM-IV-TR defines paraphilia as “recurrent, intense sexually arousing fantasies, 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 nonconsenting persons that occur over a period of at least 6 months.”

(Emphasis added.) In re Det. of Berry, 160 Wn. App. at 381.

However, as Ernesto's counsel noted, this language in the DSM-IV does not define specific or particular paraphilias.

Paraphilias are mental disorders because they are *abnormal* sexual fantasies, urges or behaviors.⁵ Accordingly, and as Dr.

⁵ The Merriam-Webster Dictionary defines a paraphilia as a pattern of recurring sexually arousing mental imagery or behavior that involves unusual and especially socially unacceptable sexual practices (as sadism, masochism,

Wollert extensively discussed, the DSM-IV, which catalogs recognized mental disorders, provides a description of the essential features of paraphilias. These described features make clear that a paraphilia, as distinguished from non-abnormal sexual behavior, is a sexual mental disorder:

The essential features of a Paraphilia are recurrent, intense sexually arousing fantasies, 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 nonconsenting persons that occur over a period of at least 6 months.

American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (4th ed. Text Revision 2000), p. 566; see 4/10/12RP at 410-11 (Wollert testimony). The numbered features are not the criteria for any particular paraphilia, and they do not, individually or together, define any specific paraphilia. Thus the Chair and Editor of text and criteria in the DSM have specifically noted, regarding the above-quoted language in the DSM-IV, that it does not define any paraphilia, including one of non-consent:

This sentence has been erroneously taken to be some kind of authoritative DSM-IV-TR definition of paraphilia and is then used to justify the diagnosis of a qualifying mental disorder called paraphilia NOS, non-consent, under the mistaken

fetishism, or pedophilia).

See <http://www.merriam-webster.com/dictionary/paraphilia>.

assumption that the text implies that the DSM-IV-TR recognizes the existence of an arousal pattern focused on the nonconsenting nature of the sexual behaviors. In fact, it was never anticipated that the opening sentence of the section would be considered a forensic definition of paraphilia or be used in determining the suitability of long-term psychiatric incarceration. It was meant instead as no more than a simple table of contents to summarize the specific types of paraphilias included in the DSM-IV, sorting them by deviant arousal pattern into convenient categories.

(Footnote omitted.) Frances, Allen and First, Michael, Paraphilia NOS, Nonconsent: Not Ready for the Courtroom, J. Am. Acad. Psychiatry Law (2011) (www.jaapl.org/content/39/4/555.full).⁶ The assertion of a diagnosis of basic paraphilia NOS non-consent has been subject to unique medical criticism regarding its use as a basis for predator commitment, including by Dr. Wollert.⁷

⁶ The editors have further noted that a paraphilia of non-consent has specifically and repeatedly been *rejected* by the DSM:

The idea that paraphilic rape should be an official category in the psychiatric diagnostic manual has been explicitly rejected by Diagnostic and Statistical Manual of Mental Disorders (DSM)-III, DSM-III-R, DSM-IV, and, recently, DSM-5. . . . [T]he diagnosis paraphilia NOS, nonconsent, is based on a fundamental misreading of the original intent of the DSM-IV Paraphilia Workgroup and represents a misuse of psychiatry[.]

Frances and First, supra; 4/10/12RP at 410-11 (Dr. Wollert's discussion of the Frances and First article).

⁷ See 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

Further, the courts in commitment cases have recognized the tenuous nature of basic paraphilia NOS non-consent as a constitutional basis for commitment. See, e.g., McGee v. Bartow, 593 F.3d 556, 579 (7th Cir. 2010) (noting that a paraphilia NOS (non-consent / rape) diagnosis is “probably . . . the most controversial among the commonly diagnosed conditions within the sex offender civil commitment realm”). For its part, the United States Supreme Court, in Kansas v. Hendricks, 521 U.S. 346, 360, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), upheld Mr. Hendricks' commitment pursuant to Kansas' Sexually Violent Predator Act against a Due Process challenge, noting that his pedophilia was “a condition the psychiatric profession itself classifies as a serious mental disorder.” Hendricks, 521 U.S. at 360. But the Justice who cast the deciding fifth vote in Hendricks emphasized that, “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 (Kennedy, J.).

[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”); 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”).

Recognizing this limitation from Hendricks, at least one federal court has determined that basic paraphilia NOS non-consent barely warrants commitment under Due Process. Brown v. Watters, 599 F.3d 602, 612 (7th Cir. 2010) (finding paraphilia NOS non-consent is "minimally sufficient for due process purposes"); see also McGee v. Bartow, 593 F.3d at 779.

Here, however, the State's expert's compound diagnosis wanders far afield even from the controversial diagnosis of basic paraphilia NOS non-consent. Dr. Judd's diagnosis of 'paraphilia NOS non-consent with the consideration of pedophilia' was an entirely novel descriptor which purported to diagnose a "mental abnormality" involving attraction to sexual activity with unwilling, non-consenting persons. Yet Dr. Judd admitted that he considered Ernesto's child contacts to fit this pattern based on the legal status of children as being unable to give consent to sexual activity. 4/9/12RP at 212.

But young Ernesto Leyva was not a pedophile. Dr. Judd testified at length about the pedophilia "consideration" portion of his diagnosis. 4/9/12RP at 199-200. First, Dr. Judd stated that the person diagnosed with pedophilia as a paraphilia must be at least age 16 and at least 5 years older than the children referenced in the first criterion. This ruled out Ernesto. 4/9/12RP at 202, 210. Dr.

Judd's novel, compound diagnosis lacked any specificity as to paraphilic focus, and instead incorporated half-definitions appearing in another, specified, DSM-listed paraphilia whose criteria Ernesto did not meet.

The State may contend that Dr. Judd diagnosed Ernesto with paraphilia NOS non-consent, and then simply discussed other 'issues' that Ernesto had, including pedophilia, although noting he could not technically be diagnosed with that well-accepted disorder. However, Dr. Judd repeatedly made clear to the jury that his particular diagnostic conclusion was that Mr. Leyva had a non-specified paraphilia of non-consenting persons, and children, with the further consideration of non-exclusive pedophilia. He again stated:

I believe that the congenital or acquired condition in this case would be paraphilia not otherwise specified, non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type.

4/9/12RP at 224. This compound diagnosis is nothing more than a determination that Ernesto had tended to sexually offend and recidivate against victims. It does not "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." In re

Detention of Thorell, 149 Wn.2d 724, 723, 72 P.3d 708 (2003);
accord Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d
856 (2002) (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 criminal recidivists).

Dr. Judd's diagnosis did not indicate that Ernesto had a
specific or recognized paraphilic disorder driving him to offend.
Rather, as Dr. Wollert concluded, Ernesto did not qualify for any
paraphilic diagnosis:

There is no specificity. In order to find Ernesto to
have a paraphilia, he would have to have some
sort of specific type of behavior or urge or fantasy
that he could not control, it was so intense he
could not control it.

4/10/12RP at 400. In Ernesto's case, his history and presentation
indicated an absence of any diagnostic specificity: Ernesto's
offending against children when he was younger, followed by
conduct of exposing himself to early teenaged girls and touching girls
in the school hallway, were "all different types of behaviors" that
could not support any specific diagnosis. 4/10/12RP at 401-02.

By compounding a failed diagnosis of pedophilia into his novel
paraphilic definition, and then by broadening the already dubious
concept of a paraphilic sexual attraction to resistant persons, to now
include child victims whose legal status rendered them incapable of

any consent recognized in law, Dr. Judd asserted for the lay jury a diagnosis that fails to meet due process standards. The Supreme Court explained the rationale for and the purpose of the “vagueness” doctrine in Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). After noting the requirement that laws must permit persons to “steer between lawful and unlawful conduct,” the Court also stated:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and **juries for resolution on an *ad hoc* and subjective basis**, with the attendant dangers of arbitrary and discriminatory application.

(Footnotes omitted.) (Emphasis added.) Grayned v. City of Rockford, 408 U.S. at 107–08. Here, if the term “mental abnormality” comprises such a diagnosis as was proffered to the jury below, it is vague as applied. The requirement of “ascertainable standards,” for application by juries, is perhaps the most important purpose of the vagueness doctrine. Thus, in Kolender v. Lawson, *supra*, 461 U.S. at 358, the Supreme Court recognized that the need to provide sufficient guidance in the enforcement and judgment arena is the more important practical rationale for the doctrine. In this case,

defining "mental abnormality" to include the compound paraphilia asserted by Dr. Judd failed to provide ascertainable standards for application by the fact-finder. If so defined, as a crucial component of the definition of an SVP, it is too loose a term to protect against arbitrary verdicts imposed by the jury in RCW 71.09 trials.

d. Reversal is required. Where a statute is vague, it grants excessive decision-making authority to juries asked to render verdicts on commitment of persons they are persuaded are generally dangerous. RCW 71.09.020(8) and (18) do not define "mental abnormality" in a manner that provided an ascertainable standard to protect against this arbitrary enforcement. See generally Douglass, 115 Wn.2d at 178 (citing Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975) (void for vagueness remedy under the due process clause of the Fourteenth Amendment); City of Spokane v. Fischer, 110 Wn.2d 541, 754 P.2d 1241 (1988) (reversing conviction obtained under vague provision). Ernesto Leyva's SVP judgment and order of commitment must be reversed.

**2. ERNESTO LEYVA'S COMMITMENT VIOLATES
DUE PROCESS BECAUSE IT WAS PREMISED ON
JUVENILE CONDUCT OCCURRING BEFORE HIS
BRAIN REACHED VOLITIONAL DEVELOPMENT.**

Dr. Wollert noted that juveniles in general do not reach full brain development, in terms of psychosocial maturity, until age 23 to

25. 4/10/12RP at 494-95. Mr. Leyva's psychosocial immaturity was demonstrated by his behavior pattern. 4/10/12RP at 496. In these circumstances, where Ernesto's conduct occurred as a juvenile, Due Process prohibits indefinite commitment.

a. Due process prohibits involuntary commitment unless predicated on a lack of volitional control. The federal and state constitutions guarantee the right to due process of law where the State seeks to deprive a person of a liberty interest. U.S. Const. amend. 14; Wash. Const. art. I, sec. 3. The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty. Foucha v. Louisiana, 504 U.S. 71, 77, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); In re Det. of Thorell, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003).

Substantive due process prohibits curtailment of liberty by indefinite civil commitment such as that imposed under RCW 71.09 *et seq.*, except in the narrowest of circumstances. See Kansas v. Hendricks, 521 U.S. 346, 356-57, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Principally, a person's dangerousness based on a likelihood of criminal recidivism is an insufficient basis for imposing indefinite, involuntary civil commitment. Hendricks, 521 U.S. at 358; Kansas v. Crane, 534 U.S. 407, 412, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). Commitment premised upon proof of volitional impairment which

drives the risk of future harm, however, can constitute a sufficient basis to civilly curtail one's physical liberty. Hendricks, 521 U.S. at 358; Crane, 534 U.S. at 412; Thorell, 149 Wn.2d at 731-32, 735-36.

In the SVP context, volitional impairment means serious difficulty in controlling behavior. Thorell, 149 Wn.2d at 732. This serious difficulty controlling behavior must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." Crane, 543 U.S. at 413. Due process therefore requires volitional impairment be proved before an individual can be indefinitely confined.

Juveniles, however, are insufficiently mentally developed to exhibit a lack of volitional control. The U.S. Supreme Court has recognized that science demonstrates that young adults as a class temporarily lack volitional control while their brain continues to develop:

[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.

Graham v. Florida, ___ U.S. ___, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825 (2010) (also stating juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults).

Notably, “adolescents are overrepresented statistically in virtually every category of reckless behavior.” Roper v. Simmons, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). This is true for three reasons. First, juveniles have a “ ‘lack of maturity and an underdeveloped sense of responsibility,’ ” leading to heedless impulsivity. Roper, 543 U.S. at 569. Second, they are more susceptible to negative influences, including psychological damage. Roper, 543 U.S. at 569; Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982) (expressing same sentiment). Third, a juvenile’s character is not “well formed” like an adult’s; his traits are “less fixed.” Roper, 543 U.S. at 570.

As Dr. Wollert testified, juveniles in general, because of immaturity, impulsiveness and irresponsibility, commit acts – including crimes - that they may not commit once reaching adulthood. 4/10/12RP at 373. Dr. Wollert explained that when a juvenile like Ernesto has also had unfortunate experiences at a younger age which affect his sexual understanding, he will need to “come to grips” with that experience, and during that time of coping, the person’s sexual identity is still forming. The fact that such teenagers may engage in certain sexual conduct at that age does not indicate that they are going to engage in sexual misconduct once they are no longer a minor. 4/10/12RP at 374-75.

In fact, juvenile sexual offenders are likely to *desist* as they reach the age of majority. 4/10/12RP at 383; see Graham v. Florida, 130 S. Ct. at 2026 (noting that parts of the juvenile brain "involved in behavior control continue to mature through late adolescence"). Dr. Wollert explained that in this area of clinical study, which is part of the practice of developmental psychology, juveniles of Ernesto's age are characterized by psychosocial immaturity. 4/10/12RP at 378-79, 383. This is a mental state of having deficits in social judgment that result in ill-advised and sometimes criminal behavior. 4/10/12RP at 383-84. Relying on studies produced by Dr. Steinberg of Temple University, Dr. Wollert noted that juveniles, in particular as they span the ages of 14 through 17, become less psychosocially immature, and eventually become more insightful and more internally controlled. 4/10/12RP at 383-84.

The common trend, therefore, is toward desistance, rather than continuance or escalation. Thus a juvenile's actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." Roper, 543 U.S. at 570. Studies show that "[o]nly a relatively small proportion of adolescents' " who engage in illegal activity " 'develop entrenched patterns of problem behavior.' " Roper, 543 U.S. at 570 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence:

Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)).

b. Because volitional impairment is a prerequisite for commitment and juveniles are insufficiently developed to exhibit chronic volitional impairment, due process prohibits the indefinite civil commitment of Ernesto Leyva. Just as youth

matters in determining the appropriateness of lifetime incarceration, so too should it matter in determining the constitutional sufficiency of indefinite civil commitment premised on serious difficulty controlling behavior. See Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012). “Making predictions about the development of relatively more permanent and enduring traits on the basis of patterns of risky behavior observed in adolescence is an uncertain business.” Steinberg, 58 Am. Psychologist, supra at 1014.

Making such predictions is too uncertain a business. Indefinite confinement must be premised upon serious difficulty controlling behavior to pass constitutional muster. But such a finding cannot be scientifically proven on conduct prior to mature brain development. Accordingly, this State should refrain from indefinitely confining individuals whose predicate conduct derives from the period of time when their volitional capacity was immature or continuing to develop.

Dr. Wollert was specifically asked how these principles and studies related to his determination regarding Ernesto and the abnormality criteria for commitment. 4/10/12RP at 385. He testified that Ernesto did not have a mental abnormality because juveniles "reach psychosocial maturity over a protracted period," and Ernesto's history reflected that he committed his prior offenses because of that immaturity. 4/10/12RP at 396.

Indeed, Ernesto's history included offenses committed during that time which reflected a progression, rather than a fixation on a particular sexual behavior, as he developed his sexual identity. 4/10/12RP at 396. Dr. Wollert emphasized that Ernesto, following a period from 1996 to 2001 in which he was sexually abused as a child, he first offended against younger children, then became involved in sexual relationships with similar and same-aged peers. 4/10/12RP at 306. His last offense was a third degree rape of a similar aged peer, E., not causing physical injury 4/10/12RP at 397-98.

Ultimately, "[d]eciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible' -- but 'incorrigibility is inconsistent with youth.'" Miller v. Alabama, 132 S. Ct. at 2465. Here, in his childhood prior to his sexual misconduct and his admitted crimes, Ernesto faced not only

the normal adolescent obstacles to controlling one's behavior, but he was further disadvantaged by his childhood sexual abuse at the hands of others. Any lack of volitional control stemmed from continuing brain development and cannot be deemed predictive of whether Ernesto had a mental abnormality leading to difficulty of control and a likelihood of sexually violent offending. Under substantive due process, this is an insufficient basis for indefinite civil commitment pursuant to RCW 71.09.

3. THE TRIAL COURT VIOLATED ERNESTO LEYVA'S RIGHT TO PRESENT A DEFENSE IN AN SVP CASE BY IMPROPERLY EXCLUDING RELEVANT, ADMISSIBLE EXPERT TESTIMONY.

The trial court violated Ernesto's right to present a defense by precluding the defense expert from presenting relevant, admissible evidence regarding his expert opinion that juveniles do not have a developed volitional capacity and cannot therefore meet the criteria of SVP status.

a. Right to present a defense; excluded testimony.

Ernesto Leyva has a right to a meaningful opportunity to present a complete defense in an SVP commitment proceeding. In re Det. of West, 171 Wn. 2d 383, 417 and n. 4, 256 P.3d 302 (2011) (noting that "[d]ue process protections apply to civil commitment trials") (citing In re Det. of Young, 122 Wn.2d 1, 48, 857 P.2d 989 (1993); In

re Det. of Stout, 159 Wn.2d 357, 369–70, 150 P.3d 86 (2007)); U.S. Const. amend. 5, amend. 6, amend. 14.

Prior to trial, the trial court, granting the State's motion in limine, precluded Dr. Wollert from testifying that he had written an article entitled "Juvenile Offenders are Ineligible for Civil Commitment as Sexual Predators." 4/3/12RP at 31-34; CP 399-402, 552-53. At trial, during Dr. Wollert's testimony, he attempted to state his reliance on studies by Dr. Steinberg on juvenile maturity. 4/10/12RP at 384, Sub # 106 (Exhibit list, Exhibit 35). Dr. Wollert stated his belief that the notion of impaired volitional capacity is difficult to apply to juvenile sexual behavior:

Psychosocial immaturity means that juveniles, those that commit the crimes as juveniles, have not reached volitional capacity. They can't suffer from something that affects their volitional capacity, because by definition of the developmental age, they're immature. So this shows how difficult it is to say that somebody who is a juvenile at the time they commit their crimes has an affected volitional capacity, because they never reached volitional capacity. It's for older persons.

4/10/12RP at 385. The prosecutor strenuously objected to this testimony, and moved (successfully) to strike it, arguing that Dr. Wollert, in violation of an order in limine,⁸ was advocating a policy

⁸ The State's motion in limine involved in part the State's argument that Dr. Wollert should not be permitted to misstate the law by saying that juveniles are not

position, and was misstating the law by saying that commitment under RCW 71.09 requires the person in question to have reached a "baseline capacity of development," instead of offering an opinion that he was relating to, or applying to, Mr. Leyva. 4/10/12RP at 386. Counsel responded that the doctor was merely relating research in the field and noting his reliance on it, for purposes of his opinion as to the alleged SVP, and argued that the matter was simply one on which he could be cross-examined. 4/10/12RP at 387.

Following additional argument from the State the trial court ruled that Dr. Wollert had testified, but could not testify, about juveniles in general and their volitional capacity, or that juveniles can never have volitional capacity, as opposed to offering his proper opinion about Mr. Leyva specifically. 4/10/12RP at 388. The court ruled that Dr. Wollert could not testify that juveniles can never have volitional capacity. 4/10/12RP at 390. The court therefore struck Dr. Wollert's answer as the AAG requested, and instructed the jury to disregard it. 4/10/12RP at 395.

legally eligible for SVP commitment in Washington. 4/3/12RP at 27-28. The argument by the AAG at trial focused on the question whether Dr. Wollert could testify juveniles have not reached volitional development so as to be impaired in volitional capacity; the trial court concluded that the proffered testimony went "one step further" than the issue addressed prior to trial, and issued a new ruling, described herein, during the objections raised in testimony. 4/10/12RP at 390-91.

Subsequently, Dr. Wollert testified that juveniles "reach psychosocial maturity over a protracted period," and that Mr. Leyva's history reflected that he committed his prior offenses because of that immaturity. 4/10/12RP at 396. However, Dr. Wollert was precluded by the court's ruling from testifying to his expert opinion regarding a categorical lack of fully developed volitional capacity in juveniles and young adults, and the determinative consequences of that scientific assessment upon the State's expert's contention that Ernesto had impaired volitional control as a result of a mental disorder.⁹

b. Right to present a defense violated. The right to present a complete and thorough defense is particularly vital in an SVP commitment proceeding, where expert testimony is crucial because the criteria for commitment are based upon the complicated science of human psychology, and are beyond the ken of the average juror. See In re Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006); Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P.3d 257 (2001).

Under the due process standards which also apply to SVP proceedings, a defendant has an absolute right to present admissible evidence in his defense. Washington v. Texas, 388 U.S. 14, 19, 87

⁹ During a subsequent discussion regarding an evidentiary issue, Ernesto's counsel noted that he had avoided eliciting planned testimony from Dr. Wollert regarding his opinion on volitional capacity, because the court had so ruled. 4/10/12RP at 436.

S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); see also Taylor v. Illinois, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); U.S. Const. amend. 6, amend. 14. The Washington Supreme Court follows this rule. See State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). As the Court observed in Maupin, "This right is a fundamental element of due process of law." Maupin, 128 Wn.2d at 924 (citing Washington v. Texas, 388 U.S. at 19).

For purposes of the right to present a defense, if evidence that is admissible is wrongfully excluded, the constitutional question is whether the proffered testimony was material and relevant to the outcome of the case. State v. Atsbeha, 96 Wn. App. 654, 660, 981 P.2d 883 (1999). The accused has "the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations").

Under these principles, a fair determination of the complex questions at issue in Ernesto's trial below required that both experts be permitted to testify to their respective opinions. Ernesto's due process right to present a defense was violated because the court's

ruling, precluding him from mounting a complete defense against the SVP allegation, violating the “touchstone of due process [which is] is the fairness” of the proceeding. United Smith v. Phillips, 455 U.S. 209, 219, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982).

Here, the evidence offered by Ernesto’s defense was certainly relevant and admissible. Under ER 401 and ER 402, Dr. Wollert could testify that juveniles lack the volitional development of adults, and could present his learned opinion that this lack of development precluded a determination of lack of control over behavior. This evidence tends – dramatically so -- to make the fact of SVP status less likely, where the material issue is whether the alleged predator has serious difficulty controlling his behavior as a result of a disorder that affects his conduct. ER 401, ER 402; see, e.g., RCW 71.09.020(8) (requiring proof of mental abnormality affecting the person’s volitional capacity); see CP 689 (jury instruction 6).

Further, under ER 701 and ER 702, the court should allow opinion testimony where it is based on scientific or other specialized knowledge, and the witness, as Dr. Wollert was, has been “qualified as an expert.” See also Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (expert opinion admissible if witness is properly qualified). Even more to the point in the present case where Dr. Wollert proposed to testify regarding studies, such as Dr.

Steinberg's, and articles written by himself on the precise topic of juveniles and SVP commitment, on which he relied for the opinion he attempted to present, ER 703 dictates that an expert is permitted to testify regarding scientific studies upon which he relied in reaching his opinion. ER 703. Here, as defense counsel noted, he was attempting to question Dr. Wollert regarding academic studies that helped him form his opinion on juvenile volitional development. 4/10/12RP at 387.

Dr. Wollert's expert opinion, including references to the fact that this was an area in which he and others had studied and written as opposed to a matter he conceived solely for trial, went to the core of the question whether Ernesto Leyva's volitional capacity predisposed him to sex offending; however, the question for purposes of error is not whether the reviewing court finds the evidence "credible," because it is the function and province of the jury to weigh the evidence, determine the credibility of the witnesses and decide disputed questions. State v. Dietrich, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969). Ernesto's right to present relevant evidence establishing his theory of the defense, so that the trier of fact could decide where the scientific truth lay, was violated.

c. The constitutional error was not harmless. In State v. R.H.S., 94 Wn. App. 844, 974 P.2d 1253 (1999), the defendant

argued that his conviction should be reversed because the trial court erroneously excluded his testimony asserting his absence of the knowledge required for a finding of recklessness. The reviewing court agreed and overturned his conviction because the defendant's testimony was material to the question of recklessness. State v. R.H.S., 94 Wn. App. at 849. As the Court stated,

We must take the testimony to be true and evaluate its likely effect on the outcome of the trial. Because the testimony, if believed, would establish a defense to second degree assault, we are unable to declare that the error is harmless beyond a reasonable doubt.

(Footnotes omitted.) R.H.S., 94 Wn. App. at 848-49 (citing State v. Maupin, 128 Wn.2d at 929-30).

In the present case, because the excluded evidence in this SVP proceeding would, if believed, defeat the State's claim of mental abnormality causing difficulty controlling behavior, it was material and highly probative as to necessary elements of the State's proof. Its exclusion was constitutional error. See also State v. Atsbeha, 142 Wn.2d at 926 (excluding evidence of diminished capacity, which went directly to the question of intent, violated the right to present a defense). Constitutional error requires reversal unless it is proved harmless beyond a reasonable doubt. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988); State v. Guloy, 104 Wn.2d 412, 425, 705

P.2d 1182 (1985). The exclusion of the defense expert's testimony in this SVP proceeding cannot be said to be harmless beyond a reasonable doubt, and the court's ruling requires reversal. R.H.S., at 848-49 (citing State v. Guloy, 104 Wn.2d at 425).

4. THE PREPONDERANCE OF THE EVIDENCE STANDARD OF PROOF IS CONSTITUTIONALLY INADEQUATE FOR SVP COMMITMENT.

Pursuant to statute, Ernesto's SVP commitment verdict was obtained by persuading the jury that Ernesto was "likely" to reoffend sexually. 4/9/12RP at 231, 284 (Dr. Judd's testimony that Ernesto was "likely" to engage in predatory acts, meaning "[m]ore than 50 percent"), 4/11/12RP at 602 (State's closing argument that it proved Ernesto was "likely" to reoffend); see CP 687 (Instruction 4), CP 688 (Instruction 5), CP 691 (Instruction 8, stating that phrase, "Likely to engage in predatory acts of sexual violence" means "that the person more probably than not will engage in such acts").

However, in order to satisfy due process in an involuntary commitment proceeding, the State must prove a person is mentally ill and dangerous by at least clear and convincing evidence. U.S. Const. amend. 5, amend. 14. RCW 71.09.020(7) and (18) violate due process because they allow for commitment based on a mere showing a person will "likely" or "more probably than not" reoffend.

a. Standard of proof. RCW 71.09.060 states that 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). However, this standard has been defined by the Legislature as follows:

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).

This is the preponderance of the evidence standard. Such a standard conflicts with the constitutionally-required standard of proof in SVP 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 instead requires proof of present dangerousness by clear and convincing evidence. Addington, 441

U.S. 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, 739, 513 P.2d 831 (1973).

Thus, civil commitment is unconstitutional absent a finding that it is “highly probable” the person will reoffend. The “more probable than not” standards of RCW 71.09 violate due process. The fact that the SVP 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 lower than the required clear and convincing evidence standard.

b. Recent caselaw mandates a higher standard. Although the Washington Supreme Court rejected this argument in In re Det. of Brooks, that opinion should be reexamined in light of subsequent caselaw. See In re Det. of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001); see also In re Det. of Mulkins, 157 Wn. App. 400, 237 P.3d 342 (2010). 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. Crane, *supra*, 534 U.S. at 413; Thorell, *supra*, 149 Wn.2d at 735. 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 statutes above. *See, e.g., Thorell*, 149 Wn.2d at 742 (“although this evidence need not rise to the level of demonstrating the person is completely unable to control his or her behavior,” the State must prove the person “has serious difficulty controlling behavior”); *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 stating that “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.” *See Thorell*, 149 Wn.2d at 737. The State must “demonstrate the cause and effect relationship between the alleged SVP’s mental disorder and a high probability the individual will commit future acts of violence.” (Emphasis added.) Thorell, at 737.

To pass constitutional muster, the statutes must mandate a showing by clear and convincing evidence that the person will

reoffend if not confined —not a showing that he will probably reoffend, or is “likely” to reoffend, or that there is a more than 50 percent chance that he will reoffend. 4/9/12RP at 231, 284, 4/11/12RP at 602; see Addington, 441 U.S. at 420 (court properly instructed jury it had to find, by clear and convincing evidence, that the defendant required hospitalization for the protection of himself or others -- not that he probably needed hospitalization).

The Legislature has found that as a group, “sex offenders’ likelihood of engaging in repeat acts of predatory sexual violence is high.” RCW 71.09.010. Due process demands that this “highly likely” finding be made on an individual basis, for each person condemned to suffer indefinite confinement. This Court should hold that the “likely” and “more probably than not” standards of RCW 71.09.020(7) and (18) violate Due Process.

5. REVERSAL IS REQUIRED UNDER STATE V. PETRICH WHERE THERE WAS NO UNANIMITY INSTRUCTION AND THE PROSECUTOR DID NOT ELECT AMONG THE MULTIPLE, DISTINGUISHABLE DIAGNOSES OFFERED BY DR. JUDD TO PROVE A “MENTAL ABNORMALITY.”

a. **Respondents have a right to jury unanimity.** A person alleged by the Petitioner State of Washington to be an SVP has a right to a unanimous jury. RCW 71.09.060(1). The unanimity requirements of criminal prosecutions apply to RCW 71.09 jury trials. State v.

Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006). Under those requirements, in order to convict a defendant, the jury must unanimously agree that he is guilty of the charged offense. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). In a multiple acts case where any one of multiple, “distinguishable” factual allegations are offered to procure the verdict, either the State must elect which circumstance constitutes the basis for the charged crime, or the trial court must instruct the jury to agree on the particular facts used to find guilt (which did not occur below). Coleman, 159 Wn.2d at 511, 516.

In this circumstance, a trial court's failure to provide a unanimity instruction violates the defendant's federal and state constitutional rights to jury proof of the charge beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 850 (1990); U.S. Const. amends. 6, 14, Wash. Const. art. I, section 21, section 22. Such an error enables some jurors, presented with several different factual allegations, to rely on different ones to conclude guilt than other jurors, without the jury as a whole agreeing on a particular one which constitutes the alleged conduct beyond a reasonable doubt. State v. Furseth, 156 Wn. App. 516, 520, 233 P.3d 902, review denied, 170 Wn.2d 1007 (2010).

This result is a manifest constitutional error and may be raised for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 912, 214 P.3d 907 (2009); RAP 2.5(a)(3).

On appeal, the absence of both an election and unanimity instruction in Ernesto Leyva's SVP trial is subject to harmless error analysis; however, as a constitutional error, it is presumed prejudicial from the start. State v. Coleman, 159 Wn.2d at 512. A court will find such error harmless only if no rational trier of fact could have entertained a reasonable doubt on any of the factual allegations offered in evidence to procure the verdict. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). Accordingly, for unanimity error to be harmless, the evidence on each fact upon which the jury could have relied must be "uncontroverted." Coleman, at 514.

b. In the absence of an election, Ernesto's right to unanimity was violated, requiring reversal. In Ernesto's SVP trial, although much of the evidence centered on the claimed diagnosis of paraphilia NOS non-consent with pedophilia consideration, the State in fact proffered evidence of two additional, distinguishable mental abnormalities to prove the allegation that Ernesto had a "mental abnormality" causing difficulty of control and predisposition.

In addition to paraphilia NOS non-consent with pedophilia consideration, Dr. Judd also diagnosed Ernesto with the further

paraphilias of Exhibitionism and Frotteurism. Dr. Judd stated at first that he “provisionally” found the paraphilia of exhibitionism, and provisionally found the paraphilia of frotteurism. 4/9/12 at 194, 202-04, 205-06, 216. He described the reports on which he based the exhibitionism paraphilia, noting that there was ambiguity about the duration and intent of Mr. Leyva's behavior. 4/9/12RP at 213-14. However, he ultimately stated that "there was a basis for the diagnosis." 4/9/12RP at 215. Similarly, regarding frotteurism, which is touching and rubbing against another person, Dr. Judd stated he made this diagnosis based on his clinical judgment, primarily on the reports of Ernesto being suspended from school for this conduct. 4/9/12RP at 215-16. Further, Dr. Judd agreed that any of these conditions predisposed Ernesto to the commission of criminal sexual acts, as shown by his continued behavior of assaults and exposing himself, even after receiving sanctions. 4/9/12RP at 227-28.

Then, the AAG, in closing argument, offered up each of the three paraphilic conditions (including paraphilia NOS non-consent with pedophilia consideration) as satisfying the “mental abnormality” requirement. The AAG first posited the mental abnormality of paraphilia NOS non-consent, with the consideration of pedophilia. 4/11/12RP at 593-94. Then, after describing Ernesto's sexual history, including his conduct of coming up behind victims and touching them, and his

conduct of repeatedly exposing himself, the AAG argued that Ernesto also had the paraphilia of frotteurism, and the paraphilia of exhibitionism. 4/11/12RP at 596-99. The AG concluded this portion of argument by telling the jury, "So when you're looking at whether Mr. Leyva has a mental abnormality, the clear answer is he does." 4/11/12RP at 600.

In rebuttal closing argument, the State again relied on the exhibitionism paraphilia, and then the frotteurism paraphilia. 4/11/12RP at 645-46. The AAG urged the jury to understand that Dr. Judd's testimony regarding each of these diagnoses as "provisional" was his way of making clear that he had been very careful in diagnosing these abnormalities. 4/11/12RP at 645-47. Although the State told the jury that it should be clear that the mental abnormality was the particular diagnosis of paraphilia NOS, 4/11/12RP at 646, each of the additional paraphilias were offered to the jury, based on the testimony of the expert, as proof of the essential "mental abnormality." The State did not elect which of the conditions it was asking the jury to find satisfied the mental abnormality requirement, and ultimately the AAG argued that all three did. See State v. Bland, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (closing argument identifying one particular act for the charge supported conclusion that the State adequately made an election).

Notably, here, the AAG expressly argued that Ernesto suffered from “at least one paraphilia, if not more.” 4/11/12RP at 594.

Finally, at a minimum, one of the State’s theories of mental abnormality was controverted, and the unanimity error was therefore not harmless. Dr. Wollert joined the issue in particular on the question of paraphilia NOS non-consent, specifically controverting that diagnosis as medically unjustified because of a lack of diagnostic specificity, as opposed to a general belief that juveniles could not satisfy the SVP criteria. 4/10/12RP at 400-02.

Jurors could have entertained a reasonable doubt as to whether the fact of paraphilia NOS non-consent with pedophilia consideration, one of the three factual claims proffered by the State in satisfaction of the “mental abnormality” means of being an SVP, was proved. See, e.g., Coleman, at 513-14 (where State offered multiple distinguishable facts to prove the charge of molestation, and one witness contradicted another’s that touching occurred during one alleged incident, Petrich was not harmless and required reversal).

c. The Court of Appeals’ previous decisions addressing this issue as raising an improper “means within a means” argument were wrongly decided. The appellant in In re Det. of Sease, 149 Wn. App. 66, 77-78, 201 P.3d 1078, review denied, 166 Wn.2d 1029 (2009), argued that the jury was required to be unanimous as to which illness it

agreed satisfied the “personality disorder” means of SVP status with which he was charged. In re Det. of Sease, 149 Wn. App. at 77. The Court of Appeals first stated that the appellant had not raised an argument that each personality disorder was a distinguishable fact that proved the means of personality disorder. In re Det. of Sease, 149 Wn. App. at 77, n. 13. By that indication, the Court did not address the Petrich argument presented here by Ernesto.

However, the Court then proceeded to address the appellant’s contention, describing it as improperly contending that there is a requirement of proof of “means within a means.” In re Det. of Sease, 149 Wn. App. at 77-78, n. 13. The Court cited In re the Personal Restraint Petition of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988), as standing for the proposition that “where a disputed instruction involves alternatives that may be characterized as a means within a means, the constitutional right to a unanimous jury verdict is not implicated . . .” In re Det. of Sease, at 77 (citing Jeffries, at 339); see also In re Det. of Pouncy, 144 Wn. App. 609, 618-19, 184 P.3d 651 (2008), aff’d, 168 Wn.2d 382, 229 P.3d 678 (2010) (rejecting, in reliance on Jeffries, argument that jury must be unanimous as to whether SVP respondent’s abnormality was paraphilia NOS nonconsent, or pedophilia).

This statement makes sense as applied in Jeffries. There, the statute at issue listed multiple numerically designated alternative means

of committing the crime of aggravated murder. In re Personal Restraint of Jeffries, at 339. The appellant in Jeffries was charged with two of those alternatives, namely:

- (7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;
- (8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person[.]

Jeffries, at 328 (citing RCW 10.95.020). These two alternatives were unquestionably “alternative means.” Jeffries, at 339.

But the appellant in Jeffries attempted to further argue that every phrase within each individual numbered means (for example, in means (7), the murder was committed to conceal a crime, or to protect the identity, or to conceal the identity of a person) were *themselves additional alternatives*. Jeffries, at 339. The Court summarily rejected this contention, and it was in this context that the Court stated that the appellant’s argument regarding the wording of the instruction was an attempt to characterize the charge as alleging means within a means, as to which the unanimity rules on appeal for alternative means should be applied. Jeffries, at 339-40.

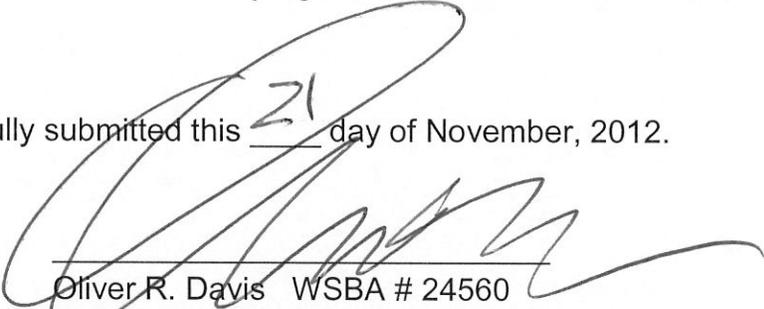
The present case is not analogous. Ernesto is not attempting to sub-divide the mental abnormality means of RCW 71.09 SVP status into further, additional alternative means. The Court of Appeals in Sease

wrongly concluded that it could reject the appellants' arguments regarding Petrich unanimity on the *facts*, if it could characterize the contention as a "*means within a means*" argument, and then it could affirm. That is not what Jeffries, a case that addressed the structure and language of the aggravated murder statute, stands for. Petrich required a unanimity instruction *or* an election requiring the jury to agree on the particular fact that proved the mental abnormality means, and the manifest constitutional error of an absence of both in Ernesto Leyva's SVP trial was not harmless beyond a reasonable doubt. Reversal is required.

E. CONCLUSION

Based on the foregoing, Ernesto Leyva respectfully requests that this Court reverse the RCW 71.09 judgment and commitment order of the trial court.

Respectfully submitted this 21 day of November, 2012.



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