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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:

ALAN MEIRHOFER

IN RE THE DETENTION OF:

ALAN MEIRHOFER

SUPPLEMENTAL BRIEF OF PETITIONER ALAN MEIRHOFER

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 ORIGINAL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES PRESENTED 2

C. STATEMENT OF THE CASE 2

D. ARGUMENT 6

1. Under the Due Process Clause and RCW 71.09.090, Mr. Meirhofer is entitled to a jury trial on the question of whether he continues to meet the criteria for confinement, because the State’s expert found there is no longer sufficient evidence of pedophilia and that actuarial risk assessment tools show Mr. Meirhofer’s likelihood of reoffense is only 20-30%..... 7

 a. The State may not continue to detain a person without trial unless the person still has a mental illness which makes him more likely than not to reoffend..... 7

 b. A trial is required because the State’s own expert found Mr. Meirhofer no longer has pedophilia..... 9

 c. A trial is required because the State’s own expert found that actuarial risk assessment tools show Mr. Meirhofer is only 20-30% likely to reoffend. 15

2. If RCW 71.09.090 is not the appropriate avenue for relief, then this Court should grant Mr. Meirhofer’s PRP. 18

E. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Detention of Ambers, 160 Wn.2d 543, 158 P.3d 1144 (2007) 11

In re Detention of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001) 16

In re Detention of McCuiston, 174 Wn.2d 369, 275 P.3d 1092 (2012),
cert. denied, 133 S.Ct. 1460 (2013)..... 6, 9, 18

In re Detention of Petersen, 145 Wn.2d 789, 42 P.3d 952 (2002) ... 8, 9, 10

In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003)..... 11, 16

In re Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1993) 7, 9, 11

Washington Court of Appeals Decisions

In re Detention of Jacobson, 120 Wn. App. 770, 86 P.3d 1202 (2004) ... 10

United States Supreme Court Decisions

Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437
(1992)..... 8, 14, 17

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) . 10

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501
(1997)..... 7

O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396
(1975)..... 17

Decisions of Other Jurisdictions

Frye v. United States, 54 App. D.C. 46, 293 F.1013 (1923) 11

In re Detention of New, 992 N.E.2d 519 (Ill.App.Ct. 2013)..... 12

Constitutional Provisions

U.S. Const. amend. XIV 7

Statutes

RCW 71.09.020 7, 15
RCW 71.09.060 7
RCW 71.09.070 8
RCW 71.09.090 passim

Rules

RAP 16.4..... 6, 18, 19

A. INTRODUCTION

Alan Meirhofer committed his crimes over 25 years ago. He served all of his prison time for those crimes, and in addition has spent more than 15 years in the “Special Commitment Center” pursuant to RCW ch. 71.09. At his commitment proceedings in 2000, the State’s two experts found that Mr. Meirhofer had pedophilia and that actuarial models showed he was up to 92% likely to reoffend. In recent annual reviews, however, the State’s expert determined that there is no longer sufficient evidence of pedophilia, and that the actuarial models show a likelihood of reoffense between 20% and 30%. The State’s expert believed Mr. Meirhofer should nevertheless continue to be confined based on a new diagnosis of “hebephilia,” and because he had never engaged in treatment. No jury has ever found Mr. Meirhofer met the criteria for commitment based on these reasons.

Under the Due Process Clause and RCW 71.09.090, Mr. Meirhofer is entitled to an evidentiary hearing regarding whether he continues to satisfy the criteria for involuntary commitment. If the statute does not provide the proper vehicle for relief, then a new trial should be granted pursuant to Mr. Meirhofer’s concurrently filed personal restraint petition.

B. ISSUES PRESENTED

1. Whether the State failed to meet its burden under RCW 71.09.090 to show an evidentiary hearing was unwarranted where: (1) the State's expert concluded there was no longer sufficient evidence that Mr. Meirhofer has pedophilia; (2) the State's expert concluded that Mr. Meirhofer's likelihood of reoffense under the actuarial risk assessment tools was no longer above 50% and was instead 20-30%.

2. Whether the Court of Appeals erred and violated Mr. Meirhofer's constitutional right to due process by denying his personal restraint petition where: (1) the State's expert concluded there was no longer sufficient evidence that Mr. Meirhofer has pedophilia; (2) the State's expert concluded that Mr. Meirhofer's likelihood of reoffense under the actuarial risk assessment tools was no longer above 50% and was instead 20-30%; and (3) Mr. Meirhofer's expert agreed he does not have pedophilia and has a likelihood of reoffense well below 50%.

C. STATEMENT OF THE CASE

Based on two events that occurred in 1986 and 1987, Alan Meirhofer pleaded guilty to one count of burglary, one count of assault, one count of rape, and one count of kidnapping. *In re Meirhofer*, 2001 WL 1643535 at *1 (unpublished; citing for facts). After Mr. Meirhofer served a nine-year prison sentence for the crimes, the State petitioned for

his commitment as a “sexually violent predator” (“SVP”) under RCW ch. 71.09. *Id.* at *2.

For the commitment trial, the State hired two psychology experts to evaluate Mr. Meirhofer, both of whom diagnosed him with pedophilia. Appendix A at 9-12.¹ The experts assessed Mr. Meirhofer’s risk using several actuarial tools. Based on these tools, the State’s experts predicted that Mr. Meirhofer was 52% - 92% likely to reoffend if not confined. Appendix A at 10-12.

Mr. Meirhofer was committed on May 22, 2000. Appendix B at 1. In subsequent annual reviews, the State’s experts concluded he continued to have pedophilia and continued to have a high risk of reoffense. Appendix B at 20.

In his 2010 and 2011 annual reviews, however, the State’s expert did not diagnose Mr. Meirhofer with pedophilia. Recognizing that Mr. Meirhofer had been diagnosed with pedophilia in the past, the expert said, “I do not think there is sufficient evidence to warrant a pedophilia

¹ Appendices A through K are attached to Mr. Meirhofer’s original Motion for Discretionary Review and PRP, both filed in the Court of Appeals June 15, 2012. Appendices L, M, and O are attached to the consolidated reply, filed in the Court of Appeals October 17, 2012. A “Supplemental Appendix” is attached to this brief.

diagnosis.” Appendix B at 12. The expert instead diagnosed Mr. Meirhofer with “hebephilia.”² Appendix B at 11, 12; Appendix G at 10.

As for likelihood of reoffense, the State’s expert assessed Mr. Meirhofer’s risk using an actuarial tool and concluded that his statistical likelihood of reoffense had dropped significantly since his original commitment. The expert concluded Mr. Meirhofer was now only 20% likely to reoffend within five years and 30% likely to reoffend within 10 years. Appendix B at 13; Appendix G at 12.

Nevertheless, based on the facts underlying Mr. Meirhofer’s 1986 and 1987 offenses and the fact that he did not participate in treatment, the psychologist opined Mr. Meirhofer still “meets the definition of a sexually violent predator.” Appendix B at 13-15; Appendix G at 14.

Mr. Meirhofer moved for an evidentiary hearing. Appendix C. He noted that a new trial was required because even the *State’s* expert found his actuarial risk assessment was now well below 50%, and Mr. Meirhofer’s own expert agreed. In fact, one actuarial assessment showed Mr. Meirhofer had only an 8% risk of reoffending within five years.

² Like the State’s experts in the original commitment trial, the expert in 2010 also concluded Mr. Meirhofer has personality disorder not otherwise specified with antisocial traits. Appendix A at 10, 12; Appendix B at 11. He also concluded, consistent with *one* of the two original State’s experts, that Mr. Meirhofer has “paraphilia, not otherwise specified, nonconsent.” App. B at 11.

Appendix C at 3, 13; Appendix D at 20-28. Mr. Meirhofer's expert also concluded he did not have pedophilia, and diagnosed him only with alcohol and amphetamine dependence (remission in controlled environment) and personality disorder not otherwise specified with antisocial traits. Appendix C at 3; Appendix D at 20. The expert also cited numerous authorities demonstrating that the State's new hebephilia diagnosis was an invalid diagnosis and was not accepted in the relevant scientific community. Appendix C at 17; Appendix D at 17-20. The trial court nevertheless denied Mr. Meirhofer's motion for a trial. Appendix I.

In the Court of Appeals, Mr. Meirhofer moved for discretionary review of the order denying an evidentiary hearing on the issue of whether he continues to have a mental abnormality that makes it more likely than not he will sexually reoffend if not confined to a secure facility. Mr. Meirhofer also filed a personal restraint petition ("PRP") seeking a new trial because the State's evidence showed he was no longer both mentally ill and dangerous, and no jury had ever committed Mr. Meirhofer based on the State's new diagnosis and significantly different risk assessment. Mr. Meirhofer filed the PRP in an abundance of caution because this Court's decision in *McCuiston* indicated that a PRP might be the proper procedural avenue for relief rather than a motion for discretionary review under RCW 71.09.090. *See In re Detention of McCuiston*, 174 Wn.2d

369, 275 P.3d 1092 (2012), *cert. denied*, 133 S.Ct. 1460 (2013). The Court of Appeals granted a motion to consolidate the PRP with the motion for discretionary review.

A panel of the Court of Appeals denied both the motion for discretionary review and the PRP. As to the former, it held the State met its burden to make a prima facie showing that Mr. Meirhofer continued to be an SVP notwithstanding the changes in both diagnosis and actuarial risk assessment, because Mr. Meirhofer did not engage in treatment. Slip Op. at 5-6. As to the latter, it held that a civil commitment detainee may *never* challenge the constitutionality of his continued confinement through a PRP; but only through the annual review process. Slip Op. at 7-10.

D. ARGUMENT.

The Court of Appeals erred in two respects. First, regardless of whether a detainee has engaged in treatment, the State bears the burden of showing he continues to be mentally ill and more likely than not to reoffend. Absent such a showing, a new trial is required under RCW 71.09.090. Second, RAP 16.4 provides that a PRP is an appropriate avenue for challenging the constitutionality of confinement, whether criminal or civil. Here, whether RCW 71.09.090 or a PRP is the proper vehicle for relief, due process demands a full trial in light of the drastic change in both diagnosis and risk assessment

1. Under the Due Process Clause and RCW 71.09.090, Mr. Meirhofer is entitled to a jury trial on the question of whether he continues to meet the criteria for confinement, because the State's expert found there is no longer sufficient evidence of pedophilia and that actuarial risk assessment tools show Mr. Meirhofer's likelihood of reoffense is only 20-30%.

a. The State may not continue to detain a person without trial unless the person still has a mental illness which makes him more likely than not to reoffend.

In Washington, a person who has served all of his prison time for a crime may nevertheless be confined in a "civil" commitment center following his term of criminal incarceration. RCW ch. 71.09. However, because civil commitment is a "massive curtailment of liberty," strict due process protections apply. U.S. Const. amend. XIV; *In re Detention of Young*, 122 Wn.2d 1, 62, 857 P.2d 989 (1993). In order to commit a person, the State must prove beyond a reasonable doubt to a jury that the individual has a mental abnormality or personality disorder that makes it more likely than not that the person will reoffend if not confined. RCW 71.09.060; RCW 71.09.020(18). Stated differently, the government must prove the person is both mentally ill and dangerous before confining him against his will. *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

Because the length of confinement is indefinite, periodic review is also constitutionally required. *Jones v. United States*, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 3043 (1984). The State violates due process when it continues to confine a person who is no longer both mentally ill and dangerous. *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (reversing where individual remained dangerous but no longer suffered from psychosis).

Washington's statute complies with due process by guaranteeing involuntarily committed individuals the right to periodic judicial review. To begin with, each person is entitled to an annual examination by a State's expert to determine whether he remains mentally ill and dangerous. RCW 71.09.070. Each individual also has the right to an annual show cause hearing at which the court decides whether the person is entitled to a full jury trial on whether he continues to meet the criteria for commitment. RCW 71.09.090. The State bears the burden of proof at the show cause hearing. *In re Detention of Petersen*, 145 Wn.2d 789, 796, 42 P.3d 952 (2002).

A trial must be granted if either (1) the State fails to present prima facie evidence that the committed person continues to meet the criteria for commitment, or (2) the committed person shows probable cause exists to believe that his condition has so changed that he no longer meets the

criteria. RCW 71.09.090(2)(c). Although a detained person is limited to showing change through treatment or incapacitation, a new trial is required regardless of treatment or physical condition if the State fails to meet its prima facie burden to show the detainee continues to meet the criteria for confinement. *McCuiston*, 174 Wn.2d at 380, 381.

This Court reviews a trial court's decision following a show cause hearing *de novo*. *Petersen*, 145 Wn.2d at 799.

b. A trial is required because the State's own expert found Mr. Meirhofer no longer has pedophilia.

Here, the State failed to meet its burden *both* as to the mental illness prong and as to the dangerousness prong, and either shortcoming alone would require a new trial.

As to the mental abnormality prong, the State's expert found that there is no longer sufficient evidence that Mr. Meirhofer has pedophilia. Pedophilia was the primary diagnosis at Mr. Meirhofer's original commitment trial; it was the only Axis I mental abnormality that both State's experts agreed existed. Appendix A at 9-12; Appendix B at 20. But in every annual review starting in 2010, the State's expert opined that Mr. Meirhofer instead has paraphilia NOS "hebephilia." Appendix B at 11, 12; Appendix G at 10. Because commitment must be "tailored to the nature and duration of *the* mental illness," *Young*, 122 Wn.2d at 39, this

change in diagnosis renders Mr. Meirhofer's continued confinement without trial unconstitutional.

The Court of Appeals did not address the change in diagnosis *at all*, affirming simply because the State's expert reached a legal conclusion that Mr. Meirhofer is still an SVP. Slip Op. at 5-6. But a court must "look beyond an expert's stated conclusion to determine whether it is supported by sufficient facts." *In re Detention of Jacobson*, 120 Wn. App. 770, 780, 86 P.3d 1202 (2004). There must be a "substantial basis for determining the existence of probable cause," and the judge's action "cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *see Petersen*, 145 Wn.2d at 797-98 (explaining that "prima facie" and "probable cause" standards are equivalent and that Fourth Amendment cases provide guidance on the meaning of the standard).

The objective facts in this case do not support the trial court's ruling, because the State's expert admits there is no longer sufficient evidence of pedophilia and has instead diagnosed Mr. Meirhofer with hebephilia. The State claims that the change in diagnosis is irrelevant because it is merely a "relabeling."³ This is incorrect; nobody changed the

³Actually, the State's primary strategy has been to remind courts that Mr. Meirhofer committed heinous crimes over 25 years ago. *See*

name of “pedophilia” to “hebephilia.” Pedophilia still exists as a mental abnormality, but Mr. Meirhofer does not have it. Hebephilia describes different symptoms and, unlike the pedophilia diagnosis, the hebephilia diagnosis – as the State admits – is “controversial.” Answer (Court of Appeals) at 26.

Indeed, the trial court should not have considered this new diagnosis at all because it fails the *Frye* standard of admissibility. *See In re Detention of Ambers*, 160 Wn.2d 543, 553 n.5, 158 P.3d 1144 (2007) (citing *Frye v. United States*, 54 App. D.C. 46, 293 F.1013 (1923)). Under *Frye*, a scientific theory must have “achieved general acceptance in the relevant scientific community” to be admitted into evidence. *In re Detention of Thorell*, 149 Wn.2d 724, 754, 72 P.3d 708 (2003).

Mr. Meirhofer presented evidence from the authoritative source – the editors of the DSM-IV-TR – explaining that hebephilia is *not* a generally accepted mental disorder. Appendix J at 78-85.⁴ Hebephilia means “attraction to pubescent individuals” and is “far too widespread” to be a paraphilia. Appendix J at 80. Adults who rape teenagers are

Answer (Court of Appeals) at 2-7. But “[t]he sexually violent predator statute is not concerned with the criminal culpability of petitioners’ past actions.” *Young*, 122 Wn.2d at 21. Mr. Meirhofer served his prison sentence for these crimes. The State must demonstrate that he *currently* has a mental abnormality that makes him more likely than not to reoffend.

⁴ It was also subsequently rejected by the authors of the DSM-V.

criminals, but an attraction to teenagers is not a mental illness. Appendix J at 80.

It is fallacious to assert that having urges involving pubescent youngsters is sufficient for a diagnosis of a mental disorder. Having such urges is normal; acting on them is a serious crime, not a mental disorder.

Appendix J at 84. “Hebephilia is not a legitimate DSM-IV-TR mental disorder.” *Id.* Its use in the correctional system “represents a misuse of the diagnostic system and of psychiatry.” *Id.*

The Illinois Court of Appeals accordingly reversed a commitment order where the trial court had denied the detainee’s motion for a *Frye* hearing on the admissibility of a hebephilia diagnosis. *In re Detention of New*, 992 N.E.2d 519 (Ill.App.Ct. 2013). As in Mr. Meirhofer’s case, the detainee pointed out that hebephilia “is not a generally accepted diagnosis, unlike pedophilia, where a person is sexually attracted to children who have not reached puberty.” *Id.* at 526. Adult male attraction to adolescent children is common, unlike the paraphilias not otherwise specified which are listed in the DSM. *Id.* at 528.

The Illinois court noted, “The purpose of a *Frye* hearing is to safeguard the court’s truth-finding role, ensuring that the fact finder cannot make findings based on unsound science.” *New*, 992 N.E.2d at 529 (citation omitted).

The issue here is the validity of the mental disorder. Unless established, we expose the justice system to avenues of future regret, whereby a so-called mental disorder that has not reached, and may never reach, a critical mass of general acceptance yet forms the basis of an individual's loss of liberty. A *Frye* hearing was meant to preclude this kind of "junk science."

Id.

Thus, the trial court here erred in finding the State satisfied its burden based on a "hebephilia" diagnosis which lacks general acceptance in the relevant scientific community. Indeed, other Washington courts have excluded evidence of hebephilia at RCW 71.09 commitment trials following *Frye* hearings. *See, e.g., In re Detention of Black*, King County Superior Court no. 11-2-36238-8 SEA, Findings of Fact and Conclusions of Law on *Frye* and ER 702/703 (Filed November 18, 2013).⁵

At worst, even if a court were to find the hebephilia diagnosis admissible under *Frye*, a jury must have the opportunity to weigh experts' competing claims as to its validity. Mr. Meirhofer has never had the opportunity for a *Frye* hearing and no jury has ever weighed expert testimony on this topic because Mr. Meirhofer was committed based on pedophilia – a diagnosis the State admits is no longer supported by sufficient evidence.

⁵ For the Court's convenience, the order is attached to this document as "Supplemental Appendix."

The State urges this Court to disregard the deletion of the pedophilia diagnosis and to affirm Mr. Meirhofer's commitment without trial regardless of the invalidity of "hebephilia" as a mental disorder. The State claims this would be proper because of Mr. Meirhofer's secondary diagnoses. Mr. Meirhofer has always had an axis II diagnosis of "personality disorder not otherwise specified with antisocial traits." Appendix G at 10, 19. Also, *one* of the State's two experts at the original trial diagnosed him with "paraphilia not otherwise specified, nonconsent," and the current expert believes Mr. Meirhofer has this condition. Appendix A at 9-12; Appendix G at 10.

But again, no jury has ever committed Mr. Meirhofer on this basis. If the State had submitted special verdict forms at the commitment trial whereby the jury indicated its unanimous agreement that each mental disorder constituted an independent basis for commitment, then the State's claim might have merit. But Mr. Meirhofer was committed based on a bundle of alleged disorders, the most serious of which was pedophilia. The State cannot eliminate this disorder yet claim continued commitment without trial is proper just because one State's employee thinks Mr. Meirhofer meets the definition of an SVP based on a new diagnosis. *See Foucha*, 504 U.S. at 78 (State sought to perpetuate Foucha's confinement based on antisocial personality disorder which rendered him dangerous,

even though original basis for commitment was drug-induced psychosis. Court stated continued confinement would be improper “absent a determination in civil commitment proceedings of current mental illness and dangerousness.”). For this reason alone, this Court should hold that Mr. Meirhofer’s commitment may not continue without an evidentiary hearing.

- c. A trial is required because the State’s own expert found that actuarial risk assessment tools show Mr. Meirhofer is only 20-30% likely to reoffend.

Another independent basis for reversal is that the State’s expert (and Mr. Meirhofer’s expert) found that Mr. Meirhofer’s likelihood of reoffense has plummeted according to the actuarial tools. The State’s expert found that the actuarial risk assessment tool placed Mr. Meirhofer at a 20% likelihood of reoffense within 5 years and a 30% likelihood of reoffense within 10 years. Appendix G at 12. In contrast, at the time of Mr. Meirhofer’s original commitment trial, he was assessed as being 52-92% likely to reoffend. Appendix A at 11-12.

A person is not a “sexually violent predator” unless he has a mental abnormality or personality disorder that makes him *more likely than not* to reoffend if not confined. RCW 71.09.020 (7), (18). In other words, there must be a greater than 50% likelihood of reoffense. *In re Detention of Brooks*, 145 Wn.2d 275, 295-96, 36 P.3d 1034 (2001),

overruled on other grounds by Thorell, 149 Wn.2d at 753. “The fact to be proved with respect to the SVP statute is expressed in terms of a statistical probability.” *Brooks*, 145 Wn.2d at 296. The question is “not whether the defendant will reoffend, but whether the probability of the defendant’s reoffending exceeds 50 percent.” *Id.* at 298.

In making this determination, actuarial models “are more reliable than clinical judgment.” *Thorell*, 149 Wn.2d at 757. The probative value of actuarial assessments is “high” and “directly relevant” to whether an individual meets the definition of “sexually violent predator”. *Id.* at 758.

Under both the State’s actuarial assessment and Mr. Meirhofer’s actuarial assessment, Mr. Meirhofer’s statistical likelihood of reoffense is well below 50 percent. Appendix B at 13; Appendix C at 3, 13; Appendix D at 20-28; Appendix G at 12. The State’s expert claimed he is nevertheless more likely than not to reoffend based on clinical judgment (“dynamic risk factors”). But contrary to the required showing of *current* dangerousness, the clinical judgment consists primarily of a description of Mr. Meirhofer’s crimes from 1986 and 1987. Appendix G at 12-13.⁶ The

⁶ The State provides no citation to the record for its erroneous claim that Mr. Meirhofer has a “continued interest in violent sexual offending against young boys.” Answer at 14. The closest it comes is a citation in the Statement of the Case to page 2 of the 2011 annual review, in which an evaluator states that many years ago Mr. Meirhofer told a

only other factors cited are (1) his refusal to engage in treatment, and (2) his own assessment that he is not a risk to reoffend. *Id.* But treatment apparently would have been for the wrong disorder anyway, since he does not have pedophilia after all. And as to his own belief that he will not reoffend, presumably if he believed he *was* a high risk to reoffend, that would be held against him as well. No matter what he says about his risk to reoffend, the State will use it to show he has a high risk to reoffend.

The Court of Appeals rubber-stamped the State's expert's opinion notwithstanding the actuarial results. Slip Op. at 5-6.⁷ But given the evidence that Mr. Meirhofer no longer has pedophilia and is no longer more than 50% likely to reoffend, his continued confinement is unconstitutional absent a full trial on the merits. *See Foucha*, 504 U.S. at 77; *Jones*, 463 U.S. at 368; *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) ("even if [a detainee's] involuntary confinement was initially permissible, it could not constitutionally continue after *that basis* no longer existed").

different evaluator that he "fantasized" about his crime. The statement at page 14 of the Answer should be stricken.

⁷ The Court of Appeals also endorsed Mr. Meirhofer's continued confinement based on his "lack of honesty" regarding "a number of unproved child rape accusations." Slip Op. at 6. In other words, the court assumes he committed these offenses that he was not convicted of committing, and then holds his assertion of innocence against him. It should go without saying that this assumption of guilt is improper in a system predicated on even a shred of due process.

Mr. Meirhofer's case is significantly different from *McCuiston*. There, the State's expert who performed the annual review concluded the detainee continued to have pedophilia and continued to score highly on risk assessment instruments. 174 Wn.2d at 375-76. The detainee's only argument for relief was that his own expert claimed he had never qualified as a sexually violent predator in the first place. *Id.* at 376. This Court held the annual review process was not an appropriate avenue for rearguing the original commitment, for which *McCuiston* had already had a full trial on the merits. *Id.* at 386 n.6. But in Mr. Meirhofer's case, the State's expert concluded that both the diagnosis and risk assessment *had* changed significantly since the original commitment. Mr. Meirhofer is not attacking his original commitment, but his continued confinement. Thus, the Court of Appeals erred in ruling the State met its burden to show Mr. Meirhofer's continued commitment absent trial was proper.

2. If RCW 71.09.090 is not the appropriate avenue for relief, then this Court should grant Mr. Meirhofer's PRP.

If the Court of Appeals was correct in concluding relief is unavailable through RCW 71.09.090, relief must be available through Mr. Meirhofer's concurrently filed personal restraint petition. A PRP should be granted if the petitioner is under "restraint" and the restraint is unlawful. RAP 16.4(a). A petitioner is under restraint if, like Mr.

Meirhofer, he is “confined”. RAP 16.4(b). The restraint is unlawful if, inter alia:

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government ...

RAP 16.4(c).

The restraint here is unlawful under both subsections (2) and (3) of RAP 16.4(c) because new evidence shows the basis for Mr. Meirhofer’s original commitment no longer exists and his continuing confinement is unconstitutional absent a jury trial on the issue of whether the State’s new alleged bases for confinement are sufficient.

The Court of Appeals ruled a civil-commitment detainee may *never* seek relief through a PRP unless he is challenging his *original* commitment. Slip Op. at 7-10. Under the Court of Appeals’ decision, a detainee who is no longer both mentally ill and dangerous but who cannot seek relief through RCW ch. 71.09 because the change occurred for reasons other than treatment simply has *no avenue for relief*. Slip Op. at 8. This ruling is unconstitutional and conflicts with RAP 16.4.

Furthermore, it is not altogether clear whether the State's expert found that Mr. Meirhofer's condition changed or found that he never had pedophilia to begin with. *See* Appendix G at 10-11. Even under the Court of Appeals' opinion, if the latter is the case, then the PRP is the appropriate avenue through which to grant a new trial.

In the end, regardless of whether the PRP or RCW 71.09.090 is the appropriate vehicle, due process dictates the result. The State may not, consistent with the Constitution, change the basis of an individual's confinement unilaterally. There must be a *jury* finding that the new basis for commitment has been proved. This Court should reverse and remand for a commitment trial.

E. CONCLUSION

Because the State's own expert has found that both the psychological diagnosis and risk assessments on which Mr. Meirhofer's original commitment was based are no longer valid, his continued confinement without trial is unconstitutional. Mr. Meirhofer respectfully requests that this Court remand for a jury trial.

Respectfully submitted this 17th day of March, 2013.

s/ Lila J. Silverstein
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SUPPLEMENTAL APPENDIX

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KING COUNTY, WASHINGTON

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MARK BLACK,

Defendant.

No. 11-2-36238-8 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON FRYE
AND ER 702/703

The court, having considered the testimony of Dr. Karen Franklin, the briefing of the parties and the arguments of counsel, now make the following findings of fact and conclusions of law on Respondent's motion to suppress the diagnosis of Hebephilia pursuant to Frye and ER 702 and 703:

FINDINGS OF FACT

I.

Dr. Karen Franklin has expertise in the area of Hebephilia literature and the debate surrounding its diagnosis in the psychological community.

The subject of Hebephilia diagnosis and ^{contro versus} ~~conflict~~ surrounding psychologist making such a diagnosis did not fully begin in the United States until the early 2000's.

Hebephilia is not a paraphilic diagnosis in the DSM IV.

The term "Hebephilia" is not favored in the relevant scientific community as a diagnosis because of a variety of imprecisions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON FRYE AND ER 702/703

ORIGINAL

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1 An example of the imprecision that a Hebephilia diagnosis presents is illustrated in by the
2 CAMH study cited by Dr. Franklin.

3 Dr. Franklin testified that one of the reasons Hebephilia is not an acceptable diagnosis is
4 because the behavior encompassing Hebephilia can often be explained by other societal and
5 sociological factors other than mental illness.

6 Dr. Franklin testified that there is insufficient testing, re-testing and peer reviewed
7 journals that support Hebephilia being an accepted diagnosis in the psychological community.

8 Hebephilia does not have a generally accepted accurate vocabulary making the diagnosis
9 one that is accepted in the psychological community.

10 There is no set standard or good literature to assist the psychological community to ~~assist~~
11 the psychological community with how to diagnose Hebephilia. *testing*

12 An example of the conflict in the literature that discusses Hebephilia is the inconsistency
13 in the age range of children that the diagnosis would cover and the varying physical
14 characteristics of pubescent aged children. *(i.e. 13-17 years old)*

15 Dr. Arnold did not diagnose Mark Black with Hebephilia.

16 Dr. Arnold diagnosed Mark Black with Paraphilia NOS, persistent sexual interest in
17 pubescent aged females, non-exclusive. *Mr. Black has been convicted of
18 crimes against 12 and 13 year old girls. He also had victims
19 without charges
20 being filed.*

21 Dr. Arnold's diagnosis of Paraphilia NOS is a permissible diagnosis.

22 Dr. Arnold may testify to his methodology and reasons he diagnosed Mark Black with
23 Paraphilia NOS because he used a set of standards and materials that people within that
24 professional community reasonably and regularly rely on to support his diagnosis.

25 Dr. Arnold made his diagnosis of Paraphilia NOS ~~persistent~~ based on a set of commonly
26 accepted standards in the psychological community.

27 It is recognized in the DSM IV, that sexually arousing fantasies, urges, or behaviors
28 involving sexual activity with a prepubescent child (typically age 13 or younger) is a paraphilic
29 condition. This paraphilia is known as pedophilia.

30 And having made those Findings of Fact, the Court also now enters the following:

31 CONCLUSIONS OF LAW

32 I.

33 The above-entitled court has jurisdiction of the subject matter and of the respondent in
34 the above-entitled cause.

35 FINDINGS OF FACT AND CONCLUSIONS OF LAW
36 ON FRYE AND ER 702/703-2

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II.

Hebephilia is not a generally accepted diagnosis in the psychological community.

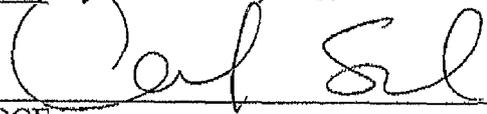
The diagnosis of Paraphilia NOS is generally accepted in the psychological community.

Dr. Arnold's methodology in diagnosing Mark Black with Paraphilia NOS is generally accepted in the psychological community and meets the standard set forth in Frye v. U. S., 293, F. 1013 (1923).

Dr. Arnold's testimony and opinion regarding his diagnosis of Paraphilia NOS will assist the trier of fact as set forth in ER 702 in determining whether Mark Black is a sexually violent predator.

Dr. Arnold's testimony and opinion regarding his diagnosis of Paraphilia NOS is based on evidence that is reasonably relied upon by experts in the field of psychology as set forth in ER 703.

DONE IN OPEN COURT this 15th day of November, 2013.



JUDGE

JUDGE CAROL SCHAPIRA

Presented by:



Julie D. Cook, WSBA# 28271
Alison Bogar, WSBA# 30380
Senior Deputy Prosecuting Attorneys

 persistent sexual interest
in pubescent aged females,
non exclusive
CIAs

Approved for entry, objections noted on the record
Devon Gibbs, WSBA#
Jacklynn Zorich, WSBA#
Attorneys for Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON FRYE AND ER 702/703- 3

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF)
)
)
ALAN MEIRHOFER)
)
_____)
IN RE THE DETENTION OF)
)
)
ALAN MEIRHOFER)
)
_____)

NO. 89251-2

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 17TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> SARAH SAPPINGTON, AAG	<input type="checkbox"/> U.S. MAIL
[sarahs@atg.wa.gov]	<input type="checkbox"/> HAND DELIVERY
OFFICE OF THE ATTORNEY GENERAL	<input checked="" type="checkbox"/> E-MAIL
800 FIFTH AVENUE, SUITE 2000	
SEATTLE, WA 98104-3188	

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF MARCH, 2014.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Subject: RE: 892512-MEIRHOFER-BRIEF

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Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Petitioner

Lila J. Silverstein - WSBA #38394
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By

Maria Arranza Riley

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