

64226-0

64226-0

No. 64226-0-I

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

---

IN RE THE DETENTION OF:

JOHN WARREN BERRY,  
Appellant.

---

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

The Honorable Thomas J. Wynne

---

BRIEF OF APPELLANT

---

THOMAS M. KUMMEROW  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

2012 FEB 9 PM 4:55  
COURT OF APPEALS  
STATE OF WASHINGTON

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

D. STATEMENT OF THE CASE ..... 3

E. ARGUMENT..... 4

    1.    THE COURT’S REFUSAL TO  
          REPLACE COURT-APPOINTED  
          COUNSEL VIOLATED MR. BERRY’S  
          RIGHTS TO COUNSEL AND DUE  
          PROCESS ..... 4

        a. A person facing involuntary commitment pursuant to  
           RCW 71.09 has a right to counsel free from conflict. ... 8

        b. The conflict between Mr. Berry and counsel was  
           irreconcilable. .... 10

        c. The court’s inquiry into the conflict was entirely  
           inadequate. .... 13

        d. After weighing all of the *Stenson* factors, Mr. Berry’s  
           convictions must be reversed. .... 15

    2.    PREDICATING MR. BERRY’S  
          COMMITMENT ON THE UNRELIABLE  
          DIAGNOSIS OF “PARAPHILIA NOT  
          OTHERWISE SPECIFIED  
          NONCONSENT” VIOLATED DUE  
          PROCESS ..... 16

        a. To satisfy due process, involuntary commitment as  
           a sexually violent predator must be based upon a valid  
           diagnosis. .... 18

b. Dr. Phenix’s diagnosis of paraphilia NOS nonconsent violates due process because it is an invalid diagnosis that has not been accepted by the medical profession. ....	22
c. At the very least, the trial court should have ordered a <i>Frye</i> hearing. ....	30
d. Mr. Berry is entitled to reversal of the jury’s verdict. ....	33
F. CONCLUSION .....	34

## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.....	8, 9, 12
U.S. Const. amend. XIV .....	18

### WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22 .....	8
Article I, section 3 .....	18

### FEDERAL CASES

<i>Adams v. United States ex rel. McCann</i> , 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942) .....	8
<i>Argersinger v. Hamlin</i> , 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) .....	8
<i>Brown v. Craven</i> , 424 F.2d 1166 (9th Cir.1970) .....	10, 11
<i>Entsminger v. Iowa</i> , 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967) .....	10
<i>Foucha v. Louisiana</i> , 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) .....	18, 19, 20
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923) .....	33
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) .....	8, 10
<i>Kansas v. Crane</i> , 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) .....	19, 21, 22, 24
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).....	passim
<i>Morris v. Slappy</i> , 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) .....	9

<i>O'Connor v. Donaldson</i> , 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).....	18
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) .....	8
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	8, 9
<i>United States v. D'Amore</i> , 56 F.3d 1202 (9th Cir. 1995), <i>overruled on other grounds in United States v. Garrett</i> , 179 F.3d 1143,1145 (9th Cir. 1999)( <i>en banc</i> ) .....	13
<i>United States v. Gonzalez</i> , 113 F.3d 1026 (9th Cir.1997) .....	12
<i>United States v. Moore</i> , 159 F.3d 1154, 1158 (9th Cir. 1998) . <i>passim</i>	
<i>United States v. Nguyen</i> , 262 F.3d 998 (9 <sup>th</sup> Cir. 2001) .....	12
WASHINGTON CASES	
<i>Berger v. Sonneland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001) .....	23
<i>In re Bedker</i> , 134 Wn.App. 775, 146 P.3d 442 (2006).....	23
<i>In re Detention of Stout</i> , 128 Wn.App. 21, 114 P.3d 658 (2005) .....	9
<i>In re Detention of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003) .....	18, 21, 22, 31
<i>In re Petersen</i> , 138 Wn.2d 70, 980 P.2d 1204 (1999) .....	9
<i>In re Stenson</i> , 142 Wn.2d 710, 16 P.3d 1 (2001) .....	10, 11, 15
<i>In re the Detention of Halgren</i> , 156 Wn.2d 795, 132 P.3d 714 (2006) .....	33
<i>In re the Detention of Post</i> , 145 Wn.App. 728, 187 P.3d 803 (2008) .....	30
<i>In re the Detention of Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993) .....	17, 31
<i>In the Detention of T.A.H.-L.</i> , 123 Wn.App. 172, 97 P.3d 767 (2004)9	

<i>State v. Arndt</i> , 87 Wn.2d 374, 553 P.2d 1328 (1976) .....	33
<i>State v. Cauthron</i> , 120 Wn.2d 879, 846 P.2d 502 (1993).....	32
<i>State v. Copeland</i> , 130 Wn.2d 244, 922 P.2d 1304 (1996) .....	32
<i>State v. Greene</i> , 139 Wn.2d 64, 984 P.2d 1024 (1999).....	31, 32
<i>State v. Romero</i> , 95 Wn.App. 323, 975 P.2d 564, <i>review denied</i> , 138 Wn.2d 1020 (1999) .....	8

#### STATUTES

RCW 71.09.020 .....	3, 4, 23
RCW 71.09.050 .....	8

#### OTHER AUTHORITIES

<i>Diagnostic And Statistical Manual Of Mental Disorders</i> (4th ed., text rev.) (2000) .....	passim
---	--------

#### TREATISES

Dennis Doren, <i>Evaluating Sex Offenders: A Manual For Civil Commitments And Beyond</i> (2002) .....	26
Holly A. Miller, et al., <i>Sexually Violent Predator Evaluations: Empirical Evidence, Strategies For Professionals And Research Directions</i> , 20 <i>Law and Human Behavior</i> , 29 (2005).....	28
Howard V. Zonna, et al., <i>Dangerous Sex Offenders: A Task Force Report Of The American Psychiatric Association</i> , 170 (1990) .....	27
Jill S. Levenson, <i>Reliability Of Sexually Violent Predator Civil Commitment in Florida</i> , 28 <i>Law and Human Behavior</i> , 357 (2004) .....	28
Paul Moran, <i>The Epidemiology of Antisocial Personality Disorder</i> , 34 <i>Social Psychiatry &amp; Psychiatric Epidemiology</i> 231 (1999) .....	21
Richard Wollert, <i>Poor Diagnostic Reliability, the Null-Bayes Logic Model, And Their Implications For Sexually Violent Predator Evaluations</i> , 13 <i>Psychology, Public Policy, and Law</i> , 167 (2007) .....	27

Robert A. Prentky, et al., *Sexually Violent Predators In The Courtroom*, 12 *Psychology, Public Policy And Law*, 357 (2006) .....28

Stephen D. Hart & Randall Kropp, *Sexual Deviance And The Law, Sexual Deviance Theory, Assessment And Treatment*, 557 (Richard Laws & William T. O'Donohue editors, 2d ed. 2008) .....28

Thomas K. Zander, *Civil Commitment Without Psychosis: The Laws Reliance on the Weakest Links in Psychodiagnosis*, 1 *Journal of Sexual Offender Civil Commitment: Science and the Law*, 17 (2005) .....27, 28

A. SUMMARY OF ARGUMENT

John Berry was involuntarily committed pursuant to RCW 71.09 following a jury trial. The commitment order should be reversed and his case remanded for a new trial because the trial court violated his right to counsel and right to due process when it failed to replace appointed counsel because of an irreconcilable conflict. In addition, his right to due process was violated when the court admitted evidence and expert opinion regarding the invalid diagnosis of paraphilia not otherwise specified (NOS) nonconsent, a diagnosis that is not accepted by the psychiatric community.

B. ASSIGNMENTS OF ERROR

1. Mr. Berry's right to due process was violated when the court refused to appoint new counsel in light of his irreconcilable differences with current counsel.

2. Mr. Berry's right to due process was violated where his commitment was based partially on a diagnosis of an unreliable mental abnormality of paraphilia NOS nonconsent.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person facing involuntary civil commitment under RCW 71.09 has a statutory and due process right to counsel free from conflicts. Where a person facing commitment is required to go to trial with an attorney with whom he has irreconcilable differences which essentially deny him his right to an attorney, the person's right to due process is violated. Here, Mr. Berry continually and consistently sought the removal of current counsel in light of irreconcilable differences which resulted in Mr. Berry refusing to communicate with counsel. Was Mr. Berry denied his right to counsel, requiring reversal of the jury's verdict to involuntarily civilly committed?

2. Due process is violated when an involuntary civil commitment is based upon a diagnosis that is not accepted in the scientific community. Paraphilia NOS nonconsent is not included in the DSM-IV-TR and is not widely accepted in the psychological community. Mr. Berry's involuntary commitment was based partially on the diagnosis of a State retained psychologist as suffering from paraphilia NOS nonconsent. Was Mr. Berry's commitment based upon an invalid diagnosis, thus violating his

right to due process and requiring the reversal of the jury's verdict involuntarily committing him?

D. STATEMENT OF THE CASE

John Berry was convicted in 1998 of first degree rape and first degree kidnapping, both sexually violent offenses as defined by RCW 71.09.020(11)(a), (c). CP 1123-24. Prior to his release from confinement in the Department of Corrections at the conclusion of his sentence, the State filed a petition to involuntarily civilly commit Mr. Berry pursuant to RCW 71.09. CP 1123-25.

At the commitment trial, the State presented the testimony of Dr. Amy Phenix, a clinical psychologist who specializes in the evaluation of sex offenders to determine whether they meet the criteria for commitment under RCW 71.09. 9/17/09RP 305-12. Dr. Phenix opined that Mr. Berry suffered from a mental abnormality (paraphilia NOS nonconsent), and a personality disorder (antisocial personality disorder) that caused him serious difficulty controlling his behavior. 9/1709RP 325. Dr. Phenix stated that the two diagnoses rested in a large part on Mr. Berry's past criminal offenses. 9/18/09RP 335-36. Dr. Phenix admitted that the paraphilia diagnosis was not defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) but was a

relatively common diagnosis for those who met the criteria for involuntary commitment under RCW 71.09. 9/17/09RP 329-32.

Dr. Richard Wollert, also a clinical psychologist specializing in the treatment of sex offenders, testified that the paraphilia NOS nonconsent diagnosis as used in RCW 71.09.020 is not defined in psychology. 9/21/09amRP 7-5, 25. Dr Wollert further testified one cannot give a diagnosis of paraphilia NOS nonconsent to any degree of reasonable psychological certainty and did not agree with Dr. Phenix's diagnosis of the paraphilia here. 9/17/09pmRP 570-81. Dr. Wollert did agree Mr. Berry suffered from antisocial personality disorder. 9/17/09pmRP 557.

A jury subsequently found Mr. Berry should be involuntarily, civilly committed under RCW 71.09. CP 66.

#### E. ARGUMENT

1. THE COURT'S REFUSAL TO REPLACE COURT-APPOINTED COUNSEL VIOLATED MR. BERRY'S RIGHTS TO COUNSEL AND DUE PROCESS

On June 22, 2009, Mr. Berry formally moved the court to remove his court-appointed attorneys, Thomas Cox and Michael Kahrs, on the basis that there existed an irreconcilable conflict between him and counsel. CP 618-22; 6/22/09RP 3-9, 17-20. Mr.

Berry alleged that his attorneys failed to communicate with him and excluded him from the preparation of the defense. CP 620-21, 6/22/09RP 3-9, 17-20. Mr. Berry was adamant that he no longer trusted counsel and had no faith the attorneys would zealously represent him. CP 621; 6/22/09RP 3-19, 17, 20. The trial court denied the motion, finding no conflict and assuring Mr. Berry his attorneys were competent to represent him. CP 576-77, 6/22/09RP 23-25.

Subsequently, on September 10, 2009, Mr. Cox and Mr. Kahrs moved to withdraw as counsel for Mr. Berry, citing the same irreconcilable conflict noted by Mr. Berry some four months before. 9/10/09RP 3-5.

As you know, Mr. Berry attempted to remove us on April 15<sup>th</sup> in front of Judge Fair and again in June 22<sup>nd</sup> in front of Judge Fair. In regards to this, Mr. Berry, on the record, stated April 15<sup>th</sup> that we are not his counsel and he would no longer communicate with us. And that has been his posture for the last six months.

In regards to that, the ethical considerations that we're bringing up here – And we actually sought professional advice in regards to our ethical obligations as far as representing Mr. Berry in this matter. Now these reflect our legal and ethical obligations and sentiments, not particularly or personal ones.

In that regard, we were given options by the ethical source, who pretty much writes the book, that we, in view of what has happened between, one, irreconcilable differences and, two, total lack of communication, shut down between client and counsel, that we either had to withdraw as not being able to effectively represent him in this case before the Court, ethically, or that we needed to continue and have him examined in order to ascertain that he was competent indeed to proceed either by himself or with ourselves or other counsel.

In regards to that, the basis of the motion that's before the Court today is that ethically we have to move to withdraw based on the fact that we have not spoken with Mr. Berry, nor he with us, in six months. We have sent him things and gotten no responses.

In that regard, because of the irreconcilable differences that he placed on the record I believe April 15<sup>th</sup> and June 22<sup>nd</sup>, and the fact that he refuses to communicate with counsel, we feel compelled to bring the motion to withdraw as his counsel as we cannot feel ethically that we can represent him within the full bounds of the law as required.

I also understand that once we're presented with a situation in Mr. Berry's case, regardless of how many lawyers he's had before, that we have to put forward what we are ethically required in order to preserve his right to a fair trial.

We were told by a very high-up ethical person, who teaches ethics at the University of Washington, that we need – If we have irreconcilable differences and we have a total communication breakdown with Mr. Berry, that we cannot effectively represent him and should move to withdraw.

9/10/09RP 3-5, 8.

The attorneys had also moved for appointment of a guardian *ad litem* because of what they perceived to be Mr. Berry's deteriorating physical and mental condition. CP 448-50, 469-70; 9/10/09RP 3-10. The court's inquiry during the hearing ignored the irreconcilable difference issue and instead focused solely on Mr. Berry's mental and physical health. 9/10/09RP 10-46. During this discussion, Mr. Berry assured the court he was in good physical and mental health. *Id.* Following this discussion, and in spite of the ethical issues raised by counsel regarding the irreconcilable difference and their self-professed inability to zealously advocate, the court denied counsel's motion to withdraw as well as counsel's motion for the appointment of a guardian *ad litem*. CP 383-84.

So I don't see any basis for the withdrawal of counsel at this time. I think counsel have brought the issue to the attention of the Court. They've fulfilled their ethical obligation. The fact that Mr. Berry is uncooperative does not bar the matter proceeding to trial

It's clear that Mr. Berry doesn't want to have a trial in this case. And it appears to me, from my prior experience, that Mr. Berry would sooner not have a trial ever in this case. But the matter has been pending six years, and I think it's time we got the issue before a jury.

9/10/09RP 44-45.

a. A person facing involuntary commitment pursuant to RCW 71.09 has a right to counsel free from conflict. The Sixth Amendment of the United States Constitution and art. 1, sec. 22 of the Washington Constitution guarantee a criminal defendant the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. Romero*, 95 Wn.App. 323, 326, 975 P.2d 564, *review denied*, 138 Wn.2d 1020 (1999). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942). If a defendant does not have funds to hire an attorney, a person accused of a crime has the right to have counsel appointed. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

People facing involuntary commitment under RCW 71.09 have the right to counsel. RCW 71.09.050(1) provides, “[a]t all

stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel.” *In re Petersen*, 138 Wn.2d 70, 92, 980 P.2d 1204 (1999). Further, the right to counsel in a sexually violent predator proceeding is meaningless unless it includes the right to the effective assistance of counsel. *In the Detention of T.A.H.-L.*, 123 Wn.App. 172, 179, 97 P.3d 767 (2004). In that vein, although persons facing involuntary commitment under RCW 71.09 do not have a Sixth Amendment right to effective assistance of counsel, Washington courts nonetheless apply the standard articulated in *Strickland* when assessing ineffective assistance claims. *In re Detention of Stout*, 128 Wn.App. 21, 28, 114 P.3d 658 (2005).

The right to counsel means more than to be physically accompanied by an attorney. See *Strickland*, 466 U.S. at 685 (“That the person who happens to be a lawyer is present at the trial alongside the accused . . . is not enough to satisfy the constitutional command.”). While a criminal defendant does not have the right to “meaningful attorney-client relationship,” *Morris v. Slappy*, 461 U.S. 1, 3-4, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), the defendant does have the right to an attorney who owes a duty of loyalty to the defendant. *Strickland*, 466 U.S. at 692. “[T]o compel one . . . to

undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.” *Brown v. Craven*, 424 F.2d 1166, 1169-70 (9th Cir.1970), *citing. Gideon, supra; Entsminger v. Iowa*, 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967).

If the relationship between the lawyer and his client collapses, the refusal of the court to appoint new counsel violates the client’s right to counsel. *In re Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001); *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998). This is because the breakdown of a relationship between attorney and defendant from irreconcilable differences effectively results in the complete denial of counsel. *Id.* Therefore, unlike a claim of ineffective assistance, there is no requirement to show prejudice where an irreconcilable difference exists. *Id.*

b. The conflict between Mr. Berry and counsel was irreconcilable. In reviewing the trial court’s decision not to substitute counsel, this Court determines: (1) the extent of the conflict between counsel and the defendant; (2) the adequacy of the court’s inquiry into the conflict; and (3) the timeliness of the

defendant's motion.<sup>1</sup> *Stenson*, 142 Wn.2d at 723 (adopting the test enumerated in *Moore*, 159 F.3d at 1158-59, *citing Brown*, 424 F.2d at 1170. The Court examines the extent and nature of the breakdown in the communication between attorney and client and the breakdown's effect on the representation the client actually received. *Stenson*, 142 Wn.2d at 724.

Instructive on this issue is *United States v. Moore, supra*. In *Moore*, the defendant moved for appointment of new counsel citing a breakdown in the attorney-client relationship. Mr. Moore was outraged by his counsel's failure to inform him of the Government's rejection of his counter offer to the Government's offer to plead guilty. *Moore*, 159 F.3d at 1159. Mr. Moore was also upset at what he perceived was the attorney's failure to investigate his defense, interview defense witnesses or otherwise adequately prepare for trial. *Id.* Mr. Moore's dissatisfaction with counsel culminated in a meeting between Mr. Moore and counsel where he threatened to sue the attorney for malpractice, and as a result, the attorney felt physically threatened. *Id.* The district court refused to appoint new counsel. *Id.* The Ninth Circuit reversed the district court's decision,

---

<sup>1</sup>The factors are the same whether reviewing a motion to substitute counsel or an irreconcilable conflict between attorney and client. *Moore*, 159 F.3d at 1158.

finding the record showed ample evidence of an irreconcilable conflict between Mr. Moore and counsel. *Id* at 1160.

In addition, in *United States v. Nguyen*, the Ninth Circuit ruled there was a complete breakdown in the attorney-client relationship where Mr. Nguyen would no longer communicate with his court appointed attorney. 262 F.3d 998, 1004-05 (9<sup>th</sup> Cir. 2001).

The Court noted:

There is no question in this case that there was a complete breakdown in the attorney-client relationship. By the time of trial, the defense attorney had acknowledged to the Court that Nguyen “just won't talk to me anymore.” In light of the conflict, Nguyen could not confer with his counsel about trial strategy or additional evidence, or even receive explanations of the proceedings. In essence, he was “left to fend for himself,” *United States v. Gonzalez*, 113 F.3d 1026, 1029 (9th Cir. 1997), in violation of his Sixth Amendment right to assistance of counsel. Nonetheless, the District Judge ignored the problems between Nguyen and his attorney, commenting that Nguyen's “strike” was not ground for a continuance, explaining to Nguyen that “the Federal Public Defenders provide very good representation to defendants,” and remarking that he was “totally comfortable” with the public defender representing Nguyen. The issue in this case is the attorney-client relationship and not the comfort of the court or the competency of the attorney.

*Id* at 1004.

In the case at bar, Mr. Berry repeatedly stated his distrust of his appointed counsel and refused to communicate with them at all. Counsel agreed that any communication between them and Mr. Berry was non-existent and appropriately moved to withdraw. Yet the trial court ignored the ethical concerns voiced by counsel and, based upon its overriding concern of getting the matter to trial, denied the motion to withdraw. Following the Ninth Circuit's ruling in *Moore*, this Court should find Mr. Berry established an irreconcilable conflict between himself and counsel requiring their replacement. *Moore*, 159 F.3d at 1159-60.

c. The court's inquiry into the conflict was entirely inadequate. "Before the [ ] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a 'sufficient basis for reaching an informed decision.'" *United States v. D'Amore*, 56 F.3d 1202, 1205 (9th Cir. 1995), *overruled on other grounds in United States v. Garrett*, 179 F.3d 1143,1145 (9th Cir. 1999)(*en banc*).

Here, the focus of the court's inquiry was on Mr. Berry's health and not on his contention that an irreconcilable difference existed. Once the court was satisfied that Mr. Berry's health would not result in a delay of the scheduled trial, the court refused to

consider Mr. Berry's request, merely noting that Mr. Berry would be dissatisfied with any attorney appointed to represent him.

9/10/09RP 44-45.

Once again looking to *Moore, supra*, the district court there dealt with Mr. Moore's claim of an irreconcilable conflict on three different occasions. Each time the district court failed to make any inquiry into the problem. On the fourth occasion the court held an *in camera* hearing without the prosecutor present. *Moore*, 159 F.3d at 1160. The district court then conducted a perfunctory inquiry, apparently more concerned with the trial schedule than with whether a conflict existed. *Id.* On a fifth occasion, the court again held an *in camera* hearing where Mr. Moore related his continuing dissatisfaction with counsel. The court made a more in-depth inquiry on this occasion. The Ninth Circuit found the district court's overall inquiry insufficient, finding the court's later more extensive inquiries too little too late. *Moore*, 159 F.3d at 1161.

Here, the court similarly made very little attempt to determine the breadth and depth of the conflict between Mr. Berry and his attorneys. As in *Moore*, the court's sole focus was on the trial date and very little, if any, questions were pointed to the topic of the irreconcilable differences claimed by Mr. Berry. In fact, the court

here engaged in even less of an inquiry than the *Moore* court. That court at least held two *in camera* hearings regarding Mr. Moore's concerns which were still deemed insufficient. *Moore*, 159 F.3d at 1160-61.<sup>2</sup> As a consequence, the court's inquiry into the conflict here was wholly inadequate.

d. After weighing all of the *Stenson* factors, Mr. Berry's convictions must be reversed. After weighing each of the *Stenson* factors, this Court must determine whether the conflict between Mr. Berry and his attorneys undermined confidence in the trial proceedings, thus constituting reversible error. *Stenson*, 142 Wn.2d at 723-35.

Here, there was an extensive conflict between counsel and Mr. Berry, his motion to substitute counsel was timely made, and the court's inquiry into the conflict was entirely inadequate. This Court is left with the inescapable conclusion the conflict between Mr. Berry and his appointed attorneys undermined confidence in the trial proceedings. At the very least, this Court should remand the matter for a more probing inquiry into Mr. Berry's allegations

---

<sup>2</sup>In *Stenson*, the Supreme Court found the inquiry sufficient where counsel and the defendant were given the opportunity to air their grievances during two extensive *in camera* hearings. *Stenson*, 142 Wn.2d at 726-31. Again, this was substantially a more exhaustive inquiry than occurred here.

regarding the irreconcilable differences between him and his appointed attorneys. This Court must reverse the jury's commitment of Mr. Berry because his right to assistance of counsel was denied.

2. PREDICATING MR. BERRY'S COMMITMENT ON THE UNRELIABLE DIAGNOSIS OF "PARAPHILIA NOT OTHERWISE SPECIFIED NONCONSENT" VIOLATED DUE PROCESS

Dr. Phenix diagnosed Mr. Berry as suffering from, among other things, the mental abnormality of paraphilia NOS nonconsent. CP 763-71. Prior to the commitment trial, Mr. Berry moved for summary judgment, or in the alternative, for a *Frye*<sup>3</sup> hearing, pointing out that the paraphilic diagnosis is not a valid diagnosis, and to involuntarily commit him based upon this diagnosis would violate his right to due process. CP 827-37; 2/27/09RP 7-12. Following a hearing on the issue, the court denied both motions:

First addressing the issue of whether or not there are disputed issues of material fact with respect to whether or not respondent suffers from a mental abnormality or personality disorder, I would agree with the State, that this is a battle of the experts. The State's expert has very clearly indicated, in her opinion, based on reliance on police reports, interviews, and testing, that Mr. Berry does suffer from a mental abnormality or personality disorder, specifically, paraphilia not otherwise specified.

---

<sup>3</sup> *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

Now, other experts indicate they don't believe that the diagnosis is accurate. They also don't believe that it exists, which I'll address in a moment. But I don't think there really can be any real question that there is a dispute among experts as to whether or not the respondent suffers from a mental abnormality or personality disorder that will be the subject of the trial.

...  
With respect to the *Frye* hearing aspects, first of all, with respect to the diagnosis of paraphilia not otherwise specified and whether or not there needs to be a *Frye* hearing on that, obviously, I've tried a number of these cases and that is a diagnosis I hear. I understand there is a debate with respect to how it is applied, but I don't believe, and I'm going back to the case law as well, specifically *In re the Detention of Young*, I don't believe that a *Frye* test is the arena to determine whether or not this diagnosis is appropriate and whether or not it can ever be offered to the jury. I just don't think this is the context that a *Frye* hearing is appropriate for.

2/27/09RP 24-26. The court also ruled Mr. Berry's motion did not raise a constitutional issue: "I guess I don't see it as a constitutional issue. I see it as an issue where experts have a disagreement. So I will respectfully decline to adopt that perspective and deny that motion." 2/27/09RP 27.

a. To satisfy due process, involuntary commitment as a sexually violent predator must be based upon a valid diagnosis.

The federal and Washington state constitutions guarantee the right to due process of law. U.S. Const. amend XIV; Const. art. I, § 3. A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause.

*Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, the State may only commit people who are *both* currently dangerous *and* suffer from a mental abnormality. *Kansas v. Hendricks*, 521 U.S. 346, 357-58, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *In re Detention of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Current mental illness is a constitutional requirement of continued detention. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).

The United States Supreme Court has established that involuntary civil commitment may not be based upon a diagnosis that is either medically unrecognized or too imprecise to distinguish the truly mentally ill from typical recidivists, who must be dealt with by criminal prosecution alone. *Kansas v. Crane*, 534 U.S. 407, 122

S.Ct. 867, 151 L.Ed.2d 856 (2002); *Hendricks*, 521 U.S. 346;  
*Foucha*, 504 U.S. 71.

In *Foucha*, the Court held that a criminal defendant found not guilty by reason of insanity could not be held involuntarily in a state hospital solely “on the basis of his antisocial personality which, as evidenced by his conduct at the facility . . . rendered him a danger to himself or others.” 504 U.S. at 78; *see also id.* at 82 (rejecting the argument that “because [an individual] once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, . . . he may not be held indefinitely.”).

The Court explained that the State’s “rationale [for commitment] would permit [it] to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true for any convicted criminal, even though he has completed his prison term.” *Id.* at 82-83. The Court reasoned that if a supposedly dangerous person with a personality disorder “commit[s] criminal acts,” then “the State [should] vindicate [its interests through] the ordinary criminal processes . . . , the use of enhanced sentences for recidivists, and any other permissible ways of dealing with patterns

of criminal conduct” – i.e., “the normal means of dealing with persistent criminal conduct.” *Id.* at 82.

In *Hendricks*, the Court reaffirmed that “dangerousness standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment;” rather, “proof of dangerousness [must be coupled] with the proof of some additional factor, such as ‘mental illness’ or ‘mental abnormality.’” 521 U.S. at 358. The Court upheld Mr. Hendricks’ commitment under Kansas’ Sexually Violent Predator Act, noting that “[t]he mental health professionals who evaluated Hendricks diagnosed him as suffering pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder.” *Id.* at 260. Thus, “Hendricks’ diagnosis as a pedophile . . . suffice[d] for due process purposes” and, further, his admitted inability to control his pedophilic urges “adequately distinguish[ed] [him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.” *Id.*

In his concurrence, Justice Kennedy, who provided the fifth vote for the majority opinion in *Hendricks*, emphasized that Mr. Hendricks’ “mental abnormality – pedophilia – is at least described in the DSM-IV.” *Id.* at 372 (Kennedy, J., concurring). He was quick

to add, “however, . . . if it were shown that mental abnormality,” as defined by state law, “is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.” *Hendricks*, 521 U.S. at 373.

In *Crane*, the Court revisited the Kansas statute and held that due process required that “there must be proof of serious difficulty in controlling behavior” in order to support involuntary civil commitment. *Crane*, 534 U.S. at 413. In reinforcing its decision in *Hendricks*, that civil commitment is reserved for dangerous sexual offenders as opposed to just dangerous persons, the Court cited to a study finding that forty to sixty percent of the male prison population is diagnosable with antisocial personality disorder (APD). *Id.* at 412, citing Paul Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 *Social Psychiatry & Psychiatric Epidemiology* 231, 234 (1999).

Following these decisions, the Washington Supreme Court has similarly recognized that in sexually violent predator proceedings, due process requires the State to prove the detainee has a serious, diagnosed, mental disorder that causes him difficulty in controlling his sexually violent behavior. *Thorell*, 149 Wn.2d at 736. “Lack of control” requires proof “sufficient to distinguish the

dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist in an ordinary criminal case.” *Id.* at 723, *quoting Crane*, 534 U.S. at 413.

Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for involuntary civil commitment as a sexually violent predator, *see Crane*, 534 U.S. at 413, diagnosis must nonetheless be medically justified. *Hendricks*, 521 U.S. at 358; *Thorell*, 149 Wn.2d at 732, 740-41.

b. Dr. Phenix’s diagnosis of paraphilia NOS nonconsent violates due process because it is an invalid diagnosis that has not been accepted by the medical profession. The State expert’s diagnosis of paraphilia NOS nonconsent is invalid, and its use as a predicate for Mr. Berry’s involuntary civil commitment therefore violates due process. The United States Supreme Court has upheld civil commitment only in cases in which the diagnosed disorder was one that “the psychiatric profession itself classifies as a serious mental disorder.” *Crane*, 534 U.S. at 410-12; *Hendricks*, 521 U.S. at 360.

Expert testimony is necessary to make a diagnosis of a mental abnormality as defined by the statute. "Mental abnormality" is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). Determining whether a particular person possesses a mental abnormality "is based upon the complicated science of human psychology and is beyond the ken of the average juror." *In re Bedker*, 134 Wn.App. 775, 779, 146 P.3d 442 (2006). When an essential element in the case is best established by an opinion which is beyond the expertise of a layperson, expert testimony is required. *Berger v. Sonneland*, 144 Wn.2d 91, 110, 26 P.3d 257 (2001).

The disorder "paraphilia NOS nonconsent" fails the Court's "medical recognition" or "medical justification" test, because it is not recognized by either the psychiatric profession in general, the American Psychiatric Association (APA), or the DSM-IV. Put simply, it is a wholly unreliable and invalid diagnosis that fails to distinguish Mr. Berry from any "dangerous but typical recidivist"

who cannot be civilly committed under the Dupe Process Clause.  
*Crane*, 534 U.S. at 413.

The term “paraphilia” describes mental disorders characterized by deviant sexual arousal. The DSM-IV-TR is organized in diagnostic classes and contains a general category of diagnoses for paraphilias. According to the DSM-IV-TR, “[t]he essential features of a Paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months.” *Diagnostic And Statistical Manual Of Mental Disorders* (4th ed., text rev.) (2000) (DSM-IV-TR).

The DSM-IV-TR lists eight separate paraphilia diagnoses: exhibitionism (deviant arousal to public exposure of one's genitals), fetishism (deviant arousal to objects), frotteurism (deviant arousal involving touching and rubbing against a non-consenting person), pedophilia (deviant arousal to prepubescent children), masochism (deviant arousal to being humiliated, beaten, bound, or otherwise made to suffer), sadism (sexual excitement from the psychological or physical suffering and humiliation of others), transvestic fetishism

(deviant arousal to cross-dressing), and voyeurism (deviant arousal to observing individuals unaware of the observation naked or engaged in sexual activity). *Id.*

Though the DSM-IV-TR does not contain a specific diagnosis for sexual arousal to nonconsensual sex, the State maintains that it is appropriate to consider such behavior as a Paraphilia Not Otherwise Specified (“NOS”). 9/17/09 RP 331-32. Every category of diagnosis in the DSM-IV-TR contains an “NOS” diagnosis. The DSM-IV-TR, in explaining the purpose of “NOS” diagnoses, states “[n]o classification of mental disorders can have a sufficient number of specific categories to encompass every conceivable clinical presentation. The Not Otherwise Specified categories are provided to cover the not infrequent presentations that are at the boundary of specific categorical definitions.” DSM-IV-TR at 576.

With respect to the Paraphilia NOS diagnosis, the DSM-IV-TR provides:

This category is included for coding Paraphilias that do not meet the criteria for any of the specific categories. Examples include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine).

*Id.*

The first “essential feature” of a paraphilia, namely the presence or absence of recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving nonhuman objects, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting persons, read broadly, would apply to all repeat rapists as they exhibit “behaviors involving ... nonconsenting persons.” *Id.*

The diagnosis of paraphilia NOS nonconsent was essentially invented by Dr. Dennis Doren, a Wisconsin psychologist who is the evaluation director for Wisconsin's SVP commitment program. See Dennis Doren, *Evaluating Sex Offenders: A Manual For Civil Commitments And Beyond* (2002). Doren has acknowledged, though, that the DSM has “no separately listed paraphilia of this type.” *Id.* at 63. Further, the APA trustees have rejected the diagnosis, in part because of the preliminary nature of the data and the difficulty physicians have in differentiating the disorder from other disorders. Thomas K. Zander, *Civil Commitment Without Psychosis: The Laws Reliance on the Weakest Links in Psychodiagnosis*, 1 *Journal of Sexual Offender Civil Commitment*:

Science and the Law, 17, 46 (2005). A subsequent APA task force similarly concluded, “[t]he ability to make such a diagnosis with a sufficient degree of validity and reliability remains problematic.” Howard V. Zonna, et al., *Dangerous Sex Offenders: A Task Force Report Of The American Psychiatric Association*, 170 (1990).

In addition to the APA’s rejection of the diagnosis of paraphilia NOS nonconsent, a number of professionals and commentators in the field continue to conclude that it is invalid and diagnostically unreliable. See e.g., Richard Wollert, *Poor Diagnostic Reliability, the Null-Bayes Logic Model, And Their Implications For Sexually Violent Predator Evaluations*, 13 Psychology, Public Policy, and Law, 167, 185 (2007) (concluding, based on analysis of results of independent evaluations in 295 SVP cases, that “psychologists who undertake [SVP] evaluations should no longer diagnose any [individual] as suffering from [Paraphilia NOS (nonconsent)]” because the diagnosis is “so unreliable . . . that it is impossible to attain a reasonable degree of certainty as to [its] presence” and therefore its “only function” is to provide a “pretext” for “preventive detection”);<sup>4</sup> Robert A. Prentky, et al., *Sexually Violent Predators In The Courtroom*, 12 Psychology,

---

<sup>4</sup> See also Wollert’s extensive criticism of the paraphilia NOS nonconsent diagnosis during Mr. Berry’s trial. 9/21/09amRP 47-50, 9/21/09pmRP 565-80.

Public Policy And Law, 357, 370 (2006) (“because by definition all victims of sexual crimes are nonconsenting, all sexual offenders with multiple offenses . . . could be diagnosed with paraphilia NOS-nonconsent,” thus, the “category becomes a wastebasket for sex offenders” and is “taxonomically useless”); Holly A. Miller, et al., *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies For Professionals And Research Directions*, 20 Law and Human Behavior, 29, 39 (2005) (“[T]he definition of [Paraphilia NOS (nonconsent)] is so amorphous that no research has ever been conducted to establish its validity”); Stephen D. Hart & Randall Kropp, *Sexual Deviance And The Law*, Sexual Deviance Theory, Assessment And Treatment, 557, 568 (Richard Laws & William T. O’Donohue editors, 2d ed. 2008) (Paraphilia NOS (nonconsent) is “an idiosyncratic diagnosis . . . that is not generally accepted or recognized in the field”); Jill S. Levenson, *Reliability Of Sexually Violent Predator Civil Commitment in Florida*, 28 Law and Human Behavior, 357, 365 (2004) (“Since none of [Doren’s] criteria [for diagnosing Paraphilia NOS (nonconsent)] are stated or implied in the DSM-IV, it is not surprising that, in practice, the diagnosis is . . . widely variable”); Zander, *supra*, at 44-45, 49-50 (summarizing research studies and academic opinion).



This Court has declined to rule on the merits of a similar argument in *In re the Detention of Post*, where the Court ruled the issue had not been preserved for review. 145 Wn.App. 728, 755-56, 187 P.3d 803 (2008). *Post* was remanded on other grounds and this Court noted Mr. Post could request a *Frye* hearing to weigh the disagreement among the experts regarding the paraphilia diagnosis. *Id.* at 756, n. 16, 757, n. 19. Here, that is precisely what Mr. Berry did, and the trial court refused the request to hold a *Frye* hearing, but noted the disagreement among the experts.

2/27/09RP 24-26

The diagnosis of paraphilia NOS nonconsent invented by a single psychiatrist, explicitly rejected by the APA, and roundly criticized within the profession, lacks medical recognition and due process prohibits its use as a predicate for involuntary commitment.

c. At the very least, the trial court should have ordered a *Frye* hearing. Despite Mr. Berry's voluminous attack on the paraphilia NOS nonconsent diagnosis and accompanying motion for a *Frye* hearing to determine whether this diagnosis was admissible, the trial court denied his motion. CP 631-32. The court's determination was erroneous in light of the extensive dispute among experts on the diagnosis and the lack of a

consensus in the scientific community, and this Court's decision in *Post, supra*, which concluded a *Frye* hearing was the proper avenue to contest the diagnosis.

Washington courts apply the *Frye* standard in determining the reliability and admissibility of scientific evidence. *Thorell*, 149 Wn.2d at 754; *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). *Frye* directs courts to apply certain criteria in assessing the reliability and admissibility of expert testimony. "The *Frye* standard requires a trial court to determine whether a scientific theory or principle 'has achieved general acceptance in the relevant scientific community' before admitting it into evidence." *Thorell*, 149 Wn.2d 754, quoting *In re the Detention of Young*, 122 Wn.2d 1, 56, 857 P.2d 989 (1993). The *Frye* standard recognizes that because judges do not have the expertise to assess the reliability of scientific evidence, the courts must turn to experts in the particular field to help them determine the admissibility of the proffered testimony. *Greene*, 139 Wn.2d at 70. "[T]he relevant inquiry under *Frye* is general acceptance within the scientific community, without reference to its forensic application in any particular case." *Id.* at 71. " 'If there is a significant dispute between qualified experts as to the validity of the scientific evidence, it may not be admitted.'"

*State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996), quoting *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993).

In *Greene*, the Washington Supreme Court concluded that dissociative identity disorder (DID) was generally accepted in the scientific community, *because* it was included in the DSM-IV:

The DSM-IV's diagnostic criteria and classification of mental disorders reflects a consensus of current formulations of evolving knowledge in the mental health field.

*Greene*, 139 Wn.2d 70.

In contrast to DID, paraphilia NOS nonconsent is not found in the DSM-IV and as discussed, has not been generally accepted in the psychiatric community. Further, there is a dispute among qualified experts regarding the validity of the paraphilia NOS nonconsent diagnosis. Therefore, expert testimony diagnosing an individual with paraphilia NOS nonconsent does not meet the *Frye* standard for admissibility. *Copeland*, 130 Wn.2d at 255. As a consequence, the trial court should have held a *Frye* hearing, and ordered the evidence of the paraphilia diagnosis inadmissible at Mr. Berry's trial.

d. Mr. Berry is entitled to reversal of the jury's verdict.

“Personality disorder” and “mental abnormality” are alternative means of establishing whether a person meets the criteria for involuntary commitment under RCW 71.09. *In re the Detention of Halgren*, 156 Wn.2d 795, 810, 132 P.3d 714 (2006). This determination by the jury must be reversed where there is not substantial evidence to support all of the alternative means. *Id.* at 811; *citing State v. Arndt*, 87 Wn.2d 374, 367-77, 553 P.2d 1328 (1976).

Mr. Berry was diagnosed as suffering from a mental abnormality (paraphilia NOS nonconsent) and a personality disorder (antisocial personality disorder). There was no special verdict delineating which of the alternative means the jury relied on in finding Mr. Berry should be involuntarily committed. Further, Dr. Phenix admitted that a person suffering antisocial personality disorder alone would not meet the criteria under RCW 71.09. 9/18/09RP 443-44. Thus, in order to survive appellate scrutiny, both alternative means were required to be supported by substantial evidence. As discussed, paraphilia NOS nonconsent is an invalid diagnosis that does not survive *Frye*, and thus, cannot be

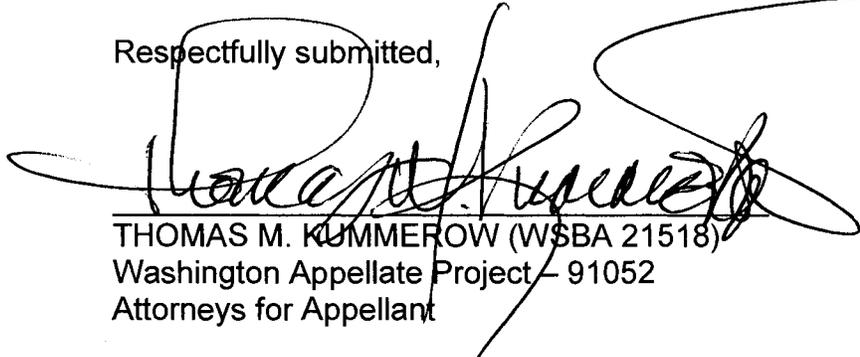
the basis of the jury's finding of commitment. Mr. Berry is entitled to reversal of his commitment.

F. CONCLUSION

For the reasons stated Mr. Berry submits the jury's verdict requiring he be involuntarily be committed pursuant to RCW 71.09 must be reversed.

DATED this 9th day of April 2010.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)  
Washington Appellate Project - 91052  
Attorneys for Appellant

