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NO. 67826-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE: DETENTION OF:

EVERETTE BURD,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Everette Burd is mildly mentally retarded. His parents had difficulty raising him. Over twenty years ago, when he was thirteen, Mr. Burd trespassed and masturbated to undergarments he found in a neighbor's home. He was denied effective treatment in light of his condition, and his family was ill-equipped to care for him on release. At age twenty he was convicted of attempted rape.

The State's expert at the civil commitment hearing assessed Mr. Burd without accounting for his cognitive disabilities. He was diagnosed with several unsubstantiated abnormalities. Despite contrary evidence from Mr. Burd's expert, the jury determined he should be committed indefinitely.

B. ASSIGNMENTS OF ERROR

1. Mr. Burd's indefinite confinement based on the diagnoses of paraphilia NOS (nonconsent) violates his constitutional right to due process.

2. Mr. Burd's indefinite confinement based on the diagnoses of antisocial personality disorder violates his constitutional right to due process.

3. Mr. Burd received constitutionally ineffective assistance of counsel where his attorney failed to request a *Frye* hearing regarding the novel diagnosis of paraphilia NOS (nonconsent).

4. Mr. Burd received constitutionally ineffective assistance of counsel where his attorney failed to object under ER 702 to the State's expert's unhelpful testimony about antisocial personality disorder.

5. The trial court erred in excluding evidence relevant to Mr. Burd's defense on hearsay and foundational grounds.

6. In the absence of substantial evidence supporting each of the alternative means on which the jury was instructed, the commitment order violates Mr. Burd's constitutional right to a unanimous verdict.

7. The trial court erred in failing to provide Mr. Burd's proposed instruction regarding unanimity and alternative means supporting commitment.

8. RCW 71.09.020 violates due process because it allows for commitment based on a showing that a defendant will "likely" or "more probably than not" reoffend.

9. The prosecutor committed misconduct that denied Mr. Burd a fair trial by appealing to the jury's passions and prejudices, by

inciting the jury reach a decision on improper grounds, and by appealing to racial biases.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process is violated when an involuntary civil commitment is based upon a diagnosis that is not accepted in the scientific community. Paraphilia NOS (nonconsent) is not included in the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM-IV or DSM-IV-TR) and is not widely accepted in the psychological community. Whether Mr. Burd's civil commitment violates due process where the State's expert's diagnosis of paraphilia NOS (nonconsent) is not medically recognized?

2. Whether Mr. Burd's civil commitment violates due process where the State's expert's diagnosis of antisocial personality disorder is overbroad and imprecise?

3. Whether trial counsel was constitutionally ineffective for failing to request the paraphilia NOS (nonconsent) diagnosis be subject to a *Frye* hearing and to object to the antisocial personality disorder diagnosis under ER 702?

4. Whether the trial court committed error that was not harmless when it excluded testimony by Mr. Burd's expert that refuted the validity of the paraphilia NOS (nonconsent) diagnosis?

5. A commitment order must be vacated where alternative means for commitment are presented to the jury but at least one of those means is not supported by substantial evidence. Where the jury was instructed that to commit Mr. Burd it must find beyond a reasonable doubt he had a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior but substantial evidence did not support the alternative means of mental abnormalities and personality disorders presented to the jury, must the commitment order be vacated?

6. In order to satisfy due process in an involuntary commitment proceeding, the State must prove a person is mentally ill and dangerous by at least clear and convincing evidence. Does RCW 71.09.020 violate due process by allowing for the involuntary commitment of a person who is merely "likely" to reoffend, that is, whose risk of reoffense is only "more probable than not?"

7. As quasi-judicial officers, prosecutors have the obligation to ensure an accused person receives a constitutionally-required fair and

impartial trial. A prosecutor commits misconduct if he or she acts appeals to the jury's prejudices and passions and encourages a decision on improper grounds. Racial bias is an improper ground. Should Mr. Burd's commitment be reversed where the prosecutor argued to the majority white jury that "[w]hite women satisfy [Mr. Burd's] predator"?

D. STATEMENT OF THE CASE

Everette Burd suffers from mild mental retardation, which went largely undiagnosed as a child. *E.g.*, RP 1109.[1] His family had trouble raising Mr. Burd in light of his special condition. RP 313-14; *see* RP 530 (parents beat him as a child). When Mr. Burd was thirteen years old, he was convicted of criminal trespass for entering through a window of a neighbor's home, picking through the underwear drawer of a twelve-year-old girl who resided there, and masturbating on the bed. RP 315; CP 4. A year later (and over twenty years ago), he sexually assaulted a 26-year-old house guest of a neighbor by grabbing her crotch. CP 4-5. Mr. Burd was placed in a residential group home and referred to treatment. RP 307-08, 320.

[1] The transcript from the civil commitment trial is contained in consecutively paginated volumes and is referred to herein simply as RP. The transcript from the probable cause hearing is referred to herein as 7/24/06RP.

In 1997, Mr. Burd pled guilty to attempted rape in the first degree for a sexually-motivated attack on a young woman in a public building. CP 55.[2]

Prior to his release at the conclusion of his sentence, the State filed a petition to indefinitely involuntarily commit Mr. Burd pursuant to Chapter 71.09 RCW. CP 1. In 2006, the court found probable cause to detain Mr. Burd pending trial, which was stayed while Mr. Burd appealed a related confinement issue. *E.g.*, 7/24/06RP 48; CP 90, 98. The civil commitment trial was eventually held in September 2011.[3]

At the commitment trial, the State presented testimony from its hired expert, Douglas Tucker. RP 621. Dr. Tucker diagnosed Mr. Burd with four mental abnormalities—paraphilia NOS (ncnconsent), mild mental retardation, fetishism, and schizoaffective disorder—and two personality disorders—antisocial personality disorder and borderline personality disorder. RP 648-51. The State argued the combination of these mental abnormalities and personality disorders rendered Mr. Burd more likely than not to commit a sexually violent

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[2] The parties agreed this conviction satisfied the predicate act element of RCW 71.09.020(18) and 71.09.060. RP 50-51.

[3] The trial initially commenced in July 2011 but was continued to September when Mr. Burd was not provided with prescribed medications. RP 154-56.

offense if not committed indefinitely. RP 1438-40, 1442, 1453. As stated in the State's petition,"Dr. Tucker concludes that the diagnosis of Paraphilia (NOS) predispose [sic] Burd to commit sexual crimes and that his lack of volitional capacity is evidenced, in part, by his drive to engage in coercive sexual acts with females, despite their protests and his detection. Moreover, Burd's personality disorders, mild mental retardation, and fetishism further disinhibit his deviant sexual urges, contributing to his dangerousness by reducing his volitional control." CP 5.

Respondent's counsel vigorously cross-examined Dr. Tucker regarding the reliability of his paraphilia NOS (nonconsent) diagnosis. *E.g.*, RP 877-97, 933-36. However, counsel did not request a *Frye* hearing.

Dr. Fabian Saleh found that Mr. Burd is a mildly mentally retarded individual who was unsophisticated and uneducated in his upbringing, which led to maladaptive behaviors. RP 1109, 1120. He did not diagnose Mr. Burd with a paraphilic disorder presently or in the past. RP 1120; *see* RP 1144 (testifying Burd did not present with anything close to sexual deviancy). The court excluded relevant

portions of Dr. Saleh's testimony refuting the controversial paraphilia NOS (nonconsent) diagnosis. RP 1045-50.

The jury found Mr. Burd to be a sexually violent predator and committed him indefinitely. RP 1491-92; CP 189-91.

E. ARGUMENT

1. Mr. Burd's involuntary commitment violates due process because it is premised upon diagnoses that are not accepted by the profession, overbroad, and insufficiently precise.

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

a. Due process requires the State prove an involuntary civil commitment is based upon a valid, medically recognized mental disorder.

The state and federal constitutions guarantee the right to due process of law. U.S. Const. amend XIV; Const. art. I, § 3. A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The indefinite commitment of sexually violent predators is a restriction on the fundamental right of

liberty, and consequently, the State may only commit persons who are both currently dangerous and have a mental abnormality. *Id.* at 77; *Kansas v. Hendricks*, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *In re Det. of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Current mental illness is a constitutional requirement of continued detention. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).

Involuntary civil commitment may not be based on a diagnosis that is either not medically recognized or is too imprecise to distinguish the truly mentally ill from typical recidivists who must be dealt with by criminal prosecution alone. *Foucha*, 504 U.S. 71; *Hendricks*, 521 U.S. 346; *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). If a supposedly dangerous person with a personality disorder "commit[s] criminal acts," then "the State [should] vindicate [its interests through] the ordinary criminal processes . . . , the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct"—that is, "the normal means of dealing with persistent criminal conduct." *Foucha*, 504 U.S. at 82; *accord id.* at 88 (O'Connor, J., concurring in part and concurring in the

judgment) (It is "clear that acquittees could not be confined as mental patients absent some medical justification for doing so.").

"Dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." *Hendricks*, 521 U.S. at 358. "Proof of dangerousness [must be coupled] with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* (affirming commitment where "diagnosis as a pedophile . . . suffice[d] for due process purposes" and, admitted inability to control his pedophilic urges "adequately distinguishe[d] [respondent] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings").[4]

Most recently, the Court reemphasized that an individual cannot be involuntarily committed unless he suffers from a mental abnormality "sufficient to distinguish . . . him . . . from the dangerous but typical

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[4] Justice Kennedy, who provided the fifth vote in support of the majority opinion in *Hendricks*, emphasized that Hendricks' "mental abnormality—pedophilia—is at least described in the DSM-IV." 521 U.S. at 372 (Kennedy, J., concurring). He therefore concluded that, "[o]n the record before [the Court], [Hendricks' commitment] conform[ed] to [the Court's] precedents." *Id.* at 373. He continued, "however, . . . [that] if it were shown that mental abnormality," as defined by state law, "is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." *Id.*

recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413.

The Washington Supreme Court similarly recognizes that in sexually violent predator proceedings, due process requires the State to prove the detainee has a serious, diagnosed mental disorder that causes him difficulty controlling his sexually violent behavior. *Thorell*, 149 Wn.2d at 736, 740-41. "Lack of control" requires proof "'sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.'" *Id.* at 723 (quoting *Crane*, 534 U.S. at 413). Expert testimony is essential to tie a lack of control to a diagnosed mental abnormality or personality disorder. *Id.* at 740-41. This proof must rise to the level of proof beyond a reasonable doubt. *Id.* at 744.

Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for commitment as a sexually violent person, *see Crane*, 534 U.S. at 413, the diagnosis must nonetheless be medically justified. *See Hendricks*, 521 U.S. at 358 (explaining that 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 (explaining that State must present expert testimony and proof beyond a reasonable doubt that offender has serious, diagnosed mental illness that causes him difficulty controlling his behavior).

b. Mr. Burd's commitment based on a diagnosis of paraphilia NOS (nonconsent) violates due process because it is an invalid diagnosis not accepted by the profession.

The State expert's diagnosis of paraphilia NOS (nonconsent) is invalid, and its use as predicate for Mr. Burd's involuntary civil commitment therefore violates due process.

The Supreme Court has upheld involuntary civil commitment only in cases in which the diagnosed disorder was one that "the psychiatric profession itself classifies as a serious mental disorder." *Hendricks*, 521 U.S. at 360; *id.* at 372 (Kennedy, J., concurring); *id.* at 375 (Breyer, J., dissenting); *Crane*, 534 U.S. at 410, 412.

The disorder referred to by Dr. Tucker as paraphilia NOS (nonconsent) fails the Supreme Court's "medical recognition" or "medical justification" test, because it is not recognized by either the psychiatric profession in general, or the APA or the DSM-IV-TR in particular. Put simply, it is a wholly unreliable and invalid diagnosis

that fails to distinguish Mr. Burd from any "dangerous but typical recidivist" who cannot be civilly committed under the Due Process Clause. *Crane*, 534 U.S. at 413.

The diagnosis of paraphilia NOS (nonconsent) was essentially invented by Dr. Dennis Doren, a Wisconsin psychologist who is the evaluation director for Wisconsin's SVP commitment program. *See* Dennis Doren, *Evaluating Sex Offenders: A Manual For Civil Commitments and Beyond* (2002). Doren has acknowledged, though, that the DSM has "no separately listed paraphilia of this type." *Id.* at 63; *accord* RP 654.

Every category of diagnosis in the DSM-IV-TR contains an "NOS" diagnosis. The DSM-IV-TR, in explaining the purpose of "NOS" diagnoses, states "[n]o classification of mental disorders can have a sufficient number of specific categories to encompass every conceivable clinical presentation. The Not Otherwise Specified categories are provided to cover the not infrequent presentations that are at the boundary of specific categorical definitions." DSM-IV-TR at 576. Thus the DSM-IV-TR does recognize a general diagnosis of "Paraphilia Not Otherwise Specified." American Psychiatric Association, The Diagnostic and Statistical Manual of Mental

Disorders, IV-Text Revision 576 (4th ed.-text rev. 2000) ("DSM-IV-TR"). This category provides a code for paraphilias that do not meet the criteria for any of the specific categories; the "specific categories" include, for example, pedophilia, exhibitionism, and sexual sadism. *See id.* at 566-75. The DSM-IV-TR explains that examples of paraphilia NOS "include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine)." *Id.* at 576.

By its terms, this diagnosis "is not limited to" the variants specifically listed. However, it would be hard to imagine that the DSM-IV-TR would list such "relatively rare" and "inherently nonviolent" disorders, such as urophilia, while omitting a valid diagnosis of nonconsent, which would be "more common and certainly more socially problematic" than the disorders specifically identified. 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, 43 (2005), *available at* http://www.soccjournal.org; *see also, e.g.*, Marilyn Price, et al., *Redefining Telephone Scatologia: Comorbidity and Theories of*

Etiology, 31 Psychiatric Annals 226, 226 (2001) (describing the paraphilia NOS category as "reserved for sexual disorders that are either so uncommon or have been so inadequately described in the literature that a separate category is not warranted"). The logical inference is that the modifier (and diagnosis) "nonconsent" was deliberately omitted.

This inference is supported by the treatment of non-consensual sexual conduct in other sections of the DSM-IV-TR. For example, sexual abuse of a child is mentioned in the section of the DSM that covers "other conditions or problems" that may merit "clinical attention" but are not independently diagnosable mental disorders. *See* DSM-IV-TR at 731, 738-39; Zander, *Civil Commitment Without Psychosis*, *supra*, at 43-44.

Further, the APA trustees have rejected the diagnosis, in part because of the preliminary nature of the data and the difficulty physicians have in differentiating the disorder from other disorders. Zander, *Civil Commitment Without Psychosis*, *supra* at 46 (2005); *see* RP 877-78 (Tucker acknowledges APA rejected diagnosis); 7/24/06RP 20-21 (testimony of Tucker that no explicit criteria to diagnose paraphilia NOS (nonconsent) exists that would be agreed on by all

clinicians); RP 1188-98 (testimony of Saleh that diagnosis unreliable and rejected by APA as well as others). A subsequent APA task force similarly concluded, "[t]he ability to make such a diagnosis with a sufficient degree of validity and reliability remains problematic." Howard V. Zonna, et al., *Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association,* 170 (1990).

In addition to the APA's rejection of the diagnosis of paraphilia NOS (nonconsent), a number of professionals and commentators in the field continue to conclude that it is invalid and diagnostically unreliable. *See e.g.*, RP 877 (Tucker conceding paraphilia NOS (nonconsent) diagnosis "is more controversial than most [diagnoses]"); *id.* at 879-80, 895-97; Richard Wollert, *Poor Diagnostic Reliability, the Null-Bayes Logic Model, And Their Implications For Sexually Violent Predator Evaluations,* 13 Psychology, Public Policy, and Law, 167, 185 (2007) (concluding, based on analysis of results of independent evaluations in 295 SVP cases, that "psychologists who undertake [SVP] evaluations should no longer diagnose any [individual] as suffering from [Paraphilia NOS (nonconsent)]" because the diagnosis is "so unreliable . . . that it is impossible to attain a reasonable degree of certainty as to [its] presence" and therefore its "only function" is to

provide a "pretext" for "preventive detection"); Robert A. Prentky, et al., *Sexually Violent Predators in the Courtroom,* 12 Psychology, Public Policy And Law, 357, 370 (2006) ("because by definition all victims of sexual crimes are nonconsenting, all sexual offenders with multiple offenses . . . could be diagnosed with paraphilia NOS-nonconsent," thus, the "category becomes a wastebasket for sex offenders" and is "taxonomically useless"); Holly A. Miller, et al., *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies For Professionals And Research Directions,* 20 Law and Human Behavior, 29, 39 (2005) ("[T]he definition of [Paraphilia NOS (nonconsent)] is so amorphous that no research has ever been conducted to establish its validity"); Stephen D. Hart & Randall Kropp, *Sexual Deviance and the Law,* Sexual Deviance Theory, Assessment And Treatment, 557, 568 (Richard Laws & William T. O'Donohue eds., 2d ed. 2008) (paraphilia NOS (nonconsent) is "an idiosyncratic diagnosis . . . that is not generally accepted or recognized in the field"); Jill S. Levenson, *Reliability Of Sexually Violent Predator Civil Commitment in Florida,* 28 Law and Human Behavior, 357, 365 (2004) ("Since none of [Doren's] criteria [for diagnosing paraphilia NOS (nonconsent)] are stated or implied in the DSM-IV, it is not surprising

that, in practice, the diagnosis is . . . widely variable"); Zander, *supra,* at 44-45, 49-50 (summarizing research studies and academic opinion).

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

c. Basing Mr. Burd's commitment on a diagnosis of antisocial personality disorder violates due process because it is too imprecise a diagnosis.

Mr. Burd's involuntary commitment also violates due process insofar as it is based on a diagnosis of antisocial personality disorder. To begin with, the Supreme Court's decision in *Foucha* strongly implies that due process prohibits involuntary commitment on the basis of such a diagnosis. *See* 504 U.S. at 78, 82-83 (State may not commit person indefinitely merely because he is determined to have "a personality disorder that may lead to criminal conduct").

Antisocial 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). For this reason, the diagnosis is fatally "[*in*]sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality,

or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413. For example, in *Crane*, the Court cited a study that found that 40 to 60 percent of the male prison population is diagnosable with antisocial personality disorder. *Id.* at 412. In reality, this number is probably 75 to 80 percent. *See, e.g.*, Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation*, 92 N.W. U. L. Rev. 1279, 1291 & n.59 (1998) (collecting studies indicating that 75 to 80 percent of all prisoners are diagnosable with antisocial personality disorder). The State's expert, Dr. Tucker, agreed that antisocial personality disorder is "way over representative in the criminal justice system." RP 705. Indeed, an estimated seven million Americans—including more than six million men—are diagnosable with antisocial personality disorder. Harriet Barovick, *Bad to the Bone*, Time, Dec. 27, 1999.

That millions of Americans and an overwhelming majority of the male prison population are diagnosable with antisocial personality disorder is not surprising. The core of an antisocial personality disorder diagnosis is the existence of any three of the following seven behaviors:

(1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;

(2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;

(3) impulsivity or failure to plan ahead;

(4) irritability and aggressiveness, as indicated by repeated physical fights or assaults;

(5) reckless disregard for the safety of self or others;

(6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations;

(7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

DSM-IV-TR at 706; *accord* RP 705.[5]

Far from "distinguish[ing] . . . the dangerous but typical recidivist convicted in an ordinary criminal case," *Crane*, 534 U.S. at 413, these criteria essentially describe a typical recidivist (as well as millions of non-criminals). *Accord* RP 1161 ("I would have to

[5] The remaining "diagnostic criteria" of antisocial personality disorder are that the individual must be at least 18 years of age, there must be some "evidence" of a "Conduct Disorder" before age 15, and the antisocial conduct underlying the diagnosis must not relate exclusively to schizophrenia or a manic episode. DSM-IV-TR at 706. An actual diagnosis of conduct disorder is not required; rather, "a history of some symptoms of Conduct Disorder before age 15" will suffice. DSM-IV-TR at 702; Zander, *Civil Commitment Without Psychosis*, *supra*, at 55.

diagnose everybody I seen [sic] in prison with antisocial personality disorder"); Sentencing Guidelines Commission, *Recidivism of Adult Felons 2007* at 1 (April 2008) (recidivism rate among adult males is 63.3 percent).[6]

The APA also has taken the position that antisocial personality disorder is an over-inclusive and inappropriate basis for civil commitment. For instance, in *Crane*, the APA appeared as *amicus curiae* and argued "the presence of 'antisocial personality disorder' as the condition causing the danger provides no meaningful limiting principle" for civil commitment statutes. Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae in Support of Respondent, 2001 WL 873316, at *18.[7]

In addition to the APA's opposition to the use of antisocial personality disorder as a predicate for involuntary commitment,

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[6] *Available at* http://www.cfc.wa.gov/PublicationSentencing/Recidivism/Adult_Recidivism_FY2007.pdf (last visited May 7, 2012).

[7] The APA opposes the use of an antisocial personality disorder diagnosis as a basis for civil commitment despite the disorder's inclusion in the APA-published DSM-IV-TR. As the DSM explains (at xxxvii): "It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category . . . does not imply that the condition meets legal . . . criteria for what constitutes a mental disease, mental disorder, or mental disability." Thus, while consensus professional recognition, as reflected by the DSM, should be seen as a necessary condition for civil commitment under the Due Process Clause, it should not be viewed as a sufficient condition.

numerous individual mental health professionals and commentators have leveled similar criticisms. *See, e.g.*, Daniel F. Montaldi, *The Logic of Sexually Violent Predator Status in the United States of America*, 2(1) Sexual Offender Treatment (2007), *available at* http://www.sexual-offender-treatment.org/57.0.html (last visited May 8, 2012); Bruce Winick et al., *Should Psychopathy Qualify for Preventive Outpatient Commitment?*, in International Handbook on Psychopathic Disorders and the Law 8 (Alan Felthous and Henning Sass, eds., 2007) (antisocial personality disorder does not justify involuntary civil commitment because it "does not impair cognitive processes or otherwise interfere with rational decision making" and "does not make it difficult for [the individual] to control [his] conduct"), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984938; Zander, *Civil Commitment Without Psychosis*, *supra*, at 52-62 (summarizing studies and scholarly opinion).

Even a prominent article espousing the minority view in the profession that involuntary commitment based on antisocial personality disorder may be appropriate in some cases concedes that "[t]he use of [antisocial personality disorder] to justify civil commitment is unlikely to find general acceptance among mental health professional groups."

Shoba Sreenivasan et al., *Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of "Mental Disorder" and "Likely to Reoffend,"* 31 J. Am. Acad. Psychiatry & L. 471, 477 (2003).

In sum, as the Supreme Court has twice suggested (and perhaps once concluded), and consistent with the APA's official position, antisocial personality disorder is simply too imprecise and overbroad a diagnosis to survive constitutional scrutiny. *See Foucha*, 504 U.S. at 82-83; *Crane*, 534 U.S. at 412-13. The diagnosis does not satisfy the State's constitutional obligation to differentiate "the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413. To the contrary, as numerous studies indicate, it comes perilously close to justifying the civil commitment of "any convicted criminal." *Foucha*, 504 U.S. at 82-83. Consequently, antisocial personality disorder is not a valid basis for civil commitment, and Mr. Burd's continued detention on that ground violates due process.

d. Mr. Burd's commitment should be reversed if either diagnosis is held invalid.

Where a verdict in a criminal case is based upon a statutory alternative means that is later held to be improper, the judgment must be reversed if it is impossible to say under which means the verdict was obtained. *Stromberg v. California*, 283 U.S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117 (1931); *Street v. New York*, 394 U.S. 576, 585-86, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969). Here, and as discussed further below, the State argued both diagnoses and a combination of six different mental abnormalities and personality disorders justified Mr. Burd's commitment. *See* Section E.4, *infra*. Accordingly, Mr. Burd's commitment should be reversed if the diagnosis of either paraphilia NOS (nonconsent) or antisocial personality disorder is held invalid.

2. Trial counsel was constitutionally ineffective for failing to request a *Frye* hearing and to object under ER 702.

Respondents in RCW 71.09 civil commitment proceedings have both a due process and statutory right to the assistance of counsel. As noted, civil commitment for any purpose is a significant deprivation of liberty that requires due process protections. *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). The constitutional right to procedural due process includes the right to

counsel. *Specht v. Patterson*, 386 U.S. 605, 609-10, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967). Moreover, the statute provides a right to the assistance of counsel at the commitment trial. RCW 71.09.050(1).

To show ineffective assistance of counsel in a civil detention context, the claimant must show counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the detainee, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *In re Det. of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); *see also Strickland v. Washington*, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

a. Counsel was ineffective for failing to request a *Frye* hearing to evaluate the paraphilia NOS (nonconsent) diagnosis.

Frye directs courts to apply particular criteria in assessing the reliability and admissibility of expert testimony. Under *Frye*, novel scientific evidence is admissible only if (1) 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 (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). The *Frye* standard

recognizes that because judges do not have the expertise to assess the reliability of scientific evidence, the courts must turn to experts in the particular field to help them determine the admissibility of the proffered testimony. *Id.* The inquiry turns on the level of recognition accorded to the scientific principle involved; the court "'look[s] for general acceptance in the appropriate scientific community.'" *Id.* (quoting *State v. Janes*, 121 Wn.2d 220, 232-33, 850 P.2d 495 (1993)). "'If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.'" *Id.* (quoting *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)).

The *Frye* standard applies in determining the reliability and admissibility of expert testimony about whether an individual suffers from a particular novel psychiatric diagnosis. *Greene*, 139 Wn.2d at 70-71. The question in such a case is whether the diagnosis is generally accepted within the psychiatric community as a recognized mental condition that is regularly diagnosed and treated. *Id.* at 71. In *Greene*, the court concluded dissociative identity disorder was generally accepted in the psychiatric community, because it was included in the DSM-IV. *Id.* The court explained, "The DSM-IV's diagnostic criteria and classification of mental disorders reflect a

consensus of current formulations of evolving knowledge in the mental health field." *Id.* (quoting DSM-IV at xxvii). Further, the disorder was regularly diagnosed and treated by mental health professionals in this state. *Id.* at 72. For these reasons, the expert testimony regarding the disorder met the *Frye* standard in *Greene*.[8]

As discussed above, Dr. Tucker's diagnosis of paraphilia NOS (nonconsent) is not enumerated in the DSM-IV-TR and is not generally accepted by the psychiatric community as a valid diagnosis. The diagnosis has not been recognized outside of the civil commitment context. Zander, *Civil Commitment Without Psychosis*, *supra*, at 49. Further, there are no peer-reviewed studies reporting reliability of the diagnosis in clinical practice or research settings across various "raters" or diagnosticians. *Id.* at 49-50. And the only (unpublished) study of reliability across raters/diagnosticians that Thomas Zander could find showed the reliability to be extremely low. *Id.* at 50.

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[8] In *In re Detention of Berry*, Division One held Frye does not apply to the use of a particular novel psychiatric diagnosis at a civil commitment trial but rather to "the science upon which the expert's opinion is founded." 160 Wn. App. 374, 379, 248 P.3d 592, *rev. denied*, 172 Wn.2d 1005, 257 P.3d 665 (2011). The court reasoned, "the science at issue is standard psychological analysis," which is well-established and therefore not subject to *Frye*. *Id.*

But as discussed, *Greene* held the *Frye* standard does apply in determining the reliability and admissibility of expert testimony regarding whether an individual suffers from a particular novel psychiatric diagnosis. *Greene*, 139 Wn.2d at 70. Because *Berry* conflicts with *Greene*, it was wrongly decided and this Court should not follow it.

In sum, the psychiatric community is far from recognizing the validity or reliability of the diagnosis. Trial counsel should have requested the diagnosis be subjected to a *Frye* hearing.

b. Trial counsel was ineffective for failing to object under ER 702 to testimony regarding the antisocial personality diagnosis.

Expert testimony is admissible under ER 702[9] only if it is helpful to the trier of fact under the particular facts of the case. *Greene*, 139 Wn.2d at 73. Under ER 702, expert testimony will be deemed helpful to the trier of fact only if its relevance can be established. *Id.* at 73. Scientific evidence that does not help the trier of fact resolve any issue of fact is irrelevant and does not meet the requirements of ER 702. *Id.* Unlike the *Frye* standard, this inquiry turns on the forensic application of the particular scientific principle or theory. *Id.*

Here, the relevant question to be resolved by the trier of fact was whether Mr. Burd had a serious mental disorder that caused him difficulty controlling his sexually violent behavior. *Thorell*, 149 Wn.2d

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[9] ER 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

at 736, 740-41; *Crane*, 534 U.S. at 413. As discussed, the expert testimony regarding the diagnosis of antisocial personality disorder did not help to satisfy the State's constitutional obligation to differentiate "the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413. To the contrary, the disorder merely describes a majority of convicted criminals and therefore is not a valid basis for civil commitment. Also, the use of the diagnosis of antisocial personality disorder in civil commitment proceedings has not found general acceptance among the relevant community. While antisocial personality disorder is recognized by mental health professionals, as well as the DSM-IV-TR, as a potentially useful diagnosis for clinical or research purposes, it is not considered a valid basis for civil commitment.

Thus, even though the diagnosis of antisocial personality disorder may have gained general acceptance in the psychiatric community as a potentially useful diagnosis for clinical or research purposes, it is not helpful to the trier of fact in Chapter 71.09 RCW proceedings and was therefore inadmissible under ER 702.

Consequently, counsel was ineffective for failing to challenge Dr. Tucker's testimony regarding antisocial personality disorder under ER 702.

c. Reversal is required.

Counsel's failure to request the paraphilia NOS (nonconsent) diagnosis be subject to a *Frye* hearing and to object to the expert's testimony about antisocial personality disorder under ER 702 resulted in prejudice. As discussed, had counsel requested a *Frye* hearing, the trial court would have concluded there was a lack of consensus among experts in the mental health field about the validity of the "paraphilia NOS (nonconsent)" diagnosis. The court would have determined the alleged disorder is not regularly diagnosed or treated by psychiatrists and is not recognized outside of the civil commitment context. Thus, the court would have concluded the expert's testimony about the diagnosis was not admissible.

Similarly, had counsel objected to the expert's testimony regarding antisocial personality disorder under ER 702, the trial court would have concluded the testimony was not helpful to the trier of fact and was therefore inadmissible.

Thus, Mr. Burd has established a "reasonable probability that, but for counsel's [failure to raise his due process claim], the result of [his civil commitment] proceeding would have been different." *Strickland*, 466 U.S. at 694. Reversal is required.

3. The trial court violated Mr. Burd's constitutional right to present a complete defense by excluding testimony from Mr. Burd's expert regarding the mental abnormality with which Mr. Burd was diagnosed.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. U.S. Const. amends. VI & XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Article I, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). A defendant must receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713,

230 P.3d 576 (2010). "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999).

Here, the trial court excluded Dr. Saleh's testimony about the nature of the debate surrounding the paraphilia NOS (nonconsent diagnosis). Though the trial court has the discretion to determine whether evidence is admissible, a defendant's inability to present relevant evidence implicates the fundamental fairness of the proceedings and the error must be analyzed as a due process violation. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924.

On cross-examination, Dr. Tucker testified that a debate about the diagnosis paraphilia NOS (nonconsent) took place at the 2010 meeting of the American Academy of Psychiatry and Law. RP 895. He conceded that in a "symbolic vote" 32 people "voted against paraphilic coercive disorder being included in the DSM-V and two people voted for it." RP 895-96. However, Dr. Tucker's testimony went on to characterize the audience as merely "people who were interested in [the] title and stopped in to hear [a political] debate." RP

897. He further testified that the debate centered around a "legal problem" rather than a medical diagnostic concern. RP 933-35.

The State then moved to prevent Mr. Burd from offering Dr. Saleh's testimony regarding the context surrounding the informal vote as hearsay and without foundation, and the court granted the motion. RP 1045-50.

The evidence from Dr. Saleh was crucial to the respondent's case that paraphilia NOS (nonconsent) is not a valid diagnosis for commitment. *See id.*; RP 1093-94. Mr. Burd's counsel argued Dr. Tucker completely mischaracterized the conference. RP 1046, 1048, 1090. Contrary to the court's ruling, Mr. Burd's offer of proof demonstrated the excluded testimony would have been based on Dr. Saleh's personal knowledge, it was not hearsay, and the information was of the type that he would rely on to form his expert opinion. *See* ER 703; RP 1046, 1048, 1090-92, 1093-94.

Further, expert testimony may be based on out-of-court statements where the statements are of the type reasonably relied upon by experts in the particular field. *E.g.*, ER 703; *State v. Lucas*, __ Wn. App. __, 271 P.3d 394, 397-98 (Mar. 6, 2012) ("out-of-court statements on which experts base their opinions are not hearsay" and are properly

admitted; citing authority). Respondent's offer of proof showed experts in Dr. Saleh's field rely upon information at conferences such as the one at issue. RP 1090-91, 1093. The court's exclusion was an abuse of discretion, and violated Mr. Burd's constitutional right to present a defense.

The error excluded information critical to the defense regarding a key issue—whether Dr. Tucker's paraphilia NOS diagnosis was a valid and reliable basis to commit Mr. Burd. Consequently, it was not harmless and the conviction should be reversed and remanded for a new trial. *E.g.*, *State v. Gresham*, 173 Wn.2d 405, 434, 269 P.3d 207 (2012) (reversing where improperly admitted evidence was not harmless); *Maupin*, 128 Wn.2d at 930; *Jones*, 168 Wn.2d at 724.[10]

4. The State failed to prove by substantial evidence each of the alternative means presented to the jury.

a. <u>"Mental abnormality" and "personality disorder" are alternative means that must be supported by substantial evidence.</u>

If a single offense may be committed in more than one way, the jury must be unanimous as to guilt for the crime charged. Const. art. I,

[10] At a minimum, the exclusion of non-hearsay evidence where a foundation was laid through Mr. Burd's offer of proof constitutes an abuse of the trial court's discretion and should be reversed on that basis. *See In re Det. of West*, 171 Wn.2d 383, 396-97, 256 P.3d 302 (2011).

§ 21; *State v. Lillard*, 122 Wn. App. 422, 433, 93 P.3d 969 (2004), *rev. denied*, 154 Wn.2d 1002, 113 P.3d 482 (2005). The jury need not be unanimous as to the specific means by which the crime was committed only if substantial evidence supports each of the alternative means. *Id.*; *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) ("to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented"); *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). "Substantial *Lillard*, 122 Wn. App.evidence exists if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." at 434.

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

Where the trial court includes alternative means of committing a crime in the to-commit instruction, the State assumes the burden of

proving each of the alternative means by substantial evidence. *See Lillard*, 122 Wn. App. at 434-35; *State v. Hayes*, 164 Wn. App. 459, 478-82, 262 P.2d 538 (2011).

Here, the jury was instructed,

> [M]ental abnormality and personality disorder are alternative means to proving [the second element]. The jury need not be unanimous as to whether a mental abnormality or personality disorder has been proved beyond a reasonable doubt so long as each juror finds that at least one of these alternative means has been proved beyond a reasonable doubt.

CP 167 (to-commit instruction). Mr. Burd objected to the instruction, arguing the evidence was insufficient to support each alternative. RP 1410-14. The court denied the objection, finding the evidence sufficient to support each alternative. RP 1415-16.

b. <u>The alternative means were not supported by substantial evidence.</u>

Based on the testimony of Dr. Tucker, the State argued Mr. Burd suffered from four mental abnormalities—paraphilia NOS (nonconsent), mild mental retardation, fetishism and schizoaffective disorder—and two personality disorders—antisocial personality disorder and borderline personality disorder. *E.g.*, RP 648-51. The State argued that the combination of these diagnoses predisposed Mr. Burd to commit sexually violent offenses if not confined to a secure

facility. RP 718; 1453. The evidence supporting the mental abnormalities and personality disorders, however, were insufficient.

i. Mental abnormality

The primary mental abnormality alleged by the State was paraphilia NOS (nonconsent). As discussed above, this diagnosis is per se insufficient because it is not recognized by the field. *See* Section E.1, *supra*.

The State also alleged Mr. Burd suffered from mild mental retardation. While Mr. Burd did not contest this diagnosis, it is insufficient to support a finding that Mr. Burd is likely to engage in criminal sexual acts. *See* RP 700-02 (Tucker's description of Burd's cognitive deficits include no reference to sexual deviancy); RP 708 (noting "mental retardation does not mean breaking the law in this way"); RP 1233 (Saleh noting mental retardation does not predispose); RP 1467 (respondent's closing argument); *cf.* RP 720-21 (mild mental retardation only affects Burd as SVP if he has another mental disorder predisposing him to a deviant sexual arousal pattern).

Fetishism, similarly, is insufficient to support a finding that Mr. Burd is likely to commit a sexually violent offense. Dr. Tucker's diagnosis was based upon Mr. Burd's "deviant arousal to underwear"

because he masturbated to another girl's underwear when he was 13 years old and "masturbated with [the] underwear" of a 26 year old's two years later. RP 695. First, a teenage male's sexual interest in female underwear, demonstrated through only two incidents, is hardly an "abnormality." *See* RP 1009-10, 1199-1200. Moreover, Mr. Burd exhibited no related behavior for over twenty years. RP 899 (testimony of Tucker); RP 1199 (testimony of Saleh).

Finally, the State alleged Mr. Burd's schizoaffective disorder predisposed him to commit sexually violent offenses. However, the State presented insufficient evidence to support this diagnosis as a predisposition to the commission of criminal sexual acts. *Thorell*, 149 Wn.2d at 736 (citing RCW 7.109.020). As the State's expert admitted, "schizoaffective disorder is not a sexual disorder." RP 697 (also describing symptoms as depression and auditory hallucinations); *see* RP 699-700 (schizoaffective disorder might explain Burd's nonsexual assaultive behavior); RP 1233 (Saleh's testimony that schizoaffective disorder does not predispose to commit sexually violent offenses). It cannot, on its own, support a commitment predicated on mental abnormality. Even if relevant to sexually violent action, Dr. Saleh demonstrated there was insufficient basis in the record to diagnose

schizoaffective disorder in the first place. RP 1152-53 (records ambiguous as to that diagnosis): RP 1231-33 (record does not support persistent schizophrenia diagnosis); *see* RP 1156 (Burd's treating psychiatrist reported Burd was diagnosed with schizoaffective disorder at some earlier unknown time by unknown professionals and diagnosis has simply carried over).

ii. Personality disorder

As discussed above, antisocial personality disorder is legally insufficient to serve as a basis for indefinite commitment. *See* Section E.1, *supra*. Further, as recognized by Dr. Saleh, the diagnosis is unsupported because Mr. Burd has conformed to the rules during the last seven years. RP 1163-64. He thus does not present as having diagnosable persistent disregard for others and acting impulsively and aggressively. *Id.*

The State also presented insufficient evidence to show Mr. Burd suffered from borderline personality disorder. Dr. Tucker testified borderline personality disorder is "on the borderline between neurosis and psychosis." RP 710. "[T]he main feature really has to do with [an] emotionally very intense and unstable, uh, makeup." RP 711. Dr. Tucker based his diagnosis on Mr. Burd's "persistent identity

disturbance," impulsivity, suicidal threats, and difficulty controlling intense anger. RP 711-13. But, as Dr. Tucker acknowledged, Mr. Burd's treating psychiatrist at the special commitment center "hasn't noticed much borderline character pathology other than irritability, uh, which has improved." RP 901. In fact, as Dr. Saleh testified, "there was no evidence whatsoever for borderline personality disorder." RP 1160; *see also* RP 1165-66.

c. The commitment order should be reversed and the matter remanded for a new trial.

The verdict cannot be found to be based only on a particular means as no special verdict was provided and the parties relied on the alternative means. *E.g.*, RP 308 (defense closing argument arguing all five means presented in instruction); *see State v. Nicholson*, 119 Wn. App. 855, 863-64, 84 P.3d 877 (2003) (reviewing court must vacate conviction unless it can determine verdict was based on one of the means supported by substantial evidence), *overruled on other grounds*, *Smith*, 159 Wn.2d 778. Accordingly, because the State failed to prove the alternatively alleged mental abnormality and personality disorder by sufficient evidence, Mr. Burd's commitment should be reversed.

5. The preponderance of the evidence standard is constitutionally insufficient.

RCW 71.09.060 requires a person may not be committed indefinitely unless the State proves beyond a reasonable doubt he is a sexually violent predator. RCW 71.09.060. A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18) (emphasis added). "'Likely to engage in predatory acts of sexual violence if not confined in a secure facility' means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7) (emphasis added). This is the preponderance of the evidence standard.

Here, Dr. Tucker testified that one of the actuarial tests for recidivism showed Mr. Burd faced a 52 percent risk of reconviction if released. CP 5 (Static 99 test result); *see* RP 908-09. This is simply slightly more likely than not.

Such a standard conflicts with the constitutionally-required standard of proof in civil commitment proceedings. "[T]he individual's

interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington*, 441 U.S. at 427. The Constitution requires proof of present dangerousness by clear and convincing evidence. *Id.* at 433. "Clear and convincing evidence" means the fact in issue must be shown to be "highly probable." *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). Thus, civil commitment is unconstitutional absent a finding that it is "highly probable" the person will reoffend. The "more probable than not" standard of RCW Ch. 71.09 violates due process.

Though our Supreme Court rejected this argument in *In re Det. of Brooks*, that opinion should be reexamined in light of subsequent caselaw. *See In re Det. of Brooks*, 145 Wn.2d 275, 36 P.3d 1034 (2001). Since *Brooks* was decided, both the U.S. Supreme Court and Washington Supreme Court have held that involuntary commitment is unconstitutional absent a showing that a defendant has "serious difficulty" controlling dangerous, sexually predatory behavior. *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 735. The evidence must be sufficient to distinguish a sexually violent predator "from the dangerous

but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413; *Thorell*, 149 Wn.2d at 731.[11]

The "serious difficulty" standard of *Crane* and *Thorell* is akin to the "highly probable" standard, not the "more likely than not" standard outlined in the statute. *See Thorell*, 149 Wn.2d at 742 ("although this evidence need not rise to the level of demonstrating the person is completely unable to control his or her behavior," the State must prove the person "has serious difficulty controlling behavior"); *see also In re Commitment of Laxton*, 254 Wis.2d 185, 203, 647 N.W.2d 784 (2002) (upholding Wisconsin's civil-commitment statute following *Crane* because statute required showing of "substantial probability that the person will engage in acts of sexual violence," and "substantially probable" means "much more likely than not").

The elevated standard of proof is necessary to support the "requirement that an SVP statute substantially and adequately narrows the class of individuals subject to involuntary civil commitment." *Thorell*, 149 Wn.2d at 737 (internal citation omitted). The State must "demonstrate[] the cause and effect relationship between the alleged

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[11] In *In re Det. of Mulkins*, 157 Wn. App. 400, 237 P.3d 342 (2010) this Court rejected a similar argument. For the reasons stated herein, that opinion was wrongly decided and should not be followed.

SVP's mental disorder and a high probability the individual will commit future acts of violence." *Id.* at 737 (emphasis added); *cf.* Sentencing Guidelines Commission, *Recidivism of Adult Felons 2007* at 1 (recidivism rate among adult male felons generally is 63.3 percent).

Thorell is consistent with the Court's earlier pronouncements regarding the due process rights of those subject to civil commitment. In the seminal case of *In re Harris*, for example, the Court required "demonstration of a substantial risk of danger" to satisfy due process and "protect against abuse." *In re Harris*, 98 Wn.2d 276, 281, 654 P.2d 109 (1982). Our Supreme Court emphasized that "involuntary commitment requires a showing that the potential for doing harm is 'great enough to justify such a massive curtailment of liberty.'" *Id.* at 283 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). Thus, "[t]he risk of danger must be substantial . . . before detention is justified." *Id.* at 284. Chapter 71.09 RCW violates due process because it requires only that the risk of danger be "likely" or "probable"—not substantial.

The fact that the statute mandates a "beyond a reasonable doubt" standard in one clause cannot save it because the standard is severely weakened in another clause by allowing for commitment only

where it is "likely" a person will reoffend. A finding beyond a reasonable doubt that it is merely "likely" or "probable" that a person will reoffend creates a standard which, in the aggregate, is lower than clear and convincing evidence.

To pass constitutional muster, the statute must mandate a showing by clear and convincing evidence that the defendant will reoffend if not confined to a secure facility—not a showing that he "might" reoffend, will "probably" reoffend, or is "likely" to reoffend. *See Addington*, 441 U.S. at 420 (trial court properly instructed jury it had to find, by clear and convincing evidence, that the defendant required hospitalization in a mental hospital for his own welfare and protection or the protection of others—not that he probably needed hospitalization).

The Legislature has found that as a group, "sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high." RCW 71.09.010. Due process demands that this "highly likely" finding be made on an individual basis, for each person condemned to suffer indefinite confinement. This Court should hold that the "likely" and "more probably than not" standards of RCW 71.09.020 are unconstitutional.

6. The State committed flagrant and ill-intentioned misconduct when it used race to motivate the jury to make a decision on improper grounds.

Prosecutorial misconduct violates a respondent's right to a fair trial where the prosecutor makes an improper statement that has a prejudicial effect. *E.g.*, *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991); *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009).

Mr. Burd may raise the error even where there was no objection at trial, and "when a prosecutor flagrantly or apparently intentionally appeals to racial bias" the commitment must be vacated unless the State can show beyond a reasonable doubt that the misconduct did not affect the jury's verdict. *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011); Const. art. I, § 22.

Though a prosecutor has "wide latitude" to draw and argue reasonable inferences from the evidence, the State may not "invite the jury to decide any case based on emotional appeals." *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason and "to act impartially in the interest only of justice." *State v. Reed*, 102

Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993); U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 22.

"A prosecutor gravely violates a defendant's Washington State Constitution article I, section 22 right to an impartial jury when the prosecutor resorts to racist argument and appeals to racial stereotypes or racial bias to achieve convictions." *Monday*, 171 Wn.2d at 676. "The gravity of the violation of article I, section 22 and Sixth Amendment principles by a prosecutor's intentional appeals to racial prejudices cannot be minimized or easily rationalized as harmless." *Id.* at 680.

Here the State intentionally and improperly appealed to the jury's racial prejudices by arguing during rebuttal that "white women satisfy [Mr. Burd's] predator." RP 1480. The argument sought to incite the jury's passion and ensure commitment based on fear. The race of Mr. Burd's hypothetical future victims was irrelevant to the elements the jury had to find to commit. *See* CP 167 (to-commit instruction); RCW 71.09.060(1); RCW 71.09.020(18). The fact that Mr. Burd testified he is more attracted to white women than black women makes the comment no more relevant. *See* RP 537 (deposition

testimony of Burd). The prosecutor's comments that "white women satisfy his predator" had no other purpose than to inflame the jury's passions and place the majority white jury in fear of failing to commit Mr. Burd.[12]

This improper appeal to racial bias cannot be held harmless beyond a reasonable doubt. The prosecutor's comment occurred during her very short rebuttal argument, immediately prior to the court releasing the jury to deliberate. *See* RP 1479-80. The prosecutor intentionally aimed to distract the jury from its actual task—determining whether the State satisfied the elements for indefinite commitment—by placing it in fear of releasing Mr. Burd. Such an inflamed, racial appeal is a rung bell that could not have been "unrung" by a curative instruction. *State v. Trickel*, 16 Wn. App. 18, 30, 553 P.2d 139 (1976), *rev. denied*, 88 Wn.2d 1004 (1977).

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[12] Chart from Appendix 2 of Petitioner's Brief, *State v. Lanciloti*, Washington Supreme Court No. 81219-5 (email from Washington State Center for Court Research showing 77 percent of King County, Seattle, jury pool is "White"), *available at* http://www.courts.wa.gov/content/Briefs/A08/812195%20chart%20from%20appendix%202%20of%20petitioner's%20brief.pdf (last visited May 8, 2012); 2010 Census, U.S. Census Bureau (showing 72.9 percent of King County identifies as "White" alone or in combination with one or more other races), *available at* http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?ref=geo&refresh=t (search by geographical region then 2010 Census) (last visited May 8, 2012).

Mr. Burd's commitment should be reversed. *See Monday*, 171 Wn.2d at 681.

F. CONCLUSION

Mr. Burd's commitment should be reversed because (1) it is based on diagnoses that are not accepted by the psychiatric community, not sufficiently specific, and overbroad; (2) trial counsel was ineffective in failing to seek exclusion of these diagnoses; (3) the trial court erred in excluding testimony pertaining to the paraphilia NOS (nonconsent) diagnosis; (4) the State failed to prove each alternative means by sufficient evidence; (5) the statutory "likely" standard conflicts with the constitutionally-mandated clear and convincing evidence standard, denying Mr. Burd due process; and (6) the prosecutor committed misconduct in closing argument.

DATED this 17th day of May, 2012.

Respectfully submitted,

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Washington Appellate Project
Attorney for Appellant

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

IN RE THE DETENTION OF	)	
	)	
	)	
EVERETTE BURD,	)	NO. 67826-4-I
	)	
	)	
APPELLANT.	)	
	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF MAY, 2012, 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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[X] EVERETTE BURD SPECIAL COMMITMENT CENTER PO BOX 881000 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF MAY, 2012.

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