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Division I  
State of Washington

No. 74248-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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IN RE THE DETENTION OF:

JAMES TURNER

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

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

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

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

E. ARGUMENT ..... 11

**1. The State failed to prove Mr. Turner committed a recent overt act..... 11**

    a. The only mental abnormality alleged by the State was pedophilic disorder..... 12

    b. Dr. Judd conceded all of Mr. Turner’s sexual partners, aside from S.H., were not prepubescent. .... 14

    c. The remaining conflicting evidence regarding Mr. Turner’s fantasies was not sufficient for a finding that he suffered from the mental abnormality of pedophilic disorder. .... 16

    d. Mr. Turner’s abuse of S.H. did not provide sufficient evidence for a finding that he suffered from pedophilic disorder. .... 18

**2. The State presented insufficient evidence that Mr. Turner committed a recent overt act..... 20**

**3. The State failed to prove Mr. Turner was more likely than not to commit a sexually violent offense if released from total confinement..... 24**

    a. The actuarial tools employed by the State did not prove Mr. Turner was more likely than not to commit a sexually violent offense..... 25

    b. Dr. Judd’s unguided clinical judgment was no more accurate than a coin toss in predicting Mr. Turner’s risk of reoffending..... 30

<b>4. The trial court erred when it permitted Dr. Judd to testify that the Static 99-R underestimated Mr. Turner’s risk of reoffending.....</b>	<b>31</b>
a. Dr. Judd’s claim was speculative and irrelevant.....	31
b. The evidence was also unfairly prejudicial.....	33
c. The error was not harmless.....	34
F. CONCLUSION.....	35

## TABLE OF AUTHORITIES

### **Washington Supreme Court**

<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593, 260 P.3d 857 (2011).....	31
<i>Henrickson v. State</i> , 140 Wn.2d 686, 2 P.3d 473 (2000).....	12, 18
<i>In re Detention of Albrecht</i> , 147 Wn.2d 1, 51 P.3d 73 (2002).....	12, 20
<i>In re Detention of Lewis</i> , 163 Wn.2d 188, 177 P.3d 708 (2008).....	20
<i>In re Detention of Post</i> , 170 Wn.2d 302, 241 P.3d 1234 (2010).....	11, 12, 24, 31, 34
<i>In re Detention of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	11, 12, 13, 19, 29
<i>In re Detention of West</i> , 171 Wn.2d 383, 256 P.3d 302 (2011).....	33
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	34

### **Washington Court of Appeals**

<i>In re Detention of Davis</i> , 109 Wn. App. 734, 37 P.3d 325 (2002).....	21, 23
<i>In re Detention of Durbin</i> , 160 Wn. App. 414, 248 P.3d 124 (2011).....	12
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001) .....	32
<i>Stedman v. Cooper</i> , 172 Wn. App. 9, 292 P.3d 764 (2012) .....	31, 32

### **United States Supreme Court**

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	11
---	----

**Constitutional Provisions**

Const. art. I, § 3..... 11, 21, 29

U.S. Const. amend. XIV ..... 11, 21, 29

**Washington Statutes**

RCW 71.09.020 ..... 11, 20

RCW 71.09.060 ..... 12, 13, 20, 23, 24

**Washington Rules**

ER 403 ..... 33

ER 702 ..... 31

**Other Authorities**

AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF  
MENTAL DISORDERS 99 (5<sup>th</sup> ed. 2013) ..... 14, 17

Grant T. Harris, Marnie E. Rice, Vernon L. Quinsey, and Catherine A.  
Cormier, *Violent Offenders, Appraising and Managing Risk* (2015)... 26

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)  
..... 30

A. INTRODUCTION

The State petitioned to commit James Turner indefinitely under RCW 71.09, but failed to present sufficient evidence to satisfy its burden. It did not prove Mr. Turner suffered from pedophilic disorder because its expert admitted that Mr. Turner had not engaged in sexual acts with a prepubescent child in over a decade, when Mr. Turner was still a teenager. It did not prove Mr. Turner committed a “recent overt act” because although it cobbled together a number of different pieces of evidence in an attempt to meet this burden, this evidence combined did not create a reasonable apprehension of harm. It did not prove Mr. Turner was more likely than not to reoffend, because it relied on an actuarial tool that estimated Mr. Turner’s risk of committing a violent offense, rather than a *sexually* violent offense.

The State’s presentation of evidence in this case utterly failed to satisfy the requirements of RCW 71.09. This Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence that Mr. Turner suffered from the mental abnormality of pedophilic disorder.

2. The State did not present sufficient evidence to prove that Mr. Turner committed a “recent overt act.”

3. The State failed to present sufficient evidence that Mr. Turner was more likely than not to reoffend.

4. The trial court erred when it admitted Dr. Judd's speculative testimony that the Static 99-R underestimated the risk of reoffending because it failed to account for sexual offenses that are unreported. CP 393.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State alleged Mr. Turner suffered from pedophilic disorder because he had acted on sexual urges involving a prepubescent child. However, where the State's expert conceded that Mr. Turner's only act against a prepubescent child occurred over a decade before the State petitioned to commit him, when he was still a teenager, did it fail to present sufficient evidence of the alleged mental abnormality?

2. The State claimed Mr. Turner committed a recent overt act when he exchanged text messages with a 15-year-old, fantasized about engaging in sexual acts with children as young as ten, violated the rules of community supervision, and engaged in role play with a consenting adult partner. Where the evidence demonstrated Mr. Turner had not acted upon any of his fantasies and his interaction with the 15-year-old

did not, alone, constitute a recent overt act, did the State present insufficient evidence?

3. In order to show that Mr. Turner was more likely than not to reoffend, it asked the jury to rely on an actuarial tool that only provided an estimate of Mr. Turner's risk of committing a violent offense. Where the law requires the State to prove Mr. Turner was more likely than not to commit a *sexually* violent offense, is reversal for insufficient evidence required?

4. In order to be admissible, expert testimony must be relevant and helpful to the trier of fact. It must also not be unfairly prejudicial or risk misleading the jury. Where the State's expert testified the Static 99-R underestimated Mr. Turner's risk of reoffending, based on nothing more than an entirely speculative claim that there may exist unreported sexual offenses not accounted for by the Static 99-R analysis, should this Court reverse?

#### D. STATEMENT OF THE CASE

##### **1. James Turner's background**

James Turner had a troubled childhood. By the time he reached kindergarten, he had attempted to slice his own wrists with blunt scissors. 10/19/15 RP 427. He was prescribed Prozac at the age of

seven, but his behavior worsened and his mother was regularly called by the school to pick him up early. 10/19/15 RP 437-38.

When he was eight years old, his doctor discovered he had Klinefelter syndrome.<sup>1</sup> 10/19/15 RP 439. Relieved that this might explain Mr. Turner's behavioral concerns, his mother pushed his pediatric endocrinologist to begin injecting him with testosterone at age twelve. 10/19/15 RP 456. The endocrinologist recommended she wait until Mr. Turner got past puberty, but eventually relented after Mr. Turner's mother insisted they begin the shots earlier. 10/19/15 RP 456.

Mr. Turner's mother initially raised him alone, but remarried when he was young, introducing two stepsisters into his life. 10/19/15 RP 434. Both girls had serious behavioral issues and had been abandoned by their own mother. 10/19/15 RP 434. Mr. Turner appeared depressed and he struggled to adjust to life with this new, blended family. 10/19/15 RP 435. Mr. Turner continued to act out, and got into physical altercations with his mother when she attempted to discipline him. 10/19/15 RP 448. However, Mr. Turner responded

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<sup>1</sup> Klinefelter syndrome is a condition resulting from the presence of an extra X chromosome in the cells, causing Mr. Turner's sex chromosomes to be XXY rather than XY. <https://ghr.nlm.nih.gov/condition/klinefelter-syndrome#genes> (last accessed September 6, 2016).

well to positive attention and his mother was advised to express greater emotional support for her son. 10/19/15 RP 488.

Mr. Turner was enrolled in special education services throughout his schooling and was often the target of bullying as a result. 10/19/15 RP 451-52. He was immature for his age and struggled with social and emotional functioning. 11/2/15 RP 1330. Because Mr. Turner had difficulty making friends, his new stepsisters became his only companions. 10/19/15 RP 434. One of his stepsisters, who was approximately one year older than Mr. Turner, initiated sexual contact with him when he was 10 years old. 11/2/15 RP 1336. Mr. Turner fell in love in with this stepsister, and grieved deeply when she died a few years later. 11/3/15 RP 1562; Ex 69 at 128.

Mr. Turner's mother had a second child, S.H., with her husband. 10/19/15 RP 435. However, Mr. Turner's mother determined her husband was not a good father to any of the children, and they later divorced. 10/19/15 RP 435. When S.H. was seven and Mr. Turner was 15, Mr. Turner's mother remarried again. 10/19/15 RP 463.

Mr. Turner was transferred from one school to the next because of his behavioral problems. 10/19/15 RP 470. He did not finish high school and after his eighteenth birthday, his mother told him to find a

job or get out of her house. 10/19/16 RP 474. Mr. Turner began sleeping on the streets. 10/19/15 RP 474.

**2. The underlying offense and Mr. Turner's subsequent disclosure of molesting his younger half-sister**

When Mr. Turner was 20 years old, he met S.P., who was 13 years old at the time. 10/20/15 RP 534. Mr. Turner told S.P.'s mother that he was 15 years old, and she granted S.P.'s request to spend a few hours hanging out with Mr. Turner. 10/20/15 RP 535. S.P.'s mother later observed Mr. Turner and S.P. kiss. 10/20/15 RP 537.

Later that same evening, Mr. Turner told S.P.'s mother that he had lost his keys and could not get into the place where he had been living. 10/20/15 RP 540. S.P.'s mother allowed Mr. Turner and his friend to stay at her house for five days while she attempted to get them assistance, surmising they were homeless. 10/20/15 RP 550. While contacting service providers, she learned Mr. Turner's true age. 10/20/15 RP 552. S.P. told her mother they had sex, and S.P.'s mother viewed a video in which Mr. Turner was sucking on S.P.'s naked breasts. 10/20/15 RP 553-54. Mr. Turner pled guilty to two counts of child molestation in the second degree and two counts of Communication with a Minor for Immoral Purposes. CP 17, 46. He

was sentenced to 31 months of incarceration with 36 to 48 months of community supervision. CP 46.

Mr. Turner later disclosed he had molested his half-sister, S.H., for two years. 10/28/15 RP 901. He was age 15 or 16 and she was age 6 or 7 at the time the abuse began. 10/28/15 RP 901. Mr. Turner pled guilty to the charge of Communication with a Minor for Immoral Purposes and was sentenced to an additional 12 months incarceration with 24 months of community custody. CP 47-48.

### **3. Mr. Turner's actions while on community custody**

Once released on community custody, Mr. Turner visited his community corrections officer, Andrea Holmes, on an almost daily basis. 10/20/16 RP 64. He also faithfully attended sessions with his sexual offender treatment provider, Sara Straus-King. 10/21/15 RP 674-75. She testified that Mr. Turner committed some violations while on community supervision, such as misusing his cell phone, but that his violations fell well within what she typically encountered. 10/22/15 RP 31, 41-42.

While on community supervision, Mr. Turner pursued a relationship with an adult, Cheyenne James. 10/21/15 RP 628.

However, CCO Holmes and Ms. Straus-King refused to approve this

relationship because Mr. Turner did not request approval before starting the relationship and they believed Ms. James was a negative influence on him. 10/21/15 RP 628-29. In addition, Ms. Straus-King was uncomfortable with how quickly Mr. Turner declared his love for Ms. James, because he had also done this with S.P. 10/21/15 RP 632.

Mr. Turner also engaged in a relationship with an adult woman named Johanna Calderon. 10/21/15 RP 632. The two met over the Internet but were unable to meet in person because Ms. Calderon lived in California. 10/22/15 RP 81, 84-85. Instead, they communicated by phone, and often engaged in phone sex. 10/22/15 RP 90, 93. During phone sex, Mr. Turner and Ms. Calderon engaged in role play in which she pretended to be a teenager ages 13 or 16. 10/22/15 RP 93.

Ms. Calderon was aware that Mr. Turner had been convicted of a sexual offense and that he had a relationship with S.P. 10/22/15 RP 91. However, Ms. Calderon ended the relationship after she learned S.P. had been murdered and Mr. Turner expressed grief over this news. 10/22/15 RP 113. Mr. Turner had hoped to eventually reunite with S.P., and it became clear to Ms. Calderon that she had no future with Mr. Turner. 10/22/15 RP 113.

In two instances, Mr. Turner engaged in brief interactions with minors. 10/22/15 RP 46. On the first occasion, a 14-year-old waved at him and he approached her a bus stop. 10/22/15 RP 48. He rode the bus with her and discussed mutual interests. 10/22/15 RP 48-49. After she purchased a pack of cigarettes, the two kissed and she promptly announced that she was only 14. 10/22/15 RP 50. Upon learning her age, Mr. Turner broke off contact and told CCO Holmes what had happened. 10/22/15 RP 51.

The State filed the petition for indefinite civil commitment in response to the second incident, in which Mr. Turner met a 15-year-old, T.A., and began exchanging text messages with her. 10/21/15 RP 638. The two engaged in no physical contact, but Mr. Turner sent T.A. messages inviting her to lunch and asking if she would like a neck massage to relieve a headache. 10/21/15 RP 638. When CCO Holmes discovered the exchange and notified T.A. that Mr. Turner was a sex offender, T.A. informed Mr. Turner she no longer wished to speak with him. 10/22/15 RP 20-21; Ex. 69 at 345. Mr. Turner immediately stopped communicating with her. Ex. 69 at 345; 10/29/15 RP 6.

#### **4. Mr. Turner's trial**

At Mr. Turner's trial, the State alleged Mr. Turner suffered from a pedophilic disorder and that, in light of his history, he had committed a recent overt act when he exchanged text messages with T.A.

10/28/15 RP 898; 10/21/15 RP 638.

In an attempt to prove that Mr. Turner was more likely than not to reoffend, the State's expert used the VRAG-R, an actuarial tool that estimates the risk that an individual is likely to commit a violent offense, but provides no information as to whether the individual is likely to commit a *sexually* violent offense. 10/29/15 RP 30. Over the defense's objection, the State's expert was permitted to testify that the Static 99-R, another actuarial tool that indicated Mr. Turner's likelihood of committing a sexually violent offense was well below fifty percent, underestimated Mr. Turner's risk of re-offense. 10/28/15 RP 1045-46. The State's expert opined this was because the Static 99-R relied on criminal history, and many sex offenses go unreported. 10/28/15 RP 1046.

The jury found the State had proven, beyond a reasonable doubt, that Mr. Turner was a "sexually violent predator." CP 1208.

E. ARGUMENT

**1. The State failed to prove Mr. Turner suffered from a mental abnormality.**

Under limited circumstances, the State is permitted to civilly commit an individual who the State fears may commit a predatory sexual act in the future. RCW 71.09.060; *In re Detention of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). Commitment requires that the individual is both mentally ill and dangerous. *In re Detention of Thorell*, 149 Wn.2d 724, 744, 742, 72 P.3d 708 (2003). In order to commit an individual under RCW 71.09, the jury must find the person is a “sexually violent predator,” beyond a reasonable doubt. RCW 71.09.060; *Post*, 170 Wn.2d at 309.

The quantum of the evidence in RCW 71.09 commitment trials is examined under a criminal standard. *Thorell*, 149 Wn.2d at 744. In criminal proceedings, Due Process requires the State prove “beyond a reasonable doubt... every fact necessary to constitute the crime with which [a defendant] is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Const. art. I, § 3. In RCW 71.09 proceedings, the State must prove:

- (1) that the respondent “has been convicted of or charged with a crime of sexual violence,”
- (2) that the respondent “suffers from a mental abnormality

or personality disorder,” and (3) that such abnormality or disorder “makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.”

*Post*, 170 Wn.2d at 309-10; RCW 71.09.020(18). When the individual has been released from total confinement, the State must also demonstrate a substantial risk of physical harm through the proof of a recent overt act. *In re Detention of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Where the sufficiency of the evidence is challenged, this Court must evaluate whether the jury had sufficient evidence to make the necessary findings beyond a reasonable doubt. *Thorell*, 149 Wn.2d at 744.

- a. The only mental abnormality alleged by the State was pedophilic disorder.

The definition of “mental abnormality” is directly tied to present dangerousness. *Henrickson v. State*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). This is because Due Process requires that an individual be both mentally ill and presently dangerous before he may be committed indefinitely. *In re Detention of Durbin*, 160 Wn. App. 414, 433, 248 P.3d 124 (2011). Pursuant to the statute, “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).

Two experts testified at trial as to whether Mr. Turner suffered from a mental abnormality. Brian Judd, Ph.D., testified for the State, and Paul Spizman, Psy.D., testified for the defense. 10/27/15 RP 840; 11/2/15 RP 1314. Both experts diagnosed Mr. Turner with antisocial personality disorder, and each agreed this diagnosis could not serve as the basis for a finding that Mr. Turner suffered from a mental abnormality. 10/28/15 RP 947-48; 10/29/15 RP 1081; 11/2/15 RP 1322; 11/2/15 RP 1368.

The experts’ opinions diverged regarding whether Mr. Turner suffered from pedophilic disorder. Dr. Judd concluded that he did, and Dr. Spizman concluded he did not. 10/28/15 RP 898; 11/2/15 RP 1322. However, as explained below, Dr. Judd’s own testimony at trial revealed his conclusion was unsupported by the evidence. Thus, the State did not present sufficient evidence that Mr. Turner suffered from a mental abnormality beyond a reasonable doubt. *Thorell*, 149 Wn.2d at 742.

- b. Dr. Judd conceded all of Mr. Turner's sexual partners, aside from S.H., were not prepubescent.

Dr. Judd acknowledged that a diagnosis of pedophilic disorder requires: (1) the individual has had “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger)” over a period of at least six months; (2) “[t]he individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty; and (3) “[t]he individual is at least age 16 years and at least 5 years older than the child or children” at issue. 10/28/15 RP 899-900 (discussing the criteria in the DSM-V); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 99 at 697 (5<sup>th</sup> ed. 2013).

Dr. Judd agreed that the focus of the pedophilic disorder criteria is the teenager's stage of development and that the “Tanner stages” are generally used to determine whether a child has entered puberty. 10/29/15 RP 1099-1100. He testified Mr. Turner's acts against his half-sister, which had occurred more than a decade prior to the commitment trial, constituted Mr. Turner's only pedophilic act and that the romantic partners he had pursued since were not prepubescent. 10/29/15 RP 1123, 1128; *see also* 10/29/15 RP 1118-19, 1121, 1123

(testifying about how each partner, aside from S.P., was postpubescent).

Dr. Judd repeatedly hedged this acknowledgement by suggesting that Mr. Turner's relationship with S.P. might satisfy the criteria for pedophilic disorder. 10/28/15 RP 907-08. He testified that S.P. was not "necessarily" out of the prepubescent category because that category is "generally age 13 or younger." 10/28/15 RP 907-08. However, he then conceded the evidence indicated that S.P., who was only two months shy of her fourteenth birthday at the time of her relationship with Mr. Turner, had small breasts and had begun menstruating. 10/29/15 RP 1113, 1115, 1117; 11/2/15 RP 1209. When discussing S.P., he stated:

At the end of the day, I would say there is some question, but it's clear that she is at some level of pubescence.

So I believe that from my standpoint, given that, this qualifies as being an individual likely to meet the criteria for pedophilia.

11/2/15 RP 1208-09.

These statements are contradictory. If it is clear that S.P. has reached puberty, than she is no longer prepubescent and does not

satisfy the criteria for pedophilic disorder.<sup>2</sup> Indeed, Dr. Judd eventually conceded that a menstruating teenager, as S.P. undisputedly was, is not prepubescent. 11/2/15 RP 1262.

- c. The remaining conflicting evidence regarding Mr. Turner's fantasies was not sufficient for a finding that he suffered from the mental abnormality of pedophilic disorder.

After being confronted with the evidence that S.P. did not qualify as prepubescent, Dr. Judd downplayed the importance of Mr. Turner's relationship with S.P. to his analysis, testifying that S.P. was just "one data point." 11/2/15 RP 1210. He testified that his diagnosis rested on additional information, explaining:

Again, as I said in my prior testimony, not only do we have these individuals between ages of 6 and in [S.H.]'s case, at age 13, but we also have the consistent reports throughout the records of him having fantasies and enacting fantasies of school girl/teacher, father/daughter, grandfather/granddaughter. We have reports of him in 2009 masturbating to individuals from age – down to age 12. We again have the same report in 2012 of the same sort of pattern, that his primary fantasy or most significant is a preteen female and her mother.

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<sup>2</sup> "Pubescence" is defined as "the quality or state of being pubescent." <http://www.merriam-webster.com/dictionary/pubescence> (last accessed September 6, 2016).

So we have these various data points throughout the records which would support a pedophilic diagnosis.

11/2/15 RP 1210

Thus, the only additional evidence upon which Dr. Judd relied is Mr. Turner's self-report of his fantasies. Yet as Dr. Judd acknowledged, a diagnosis of pedophilic disorder is only appropriate where the individual has acted on the pedophilic sexual urges or those sexual urges are causing him marked distress or interpersonal difficulty. 10/28/15 RP 900; *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 99 at 697 (5<sup>th</sup> ed. 2013).

As Dr. Judd conceded, Mr. Turner had not acted on the urges since he was either age 15 or 16. 10/28/15 RP 901. After that time, he exhibited interest in developing romantic relationships with his peers or teenagers who were no longer prepubescent. 10/29/15 RP 1118-19, 1121, 1123.

In addition, Dr. Judd did not claim that these urges caused distress and the evidence demonstrated the opposite. While Mr. Turner and Ms. Calderon both testified that she never played a minor younger than age 13 during their role play conversations, Dr. Judd believed Mr.

Turner had reported that she had played the role of a minor as young as ten. 10/22/15 RP 114; 10/29/15 RP 1139. Even if Dr. Judd was correct, he acknowledged such fantasies alone were not enough to diagnose Mr. Turner with pedophilic disorder. 10/28/15 RP 900. The State was required to demonstrate he had acted on his pedophilic sexual urges or the urges had caused him distress. Because the evidence demonstrated S.P. was not prepubescent, and Mr. Turner was content to engage in role play with a consenting adult, the State could not make this showing.

- d. Mr. Turner's abuse of S.H. did not provide sufficient evidence for a finding that he suffered from pedophilic disorder.

The State may claim Mr. Turner's abuse of S.H. was sufficient for a finding that he suffered from pedophilic disorder. It is not. As Dr. Judd acknowledged, this sexual contact began prior to Mr. Turner turning 16 and ended more than a decade before the trial. 10/29/15 RP 1128. A diagnosis of pedophilic disorder is not appropriate where the individual is under 16 years old. 10/28/15 RP 900. In addition, the mental abnormality must be directly tied to present dangerousness. *Henrickson*, 140 Wn.2d at 692.

While Dr. Judd speculated that, given this history, Mr. Turner could reoffend if he was given access to a child through babysitting, or by dating a woman with a child or younger sister, the evidence demonstrated that the exact opposite had actually occurred. 10/29/15 RP 1079. Mr. Turner had access to S.P.'s sister, who was three and a half years younger, but had demonstrated no interest in her. 10/20/16 RP 532; 10/29/14 RP 1129. He remained just as interested in rekindling his relationship with S.P. once she turned 18 as he had when she was almost 14. 10/29/15 RP 1177-78. There was no evidence he had ever attempted to babysit a child or date a mother of a child. 10/29/15 RP 73. Further, Dr. Judd acknowledged that individuals who offend within their own family are at the lowest risk of reoffending. 10/29/15 RP 27.

Dr. Judd's conclusion that Mr. Turner suffered from pedophilic disorder was not supported by sufficient evidence. The State failed to meet its burden and reversal is required. *Thorell*, 149 Wn.2d at 744

**2. The State presented insufficient evidence that Mr. Turner committed a recent overt act.**

Involuntary civil commitment is a substantial curtailment of liberty and therefore requires a showing that the individual is presently dangerous. *In re Detention of Lewis*, 163 Wn.2d 188, 193, 177 P.3d 708 (2008) (citing *Albrecht*, 147 Wn.2d at 7). In order to satisfy this requirement, the State must prove beyond a reasonable doubt that the individual has committed a “recent overt act.” *Id.*; RCW 71.09.060(1).

A “recent overt act” is “any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.” RCW 71.09.020(12). Only when the State has proved the individual committed such an act is Due Process satisfied. *Lewis*, 163 Wn.2d at 193.

The State alleged Mr. Turner committed a recent overt act when he met fifteen-year-old T.A., and began exchanging text messages with her. 10/21/15 RP 638. He asked her if he was a “bad boy” for talking with her, offered to massage her neck to alleviate a headache, and invited her to lunch at his expense. 10/21/15 RP 638. CCO Holmes

learned about the interaction after she observed him composing a poem to T.A. on his phone. 10/22/15 RP 18.

CCO Holmes notified T.A. that Mr. Turner was a sex offender and T.A. informed Mr. Turner she no longer wished to talk to him. 10/22/15 RP 20-21; Ex. 69 at 345. Mr. Turner respected her wishes and did not attempt to contact her again. Ex. 69 at 345; 10/29/15 RP 6.

Dr. Judd opined that this incident alone did not qualify as a recent overt act. 10/28/15 RP 1072; 10/29/15 RP 69. Instead, Dr. Judd believed Mr. Turner's interaction with T.A. created a reasonable apprehension of fear based on Mr. Turner's role play with Ms. Calderon, reported fantasies of engaging in sexual acts with minors as young as ten, seeking materials out that depict student/teacher interactions or incest, and his failure to comply with community supervision. 10/29/15 RP 70-71.

This evidence was not sufficient to find Mr. Turner committed a recent overt act. Due Process does not permit the State to rely on proof of a community custody violation to satisfy its burden of proving a recent overt act. *In re Detention of Davis*, 109 Wn. App. 734, 745, 37 P.3d 325 (2002); U.S. Const. amend. XIV; Const. art. I, § 3. In *Davis*, the individual was incarcerated for violating his community placement

terms after he had unauthorized contact with a 15-year-old boy. 109 Wn. App. at 737. While he was in prison on the violation, the State moved to involuntarily commit him under RCW 71.09, arguing that it was not required to prove a recent overt act because Mr. Davis was incarcerated at the time the petition was filed. *Id.*

This Court reversed, finding that “[e]quating incarceration for a community placement violation with incarceration for the underlying offense” violated Due Process because community custody violations must be proven only by a preponderance of the evidence, rather than beyond a reasonable doubt, and the violation may involve conduct that has nothing to do with a recent overt act or a sexually violent offense.

*Id.* at 745. In reaching this conclusion, this Court held:

To comport with due process, the State’s statutory obligation to plead and prove a recent overt act beyond a reasonable doubt should not turn on whether the individual is found, by only a preponderance of the evidence, to have violated community placement terms which may be vague and insignificant.

*Id.*

Here, Dr. Judd conceded that most of Mr. Turner’s community supervision violations had not been sexual in nature. 10/29/15 RP 71. In fact, Mr. Turner’s treatment provider testified that he had been doing

well in treatment until the incident with T.A. 10/21/15 RP 637. He attended his treatment sessions faithfully and the provider would have been willing to have Mr. Turner return to treatment after the incident with T.A. 10/21/15 RP 674-76.

In *Davis*, this Court also found that Mr. Davis's unauthorized contact with a 15-year-old did not rise to the level of a recent overt act because the State did not demonstrate that it "caused harm of a sexually violent nature or create[d] a reasonable apprehension of such harm." 109 Wn. App. at 747; RCW 71.09.020(12). Dr. Judd recognized this when he conceded that Mr. Turner's similar actions, involving unauthorized contact with a 15-year-old girl, did not meet the requirements for a recent overt act. 10/28/15 RP 1072; 10/29/15 RP 69.

The only remaining evidence upon which Dr. Judd relied, Mr. Turner's self-report of his fantasies, did not provide sufficient evidence for a finding that Mr. Turner had committed a recent overt act. Dr. Judd testified his fear was that, given Mr. Turner's fantasies of engaging in sexual acts with minors younger than T.A., Mr. Turner would have been equally likely to engage with T.A. if she had been

twelve, rather than fifteen. 10/28/15 RP 1073. However, this concern was merely speculative and was not supported by the evidence.

In fact, once again the evidence demonstrated the exact opposite. Even if one assumed that Dr. Judd was correct, and Mr. Turner fantasized about younger minors, the evidence presented at the commitment trial showed Mr. Turner did not act on those fantasies. When living in the same home as S.P. and her younger sister, Mr. Turner demonstrated no interest in the younger sister. 10/29/15 RP 1129. When Mr. Turner met a teenager at the park, who he initially believed was older, he did not pursue her after finding out she was only 14. 11/3/15 RP 1588. Finally, when Mr. Turner explored his fantasies, he did so with another consenting adult. 10/28/15 RP 911. Thus, while Dr. Judd may have had concerns, the evidence at trial did not support those concerns. Because the State failed to prove Mr. Turner committed a recent overt act, this Court should reverse.

**3. The State failed to prove Mr. Turner 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); *Post*, 170 Wn.2d at

309-10. 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 tools employed by the State did not prove Mr. Turner was more likely than not to commit a sexually violent offense.

At Mr. Turner's trial, Dr. Judd admitted it was impossible to present an individual's specific risk for reoffending using an actuarial tool. 10/28/15 RP 1007. He also admitted the tools were specifically problematic for incest offenders because incest offenders have a relatively low rate of recidivism, yet are grouped together with all offenders in the actuarial tools. 10/28/15 RP 1006-07. Despite acknowledging these significant deficiencies, he relied on the use of actuarial tables in order to reach his conclusion that Mr. Turner was likely to commit a future crime of sexual violence. 10/28/15 RP 1053.

The first actuarial tool Dr. Judd employed was the Static 99-R.<sup>3</sup> Using this tool, Dr. Judd determined that the likelihood Mr. Turner would commit a new sexual offense was 21.2 percent within five years of release and 32.1 percent within 10 years of release. 10/28/15 RP

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<sup>3</sup> The authors of the Static 99 maintain a clearinghouse on the tool and its employment. It can be found at <http://www.static99.org/> (last accessed September 6, 2016).

1009. Mr. Turner's expert, Dr. Spizman, employed the same tool and reached the same conclusion. 11/2/15 RP 1375-76. Using the Static 99-R alone, the State could not meet its burden to show that Mr. Turner was likely to reoffend. 10/28/15 RP 1052.

Dr. Judd testified that he had concerns about whether the Static 99-R appropriately identified the risk of re-offense because it examines only "rap sheet recidivism." 10/28/15 RP 1011. If the individual has committed a sexual offense, but not been charged or convicted of the offense, or if the crime is not identified as sexually motivated, the Static 99-R will not capture it. 10/28/15 RP 1011-12.

However, as Dr. Judd acknowledged and Dr. Spizman further explained, the Static 99-R casts a wide net, including within its assessment many crimes that are not a predatory sexually violent act. 10/29/15 RP 26; 11/2/15 RP 1377. For example, the Static 99-R includes crimes involving exhibitionism, voyeurism, and possession of child pornography. 11/2/15 RP 1378.

Because of his concerns, Dr. Judd used a second, newly developed, actuarial tool called the VRAG-R. 10/28/15 RP 1019. This tool was intended to be easier to score than previously created assessment tools. 10/28/15 RP 1020-21; Grant T. Harris, Marnie E.

Rice, Vernon L. Quinsey, and Catherine A. Cormier, *Violent Offenders, Appraising and Managing Risk* (2015). However, it does not distinguish between violent and sexually violent offenses. 10/29/15 RP 30. It estimates the individual's risk of committing a violent offense in the future, but does not offer an assessment of how likely it is that someone will commit a predatory act of sexual violence if released. 10/29/15 RP 30.

Dr. Judd determined that, according to the VRAG-R, Mr. Turner's likelihood of re-offense was 76 percent within five years and 87 percent within 12 years. 10/28/15 RP 1030. However, as Dr. Spizman discussed, the tool equates low level assaults with sexual offenses, skewing the results. 11/2/15 RP 1382. Dr. Spizman explained:

I have various concerns, but the most crucial concern is that what it does, it counts as recidivism virtually any violent act.

I have a very strong concern about that because just, for example, with Mr. Turner, he has about four low-level sort of assaults in his history. This measure would quite literally consider those to be sexual recidivism; and considering how many sexual offenses he has and how many of these low-level assaults that he has, it would essentially double his number of sexual offenses.

And so I think it really significantly overestimates risk by incorporation [sic] any violent offense in the definition of sexual recidivism.

11/2/15 RP 1383.

The State made no claim that the VRAG-R could distinguish between violent and sexually violent offenses. Instead, Dr. Judd opined this was of little concern, given his belief that the Static 99-R underestimated the risk of reoffending. 10/28/15 RP 1045-46. When asked by the prosecuting attorney how it made sense to use the VRAG-R, which only measured violent crimes, to estimate an individual's likelihood of committing a sexually violent crime, Dr. Judd responded:

We are looking at the – we are looking at risk for an individual that includes the risk for future violence, which includes sexual violence.

So based upon the testimony that I have given earlier in describing the fact that if we are looking at rap sheet sexual recidivism, we are only capturing a percentage of those that are actually sexually motivated.

The authors of this instrument argue, in fact, that the violence, the overall violence assessment or the risk of future violence, including sexual violence, more accurately captures the risk of sexually motivated reoffending.

10/28/15 RP 1045-46.

Dr. Judd then went so far as to suggest the numbers provided by the VRAG-R could be *conservative*, despite measuring the risk of committing any violent offense, because Mr. Turner would be alive longer than 12 years. 10/28/15 RP 1046. This was contrary to his later concession that for every year Mr. Turner did not reoffend, his risk decreased by 10 percent. 10/29/15 RP 41.

Ultimately, Dr. Judd admitted he did not believe Mr. Turner's risk of committing another sexually violent offense was 87 percent, and that in fact the risk must be lower. 10/29/15 RP 41. However, because the VRAG-R does not distinguish between violent offense and sexually violent offenses, exactly how much lower was impossible to say. Only the Static 99-R, which put Mr. Turner's risk of offending well below 50 percent, provided a possible answer to this question.

Due Process is not satisfied where the State presents insufficient evidence that the individual is likely to reoffend. *Thorell*, 149 Wn.2d at 744; U.S. Const. amend. XIV; Const. art. I, § 3. Where the State presented evidence that Mr. Turner's likelihood of committing a violent offense was 87 percent within 12 years but his likelihood of committing a *sexually* violent act was only 32.1 percent within ten years, the State failed to meet its burden. Committing Mr. Turner in the absence of

sufficient evidence that he was more likely than not to reoffend violated his due process rights.

- b. Dr. Judd's unguided clinical judgment was no more accurate than a coin toss in predicting Mr. Turner's risk of reoffending.

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. Spizman explained research shows that “unguided clinical judgment” is no better than chance at accurately predicting an individual’s risk of reoffending. 11/2/15 RP 1375. In order to obtain a reliable risk assessment, evaluators should end the analysis after application of the actuarial measures and dynamic risk factor scheme. 11/2/15 RP 1375.

Because the actuarial evidence did not support the conclusion Mr. Turner was likely to commit a sexually violent offense if released, the State was forced to rely upon Dr. Judd’s undependable clinical judgment. This judgment, that Mr. Turner’s risk was lower than that provided by the VRAG-R, but greater than that provided by the Static

99-R, found no basis in science and was as likely to be as accurate as a coin toss. His unguided claims did not provide a sufficient basis to justify Mr. Turner's continued confinement. This Court should reverse.

**4. The trial court erred when it permitted Dr. Judd to testify that the Static 99-R underestimated Mr. Turner's risk of reoffending.**

a. Dr. Judd's claim was speculative and irrelevant.

The trial court should not have permitted the State to elicit Dr. Judd's opinion that the Static 99-R underestimated Mr. Turner's risk of offending over Mr. Turner's objection. CP 160, 393; 10/13/15 RP 63-64. "It is a fundamental rule of evidence that '[e]vidence which is not relevant is not admissible.'" *Post*, 170 Wn.2d at 311; ER 402. Evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." *Post*, 170 Wn.2d at 311; ER 401.

In order to be admissible, expert witness testimony must be both relevant and helpful to the trier of fact. *Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764 (2012) (citing *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011)); ER 702. "When ruling on speculative testimony, the court should keep in mind the

danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Stedman*, 172 Wn. App. at 16 (citing *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)). Thus, conclusory or speculative opinions should not be admitted. *Id.*

Dr. Judd’s opinion that the Static 99-R underestimated the risk that Mr. Turner would commit a sexually violent offense in the future was nothing more than speculation. He based his opinion on the assertion that many acts of sexual assault go unreported, and such acts would possibly remain unaccounted for in the Static 99-R analysis.

10/28/15 RP 1046. However, as Dr. Spizman explained, this

suggestion was too simplistic. 11/2/15 RP 1380. First, the vast

majority of sexual offenses are committed by someone known to the

victim, and are therefore not a predatory act. 11/2/15 RP 1379.

Second, undetected sexual offense are more likely to perpetrated by

first time offenders, because a recidivist would be under more scrutiny.

11/2/15 RP 1380.

Thus, the testimony at issue was both irrelevant and speculative because it offered nothing more than a vague assertion, without any data to back it up, that the Static 99-R might miss a prior criminal act

by relying on the individual's criminal history. The trial court's admission of this evidence was error. CP 393.

b. The evidence was also unfairly prejudicial.

Even if evidence is relevant, it should be excluded where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403; *In re Detention of West*, 171 Wn.2d 383, 400, 256 P.3d 302 (2011).

Because Dr. Judd's assertion suggested that the Static 99-R was unreliable, admitting this evidence created the danger that the jury would dismiss the results of the Static 99-R as flawed. This posed a particularly grave risk given that, as discussed above, the State encouraged the jury to adopt an actuarial tool that did not actually estimate Mr. Turner's risk of committing a sexually violent crime. Indeed, Dr. Judd used this vague claim of underreporting to distract from the fact that the VRAG-R only estimated an individual's risk of committing a violent crime.

Because Dr. Judd provided no basis for his claim that the Static 99-R's use of an individual's criminal history failed to capture all of the relevant criminal offenses, any probative value was significantly outweighed by the danger of unfair prejudice to Mr. Turner or the risk

of misleading the jury. The trial court erred when it admitted this evidence over Mr. Turner's objection.

c. The error was not harmless.

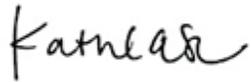
An evidentiary error cannot be found harmless if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Post*, 170 Wn.2d at 314 (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)). Here, whether the jury accepted the risk estimate produced by the Static 99-R or VRAG-R directly affected the jury's verdict. If the jury accepted Dr. Judd's speculative claim that the Static 99-R underestimated the risk of reoffending, it was much more likely to believe the estimate produced by the VRAG-R captured the true risk. This error was not harmless, and this Court should reverse.

F. CONCLUSION

This Court should reverse because the State presented insufficient evidence to prove Mr. Turner should be committed under RCW 71.09. This Court should also reverse because the trial court erroneously admitted Dr. Judd's speculative testimony.

DATED this 9<sup>th</sup> day of September, 2016.

Respectfully submitted,



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Attorney for Appellant

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

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IN RE THE DETENTION OF	)	
	)	
JAMES TURNER,	)	NO. 74248-5-I
	)	
APPELLANT.	)	
	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF SEPTEMBER, 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:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF SEPTEMBER, 2016.

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