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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 28167-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of:

ROLANDO REYES,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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Attorney General

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II. ISSUES PRESENTED

A. Where, With The Knowledge Of The Court And Defense Counsel And Without The Knowledge Of The Prosecutor, The Court Held A Hearing On The Purely Legal Question Of Whether Reyes' Case Should Be Dismissed For Lack Of Jurisdiction, Does Article I, Sec. 10 Require Reversal And A New Trial?

B. Was There Sufficient Evidence To Establish That Reyes Is A Sexually Violent Predator?

III. STATEMENT OF THE CASE

The State accepts Reyes' statement of facts except as otherwise noted.

On May 22, 2009, the trial court heard argument on Reyes' "Motion to Dismiss Jurisdiction." CP at 58-78. The motion had been noted by Reyes' (then) Guardian ad Litem,[1] Robert Thompson, roughly five weeks earlier. Supp. CP at 337 (Note for Motion Docket, filed April 14, 2009). The Note to Motion Docket indicates that the hearing is a special setting before the Honorable Craig Matheson, that it will be "brought on for hearing upon the 22nd day of May, 2009, in the above-entitled Court at the hour of 9:00 a.m." and requests that the clerk of the court note the hearing on the motion docket. *Id.* Briefs in support of the motion were all filed in the legal file, which is not sealed. CP at 58-78; Supp. CP at 312-36

[1] Mr. Thompson, prior to trial, was "converted" to co-counsel for Reyes, and served in that capacity at trial. 5/22/09 RP at 24-25.

(Petitioner's Response to Respondent's Motion to Dismiss, filed March 29, 2009)

On the morning of the hearing, the parties convened. The record indicates that Mr. Thompson, Carl Sonderman, counsel for Reyes, and Jana Franklin, counsel for the State, were all present. RP at 2. The hearing began with Mr. Thompson asking the court whether those present could go on the record. *Id.* He then introduced the case. While the verbatim record of proceedings indicates that the matter was "heard in chambers with Ms. Franklin appearing by telephonic means" (RP at 2), there was no mention of the fact that the hearing was in chambers, and there is nothing in the record to indicate or indeed even suggest that the State's counsel was aware that the hearing was not in open court.

Three matters were discussed at the hearing: Case scheduling (RP at 2-3; 17-21), Mr. Thompson's status as GAL on the case (*Id.* at 3-8) and Mr. Thompson's motion to dismiss. *Id.* at 8-17. The motion to dismiss was based on another sex predator case, *In re Martin,* 163 Wn. 2d 501, 182 P.2d 951 (2008). In *Martin*, the Washington State Supreme Court held that, where the SVP respondent's only sexually violent offenses[2] had occurred

[2] The sex predator statute defines "sexually violent" offenses in RCW 71.09.020(17). Reyes' convictions for Rape of a Child First Degree in Franklin County and Residential Burglary in Benton County both constitute "sexually violent" offenses under that section; Communication with a Minor for Immoral Purposes, while a sexual offense, does not.

outside of Washington State, the Office of the Attorney did not have authority to file sex predator proceedings in Thurston County. Reyes argued that *Martin* mandated dismissal of his case in that his most recent sexual offense, a 2002 conviction for Communication with a Minor for Immoral Purposes, had occurred in Pierce County. CP at 59-63. As such, Reyes argued that the Department of Corrections should have "consulted" Pierce County prior to referring the case for consideration under the SVP statute, and also suggested that Benton County may not, under the procedures used, have jurisdiction to file the case. CP at 59-63. The State responded by observing that *Martin* was distinguishable on its face, in that, unlike the appellant in *Martin*, Reyes had two sexually violent offenses in Washington State, the most recent of which had occurred in Benton County. Supp. CP at 314 (Response at 3). The trial court summarily denied the motion, commenting that it did not believe that jurisdiction was a "big issue here." RP at 16. The transcript of the entire hearing is less than 21 pages.

IV. ARGUMENT

Reyes makes two arguments on appeal, both of which lack merit. First, there was no violation of the constitutional requirement of an open proceeding where the matter before the trial court involved only uncontested ministerial or purely legal issues. Second, there was more than sufficient evidence presented at trial for a finding that Reyes is a sexually

violent predator. This Court should deny Reyes' appeal and affirm his civil commitment as a sexually violent predator.

A. The Public's Right To Open Justice Was Not Violated By The Procedure Utilized

Reyes argues that Article I, Section 10 of the Washington Constitution, which requires that justice "in all cases shall be administered openly," mandates reversal in this case. His claim should be rejected. First, Reyes has no standing to raise the public's right to open proceedings under Art. 1, Section 10. Second, while Reyes is correct that the public's right to the open administration of justice is constitutionally protected, this has never been interpreted as mandating reversal in a civil case where the public is inadvertently excluded from a discussion of purely legal or uncontested ministerial matters and where neither the public nor the press was subsequently denied access to any information elicited at the hearing.

Even if an Art. 1, Section 10 violation technically occurred, reversal is not required. Rather, the case should be remanded with instructions to the trial court to file a transcript of the May 22 hearing. In the alternative, this Court could remand for an open re-hearing on that issue. Because this hearing involved no evidentiary issues and had absolutely no effect on the ultimate trial, there is no reason for retrial. Remand for filing of the transcript or re-hearing on this discreet issue will protect any interest the

public has in open proceedings, and will avoid pointless re-litigation of this matter.

1. Standard Of Review

Whether the right to a public trial has been violated is a question of law subject to de novo review. *State v. Bone-Club,* 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

2. Reyes Has No Standing To Object To The In-Chambers Hearing

Art. 1, Section 10 provides that "[j]ustice in all cases shall be administered openly." The Sixth Amendment to the United States Constitution and Art. 1, Section 22 of the Washington State Constitution guarantee a criminal defendant the right to a "public trial by an impartial jury." These provisions both protect the right to a public proceeding.

Because this is a civil, rather than criminal proceeding, Reyes does not attempt to argue that his rights to a public trial under Art. 1, Section 22 have been violated. Rather, Reyes attempts to obtain a new trial by arguing that the public's right to open justice under Art. 1, Section 10 was violated by the fact that his motion to dismiss was held in chambers, rather than in open court. Reyes lacks standing to raise this issue, and as such his argument must be rejected.

"[A] plaintiff may only raise the rights of another person when '(1) the party asserting the rights has suffered an injury in fact, giving him a

sufficiently concrete interest in the outcome of the litigation, (2) there is a sufficiently close relationship between the litigant and the person whose rights are being asserted so that the litigant will be an effective proponent of the rights being litigated, and (3) there is some hindrance to the third party's ability to protect his own interests.'" *State v. Wise*, 148 Wn. App. 425, 442, 200 P.3d 266 (2009) (citing *United States v. De Gross,* 960 F.2d 1433, 1437 (9th Cir., 1992) (citing *Powers v. Ohio,* 499 U.S. 400, 409-13, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). Wise, a defendant in a criminal case, argued that his rights to a public trial under Art. 1, Section 10[3] had been violated when the trial court conducted portions of voir dire in the trial judge's chambers without first conducting a *Bone-Club* analysis. In rejecting Wise's Section 10 claim, the court noted that Wise did not point to any injury caused by the alleged violation, and that he was not barred from attending the juror questioning. As such, he did not have a "sufficiently close relationship" to the public's open trial right to create standing. *Wise,* 148 Wn. App. at 442-43.

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[3] Wise also claimed a violation of his public trial right under Section 22. Article 1, Section 22 provides, in relevant part:"In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases..."

In rejecting Wise's argument, the court noted that this standing requirement serves important functions. It ensures that parties with actual and substantial interests in the issue are before the court, and thus guarantees that the parties will be motivated and appropriately situated to fully and factually articulate those interests. *Id.* at 442. By contrast, allowing a party to raise the constitutional interests of those who are not parties to the case and have not sought to participate in the case, invites the court to resolve important legal issues on the basis of speculative uninformed claims, and in that respect diminishes the court's ability to fully analyze and resolve the issue. The general prohibition against standing to raise the rights of third parties "'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,' and it assures the court that the issues before it will be concrete and sharply presented." *Sec'y of State of Maryland v. Munson,* 467 U.S. 947, 955, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984) (quoting *United States v. Raines,* 362 U.S. 17, 22, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (footnote and citation omitted).

While some appellate courts have found that a criminal defendant may have standing to raise a Section 10 claim,[4] none of these cases involve, as here, an after-the-fact attempt by the losing party to reverse the result in a civil trial based on the public's exclusion from a hearing on a purely legal or ministerial matter which he himself did not bother to attend. Instead, all have involved voir dire, a process which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" *In re Pers. Restraint of Orange,* 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting *Press-Enter. Co. v. Superior Court,* 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). As such, the public policy considerations underlying those courts' standing decisions simply are not presented in this case.

Indeed, this case presents a good example of why the Court should not reach a constitutional claim raised on behalf of third parties. Reyes has not and cannot present a claim of harm to himself based on the fact that his motion was heard in chambers. Moreover, there is no evidence that the State's attorney was even aware that the hearing was being conducted in chambers, the arrangement apparently having been reached by agreement between Reyes' counsel and the trial court. Thus, the in-chambers hearing

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[4]*See, e.g. State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007); *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007); *State v. Erikson*, 146 Wn. App. 200,189 P.3d 245 (2008).

raises no possibility of an alleged injury to *his* rights under Art. 1, Section 10.

Nor is there reason to believe that, having foregone the opportunity to open his own proceedings—indeed, having failed to even notify the State that this proceeding was being held in chambers—Reyes is appropriately situated to advocate the alleged rights of third parties to have such proceedings open. Indeed, one can only assume that he preferred to have the hearing closed, or, at a minimum, had no interest in have the proceeding opened. That circumstance certainly would suggest that Reyes is not an appropriate advocate for parties who might wish to have such proceedings open to the public. Reyes otherwise claims no close relationship with the third parties whose rights he would assert and no hindrance to the ability of those parties to assert their own rights should they choose to do so. *Wise,* 148 Wn. App. at 443; *see also Kowalski v. Tesmer*, 543 U.S. 125, 128-29, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004) (exception to general prohibition on third-party standing requires showing that party asserting the right has a close relationship with the person who possesses the right, and the possessor's ability to protect his interests is hindered). Nor has Reyes offered a concrete example of the interests of third parties or explained why those interests cannot be accommodated by a remedy short of reversal of the trial court's order of commitment.

Deciding whether the in-chambers hearing procedure comports with Art. 1, Section 10 without the benefit of hearing from third parties whose rights it allegedly infringes would place the Court in the awkward position of speculating on whether the public has a substantial interest in attending such a hearing, and what interests the public might have in such a proceeding. The Court should hold that Reyes lacks standing to challenge the constitutionality of the in-chambers and reject his argument.

3. Even Assuming This Court Considers His Argument, There was No Violation of the Constitutional Requirement of an Open Proceeding

Even if this Court determines that Reyes has standing to raise the public's right to be present at his motion, his argument fails. Because the issues considered at the May 22 hearing were either purely legal or uncontested ministerial matters and did not dispose of the case on its merits, the case does not fall within the "open justice" mandate of the state constitution.

While the public's constitutional right to the open administration of justice under Art. 1, Section 10 has been applied to various aspects of civil trials, the courts, in conducting that analysis, have focused on whether the proceedings or materials sought to be opened are "central to the court's decision making process." *Dreiling v. Jain*, 151 Wn.2d 900, 910, 93 P.3d 861 (2004). Thus where a matter involves testimony and is adjudicated on

its merits, the proceedings are subject to Section 10. *Cohen v. Everett City Counsel*, 85 Wn.2d 385, 535 P.2d 801(1975). Likewise, the courts have held that Art. 1, Section 10 mandates application of the factors identified in *Seattle Times Co. v. Ishikawa,* 97 Wn.2d 30, 640 P.2d 716 (1982) where a party seeks to prevent release of documents filed in support of a party's motion to terminate a shareholder derivative lawsuit, noting that such a motion, like a motion for summary judgment "effectively adjudicates the substantive rights of the parties." *Dreiling* 151 Wn.2d at 910.[5]

This does not mean, however, that all aspects of all proceedings are subject to Section 10 requirements. While under Section 10, "a strong presumption exists that courts are to be open at all trial stages" (*State v. Momah,* 167 Wn.2d 140, 148, 217 P.3d 321 (2009)), our State Supreme Court has declined to read these requirements in absolute terms, noting that "a literal interpretation of Section 10 would wreak havoc with established judicial practices in that it would allow public access to all phases of the administration of justice, including chambers conferences, plea bargaining and settlement conferences, adoption proceedings...and appellate court conferences." *Federated Publications, Inc. v. Kurtz,* 94 Wn.2d 51, 60, n.3, 615 P.2d 440 (1980).

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[5] *See also Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 541-42, 114 P.3d 1182 (2005)(sealing of pre-trial, trial and deposition materials and transcripts); *Building Industry Association of Washington v. McCarthy,* 152 Wn. App. 720, 218 P.3d 196 (2009) (materials attached to summary judgment motion).

Moreover, it is clear that, had this been a criminal proceeding, Reyes would have had no right to attend the motion hearing and could not have succeeded in arguing that his rights to a public trial under Section 22 were violated. "The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial, thus 'a defendant has a right to an open court whenever evidence is taken, during a suppression hearing...during voir dire,' and during jury selection process." *State v. Sadler*, 147 Wn. App. 97, 115, 193 P.3d 1108 (2008), citing *State v. Riviera,* 108 Wn. App. 645, 32 P.3d 292 (2001). The defendant's Art. 1, Section 22 public trial right "applies to the evidentiary phases of the trial, and to other 'adversary proceedings.'" *Riviera* 108 Wn. App. at 653 (quoting *Ayala v. Speckard,* 131 F.3d 62, 69 (2nd Cir. 1997). A defendant has the right to be present at proceedings where his or her presence has a reasonably substantial relation "'to the fulness of his opportunity to defend against the charge....'" *State v. Pirtle*, 136 Wn.2d 467, 483-84, 965 P.2d 593 (1998) citing *State v. Lord,* 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

Because the criminal defendant's public trial rights under Art.1, Section 22 are related to this "fulness of opportunity" to defend against the charge, the appellate courts of this state have consistently rejected claims of violation to a criminal defendant's Art. 1, Section 22 public trial rights where the matter under consideration involved "ministerial" or purely legal

matters. A criminal defendant's right to public trial is not violated, for example, by in-chambers discussions relating to jury instructions and ministerial matters such as jury sequestration. *Pirtle*, 136 Wn.2d at 483-84. Nor is a criminal defendant's right to public trial violated when the trial court bars the public from the courtroom during discussions dealing confidentially with a juror's complaint regarding a fellow juror's lack of personal hygiene. *Riviera* at 653. Likewise, the defendant's public trial right is not violated by a trial court's conference with counsel on how to resolve a purely legal question which the jury submitted during its deliberations. *State v. Sublett,* ___ Wn. App. ___, 231 P.3d 231, 243 (2010). As the Washington State Supreme Court has noted, "...a trivial closure does not necessarily violate a defendant's public trial right." *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

The in-chambers hearing of Reyes' motion to dismiss was precisely such a trivial "closure." The issues considered were either purely legal in nature (the motion to dismiss based on jurisdictional grounds) or uncontested ministerial matters (case scheduling and the status of the GAL) and had nothing to do with the ultimate resolution of any of the factual issues resolved against him at trial. Nor did the motion hearing bear in any way on the issue of whether Reyes received a fair trial on the ultimate issue of his status as an SVP. Indeed, he does not allege that any aspect of the

proceedings was unfair, nor does he suggest that the fact that the hearing occurred in chambers had any effect on the outcome of either the motion or the trial. Rather, he simply seeks, post-hoc, to take advantage of a closure that his own attorneys at a minimum knew about and perhaps even requested, and where the State had no reason to suspect that the matter was not in open court. This Court should reject his argument.

4. None Of The Cases Cited By Reyes Mandate Reversal

Reyes cites to a variety of cases in which reversal was mandated due to violation of a criminal defendant's public trial rights under the Washington State Constitution, arguing that the same result is required here. In making his argument, however, Reyes fails to distinguish between the criminal defendant's public trial rights under Art. 1, Section 22, and the public's right to a public trial under Art. 1, Section 10. Ultimately, Reyes fails to identify a single civil case which has been reversed on the basis of an Art. 1, Section 10 violation, such as that claimed here.

All of the cases cited by Reyes are criminal cases that deal, broadly speaking, with one of two factual contexts: jury selection[6] or closure during

[6] *State v. Brightman,* 155 Wn.2d 506, 122 P.3d 150 (2005) (jury selection); *In re Pers. Restraint of Orange,* 152 Wn. 2d 795, 100 P.3d 291(2005) (closure of voir dire to family members and public); *State v. Erickson, supra* (questioning of prospective jurors in chambers without first applying *Bone Club* factors; *State v. Duckett, supra* (questioning of several venire members in jury room) and *State v. Frawley, supra* (trial court's private portion of jury selection).

an evidentiary portion of a criminal trial.[7] This is, of course, a civil proceeding, and neither voir dire nor an evidentiary hearing is implicated here. Moreover, none of the cases to which Reyes cites were based, as is his own claim, on Art. 1, Section 10 alone: *Brightman, Orange,* and *Bone Club* were all (criminal) cases in which a violation of the defendant's rights under Section 22 was alleged. Although *Easterling, Erikson, Duckett,* and *Frawley* all involved allegations of a violation of Art. 1, Section 10, this argument appeared alongside an Art. 1, Section 22 argument. In other words, notwithstanding Reyes' broad claim that "the solid basis in civil precedent supporting *Bone Club* and its progeny cannot be seriously disputed" (App. Br. at 39[8]), Reyes fails to identify a single civil case in which the case is reversed after trial on the basis of a Section 10 violation alone, or where the alleged violation concerns purely legal or ministerial matters, as was the case here.

5. Even If There Was A Constitutional Violation, The Remedy Is Not Reversal

Even if Reyes' constitutional rights were violated by the in-chambers hearing, reversal would not be an appropriate remedy. First, as noted, the issues addressed at the hearing were entirely legal or ministerial in nature.

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[7] (*State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006) (closure of co-defendant's severance hearing); *State v. Bone Club, supra* (closure of pretrial suppression hearing during testimony of undercover police officer).

[8] All citations to Appellant's Brief are to Appellant's Second Amended Brief, filed on or about June 16, 2010.

There is absolutely no evidence, nor even any argument, that the fact that the hearing was held in chambers affected the ultimate outcome of the trial, or in any way rendered the ultimate trial less fair. As such, it would be absurd to reverse the commitment order and require a new trial. Rather, any constitutional violation can be easily remedied in one of two ways: This Court could remand to the superior court with instructions to file a complete 21-page transcript of the May 22 hearing. *See e.g. Ishikawa* (court orders unsealing of records of pre-trial motion to dismiss after trial). In this way, the public's access to the proceedings will be assured. In the alternative, this Court could remand for a new hearing on the motion to dismiss, which hearing would be held in open court.

B. Substantial Evidence was Presented At Trial to Support a Finding that Reyes is a Sexually Violent Predator

Reyes argues that there was insufficient evidence to support the court's finding that Reyes in an SVP because Dr. Tucker erred in diagnosing Reyes with Pedophilia. Reyes' argument clearly ignores the evidence presented at trial, and his argument fails.

1. Standard of Review

A Sexually Violent Predator is an individual "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(16).

The quantum of evidence in SVP commitment hearing should be examined under a criminal standard. *In re the Detention of Thorell,* 149 Wn.2d 724, 743, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.,* 149 Wn.2d at 744. This court must look at the evidence in the light most favorable to the State and determine whether any trier of fact could, based on that evidence, determine that he met SVP criteria. When examining a claim that a verdict in an SVP case was based upon insufficient evidence, the court must determine whether the evidence, "viewed in a light most favorable to the State, is sufficient to persuade a fair minded rational person that the State has proven beyond a reasonable doubt that [Respondent] is a sexually violent predator." *Id.*

2. The State Presented Sufficient Evidence that Reyes Suffers From Pedophilia

Reyes asserts that Dr. Tucker, a highly qualified and experienced clinical and forensic psychiatrist, erred in diagnosing him with Pedophilia. The evidence presented at trial, however, was more than sufficient to support this diagnosis.

Dr. Tucker provided ample evidence to the court that Reyes, in addition to suffering from Frotteurism and Exhibitionism, suffers from Pedophilia, a mental abnormality under RCW 71.09.020(8). RP at 61-68, 122. A "mental abnormality" is defined as "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). Dr. Tucker opined that it was the combination of Reyes' Pedophilia, Frotteurism and Exhibitionism, as well as his personality disorder, that qualified him for civil commitment. RP at 79-80; 122-23.

Reyes now argues that there was insufficient evidence to support the Pedophilia diagnosis, arguing that Dr. Tucker's diagnosis was incorrect because it was based on behavior alone. App. Br. at 44. This argument lacks merit for two reasons. First, even if Dr. Tucker had made the diagnosis of Pedophilia on the basis of behavior alone—which he did not—this would not invalidate his diagnosis. The DSM has allowed for behavior alone to satisfy diagnostic criteria for Pedophilia since at least 1994, four years after the passage of RCW 71.09. RP at 498-500. In 2000, the DSM underwent an additional text revision, bringing about the current version, the DSM-IV-TR (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, (4th ed. Text Revision 2000)). In

the current version, the "or behaviors" language has been retained, allowing for a diagnosis of Pedophilia based upon ones prior behavior alone. *Id.*

Nor is Reyes correct when he argues that there was insufficient evidence that Reyes suffered from fantasies or urges regarding sex with children. App. Br. at 46-48. Reyes, Dr. Tucker noted, "has never been forthcoming about thoughts or fantasies." RP at 62. As such, "we don't get a lot of information directly from Mr. Reyes about his fantasy life and his urges." *Id.* Dr. Tucker noted, however, that Reyes had admitted to sexual urges towards his nine-year old victim. *Id.* In addition, Dr. Tucker also considered the nature of his 1997 assault of the two boys, ages eight and nine:

> ...the fact that at age 14 he molested a nine-year-old and eight-year-old boy, substantial molestation, not just a brushing with his hand but oral sex, had both boys orally copulate him, masturbated the nine-year-old and attempted to orally copulate the boys and have anal sex with them, and this is all at a level of invasiveness that takes us out of the realm of, you know, maybe this is mild; maybe this isn't arousal. You know, the fact that he had an erection throughout all of this is pretty convincing that he was sexually aroused...

Id. at 61-62. This assault, considered in light of his behavior at age 17 toward the two girls, aged nine and five, "relatives of his who he was fondling and rubbing this erect penis against the behind and so on" persuaded Dr. Tucker that Reyes experienced intense, recurrent urges or fantasies over a period greater than six months. *Id.* at 62.

Reyes also argues that the court's findings fail "to make a direct link between the diagnosed mental abnormalities and personality disorder and difficulty in controlling behavior." App. Br. at 49. Reyes does not, however, cite authority for the proposition that such a finding is required, and indeed it is not. Our State Supreme Court has specifically held that, while a determination that a sex predator has serious difficulty controlling dangerous, sexually predatory behavior is required under *Kansas v. Crane,* 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002), a separate finding to that effect is not. *Thorell,* 149 Wn.2d at 735. A lack of control determination may be included in the finding of mental abnormality. *Thorell* at 735, citing *Crane*, 534 U.S. at 413. "What is critical...is the existence of 'some proof' that the diagnosed mental abnormality has an impact on offenders' ability to control their behavior....[I]f the existence of this link is challenged on appeal, this case specific approach requires the reviewing court to analyze the evidence and determine whether sufficient evidence exists to establish a serious lack of control..." *Thorell* at 736.

Dr. Tucker determined, using the diagnostic criteria in the DSM-IV-TR that Reyes suffered not only from Pedophilia, but from Frotteurism and Exhibitionism as well. RP at 61-68. Reyes, he testified, is "essentially disabled" by these "catastrophic" sexual disorders. RP at 61. These disorders, as well as his personality disorder, cause Reyes to have serious

difficulty controlling his sexually violent behavior. All of his diagnosed disorders—the three paraphilias, the personality disorder, his cognitive impairment, his attention deficit disorder, and his substance abuse,

> affect his emotional responsivity to victims." So to the extent that he actually would hear it and have a bad feeling because these kids are crying while he's making them suck his penis, he doesn't make that emotional connection. He doesn't care. ...And I think it's a result of these various disorders which comprise his mental abnormality. And likewise the volitional impairment. He is not able to inhibit his impulses adequately...[W]hen it comes to sexual behavior even with a certainty of being caught and punished for his behavior, he continues to do this behavior repeatedly, including rape, including rape of another inmate. So even up to the most severe level, and I think that's a clear result of these disorders...

RP at 79-80. While incarcerated, Reyes has "repeatedly demonstrated failure to inhibit or control his inappropriate sexual behavior, including predatory grabbing and actual anal rape of another male inmate...There's literally dozens of entries relating to these behaviors." *Id.* at 84. Reyes has engaged in "very severely recidivistic sexual offending," which Dr. Tucker as described as "very unusual." *Id.* at 85.

> Often even severe sex offenders with problems with behavioral control can avoid actually committing sex offense while they're caught, and in Mr. Reyes' case he's not able to control himself even enough to avoid offending, even when there's a certainty of his being caught and caught repeatedly...And even despite various sanctions and punishments and efforts by staff to work therapeutically with him or give him negative feedback or understanding and discussion, nothing has worked....So this to me as a clinician and a forensic evaluator, this is a very impressive list of

> nonstop sexual recidivism of a serious nature, even in the institutional setting, which is usually where most people can hold it together and not reoffend. Even if they are having urges and fantasies to do it, they don't act on it.

Id. at 85-87.

The trial court heard from Reyes' expert, Dr. Halon, who made the same argument that Reyes now makes: that Reyes does not suffer from Pedophilia or any other mental abnormality. RP at 386-87.[9] Although Dr. Halon provided testimony contrary to that of Dr. Tucker, the court was entitled to give more weight to the testimony of Dr. Tucker's than to that of Dr. Halon. *In re Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.2d 714 (2006). In reviewing a record for substantial evidence, this Court should not second guess the credibility determinations of the finder of fact. *Id.*, 156 Wn.2d at 811. As Dr. Tucker is a qualified mental health expert and his testimony was based upon facts amply supported in the record, the trial court was entitled to give his opinion great weight. The trial court heard more than enough evidence to support its decision that Reyes suffers from the mental abnormality of Pedophilia. Since there was substantial evidence supporting the court's findings, Reyes' arguments should be rejected.

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[9] Reyes asserts that the court failed to view the videotaped deposition of Dr. Halon. App. Br. at 18, FN 4. This is incorrect. Dr. Halon's deposition was taken telephonically and not videotaped. CP 181-278.

V. CONCLUSION

For the foregoing reasons, the State requests that this Court reject Reyes' arguments and affirm his civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 3rd day of August, 2010.

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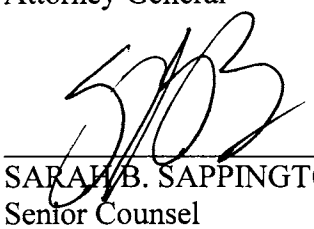

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