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65436-5

NO. 65436-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE: DETENTION OF EDDIE WILLIAMS

STATE OF WASHINGTON,

Respondent,

v.

EDDIE WILLIAMS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The court's order compelling Eddie Williams to submit to a current mental examination was not authorized by statute and violated his right to due process of law and his right to be free from unlawful invasions of his private affairs.

2. The court erroneously compelled Williams to submit to an additional mental examination based on the unsupported finding that it was necessary to the State's case.

3. Williams's right to due process of law was violated where his commitment was based on a diagnosis of the mental abnormality of paraphilia NOS nonconsent, which is not generally accepted in the medical community.

4. The court incorrectly refused Williams's request for a hearing on the admissibility of the diagnosis of paraphilia NOS nonconsent under Frye¹ and ER 703.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The statutory procedures for obtaining indefinite commitment under RCW 71.09 are strictly construed because of the massive curtailment of liberty at stake. RCW 71.09.040(4)

¹ Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

directs the State to obtain a psychological evaluation of an individual whom the State seeks to indefinitely confine. Here, the State insisted it was entitled to additional, current evaluations and obtained a court order compelling Williams to participate in the evaluation. Where the governing statute does not authorize the court to order a person to participate in an evaluation and the evaluation involves a tremendous invasion of a person's private affairs, was the court order compelling Williams's participation in the evaluation contrary to its statutory authority and a violation of Williams's right to due process of law and to be free from unlawful invasions of his private affairs?

2. Scientific evidence is admissible at trial only when it is derived from a theory that is generally accepted in the relevant scientific community. The court refused Williams's request for a hearing on the general acceptance among the psychological or medical community of the mental abnormality paraphilia NOS nonconsent. When the evidence shows a dispute within the scientific community of medical professionals about the validity of a novel diagnosis, did the court err by refusing to hold a hearing on the scientific testimony?

C. STATEMENT OF THE CASE.

After the court found probable cause to detain Eddie Williams pending the State's request for indefinite confinement under RCW ch. 71.09, the State housed him at the Special Commitment Center and a qualified psychologist evaluated him as required by RCW 71.09.040(4). CP 64-65; 3/20/09RP 5-6. Then, the State demanded another mental examination by a different psychologist. In re Det. of Williams, 147 Wn.2d 476, 480-82, 55 P.3d 597 (2002). The State filed an interlocutory appeal asserting its right to another mental examination. Id. The Supreme Court held that the State could not use the civil discovery rules to supercede RCW 71.09.040(4) and it was not entitled to an additional examination of Williams pursuant to this controlling statute. Id. at 491.

After the Supreme Court's ruling on the pretrial evaluation, a number of different factors delayed the trial on the State's petition for commitment. Williams initially refused to submit to the State's requested videotaped deposition and the trial court stayed the trial as a contempt sanction. 9/3/03RP 3, 5, 9. After Williams agreed to participate in the videotaped deposition, the prosecuting attorneys declined to schedule the deposition due to obligations from other

cases as well as a desire to wait until they received the report from Williams' expert if he chose to use an expert at trial. 2/20/04RP 2-3; 9/15/04RP 6. Further delays occurred based on changes in counsel for both the State and Williams, as well as health problems experienced by various parties, including Williams, and other scheduling difficulties. See e.g., CP 184-85; 9/15/04RP 5-6.

On March 20, 2009, when trial was set to begin in two months and the parties were ready to proceed, the State asked the trial court to compel Williams to submit to a "current" mental examination by its expert. 3/20/09RP 2. If Williams refused, the State insisted that the court must hold him in contempt at the King County jail. Id. at 3. Williams objected, explaining that there was no authority to order him to submit to the additional mental examination and the State had plenty of information on which to base its diagnosis, including many years of daily observations and interactions with him while under close scrutiny in the confines of the SCC. Id. at 5-9. The court ordered that he submit to the examination so that the State had a current evaluation by its testifying expert. Id. at 12. Dr. Robert Wheeler then spent two days interviewing Williams and conducting additional psychological tests. Supp. CP __, sub. no. 213, p. 6.

Before his trial, Williams moved to prohibit the State's expert from relying on the diagnosis of paraphilia NOS consent as the mental abnormality qualifying him for indefinite commitment and sought a Frye hearing to determine its scientific validity. CP 212; RP 28.² The court refused. RP 36.

At his trial, Wheeler testified in great detail about each prior allegation of criminal activity as well as Williams' recent discussions of his mental state, including his fantasies and beliefs. RP 308-09, 314, 319-25, 327-35, 336-43. Wheeler opined that Williams suffered from paraphilia NOS nonconsent and antisocial personality disorder. RP 353-68, 396-411. He also explained that under various psychological tests and actuarial tables, Williams was likely to reoffend. RP 461-98. The State also called Williams as a witness, and Williams explained his difficult childhood made worse by his learning disabilities, his prior criminal acts, his drug addiction, and his exercise of bad judgment in the past. RP 958, 960-61, 984, 993.

² The verbatim report of proceedings (RP) from the trial in 2010 is consecutively paginated and referenced herein as RP. Any citations from proceedings that did not occur as part of the 2010 trial are referred to by the date of the proceeding.

Dr. Richard Wollert, a clinical psychologist, disagreed with the basis of Wheeler's opinions. He explained that paraphilia NOS nonconsent is an invalid diagnosis that labels past behaviors without requiring an actual underlying dysfunction. RP 693-94, 746. He criticized Wheeler's methodology with regard to his predictions of future dangerousness, specifying the flaws in the tests used to predict Williams' future behavior. See e.g., RP 645, 650, 655-57, 633, 738. Wollert also explained that Williams was then 51 years old, and a person's likelihood of committing a predatory act of sexual violence greatly diminishes with advancing age. RP 640-42. Traits of psychopathy likewise reduce with age. RP 640-41.

The jury found Williams met the criteria for commitment. CP 643. Pertinent facts are further addressed in the relevant sections of the argument below.

D. ARGUMENT.

1. THE COURT IMPROPERLY ORDERED WILLIAMS TO SUBMIT TO A PSYCHOLOGICAL EVALUATION CONTRARY TO STATUTE AND IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW

Two months before his trial was set to begin, the State requested that Williams submit to a psychological evaluation and examination conducted by the expert of its choosing. The State insisted that RCW 71.09.040(4) entitles it to a “current” evaluation and the individual whom the State seeks to detain must personally participate in the evaluation. The court agreed and ordered Williams to participate in this evaluation despite his objection and under the threat that the State would request the contempt sanction of holding him in the King County jail without trial until he participated in the evaluation. Because the court did not have authority to order Williams to participate in this pretrial psychological evaluation, this order violated Williams’ right to due process of law and his right to be free from compelled invasions into his private affairs.

- a. The governing statute dictates the court’s authority to force a person facing commitment to personally participate in a psychological evaluation. Civil commitment is a massive

curtailment of the fundamental right to liberty protected by the right to due process of law. In re Detention of Thorell, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. 14; Const, art. I, § 3. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992). Due process requires state laws impinging on the fundamental right to liberty must advance compelling state interests and be “narrowly drawn to serve those interests.” In re Detention of Young, 122 Wn.2d 1, 26, 857 P.2d 396 (1993).

Because of the “massive curtailment of liberty,” at stake this Court “must narrowly construe the present statute,” RCW 71.09.040, defining the requirements of the civil commitment scheme. In re Det. of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting *inter alia* Humphrey v. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)); see In re Det. of Martin, 163 Wn.2d 501, 508, 182 P.3d 951 (2008) (“we strictly construe statutes curtailing civil liberties to their terms”). Statutory construction is a question of law reviewed *de novo*. Martin, 163 Wn.2d at 511.

RCW 71.09.040 is the statute setting forth the required and permissible pretrial procedures for people who are facing commitment. Hawkins, 169 Wn.2d at 801. It is construed narrowly and does not authorize mental examinations during discovery preceding a commitment trial. Williams, 147 Wn.2d at 490.

After a court finds probable cause to detain a person pursuant to a petition for civil commitment under RCW 71.09, the pretrial detainee is transferred “for an evaluation as to whether the person is a sexually violent predator.” RCW 71.09.040(4). The statute does not dictate the individual must participate in the evaluation.

RCW 71.09.040(4) provides:

If the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. A witness called by either party shall be permitted to testify by telephone.

Expert evaluations are routinely undertaken where the person being evaluated does not actually participate in the evaluation. Rendering an opinion based on records review is generally accepted practice within the profession of experts who perform psychological evaluations required for civil commitment. In re Det. of Marshall, 156 Wn.2d 150, 155, 125 P.3d 111 (2006). Experts in the field rely on review of records and evaluations conducted in the past to render valid diagnoses and helpful opinions on future dangerousness. Id. at 162.³

In Hawkins, this Court construed the “evaluation” language of RCW 71.09.040(4) to bar the court from ordering a person to submit to a sexual history polygraph examination. 169 Wn.2d at 801-02. The State’s expert insisted he needed the detainee to submit to this polygraph as part of his evaluation, conducted pursuant to RCW 71.09.040(4), and noted that the administrative rules permitted the State to obtain a polygraph. Id. at 800. The court disagreed. It ruled that even if the administrative rules allowed the State’s expert to request a sexual history polygraph

³ See also In re Det. of Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993), (expert opinion based on record review is reasonable and admissible); In re Pers. Restraint of Duncan, 167 Wn.2d 398, 404-05, 219 P.3d 666 (2009) (detainee’s refusal to participate in non-mandatory psychological examination admissible at

examination, the State “cannot create rules that contradict the statute.” Id. at 804. The plain text of the statute, narrowly construed, did not “specifically permit compelled polygraph examinations in RCW 71.09.090(4), [thus] the statute prohibits such examinations.” Id. at 803.

Likewise, RCW 71.09.040(4) directs the State to conduct “an evaluation” performed by a qualified professional. It does not specifically permit the court to compel a detainee to participate in the evaluation. If the statute does not expressly authorize the court to mandate the detainee to participate in the examination, the court lacks authority to order he do so. Hawkins, 169 Wn.2d at 803.

Statutory provisions “should be read in relation to the other provisions” Williams, 147 Wn.2d at 490. The State insisted that RCW 71.09.040(4) entitled it to a “current” examination of Williams, in which he personally participated. 3/20/09RP 2. But RCW 71.09.040(4) does not require a “current” examination. On the other hand, RCW 71.09.025(1)(b)(v) directs an agency to provide the prosecution with “[a] current mental health evaluation or mental health records review” when it is holding a person who may

trial to rebut claim lack of in-person interview discounts validity of evaluation).

meet the criteria for commitment. RCW 71.09.070 requires the Department to provide the court with “a current examination” of each committed person’s “mental condition made by the department of social and health services at least once every year.” Unlike those two statutes, RCW 71.09.040(4) directs the State to conduct “an evaluation as to whether the person is a sexually violent predator,” upon transfer to the appropriate facility after a probable cause finding.

The State had conducted an evaluation of Williams under RCW 71.04.040(4) several years earlier, and the courts had denied the State’s request to obtain a further compelled examination of Williams. 3/20/09RP 5-6. In 2002, the State petitioned the Supreme Court in Williams’s case, arguing it was entitled to a current psychological examination of Williams in addition to the already-performed RCW 71.04.040(4) evaluation. Williams, 147 Wn.2d at 480-81. The State claimed that CR 35 permitted it to obtain a court-ordered psychological evaluation so that it may be better prepared for trial.

The Supreme Court ruled that RCW 71.09.040(4) is a controlling statute that defines when the State is entitled to a mental examination. 147 Wn.2d at 490-91. To construe the terms

of the statute, it looked at a related provision in the same chapter. It compared RCW 71.09.090(3), which granted the State authority to obtain a new mental examination for post-commitment detainees who receive a new trial to determine whether he continues to meet the criteria for commitment. In that statute, “[t]he Legislature has expressly provided” for a new evaluation by the expert of the state’s choosing. Id. at 491; RCW 71.09.090(3). RCW 71.09.040(4) did not similarly direct the State to conduct an additional examination as part of its trial preparation. The court held, “In the absence of such statutory language for pretrial discovery, it can be inferred that the Legislature did not intend for the State to conduct such evaluations before commitment.” 147 Wn.2d at 491.

Because the Legislature expressly structured statutory procedures for a mental examination, the Williams Court ruled that the pretrial examination under RCW 71.09.040(4) is the only examination intended by the Legislature. Id. Subsection 040(4) created a full alternative to other discovery rules, and it delineated not only when the State may receive a mental evaluation (upon transfer to an appropriate facility), but who will perform the evaluation (a qualified professional meeting standards promulgated by the State). RCW 71.09.040(4).

Here, the State claimed it was entitled to an additional evaluation under RCW 71.09.040(4), because the statute mandated a “current” evaluation. 3/20/09RP 2. But the statute only authorizes “an evaluation.” RCW 71.09.040(4). It does not direct the court to order a current evaluation, as the Legislature did in RCW 71.09.025(1)(b)(v) or RCW 71.09.070. “[T]o express one thing in a statute implies the exclusion of the other.” Williams, 147 Wn.2d at 491. The omission of the word “current” in RCW 71.09.040(4) demonstrates that the Legislature determined that the State would not be entitled to repeatedly insist on further intrusive examinations during pretrial proceedings.

b. The statute reasonably limits the court from ordering involuntary participation in an extremely invasive compelled mental examination. Compelled examinations are “an invasion of the person,” which thus “stand on a very different footing from [other discovery issues].” Sibbach v. Wilson, 312 U.S. 1, 19, 61 S.Ct. 422, 85 L.Ed.2d 479 (1941) (Frankfurter, J., dissenting); see also Schlagenhauf v. Holder, 379 U.S. 104, 122, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (recognizing particular invasiveness of physical and mental examinations).

In Hawkins, the court reasoned that a sexual history polygraph is intrusive both physically and as an invasion of one's private affairs. 169 Wn.2d at 802-03. "[T]he inquiry is into his sexual history, one of the most private affairs of a person." Id. at 803. The Legislature is "surely aware" that such an examination is intrusive and implicates constitutional concerns. Id.

Similarly, in Williams, Justice Chambers specially concurred in order to address the "significant constitutional issues attendant to such [mental] examinations." 147 Wn.2d at 496 (Chambers, J., concurring). Justice Chambers reasoned that people who have not been committed and are awaiting trial have not lost their individual rights to privacy. Id. A conclusory claim that the State desires an examination does not show good cause for conducting one. Id. Due to their burdensome nature, such examinations should only be ordered, even when permitted under discovery rules, "upon a most stringent showing of necessity." Id. at 498.

Washington holds an individual's right to privacy in particularly high regard and protects a person's private affairs from unlawful governmental intrusion. Const. art. I, § 7. This provision of the Washington Constitution is broader than the federal constitution, as it "clearly recognizes an individual's right to privacy

with no express limitations” and places greater emphasis on privacy. State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). The right to privacy encompasses more than the right to be free from governmental searches. See In re Guardianship of Grant, 109 Wn.2d 545, 747 P.2d 445 (1987) (right to refuse life sustaining medical care); see also Butler v. Kato, 137 Wn.App. 515, 527, 154 P.2d 259 (2007) (right to nondisclosure of intimate personal information).

By improperly ordering Williams to submit to an extremely invasive examination and provide the State with psychological evidence to which it was not entitled, the compelled examination violated his rights to privacy and due process of law.⁴ There are “significant constitutional issues attendant to such exams.” Williams, 147 Wn.2d at 496 (Chambers J., concurring).

Other than the State’s conclusory claim that it wanted a new evaluation so as to be current and more thorough, the State did not articulate its basis for the request. See Supp. CP __, sub. no. 200 (State’s Motion for Compelled Forensic Interview). It did not try to limit its request to certain types of tests or specific issues. It

broadly asserted it was entitled to an additional examination without restriction based on administrative protocols and the passage of time. Id. Of course, the State cannot use administrative rules to create entitlements that are not authorized by statute. Hawkins, 169 Wn.2d at 804.

Williams objected. 3/20/09RP 5. He had recently submitted to a “very long deposition” that was videotaped and in which he answered significant probing questions about his sexual history, criminal history, and on-going mental state. 3/20/09RP 6. As an example of the kinds of questions the State asked Williams in the course of discovery, one written interrogatory request demanded that Williams “[d]escribe and identify each sexual fantasy that respondent has had in the past three years,” and “for each fantasy, state” its nature, how many times he entertained the fantasy, whether he “has masturbated” to it, whether he ejaculated to it, the dates he entertained it. Supp. CP __, sub. no. 201, Attachment I, page 13 (State’s Second Discovery Request, attached to Response to Prosecution’s Motion for Compelled Interview). Notwithstanding this very detailed probing of Williams’s sexual thoughts, feelings,

⁴ See Thorell, 149 Wn.2d at 744 (based on liberty interests at stake and statutory commitment requirements, due process protections of criminal

and history in the videotaped deposition and by other discovery tools, the court ordered Williams to submit to Wheeler's evaluation. CP 146-47. This evaluation lasted "two full days." Supp. CP __, sub. no. 213, p. 6. It included over nine hours of interviewing Williams as well as conducting psychological tests. Id.

The statute did not authorize this intrusion and the State did not put forward a particularized showing explaining its need for a full mental examination. The court's order requiring Williams to submit to a psychological examination under threat of jail violated the terms of the statute and Williams' rights to due process of law and to be free from unlawful invasions of his private affairs.

c. The improperly ordered compelled mental examination affected the outcome of the proceedings. A violation of the right to privacy must be remedied by the suppression of the unlawfully obtained evidence. Article I, section 7 guarantees individual privacy rights without exception. State v. Winterstein, 167 Wn.2d 620, 635, 220 P.3d 1226 (2009). It protects the individual's right of privacy by mandating that "whenever the right is unreasonably violated, the remedy must follow." Id. at 632 (quoting

prosecutions apply in SVP proceedings).

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). It also “protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence.” Id. The remedy of excluding illegally obtained evidence has strong historical roots and is a “nearly categorical” requirement under our Constitution. Id. at 632, 635.

Due to the fundamental rights abridged by the improperly compelled examination, this Court should examine the error under the constitutional harmless error test. A constitutional error is presumed prejudicial, and requires reversal unless the State proves beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, and “the untainted evidence admitted at trial” is so overwhelming it necessarily leads to a finding of guilt. State v. Thomas, 151 Wn.2d 793, 808, 92 P.3d 228 (2004) (applying constitutional harmless error test in case of illegally seized evidence).

Should this Court apply a standard of review used for erroneously admitted evidence without a constitutional violation, that test looks at whether the error “affects, or presumptively affects the outcome of the case.” Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). In Thomas, the trial court admitted into

evidence a letter containing inadmissible hearsay. Id. at 101-03. In its harmless error analysis, the Thomas Court found the letter was cumulative of trial testimony but could have bolstered the plaintiffs' credibility as additional evidence favoring its claims and, "[s]uch reinforcement may well have prejudiced the jury's assessment of respondents' testimony in other respects." Id. at 105. Since the reviewing court could not know what value the jury placed on the improperly admitted evidence, the court ordered a new trial. Id.

In the case at bar, a new trial is required under either test. The State was required to prove Williams suffered from a mental abnormality and/or personality disorder that causes him serious difficulty controlling his sexually violent behavior and makes him likely to engage in predatory acts of sexual violence if not confined. RCW 71.09.020; RCW 71.09.060. Wheeler was the sole expert testifying for the State about Williams' mental disorder and the legal requirements of RCW 71.09. Had he not testified, the State could not have proved its case. He relied heavily on the new tests he conducted and the admissions he obtained from Williams in the course of his lengthy, multi-day mental examination. See RP 278, 286, 356, 362, 376, 411, 421-39, 441. The error in forcing Williams

to submit to this examination was not a harmless error when it was central to the testimony at trial and used as pivotal evidence to claim he met the criteria for commitment. Because he is entitled to a fair trial based on properly admitted evidence, the commitment order must be reversed and a new trial ordered.

2. THE COURT'S REFUSAL TO HOLD A FRYE HEARING AND ITS ADMISSION OF EVIDENCE PREDICATING WILLIAMS'S COMMITMENT ON THE UNRELIABLE DIAGNOSIS OF PARAPHILIA NOT OTHERWISE SPECIFIED VIOLATED DUE PROCESS

The State's expert testified that his diagnosis of Williams with paraphilia NOS nonconsent constituted the mental abnormality justifying his commitment. RP 368. Prior to the commitment trial, Williams moved to bar testimony about this diagnosis or in the alternative, for a Frye hearing, pointing out that the paraphilic diagnosis is not a valid diagnosis and it is unhelpful to the jury as required under ER 703. RP 28; CP 212-20. The court denied both motions. RP 36.

a. To satisfy due process, involuntary commitment as a sexually violent predator must be based upon a valid diagnosis.
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, 504 U.S. at 80; U.S. Const. amend. 14; Const. art. I, § 3. 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); Thorell, 149 Wn.2d at 731-32. 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 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.

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. Wheeler's diagnosis of paraphilia NOS nonconsent violates due process because it is an invalid diagnosis and recent evidence demonstrates it is not accepted by the medical profession. The State expert's diagnosis of paraphilia NOS nonconsent is invalid, and its use as a predicate for Williams'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 claimed mental abnormality of “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 standard diagnostic manual, Diagnostic And Statistical Manual Of Mental Disorders (4th ed., text rev.) (2000) (DSM-IV-TR).

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.”

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"). RP 31-33. 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”);⁵ Robert A. Prentky, et al., *Sexually Violent Predators In The Courtroom*, 12 *Psychology, 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

⁵ See also Wollert’s criticism of the paraphilia NOS nonconsent diagnosis during Williams’s trial, largely elicited by the State. RP681-82, 693-99.

(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).

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.

In Young, the Supreme Court recognized that the DSM is an “evolving and imperfect document.” 122 Wn.2d at 28. But in a recent case, this court cited Young for the proposition that the diagnosis of paraphilia NOS nonconsent was generally accepted and admissible at trial. In re Det. of Berry, 160 Wn.App. 374, 595-96, 248 P.3d 592, petition for review pending, S.Ct. No. 85919-1 (2011). Young did not consider this issue, or reach this holding, because that case, “none of the experts” had “challenged the acceptance of this diagnostic category.” 122 Wn.2d at 29. The

issue in Young was the overbreadth of the mental abnormality category, which is the context in which the court's discussion arose. Id. at 28-29. Berry's reliance on Young was misplaced. Young did not determine that paraphilia NOS nonconsent rests on scientific principles that are generally accepted by the relevant professional community.

The relevant scientific community is not defined as the narrow group of practitioners who use this particular diagnosis. Rather, it is the broader psychological, psychiatric, and medical professions that determines general acceptance. Otherwise, a minority group could self-validate a technique or method without the scientific community's input. Simon A. Cole, Out of the Daubert Fire and into the Frying Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions, 9 Minn. J. L. Sci. & Tech., 453, 478 (2008) (attached as Ex. 1 to William's Motion in Limine to Exclude Testimony of Dr. Robert Wheeler). The fact that the State's expert uses this diagnosis to justify commitment does not resolve the enduring debate within the medical profession as to the validity of this diagnosis.

c. At the very least, the trial court should have ordered a *Frye* hearing. Despite Williams's explanation of recent evidence further discounting the paraphilia NOS nonconsent diagnosis in its motion for a *Frye* hearing to determine whether this diagnosis was admissible, the trial court denied his motion. RP 35-36; CP 217-353. 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.

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 *Young*, 122 Wn.2d at 56). 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 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.

In Berry, the court reasoned that the science of psychology and psychiatry are firmly established and the evaluation was based upon a standard psychological analysis. 160 Wn.App. at 595. The Court noted that courts have upheld SVP commitments based upon this diagnosis. Id.

But this reasoning misunderstands the due process issue at stake. Due process is not violated in the testing method, it is violated in applying the results of the test to reach a diagnosis where the diagnosis is not generally accepted in the relevant scientific community. The Berry decision assumed that the offender suffered from a mental condition, ergo, any testing done to confirm that diagnosis does not have to meet Frye. Its reasoning would lead to the absurd result that testing of an individual which then leads to a diagnosis of a non-existent mental condition does not violate Frye or due process merely because the testing done by the psychologists and psychiatrists was firmly established in the psychological community.

Based on the dispute in the scientific community, one that even the State's expert acknowledged, RP 305-06, the trial court should have held a Frye hearing, and ordered the evidence of the paraphilia diagnosis inadmissible at Williams's trial.

d. Williams 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)). There was no special verdict delineating which of the alternative means the jury relied on in finding Williams should be involuntarily committed and the court instructed the jury that it need not be unanimous as to either. CP 620 (Instruction 6). The paraphilia NOS nonconsent diagnosis was the primary basis on which the State sought Williams's commitment. RP 353, 368. Wheeler conceded that the antisocial personality disorder diagnosis alone might not meet the criteria under RCW 71.09, and the paraphilia diagnosis predisposed him to being found to have the personality disorder. RP 448, 454. 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.

Williams is entitled to reversal of his commitment.

E. CONCLUSION.

For the foregoing reasons, Mr. Williams respectfully requests this Court reverse and dismiss the order committing him indefinitely under RCW 71.09.040.

DATED this 31st day of May 2011.

Respectfully submitted,



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

IN RE THE DETENTION OF)

EDDIE WILLIAMS,)

APPELLANT.)

NO. 65436-5-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MAY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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