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Court of Appeals
Division I
State of Washington

NO. 73223-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LOUGH,

Appellant.

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

APPELLANT'S OPENING BRIEF

TRAVIS STEARNS
Attorney for Appellant

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

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American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders</i> , 5th ed. (2013).....	passim
APA Final Action Paper, <i>Eliminating the Use of Antisocial Personality Disorder as a Basis for Civil Commitment</i> (APA Assembly, May 19- 21, 2006)	24
Freedman, David M., <i>False Prediction of Future Dangerousness: Error rates and Psychopathy Checklist-Revised</i> , 1 <i>Journal of the American Academy of Psychiatry and Law</i> 29 (March, 2001)	25

Garb, Howard, Patricia Boyle, <i>Understanding Why Some Clinicians Use Pseudoscientific Methods: Findings from Research on Clinical Judgment</i> , Science and Pseudoscience in Clinical Psychology (2015)	37
Harris, Grant T., Marnie E. Rice, Vernon L. Quinsey, and Catherine A. Cormier, <i>Violent Offenders, Appraising and Managing Risk</i> (2015)	35
Heilbrun, Kirk, Stephanie Brooks, <i>Forensic Psychology and Forensic Science: A Proposed Agenda for the Next Decade</i> , 16 Psychol. Pub. Pol'y & L. 219 (2010)	43
Scheck, Barry, <i>Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted</i> (Signet 2000)	43
Stephen Porter, et al, <i>Crime Profiles and Conditional Release Performance of Psychopathic and Non-Psychopathic Sexual Offenders</i> , 14 Legal and Criminological Psychology 109 (2009)	26
Zander, Thomas K., <i>Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis</i> , 1 Journal of Sexual Offender Civil Commitment: Science and the Law 17 (2005)	23

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A. INTRODUCTION

Robert Lough has maintained a violent and dangerous existence his whole life, culminating in rape and attempted murder in 1986. At his commitment trial, the jury heard about numerous violent acts Mr. Lough had committed. Any person hearing these stories would feel safer knowing Mr. Lough is confined.

RCW 71.09 civil commitment was not established, however, to detain persons beyond the expiration of their sentences simply because they are dangerous or violent. Due process would not allow it. RCW 71.09 requires the State to prove a mental abnormality which causes a lack of control and thereby creates a likelihood the person will commit a sexually violent offense if released from custody. The State failed to prove Mr. Lough had a mental abnormality, he was likely to commit a sexually violent offense if released from custody, or that there was a causal link between a recognized disorder and his likelihood to commit a sexually violent act if released from total confinement.

While Mr. Lough continues to be dangerous, this is not enough for indefinite commitment. The failure to establish Mr. Lough is likely to commit a sexually violent act if released entitles him to release.

B. ASSIGNMENTS OF ERROR

1. The court violated Robert Lough's constitutional and statutory speedy trial rights by staying his commitment trial until he had completed an intervening prison sentence.

2. The State failed to prove Mr. Lough suffered from a medically recognized mental abnormality.

3. The State failed to establish Mr. Lough would commit a sexually violent act if released from custody.

4. The State failed to provide a causal link between a mental abnormality and Mr. Lough's likelihood to commit a sexually violent act if released from custody.

5. Mr. Lough's right to a fair trial was violated when the court allowed the State to introduce irrelevant actuarial evidence, which only established Mr. Lough's likelihood to commit a violent act.

6. Mr. Lough's right to a fair trial was violated when the court allowed the State to introduce actuarial evidence which did not satisfy standards of scientific reliability.

7. Mr. Lough's right to a fair trial was violated by the admission of evidence of his likelihood to commit a violent crime, the probative value of which was outweighed by its prejudicial effect.

8. The court violated Robert Lough's right to present a defense by interfering with his ability to confer with his expert and to have his expert evaluate the testimony of other witnesses.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Were Mr. Lough's constitutional and speedy trial rights violated when the court stayed his commitment hearing until the completion of an intervening prison sentence?

2. RCW 71.09.020(18) requires the State to establish a person suffers from a mental abnormality or personality disorder which makes it likely they will engage in predatory acts of sexual violence if not confined in a secure facility. Is due process denied where the State was not able to establish Mr. Lough suffered from a mental abnormality?

3. Due process requires the State to prove Mr. Lough is likely to commit a sexually violent act if released from confinement. Is due process denied where the State only proved Mr. Lough was likely to commit a violent act if released from custody and failed to prove he was likely to commit a sexually violent act?

4. Due process requires the State to prove the likelihood of committing a sexually violent act if released from custody is the result of a mental abnormality. Is due process denied where the State was

unable to establish a causal link between Mr. Lough's likelihood of committing a sexually violent act and a committable mental abnormality?

5. For scientific evidence to be admissible, the court must be satisfied the evidence meets standards of scientific reliability. Where the State introduced actuarial evidence without proof it has been generally accepted in the scientific community and that there are other generally accepted methods of applying the theory or principle in a manner capable of producing reliable results, were Mr. Lough's right to a fair trial violated?

6. Was Mr. Lough's right to a fair trial violated by the introduction of irrelevant evidence which only established Mr. Lough was likely to commit a general violent offense if released from custody and not a sexually violent offense?

7. Was the probative value of introducing evidence Mr. Lough was likely to commit a general violent offense if released from custody outweighed by its prejudicial effect?

8. Did the court violate Mr. Lough's right to present a defense when it prohibited Mr. Lough from conferring with his expert about the testimony of other witnesses?

D. STATEMENT OF THE CASE

In 1986, Robert Lough raped and attempted to murder R.I.,¹ a woman he had met that night. CP 12.² This was a brutal act, culminating in R.I. being left on the side of the road to die. 1/8/15 RP 41. It was only through the intervention of a passerby that R.I. was able to survive Mr. Lough's attack. 1/8/15 RP 41.

1. As a child, Mr. Lough was severely abused and engaged in reckless and dangerous acts.

Robert Lough had a dark childhood. 1/15/15 RP 98. He was abandoned by his father and severely abused by his mother and uncle. CP 847. Mr. Lough's older siblings abused him. CP 847. He was involved in uncharged violent behavior. 1/8/15 RP 101. A cousin and neighbor accused Mr. Lough of possibly molesting them. 1/8/15 RP 66; 1/12/15 AM RP 27. With another cousin, Mr. Lough had engaged in uncharged "rough and tumble" acts, including possible sexual exploration. 1/8/15 AM RP 103-04.

¹ Because R.I. is a victim of rape and attempted murder, this brief will only refer to her by initials.

² The transcript consists of multiple volumes which are not labelled except by date. The pages are not sequential and every volume begins at page one. This brief will refer to the transcript by the date of the volume and then the referenced page number. *E.g.* "1/8/15 RP 41." For days where multiple volumes were created, the volume will also be designated by AM or PM to indicate which volume is being referred to. *E.g.* "1/12/15 AM RP 27."

When he was approximately 14 years old, Mr. Lough left his mother's house. 1/15/15 RP 103. Mr. Lough then started to get into trouble with the law, initially for possession of marijuana. 1/15/15 RP 78. He had other contact with law enforcement, including possible joyriding charges and acquiring a handgun to shoot his brother after his sister told Mr. Lough their brother had sexually assaulted her. 1/15/15 RP 78.

2. *Mr. Lough committed violent and dangerous acts as an adult.*

In order to avoid being charged with the attempted assault on his brother, Mr. Lough joined the Army. 1/15/15 RP 79. He did not fare well in the military, first being sanctioned for shoplifting. 1/15/15 RP 81. A fight with another soldier followed, which resulted in Mr. Lough's conviction for assault. 1/15/15 RP 83-84. Mr. Lough served time in Leavenworth prison and was given a bad conduct discharge. 1/15/15 84.

After completing his sentence, Mr. Lough continued to get into trouble. He sold drugs and abused controlled substances. He was convicted of theft for stealing a motorcycle. 1/15/15 RP 86. He also assaulted his wife. 1/15/15 RP 90. At his commitment trial, Mr. Lough was also accused of having sexually assaulted his wife, although this

act was never investigated or charged. 1/15/15 RP 123. Mr. Lough denied any sexual assault of his wife ever occurred. 1/15/15 RP 123.

3. During his prison term, Mr. Lough received numerous infractions and had many fights with other inmates.

Mr. Lough was sentenced to 30 years for the rape and attempted murder of R.I. CP 3, 2/10/15 RP 132. He was a difficult prisoner. He served much of his time in solitary confinement and committed over 100 serious infractions. CP 3, 1/26/15 RP 100. The only incident of possible sexual misconduct, however, occurred in 1996, when Mr. Lough sexually harassed a female correction officer, threatening her and possibly masturbating in front of her. 1/12/15 AM RP 99, 115. There was no other evidence of sexual misconduct in the 30 years Mr. Lough was incarcerated.

While at Leavenworth, Mr. Lough had become involved in Native American practices. He continued this practice while incarcerated in Washington. Mr. Lough became a “warrior” and testified to having never walked away from a knife fight. 2/9/15 RP 75. Mr. Lough showed the jury his prison tattoo, which had an eagle feather for each fight he had been involved in while in prison. 2/9/15 RP 79.

Before his release from prison, the State moved to commit Mr. Lough under RCW 71.09. CP 1. Initially, the State believed Mr. Lough suffered from a paraphilic mental disorder. CP 8. Based upon Dr. Richard Packard's testimony that Mr. Lough suffered from a paraphilic disorder, the court found probable cause. 7/6/10 RP 155, CP 299, 311.

4. *The court granted the State's motion to stay commitment proceedings for the entirety of Mr. Lough's sentence for an intervening crime.*

While waiting for jury trial to determine whether he met the criteria for indefinite commitment, Mr. Lough assaulted another person confined at the special commitment center. 1/26/15 RP 50, *see also* 7/6/2010 RP 1-2. Initially charged with assault in the second degree, Mr. Lough pled guilty to assault in the third degree and returned to prison. CP 849. Over Mr. Lough's objection, the court stayed proceedings until he completed his sentence for the assault. . CP 300, 323, 326.

5. *Mr. Lough's behavior improved upon his return to the special commitment center.*

When Mr. Lough returned to the special commitment center, his behavior improved. 2/3/15 RP 13, 28; 2/4/15 RP 10, 21. Security officers recognized Mr. Lough was "trying to find a better way to handle things" than he had in the past. 2/4/15 RP 10. He was living in a

less restricted ward. 2/3/15 RP 12. He engaged with his case manager. 2/3/15 RP 28. He participated in Native American rituals intended to address his anger, substance abuse and the sexually violent acts he had committed in the past. 2/5/15 RP 15, 48. He has found better ways to deal with his anger. 2/4/15 RP 5-6.

6. *The State's expert was unable to diagnose Mr. Lough with a paraphilic disorder, instead relying primarily upon anti-social personality disorder for his conclusion Mr. Lough has a mental abnormality.*

Mr. Lough was again evaluated by the State's expert, Dr. Richard Packard, who this time was unable to diagnose Mr. Lough with a paraphilic mental disorder. CP 1029.

At the commitment trial, Dr. Packard's primary diagnosis was anti-social personality disorder. 1/27/15 AM RP 41; CP 1029. Dr. Packard believed this personality disorder demonstrated Mr. Lough was "willing" to commit sexually violent crimes. 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/27/15 AM RP 32. Dr. Packard also believed Mr. Lough suffered from post-traumatic stress disorder and multiple substance abuse disorders. 1/27/15 AM RP 65; CP 1029. The State described Mr. Lough as having a "unique psychological profile." 1/15/15/ RP 42.

Believing the combination of anti-social personality disorder and the other disorders was sufficient to find Mr. Lough had a mental abnormality, Dr. Packard testified to a reasonable degree of psychological certainty that Mr. Lough's disorders could be defined as a mental abnormality. 1/27/15 PM RP 4-5.

7. The actuarial tools employed by the State's expert could not predict the likelihood Mr. Lough would commit a sexually violent offense if released from prison.

Dr. Packard also testified that there was no scientifically derived tool available which could answer the question of whether Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/29/15 RP 96. Even so, Dr. Packard opined on Mr. Lough's likelihood to commit a sexually violent offense based upon his interpretation of the Static 99-R and the Violence Risk Appraisal Guide-R (VRAG-R). 1/27/15 PM RP 16.

The Static 99-R indicated there was a less than fifty percent likelihood Mr. Lough would commit a sexual offense if released from custody. 1/27/15 RP 20. The test determined he was only 37 percent likely to commit a sexual offense in the next ten years if not in custody. 1/27/15 PM RP 20.

The VRAG-R is a test which measures the likelihood a person will commit a violent offense if released from custody. 1/27/15 PM RP 49. Here, the testing indicated Mr. Lough was very likely to commit a violent offense if released from custody. 1/27/15 PM RP 25.

Dr. Packard agreed the diagnostic testing was insufficient to establish Mr. Lough's likelihood to commit a sexually violent offense if released from custody. 1/29/15 RP 96.

Dr. Packard also agreed that clinical judgment is not a reliable measure for determining future likelihood of sexually violent reoffending, recognizing studies which demonstrate that an experienced psychologist is no more likely than a graduate student to make an accurate assessment. 2/2/15 RP 28. The defense's expert, Dr. Brian Abbott, described clinical judgment as no better than a coin toss. 2/2/15 RP 95. Nevertheless, Dr. Packard testified with regard to his clinical judgment, asserting it was his belief Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/26/15 RP 76.

8. Defense experts diagnosed anti-social disorder but were not able to find a medically recognized diagnosis upon which to base mental abnormality or a likelihood Mr. Lough would commit a sexually violent offense if released from custody.

Dr. Michael First testified on behalf of Mr. Lough with regard to his diagnosis of Mr. Lough's mental state. 1/28/15 RP 28. Dr. First is a

clinical and forensic psychologist who teaches at Columbia University and has helped draft the *Diagnostic and Statistical Manual of Mental Disorders*, 4th and 5th editions. 1/28/15 RP 8. Dr. First did not find Mr. Lough had a personality disorder or mental abnormality which qualified him for RCW 71.09 civil commitment. 1/28/15 RP 28. In order to meet the statutes requirements, he testified “there has to be some connection to sexual violence.” 1/28/15 RP 30.

Dr. First agreed with Dr. Packard that Mr. Lough suffered from anti-social personality disorder, but stressed this diagnosis could not provide a basis for finding Mr. Lough was likely to commit a sexually violent offense if released from custody. 1/28/15 RP 34. Dr. First found Mr. Lough did not meet the criteria for post-traumatic stress disorder. 1/28/15 RP 64. He found the substance abuse disorders to be in sustained remission, since there was no evidence Mr. Lough had used any controlled substances since his 1986 conviction. 1/28/15 RP 41.

Dr. Abbott provided his psychological opinion on Mr. Lough’s likelihood to commit a sexually violent offense. He employed the Static 99-R and, like Dr. Packard, found Mr. Lough was not more likely than not to commit a sexually violent offense if released from custody. 2/2/15 RP 92; 2/5/15 RP 126. He did not conduct a clinical interview of

Mr. Lough, citing his concern for the inaccuracies involved in clinical judgment. 2/2/15 RP 95, 106.

9. *Mr. Lough admitted to his past and explained his lifestyle, before and while in prison.*

Mr. Lough told the jury of the dangerous life he had led. 2/9/15 RP 62-63. He admitted to the violent rape of R.I. and having not been truthful about his involvement in the crime for most of his adult life. 2/10/15 RP 132. He admitted to his violent behavior in prison and his assault of another person confined in the special commitment center. 2/9/15 RP 65-66. He told the jury he had been working on becoming more peaceful and had been actively engaged with Native American culture to find a less violent path in his life. 2/9/15 RP 65.

Mr. Lough also told the jury of his regret for having raped R.I. 2/10/15 RP 132. He explained to the jury that the rape was a “horrible thing.” 2/10/15 RP 131. Mr. Lough also told the jury he had “no intentions of being that person again.” 2/10/15 RP 132.

Nevertheless, the jury found Mr. Lough met the definition of RCW 71.09.020(18) and he was ordered committed indefinitely. CP 1730.

E. ARGUMENT

1. MR. LOUGH’S CONSTITUTIONAL AND STATUTORY SPEEDY TRIAL RIGHTS WERE VIOLATED WHEN THE COURT STAYED PROCEEDINGS FOR THE ENTIRE PERIOD MR. LOUGH SPENT IN PRISON FOR AN INTERVENING CRIMINAL CONVICTION.

a. Mr. Lough had a constitutional and statutory right to a speedy trial.

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914)).

Civil commitment involves a serious deprivation of liberty and requires the State to comply with due process. *Addington v. Texas*, 441 U.S. 418, 419–420, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Extensive pretrial delay following the filing of a commitment petition creates a presumption of prejudice. *People v. Litmon*, 162 Cal. App. 4th 383, 405, 76 Cal. Rptr. 3d 122, 139 (2008). Due process requires the State to comply with speedy trial obligations when seeking to civilly commit a person. *See State v. Goode*, 830 So.2d 817, 825-26 (Fla.

2002) (Dismissal is remedy for State's failure to comply with speedy trial obligations.). The ultimate responsibility for bringing a person to trial for a civil commitment within a meaningful time lies with the State. *Litmon*, 162 Cal. App. 4th at 406.

In Washington, a civil commitment trial must be held within 45 days of the probable cause hearing. RCW 71.09.050(1). The trial may be continued upon the request of either party with a showing of good cause, or by the court on its own motion in the due administration of justice, when the respondent's rights will not be substantially prejudiced. *Id.* A case set outside of the speedy trial period without a waiver should be dismissed. *In re Det. of Fowler*, 784 N.W.2d 184, 192 (Iowa 2010); *In re Searcy*, 274 Kan. 130, 144, 49 P.3d 1 (2002).

There are no provisions within RCW 71.09 which allow the court to stay proceedings on the basis that a person has become incarcerated on new charges during the pendency of the commitment process. And although a civil matter may be stayed, the mere pendency of related civil and criminal proceedings does not prevent the civil proceedings from going forward. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 352, 16 P.3d 45 (2000), *as amended on reconsideration* (Feb. 14, 2001); *see also United States v. Kordel*, 397 U.S. 1, 90 S.Ct.

763, 25 L.Ed.2d 1 (1970) (simultaneous civil and related criminal proceedings do not constitute unfairness and want of consideration for justice so as to require reversal of a criminal conviction).

b. The court delayed Mr. Lough's commitment trial until after he completed an intervening criminal sentence.

Mr. Lough's commitment trial was stayed from July 6, 2010 until he appeared in court on February 5, 2014—the entire time Mr. Lough remained in prison. CP 302. Mr. Lough objected to the stay of his proceedings. He had entered a waiver of speedy trial on October 14, 2009, agreeing to a continuance until July 8, 2010, waiving any objection to a trial date as late as September 1, 2010. CP 299. The court granted an oral motion from the State to stay Mr. Lough's commitment hearing pending the outcome of his criminal case. CP 300, 318. The State filed a motion to stay on June 20, 2010 and again on August 18, 2010. CP 300. Mr. Lough filed a motion that the court deny a stay on August 19, 2010. CP 300. He then filed a waiver of speedy trial through December 17, 2010. CP 300, 320.

The court ordered Mr. Lough's commitment trial stayed “pending the resolution of the criminal matters” in Pierce County. CP 300, 323. The court entered a new stay on November 9, 2011, “until

such time Lough is released from the Department of Corrections and appears before this court,” resetting trial to October 22, 2013.³ CP 300, 326-27. Mr. Lough objected to the stay.

c. Staying Mr. Lough’s trial until he completed an intervening prison sentence violated Mr. Lough’s constitutional and statutory rights to a speedy trial.

While there are no provisions within RCW 71.09 to authorize a stay, *King* does analyze when to stay a civil matter because of an intervening criminal case, creating a balancing process to determine whether a stay should be granted and requiring the trial court to conduct a case-by-case analysis “in light of the particular circumstances and competing interests involved in the case.” *King*, 104 Wn.App. at 353 (citing *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 901 (9th Cir. 1989)). In order to establish grounds for the stay, the moving party must establish a clear case of hardship or inequity in being required to go forward. *King*, 104 Wn.App. at 350.

The State failed to establish grounds for a stay. The State argued the stay was necessary in order to protect Mr. Lough’s right to remain silent. CP 302. However, Mr. Lough neither requested such a stay, nor

³ The original order had a scrivener’s error setting to trial to 2113, which was corrected on May 18, 2012. CP 329-30.

did he ever assert his right against self-incrimination. Moreover, the stay was not put into place merely during the pendency of Mr. Lough's criminal proceedings, but extended to the entire period he spent in prison after resolving his criminal case, a period of approximately 40 months. CP 300, 326-27.

Mr. Lough does not agree there was a justification for a stay, but if this Court finds otherwise, any justification expired when Mr. Lough pled guilty to assaulting Mr. Titus. At that time, he no longer had a right to remain silent and there would have been no concern that the State would be unable to conduct a complete interview with him. Instead of returning him to court, the court's stay remained in effect. The violation of Mr. Lough's right to a speedy trial entitles him to dismissal. *Litmon*, 162 Cal. App. 4th at 405.

2. THE STATE FAILED TO ESTABLISH MR. LOUGH SUFFERED FROM A MEDICALLY RECOGNIZED DISORDER WHICH JUSTIFIES COMMITMENT.

Mr. Lough was described by the State as a person with a "unique psychological profile." 1/15/15 RP 42. The State's expert created a diagnosis not found in psychology, based upon Mr. Lough's anti-social personality disorder. 1/27/15 AM RP 41. Dr. Packard argued Mr. Lough's anti-social personality disorder, along with diagnoses for

other disorders which do not cause a person to have difficulty controlling sexually violent behavior, was sufficient to establish Mr. Lough met the definition of RCW 71.09.020(18). 1/27/15 AM RP 33.

Due process requires more. The diagnoses for anti-social personality, post-traumatic stress and substance abuse disorders do not satisfy the requirement that the State establish Mr. Lough has a mental abnormality which causes him to have difficulty controlling his sexually violent behavior. *In re Det. of Thorell*, 149 Wn.2d 724, 736, 740-41, 72 P.3d 708 (2003). These diagnoses fail to meet the requirements of due process because none of them contributed to a propensity for sexual violence. Because the State failed to establish Mr. Lough suffers from a mental abnormality which causes him to have difficulty controlling his sexually violent behavior, Mr. Lough is entitled to dismissal.

a. Due process requires the State to prove a person's risk of committing a sexually violent offense comes from a valid, medically recognized mental disorder.

“Mental abnormality” is defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of

others.” RCW 71.09.020(8). In contrast, a “personality disorder” requires a finding of “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 adolescence or early adulthood, is stable over time and leads to distress or impairment.” RCW 71.09.020(9). Evidence of a personality disorder “must be supported by testimony of a licensed forensic psychologist or psychiatrist.” *Id.*

While jurisdictions have leeway in defining when a mental abnormality or personality disorder makes an individual eligible for commitment as a sexually violent person, the diagnosis must be medically justified. *See Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (States must prove not only dangerousness but also mental illness in order to “limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control”); *Thorell*, 149 Wn.2d at 732, 740-41 (State must present expert testimony and proof beyond a reasonable doubt that offender has serious, diagnosed mental illness which causes him difficulty controlling his behavior).

Due process only allows involuntary commitment for those diagnoses which “the psychiatric profession itself classifies . . . as [] serious mental disorders.” *Crane*, 534 U.S. at 410.

b. Anti-social personality disorder is an insufficient basis for RCW 71.09 involuntary commitment.

The State argued Mr. Lough had a “very unique psychological profile” which justified commitment. 1/15/15/ RP 42. Dr. Packard provided his opinion that because Mr. Lough could be diagnosed with anti-social personality disorder and had other identifiable disorders, he had a mental abnormality. CP 1029. This is an insufficient diagnosis. Instead, due process requires this Court to focus upon diagnosed mental disorders which cause a person to have difficulty controlling their sexually violent behavior. *See Thorell*, 149 Wn.2d at 136.

Dr. Packard’s primary diagnosis of Mr. Lough was for anti-social personality disorder, a diagnosis the State agreed was insufficient on its own to justify Mr. Lough’s continued commitment. 1/1/5/15 RP 42; 1/27/15 RP 41. Anti-social personality disorder is described by psychologists as a personality disorder defined by a person’s pattern of disregard for, and violation of, the rights of others. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. 645 (2013) (Hereafter DSM-5). Mr. Lough did not

contest this diagnosis, agreeing it was an insufficient basis for continued confinement. 1/28/15 RP 28.

In his concurring opinion in *Hendricks*, Justice Kennedy questioned whether anti-social personality disorder could be a sufficient basis for commitment, stating that anti-social personality disorder is simply “too imprecise a category to offer a solid basis for concluding that civil detention is justified.” *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring). While this Court has not addressed whether a diagnosis for anti-social personality disorder is sufficient for commitment, other courts have. New York, which has a statute similar to Washington’s, has held that without other clear evidence of mental abnormality, “evidence that a respondent suffers from anti-social personality disorder cannot be used to support a finding that he has a mental abnormality.” *State v. Donald DD.*, 24 N.Y.3d 174, 177, 21 N.E.3d 239, 996 N.Y.S.2d 610 (2014); *see also* N.Y. MHY. LAW § 10.03.⁴ In *Donald DD.*, the court found anti-social personality disorder

⁴ N.Y. MHY. LAW § 10.03 provides in pertinent part that (e) “Dangerous sex offender requiring confinement” means a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility;” (i) “Mental abnormality” means a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes

“simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case.” 24 N.Y.3d at 190.

This is consistent with scientific research and opinion. A person diagnosed with anti-social personality disorder chooses 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)⁵. Because the ability to choose to engage in unlawful conduct remains, the unlawful acts committed by a person diagnosed with anti-social personality disorder are not the result of an inability to control behavior, but a choice not to.

This is why the American Psychiatric Association (APA) has condemned the use of anti-social 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*

him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct.”

⁵ Available at <http://www.socjournal.org/archives>.

Civil Commitment (APA Assembly, May 19-21, 2006).⁶ Because anti-social personality disorder “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,” the APA rejected the diagnosis as a basis for involuntary commitment. *Id.*, at 1-2.

The State’s expert agreed that anti-social personality disorder does not cause a person to lose their ability to choose to commit a sexually violent offense. In making his diagnosis of anti-social personality disorder, Dr. Packard made frequent references to how Mr. Lough’s anti-social personality disorder made him “willing to break the law.” 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/2/7 RP 32. Because RCW 71.09 requires the State to prove the likelihood to commit a sexually violent offense is based upon an inability to control behavior, this diagnosis is constitutionally insufficient to support indefinite commitment. *Crane*, 534 U.S. at 413.

⁶ The Final Action Paper was adopted by the May 2006 APA Assembly (see, Assembly, Board Pass Statement on Detainee Interrogations, 41 Psychiatric News, no 12 at 1, 10 (June 16, 2006), available at <http://psychnews.psychiatryonline.org/toc/pn/41/12>).

- c. *“Psychopathy” is a modifier of anti-social personality disorder and is insufficient to justify RCW 71.09 involuntary commitment.*

Dr. Packard used the “Hare Psychopathy Checklist” to determine whether Mr. Lough’s personality disorder could also be defined as a psychopathy, employing a tool known as the PCL-R. 1/27/15 AM RP 28. Dr. Packard explained to the jury that, among other characteristics, a person who scores highly on this test demonstrates a “willingness to violate social norms.” 1/27/15 RP 32. This test is designed to rate a person’s anti-social tendencies. David M. Freedman, *False Prediction of Future Dangerousness: Error rates and Psychopathy Checklist-Revised*, 1 Journal of the American Academy of Psychiatry and Law 29, 89-95 (March, 2001).

Psychopathy is not a medical diagnosis. The DSM-5 does not distinguish between psychopathy and anti-social personality disorder. DSM-5 at 660. Instead, the DSM-5 finds anti-social personality disorder and psychopathy have essentially the same “pattern,” describing them as synonyms of each other. *Id.*

Dr. Packard claimed it is not uncommon to use this test with sex offenders. 1/27/15 RP 29. There is, however, a growing body of literature which demonstrates that the information provided by the

PCL-R on psychopathy is not an adequate or consistent predictor of sexual recidivism. Stephen Porter, et al, *Crime Profiles and Conditional Release Performance of Psychopathic and Non-Psychopathic Sexual Offenders*, 14 *Legal and Criminological Psychology* 109–18 (2009). A person diagnosed with anti-social personality disorder with a high PCL-R score may engage in more frequent offending, but this does not mean they lack the ability to control such behavior or are likely to commit sexually violent acts. *Id.* A high PCL-R score is simply not an indicator of whether a person is likely to lack the volitional control to commit a future sexually violent offense.

Psychopathy is, at best, a modifier of anti-social personality disorder. Dr. Packard stated that a person with high psychopathic tendencies is more willing to violate social norms and violate others. 1/27/15 RP 32. This is not, however, the standard required for indefinite commitment. Instead, the State must establish a mental abnormality which causes the person to lack the volitional control to refrain from committing sexually violent crimes. *Hendricks*, 521 U.S. at 346. Like the personality disorder psychopathy modifies, this is an insufficient basis for indefinite commitment.

d. Post-traumatic stress disorder is an insufficient basis for RCW 71.09 involuntary commitment.

Recognizing that a diagnosis for a personality disorder was insufficient to support indefinite commitment, Dr. Packard attempted to connect Mr. Lough's anti-social personality disorder diagnosis with a diagnosis for post-traumatic stress disorder. 1/27/15 AM RP 64. While the State and Mr. Lough agreed Mr. Lough suffered from anti-social personality disorder, Mr. Lough contested his diagnosis for post-traumatic stress disorder. 1/28/15 RP 34.

The essential feature of post-traumatic stress disorder is the development of characteristic symptoms following exposure to one or more traumatic events. DSM-5 at 274. According to Dr. First, who testified on behalf of Mr. Lough and is a premier expert on psychological disorders, "[t]here's nothing about PTSD that connects people to sexual violence at all." 1/28/15 RP 64. Dr. Packard recognized that "different people respond to traumatic events in different ways." 1/26/15 RP 68. He told the jury that post-traumatic stress disorder creates a sensitivity to stress, acute awareness and a hair trigger response to stimuli. 1/26/15 RP 71.

Persons who suffer from post-traumatic stress disorder may suffer from negative alterations in their cognition or mood. DSM-5 at

275. This may lead to an inability to remember certain events, negative expectations, persistent erroneous cognitions about the traumatic event, and a tendency to blame themselves or others for the cause of the event.

Id. Post-traumatic stress disorder may manifest itself in a diminished interest or participation in previously enjoyed activities, detachment from others or the persistent inability to feel positive emotions. *Id.*

Post-traumatic stress disorder may cause persons to become quick tempered and engage in aggressive behavior. DSM-5 at 275. Research has also indicated a high frequency of reckless or self-destructive behavior including dangerous driving, excessive alcohol or drug use, or suicidal behavior. *Id.* Post-traumatic stress disorder may cause a person to become very reactive to unexpected stimuli, to have concentration difficulties, and problems with sleep. *Id.* at 276. Some persons may suffer from persistent dissociative symptoms of detachment. *Id.*

Significantly, the DSM-5 does not conclude that post-traumatic stress disorder causes a person to have difficulty controlling their sexually violent behavior. Like anti-social personality disorder, there is not a causal link between post-traumatic stress disorder and the emotional and volitional inability to control behavior or the

predisposition to commit a sexually violent act, as required for civil commitment. *See* RCW 71.09.020(8). At best, Dr. Packard was able to say that persons who suffered from post-traumatic stress disorder feel as if they are on auto-pilot when committing their crimes. 1/27/15 RP AM 75. In making these observations, Dr. Packard was unable to describe how post-traumatic stress disorder causes the loss of volitional control required by RCW 71.09 and unable to demonstrate that this disorder is connected to sexual violence. This diagnosis is also an insufficient basis to establish Mr. Lough has a mental abnormality.

e. Substance abuse disorder is an insufficient basis for RCW 71.09 involuntary commitment.

Dr. Packard also inflated the significance of Mr. Lough's anti-social personality disorder by recognizing Mr. Lough had suffered from a substance abuse disorder. 1/27/15 AM RP 86. Dr. Packard testified that persons with substance abuse disorder can become "physiologically or psychologically" dependent upon substance use. 1/27/15 AM RP 87. He said substance abuse played a significant role in his diagnosis of Mr. Lough's anti-social personality disorder because it has a "disinhibiting effect." 1/27/15 AM RP 89.

Mr. Lough also contested this finding. To find a substance abuse disorder, a person must manifest clinically significant impairment or

distress of at least two of the footnoted factors, in a period of twelve months.⁷ While Dr. First recognized Mr. Lough had suffered from substance abuse disorder in the past, he could find no evidence of the disorder since Mr. Lough's incarceration. 1/28/15 RP 41. As result, he found Mr. Lough's chemical dependency to be in sustained remission. 1/28/15 RP 41.

More importantly, beyond Dr. Packard's claim substance abuse may have a disinhibiting effect, evidence does not support the contention a substance abuse disorder causes a person to have difficulty controlling sexually violent behavior.

The National Institute of Alcohol Abuse and Alcoholism has stated that although "alcohol consumption and sexual assault frequently co-occur, this phenomenon does not prove that alcohol use causes sexual assault." Antonia Abbey, Tina Zawacki, Philip Buck, A.

⁷ Factors include: that the substance is used larger amounts or for a longer period than intended; there is a persistent desire or unsuccessful efforts to cut down or control the substance; a great deal of time is spent in activities necessary to obtain or use or recover from the effects of the substance; there is a craving, or a strong desire or urge to use the substance; the substance results in the failure to fulfill major role obligations at work, school, or home; there is continued use of the substance despite having persistent or recurrent social or interpersonal problems caused or exacerbated by its effect; important social, occupational, or recreational activities are given up or reduced because of substance use; the substance is used in situations in which it is physically hazardous; use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated substance abuse; a marked increase in tolerance; and difficulties with withdrawal. *See generally*, DSM-5 at 483-585.

Monique Clinton, and Pam McAuslan, *Alcohol and Sexual Assault* (2001), available at <http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm>. In some cases the research has pointed out it may actually be the other way around. *Id.* While research indicates that many persons who consume substances and commit a sexual assault may attempt to excuse the assault based upon the substance use, this does not create a causality between substance use and sexual assault. *Id.*

The analysis is much the same here. Dr. Packard recognized that substance use is a disinhibiting factor that may make it more likely a person will choose to act in a certain way. 1/27/15 AM RP 89. This is not, however, the same as loss of volition control. At best, a substance abuse disorder makes it more likely a person like Mr. Lough is more “willing” to commit crimes than he might otherwise be. 1/15/15 RP 143. Modifying Mr. Lough’s anti-social personality disorder by recognizing he may also suffer from substance abuse disorder is not sufficient to establish Mr. Lough has a mental abnormality which makes it difficult, if not impossible, for him to control his sexually dangerous behavior. *See, Hendricks*, 521 U.S. at 358; *Thorell*, 149 Wn.2d at 732. The abnormality must compel a person to commit sexually violent acts, which substance abuse disorder does not. *Id.*

f. The “unique psychological profile” created by the State is an insufficient basis for RCW 71.09 involuntary commitment.

There is a critical distinction between the dangerous recidivist who chooses to commit a sexually violent offense, or simply a violent offense, and a person who will commit a sexually violent act due to a mental disorder. Dr. Packard did not provide a diagnosis which would cause Mr. Lough to lack the ability to control his sexually violent behavior, instead focusing upon Mr. Lough’s willful behavior and his general propensity towards violence.

Dr. Packard argued that the collection of disorders qualified Mr. Lough for commitment under RCW 71.09. But masking anti-social personality disorder as a mental abnormality by combining it with other disorders which also cannot be linked to the inability to control sexually violent behavior is insufficient to justify indefinite commitment. A person diagnosed with anti-social personality disorder retains the ability to control behavior and simply chooses not to; the diagnosis does not result in a limitation of volitional control and therefore does not provide the causal link required by due process and RCW 71.09.020. *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring); *Thorell*, 149 Wn.2d at 136.

Identifying triggers which might cause a person to choose to commit a crime does not change the underlying problem with the State's case: the State relied upon a personality disorder to prove mental abnormality. Because the State never established a mental disorder which would cause Mr. Lough to lack the volitional control to refrain from committing a sexually violent act, this Court must find Mr. Lough's due process rights were denied. *Thorell*, 149 Wn.2d at 736.

3. THE STATE FAILED TO PROVE MR. LOUGH WAS MORE LIKELY THAN NOT TO COMMIT A SEXUALLY VIOLENT OFFENSE IF RELEASED FROM TOTAL CONFINEMENT.

Indefinite commitment requires a finding a person is likely to “engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18) (emphasis added). Proof of future likelihood to commit a general violent offense is insufficient to satisfy the legal definition or due process requirements of indefinite commitment.

a. The actuarial tables used to assess Mr. Lough's likelihood to commit a sexually violent offense were insufficient.

Actuarial instruments may be admitted when they satisfy the requirements of ER 403, ER 702 and ER 703. *Thorell*, 149 Wn.2d at 757. Unlike other cases where actuarial tables have been found to be

useful, however, Dr. Packard testified that the actuarial risk assessment instruments he used could not answer the question of whether Mr. Lough met the definition of a sexually violent predator. 1/29/15 RP 96. Nonetheless, he testified extensively about his use of actuarial tables in coming to the conclusion Mr. Lough was likely to commit a future crime of sexual violence. 1/27/15 PM RP 16.

The first test Dr. Packard employed was the Static 99-R.⁸ According to Dr. Packard, this test was employed by correctional departments to manage offenders. 1/27/15 PM RP 16-17. The Static 99-R is not used to determine the likelihood a person will commit a sexually violent offense in the future. 1/27/15 PM RP 20. Nevertheless, Dr. Packard found the likelihood Mr. Lough would commit a new sexual offense, based upon the Static 99-R, was 20.5 percent within five years of release and 37.3 percent within 10 years of release. 1/27/15 RP 20.

The reason why psychologists criticize the Static 99-R as a tool for civil commitment is because it examines a broad range of sexual offenses. 2/15/15 RP 96. As a result, it tends to overestimate the risk

⁸ The authors of the Static 99 maintain a clearinghouse on the tool and its employment. It can be found at <http://www.static99.org/>.

potential for predatory acts of sexual violence. 2/15/15 RP 96. Both Mr. Lough and the State agree the Static 99-R is an incomplete tool to determine the future likelihood of a person committing a sexually violent act. 2/15/15 RP 17, 45.

Dr. Packard also employed the VRAG-R, a tool created in 2013 to assess the likelihood a person will commit a future violent offense. 1/27/15 RP 49. This new tool is intended to be easier to score than previously created assessment tools. Grant T. Harris, Marnie E. Rice, Vernon L. Quinsey, and Catherine A. Cormier, *Violent Offenders, Appraising and Managing Risk* (2015). This tool does not distinguish between violent and sexually violent offenses. 1/28/15 RP 189. It was not designed to determine whether someone will commit a predatory act of sexual violence if released from custody. 1/28/15 RP 104.

Dr. Packard found the VRAG-R established Mr. Lough was highly likely to commit a violent offense if released from custody. 1/27/15 PM RP 25. While Dr. Packard was careful to use the phrase “including sexually violent” when he testified, this distinction does not exist within the tool. 1/27/15 RP 49; 1/28/15 RP 189. In fact, the VRAG-R was not designed to address the likelihood a person would commit a sexually violent offense. 1/29/15 RP 104. While Dr. Packard

argued the VRAG-R includes “sexually violent” offenses within the definition of violent offenses and is therefore a useful measure, the State provided no evidence of how the tool could be used to distinguish between violent and sexually violent offenses. 1/29/15 RP 96.

The lack of a satisfactory tool to assess Mr. Lough’s likelihood to commit a future sexually violent offense should not allow the State to rely upon tools designed to measure other information. Due process is not satisfied when the State presents insufficient evidence of Mr. Lough’s likelihood to commit a sexually violent act if released from custody. The actuarial evidence established Mr. Lough is only 37 percent likely to commit a sexual offense, including non-violent offenses, in the next ten years. It also established Mr. Lough is more likely than not to commit a violent offense if released for custody. This does not satisfy the State’s burden and violates Mr. Lough’s due process rights.

b. The highly inaccurate clinical judgment relied upon by the State to establish Mr. Lough’s likelihood to commit a future sexually violent offense was insufficient.

According to studies reviewed by Dr. Packard, the more clinical judgment an assessor uses, the lower the predictive accuracy of the assessment will be. 1/28/15 RP 182-83. Dr. Abbott explained that the

predictive accuracy of a clinical judgment is close to 50 percent, or in other words, “essentially a toss of a coin.” 2/2/15 RP 95.

The overconfidence of clinical judgment is well established in scientific literature. Howard Garb, Patricia Boyle, *Understanding Why Some Clinicians Use Pseudoscientific Methods: Findings from Research on Clinical Judgment*, *Science and Pseudoscience in Clinical Psychology* 20 (2015) (experienced clinicians are no more accurate than less experienced clinicians and graduate students). Dr. Packard agreed that studies show overconfidence in clinical assessment is influenced by many factors like double counting external factors, over influence from the index offense, confidence bias and anchoring bias. 2/2/15 RP 28. As a result, Dr. Packard agreed that studies have indicated an experienced clinician has no greater ability to predict future outcomes than graduate students. 2/2/15 RP 28. Dr. Packard agreed that the “more professional judgment you insert in the process [of assessing likelihood to commit a sexually violent offense], the lower the accuracy gets.” 1/28/15 RP 181-82.

Because the actuarial evidence did not support the conclusion Mr. Lough was likely to commit a sexually violent offense if released, the State was forced to rely upon Dr. Packard’s undependable clinical

judgment. The overwhelming scientific literature and Dr. Packard's testimony make clear this is an insufficient basis to justify Mr. Lough's continued confinement. Because the State failed to establish Mr. Lough is likely to commit a sexually violent offense if released from custody, Mr. Lough is entitled to release.

c. Proof of mere dangerousness is insufficient to establish Mr. Lough is likely to commit a sexually violent offense if released from custody.

The State may argue that the combination of clinical judgment and the actuarial information provided to the jury is sufficient to satisfy the State's due process burden. This Court should reject this argument. Unlike cases where the State was able to meet its burden of establishing likelihood to commit a sexually violent offense, this case is an example of where the State was only able to prove Mr. Lough was likely to commit a violent offense if released from custody. This is an insufficient basis for continued confinement under RCW 71.09.

Mere dangerousness cannot justify indefinite commitment. *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 412. Due process instead requires the State to prove an individual is currently dangerous and likely to commit a sexually violent offense. *See In re Det. of Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993) (citing *Addington*, 441

U.S. 418); *Foucha v. Louisiana*, 504 U.S. 71, 82-83, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

While the State was able to demonstrate through history and psychological testing that Mr. Lough is a dangerous man who may commit a new crime if released from confinement, this is not what due process requires. It is not enough to show Mr. Lough is dangerous. The State must prove Mr. Lough is likely to commit a sexually violent offense if released from custody. Because the State was only able to establish Mr. Lough is likely to commit a violent offense if released from custody, he is entitled to release.

4. THE STATE FAILED TO PROVE A CAUSAL LINK BETWEEN MR. LOUGH’S RISK OF COMMITTING A SEXUALLY VIOLENT OFFENSE AND A MEDICALLY RECOGNIZED DISORDER JUSTIFYING COMMITMENT.

- a. *“Lack of control” requires the State to establish a causal link between a mental abnormality and the likelihood Mr. Lough will commit a sexually violent act.*

A commitment under RCW 71.09 comports with the requirements of due process only where the State establishes the person has a mental abnormality which makes it “difficult, if not impossible, for the person to control his dangerous behavior.” *Hendricks*, 521 U.S. at 358; *see also Thorell*, 149 Wn.2d at 732.

Hendricks emphasizes the constitutional importance of differentiating the dangerous sexual offender from other dangerous persons who are more properly dealt with exclusively in criminal proceedings. *Crane*, 534 U.S. at 413. This distinction is necessary so that civil commitment does not become a mechanism for “retribution or general deterrence,” functions of the criminal justice system and not civil commitment. *Id.*; see also *Foucha*, 504 U.S. at 82-83 (rejecting an approach to civil commitment that would permit the indefinite confinement “of any convicted criminal” after completion of a prison term).

Thus, to narrow the class of individuals subject to indefinite incarceration, due process requires more than mere proof of a risk to reoffend but rather proof of a risk to commit a sexually violent offense which stems from a mental disorder. See e.g. *Thorell*, 149 Wn.2d at 715-16. *Crane* requires the State’s proof distinguish the person who is likely to commit a sexually violent offense because of their mental condition from the normal recidivist who may not be constitutionally committed no matter how great the likelihood of reoffending. *Thorell* concluded Washington’s commitment statute is consistent with these constitutional requirements. Thus, RCW 71.09.060 requires the State to

prove Mr. Lough is not merely likely to commit a sexually violent act, but will do so because of his mental abnormality. The State failed to meet this burden.

b. The State failed to distinguish Mr. Lough from the dangerous but typical recidivist.

The State presented significant evidence of Mr. Lough's dangerous behavior. Mr. Lough had a history of violence as a child. *See, e.g.* 1/8/15 RP 101. He committed an assault while in the army at age 17. 1/1/5/15 RP 105; CP 84. His rape of R.I. also resulted in his conviction for attempted murder. 1/15/15 RP 91. Mr. Lough admitted to having been involved in a great number of fights when he was in prison. 2/9/15 RP 76-77. He was convicted of another assault he committed when he first confined to McNeil Island. 1/1/4/15 RP 36.

The only evidence of Mr. Lough's sexual misconduct after his 1986 conviction was an incident which occurred in 1996, when Mr. Lough harassed and made sexually threatening remarks towards a prison guard. 1/12/15 RP 95. Despite being under constant watch since 1986, no other evidence of sexual compulsion was ever presented in either prison or the special commitment center.

In fact, while Mr. Lough received numerous infractions and reports over that time, there is no record of sexual misconduct and

certainly no evidence of an attempt or threat by Mr. Lough to commit a sexually violent assault. Instead, the State focused on Mr. Lough's disrespect for women, within a lifetime of disrespect toward anyone in authority, presenting evidence of the way he treated an administrative assistant at a disciplinary hearing. 1/12/15 RP 65.

There is no link between Mr. Lough's anger and a lack of volitional control to not commit a sexually violent offense. This is a critical requirement for indefinite commitment. The failure of the State to establish this element requires dismissal. *Crane*, 534 U.S. at 413.

5. THE VRAG-R FAILS TO MEET THE TEST FOR SCIENTIFIC RELIABILITY, PROVIDES IRRELEVANT INFORMATION TO THE JURY, WAS MORE PREJUDICIAL THAN PROBATIVE, AND COMPROMISED THE JURY'S VERDICT.

Mr. Lough sought to exclude the use of the VRAG-R by the State, arguing it did not meet standards for reliability, was not relevant, and had the potential to mislead the jury. CP 905. The court denied Mr. Lough's motion to exclude this testimony. CP 1291; 1/26/15 RP 57-58.

a. The VRAG-R fails to meet scientific standards for reliability.

Courts must be wary when admitting scientific evidence. In an examination of 62 of the first 67 DNA exonerations of wrongful convictions, the Innocence Project concluded that more than a third of

them had involved “tainted or fraudulent science.” Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*, at 246, n.60 (Signet 2000). Courts must scrutinize psychological testing, much as they have done with other forensic sciences in recent years. Kirk Heilbrun, Stephanie Brooks, *Forensic Psychology and Forensic Science: A Proposed Agenda for the Next Decade*, 16 Psychol. Pub. Pol'y & L. 219, 228 (2010).

Washington employs the *Frye* test for novel scientific evidence. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 600-01, 260 P.3d 857 (2011). *Frye*'s conservative approach to admitting new scientific evidence requires careful assessment of the general acceptance of the theory and methodology in order to exclude, among other things, “pseudoscience.” *State v. Copeland*, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996). “Evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.” *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984).

Novel scientific evidence satisfies *Frye* if the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part and

there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 175, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014) (citing *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir.1923)).

The trial court found the VRAG-R is a new scientific instrument, but admitted the test result without conducting a *Frye* hearing because the VRAG-R “falls in the field of actuarial instruments.” 1/26/15 RP 58. It had, in fact, only been developed in 2013. 1/27/15 RP 25. Because the court found the test to be novel, the court should have held a *Frye* hearing before allowing the results of the VRAG-R to be admitted. *Det. of Ritter v. State*, 177 Wn. App. 519, 521, 312 P.3d 723 (2013), *review denied sub nom., In re Det. of Ritter*, 180 Wn.2d 1028, 331 P.3d 1172 (2014).

The VRAG-R fails to satisfy *Frye*. Although based upon an older actuarial table, the VRAG-R is a new test. CP 1320, 1332. It has not been peer reviewed. CP 1320, 1342. It has not been tested upon a population in the United States, let alone those eligible for RCW 71.09 commitment. CP 1320, 1339-40. Without greater scrutiny from within

the scientific community, this Court cannot find that *Frye* is satisfied. Allowing the State to discuss this test infringed upon Mr. Lough's right to a fair trial and entitles him to a new trial.

b. The VRAG-R was not relevant as it only measures likelihood to commit a future violent offense.

Even if it satisfied *Frye*, the VRAG-R should not have been admitted because it lacked relevance. Evidence must be relevant to be admissible. ER 402. In a RCW 71.09 commitment trial, evidence is only relevant if it increases or decreases the likelihood that a fact exists that is consequential to the jury's determination of whether the respondent meets the definition of RCW 71.09.020(18). *In re Det. of West*, 171 Wn.2d 383, 397, 256 P.3d 302 (2011).

The VRAG-R purports to measure the likelihood a person will commit a violent offense if released from custody. It is not designed to determine whether someone will commit a predatory act of sexual violence if released from custody. 1/28/15 RP 104. Although Dr. Packard was careful always to include the phrase "including sexually violent" when describing the results of his testing, there is no evidence that the test was ever designed to be used in this way. 1/29/15 RP 96. If the question before the jury had been the likelihood Mr. Lough would commit a violent offense, including a sexually violent offense, then the

VRAG-R would be relevant, provided it satisfied *Frye*. Because it fails to provide any distinction between violent and sexually violent offenses, the VRAG-R fails to meet the test for minimal relevance.

c. The prejudicial effect of the VRAG-R outweighed its probative value.

Even if admissible under *Frye* and relevant, the VRAG-R should have been excluded pursuant to ER 403. Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” ER 403. While the results of assessment tools have been admitted despite their prejudicial nature, these tools have largely assessed the likelihood a person would commit a future sexually violent offense. *See Thorell*, 149 Wn.2d at 758. The VRAG-R does not assess the likelihood a person will commit a future sexually violent offense, but rather the likelihood they will commit a future violent offense. 1/27/15 RP 24. Dr. Packard used the VRAG-R to find the likelihood Mr. Lough would commit a violent crime within the next fifteen years to be 90 percent. 1/27/15 RP 25.

The likelihood that this evidence rendered the jury’s verdict unfair is high. While Dr. Packard used the phrase “including sexual acts” when describing the VRAG-R, there is no such distinction made

in the test or its results. *See, e.g.*, 1/27/15 RP 24. The jury, moreover, was given no way to parse the 90 percent figure among sexually violent offenses and general violent offenses.

The results of the VRAG-R instead put squarely before the jury the likelihood that, if released, Mr. Lough is likely to commit a violent crime. If the Court finds this to have some relevancy, it cannot find that the probative value outweighs prejudice to Mr. Lough. Instead, the evidence created the likelihood the jury would find the State met its burden not because the State proved its case, but because Mr. Lough is a dangerous man. The failure of the trial court to restrict this testimony unfairly prejudiced the jury and resulted in a compromised verdict.

6. MR. LOUGH WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE COURT PREVENTED HIS EXPERT FROM CONSULTING WITH MR. LOUGH'S ATTORNEYS REGARDING THE TESTIMONY PRESENTED AT TRIAL.

Basic to our system of jurisprudence is the right to cross examine witnesses and to offer testimony. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973)).

Relevant evidence should only be withheld if the State's interest in excluding the evidence outweighs the defendant's need. *State v.*

Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The due process guarantee of fundamental fairness requires that when a person's liberty interest is at stake, they must be provided with meaningful opportunity to present a defense. *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53 (1985).

Evidentiary rules impermissibly abridge the right to present a defense when they are "arbitrary or disproportionate" and "infringe [] upon a weighty interest of the accused." *State v. Rafay*, 168 Wn. App. 734, 796, 285 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023, *cert. denied*, 134 S.Ct. 170 (2013) (alteration in original) (internal quotation marks omitted) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)) ; *see* U.S. Const. amend. VI.

Before trial began, the court restricted Mr. Lough and his attorneys from consulting with their experts with regard to the testimony of other witnesses. 12/19/14 RP 42. The court found that allowing Mr. Lough to communicate with his expert about the testimony of Dr. Packard would not be "productive." 12/19/14 RP 42.

Of course, the issues critical to the State's case were whether Mr. Lough suffered from a mental abnormality and the likelihood he would commit a sexually violent crime if released from custody. To

answer these questions, the State relied upon the testimony of Dr. Packard. To prevent Mr. Lough from consulting with his expert regarding the testimony provided by Dr. Packard is an infringement of Mr. Lough's right to present a defense. In a case relying upon forensic evidence, the ability to consult with a forensic expert is critical. The restriction placed upon Mr. Lough was an unconstitutional restraint on his right to present a defense.

F. CONCLUSION

While the State established Mr. Lough lived a dangerous life and may commit a dangerous act if released from custody, this is not sufficient to justify Mr. Lough's continued confinement under RCW 71.09.

Due process demands that the State establish Mr. Lough suffers from a mental abnormality which makes it likely he will commit a predatory act of sexual violence if not confined in a secure facility. The State failed to meet this standard and Mr. Lough is entitled to relief.

In addition, Mr. Lough's right to a speedy trial was violated when the court stayed Mr. Lough's trial for the entire time he was charged, convicted and sentenced for an intervening crime.

Mr. Lough's right to a fair trial was prejudiced when the State presented actuarial evidence which did not meet standards for scientific reliability, only measured Mr. Lough's likelihood to commit a violent act, and was more prejudicial than probative.

Mr. Lough was denied his right to present a defense when the court restricted his ability to confer with his expert during trial.

This Court should order Mr. Lough's release.

DATED this 18th day of April 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

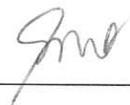
IN RE THE DETENTION OF)	
)	
ROBERT LOUGH,)	NO. 73223-4-I
)	
APPELLANT.)	
)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF APRIL, 2016, 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:

[X] ANDREA VITALICH, DPA [paosvpstaff@kingcounty.gov] [Andrea.Vitalich@kingcounty.gov] [PAOAppellateUnitMail@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY SVP UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] ROBERT LOUGH SPECIAL COMMITMENT CENTER PO BOX 881000 STEILACOOM, WA 98388	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF APRIL, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎ (206) 587-2711