NO. 30853-7

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of:

ERNESTO LEYVA,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

ROBERT W. FERGUSON
Attorney General

SARAH SAPPINGTON
Senior Counsel
WSBA #14514
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. ISSUES

A. Has Leyva demonstrated that the definition of "mental abnormality," as applied to him, is unconstitutionally vague?

B. Has Leyva demonstrated that his commitment violates due process?

C. Did the trial court err in excluding evidence that would not have been helpful to the jury?

D. Where the Supreme Court has determined that Washington's standard for commitment is constitutional, should this Court reexamine this issue?

E. Where the State presented testimony that Leyva suffered from only one mental abnormality, was a unanimity instruction required?

II. FACTS

Ernesto Leyva was born on December 11, 1990. CP at 6. His first sexual contacts were with his sisters. Leyva appears to have been only six when he and his older sister, A., then seven, began to engage in what he described "sex play." *Id.* at 107.[1] This sexual contact with his sister continued until she was 13, and eventually included sexual intercourse roughly once per month. *Id.* at 107-08. Leyva also admitted to sexual contact with a younger sister, A., who was five then Leyva was 11. *Id.* at 109. This sexual contact included digital penetration as well as

[1] The majority of these facts came into evidence through the testimony of Donald King, who interviewed Leyva several times following his 2006 arrest for Child Molestation.

attempted vaginal and anal intercourse. *Id.*109-11.[2] He also admitted that he had exposed his erect penis to his youngest sister, X., several times, but did not attempt further sexual contact with her, explaining that he "was already doing it with his other sisters." *Id.* at 114-16.

By the age of 10, Leyva's sexual contacts began to expand beyond his immediate family. It was then that he began having sexual contact with five-year-old C., the daughter of one of his parents' friends. *Id.* at 92. This sexual contact, which included digital penetration and sexual intercourse, continued for five years, until Leyva was 15 and C. was 10. *Id.* at 92-93. Leyva also admitted that, between the ages of 11 and 13, he had anal sex with a six or seven year old boy, D. *Id.* at 102-103. Leyva, who described these incidents as consensual, indicated that they occurred roughly every two months for approximately two years. *Id.* at 104. Leyva also admitted that he had had D.'s younger brother, approximately five when Leyva was 13, fellate him, but said that the child had refused Leyva's instructions to remove his own pants. *Id.* at 105.

Between the ages of 12 and 14, Leyva had sexual contact with V., a female child, who was between five and seven. *Id.* at 116. This contact consisted of exposing his erect penis to her, touching her buttocks, and

---

[2] By the time Leyva interviewed with Dr. Brian Judd, the State's expert at trial, he was no longer admitting aspects of his sexual contact with his sisters. RP 4/9/12 at 183-84.

rubbing his penis against her. *Id.* On one occasion, he attempted to pull V.'s pants down, but she refused. *Id.* Leyva indicated that V. was "upset" by these sexual contacts, which he described as having occurred once every three weeks for two years. *Id.* at 117.

Leyva's deviant sexual behavior extended to his school, and school officials were developing concerns about Leyva's behavior. He was suspended from school in the seventh grade following allegations that, after having been dropped off at his home by the school bus, he had walked in front of one of his windows in his underwear, and had then gone outside, put his hand down his pants and partially unbuttoned his pants. RP 4/5/12 at 43, 48. He admitted to this allegation and, after he agreed to seek mental health counseling, was ultimately suspended for five days. *Id.* at 49. The following year, in November of 2005 when Leyva was in the eighth grade, he pulled down his pants while on the school bus and exposed himself to J.B., an eight-year-old girl. RP 4/5/12 at 50; Ex. 4. When questioned regarding this incident, Leyva admitted that he had urges that he did not know how to control. RP 4/5/12 at 51. He was charged and pled guilty to the crime of Indecent Exposure on the basis of this incident, receiving six months of community supervision. Ex. 4 and 5. Because it was the fourth sexual incident in his school district in three years, he was also expelled. RP 4/5/12 at 52. Very shortly after he had

exposed to J.B., Leyva exposed himself again, this time entering into a diversion with community service. Ex. 6.

Leyva also acted out sexually at his church. During roughly the same period of time, Leyva was engaging in a series of assaults against two girls at his church, R.C. and D.C. These assaults occurred over a period of several months, beginning in June of 2005. RP 4/5/12 at 77 -78; 82; Ex. 1. Leyva, when interviewed after charges were filed, admitted that he had walked by R.C. and touched her buttocks with his hand, and also described once accosting R.C. outside the boys' bathroom and exposing his erect penis to her. *Id.* at 77-82. 80. Leyva also admitted to taking R's sister, D.C, into the boy's bathroom, exposing his penis to her, digitally penetrating and licking D.C.'s vagina, and attempting vaginal intercourse. *Id.* at 84. He admitted that he "knew it was wrong," when he did it, but that he had "wanted to do it." *Id.* at 88. Although originally charged with Child Molestation for the offenses against both sisters, Leyva pled guilty to one count of Child Molestation First Degree for the assaults on D.C. Ex. 1-3. Leyva was also attracted to the girls' mother, and admitted having both exposed himself to her and having touched her breast. *Id.* at 95. Leyva admitted that he wanted to have sex with Mrs. C., and admitted to masturbatory fantasies about her and his other victims. *Id.* at 97.

In addition to these incidents, Leyva admitted to numerous other incidents while in elementary school in which he had touched the buttocks of young girls while he had an erection, (RP 4/5/12 at 89) as well as an incident in which he exposed himself to an unknown teenage girl in a Goodwill store in Wenatchee in 2006, when he was 15. *Id.* at 94.

Finally, on October 8, 2007, Leyva sexually assaulted E.R., a 16-year-old girl. Ex. 7-9; 4/9/12 at 207, 220. He was arrested and charged with Rape in the Second Degree, and ultimately pled guilty to rape in the third degree on January 15, 2009. Ex. 7-9.

At trial, the State presented the testimony of three witnesses: Scott Ramsey, who was the principal of Quincy Junior High School when Leyva was in seventh and eighth grades (RP 4/5/12 at 35-54); Donald R. King, who had interviewed Leyva several times following his arrest for child molestation relating to the assaults on R. C and D.C. (*Id.* at 55-129), and Dr. Brian Judd, Ph.D. RP 4/9/12 at 148-316; RP 4/11/12 at 548-572. The State also presented the testimony of Leyva via video deposition. RP 4/5/12 at 132,-134; CP 293-385. Dr. Judd, relying on the factual history described above, testified that he had assigned three diagnoses to Leyva: Paraphilia not otherwise specified (NOS) non-consent with consideration and a rule out of pedophilia; a provisional diagnosis of exhibitionism, and frotteurism. RP 4/9/12 at 194;

202-05. He testified that, in Leyva's case, the diagnosis of paraphilia NOS non-consent constituted a mental abnormality, and that Leyva was more likely than not to reoffend if not confined to a secure facility. RP 4/9/12 at 225-227. Leyva presented two witnesses: Dr. Richard Wollert, Ph.D. (RP 4/10/12 at 354-514; RP 4/11/12 at 521-547) and his father, Ernesto Leyva Sr. RP 4/19/12 at 339-353. After hearing all the evidence and closing arguments, the jury returned a unanimous verdict to commit Leyva as a sexually violent predator. CP at 713. This appeal follows.

III. ARGUMENT

A. The Definition Of "Mental Abnormality" Is Not Unconstitutionally Vague As Applied To Leyva

Leyva asserts that the term "mental abnormality"[3] is unconstitutionally vague if the term is interpreted as embracing the diagnosis assigned Leyva by the State's expert, Dr. Brian Judd. App. Br. at 8-23. This argument is without merit. As Dr. Judd's extensive trial testimony demonstrated, the term "mental abnormality," as applied to Leyva's particular sexual deviance and the way that deviance

[3] "Mental abnormality" means 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).

expressed itself in criminal behavior, has real meaning and withstands constitutional challenge.

Various unsuccessful vagueness challenges to the sex predator statute have been raised since the statute's inception. In *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), the Washington State Supreme Court rejected vagueness challenges to several statutory terms, including "mental abnormality." *Id.,* 122 Wn.2d at 49. Rejecting the challenge to the term "mental abnormality," the Court held that "the experts who testified at the commitment trials adequately explained and gave meaning to this term within a psychological context." *Id.* at 49-50. Because the record clearly demonstrates that Dr. Judd "adequately explained and gave meaning to this term within a psychological context" in this case, Leyva's challenge fails.

Dr. Judd diagnosed Leyva with "paraphilia not otherwise specified [NOS] with the consideration and the rule-out of pedophilia, sexually attracted to both, non exclusive type." RP 4/9/12 at 224. Leyva takes issue with this diagnosis on several levels. First, he asserts that "paraphilia NOS non-consent' is not defined as a paraphilia in the DSM-IV..."[4]

[4] All references to the DSM refer to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, published by the American Psychiatric Association in 2000. In the profession, the text is sometimes referred to as the DSM-IV-TR. For the sake of simplicity, this brief will use the shorthand "DSM."

App. Br. at 11. He then goes on to argue that Dr. Judd, apparently by adding the descriptor of "consideration and the rule-out of pedophilia" to his diagnosis of paraphilia NOS, has created a "novel, compound diagnosis," "a creature of his own devising," lacking "any specificity as to paraphilic focus beyond describing simple recidivism." *Id.*

These arguments lack merit. To begin with, Leyva has long since lost his argument that paraphilia NOS is an invalid diagnostic category and, as such, cannot form the basis for commitment. Indeed, Leyva appears to concede this point in his citation to Division I's conclusion to the contrary in *In re Detention of Berry*, 160 Wn. App. 374, 379, 248 P.3d 592 (2011). App. Br. at 15. The *Berry* Court, in rejecting the argument that the diagnosis of paraphilia NOS is invalid because it is not explicitly included in the DSM, pointed to language in the seminal case of *Young* in which the Court observed:

> The fact that pathologically driven rape, for example, is not yet listed in the DSM-III-R does not invalidate such a diagnosis. The DSM is, after all, an evolving and imperfect document. Nor is it sacrosanct. ... *What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.*

122 Wn.2d at 28, 857 P.2d 989 (emphasis added) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing*

Sexually Violent Predators, 15 U. PUGET SOUND L. REV. 709, 733 (1991-92)). The *Berry* Court went on to observe that "paraphilia NOS" in fact "does appear in the DSM-IV-TR." 160 Wn. App at 381. Noting that the DSM defines paraphilia as "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner, or (3) children or other non-consenting persons that occur over a period of at least 6 months," the *Berry* Court, citing to *Young*, observed that "paraphilia not otherwise specified" is a "residual category...which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the DSM-III-R." *Id.* at 381 (citing to *Young*, 122 Wn. 2d at 29). The DSM-IV-TR, the court noted, provides a number of examples of paraphilia NOS, but clearly states that the category is "not limited to" that list.[5] The omission of the term "non-consent" from this list does not prove it is an invalid diagnosis.

Although Leyva appears to grudgingly concede this point, he argues that Dr. Judd's "compound diagnosis" "wanders far afield even

[5] DSM at 576 ("This category is included for coding Paraphilias that do not meet the criteria for any of the specific categories. Examples include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine).").

from the controversial diagnosis of basic paraphilia NOS non-consent." App. Br. at 19. His underlying concern appears to be that Dr. Judd's "novel" diagnosis runs afoul of *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) because it is not "medically recognized" and as such does not "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 in an ordinary criminal case" as required by *Kansas v. Hendricks,* 521 US 346, 360, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). App. Br. at 20-21. He then asserts that Dr. Judd's diagnosis "dramatically exceeded, in both imprecision and in lack of medical recognition, the already highly controversial diagnosis of paraphilia NOS non-consent..." *Id.*

A careful reading of both *Crane* and other cases cited in support of this proposition makes clear that, contrary to Leyva's assertions, Dr. Judd's conclusion that Leyva's diagnosis constituted a mental abnormality under the law forms, along with his other testimony, a sufficient basis for commitment. Neither the United States Supreme Court nor the appellate courts of other jurisdictions share Leyva's fixation on the semantics of particular diagnostic classifications. The Supreme Court has, for decades and in a variety of contexts, repeatedly

acknowledged "the uncertainty of diagnosis in this field and the tentativeness of professional judgment" (*Greenwood v. United States,* 350 U.S. 366, 375, 76 S. Ct. 410, 100 L. Ed. 412 (1956). Reported cases, the Court has noted, "are replete with evidence of the divergence of medical opinion in this vexing area." *O'Conner v. Donaldson,* 422 U.S. 563, 579, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) (C.J. Burger, concurring). Psychiatry, the Court has noted, "is not... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma,* 470 US 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Likewise, the Washington State Supreme Court has noted that "the DSM-IV-TR candidly acknowledges...that each category of mental disorder is not a completely discrete entity." *State v. Klein,* 156 Wn.2d 103, 120. 124 P.3d 644 (2005). For that reason, "the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it." *Id.* Construing the law to mandate release "based on mere semantics would lead to absurd results and risks to the patient and public beyond those intended by the legislature." *Id.* at 121.

The Court's decision in *Crane* reflects and is entirely consistent with this approach. There, the Court was asked to clarify the "lack of control" requirement articulated in *Hendricks*. Contrary to Leyva's assertion, there is nothing in *Crane* that requires that the underlying mental abnormality must be "medically recognized." While the *Crane* Court acknowledged "[t]he presence of what the "psychiatric profession itself classifie[d] . . . as a serious mental disorder" "helped to make" the distinction between those appropriate for civil commitment and the "typical recidivist" (*Crane,* 534 U.S. at 413), nowhere did the Court state that such "classification" by the psychiatric profession was mandated, nor did it state that, in order to justify commitment, the diagnosed condition must be "medically recognized." Consistent with its remark in *Hendricks* that the term "mental illness" was "devoid of any talismanic significance" (*Hendricks*, 521 U.S. at 358-59), the *Crane* Court steered clear of semantic mandates, noting that "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." 534 U.S. at 413. The Court went on to observe that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Id.* Noting that it had not, in *Hendricks,* given the phrase "lack of

control" "a particularly narrow or technical meaning," the Court observed that, "where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision." *Id.* Rather,

> [i]t is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be 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.

Id.

Nor do the two Wisconsin cases (*McGee v. Bartow*, 593 F.3d 556 (7th Cir 2010) and *Brown v. Watters*, 599 F.3d 602 (7th Cir, 2010); Cert. denied 131 S. Ct. 293, 178 L. Ed. 2d 192, (Oct. 4, 2010)) that Leyva cites help him. In both cases the Seventh Circuit, while acknowledging the controversy surrounding the diagnosis of paraphilia NOS: non-consent, rejected due process challenges to that diagnosis. In doing so, the court emphasized both the uncertainty of psychiatric diagnosis and the critical role of the factfinder. The fact that a particular diagnosis "is not accepted or is explicitly rejected by the DSM or other authoritative sources...is a highly relevant consideration for the factfinder." *McGee,* 593 F.3d at 577. In either situation, however, "the factfinder has the ultimate responsibility to assess how probative a particular diagnosis is on the *legal* question of

the existence of a 'mental disorder'" and "the status of the diagnosis among mental health professionals is only a step on the way to that ultimate legal determination." *Id.* This point was again made in *Brown,* where the court, again rejecting the challenge to the diagnosis of paraphilia NOS: non-consent, noted that, in that case, "able assistance of counsel *actually did expose* the professional debate to the jury and substantial contrary professional opinions were offered." *Brown,* 599 F.3d at 612 (emphasis in original). The court went on to say that "[t]he the existence of a professional debate about a diagnosis or its use in the civil commitment context does not signify its insufficiency for due process purposes, particularly where, as here, that debate has been evaluated by the factfinder." *Id.* at 614.

Here, as in *Brown*, the jury had ample opportunity to "evaluate that debate" by listening to the "substantial contrary professional opinion" that were presented at trial. Dr. Judd explained the basis for his diagnosis at length, discussing the factual basis for diagnosis of paraphilia NOS: non-consent (a 2007 assault against E.R., who was described in the records as having resisted the attack; one adjudicated minor victim, D.C., and six additional child victims all of whom were more than five years younger than Leyva). 4/9/2012 RP at 207-08. All of these assaults were against children and might ordinarily form the basis for a diagnosis of

pedophilia. Dr. Judd explained, however, that he had assigned a "rule out" diagnosis of pedophilia because the diagnosis of pedophilia, as set forth in the DSM, requires that the assailant be at least 16 years of age, and Leyva had been between 10 and 15 years old at the time of all but one of these offenses. *Id.* at 210-11. As such, there was "some deviation from the criteria in some specific way" that did not permit making the full diagnosis of pedophilia. *Id.* at 209. Despite this deviation, Dr. Judd believed that, "based on the consistency of his behaviors, based upon his report of fantasizing and masturbating to fantasies of children," including two of his victims, Leyva met criteria for pedophilia "in large part." *Id.* Dr. Judd went on to explain that it was important to make this "rule out" diagnosis in order "to clarify that there's consideration of a full range of diagnoses..." *Id.* at 211.

Dr. Judd's diagnosis is of a type entirely anticipated by the DSM, whose authors freely admit that, "[b]ecause of the diversity of clinical presentations, it is impossible for the diagnostic nomenclature to cover every possible situation." DSM at 4. Such NOS diagnoses are appropriate where "the symptomatic picture does not meet the criteria for any of the specific disorders. This situation would occur either when the symptoms *are below the diagnostic threshold* for one of the specific disorders or when there is an atypical or mixed presentation." *Id.* (emphasis added).

Dr. Judd also explained both what he understood by the term "mental abnormality" (RP 4/9/12 at 186-187) and why that term applied to Leyva: He suffers from a "congenital or acquired condition" in the form of "paraphilia not otherwise specified, non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type." *Id.* at 224.This condition "affects his emotional or volitional capacity:" Dr. Judd explained that Leyva, discussing the 2005 exposure incidents, made statements to the effect that he "had difficulty with his sexual urges and didn't know how to control or couldn't control them." *Id.* at 225. Leyva had made other statements in 2005 to the effect that "when he gets tempted, he can't seem to help himself' and that, "his mind goes blank when he is tempted and it just happens." *Id.* Further, the fact that Leyva continued to offend after having been sanctioned by the courts contributed to Dr. Judd's conclusion that his volitional control was impaired. *Id.* at 225-26. Finally, this mental condition "predisposes" Leyva "to the commission of criminal sexual acts in a degree constituting ...a menace to the health and safety of others." *Id.* at 227. As noted by Dr. Judd, despite having been sanctioned, expelled, criminally charged, and then briefly incarcerated, Leyva continued to sexually offend. *Id.* at 228. This testimony both gave meaning to the term mental abnormality "within a psychological context" as required by *Young,* and

provided an ample basis from which the jury could conclude that Leyva had "serious difficulty" controlling his sexually violent behavior as required by *Crane.* Leyva's challenge fails.

B. Due Process Does Not Prevent The Civil Commitment Of Persons Whose Sexual Crimes Occurred While They Were Juveniles

Leyva next argues that his civil commitment as a sexually violent predator violates due process because juveniles are "insufficiently developed to exhibit chronic volitional impairment." App. Br. at 28. Because serious difficulty controlling behavior "cannot be scientifically proven on conduct prior to mature brain development," the State "should refrain from indefinitely confining individuals whose predicate conduct derives from the period of time when their volitional capacity was immature or continuing to develop." *Id.* The State demonstrated at trial that Leyva was both mentally ill and dangerous, as required by due process. As such, there is no constitutional impediment to his commitment as a sexually violent predator.

1. Neither The Constitution Nor State Law Prohibits Leyva's Commitment As A Sexually Violent Predator

Although he does not appear to frame it as such, Leyva's challenge is essentially a challenge to the constitutionality of the sex predator statute. The Legislature has included juvenile sex offenders in the group subject of

commitment as sexually violent predators. RCW 71.09.025[6]; 030.[7] By arguing that his commitment violates due process, Leyva effective argues that these portions of the statute are unconstitutional, in that they explicitly permit commitment in cases not only where much of the underlying conduct occurred when the person was a juvenile, but also in cases where, because the person is a juvenile at the time of filing, all such conduct must by definition have occurred before the age of 18. Because Leyva fails to meet the high burden required in order to invalidate a portion of a statute as unconstitutional, his challenge fails.

"A court will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." *State v. Glas,* 147 Wn.2d 410, 422, 54 P.3d 147 (2002). The presumption

---

[6] RCW 71.09.025 provides in pertinent part as follows:

(1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in *RCW 71.09.020(16), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county in which an action under this chapter may be filed pursuant to RCW 71.09.030 and the attorney general, three months prior to:

(ii) The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile...

[7] RCW 71.09.030 provides in pertinent part as follows:

(1) A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that:... (b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement...

of constitutionality is overcome only in exceptional cases. *City of Seattle v. Eze,* 111 Wn.2d 22, 28, 759 P.2d 366 (1988).

Leyva begins with the now widely-accepted premise that the juvenile brain is not fully formed, and indeed appears to continue to develop until a person's mid-twenties. He then turns to three recent cases from the United State Supreme Court and argues that, because juvenile offenders cannot be sentenced to death (*Roper v. Simmons,* 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1(2005)), given mandatory life-without-parole sentences (*Miller v. Alabama,* ___ U.S. ___, 132 S. Ct. 2455, 183 L.Ed. 2d 407 (2012)), or receive a life-without-parole sentence where the juvenile offender did not commit homicide (*Graham v. Florida,* ___ U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)), the State "should refrain from indefinitely confining individuals whose predicate conduct derives from the period of time when their volitional capacity was immature or continuing to develop." App. Br. at 28. This enormous leap is unwarranted logically and unsupported by law. All of these cases, of course, are criminal cases in which the claims are analyzed under the Eighth Amendment to the United States Constitution. Even setting that obvious distinction aside, these cases are entirely distinct from Leyva's. Leyva is unable to point the Court to any "overwhelming weight of international opinion" (*Roper*,

543 U.S. at 579) or national consensus pointing to the conclusion that persons who committed their crimes while juveniles cannot be indefinitely detained for the purpose of incapacitation and treatment. Rather, Leyva simply asks this Court to accept the premise that, because the Supreme Court has established certain limitations on criminal punishments that can be imposed on persons who committed crimes prior to adulthood, the same should hold true in this context. Leyva's argument fails.

Substantive due process requires that those civilly committed under the sexually violent predator law be demonstrated to be both mentally ill and dangerous. *Hendricks,* 521 U.S. at 358. Commitment must be supported by proof that the person has serious difficulty controlling his or her sexual behavior. *Crane.* 534 U.S. 407; *In re Detention of Thorell*, 149 Wn.2d 724, 753-58, 72 P.3d 708 (2003). The constitutionality of Washington's statute has been repeatedly upheld against various due process challenges. *Young,* 122 Wn.2d 1; *Thorell*, 149 Wn.2d 724; *In re McCuistion*, 174 Wn.2d 369, 275 P.3d 1092 (2012). Due process does not require or depend upon a particular diagnosis or demand that a diagnosis contain particular words. Rather, due process is satisfied if the State is able to demonstrate, beyond a reasonable doubt, that the offender is both mentally ill and dangerous. Because that showing was made here, Leyva's argument fails.

Leyva does not directly address this body of case law, but appears to attempt to add an additional requirement to due process: Not only must the State demonstrate "serious difficulty controlling behavior," as required by *Crane;* it must demonstrate "***chronic*** volitional impairment." App. Br. at 28. Because human brains continue to develop until an individual's mid-twenties, Leyva appears to reason, evidence of impaired volitional control before that time should not be considered. This logic would essentially prevent the State from acting to protect the public and incapacitate and treat dangerous sex offenders until some "chronic volitional impairment" occurring after the brain's full maturation could be developed. Due process does not require this.

2. Testimony At Trial Demonstrated That Leyva Was Mentally Ill and Dangerous

Moreover, there was overwhelming evidence at trial that Leyva was both mentally ill and dangerous, and as such due process was satisfied. Arguments relating to the effects, if any, of his age on his volitional capacity would appropriately have been made to the jury, and indeed were. Dr. Judd, making the diagnosis of paraphilia NOS, noted that paraphilias are generally regarded as chronic conditions that may last the duration of the individual's life, not "just something that's a passing phase in a person's life." RP 4/9/2012 at 220-21. Paraphilias reflect "patterns of

interest, patterns of sexual arousal, patterns of urges" that are "reinforced by the amount of contact that the individual engages in or the amount of experience that they have." *Id.* Dr. Judd, who had experience treating juvenile sex offenders, testified that he took Leyva's age in to consideration in conducting his evaluation. *Id.* at 222. His age, he explained, was not a factor that would reduce the likelihood of recidivism. *Id.* Rather, both because of his relative youth when he began offending and the persistence of that behavior over a number of years, "would suggest that he constitutes a higher risk in terms of offense relative to an individual who started offending at a later time in their life..." *Id.* at 223.

In addition, there was overwhelming evidence of Leyva's volitional impairment: Dr. Judd explained that Leyva, when discussing the 2005 exposure incidents, made statements to the effect that he "had difficulty with his sexual urges and didn't know how to control or couldn't control them." *Id.* at 225. Leyva had made other statements regarding those incidents to the effect that "when he gets tempted, he can't seem to help himself," and that, "his mind goes blank when he is tempted and it just happens." *Id.* Further, the fact that Leyva continued to offend after having been sanctioned by the courts contributed to Dr. Judd's conclusion that his volitional control was impaired. *Id.* at 225-26. As noted by Dr. Judd, despite having been sanctioned, expelled, criminally charged,

and then briefly incarcerated, Leyva continued to sexually offend. *Id.* at 214-15. Nor did the fact that Leyva had not acted out sexually while confined by DSHS affect Dr. Judd's opinion: Leyva's paraphilias, Dr. Judd explained, were "focused on minor children and adult or peer-aged females." RP 4/11/12 at 569.

3. Trial Testimony Demonstrated That There Is No Consensus That The Risk Posed By Juveniles Cannot Be Accurately Assessed

Moreover, as the testimony at trial made clear, there is nothing approaching a consensus that, as youthful sex offenders age, they become less likely to offend, or that the risk of reoffense of such youthful offenders cannot be adequately assessed. Leyva was born in 1990 and was 21 at the time of his commitment trial. The jury thus had an opportunity to consider the possibility that, although he had indeed been a juvenile at the time of his offense, he had since aged and, as implied by Leyva's argument, matured to the point that he could no longer be said to be "likely" to reoffend. Indeed the jury heard a great deal of testimony—from Leyva's expert, Dr. Wollert-- to this effect. RP 4/10/12 at 373-96.

The jury, however, also heard testimony from Dr. Judd to the effect that the mere fact of chronological aging was insufficient to reduce Leyva's risk of reoffense. The available studies, Dr. Judd testified, demonstrate that there is a category of adolescent offenders "that continues to offend,

even as they age into adulthood." RP 4/11/12 at 550. As Dr. Judd testified, studies indicate that, although some juvenile offenders did indeed desist as they matured, others did not. By way of example, Dr. Judd testified regarding a 2009 study by Monahan, Steinberg, Coughman and Mulvey[8] that had been cited by Dr. Wollert. Dr. Judd explained that this study had identified five different "trajectories" for adolescent offenders. RP 4/11/12 at 549. Of those, three "resulted in desistance," but two did not. RP 4/11/12 at 549-50. Another study discussed by Dr. Judd identified two types of adolescent offenders, one of which began offending during childhood or adolescence and continued, despite incarceration or other interventions such as treatment, to offend. *Id.* at 550. Other studies, Dr. Judd explained, examine the percentages of adult offenders who had begun offending as adolescents. *Id.* at 551. In one such 1993 study by Knight and Prentky, Dr. Judd testified, 55 percent of the sample had begun offending as adolescents. *Id.* at 551. An earlier study from 1982 found that fully 50 percent to 80 percent had begun offending as adolescents. *Id.* Another study, at 2010 meta-analysis that attempted to identify risk factors relevant to adolescent offenders, found that risk factors in adolescents were "relatively similar to those in adults,"

[8] Because complete citations to these articles were not offered as part of trial testimony, they will not be included here.

and that "the atypical sexual interest or deviant sexual interest was the strongest factor." *Id.* at 552. Another relatively strong factor was criminal history, "this kind of antisocial conduct or behavior." *Id.*

The testimony at trial reveals both that there is nothing approaching a consensus in the field—much less the "overwhelming weight of international opinion" cited in *Roper*—that there is something about the diagnosis and risk assessment of juveniles that would make their detention for treatment and incapacitation—the goals of the sex predator statute—unconstitutional. Indeed, recent studies discussed by Dr. Judd indicate that, because the risk factors for juveniles are much like those of adults, the same actuarial instruments routinely used for adults can also be used to assess the risk of offenders 16 to 17 years old. RP 4/11/12 at 554-55. Nor, Dr. Judd testified, was there any literature "whatsoever" to the effect that widely used and generally accepted actuarial instruments used by Dr. Judd to assess Leyva's risk should not be used on persons under the age of 23. *Id.* at 557. Dr. Judd explicitly rejected the proposition that Leyva would be able to control his sexually deviant behavior simply as a result of maturing as an adult. RP 4/11/12 at 570.

C. The Trial Court Properly Limited Dr. Wollert's Testimony To Matters Helpful To The Jury

At trial, the court sustained an objection by the State to certain of Dr. Wollert's testimony, arguing that it was precluded by rulings the trial court had made in response to the State's motions in limine. RP 4/10/12 at 385-86. Dr. Wollert's testimony, as characterized by Leyva, related to a "categorical lack of fully developed volitional capacity in juveniles and young adults," and "the determinative consequences of that scientific assessment upon the State's expert's contention that Ernesto had impaired volitional control as a result of a mental disorder." App. Br. at 33. Leyva attempts to elevate this evidentiary ruling to an issue of due process, arguing that the trial court's ruling violated his constitutional right to present a "complete and thorough" defense. *Id.* The Court should reject his argument. The trial court properly struck testimony it had previously deemed inadmissible, and, while precluding certain evidence it determined would not be helpful to the trier of fact, allowed Leyva to put on a "complete and thorough" defense.

Admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion *State v. Brown,* 132 Wn.2d 529, 578, 940 P.2d 546 (1997). An abuse of discretion occurs only when no reasonable person would take the view the

trial court adopted. *State v. Castellanos,* 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Discretion is abused if it is based on untenable grounds or is manifestly unreasonable. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Prior to trial, the State made various motions in limine related to Dr. Wollert's testimony with the general goal of restricting that testimony to matters both within his expertise and directly relevant to the case at hand. The State moved, *inter alia*, to preclude Dr. Wollert from testifying regarding a presentation he had chaired entitled "Juvenile Offenders are Ineligible for Civil Commitment as Sexual Predators." CP at 399-400. In the paper of the same name, Dr. Wollert urged the American Psychological Association to take a stand against the civil commitment of juvenile offenders in much the same manner as it had in *Roper* and *Graham*. Based on these cases, Dr. Wollert argued in his paper that a "judicial consensus" had emerged regarding juvenile offenders' developmental capabilities and vulnerabilities. CP at 400. In moving to preclude such testimony, the State argued that Dr. Wollert's position on this issue was "political and legal," that he had not considered or undertaken any testing of Leyva's own "developmental capabilities," and that his position was of a general nature, not specific to Leyva. *Id.* As such, the State argued, this testimony would be beyond the scope of

ER 702.[9] Dr. Wollert, the State argued, should be limited to "provide an opinion as to whether Mr. Leyva has a mental abnormality or personality disorder that makes him likely to engage in predatory acts of sexual violence," and "should be required to apply the facts of this case to his opinion under Washington law—as it is written today—not as he would like to see it in the future and not as he believes it should be." CP at 401. The trial court granted the State's motion, ruling that Dr. Wollert was prohibited from testifying "regarding his political or legal opinion as to the eligibility of juvenile offenders for civil commitment, including mentioning the name of his paper (CP at 552) and could not testify that an individual must have reached a "baseline" of developmental capacity in order to qualify for commitment. CP at 553.

Against this backdrop, Leyva argues that his constitutional right to an adequate defense was violated when the trial court sustained the State's objection and struck testimony by Dr. Wollert the effect that juvenile offenders "can't suffer from something that affects their volitional capacity, because by definition of the developmental age...they never reached volitional capacity. It's for older persons." RP 4/10/12 at 385. The

[9] ER 702 provides that, "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."

trial court properly exercised its discretion in striking this improper testimony, and Leyva's argument fails.

After the State objected to Dr. Wollert's contested testimony at trial, the trial court heard argument and then struck the testimony but in doing so, made the narrow scope of its ruling abundantly clear:

> [Dr. Wollert] can't testify that juveniles can never have volitional capacity. He can testify that Mr. Leyva can't because he's a juvenile. ...that's what would help the jury, that opinion, Mr. Leyva, not juveniles in general. And I'm finding that an expert can't given an opinion unless it's helpful to the jury, and his opinion about juveniles in general and his opinion about they can never have volitional capacity is not helpful to the jury. His opinion about Mr. Leyva being affected by his age is helpful.

RP 4/10/12 at 390. This holding was reiterated several times, the trial court expressing concern about the potential for "policy statement and misstatements of law, and general opinions about the law, rather than opinions about Mr. Leyva." *Id.* at 392. Dr. Wollert, the court explained, "could certainly testify about youth and juveniles and how their age affects mental abnormalities and volitional capacities. But when it comes to his opinion about whether X has volitional capacity, the X has to be Mr. Leyva, not juveniles." *Id.* at 392; *see also Id.* at 393-395. Following the court's ruling, Dr. Wollert went on to provide testimony regarding the "psychosocial maturity" process of juveniles in general (*Id.* at 396), and application of those principles to Leyva in particular. *Id.*

at 396-398. Dr. Wollert had further opportunity to discuss his theories about brain development and maturation during the State's cross examination. *Id.* at 494. In fact, he made clear during cross that "this theory about psychosocial immaturity" was not specific to Mr. Leyva, but was a "general theory." *Id.* at 494-95.[10] The trial court did not err in limiting Dr. Wollert's testimony to matters that would actually be helpful to the trier of fact, and that ruling in no way prevented Leyva from presenting a full and thorough defense.

D. Washington's Statute Requires Proof Beyond A Reasonable Doubt

Leyva next argues that the statute's requirement that the State prove, beyond a reasonable doubt, that the offender is "likely" to reoffend cannot pass constitutional muster. Although he acknowledges that the Washington State Supreme Court rejected this argument in *In re Brooks,* 145 Wn.2d 275, 36 P.3d 1034 (2001) (reversed on other grounds by *Thorell*), he argues that this argument should be reexamined in light of

[10] Leyva also seems to suggest that Dr. Wollert was prevented from testifying regarding studies by Dr. Laurence Steinberg ("At trial, during Dr. Wollert's testimony, he attempted to state his reliance on studies by Dr. Steinberg on juvenile maturity. 4/10/12 RP at 384.") In fact, Dr. Wollert was permitted to testify at length regarding Dr. Steinberg's work (*Id.* at 378-384; 394) he was simply prohibited from "vouching as to [Dr. Steinberg's] being prestigious or eminent or well-recognized or someone's favorite." *Id.* at 384.

Crane and *Thorell*'s requirement that the offender have "serious difficulty" controlling his dangerous sexual behavior.

This argument fails. The Kansas statute at issue in *Crane* contained virtually identical language to that identified by Leyva as problematic.[11] Nowhere in that opinion does the Supreme Court indicate that that use of the term "likely" prevents a determination by a fact finder that the individual in question has "serious difficulty" controlling his or her sexually dangerous behavior. Nor did the *Thorell* Court suggest that this language was at odds with the *Crane* Court's "serious difficulty" language. This argument is frivolous and must be rejected.

E. No Unanimity Instruction Was Required Where The State Provided Evidence Of Only One Mental Abnormality

Finally, Leyva asserts that, under *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984),[12] he was entitled, because the State's expert assigned three different paraphilia diagnoses, to an instruction specifying which of the "multiple, 'distinguishable' factual allegations" formed the

---

[11] Referring to Kansas' sex predator act, the Court wrote: "That Act permits the civil detention of a person convicted of any of several enumerated sexual offenses, if it is proven beyond a reasonable doubt that he suffers from a "mental abnormality"-a disorder affecting his "emotional or volitional capacity which predisposes the person to commit sexually violent offenses"-or a "personality disorder," either of "which makes the person likely to engage in repeat acts of sexual violence." Kan. Stat. Ann. §§ 59-29a02(a), (b) (2000 Cum.Supp.) ."

[12] *Petrich,* a criminal case, holds that where the state alleges that several distinct criminal acts have been committed by a defendant who is not charged for each act, the prosecutor must elect the acts she is relying upon, or the jury must receive a unanimity instruction.

basis of his commitment. App. Br. at 42-43. Leyva's argument is supported by neither the facts of this case or the law of this State. His argument must be rejected.

Leyva's assertion of "multiple, 'distinguishable' factual allegations" in this case requiring a unanimity instruction is an attempt to create ambiguity where none exists. At trial, the State made it clear that the mental abnormality in this case was the diagnosis of paraphilia NOS: non-consent. RP 4/9/12 at 224. Asked specifically whether Leyva had a congenital or acquired condition that "relates to a mental abnormality," Dr. Judd responded that he believed that "that the congenital or acquired condition in this case would be paraphilia not otherwise specified. Non-consent with the consideration and the rule out of pedophilia, sexually attracted to both, non-exclusive type." *Id.* That this was the only diagnosis to which the term "mental abnormality" was assigned was made clear by the AAG in closing when she stated, "[n]ow, Dr. Judd indicated that Mr. Leyva does have a mental abnormality. This is Dr. Judd's diagnosis of paraphilia not otherwise specified, non-consent. And Dr. Judd told you that he reached this conclusion because it was clear that Mr. Leyva has strong sexual urges to engage in sexual contact with non-consenting persons." RP 4/11/12 at 593; 646. Indeed, it is apparent from defense counsel's closing argument that Levya understood that the mental

abnormality alleged was paraphilia NOS. *See Id.* at 615 ("Dr. Judd testified Monday that the way to diagnose or consider a mental abnormality, the only way to do it was to see if someone qualifies for a disorder in the manual. Do you remember what we read? About paraphilia NOS?"); 617-18 ("All right. Mental abnormality. Let's get back. Any of you notice that when he had a chance to back up his diagnosis of paraphilia NOS on rebuttal he didn't touch it."); and 619 ("Mental abnormality diagnosis. Okay. Paraphilia NOS, that's the only one that he actually diagnoses, he gives us several rule-outs."). Indeed, Leyva appears to concede this fact, writing that "the State told that jury that it should be clear that the mental abnormality was the particular diagnosis of paraphilia NOS." App. Br. at 46.

Moreover, even if Leyva were correct that the State made "multiple, 'distinguishable' factual allegations" in support of its contention that he suffered from a mental abnormality, no unanimity instruction would be required. As Leyva notes, a virtually identical question was addressed in *In re Sease*, 149 Wn. App. 66, 210 P.3d 1078 (2009), *review denied* 166 Wn.2d 1029, 217 P.3d 337 (2009). In *Sease*, there was no dispute that Sease suffered from one or, possibly, two personality disorders. *Id.,* 149 Wn. App. at 78. This did not, however, mean that a unanimity instruction was required. Rather, the court

determined, the jury "need only have unanimously found that the State proved that Sease suffered from a personality disorder that made it more likely that he would engage in acts of sexual violence if not confined to a secure facility. The jury need not have unanimously decided whether Sease suffered from borderline personality disorder or antisocial personality disorder." *Id.*

While Leyva argues at length that *Sease* was wrongly decided, he presents no persuasive basis for this Court to diverge from that established holding. In cases in which this and related arguments have been considered, the courts of this state have been clear that they understand the complexity of human nature and hence of psychological diagnosis. In *In re Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006), the Washington State Supreme Court considered an SVP's argument that, where there is testimony at trial to the effect that the offender suffers from both a mental abnormality and a personality disorder, a *Petrich* instruction was required. Rejecting this argument, the court held that, where substantial evidence supports each, these two conditions "are alternative means for making the SVP determination." *Halgren,* 156 Wn.2d at 810. As Division I noted in its earlier decision in that case, "[t]o force the State to elect or the jury to rely on only one...would unnecessarily introduce a requirement that is not present in the statute. It would also compromise the value of the clinical

judgments of expert witnesses in this difficult area. Neither the constitution nor the statute requires this." *In re Halgren* 124 Wn. App. 206, 215, 98 P.3d 1206 (2004). Affirming the Court of Appeals' decision on this issue, the Supreme Court noted that, "because both mental illnesses are predicates for the SVP determination, the two mental illnesses are closely connected..." and that "these two means of establishing that a person is an SVP may operate independently ***or may work in conjunction***." *Halgren,* 156 Wn.2d at 810 (emphasis added). *Accord In re Ticeson,* 159 Wn. App. 374, 246 P.2d 550 (2011).

That Leyva's paraphilias were intertwined and all contributed to his offending was clear from Dr. Judd's testimony. After identifying each of Leyva's paraphilias, he agreed that "each of these mental disorders relate(s) in some way" to his opinion that Leyva suffers from a mental abnormality. RP 4/9/12 at 195. Indeed, no highly specialized knowledge of the subtleties of psychological diagnosis is required to understand that, where an offender, since the age of six, has displayed deviant sexual interest in the form of exposing, peeping, groping, and, ultimately, rape, all of the underlying psychological conditions will contribute to any conclusion that the offender has serious difficulty controlling his sexual behavior, and is likely to reoffend. The law does not require juries to force

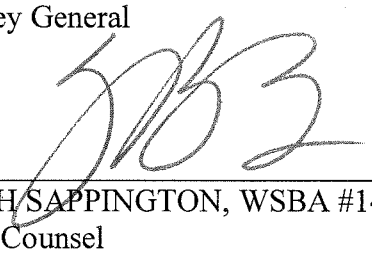
human beings into separate and discreet classifications that do not exist in the real world.

IV. CONCLUSION

For the reasons set forth above, this Court should affirm Leyva's commitment as a sexually violent predator

RESPECTFULLY SUBMITTED this 15TH day of March, 2013.

ROBERT W. FERGUSON
Attorney General



SARAH SAPPINGTON, WSBA #14514
Senior Counsel
Attorneys for Respondent

NO. 30853-7

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of: ERNESTO LEYVA, Respondent.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On March 15, 2013, I sent via email and the United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

Oliver Davis
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle, WA 98101-3647
oliver@washapp.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15TH day of March, 2013, at Seattle, Washington.

Allison Martin
ALLISON MARTIN