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NO. 63268-0-I

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

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In re the Commitment of James Taylor

STATE OF WASHINGTON,

Respondent,

v.

JAMES TAYLOR

Appellant.

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

The Honorable Michael T. Downes, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant's conviction for third degree child molestation constituted a "recent overt act."

2. Insufficient evidence supported the State's claim that appellant was a pedophile.

3. The trial court erred in admitting evidence of "relative risk" as applied to appellant.

4. The trial court erred by allowing hearsay evidence to be used to impeach the defense experts.

5. The trial court erred in defining the "beyond a reasonable doubt" standard. CP 17 (Instruction 5).

6. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

Appellant was nearing completion of his sentence for third degree child molestation. Prior to his release, however, the State petitioned for his indefinite commitment under Chapter 71.09 RCW, claiming that he suffered from pedophilia and his crime of incarceration constituted a "recent overt act."

1. A "recent overt act" is an act that "an objective person knowing the factual circumstances of the [actor's] history and mental condition would have a reasonable apprehension that the [actor's] act

would cause harm of a sexually violent nature.” Appellant had previously molested his younger siblings, but the offense for which he was incarcerated involved sexual contact with a physically mature, sophisticated 15 year-old when appellant was 19, and all the experts agreed that this contact was not pedophilic. Did the court err in finding an objective person would have a reasonable apprehension this offense “would cause harm of a sexually violent nature?”

2. “Substantial evidence” must support the pedophilia diagnosis for appellant's commitment to stand. The diagnosis requires that the appellant: 1) have recurrent, intense sexual urges toward prepubescent children, age 13 or younger; 2) either act on those urges or else experience marked emotional distress or interpersonal difficulty thereby; and 3) be at least 16 years old, and at least 5 years older than the child or children referenced in the first criterion. Here, appellant molested his younger siblings and cousins, but such molestation ended before appellant was 16. The State's expert admitted she found no evidence appellant had sexual contact with anyone prepubescent and five years younger than himself after he turned 16, and the only evidence of sexual urges towards those younger than himself came from a penile plethysmograph (PPG), where the appellant briefly had 8-17% sexual arousal to a picture of a child 0-3 years of age, arousal that did not match his offense pattern. Moreover, the

only evidence of emotional distress or interpersonal difficulty was appellant's incarceration and social alienation, which occurred due to acts that were not pedophilic. Without proof of any sexual activity meeting the age criteria, with no showing of interpersonal difficulty stemming from pedophilic activity, and with only a weak PPG showing evidence of any fantasies of children, must the pedophilia diagnosis fail?

3. Over a defense objection, the State's expert testified variously that appellant tested into the highest 96.6 to 99.9 percentile of sex offenders taking the Static-99 and the Static-2002. These numbers were much higher than appellant's actual likelihood of reoffense under the same tests. In closing, the State discussed the high, relative risk numbers and then explained "These tools all measure risk of being rearrested, recharged, reconvicted...." Did the court err in admitting these misleading statistics over defense objection?

4. Hearsay statements by non-testifying experts are only admissible to explain the basis of an expert's opinion, and questions to an expert witness are not to be used as a vehicle to admit a non-testifying witness's hearsay opinions. Over a defense objection, the State cross-examined both defense experts by reading lengthy opinions from reports by non-testifying experts and then asking the defense experts, "Does it say that?" Was this use of hearsay impermissible?

5. Over a defense objection, the trial court instructed the jury using the “beyond a reasonable doubt” definition used for criminal trials. This instruction ends with the sentence, “If you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” Was the use of this instruction in a non-criminal case, where there was no “charge” other than appellant’s prior convictions, error?

6. The use of misleading statistics, use of inadmissible hearsay in expert testimony, and the erroneous instruction to the jury all impaired appellant's constitutional right to a fair trial. Even if these do not individually require a new trial, do they together constitute prejudicial cumulative error?

B. STATEMENT OF THE CASE

1. Procedural History

On November 13, 2006, the State filed a petition against appellant James Taylor seeking his involuntary and indefinite commitment under Chapter 71.09 RCW. CP 145-203. Taylor was then in prison for a 2002 conviction for Third Degree Child Molestation (CM3). CP 146.

Prior to trial, Taylor filed a motion to dismiss for lack of a recent overt act (ROA), because CM3 is not on the list of “sexually violent

offenses.” CP 93-101; RCW 71.09.020(17); 1RP 3.<sup>1</sup> After argument, the trial court found Taylor’s CM3 conviction constituted a ROA. CP 102-03; 1RP 3-22, 34-38.

Taylor’s commitment trial began March 9, 2009. 1RP. Taylor and two counselors testified by deposition. 2RP \_\_;<sup>2</sup> Ex. 12, 13, 15, 16, 18, and 19.<sup>3</sup> On March 26, 2009, the jury found the State had proved the criteria necessary to indefinitely commit Taylor. CP 7-9; 7RP 596-97. Taylor appeals. CP 3-6.

2. Substantive Facts

a. Childhood and Initial Charges.

Taylor molested most of his younger siblings, beginning when he was 10 and largely ending when he was removed from the home at 14. 3RP 208. The molestation was all nominally consensual, but involved siblings as young as 4.

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<sup>1</sup> The report of proceedings are cited as follows: 1RP – March 9 and 16, 2009; 2RP – March 18, 2009; 3RP – March 19, 2009; 4RP – March 20 and 23 (am), 2009; 5RP – March 23, 2009 (pm); 6RP – March 24, 2009; and 7RP – March 25 and 26, 2009. Note that several non-consecutive transcripts are nonetheless consecutively numbered (1RP, 3RP, 4RP, and 7RP).

<sup>2</sup> The transcript for March 18, 2009 - the first day of testimony - has been ordered, but not yet received. Nearly all the deposition testimony was played for the jury on this date.

<sup>3</sup> Although the transcripts (Ex. 12, 15, and 18) appear to be accurate transcriptions of the DVD’s (Ex. 13, 16, and 19), the track order of the DVD’s does not match the order in the transcripts. To avoid confusion, the transcripts will be cited to exclusively, as they are chronologically correct and pages of the transcript can be more specifically cited than entire tracks.

Even the State's experts described Taylor's childhood in terms like "dysfunctional," "chaotic," "unique," and "disturbing." 3RP 164-65, 223-24, 226, 228. Taylor was the oldest of eight children.<sup>4</sup> 3RP 226; Ex. 12 (p.3); Ex. 15 (p.11). His family lived in a single-wide trailer on a small farm in Sultan, Washington. 3RP 224; Ex 12 (p.6). All the witnesses agreed the family was very isolated. 3RP 169, 224; 5RP 6; Ex. 15 (p. 4, 13).

Taylor's father worked as a prison guard and was frequently absent from the home for work, on errands, and spending time with friends. 3RP 226-27. Taylor's father was apparently the only family member who regularly left the farm. 3RP 227.

Taylor's mother was described as "closed, distant, and checked-out." Ex. 15 (p.10); 3RP 165. Taylor's mother was supposed to home school him and her other children, but she became angry with Taylor for his lack of progress, beat him a few times, and then "gave up on him." 3RP 169-70, 224, 233; 5RP 6; Ex. 15 (p.10-11). Taylor's mother was harsh in other disciplinary techniques, sometimes locking him into a wooden box and limiting his food and water. 3RP 228.

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<sup>4</sup> Taylor's siblings consisted of: brother Donovan (about a year and a half younger); sister Deborah (4 years younger); sister Kathleen (6 years younger); sister Jennifer (7 years younger); sister Colleen (8 years younger); brother Christopher (10 years younger); and brother Kenneth (12 years younger). Ex. 12 (p.3).

Taylor's mother taught him to cook for his siblings and had him largely take responsibility for their education and discipline. 3RP 170, 226; 5RP 6. For many years, she withdrew to her room, frequently reading or laying in bed all day, leaving Taylor in charge. 3RP 166, 226; Ex. 15 (p.11).<sup>5</sup> Once the family acquired internet service, she often arose, went to the computer, and remained on it playing online fantasy games until nighttime, leaving the children entirely unsupervised by adults. 3RP 140-41, 166, 226, 228; Ex. 15 (p.11, 13).<sup>6</sup>

At the age of 6 or 8, Taylor was molested by a teenage female cousin. 3RP 140-41; 6RP 162-63; Ex. 12, (p.4), Ex. 15 (p.11). At the cousin's instigation, they engaged in oral sex and fondling. Ex. 12 (p.4). Taylor reported that he "kind-of enjoyed" the contact. Ex. 12 (p.4-5). The molestation happened a "few times," perhaps three or four. Ex. 12 (p.5).

According to two psychologists, Taylor was distressed by a lack of attachment to his mother and compensated by becoming overly emotionally attached to Deborah, the oldest of his sisters. 5RP 6-7; Ex. 15 (p.14-15). The emotional attachment eventually became molestation,

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<sup>5</sup> Although it did not come up at trial, responding social workers found the farm "filthy," with the "counter and floor space covered with food and clothes." The house smelled of old food and dirty diapers; dirty diapers were stacked outside on the porch; there were chickens wandering in and out of the house; and the children were ungroomed. CP 177 (pg. 14 of Dr. Longwell's initial report).

<sup>6</sup> Although the family described itself as Pentecostal, Taylor's mother also apparently took pictures of herself naked and posted them on the internet, and Taylor found the hard copies of the pictures at some point. 3RP 165-66; Ex. 12 (p.15).

actions Taylor interpreted at the time as expressing affection for Deborah. 5RP 6-7; 6RP 163. The State's expert opined that Taylor would have believed sexual behavior was "normal" because of his own molestation, and his family's isolation meant he was not taught about concepts like "good touch" and "bad touch" at school. 3RP 225-26.

In any case, when he was 10 and she 6, Taylor first asked Deborah if he could touch her. Ex. 12 (p.5). As he had learned from his older cousin, he touched Deborah over her clothes in the genital and breast area. Ex. 12 (p.5). A few months later, he asked to do the same thing while Deborah's clothes were off. Ex. 12 (p.5).

Later, when Taylor was 11 or 12 and Deborah was 8, they engaged in a nominally consensual arrangement where they would engage in oral sex and fondling. Ex. 12 (p.6). Taylor eventually asked Deborah if they could try some of the activities pictured in a pornographic magazine he found. Ex. 12 (p.7). He then began sometimes rubbing his penis on Deborah's vaginal area. Ex. 12 (p.7). He attempted to enter her, but was initially unsuccessful. Ex. 12 (p.7). Taylor and Deborah did begin having intercourse later, when Taylor was a teenager. 3RP 137; Ex. 28 (p.1).

When he was about 12, Taylor apparently took Deborah and his brother Donovan into a room and had Deborah undress. 3RP 137; Ex. 12 (p. 11, 12); Ex. 28 (p.4). Taylor then pointed out parts of Deborah's body

to Donovan and explained their names and uses. 3RP 137; Ex. 28 (p.4). After that, Donovan also engaged in a nominally consensual relationship with Deborah. 3RP 137. Taylor and Donovan also had occasional sexual interactions by mutually masturbating each other. Ex. 12 (p.11). On a few occasions, Taylor, Deborah, and Donovan all sexually played together in a group. Ex. 12 (p.11).

Taylor had sexual contact with his sister Kathleen when he was 11 or 12, and she 6. 3RP 138-39; Ex. 12 (p.8); Ex. 28 (p.2). They also engaged in a nominally consensual sexual relationship. Roughly twice a week for a year, Taylor and Kathleen would touch each other or Taylor would perform oral sex on Kathleen, or Taylor would rub his penis on Kathleen's vaginal area. Ex. 12 (p.8). He tried to put his penis in Kathleen, but "he didn't fit," so he stopped. 3RP 138-39; Ex. 12 (p.9).

Taylor initiated sexual contact with his sister Jennifer when she was about 5 and he 13. 3RP 139-40. He performed the same acts as he did with Kathleen, but claimed he only did so once a week or every other week for three or four months, as Jennifer did not excite him the way Deborah did. 3RP 139-40; Ex. 12 (p.10).

When Taylor was 14 and his sister Colleen was 4 or 5, she came into a room where he and Deborah were touching or having sex. Ex. 12 (p.10). Colleen asked what they were doing, and Taylor explained he was

touching Deborah. Ex. 12 (p.10-11). Taylor offered to touch Colleen, too, and Colleen came over and stood next to him. Ex. 12 (p.10-11). Taylor performed the same acts on Colleen as he did with Kathleen and Jennifer, but claimed he only did so perhaps a dozen times because like Jennifer, Colleen did not really excite him. 3RP 138-39; Ex. 12 (p.10-11).

When Taylor was 14, he initiated contact with his brother Christopher, then 4. 3RP 140; Ex. 12 (p.12). Taylor said that he was in charge of potty-training Christopher and would then play with Christopher's penis or give him oral sex. Ex. 12 (p. 12). Taylor only had "a few" contacts with Christopher because Christopher did not excite him. Ex. 12 (p.12). Taylor never offended against his youngest brother, Kenneth. Ex. 12 (p.12-13).

Taylor also molested three male cousins, on one occasion each. Ex. 12 (p.13); Ex. 18 (p.2-3, 6). All of these contacts happened when Taylor was 12. Ex. 18 (p.3, 6). One of the boys was 9. 4RP 382. Taylor and the cousin were supposed to be napping on a bed when Taylor unzipped the boy's pants and started playing with the boy's penis. 4RP 382. When the boy asked Taylor what he was doing, Taylor stopped. 4RP 382.

The other cousins were twins and 5 at the time. Ex. 12 (p.14). In each case, Taylor invited the boys into his room in order to "show them

something.” 4RP 382-83. At his instigation, they engaged in oral sex and mutual masturbation. Ex. 12 (p.13-14); 4RP 383.

Deborah was Taylor’s favorite sexual partner. Taylor believed he was in love with Deborah, and wanted to marry her. Ex. 15 (p.6, 8, 14); 3RP 172; 5RP 9-10; 6RP 59. Taylor and Deborah had sexual contact hundreds or thousands of times. 3RP 137; Ex. 18 (p.11); Ex. 28 (p.1).<sup>7</sup>

None of the children complained to their parents or other adults about Taylor’s molestation. Taylor’s mother caught him and Deborah together on several occasions. 3RP 142, 209-10, 227; Ex. 15 (p.10). Each time, he was beaten severely, but the sex would continue once supervision was loosened again. 3RP 142, 227; 6RP 5-6, 197-98; Ex. 15 (p. 10, 15). When Taylor was 15, his father intercepted a letter from Deborah offering to have sex with Taylor thirty times in exchange for him doing her chores around the farm. 3RP 210; Ex. 12 (p.14).

At this point, his parents contacted therapist Dr. Gary Smith, a certified treatment provider for sex offenders. 3RP 210, 231; Ex. 12 (p.14); Ex. 15 (p.2-3, 10). Dr. Smith warned Taylor’s parents he would be obligated to report Taylor’s acts to the police, and he gave them the option of voluntarily disclosing them instead. 3RP 210, 231; Ex. 12 (p.14); Ex.

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<sup>7</sup> When, shortly before being ejected from the family home, Taylor began reducing his sexual contact with Deborah, Deborah began initiating more sexual contact with Donovan. 5RP 7-9.

15 (p.3, 10). Taylor's parents then contacted the police. 3RP 210, 231; Ex. 15 (p.3, 10).

Taylor was immediately removed from the home and went to live with his grandmother. 3RP 169, 231; Ex. 12 (p.14); Ex. 15 (p.4). For the first time, Taylor attended public school – a high school. 3RP 161, 231. Dr. Smith described Taylor as a “very socially...uncomfortable and awkward,” having never had friends outside his own family. 3RP 164; Ex. 15 (p.4). In public school, teachers reported he had “no contact” with other students, although according to the only witness testifying to his schoolwork, he performed well and learned quickly when he applied himself. 3RP 161-62, 231, 234.

Certified Sex Offender Treatment Provider Scott Zankman performed a Specialized Sex Offender Diversion (SSODA) evaluation on Taylor and opined that Taylor's treatment in the community would be safe as long as he had no contact with his siblings. 3RP 133-35, 149-50; Ex. 15 (p.16). By agreement, Taylor pled guilty to one count of first degree rape of a child, in reference to Deborah, and one count of first degree child molestation, in reference to Kathleen, and was sentenced under a SSODA option. 3RP 208; 5RP 41, 43; Ex. 1-4; Ex. 12 (p.14).

b. Time in SSODA, at Youth Camp, and Indecent Exposure Charges

Unfortunately, Taylor did not complete the SSODA. He was, however, in therapy with Dr. Smith for about a year and a half, including six months on the SSODA. Ex. 12 (p.15); Ex. 15 (p. 5, 9, 12).

Dr. Smith testified that Taylor made some progress in therapy. Ex. 15 (p.13). For example, Taylor initially blamed his mother for some of his offenses. Ex. 15 (p.4, 13). But by the end of therapy with Dr. Smith, Taylor began to understand the molestation was his own decision. Ex. 15 (p.13).

Taylor also soon recognized he had victimized his siblings and expressed sincere remorse for those actions. Ex. 15 (p.11-12, 14). Seeing Deborah as a victim, however, was difficult for Taylor, as he viewed her more as a willing participant. Ex. 15 (p.14-15). Dr. Smith testified that Taylor continued to be convinced he was in love with Deborah. Ex. 15 (p.6, 8, 14).<sup>8</sup>

Dr. Smith said Taylor could be “hard to connect with,” and sometimes made “halfhearted” effort in his group sessions, but Taylor was also “cooperative” and “engaged” in treatment. Ex. 15 (p. 4-5, 11). Taylor was “socially awkward,” but not disruptive and seemed to be trying

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<sup>8</sup> During his therapy with Dr. Smith, Taylor apparently continued some sexual contact with Deborah when he would go home to visit his family. 3RP 232.

to be honest about his offenses. Ex. 15 (p. 12, 14). Dr. Smith also noted Taylor was “never aggressive.” Ex. 15 (p.11-12).

While in high school and treatment, Taylor was also working as a janitor at an internet service provider in Sultan. Ex. 12 (p.3). Taylor was curious about pornography and used the numbers from checks belonging to his mother and his employer to access internet pornography. 3RP 232; 4RP 433-34; Ex. 12 (p.4, 15); Ex. 15 (p.7-8, 10). Taylor only accessed adult pornography, not child pornography. 3RP 232; 4RP 434; 5RP 10-11.

Dr. Smith called this incident “very unfortunate.” Ex. 15 (p. 16). Dr. Smith noted that it was not wrong for Taylor to look at pornography – only the manner in which Taylor had obtained the images was wrong. Ex. 15 (p. 16). Dr. Smith noted that all human beings have to develop sexually, and that Taylor had no legitimate access to a sexual outlet. Ex. 15 (p.16).

Soon after this incident, Taylor’s parents told Dr. Smith they could not afford the co-payments and therefore would no longer bring him to treatment. Ex. 15 (p. 7, 16). Before this, Taylor had been diligent about attendance, only absent when his parents failed to provide transportation. Ex. 15 (p.5, 12-13). Dr. Smith characterized this decision by Taylor’s parents as “real bad.” Ex. 15 (p.7).

Soon after Taylor's treatment stopped, his SSODA was revoked based on the check/pornography incident. Ex. 12 (p.16). Taylor, then 17, was sent to Naselle Youth Camp in September 1999. Ex. 18 (p.2-3, 10).

Taylor attended individual and group therapy at Naselle. Ex. 18 (p.3-5). He told counselor Pauline Bartley that he was "used to" lying and that it was a "way of life" for him. Ex. 18 (p.5). Like Dr. Smith, Bartley worried Taylor did not always see his siblings - especially Deborah - as victims, but as willing participants. Ex. 18 (p.7-9). She did, however, note Taylor was always compliant with treatment requirements and was very honest about his sexual acts with his siblings and about continuing to fantasize about Deborah. Ex. 18 (p. 3, 9, 11-13).

Bartley also saw that Taylor lacked social skills. Ex. 18 (p.13). For example, in an effort to get other boys to stop harassing him, Taylor loudly announced in a common area he was gay. Ex. 18 (p.13). Predictably, this only made the harassment worse. Ex. 18 (p.13). Although Bartley indicated Taylor was victimized and made fun of at Naselle, he never responded in an aggressive manner. Ex. 18 (p. 13).

Like many residents at Naselle, Taylor was assigned an individual bunk room. Ex. 12 (p.16). The room's door had a window on it, which was used by counselors to do hourly bed checks overnight. 3RP 213; Ex. 18 (p.1).

On three occasions in October 1999, counselors doing these bed checks saw Taylor's erect genitals exposed outside his underwear and the bed sheets. Ex. 12 (p.16); Ex. 18 (p.3, 10-11); 3RP 213; 6RP 181-82. Because of the large number of exposures, Taylor was charged in juvenile court with two counts of indecent exposure and found guilty. 3RP 213-14; Ex. 6; Ex. 7; Ex. 18 (p.3-4). Taylor never recanted his position on the exposures, which was that he did it accidentally<sup>9</sup> and did not remember the incidents because he was asleep. 3RP 179-80; 6RP 182; Ex. 12 (p.16-17); Ex. 18 (p.4, 11). Counselor Scott Zankman expressed unhappiness about the incident, comparing it to "prosecuting a homeless man for drinking on the street." 3RP 180. Taylor was released from Naselle in 2000, about a year after his arrival. Ex. 18 (2-3).

c. Time in the Community and the Index Offense

When Taylor was released at age 18, he returned to the provider who had done his SSODA evaluation, Scott Zankman, for his required sexual offender treatment. 3RP 150-51. Taylor was "very good" and "very active" in treatment with Zankman, attending sessions for a year and a half, even when Taylor lost his job and housing and was living under a bridge for a number of months. 3RP 152, 153, 186; 5RP 15.

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<sup>9</sup> Taylor explained that he often put himself to sleep at night by masturbating. 3RP 214; 6RP 182-83; Ex. 12 (p.17).

Zankman was concerned that Taylor was “totally lacking in social skills.” 3RP 178. Zankman felt Taylor would make little progress in treatment until he had some friends and support in the community. 3RP 173-74; 5RP 15. For this reason, Zankman told Taylor he would not enforce the probation requirement that Taylor only interact with people less than two years younger than himself, so long as Taylor was not interacting with people more than four years younger. 3RP 178, 185; 6RP 27-28, 61.

Taylor fell in with a group of “Goths,” young people who hung out at the bus depot and called themselves the “Depot Rats.” 3RP 154, 172-73. The group ranged in age from about 13 to 40. 3RP 184; 5RP 16, 107. Zankman was concerned that the Depot Rats used drugs and had promiscuous, frequently bisexual and/or alternative sex with each other. 3RP 154-55, 173, 177. However, he still saw Taylor’s relation to them as fundamentally positive, as Taylor desperately needed friends, and the Depot Rats were the first to accept the socially unskilled Taylor knowing he was a sex offender. 3RP 173-74; 5RP 15-16. Zankman therefore did not intervene in Taylor’s relationship with the Depot Rats. 3RP 185.

Taylor was very malleable, taking up gothic clothing and frequent sex with the older members of the Depot Rats. 3RP 155-56, 178; 5RP 108; Ex. 12 (p.19-21); Ex. 27 (p.4). Zankman was not very concerned that

Taylor would victimize anyone in the group, but very worried that Taylor – because of his naiveté and his extreme desire to belong – would be victimized by the Rats, who were more sophisticated than him. 3RP 174-75; 6RP 28-29.

Taylor was open with Zankman about his sexual experimentation. After falling in with the Depot Rats, Taylor had sex with both men and women and frequently changed partners. 3RP 176-77, 179, 184-85. When Taylor acquired an STD, he reported it to Zankman. 3RP 175. When Taylor began experimenting with sadomasochistic practices, he reported it and Zankman decided not to intervene, partially to allow Taylor to develop his sexual identity, but also because Taylor only wanted to take on the role of the submissive or masochistic partner – not the dominant or sadistic role. 3RP 175-76, 179, 184; 5RP 17. Like Dr. Smith, Zankman reported that Taylor was “never aggressive.” 3RP 176.

Despite Taylor’s openness about his sexual behavior, he never reported any fantasies about prepubescent children. 3RP 179, 187-89. The only child Taylor ever told Zankman he fantasized about was Deborah. 3RP 168, 170-72. This fixation worried Zankman, but he was not concerned that Taylor would generalize that fixation, as Taylor showed no interest in children, only other adolescents. 3RP 170-72, 177, 179, 187-89.

Taylor also made progress in treatment with Zankman. By the time he left treatment, Taylor was doing a “great job” of not sexualizing Deborah anymore. 3RP 168. A “clarification process” was held where Taylor was allowed to visit Deborah and his other siblings, and all the siblings were very happy to see each other again. 3RP 167-68.

Although Zankman said Taylor was very open about many things, Taylor was not always fully honest. 3RP 182-85. Zankman said that Taylor would tell “half-truths” and sometimes leave critical information out to avoid problems with Zankman. 3RP 182-83. This was particularly true in the case of one of Taylor's sexual partners, Brittany (d.o.b. 1/4/87).<sup>10</sup> 4RP 393.

Taylor met Brittany among the Depot Rats, and they dated one time when he was 18 and she 14, but then did not see each other romantically again until after Brittany turned 15. 3RP 218; 4RP 388-94; Ex. 12 (p.18).

Brittany was a very well-developed adolescent when she and Taylor began dating. She stood 5'10”, weighed 160-170 pounds, and was already sexually experienced, even providing the condoms when she and Taylor had sex. 4RP 371, 415; 5RP 18. Taylor at one point met

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<sup>10</sup> Although Brittany has long since passed the age of adulthood, she was a minor at the time of this offense, and so her last name is not used. Brittany's name is spelled “Brittani” in some transcripts.

Brittany's mother, Jade, and Jade specifically told Taylor that Brittany was 15. 4RP 415-16. Jade later wrote that she did so because "Brittani looks and behaves much more mature than her years." 4RP 414-16.

Taylor lied several times in circumstances related to Brittany. For example, he told Jade he was 17, not his actual age of 19, and he told Jade he was not interested in Brittany. 3RP 219-20. Taylor meanwhile told Zankman that Brittany was 16.

Taylor had admitted to Brittany he was a sex offender, but he told her it was because of mutually fondling a 12-year-old when he was 14. 3RP 220; 5RP 106. Also, Taylor asked Brittany to tell others that she had told Taylor she was 16 if she was asked about it. 5RP 106; Ex. 12 (p.22-23).

Zankman eventually contacted Jade and explained that Taylor was a sex offender. 4RP 429. Jade, in turn, reported that Brittany was only 15. 3RP 186-87. Taylor was subsequently arrested and charged with third-degree child molestation(CM3). 3RP 186-87; Ex. 8. Zankman nonetheless did not see anything "pedophilic" in Taylor's behavior with Brittany, because Brittany was 15 years old, not a child. 3RP 188-89.

According to charging documents, between March and May 2004, Brittany and Taylor dated and had sex about seven times. Ex. 8. Taylor described himself to Zankman as "in love" with Brittany, although

Brittany once said it was “just sex.” 3RP 219; 4RP 370; 5RP 65; 6RP 30; Ex. 12 (p.23).

Taylor pled guilty to CM3 in 2002. 3RP 214; Ex. 9. The court sentenced him to 54 months, the high end of the standard range. Ex. 10 (p.3, 4). Taylor entered Twin Rivers Correctional Facility, where he enrolled voluntarily in the Sexual Offender Treatment Program (SOTP). 6RP 75, 81; Ex. 12 (p.24).

In the SOTP, Taylor clashed with his treatment provider, MSW Bob Alvord. 6RP 78. In reports, Alvord described Taylor as not taking responsibility, as immature, lacking in ambition, stubborn, forgetful, and the like. 6RP 38, 114-15.<sup>11</sup> Taylor was ordered to repeatedly rewrite “homework,” where he would list former victims, his offenses, his thinking patterns, and his current fantasies. 6RP 50.

During this time, Taylor said, you had to “[m]ake yourself look worse to look better” for SOTP. Ex. 12 (p.25). Prisoners who disclosed more victims or more victimization of themselves were considered more open and more likely to benefit from treatment. Ex. 12 (p.25)<sup>12</sup>. Even the

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<sup>11</sup> Alvord died of a heart attack prior to trial and so did not appear, although his reports figured into expert testimony. 6RP 79. Alvord’s former supervisor at the SOTP testified briefly to her observations of Taylor at the program. 6RP 73, 79, 82-84, 86-87.

<sup>12</sup> In a similar vein, Bartley testified that Taylor’s disclosure of his molestation of his cousins while at Naselle was viewed as a very positive sign, because it indicated Taylor was “coming clean” with information. Ex. 18 (p.6).

State's witness acknowledged that treatment at Twin Rivers was a "highly pressurized situation," where a treatment provider might give a client more credit for reporting more victims. 6RP 77, 90-91.

According to Taylor, he therefore began exaggerating his prior offenses, as well as his prior victimization. Ex. 12 (p.6, 25). He claimed, for example, additional victimization at the hands of two aunts and an aunt's boyfriend. 3RP 225; Ex. 12 (p.6). In his "sexual autobiography," Taylor also claimed that when he was 18 he had sexual contact with a 13-year-old girl, the daughter of the new age shop where he had previously worked in Everett. 3RP 256-57, 260-61; 4RP 412-13; Ex. 27 (p.4-5).

Twice at Twin Rivers, Taylor apparently became extremely upset. 3RP 274-75; 4RP 357. Once, he responded by saying he was thinking about finding a vulnerable inmate to hurt. 3RP 275; 4RP 357, 366; 5RP 93. Another time, he said he was thinking about finding a woman to rape and drown. 3RP 275; 4RP 357, 366; 5RP 92. Taylor later claimed he had said these things only "for shock value." 4RP 357.

Taylor eventually left the SOTP. 6RP 84-85. Taylor said that he was terminated from the program involuntarily, and everyone agreed he wrote an impassioned note to the DOC asking to be reinstated. 5RP 22; 6RP 31-32, 115; Ex. 12 (p.26). But Alvord's supervisor testified Taylor agreed he was not making progress, and termination was thus a mutual

decision. 6RP 84, 114-15. The final report on Taylor was nonspecific, indicating he “was terminated.” 6RP 114-15.

In 2005, the State had Taylor evaluated by psychologist Dr. Kathleen Longwell, and she diagnosed Taylor with pedophilia and personality disorder not otherwise specified (NOS), with borderline (BPD) and antisocial personality disorder (APD) traits. 3RP 197, 204-07, 253-54. Dr. Longwell recommended commitment after Taylor completed his sentence. 4RP 364. The State’s SVP petition followed, and Taylor was incarcerated at the Special Commitment Center (SCC) for just over two years awaiting trial. Ex. 12 (p.1); 6RP 153.

d. Expert Testimony at Trial

i. *State’s Expert*

At trial, the State called Dr. Longwell to testify about her diagnosis and conclusions. 3RP 195-96. For her 2005 evaluation, Dr. Longwell reviewed Taylor’s records and also met with him. 3RP 204-07. Dr. Longwell acknowledged that Taylor was open about his offenses and his treatment. 3RP 209.

Per the DSM IV-TR, the pedophilia diagnosis required Dr. Longwell to find: 1) intense, recurrent sexual fantasies or urges towards prepubescent children (generally those age 13 or younger); 2) either acting on those urges or experiencing distress or interpersonal difficulty because

of those urges; and 3) being over age 16, and at least 5 years older than the child or children referenced in criterion 1. 3RP 256, 258-60; 4RP 398-99; Ex. 31.

Dr. Longwell asserted that Taylor met all three criteria, even though his last acknowledged act with a prepubescent child was with his family members when he was still under the age of 16. 3RP 256, 412, 431, 458. Dr. Longwell conceded, however, that sex with 15-year-old Brittany did not constitute pedophilic behavior. 4RP 434. Further detail about Dr. Longwell's pedophilia diagnosis is reviewed in section C.2., infra.

Dr. Longwell also claimed Taylor could have been diagnosed with either APD or BPD, but she did not think either diagnosis "properly define[d]" Taylor, so she diagnosed him with personality disorder NOS, with APD and BPD traits. 3RP 266-67, 275-76. The APD traits<sup>13</sup> were more focused on in the trial, as Dr. Longwell asserted those traits made Taylor more likely to reoffend. 3RP 263, 266, 276-78. Dr. Longwell also scored Taylor on the Hare Psychopathy Checklist (PCL-R) and made similar findings. 4RP 344-45, 347, 454-58.

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<sup>13</sup> Examples of Taylor's allegedly antisocial behavior included his arrest for abuse of his siblings, his periodic deceit, and "poor impulse control," shown by his large number of sex partners. 3RP 270-71. Dr. Longwell also opined that Taylor did not seem to have a normal sense of remorse or guilt for harming people, as shown when he had told providers that his siblings had consented to their molestation. 3RP 271-72.

Dr. Longwell also scored Taylor on a number of actuarial instruments, including the Static 2002; the Static-99; the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R); and the Sex Offender Risk Appraisal Guide (SORAG). 3RP 284. The exact risk percentages varied on these tests, but Dr. Longwell’s scores for Taylor always placed him in the highest risk category for any given actuarial. 3RP 286-291, 294-313, 321-22, 331-32; 4RP 339, 435-42, 448-49. Over objection, Dr. Longwell also testified about Taylor’s “relative risk” under both Static tests. 3RP 293-94. See also Section C.3., infra.

Dr. Longwell opined in sum that Taylor’s mental abnormalities would make him likely to engage in predatory acts of sexual violence if he were not confined in a secure facility. 3RP 279-80; 4RP 364.

ii. *Defense experts*

The defense called two experts, clinical psychologists Dr. Theodore Donaldson<sup>14</sup> and Dr. Diane Lytton, who disagreed “emphatically” and “absolutely” with Taylor’s diagnoses by Dr. Longwell. 5RP 69; 6RP 125, 148, 174; 7RP 505. Dr. Donaldson specifically labeled the pedophilia diagnosis “ridiculous” and “patently contrived.” 5RP 27, 69-70. Both Dr. Donaldson and Dr. Lytton thoroughly reviewed Taylor’s

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<sup>14</sup> In addition to the testimony reviewed herein, Dr. Donaldson also testified about “base rate” problems with the actuarials. 4RP 481-83; 5RP 33, 37-39; 6RP 12, 14-15. Because this testimony does not bear directly on legal issues raised herein, it is not reviewed.

records and interviewed him to explore the diagnoses proposed by the State. 4RP 484-85; 5RP 64-65; 6RP 134-35.

Dr. Donaldson and Dr. Lytton both explained Taylor's molestation of his siblings as a reaction to his unusual life circumstances at the time. 5RP 6; 6RP 162. Both asserted that unsupervised children will often engage in sexual contact with siblings. "You take any group of kids and leave them unsupervised, and most of them are going to start fooling around." 5RP 6-8; 6RP 162-63. The doctors agreed that what was unusual in this case was how long the molestation continued and how thorough it was. 5RP 6, 8; 6RP 162. But they indicated that the extent of the molestation reflected more the failure of Taylor's family to supervise their children than anything about Taylor. 5RP 6, 8; 6RP 162.

Both doctors opined that the diagnosis of pedophilia was clearly wrong because Taylor did not fantasize about children or behave sexually towards children after the age of 16. 5RP 4, 9, 13-14, 30; Ex. 18 (p.8-9, 12). Taylor continued to be attracted to Deborah after his 16<sup>th</sup> birthday, but Deborah was not 5 years younger than Taylor, and moreover, Taylor never generalized his attraction to Deborah to others in her age group. 5RP 9-10. Dr. Donaldson noted that Taylor was very open with Bartley and Zankman about his sexual fantasies, but never reported any fantasies about children other than Deborah. 5RP 13-14, 16-17. In fact, at Naselle,

Taylor's other sexual fantasies all involved the adult staff of the facility. 5RP 13-14; Ex. 18 (p.8, 14).

Both doctors moreover agreed that Taylor's involvement with Brittany did not constitute pedophilic behavior because Brittany was obviously developed, sophisticated, and mature – not a child – and Taylor at 19 was still an adolescent himself. 5RP 5, 18; 6RP 166, 174. Both doctors thought that an attraction by an 18 or 19 year-old to a 14 or 15 year-old was normal, non-deviant behavior, even if technically illegal. 6RP 16-17, 138-39, 166. Dr. Lytton was unimpressed by Taylor's prior admissions to counselors that he was attracted to "minors," because the minors were specified ones who did not meet the criteria, like Deborah or Brittany. 6RP 141-42, 179.

Dr. Donaldson indicated that Taylor's relationship with Bob Alvord at the SOTP was "terrible," as demonstrated by Alvord's notes about Taylor. 5RP 20-21; 6RP 24, 50. Dr. Donaldson opined that Taylor obviously had begun exaggerating his stories with Alvord, as the stories quickly became absurd. 5RP 22, 26-27; 6RP 49-50.<sup>15</sup> Dr. Lytton agreed. 6RP 145.

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<sup>15</sup> In addition to the story about the 13-year old, Taylor claimed variously: that his older cousin climaxed four or five times during her initial molestation of him; that his aunt and the aunt's 18-year old boyfriend joined in on the cousin's abuse, abusing Taylor with toys and beads and vibrators; and that he was once anally raped and beaten by seven men in

Dr. Donaldson therefore rejected the (now recanted) self-report of contact with a 13-year-old daughter of the owner of a new age store, both because Scott Zankman interviewed Taylor's friends at the store at roughly the same time and no such situation was mentioned to Zankman,<sup>16</sup> and also because no one had bothered to follow-up on Taylor's report and confirm it with the girl or family in question. 3RP 185-86; 5RP 19, 26. Dr. Donaldson moreover described the content of Taylor's report of the incident as "preposterous." 5RP 20.<sup>17</sup>

Dr. Donaldson also dismissed Taylor's threats in the SOTP to go and find an inmate or woman to hurt. Dr. Donaldson noted that Taylor had never been aggressive or violent, even when reporting fantasies, and while such an assertion might show anger, Taylor would not completely transform his offense pattern. 5RP 26; 6RP 39-40.

Both Dr. Donaldson and Dr. Lytton also dismissed the PPG results, noting that the results were "totally inconsistent" with Taylor's offense

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an Everett alley, after which Taylor claimed he went home instead of to the hospital. 5RP 22-25.

<sup>16</sup> Zankman interviewed the store owner and Taylor's friends at the store because Taylor had allegedly stolen something there. 3RP 185. The owner and friends were upset about the stealing, but otherwise liked Taylor and had no other complaints about him. 3RP 185-86.

<sup>17</sup> The only report of this incident is in Taylor's sexual autobiography from the SOTP, wherein he wrote that the 13-year-old entered his room wearing a only a bathrobe, dropped the robe, and requested sex from him; that they "explored each other's bodies" for a half hour, performing oral sex and digital penetration; and then he prepared to take the girl's virginity, but then stopped when he realized it was wrong and sent her back to her room. 4RP 408-09; Ex. 27 (p.4-5).

history, and also that there was no record of how the test was administered. 5RP 26, 30-32; 6RP 35-36, 111-13, 140-41, 184. The arousal level was also low – only 8-17%, which would normally be considered “insignificant” for a PPG. 5RP 31.

Taylor told both psychologists he had been told to think about his prior victim during the PPG and thus had been thinking about Brittany. 5RP 31; 6RP 111-13, 7RP 499-500. Both doctors thought Taylor’s brief, mild arousal would be explained by his version of how the test was administered. 5RP 31; 7RP 499-500. Dr. Donaldson also noted that even with a valid PPG, such a test can account for only about 10% of a risk prediction. 5RP 90.

Both defense experts said that if Taylor were truly a pedophile they would expect him to possess or have possessed child pornography, or at least pictures or drawings of children. 6RP 54, 57, 147. They would expect that in the community Taylor would have hung around playgrounds or grammar schools or tried to date women with young children or to get jobs around young children, none of which Taylor did. 6RP 54, 56-57, 145-47.<sup>18</sup>

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<sup>18</sup> Over the 1.5 years he spent in Everett, Taylor once went to the edge of the children’s section of the Everett Library to look at comics or graphic novels. 3RP 157-60; 4RP 427. This incident was investigated by Zankman at the time, however, and was apparently an isolated incident. 3RP 188; 4RP 427; 6RP 25-26.

The experts also noted that Brittany had a younger sister, Karli, who was 12. 4RP 428-30. Although Taylor would sometimes be at Brittany's house waiting for Brittany with only Karli in the house, Taylor never approached Karli with any sexual remarks or intimations of sexual contact. 4RP 428-30, 465-66. Karli was interviewed carefully by law enforcement and by her own mother, and neither uncovered evidence that Taylor had ever behaved improperly with Karli, even after Karli was again asked similar questions as an adult. 4RP 429-30, 466.<sup>19</sup>

Both doctors also rejected the diagnosis of personality disorder NOS, with APD and BPD traits. 5RP 27; 6RP 148, 154. A personality disorder, Donaldson testified, must be "pervasive," not focused on only one aspect of the person's life. 5RP 28; 6RP 50-51. But here, Taylor had been compliant in treatment and had never been violent. 5RP 28-29. Taylor had been careful of his siblings' feelings and had stopped sexual activities with them when they said that they hurt or that they didn't want to do them. 5RP 29-30. Dr. Donaldson also noted that Taylor was doing very well at the SCC without any reports of bad behavior. 6RP 51; Ex. 12 (p.2). In fact, Taylor had received at least one "glowing" review of his

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<sup>19</sup> Dr. Longwell briefly claimed that Taylor had asserted Karli was interested in him, but could not find any reference to such assertion in her records, only finding Taylor's assertion that Jade – Karli and Brittani's mother – was interested in him. 4RP 465-70. Dr. Longwell then acknowledged that her memory of the assertion was incorrect, and Taylor had never indicated Karli had an interest in him. 4RP 469-70.

work in the SCC kitchens. 6RP 52; Ex. 12 (p.1-2). Donaldson felt that these sorts of behaviors indicated Taylor was not antisocial.

Dr. Lytton, whose doctorate was in psychology, human learning, and human development, also testified specifically about the mental development of adolescents. 6RP 125-26, 129. She noted that the frontal lobes of the brain continue to develop until the mid-20s. 6RP 149-51; 7RP 497. Many of the conditions of adolescence – impulsivity, grandiosity, irresponsibility, lack of judgment, and the like – are simply due to the incomplete brain development. 6RP 150-52, 157.

These same symptoms, Dr. Lytton explained, can easily be mistaken for antisocial traits, leading to an incorrect diagnosis of APD. 6RP 157-58; 7RP 501-04. Lytton testified that when Dr. Longwell interviewed Taylor in 2004, he was 21 and still very young and immature, whereas the man Lytton had met with in 2008 was 26 and very mature. 6RP 150, 152-53, 160, 173-74. Lytton said that Taylor had no indications of psychopathy at the time she interviewed him. 7RP 503.

Lytton described Taylor as open, honest, humble, and polite. 6RP 153, 161. Taylor did not excuse or rationalize his behavior with his siblings or with Brittany, but rather admitted his actions were wrong and expressed remorse for them. 7RP 498, 510. Moreover, unlike his former

promiscuous behavior, Taylor had been involved with only one person in his two years at the SCC, a 58-year-old inmate. 6RP 188; 7RP 518-19.

Dr. Lytton's favorable observations were reinforced by her review of SCC records, which showed Taylor was well-behaved, got along well with staff, and held down the responsibilities of his kitchen job in a mature and responsible way. 6RP 153-54. Lytton opined that if Taylor was actually antisocial or psychopathic, his records at the SCC would reflect it, as he is under observation there 24 hours per day; instead, SCC records showed Taylor as "[r]ather meek, mild, gentle." 6RP 153, 160-61, 165. Similarly, Lytton opined that if Taylor were a "pathological liar," as he once stated, incidents involving him lying would appear in the SCC's records, but they did not. 6RP 199.

Dr. Lytton interviewed Taylor for 3.5 hours over a single day, time enough, she opined, for him to give himself away with inconsistencies if he were lying or faking his mental health. 6RP 160-61; 7RP 509. Dr. Lytton scored Taylor on the PCL-R and found Taylor scored a 9 or 10 – a non-psychopath – versus Dr. Longwell's calculation of a 25. 6RP 135, 155-57, 158, 161, 187-91; 7RP 501. Dr. Longwell's miscalculation, according to Lytton, was a common error on the part of evaluators working with adolescents. 6RP 158; 7RP 501-04.

Both doctors pointed out that juvenile sexual behavior only rarely predicts adult behavior. 5RP 71-72; 6RP 136-37. Dr. Lytton specifically testified people under 15 or 16 often experiment and have a lot of “fluidity” in their behavior. 6RP 137-38. Neither doctor believed Taylor presented a threat of sexually violent behavior, because neither found Taylor to be pedophilic at all in orientation. 5RP 5, 27, 30, 38, 40, 69-70; 6RP 139-40; 7RP 505.

C. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE DISMISSED THE PETITION FOR LACK OF A RECENT OVERT ACT.

CM3 is not a sexually violent offense for purposes of involuntary commitment. RCW 71.09.020(17). The parties agreed that because Taylor was not incarcerated for such an offense when the petition was filed, the State had to prove Taylor’s CM3 with Brittany was a “recent overt act” (ROA) under State v. Marshall, 156 Wn.2d 150, 156-58, 125 P.3d 111 (2005), and State v. McNutt, 124 Wn. App. 344, 347-49, 101 P.3d 422 (2004), review denied, 156 Wn.2d 1017 (2006).<sup>20</sup>

An ROA is:

[A]ny act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an

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<sup>20</sup> The State was very explicit that it was relying only upon the CM3 and its immediate context, not upon any other allegations of misconduct. 1RP 3-5, 12-13, 14-15.

objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

RCW 71.09.020(12). In argument, the State acknowledged it was relying on the “reasonable apprehension” prong of the definition. 1RP 5.

Consequently, under Marshall and McNutt, the trial court had to undergo a two-step analysis:

[F]irst, an inquiry must be made into the factual circumstances of the individual's history and mental condition; second, a legal inquiry must be made as to whether an objective person knowing the factual circumstances of the individual's history and mental condition would have a reasonable apprehension that the individual's act would cause harm of a sexually violent nature.

Marshall, 156 Wn.2d at 158 (citing McNutt, 124 Wn. App. at 350-51).

Here, the trial court attempted this inquiry, but focused on the wrong question – not whether this act could have caused sexually violent harm, but whether some unspecified future act, for which the act with Brittany was some sort of harbinger, would lead to sexually violent harm in the future.

The facts of Marshall, McNutt, and other cases show that a court must focus on the alleged ROA and whether that specific act or acts would naturally tend to lead towards harm of a sexually violent nature. For example, in Marshall, the defendant had a history of seeking out and molesting young girls. 156 Wn.2d at 159. He had been diagnosed with

pedophilia, sexual sadism, and an unspecified paraphilia. Id. The State asserted that while Marshall's conviction for third degree rape was not a sexually violent crime itself, it should constitute an ROA because the victim was a developmentally disabled young woman, with a mentality the equivalent of a 10 to 12-year old girl. Id. In effect, the crime really was very similar to a Child Rape 2, a sexually violent crime. See also Froats v. State, 134 Wn. App. 420, 438-39, 140 P.3d 622 (2006) (pedophile respondent who molested 18 children committed ROA when he sexually harassed inmate with mental capacity of 5-year old), review denied, 160 Wn.2d 1022 (2007).<sup>21</sup>

In McNutt, the defendant was a sexual masochist who had a history of enticing young boys to spit at him, hit him, and otherwise hurt or humiliate him while he masturbated. 124 Wn. App. at 351. Often the defendant plied the boys with beer. Id. Prior to the filing of the commitment petition, McNutt invited three young adult men and a 14-year-old girl to his home, where he gave them beer and suggested sexual activities similar to those he had requested previously. Id. He was convicted of communicating with a minor for immoral purposes (CMIP) with regard to the minor female. Id. The McNutt Court held that

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<sup>21</sup> Several other actions were also considered ROA's by the Froats Court, including sexually harassing an adult member of Froats' work camp when there were no children available, cutting out and displaying hundreds of photos of young children while at the SCC, and possessing photographs of nude children. 134 Wn. App. at 425-26, 437-38.

McNutt's activity, although it involved a girl rather than a boy, was similar to what he had accomplished previously, and clearly created the danger of such acts being accomplished again. Id. at 351-52. As such, the CMIP constituted a ROA. Id.

The Marshall Court analyzed Henrickson similarly:

There, one of the petitioners, Henrickson, had a history of sexual assaults on young girls and was incarcerated for attempted kidnapping and communicating with a minor-based on abducting a six-year-old girl and showing her a pornographic picture. The other petitioner, Halgren, had a history of sexual related offenses including first degree rape and was incarcerated for unlawful imprisonment of a prostitute....[I]n each case...the petitioner was incarcerated for an act that constituted a recent overt act.

156 Wn.2d at 158.

In all these cases, either the respondent committed an act functionally equivalent to a sexually violent offense, or else was incarcerated for actions clearly leading to such an offense – for example the CMIP where the defendant was unsuccessful at completing the intended molestation. McNutt, 124 Wn. App. at 351-52. See also In re Detention of Robinson, 135 Wn. App. 772, 775-76, 784-85, 146 P.3d 451 (2006) (pedophile discovered in locked bedroom with sleeping young girl constituted ROA), review denied, 161 Wn.2d 1028 (2007).

In a lengthy verbal ruling, the trial court held Taylor's sexual relationship with Brittany – a sophisticated, physically mature 15-year old, constituted a ROA.<sup>22</sup>

At the time of the offense that State [sic] now wants me to find is a recent overt act, Mr. Taylor was in fact on community supervision for his prior two sex offenses. He had clearly been told not to associate with anyone two years or younger [sic] than he was. So if was [sic] 19, he could associate, maybe, with people who were 17 but no younger than that. If he was 20, people who were 18 but no younger than that.

Mr. Taylor made a conscious decision to ignore the fact that he had been told that. The evidence indicates that Mr. Taylor in fact actively misled the fifteen-year-old victim's mother by telling her that he was younger than he really was. He also told her that his real role here was to be a friend and protector of the fifteen-year-old young lady when in fact that wasn't his role. It wasn't what he really saw it as, because he was having sex with her or began having sex with her.

Mr. Taylor had written letters to the victim saying, you know, if anybody asks what's going on here, lie. Tell them you told me you are older than you really are. When in fact that was not true.

Mr. Taylor had been told by Jade, who is the victim's mother, that her daughter was too young. He was in treatment at the time he committed the offense. The evidence indicates that he lied to his therapist and his treatment group and his parole officer about his contact with the fifteen-year-old girl Brittani. Apparently going so far as to tell his treatment provider that the JRA staff had told him they would not enforce the no-contact condition.<sup>[23]</sup> Mr. Taylor indicated that his community of

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<sup>22</sup> An order was entered on this matter, but no written factual findings were filed. CP 102-03.

<sup>23</sup> This is probably confusion on the trial court's part, as what actually happened is that Zankman told Taylor he could associate with people up to 4 years younger than him, in

friends that he was hanging out with included people as young as thirteen years old.

The background and history beyond that indicates that Mr. Taylor, through various testing that was done, including plethysmograph testing, had significantly high arousal rates to very young children, children three years of age and less. And that he had very, very little arousal to adults or of what would for him be age appropriate males or females.

....

I am satisfied looking at the [CM3] in light of all the surrounding facts and circumstances and his entire history, a reasonable person, and a reasonably informed person, would have a huge amount of concern, frankly, beyond a reasonable doubt, that there is going to be harm of a sexually violent nature.

1RP 36-38.

Here, the facts the trial court seems to be rely on are:

- 1) Taylor had sex with Brittany, who was 15;
- 2) Taylor lied to Brittany's mother Jade about his age and interest in Brittany;
- 3) Taylor told Brittany to lie to others about what she had told Taylor about her age;
- 4) Taylor associated with people as young as 13;
- 5) Taylor did so while in treatment and in community custody, and thereby had to mislead his therapist and corrections officer; and

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order to allow Taylor to begin developing age-appropriate friendships. 3RP 178, 185; 6RP 27-28, 61.

6) Taylor had PPG results that showed some arousal (8-17%, according to testimony) to children age 0-3.

Assuming all these to be correct factual findings, then the question of whether these facts would lead a reasonable, objective person to believe the crime against Brittany was a ROA is only a legal one, and therefore can be reviewed de novo. See, e.g., Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) (review of law to undisputed facts is generally de novo).

The problem is that none of these circumstances demonstrate that Taylor's crime was functionally the equivalent of a sexually violent offense, nor does it show that Taylor was essentially "interrupted" while attempting to commit a sexually violent offense. Brittany was not developmentally disabled; in fact, her own mother indicated "Brittani look[ed] and behave[d] much more mature than her years." 4RP 414-16. Indeed, if an assault against an adult can be considered "worse" – the equivalent of one against a child – because of a lack of development on the victim's part, then if anything this crime was less culpable than it looks on paper, because Brittany, at 5'10" and 170 pounds, was acknowledged to be much more mature in appearance and behavior than a normal 15-year-old. 4RP 371, 414-16; 5RP 18. Compare Marshall, 156 Wn.2d at 159; Froats, 134 Wn. App. at 438-39.

The PPG results, although maybe concerning, have nothing to do with Taylor's behavior. The experts all agreed Taylor had never been shown to approach a child except for his own family members, all of which happened when he himself was under 16. Even assuming an 8-17% arousal rate to a single picture told the court anything, this arousal had nothing to do with harm to Brittany or anyone similar to Brittany.

Another recent Supreme Court case is instructive: In re Detention of Anderson, 166 Wn.2d 543, 211 P.3d 994 (2009). In Anderson, the Court found that a pedophile respondent committed an ROA when he offended against vulnerable inmates at Western State Hospital (WSH) as a substitution for his preferred victims – children – who he had no access to at WSH. 166 Wn.2d at 548-50. Here, of course, Taylor did have access to children in the community, but the State brought forth no evidence Taylor sought them out as victims. Instead, Taylor sought out adolescents, which was, while illegal, psychologically normal for his 19 years. 4RP 434; 5RP 5, 18; 6RP 16-17, 138-39, 166.

The State was required to prove an ROA as a threshold issue to sustain the commitment petition. McNutt, 124 Wn. App. at 347-48. Consensual sexual acts with Brittany, though illegal, did not rise to this level under Washington law because they did not threaten harm of a sexually violent nature. Compare Anderson, Marshall, Henrickson,

Robinson, Froats, McNutt, supra. This Court should therefore reverse the commitment order and dismiss the petition.

2. THERE IS INSUFFICIENT EVIDENCE TO CONCLUDE TAYLOR WAS A PEDOPHILE.

a. The Finding of Pedophilia Must Be Supported By “Substantial Evidence” to Sustain the Verdict.

Although the State’s expert diagnosed Taylor with both pedophilia and a personality disorder NOS (with APD and BPD traits), the verdict that Taylor was an SVP relied on the finding that Taylor was a pedophile. The expert testified that the personality disorder’s primary importance to her was her concern it would augment Taylor’s risk of reoffense in a pedophilic manner. 3RP 263, 276-78. Moreover, the State elected to rely on the pedophilia as the basis for commitment in closing argument:

The personality disorder by itself, [sic] wouldn't necessarily predispose anybody to commit crimes against children. But when you have these pedophilic urges in your mind and you also have a personality disorder, it's a whole lot harder to keep yourself from acting out. That's the importance of that diagnosis

7RP 552.

Even if the State had not elected pedophilia as the basis for the commitment, then pedophilia would still need to be supported by “substantial evidence.” In re Detention of Halgren, 156 Wn.2d 795, 807-09, 132 P.2d 714 (2006). A respondent at a commitment trial under

Chapter 71.09 RCW is entitled to a unanimous jury, and multiple diagnoses are considered “alternative means” to a commitment finding. Halgren, 156 Wn.2d at 807-09. No unanimity instruction was given here, so both diagnoses had to be supported by “substantial evidence” in the record. Halgren, 156 Wn.2d at 809; CP 10-54 (jury instructions).

b. The Pedophilia Diagnosis Was Not Supported By “Substantial Evidence.”

The substantial evidence test is the same as that used in criminal cases. Halgren, 156 Wn.2d at 809. That test is satisfied if the reviewing court is convinced that “a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.” State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988) (emphasis in original).

Dr. Longwell testified she diagnosed Taylor with pedophilia based on the DSM IV-TR criteria. 3RP 253-56. These were undisputed:

- 1) Over a period of at least 6 months, the person has recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger); 3RP 256; 4RP 398; Ex. 31;
- 2) The person has acted on these urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty; 3RP 258; 4RP 399; Ex. 31; and

- 3) The person is at least 16 years old, and at least 5 years older than the child or children referenced in Criterion [1]. 3RP 259-60; 4RP 399; Ex. 31.

- i. Criterion 1 is Not Proven  
Beyond a Reasonable Doubt.*

Dr. Longwell conceded that Taylor's sexual contact with Brittany did not constitute pedophilic behavior. 4RP 434. She nonetheless opined Taylor met the first criteria for three reasons. First, Dr. Longwell based this conclusion on his behaviors with his siblings and cousins, even though she acknowledged his behavior could not be considered "pedophilic" until after Taylor reached 16, by which point it had ended.<sup>24</sup> 3RP 256, 431, 458.

Second, she based it upon his numerous sexual contacts – primarily with adults – in Everett after his release from Naselle, and based on his allegedly "gravitating toward younger teenagers." 3RP 256; 4RP 412; Ex. 27 (p.4). Taylor admitted having sex with teenagers as young as 14 when he was in the community, and at one point in the SOTP at Twin Rivers, he claimed (then later recanted) sexual contact with a 13 year old daughter of the owner of a new age shop, but no one contacted the girl to confirm the claim or to verify whether she was prepubescent at the time. 3RP 256-57, 260-61; 4RP 412-13. Dr. Longwell conceded, however, that

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<sup>24</sup> There is some evidence that Taylor continued sexual contact with Deborah a few times after reaching age 16, but she was not 5 years younger than him, so those few interactions do not meet the criteria either.

from the time Taylor turned 16, he has not had confirmed sexual contact with anyone under the age of 13 and 5 years younger than himself. 4RP 458.

Third, Taylor was assessed with a penile plethysmograph while in the SOTP in 2004. He showed no arousal to adult pornography, but showed an 8-17% arousal to a picture of a child, age 0-3. 3RP 257-58, 260; 4RP 459, 461-62.<sup>25</sup>

Other than “admitting” arousal immediately after the PPG, Taylor never, throughout some 5+ years of therapy, admitted to fantasizing about any child other than Deborah. 3RP 168, 170-72, 177, 179, 187-89; 4RP 463; 6RP 58-59. This was despite being open with his counselors about alternative sexual acts, his bisexuality, his STD status, and his fantasies about Deborah, which continued for some time even into his treatment with Zankman. 3RP 168, 170-72, 175-77, 179, 184-85; 5RP 13-14, 16-17; Ex. 18 (p. 3, 9, 11-13).

Taylor moreover had none of the usual behaviors of pedophiles of seeking out children or socializing with their parents, of spending time

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<sup>25</sup> According to data used in cross-examining a defense expert, Taylor reacted to audio simulations of sexual interactions with children. 5RP 86-88. This, however, was not considered reliable evidence by the defense experts, and even the State’s witness never mentioned the audio portion of the PPG in her testimony or her report. CP 164-203 (initial report by Dr. Longwell); 6RP 34-36, 184. As this evidence arose only on cross-examination, it also goes only to credibility and cannot be considered substantive evidence. State v. Martinez, 78 Wn. App. 870, 879, 899 P.2d 1302 (1995), review denied, 128 Wn.2d 1017 (1996).

where children congregate, or of attempting to obtain child pornography or keeping photos of children around. 6RP 54, 56-57, 145-48. Not one of Taylor's counselors – Dr. Smith, Zankman, or Bartley – found him to be “pedophilic” in his behavior. 3RP 189; 5RP 13-14, 96-97; 6RP 21. These are astounding facts given Taylor was committed as a pedophile.

Dr. Longwell's claim of the importance of the PPG is also highly suspect. At the time of her deposition, when Dr. Longwell incorrectly believed Taylor had contact with children 5 years younger than himself when he was over 16, she testified she gave the PPG results only “low to moderate” weight. 4RP 376-89, 400-01, 464-70. When at trial, Dr. Longwell realized that her interpretations of records were incorrect, and Taylor had no documented instances of fantasizing about or fondling young children after age 16, she then emphasized the importance of the PPG, calling it “the most definitive indicator of pedophilia in Mr. Taylor after the age of 16.” 4RP 400-02, 461-62. Dr. Longwell admitted, however, that she wouldn't make a pedophilia diagnosis based solely on a PPG, 4RP 401-02, and moreover, although she had performed some 800 similar evaluations in her career, she had never once asked a person being evaluated to undergo such a test. 4RP 401.

Moreover, it was agreed by the experts that the procedure used during the PPG was not documented, so the test's validity was difficult to

assess. Both Dr. Donaldson and Dr. Lytton believed that Taylor's account of being told to fantasize about Brittany would explain the single short arousal, and because of the lack of proper documentation of the procedure, there is no basis to question Taylor's account. 5RP 30-31; 6RP 34-37, 112-13, 183-84; 7RP 499-500, 504. According to Dr. Donaldson, the brief arousal – only 8-17% to a single picture – would not even have been considered significant under normal circumstances. 5RP 31. Under these circumstances, a reasonable fact-finder could not find criterion 1 proven beyond a reasonable doubt.

*ii. Criterion 2 is Not Proven  
Beyond a Reasonable Doubt.*

Dr. Longwell opined Taylor met the second criteria because he had been separated from his family, shunned by society, and imprisoned both for the abuse of his siblings and also for his sexual acts with Brittany. 3RP 258-59. These constituted “distress or interpersonal difficulty” allegedly caused by his inappropriate arousal to children. 3RP 258-59.

This second criteria is the one most easily disposed of. Taylor's incarceration and estrangement from his family, simply put, did not occur for any “pedophilic” reason. Dr. Longwell conceded Taylor's acts with his siblings could not be considered pedophilic until he reached 16, and

also that his interaction with Brittany was not pedophilic at all. 3RP 256; 4RP 431, 434, 458.

Claiming this criteria is met – and therefore that Taylor is a pedophile – because Taylor has been alienated from those he cares about, but based on activities that don't meet the criteria of the paraphilia, constitutes bootstrapping of the highest order. For these reasons, a reasonable fact-finder could not find criterion 2 proven beyond a reasonable doubt.

*iii. Criterion 3 is Not Proven Beyond a Reasonable Doubt.*

Criterion 1 and 3 overlap somewhat. Dr. Longwell opined Taylor met the third criteria because, while all the abuse of his siblings and cousins occurred before he turned 16, the plethysmograph was taken when Taylor was 22, and it showed arousal to very young children. 3RP 260; 4RP 399-400. She also cited Taylor's alleged, later-recanted involvement with the 13-year old daughter of the new age shop, which supposedly occurred when Taylor was 18. 3RP 260-61; Ex. 27 (p.4-5).<sup>26</sup> Dr. Longwell admitted she did not ask Taylor about this allegation when she interviewed him. 4RP 423-24.

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<sup>26</sup> This contact was never confirmed by any follow-up with the alleged victim or her parents, even though Scott Zankman did meet with the family when Taylor allegedly stole something from the shop while in the community. 4RP 405-06.

Dr. Longwell acknowledged that a primary question in Taylor's case was whether the activities with his siblings was something caused by the unusual circumstances of his childhood, or whether they were demonstrative of a pedophilic problem that would persist throughout his life. 3RP 223-24. Boys who molest younger children when they themselves are under or at the age of 15 are "marginal," meaning that it is hard for an expert to say whether they will ever offend again after they leave adolescence. 3RP 230-31. The defense experts agreed that adolescent offenders cannot be reliably predicted to offend as adults, and Dr. Lytton explained how the "fluidity" and "impulsiveness" of adolescent behavior can be attributed to the uncompleted development of the frontal lobes of the brain. 5RP 71-73; 6RP 136-38, 149-52.

For these types of reasons, a pedophilia diagnosis requires proof of sexual deviance after age 16. 3RP 230-31. At the time of the abuse of his siblings, Taylor was, moreover, an "incest offender," and such offenders have very low rates of reoffense. 4RP 361; 6RP 59-60.

Here, the only evidence Dr. Longwell could firmly point to after age 16 was the PPG. The PPG's procedures, as previously noted, were undocumented, and Taylor only showed a very partial arousal at any rate. See Section C(1)(b)(i), above. The PPG alone cannot show Taylor's

interest in prepubescent children lasted beyond his relationship with his family members.

As for the tale of the 13-year-old – aside from the facts that this story was told in a rather unbelievable manner, never again retold, and later recanted – the story was also unconfirmed when Zankman interviewed the people at the new age store, people who at that point had every reason to tell Zankman if Taylor had misbehaved. Finally, no one ever contacted the 13-year-old to confirm either: 1) that the contact had happened, or 2) that she was actually prepubescent when it occurred, which would obviously be necessary to show Taylor’s activity with her was actually pedophilic.<sup>27</sup> Under these circumstances, a reasonable fact-finder could not find criterion 3 proven beyond a reasonable doubt.

Here, the State had to prove that Taylor: 1) had recurrent, intense fantasies about prepubescent children; 2) that these fantasies caused him, at minimum, interpersonal distress; and 3) that he was at least 16 at the time, and that the child or children in the first criteria was at least 5 years younger than himself. The State is unable to identify a single documented instance of Taylor fantasizing about prepubescent children other than Deborah after age 16, and Deborah was less than 5 years younger than

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<sup>27</sup> Dr. Longwell acknowledged that the importance of the “13 year” age criteria was whether a victim had actually reached puberty. 4RP 398-99. She acknowledged that a person might reach puberty either earlier or later. Id.

Taylor. Moreover, although the expert argued Taylor's incarceration and social stigma from being a sex offender constituted "interpersonal distress," these were not consequences of pedophilic acts under the DSM IV criteria, as even the State's witness admitted. 3RP 258-59; 4RP 434, 458. Thus, the State failed to support any of the three criteria by the "substantial evidence" to required support the verdict. Halgren, 156 Wn.2d at 809. This Court should therefore reverse the verdict and remand with instructions to dismiss the petition.

3. THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE'S EXPERT TO TESTIFY REGARDING "RELATIVE" VERSUS "ABSOLUTE" RISK OF REOFFENSE.

The defense moved in limine to exclude testimony regarding "relative risk" of Taylor reoffending. 1RP 52-55. This referred to the measurement of Taylor relative to other sex offenders who had taken the same test. 1RP 52-54. The defense argued such evidence was irrelevant and would confuse the jury. 1RP 53-54. The trial court denied the motion, and the State's expert testified about Taylor's relative ranking among sex offenders under the Static-99 and the Static-2002. 1RP 56; 3RP 291-95, 312. The matter was also argued by the State in closing. 7RP 559-61.

In order to be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence.” ER 401. Even if relevant, evidence may still be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403.

A trial court’s admission of evidence is reviewed under an abuse of discretion standard. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Id.

How Taylor compares to other sex offenders taking the Static tests tells the jury little or nothing in terms of reoffense. However, it does portray him as “the worst of the worst” – scoring horribly even compared to other sex offenders. In fact, the risk of reoffense measured by the actuarials was a different – and much smaller – number, but one easily confused with the larger numbers cited, as shown below:

Q: So is there another way to quantify the results other than calling someone high risk, low risk or putting them into those types of categories?

A: Well, as far as the instrument goes, there are two other ways of quantifying. The first is – this is new data that we have. [D]epending on the score...they have a percentile rank. And that is just – the percentile rank is very similar to what would happen in school when ...you took reading tests in school or your children took them – what percentile

they fell into. That means that whatever your score was or his score or anyone's score, how many people scored lower than him, how many people scored above him.

So the easiest way of looking at this is with a score of 7,...what percentage of the people scored lower than him. What level in the percentile between zero and 100 percent, what level did he fall in? So that is one way of quantifying it.

Another way of quantifying it is what does the research tell us when we look at people who are released from prison...or from a confined facility....If we look back at ones who are maybe released five years, ten years, fifteen years ago, what percentage of them committed a sex offense. .

....

Q: So with a score of 7, what was the percentile?

....

A: [F]or groups of people who score a 7 [on the Static-99], a score of 7 falls between the 96.3 and the 98.3 percentile. So in other words, a score of 7 is 96.3 to 98.3 percent of the people scored lower than a 7. So we're looking at somewhere around 4 percent scored higher than a 7.

Q: What is the risk percentage associated with a score of 7?

A: ...[T]he risk range for someone with a 7 for five years was as low as 11.4 percent and as high as 24.2 percent....As I said, this data is fairly new, somewhat a preliminary [sic] and not yet well refined. And then in ten years the risk ranged from 13.3 percent to 32.1 percent.

3RP 291-95.

Dr. Longwell testified similarly about the Static-2002:

Q: Have they had an opportunity to put together percentile rankings or risk percentages with this test?

A: Yes....Now, for a score of 11 on the Static-99 [sic] the percentile rate for people who score 11 is 99.99 percentile to 99.98 percentile. So that doesn't mean that is their risk of committing another sex offense, but it says that a person – like Mr. Taylor's only less than 1 percent of the sex offenders – sex offender [sic] in this study, had a score

higher than him. I mean actually a lot less than 1 percent, a fraction of a percent. So percentile-wise he was really, really top group.

And the recidivism rate for that – again, he fits in the higher risk category, in my opinion, for ten years is 50.1 percent chance of someone who would be charged or convicted of a sex offense in the first ten years after release.

3RP 312.

The State's expert thus emphasized the relative ranking of Taylor over the absolute ranking – calling the relative ranking the “easiest way of looking at this,” and saying that Taylor was “really, really top group” on his percentile for the Static 2002. 3RP 291, 312. Moreover, she deemphasized the much lower rates for reoffense, explaining of them: “this data is fairly new, somewhat... preliminary and not yet well refined.”

3RP 294-95.

In closing argument, the State also addressed the “relative risk” numbers in very close proximity to the absolute risk numbers, blurring the distinction:

Static-99 he got a 7. Risk level is high. 96 to 98 percentile. Meaning of all the people they scored when they made that test up, Mr. Taylor's score was higher than 96 percent of them. Percentage, 13.3 to 32.1. It's hard to tell from the testimony where in there Mr. Taylor should fall....

[Discussion of Mn-SOST and SORAG]

Static-2002, risk level, again, high. Percentile off the charts on that one. Less than 1 percent of folks – he outscored everybody but less than 1 percent of the folks on that. And we have more percentages there.

Now, this is my way of giving you an example about those percentages. These tools all measure risk of being rearrested, recharged, reconvicted, things of that nature....

7RP 559-61 (emphasis added). But the fact is, the very high numbers cited for the Static-99 and Static-2002 do not measure the things implied by the State. They measure only relative rank, which is not a measure of risk of being rearrested or reconvicted.

As this Court has previously noted, scientific evidence has the “potential to mislead the jury,” because “an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny.” Reese v. Stroh, 74 Wn. App. 550, 558, 874 P.2d 200 (1994) (quoting Paul C. Giannelli, “The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later,” 80 COLUM. L. REV. 1197, 1240 n. 321 (1980)), affirmed, 128 Wn.2d 300 (1995).

Here, Taylor’s “percentile” on the Static tests ranged from high – 96.3 to 98.3 on the Static-99 – to incredible – 99.98 to 99.99 on the Static-2002. But his percentage risk of reoffense was actually much lower – 11.4 to 32.1% on the Static-99 and 50.1% on the Static-2002. 3RP 291-95, 312. But by blurring the distinction between the percentile and risk percentages, as it did both in testimony and in closing, the State could give the impression that Taylor’s risk of reoffense was monolithically high.

Improperly admitted evidence requires reversal if, within reasonable probabilities, it materially affected the trial's outcome. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Here, the improper evidence bore directly on an essential jury question – how likely Taylor was to reoffend. It therefore was likely to affect the outcome of Taylor's trial, and this Court should reverse.

4. THE COURT ERRED WHEN IT PERMITTED THE HEARSAY CONCLUSIONS OF OTHER EXPERTS TO BE EXTENSIVELY READ TO THE JURY DURING THE CROSS-EXAMINATION OF A DEFENSE EXPERT.

Washington evidentiary rules permit an expert, when forming an opinion, to rely on data that is not admissible as evidence so long as the data is of a type reasonably relied upon by experts in the field. ER 703. An expert can, moreover, testify to his or her conclusions, with or without prior disclosure of the underlying data. ER 705.

When a court does admit the underlying data, it does not do so as substantive evidence. Martinez, 78 Wn. App. at 879. The admission of such otherwise inadmissible evidence must be done carefully, and may only be done for items upon which the expert relied. Washington Irrigation and Development Co. v. Sherman, 106 Wn.2d 685, 687-88, 724 P.2d 997 (1986).

Washington courts have repeatedly found it impermissible to use direct or cross-examination as a vehicle to admit hearsay opinions of non-testifying experts. Sherman, 106 Wn.2d at 687-90 (cross-examination); State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002) (direct), review denied, 148 Wn.2d 1001 (2003); Martinez, 78 Wn. App. at 879-881 (direct). ER 703 and 705 were “not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence.” 3D. Louisell & C. Mueller, FEDERAL EVIDENCE §389, at 663. The Sherman court approved another court’s finding that such opinions are admissible in cross-examination only if the witness acknowledges reliance on the opinion:

Plaintiff’s witness did not state that he had relied on the report, even though he had admitted that he had seen it. Until defendant established that plaintiff had relied on the report of the other doctor, it was improper for the defendant to read from that report in cross-examining plaintiff’s witness.

Sherman, 106 Wn.2d at 688-89 (quoting Bobbe v. Modern Products, Inc., 648 F.2d 1051, 1056 (5<sup>th</sup> Cir. 1981)).

Here, the judge did read an agreed cautionary instruction that applied to expert testimony. 6RP 3-4. The instruction explained that data forming the “basis for an [expert’s] opinion” was only to be considered for purposes of “credibility and weight” of the expert’s opinion. 6RP 3-4.

However, this instruction did not clearly apply to cross-examination, wherein Dr. Donaldson and Dr. Lytton were not being asked about the “basis of their opinion,” but simply being repeatedly challenged by hearsay statements not shown to meet the criteria of ER 703 and 705. Moreover, the cross-examination that occurred herein was so extreme in violating the underlying rule that it could not be excused, even by a more thorough cautionary instruction.

Here, in putatively cross-examining Dr. Donaldson, the State read extensively from the opinions and conclusions of other experts. At the first of these interactions, the defense objected and the jury was sent out. 5RP 95-96. The defense argued that Dr. Donaldson had not been shown to have relied upon these reports, and moreover that the report was taken out of context and misleading. 5RP 96-99. The defense also pointed out that Dr. Smith had already testified and could have been asked about these conclusions when he was on the stand. 5RP 100. The trial court nonetheless decisively overruled the objection, holding this document was:

information that the witness had in front of him at the time he was doing the evaluation of Mr. Taylor. This also potentially goes...to the entirety of his analysis of the case. It goes potentially to his bias. It goes potentially to him choosing to pay attention to some information and not to other information, and it's the type of information that I think the jury is entitled to hear him be cross-examined on.

5RP 100. Following this ruling, the defense did not object to additional similarly-worded questions by the State.

The initial question interrupted by the objection was:

Q: “I noticed that James had been acting strange during this period and seemed to be more dissociative. He described his blanking out as soul travel. I’m thinking this is a convenient excuse for his decision to act out sexually.” [State quoting Dr. Smith].

5RP 95. After the jury returned, this exchange occurred:

Q: So we’re looking at a letter by Gary Smith, Mr. Taylor’s SSODA provider, correct?

A: Yes.

Q: And in the last paragraph, it says, “He has been deceptive and deviant for a long time and has been repeatedly willing to live a deviant double life. His conversion may have some positive value, but it also came at a time when he was fearful that he would be discovered. I don’t wish to discount his religious experience or that his mood may have been more positive since then. I do think that James is a very disturbed young man who is extremely deceptive and deviant.”<sup>[28]</sup>

A: It does say that.

....

Q: [And in the SSODA quarterly progress report, Ex. 53], the third sentence is, “James has a criminal bent and a fascination with anything illegal. He told about how he made homemade drugs out of things he found around the home. He really seems to be attracted to the delinquent lifestyle.”

Does it say that, Dr. Donaldson?

...

A: Yes.

5RP 101-02. Similar questions followed. For example:

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<sup>28</sup> On redirect, Dr. Donaldson pointed out that Dr. Smith had been talking about Taylor’s theft and the “disturbed and deviant” language had nothing to do with sexual deviance. 6RP 19-21.

Q: [In the PSI,] There's a section called attitude/orientation. "Taylor is 20 years of age and stands convicted of his second felony assault offense. He willingly violated known conditions of his parole by consuming drugs and alcohol, having contact with children more than two years younger than he, and having sexual intercourse with a 15-year-old girl. He was attending sexual deviancy treatment and lied to his therapist, his treatment group, and his parole officer about violating those conditions.

[“]He went so far at to tell me that JRA staff had told him that they would not enforce the no contact condition to further justify his behavior. Taylor knows the rules and consequences, he just ignores them when it meets his needs to do so.”

Does it say that Dr. Donaldson?

A: Yes, it does.

5RP 104.

Q: [From monthly notes from the SOTP in 2004], I'm looking on the last page, second to last paragraph before the word "goals."

"Mr. Taylor can be deceitful showing little concern when caught in a lie or when pointed to the contradictory information he presents. He casually dismissed observations made by others on his being manipulative and dishonest. He shows little responsibility in his behavior and a tendency to be rather impulsive. Mr. Taylor has stated that he is remorseful for his index offense, and he understands the negative effects of his criminal behavior upon others. His words seem to lack true emotional depth."

Does it say that, Dr. Donaldson?

A: Yes.

5RP 105. The next day, cross-examination continued:

Q: [In the PSI,] [u]nder the leisure, recreation, companion section. "Taylor spent much of his leisure time in the company of friends who were as young as 13 years of age. He was doing so in direct violation of his parole conditions

which Taylor said were 'no big deal' and reported no one was enforcing the rules.

[“]His conditions further restrict him from having contact with others using or possession drugs or alcohol. He was around people using both during his leisure time. He had elevated UA results for THC during his SSODA and parole terms. He said he 'got it from the air he was in because his friends were smoking it around him.’”

Does it say that, Dr. Donaldson?

A: Yes, it says that.

6RP 8.

The State asked similar questions of Dr. Lytton:

Q: And a quarterly evaluation while on SSODA, Gary Smith noted that, “Mr. Taylor has lived his life thinking he can fool everyone and do whatever he wanted behind their backs. He seems to get a certain pleasure from being deceptive.[”]

6RP 194; and

Q: ...Scott Zankman noted in 2001 that James is never aggressive in his speech, but there's always concern that James is not openly reporting about any given incident. He's very skilled at seeming sincere when he's actually lying.”

A: Yes.

Q: There's a case note in March 2004 from the SOTP program that states, “Mr. Taylor can be deceitful, showing little concern when caught in a lie or when pointed to contradictory information he presents.”

Did you review that?

A: Yes.

6RP 195.

Q: And Mr. Taylor's treatment summary, when he left or was asked to leave the treatment program at the prison in 2004,

they noted: "I'm not sure Mr. Taylor knows his own truth or he makes up or embellishes stories regularly.

[“]When this was addressed to him early in treatment, he agreed and stated too often he did not know what was real any longer.[”] Did you review that?

A: That’s right. Yes.

6RP 197.

These “questions” are extraordinary in the degree to which they directly quoted the opinions of non-testifying persons. Although the jury was given a cautionary instruction about the bases for expert opinions, the instruction did not advise the jury about cross-examination, and could not have protected against the overload of hearsay in any event.

In Sherman, the Supreme Court found a similar use of hearsay opinions as impeachment was impermissible and prejudicial. 106 Wn.2d at 690, 695. Given their extent and content, this Court should also find this incredible parade of inadmissible opinions prejudicial, and reverse.

5. THE COURT ERRONEOUSLY INSTRUCTED THE JURY AS TO THE DEFINITION OF “BEYOND A REASONABLE DOUBT.”

Jury instruction 5 read as follows:

The State has the burden of proving beyond a reasonable doubt that James Taylor is a sexually violent predator. James Taylor has no burden of proving that a reasonable doubt exists.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of reasonable person after fully, fairly, and carefully considering all the

evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 17. The second paragraph is identical to both WPIC 4.01, which defines reasonable doubt in criminal trials, and to one version of WPI 365.11, which does the same in SVP trials. 11 WASHINGTON PRACTICE MANUAL: PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3<sup>rd</sup> ed., 2008); 6A WASHINGTON PRACTICE MANUAL: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL, 365.11, at 512 (5<sup>th</sup> ed., 2005)

The defense objected to this instruction and suggested one which struck the last sentence. CP 71; 7RP 530-31. The objection and defense proposed instruction were, however, rejected by the trial court. 7RP 531. The last sentence of the instruction is, as used in a SVP trial, confusing: “If you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” But there is no “charge” in a SVP case. An SVP case is not a criminal trial, but a trial to determine if someone is safe to live in the community. See In re Young, 122 Wn.2d 1, 19, 857 P.2d 989 (1993). Telling the jury that this is a criminal case only invites the jury to speculate as to what the “charge” might be.

The definition of the standard of proof is, moreover, a critical instruction in any case:

The presumption of innocence is the bedrock upon which the criminal justice system stands. The reasonable doubt instruction defines the presumption of innocence. The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.

State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). See also State v. Castillo, 150 Wn. App. 466, 208 P.3d 1201 (2009).

Here, the jury was invited to speculate as to what the “charge” in Instruction 5 referred. In fact, evidence of multiple criminal convictions of Taylor’s came before the jury. If they thought that the conviction against Deborah or against Brittany – might be “the charge,” then the juror might believe the State’s proof of those underlying “charges” constituted proof “beyond a reasonable doubt” that Taylor was an SVP.

It is constitutional error to instruct a jury in a manner that unfairly relieves the State of its burden of proof beyond a reasonable doubt. Bennett, 161 Wn.2d at 307 (citing Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993)). Here, the confusion that might have been caused by telling the jury that an abiding belief in the proof of “the charge” constituted proof beyond a reasonable doubt is impossible to quantify. This Court should therefore reverse and remand for a new trial.

6. CUMULATIVE ERROR WARRANTS REVERSAL.

The evidentiary errors in C.3 and C.4., and the instructional error in C.5., all affected Taylor's right to due process and a fair proceeding. The "cumulative error doctrine" states that while some errors, standing alone, might not constitute grounds for a new trial, the accumulation of such errors may. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1990).

Taylor asserts that any of these errors could independently warrant a new trial. But if they do not, as all three errors adversely affected his due process right to a fair proceeding, their combined prejudice requires a new trial.

D. CONCLUSION

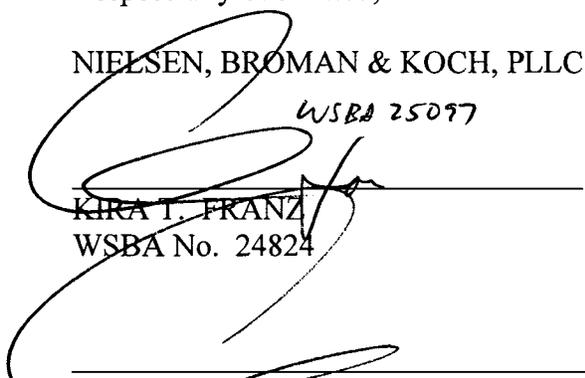
This Court should reverse and remand for entry of an order that the petition for finding James Taylor an SVP must be dismissed for lack of a recent overt act or, alternatively, for lack of proof of pedophilia. In the alternative, this court should reverse and remand for a new trial because evidentiary errors and instructional error deprived Taylor of a fair trial.

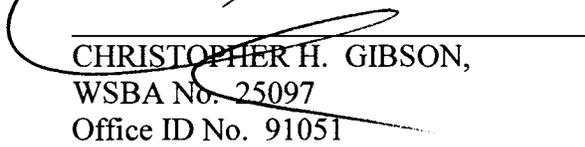
DATED this 21<sup>st</sup> day of December, 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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

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In re the Detention of:	)	
	)	
JAMES TAYLOR,	)	
	)	
Appellant,	)	
	)	
v.	)	COA NO. 63268-0-I
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent.	)	

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FILED  
STATE OF WASHINGTON  
2009 DEC 21 PM 4:25

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JOSHUA CHOATE  
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**SIGNED** IN SEATTLE WASHINGTON, 21<sup>ST</sup> DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*