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COA No. 68147-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE DETENTION OF DILLINGHAM,

STATE OF WASHINGTON,

Respondent,

v.

DARIN DILLINGHAM,

Appellant.

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

The Honorable Ronald Castleberry

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Mr. Dillingham's jury trial on his continued status as an indefinite committee under RCW 71.09, the absence of a unanimity instruction as to the two alternative means alleged (mental abnormality and personality disorder) requires reversal and a new trial pursuant to State v. Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006).

2. Where there was evidence of multiple distinguishable conditions posited in order to establish the "mental abnormality" means, Mr. Dillingham is entitled to reversal and a new trial, pursuant to State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

3. The evidence was insufficient to find that Mr. Dillingham continued to have a mental illness justifying commitment as an SVP.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due Process requires that the jury unanimously agree on the basis for confinement under RCW 71.09. There was no unanimity instruction as to the two alternative means under which Mr. Dillingham was alleged to be an SVP. There was not, however, substantial evidence of both a "mental abnormality" and a "personality disorder" resulting in difficulty controlling behavior and predisposition to commit sexually violent offenses. Is Mr. Dillingham entitled to reversal of the order of

continued SVP commitment, and a new trial, pursuant to State v.

Halgren?

2. Where there was evidence of multiple conditions posited as mental abnormalities (pedophilia nonexclusive, and substance abuse), the prosecutor did not elect a particular condition in closing argument, and the evidence regarding one condition was controverted as to whether it was a mental abnormality resulting in difficulty of control and predisposition, is Mr. Dillingham entitled to reversal and a new trial, pursuant to State v. Petrich?

3. Was the evidence insufficient to prove beyond a reasonable doubt that Mr. Dillingham had a mental illness causing difficulty of control of behavior and a predisposition to commit sexually violent crimes, and thus continued to be an SVP?

C. STATEMENT OF THE CASE

Darin Dillingham, age 40, was committed as an SVP pursuant to RCW 71.09.020(16) by stipulation in June of 2003. CP 562. He had a history of sex offenses which began during his early teenage years. CP 564-68; 12/1/11RP at 241-63. The State's pursuit of commitment, in 2001, followed a period of Mr. Dillingham's successful participation in sex offender treatment at Twin Rivers after his most recent and final

offense, a conviction for attempted indecent liberties committed in 1992, at age 21. CP 569-70.

Following SVP commitment, Mr. Dillingham thereafter resided at the Special Commitment Center and, following extensive treatment at SCC, secured a new SVP commitment trial under RCW 71.09.090(3)(b). Trial was held November 29 to December 6, 2011. State's witnesses recounted Mr. Dillingham's prior offenses, including several convictions for crimes qualifying as sexually violent offenses per RCW 71.09.020(17). 12/1/11RP at 241-63. In addition to these offenses, actuarial statistics, and his assessment of Mr. Dillingham's progress in treatment, the State's expert, Dr. John Hupka, relied on evidence of other offenses, parole violations, and uncharged conduct from 1984 to 1992 involving child, and then adult victims, in reaching his opinion that Mr. Dillingham continued to be an SVP. 12/1/11RP at 236-38, 293-307, 12/2/11RP at 339-42.

Mr. Dillingham presented evidence of his increased dedication to effective offender treatment at the Special Commitment Center (SCC). 12/5/11RP at 501, 554, 576.

In closing argument, the Assistant Attorney General (AAG) argued that Mr. Dillingham suffered from three illnesses, and told the jury that any one of them (the abnormality of pedophilia non-exclusive,

substance abuse abnormality, or antisocial personality disorder), independently sufficed for SVP commitment under the instructions. 12/6/11RP at 681, 684-85.

The jury returned a general verdict of “yes” to the question whether the State had proved Mr. Dillingham continued to be an SVP, and the trial court entered a judgment of continued commitment. CP 3, CP 4. The trial court had denied Mr. Dillingham’s request for a special verdict, specifying whether the jury was unanimously agreeing that Mr. Dillingham had a mental abnormality, or whether it was unanimously agreeing that he had a personality disorder. 12/6/11RP at 670-71.

Mr. Dillingham appeals. CP 1-2.

D. ARGUMENT

1. **REVERSAL IS REQUIRED UNDER STATE V. HALGREN WHERE THERE WAS NOT SUBSTANTIAL EVIDENCE OF BOTH A MENTAL ABNORMALITY AND A PERSONALITY DISORDER AND THERE WAS NO INSTRUCTION OR SPECIAL VERDICT REQUIRING THE JURY TO UNANIMOUSLY AGREE AS TO THE MEANS.**

A. SVP Commitment requires proof of a serious mental illness that causes the person to have difficulty controlling his behavior and predisposes him to commit sexually violent offenses.

Prior sexual offenses in and of themselves do not demonstrate an inability to stop sexual offending unless confined. Rather, Due Process and Washington statute require that the person suffer from a serious

mental disorder that causes difficulty controlling behavior and predisposes him to commit sexually violent offenses.¹

These requirements for SVP commitment distinguish persons who may be indefinitely committed without transgression of Due Process, from typical recidivists, who society must deal with through *criminal* prosecution for crimes charged, along with offender scoring increasing sentence, and where appropriate, exceptional sentences. Kansas v. Crane, 534 U.S. 407, 410-12, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); Foucha v. Louisiana, 504 U.S. 71, 86-87, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992); In re the Detention of Thorell, 149 Wn.2d 724, 715-16, 72 P.3d 708 (2003); U.S. Const. amend. 14; Wash. Const. art 1, § 22.

¹ RCW 71.09 allows indefinite commitment as an SVP where the jury finds it proved beyond a reasonable doubt that the person has been convicted of a crime of sexual violence, and that he

suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.

RCW 71.09.020(16); see CP 10 ('to-commit' instruction). At his new commitment trial following a period of SVP commitment, the State was required to prove that Mr. Dillingham's condition remained such that he continued to meet the definition of an SVP. RCW 71.09.090(3)(b).

The crucial required proof beyond a reasonable doubt in an SVP commitment case, therefore, is that the person suffer a psychological illness that compels the person to commit sexual crimes; absent such proof, a repeat sex offender is merely a recidivist or person likely to re-offend. Thorell, 149 W.2d at 715-16.

B. Unanimity Requirements in Sexually Violent Predator cases; Manifest Constitutional Error.

Along with these requirements of proof and Due Process in RCW 71.09 cases is the rule that, where the SVP respondent was posited at trial to have both a mental abnormality and a personality disorder, the appellate court will reverse the jury's verdict if there was not substantial evidence of *both* these alternative means, absent expressions of unanimity of agreement as to whether the person suffered from the abnormality, or from the disorder. In re Detention of Halgren, 156 Wn.2d 795, 807–11, 132 P.3d 714 (2006) (and holding absence of unanimity instruction as to abnormality or disorder in circumstances of inadequate evidence on either means is RAP 2.5(a)(3) manifest constitutional error); Wash. Const. Art. 1, § 21. As this Court of Appeals recently stated in In re Detention of Ticeson:

In re Detention of Halgren makes clear that due process requires jury unanimity in SVP cases. [citing Halgren, 156 Wn.2d at 807–08 n. 4]. [This] is an issue of constitutional magnitude subject to review for the first time on appeal under RAP 2.5(a)(3).. . . Under Halgren, the presence of a

disorder and/or abnormality are two alternative means of establishing the mental illness element of an SVP commitment determination. [citing Halgren, 156 Wn.2d at 811; In re Det. of Pouncy, 144 Wn. App. 609, 618, 184 P.3d 651 (2008), aff'd, 168 Wn.2d 382, 229 P.3d 678 (2010)]. Where an element may be established by alternative means, a particularized expression of unanimity as to the means relied upon to reach the verdict is not required so long as there is substantial evidence to support a verdict on each alternative. [citing, *inter alia*, Halgren, 156 Wn.2d at 809; State v. Arndt, 87 Wn.2d 374, 376–77, 553 P.2d 1328 (1976)]. If a rational juror could have found each means proved beyond a reasonable doubt, no unanimity instruction is necessary. [citing Halgren, 156 Wn.2d at 811–12].

(Footnotes omitted.) (Emphasis added.) In Detention of Ticeson, 159 Wn. App. 374, 387-89, 246 P.3d 550 (2011);² see also Halgren, 156 Wn.2d at 812 (“[B]ecause there was substantial evidence to justify a finding that Halgren had both a mental abnormality and a personality disorder beyond a reasonable doubt, the trial court did not violate Halgren's constitutional right to unanimity by failing to instruct the jury that it must reach unanimous agreement as to which condition satisfied RCW 71.09.020(16)”).

² Ticeson had conceded there was substantial evidence of a mental abnormality but argued the evidence did not show he had a personality disorder that led to difficulty of control and predisposition, thus requiring reversal in the absence of a unanimity instruction on the means. Ticeson, 159 Wn. App. at 389 and n. 40. This Court concluded that the record did include evidence of a personality disorder that met the difficulty of control and predisposition requirements of the SVP statute. Id., at 389 (“There is thus substantial evidence to support either alternative means. No unanimity instruction was required”).

Absent a unanimous jury, the State has not proved every element of the crime beyond a reasonable doubt, and the conviction violates Due Process. U.S. Const. amends. 6, 14, Wash. Const. Art. 1, § 21, § 22.

Notably, here, Mr. Dillingham's counsel did request a special verdict form that would require the jury to indicate whether it had agreed that he suffered from a mental abnormality causing difficulty of control and predisposition, or agreed that he had a personality disorder resulting in the same.³

That request for a special verdict was ultimately denied, 12/6/11RP at 670-71, and the jury was not in any other manner instructed to be unanimous as to whether it was resting its verdict on the mental abnormality means, or on the means that Mr. Dillingham was anti-social. CP 5-27 (Court's instructions to jury). However, the State's evidence affirmatively showed that Mr. Dillingham did not suffer from a

³ The trial court, in the course of deciding to give the jury the RCW 71.09.020(9) definition of personality disorder which requires such disorder to be "stable over time," indicated its additional concern directed to the AAG that a special verdict form or other type of instruction was needed to make clear whether the jury had agreed that Mr. Dillingham suffered from a mental abnormality, or that it agreed he had a personality disorder. 12/6/11RP at 666-70 ("Otherwise, quite frankly, you bought yourself an appeal, and the court of appeals is going to say, we don't know whether they decided that he was [sic] a personality disorder or mental abnormality"). The court determined it would give the jury the definition of personality disorder (over the State's objection), but ultimately also decided to not give a special verdict form. 12/6/11RP at 669-71. Defense counsel requested a special verdict form following the court's discussion, and reiterated the request again after the court denied it. 12/6/11RP at 670-71.

personality disorder that met the Due Process requirements for indefinite commitment, or that met the requirements of proof of the SVP statute or the jury instructions.

Dr. John Hupka, the State's expert,⁴ stated repeatedly that the mental illness that impaired Mr. Dillingham and rendered him dangerous was pedophilia nonexclusive. 12/2/11RP at 368, 375. Hupka testified that antisocial personality "disorder" is simply a set of behavioral characteristics that act as risk factors driving a pedophilia abnormality. 12/2/11RP at 363-66. In this case in particular, Mr. Dillingham's antisocial personality was specifically not an independent mental illness justifying SVP commitment as causing difficulty of control or predisposition. 12/1/11RP at 283-84, 289. Finally, Dr. Hupka also stated that in this case, Mr. Dillingham's antisocial personality was not stable over time, but was diminishing, in accord with typical models of the condition. 12/2/11RP at 368-69, 372-75; see CP 13 (defining personality disorder as a pattern that is "stable over time").

Yet in closing argument, the Assistant Attorney General argued to the jury that any one of Mr. Dillingham's "three conditions" (pedophilia

⁴ Dr. John Hupka is a licensed psychologist who works primarily in the areas of personal injury and forensic psychology. 12/1/11RP at 228, 230. Dr. Hupka is a member of the American Psychological Association. 12/1/11RP at 231. He is not a certified sex offender treatment provider and does not provide sex offender treatment. 12/2/11RP at 349-50.

nonexclusive abnormality, substance abuse abnormality, or antisocial personality disorder) sufficed as qualifying, sex-offense predisposing, mental illnesses for a verdict of SVP commitment. 12/6/11RP at 681, 684-85.

There was not substantial evidence on both alternative means -- mental abnormality and personality disorder -- and reversal is thus required.⁵ Halgren, supra, Ticeson, supra.

C. There was not substantial evidence on both alternative means, because there was insufficient evidence of a qualifying personality disorder that caused difficulty of control and predisposition.

First, “antisocial personality disorder,” as a matter of Due Process, does not satisfy the constitutional requirement of a serious mental illness that causes a person to have difficulty controlling behavior and predisposes him to sexual violence.

(1) As a matter of law, “antisocial personality disorder” is not a personality disorder that justifies SVP commitment over criminal punishment.

Before the State may commit an individual under RCW 71.09, a unanimous jury must conclude the State has proved the elements of RCW

⁵ Mr. Dillingham further argues, *infra*, that he is entitled to reversal not just because of the absence of expressions of jury unanimity on the alternative *means*, pursuant to Halgren, but also, pursuant to Petrich, because of the absence of any instruction requiring unanimity as to which *fact* (pedophilia nonexclusive, or the non-qualifying ‘substance abuse abnormality,’ the jury determined was proved beyond a reasonable doubt to satisfy the charged means of a mental abnormality. See Part D.2, *infra*; see State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

71.09.020(1) beyond a reasonable doubt. In re Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1995); RCW 71.09.050; RCW 71.09.060.

The United States Supreme Court has concluded that indefinite commitment comports with the requirements of Due Process only where the state can establish that the person has a mental abnormality that makes it "difficult, if not impossible, for the person to control his dangerous behavior." Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The Court subsequently clarified this constitutional requirement, saying

Hendricks underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." That distinction is necessary lest "civil commitment" become a "mechanism for retribution or general deterrence"-functions properly those of criminal law, not civil commitment. cf. Moran, The Epidemiology of Antisocial Personality Disorder, 34 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999) (noting that 40% to 60% of the male prison population is diagnosable with Antisocial Personality Disorder).

Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856

(2002). This requirement is consistent with the plurality decision in

Foucha v. Louisiana, in which the Court deemed "antisocial personality disorder" to be inadequate for indefinite commitment:

[T]he state asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct..., he may be held

indefinitely. This rationale would permit the State 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 of any convicted criminal, even though he has completed his prison term.

Foucha v. Louisiana, 504 U.S. 71, 86-87, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

In this case, Mr. Dillingham's antisocial personality was deemed by the State's own expert to be merely a risk factor driving his pedophilia. By that undisputed testimony, Mr. Dillingham's antisocial personality might properly have been an aspect of the expert's multiple mechanisms which he used to elevate his actuarial assessment of Mr. Dillingham's risk of re-offending. However, that is not how the State employed this evidence.

In order to conclude that Mr. Dillingham had an antisocial personality, Dr. Hupka had him fill out the Minnesota Multiphasic Personality Inventory test, and concluded based on the results that Mr. Dillingham has "antisocial personality disorder," consistent with persons who are:

selfish, [and] don't have regard for other people's feelings. They tend to live by their own rules.

12/1/11RP at 239. Hupka also stated that people with antisocial personalities like Mr. Dillingham tend to "re-offend sooner or later and

get back in custody.” 12/1/11RP at 239-40.

This diagnosis of Mr. Dillingham as having an antisocial personality merely showed that he had a tendency to repeatedly do what he wanted to do, and commit crimes against people in disregard of their rights and the law. This is nothing more than showing that he was a repeat offender. See Kansas v. Crane, 534 U.S. at 413.

Further, because a personality disorder is merely a description of a person's pattern of behaviors, the disorder does not predispose a person to any behavior. The disorder does not cause behavior -- it merely describes it. The American Psychiatric Association (APA), the publisher of the DSM, has condemned the use of “Antisocial Personality Disorder” as a basis for commitment under laws such as RCW 71.09. APA Final Action Paper, Eliminating the Use of Antisocial Personality Disorder as a Basis for Civil Commitment (APA Assembly, May 19-21, 2006). The APA rejected Antisocial Personality Disorder as a basis for involuntary commitment because it is a disorder largely defined on the basis of the behavior exhibited by the individual; it is “not premised on any underlying disturbance of thought, mood, cognition or aberrant sexual urge.” APA Final Action Paper, supra, at 1-2.

Consistent with Dr. Hupka’s testimony regarding Mr. Dillingham, a person diagnosable with antisocial personality disorder will *choose* to

engage in conduct without regard to consequences. Thomas K. Zander, Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis, 1 Journal of Sexual Offender Civil Commitment: Science and the Law 17, 52-62 (2005) (summarizing studies and scholarly opinion).

This is the opposite of “serious difficulty controlling behavior.” The conduct of a person with an antisocial personality is not the result of an inability to control behavior but rather the choice not to -- precisely as Dr. Hupka described, when he testified that the nature of Mr. Dillingham’s antisocial personality was that he “does little to try to control his impulses.” 12/1/11RP at 279-81.

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, the diagnosis must nonetheless be medically justified as an illness that causes serious difficulty controlling behavior. Hendricks, 521 U.S. at 358; Thorell, 149 Wn.2d at 732, 740-41.

Evidence that Mr. Dillingham had an ‘antisocial personality’ is therefore legally insufficient to justify indefinite commitment based on dangerousness caused by mental illness, and the absence of expressions of unanimity in this alternative means case cannot be deemed harmless.

If even one juror relied on “personality disorder” to find Mr. Dillingham to be an SVP (as the State gave the jury the option to do), the jury’s verdict was not only completely non-unanimous, but it also rested on a claim as to which the evidence was legally insufficient. Reversal is required. See also State v. Wright, 165 Wn.2d 783, 794 n. 6, 203 P.3d 1027 (2009) (retrial necessary when jury may have relied on legally insufficient alternative means).

(2) As a matter of fact, the record is insufficient to prove that Mr. Dillingham suffered from a personality disorder that caused difficulty of control and predisposition, or that he suffered from a personality disorder as defined in the jury instructions and by Washington statute.

The “substantial evidence” that is required on both alternative means, in order to affirm a general verdict in an SVP case that was issued without a unanimity instruction or other assurances of agreement as to the means, is evidence which is adequate to convince the appellate court that a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. Halgren, at 811 (citing State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988)). This standard is equated to that required to affirm on a sufficiency challenge. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994). Here, the evidence was legally insufficient. Jackson v. Virginia, 443 U.S. 307, 99

S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); U.S. Const. amend. 14.

i. There was no evidence that Mr. Dillingham suffered from a personality disorder that caused difficulty of control and predisposition to commit sexual offenses.

Current dangerousness is the foundation of sexually violent predator commitment. In re Det. of Henrickson, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). The State in this case was required to prove that Mr. Dillingham suffered from a condition that causes him serious difficulty in controlling his sexually violent behavior, and which makes him likely to engage in predatory acts of sexual violence if not confined. CP 10.

This is specifically *not* what the State's expert concluded.

Although Dr. Hupka answered in the affirmative that it was his opinion that Mr. Dillingham suffered from a "mental abnormality or personality disorder that causes him serious difficulty in controlling his sexually violent behavior," he made clear that Mr. Dillingham's antisocial personality was not his condition that qualified under these criteria. On cross-examination, Dr. Hupka first confirmed that the illness suffered by an SVP must be one that predisposes the person to criminal sexual acts, within the meaning of the legal definitions. 12/2/11RP at 362-63. However, when questioned about the mental condition Mr. Dillingham suffered from which fit the legal standard, Dr. Hupka

clarified that Mr. Dillingham's antisocial personality was essentially a series of risk factors and circumstances that bore on the question of his risk based on his actual illness, which was pedophilia nonexclusive. 12/2/11RP at 363-66.

Regarding Mr. Dillingham's antisocial personality, Hupka confirmed that he would not consider that condition to meet the criteria of predisposition to commit sexual offenses except as it affected Mr. Dillingham's pedophilia. 12/2/11RP at 368. Specifically, he stated that Mr. Dillingham's specified conditions – pedophilia, antisocial personality, and substance abuse, were not each independent illnesses each meeting the SVP criteria of dangerousness. 12/2/11RP at 374-76. He repeatedly made clear that pedophilia was the illness that predisposed Mr. Dillingham to crimes of sexual violence as required by the SVP laws. 12/2/11RP at 375.

Critically in this case, the evidence characterizing Mr. Dillingham's antisocial personality as inadequate for purposes of SVP commitment was undisputed. The State rested its case after not asking about, or disputing, any of the expert's characterizations of Mr. Dillingham's antisocial personality in cross-examination, above. 12/2/11RP at 461.

This was not surprising. On direct examination, Dr. Hupka had been asked by the AAG whether it was possible that Mr. Dillingham's antisocial personality disorder was the sole reason he commits sexual offenses. 12/1/11RP at 283-4. The doctor stated that people with antisocial personalities do commit a lot of offenses, but for Mr. Dillingham, his SVP-qualifying illness was his pedophilia:

I think the particular problem with him is that you have the combination of sexual deviance, that is the attraction to children and the desire for coercive sex that he's shown. So he has this sexual deviance, and because of the antisocial personality disorder he's not the least bit motivated to change that sexual deviance.

12/1/11RP at 283-84; see also 12/1/11RP at 289 (stating that the pedophilia abnormality was the condition that caused Mr. Dillingham to have impaired volitional capacity).⁶

The State's evidence below was inadequate to convince this appellate court that a rational trier of fact could have found each SVP means - abnormality and disorder causing difficulty of control and predisposition - proved beyond a reasonable doubt. Halgren, at 811

⁶ Following cross-examination of Dr. Hupka, the State's attorney on re-direct asked the doctor a series of questions about Mr. Dillingham's PPG results, and engaged in further questioning regarding the utility of actuarial studies in showing the degree of likelihood of re-offense. 12/2/11RP at 446, 449-51, 452. The AAG did not re-examine the doctor or dispute his statements in cross-examination, set forth here, that neither Mr. Dillingham's antisocial personality disorder or his substance abuse abnormality were independent illnesses causing him the difficulty of control or predisposition required by the SVP statute.

(citing Kitchen, 110 Wn.2d at 410-11. Reversal for a new trial is therefore required.

ii. There was no proof that Mr. Dillingham's antisocial personality was a condition that was enduring, pervasive, inflexible, and stable over time, as required by the jury instructions.

Dr. Hupka also agreed that an anti-social personality is a personality disorder that remits over time, meaning it can actually “disappear” and be “not there anymore.” 12/2/11RP at 368-69, 372. But in the jury instructions, the jury was told that in order to have a personality disorder, there must be

an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in early adolescence or early adulthood, is stable over time and leads to distress or impairment.

CP 13 (jury instruction no. 6); RCW 71.09.020(9). Here, not only did Dr. Hupka state that Mr. Dillingham's type of disorder remits with time, he then repeatedly agreed that Mr. Dillingham specifically fit this pattern, because there was evidence he had demonstrated decreasing presentations of the disorder's behavior. 12/2/11RP at 372-74. As Mr. Dillingham was approaching his early 40's, he was showing evidence that these behaviors were decreasing. 12/2/11RP at 374-75.

Once again, all of this was undisputed. In direct examination, Hupka similarly agreed that Mr. Dillingham's antisocial personality was

remitting with his increasing age, and was leading him to “act out” less, even considering that he was in a commitment environment. 12/1/11RP at 285-86. Hupka made clear that an antisocial personality, unlike other disorders, “starts to slow a little bit earlier.” 12/1/11RP at 286.

This is not evidence of a pervasive, enduring mental illness. The criteria of a pervasive disorder that is stable over time makes eminent sense in an indefinite commitment case based on future dangerousness. In this case, however, the State did not prove such a disorder.

Yet, despite all the foregoing testimony, the AAG, seeking to obtain a verdict in the face of Mr. Dillingham’s counsel’s penetrating challenges to the testimonial claims of pedophilia, continued to blur the choices in front of the jury and posit Mr. Dillingham’s antisocial personality as a fully qualifying, independent illness justifying indefinite commitment. In closing argument, the AAG expressly offered all three – arguing each was adequate in itself – as proving SVP illness. But the evidence below was not sufficient to prove the “personality disorder” alternative means. In the absence of a unanimity instruction, or the expressions of unanimity requested by the defense in the form of a special verdict, Mr. Dillingham’s SVP commitment order must be reversed for a new trial. Halgren.

2. REVERSAL IS REQUIRED UNDER STATE V. PETRICH WHERE THERE WAS NO UNANIMITY INSTRUCTION AND THE PROSECUTOR DID NOT ELECT AMONG THE MULTIPLE, DISTINGUISHABLE FACTS OFFERED TO PROVE A “MENTAL ABNORMALITY.”

A. SVP Respondents have a right to jury unanimity.

By statute, a person alleged to be an SVP has a right to a unanimous jury. RCW 71.09.060(1). The unanimity requirements of criminal prosecutions apply to SVP jury trials. State v. Halgren, supra, 156 Wn.2d at 809.

In order to convict a defendant, the jury must unanimously agree that he is guilty of the charged offense. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). In a multiple acts case where any one of multiple, “distinguishable” acts are offered to satisfy the charge, either the prosecutor must elect which act constitutes the basis for the charged crime, or the trial court must instruct the jury to agree on the particular facts used to find guilt. Coleman, 159 Wn.2d at 511, 516.

In Mr. Dillingham’s SVP trial, the State proffered evidence of two distinguishable facts – pedophilia nonexclusive, and substance abuse -- to prove the allegation that he had a mental abnormality causing difficulty of control and predisposition. As noted, the AAG, in closing argument,

posited both conditions as satisfying the mental abnormality requirement.⁷

In this circumstance, a trial court's failure to provide a unanimity instruction violates the defendant's federal and state constitutional rights to jury proof of the charge beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 850 (1990); U.S. Const. amends. 6, 14, Wash. Const. art. I, § 21, §22. Such an error enables some jurors, presented with several different acts, to rely on different acts to conclude guilt than other jurors, without the jury as a whole agreeing on a particular act which constitutes the charged conduct beyond a reasonable doubt. State v. Furseth, 156 Wn. App. 516, 520, 233 P.3d 902, review denied, 170 Wn.2d 1007 (2010).

This result is a manifest constitutional error and may be raised for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 912, 214 P.3d 907 (2009); RAP 2.5(a)(3).

On appeal, the absence of both an election and unanimity instruction in Mr. Dillingham's SVP trial is subject to harmless error analysis; however, as a constitutional error, it is presumed prejudicial. State v. Coleman, 159 Wn.2d at 512. A court will find the error harmless

⁷ Mental abnormality is one alternative means of alleging that an SVP respondent meets the criteria for indefinite commitment; personality disorder is the other alternative means under the statute. Halgren, 156 Wn.2d at 810.

only if no rational trier of fact could have entertained a reasonable doubt that each fact established the charge beyond a reasonable doubt. Kitchen, 110 Wn.2d at 405–06. Accordingly, the evidence on each fact upon which the jury could have relied must be uncontroverted, or the appellate court must reverse. Coleman, at 514.

B. Mr. Dillingham’s *Petrich* right to unanimity was violated.

Dr. Hupka testified that he diagnosed Mr. Dillingham with the mental abnormality of pedophilia nonexclusive. 12/1/11RP at 263, 267, 272. But this diagnosis was highly controverted. The defense expert, Dr. Luis Rosel, testified extensively that Mr. Dillingham did *not* suffer from pedophilia. See, e.g., 12/5/11RP at 514-29.⁸

This decides the issue. Jurors could have entertained a reasonable doubt as to whether the fact of pedophilia, one of the two factual claims proffered by the State in satisfaction of the “abnormality” means of being an SVP, was proved. Reversal is required. See, e.g., Coleman, at 513-14 (where State offered multiple distinguishable facts to prove the charge of molestation, and one witness contradicted another’s that touching occurred during one incident, Petrich required reversal).

⁸ Notably, Dr. Hupka himself admitted that his assessment of Mr. Dillingham as having the highest sexual arousal to adult women was inconsistent with an accepted definition of pedophilia as requiring that the person’s sexual interest in children exceed the person’s interest in adults. 12/2/11RP at 401-03, 406.

It is therefore unnecessary to point out that the evidence of the other fact offered to prove the legal allegation of “mental abnormality” was also contradictory and controverted. The defense expert testified that “substance abuse” was not a mental disorder that predisposed Mr. Dillingham to commit sexual offenses. 12/5/11RP at 532-34. And more than that, as noted, the State’s own expert himself admitted, *inter alia*, that Mr. Dillingham’s substance abuse pattern was not an independent condition causing the difficulty of control and predisposition required for SVP commitment, but was a mere risk factor for his pedophilia. 12/2/11RP at 363-66.

The State did not elect which of these two conditions it was asking the jury to find satisfied the mental abnormality requirement, and indeed the AAG argued that both did. The State’s attorney argued to the jury in closing that Mr. Dillingham’s substance abuse was one of the two ‘mental abnormalities’ from which he suffered, the other being the pedophilia. 12/6/11RP at 681.

This is not in any sense an election; rather, it is the opposite. See State v. Bland, 71 Wn. App. 345, 352, 860 P.2d 1046 (1993) (closing argument identifying one particular act for the charge supported conclusion that the State adequately made an election). Reversal is required pursuant to Petrich.

C. This Court of Appeals' previous decisions addressing this issue as raising an improper "means within a means" argument were wrongly decided.

The appellant in In re Det. of Sease, 149 Wn. App. 66, 77-78, 201 P.3d 1078, review denied, 166 Wn.2d 1029 (2009), argued that the jury was required to be unanimous as to which illness it agreed satisfied the "personality disorder" means with which he was charged. In re Det. of Sease, 149 Wn. App. at 77. This Court of Appeals first stated that the appellant had not raised an argument that each personality disorder was a distinguishable fact that proved the means of personality disorder. In re Det. of Sease, 149 Wn. App. at 77, n. 13. By that indication, this Court has not addressed the Petrich argument presented here by Mr. Dillingham.

However, the Court then proceeded to address the appellant's contention, describing it as improperly seeking unanimity on "means within a means." In re Det. of Sease, 149 Wn. App. at 77-78, n. 13. The Court cited In re the Personal Restraint Petition of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988), as standing for the proposition that "where a disputed instruction involves alternatives that may be characterized as a means within a means, the constitutional right to a unanimous jury verdict is not implicated . . ." In re Det. of Sease, at 77 (Internal quotation marks omitted.) (citing Jeffries, at 339); see also In re Det. of

Pouncy, supra, 144 Wn. App. at 618-19 (rejecting, in reliance on Jeffries, argument that jury must be unanimous as to whether SVP respondent's abnormality was paraphilia NOS nonconsent, or pedophilia).

This statement makes sense as applied in Jeffries. There, the statute at issue listed multiple numerically designated alternative means of committing the crime of aggravated murder. In re Personal Restraint of Jeffries, at 339. The appellant in Jeffries was charged with two of those alternatives, namely:

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person[.]

Jeffries, at 328 (citing RCW 10.95.020). These two alternatives were unquestionably "alternative means." Jeffries, at 339.

But the appellant in Jeffries attempted to further argue that every phrase within each individual numbered means (for example, in means (7), the murder was committed to conceal a crime, or to protect the identity, or to conceal the identity of a person) were *themselves additional alternatives*. Jeffries, at 339. The Court summarily rejected this contention, and it was in this context that the Court stated that the appellant's argument regarding the wording of the instruction was an

attempt to characterize the charge as alleging means within a means, as to all of which the unanimity rules should be applied. Jeffries, at 339-40.

The present case is not analogous. Mr. Dillingham is not attempting to sub-divide the mental abnormality means of RCW 71.09 SVP status into further, additional alternative means. Rather, he is making an argument no different than might be made by a person charged with second degree assault by the particular statutory means of “assault with a deadly weapon.” See RCW 9A.36.021(1)(c). If the proof in such a case showed two distinguishable sets of facts (which were not a continuing course of conduct) proffered in satisfaction of that allegation, the accused would have a right to a unanimity instruction under Petrich, requiring the jury to agree on which fact proved the means charged. This result would not change simply because the State might also decide to charge an *additional means* of second degree assault from among the many other alternatives available in RCW 9A.36.021. And the result here – a requirement of unanimity as to which *fact* proved the mental abnormality *means* -- does not change simply because the State also charged an additional statutory *means*, i.e., personality disorder. When the State decides to charge two alternative means (and goes forward to argument relying on a means its own expert found inadequate), and then offers multiple fact patterns to satisfy one of those means (and goes

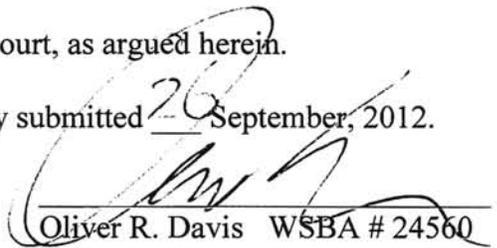
forward to argument on both facts despite the fact that one is inadequate), the accused surely has a right to unanimity analyses on appeal not just under the Halgren test, but also under Petrich.

This Court in Sease and Pouncy wrongly concluded that it could reject the appellants' arguments regarding unanimity on the *facts*, if it could characterize the contention as a “*means within a means*” argument, and then it could affirm. That is not what Jeffries, a case that addressed the structure and language of the aggravated murder statute, stands for. Petrich required a unanimity instruction *or* an election requiring the jury to agree on the particular fact that proved the mental abnormality means, and the manifest constitutional error of an absence of both was not harmless beyond a reasonable doubt. Reversal is required.

E. CONCLUSION

Based on the foregoing, Darin Dillingham respectfully requests that this Court reverse the judgment and order of continued commitment issued by the trial court, as argued herein.

Respectfully submitted 26 September, 2012.



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