NO. 30845-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

IN RE: DETENTION OF:

FILED
NOV 19, 2012
Court of Appeals
Division III
State of Washington

STEVEN RITTER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Steven Ritter's has lived in extreme turmoil. He was found abandoned and wandering the streets when he was only two years old. His biological mother sexually and emotionally abused him for the first two years of his life. His lived in institutional settings as a toddler before he was adopted by a family who did not let him be himself and isolated him. In short, he was never properly socialized or loved.

The State alleged he molested a 9 year old female when he was 18 years old. While confined for that offense, Mr. Ritter participated in sex offender treatment. Nonetheless, the State filed a petition against him under RCW 71.09. The petition and resulting commitment order is predicated on conduct that occurred before Mr. Ritter's mind had fully developed and largely as a result of his tumultuous upbringing. It should be reversed.

B. ASSIGNMENTS OF ERROR

1. Basing indefinite commitment upon conduct committed while a juvenile's brain is undergoing continuing development violates due process.

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

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

4. The trial court abused its discretion by denying Mr. Ritter's motion to exclude evidence and testimony, or in the alternative to hold a *Frye*[1] hearing, pertaining to the Structured Risk Assessment: Forensic Version (SRA: FV), Static-99R, and MnSOST-R actuarial tests and statistical theories.

5. 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.

6. Cumulative error denied Mr. Ritter his due process right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Principles of substantive due process require that no individual be indefinitely committed absent a showing of lack of

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[1] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

volitional control. A child's brain continues to develop into his or her late teens and early twenties; in particular, the frontal lobe, which controls volitional capacity, generally is not fully developed until after age 18. Was Mr. Ritter's constitutional right to due process violated when his indefinite civil commitment was premised on conduct that occurred prior to maturity of his volitional functioning?

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

3. Scientific evidence is admissible only if it is generally accepted in the relevant scientific community and not otherwise subject to exclusion under the Evidence Rules. The Evidence Rules permit admission of only relevant evidence where the probative value is not substantially outweighed by the danger of unfair prejudice. Moreover, expert testimony is only admissible if helpful to the jury and based on facts or data reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. Did the trial court abuse its discretion in admitting the SRA:FV, Static-99R and MnSOST-R, where these statistical theories are not generally accepted in the relevant scientific community, would not be helpful to the trier of

fact, are not probative of the issues in Mr. Ritter's commitment trial and any probative value is substantially outweighed by the danger of unfair prejudice?

4. 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"?

5. Cumulative error may deprive a person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. This is true even if no error standing alone merits reversal of the resulting commitment. In light of the errors assigned above, should this Court conclude that the cumulative effect of the errors denied Mr. Ritter a fundamentally fair trial?

D. STATEMENT OF THE CASE

Mr. Ritter's biological mother physically and sexually abused him at a young age. CP 22; RP 1053.[2] She "forced him to place his

[2] The designation "CP" is used to refer to the Clerk's Papers. Consecutively paginated volumes 1 and 2 of the verbatim reports of proceedings are referred to as 1RP and 2RP, respectively. Consecutively paginated volumes I

head between her legs and lick her vagina" and to perform similarly towards her female friends. CP 25. Equally troubling, the young Mr. Ritter "was forced to insert his hand or arm into the vagina of these females." CP 25.

Abandoned, he was found wandering the streets alone at two-and-a-half years old. CP 22; RP 1053. For the next three years, he was moved among foster homes and institutional settings. CP 22; RP 1053. Mr. Ritter reports being sexually abused by females from two different foster families. CP 25. As a result of the abuse by females from a very young age, he reports a "long history of anger and contempt for females." CP 25. Unsurprisingly, one report also found him "not socially civilized" and not accepting of affection. CP 22; *accord* 1RP 77-78 (testimony of Dr. Robert Halon that "if you know anything about child development, you know that by the time a child's five years old, their attachment patterns [social attitudes and behavior] are pretty well set").

Mr. Ritter was adopted at age five-and-a-half. CP 22; RP 1054. Though well-meaning, his adoptive family provided no solace. His adopted parents did not let Mr. Ritter be himself and made clear he

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through X are referred to simply as "RP"; and the transcript of the September 18, 2009 hearing is referred to as "9/18/09RP."

would go to hell if he was a homosexual. CP 952-53. They isolated him from friends and even within the family. *Id.* At age seven the family moved him across the country from Oklahoma to Washington. CP 22. To escape his unsupportive and isolating "home" environment, he acted out. CP 953; *see* CP 956. Mr. Ritter was classified as behaviorally disturbed for educational purposes. CP 23. He suffered from "profoundly unreconciled attachment issues, trust issues with people." RP 1055. "Essentially his whole life has been turmoil." RP 1056. Despite these setbacks, Mr. Ritter obtained a high school diploma. CP 23.

He also spent time in juvenile detention for sexually assaulting his 46-year-old aunt. RP 732. Later, Mr. Ritter was incarcerated at 19 years old following an incident where he fondled a nine-year-old at a library. RP 627-38, 733. While incarcerated, he partook in 12 months of sex offender treatment. RP 664-65. During treatment, Mr. Ritter made progress in regulating his emotions and some progress in developing relationships and trust. RP 668, 679 (testimony of therapist). At the conclusion of his sentence, the State filed a petition for indefinite civil commitment.

At the commitment trial, the State also produced evidence of uncharged crimes. Sierra Andring testified that when Mr. Ritter was 14 or 15 years old he used force to touch her vaginal areas. RP 641-45. Mr. Ritter was not prosecuted for the alleged conduct. RP 647, 731-32. The State also alleged Mr. Ritter had sexual contact with a boy in 1996, when Mr. Ritter was only 15 years old himself. RP 732. But the State offered very few details about that incident: missing information included where it occurred, the form of abuse, if any, and the boy's name. RP 851-52.

While confined, Mr. Ritter had a relationship with a transsexual partner who eventually committed suicide. CP 954. He also had homosexual relations with an adult fellow inmate. CP 954-56.

Also while confined, staff seized anime drawings from Mr. Ritter. CP 958-59; RP 865-66. The State maintained these drawings contained sexually explicit content relating to minors. *E.g.*, RP 586-87, 958-59. Mr. Ritter testified the drawings showed no genitalia or pornographic material. RP 652; CP 1322-26,1328-29 (Verbatim Report of Proceedings of Ritter testimony at 103-07, 109-10); *see* CP 958 (Ritter asserted same in evaluation). Even the State's expert questioned the basis for such a conclusion, finding the infraction very

possibly could have been improperly characterized. CP 958-59, 965-66. Unfortunately, the Department of Corrections destroyed the seized drawings before any of the attorneys or their experts could examine the material. *E.g.*, RP 584, 587, 863.

The State alleged Mr. Ritter suffered from pedophilia and antisocial personality disorder. CP 965; RP 723-24. The State's expert, Dale Arnold, diagnosed Mr. Ritter under the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM-IV or DSM-IV-TR). RP 724-38, 751-54. Dr. Arnold diagnosed Mr. Ritter with pedophilia even though his sexual history shows attraction to adults and individuals close to his age. RP 739-40. Dr. Arnold explained Mr. Ritter's alleged attraction to prepubescent children is "non-exclusive." RP 739-40. In Dr. Arnold's opinion, a pedophilia diagnosis does not even require "strong preference" for prepubescent children. RP 740.

Dr. Robert Halon, retained by Mr. Ritter, recognized there was some evidence Mr. Ritter was interested in touching kids but disagreed the evidence amounted to a diagnosis of the mental disorder pedophilia. RP 1068. Specifically, he found insufficient evidence of pedophilic fantasies and urges. RP 1077.

In diagnosing Mr. Ritter with antisocial personality disorder, Dr. Arnold relied heavily on Mr. Ritter's conduct as an adolescent and younger. RP 751-58. Dr. Halon disagreed with Dr. Arnold's diagnosis. Dr. Halon took Mr. Ritter's upbringing and demoralized and distressing situation into account in accord with the Minnesota Multiphastic Personality Inventory, II (MMPI-II). RP 1043, 1045. "[W]hat looks like antisocial personality in Mr. Ritter is really his way of handling his misery, his stress that he's been in probably his whole life long." RP 1047; *accord* RP 1066 ("he often has trouble controlling himself, but they're currently caused by tremendous situational stress"). The MMPI-II scoring still showed Mr. Ritter as oppositional and somewhat impulsive, but below the cutoff for a diagnosis of antisocial personality disorder. RP 1043-47.

Relying on statistical theories and actuarial tests, Dr. Arnold reported Mr. Ritter would "more likely than not" engage in predatory acts if not confined. CP 966-68; RP 763-64. Contrary to Dr. Arnold's hypothesis, personality testing administered by Dr. Halon indicated that Mr. Ritter has normal self-control. RP 1051; *accord* RP 1061-62. This confirmed for Dr. Halon that Mr. Ritter's impulsivity was a result of distress, not of a volitional impairment. RP 1051, 1062, 1066, 1088-

89. Dr. Halon also found Mr. Ritter to be strong in reasoning ability, open to change, self-reliant, and a perfectionist. RP 1051-52. He is also cautious about relationships, which was unsurprising to Dr. Halon based on Mr. Ritter's upbringing. RP 1052.

Despite Dr. Halon's testimony, the jury found Mr. Ritter to be a sexually violent predator and committed him indefinitely. CP 999-1000.

E. ARGUMENT

1. Mr. Ritter's involuntary commitment violates due process because it is premised on conduct occurring before he developed mature volitional control.

Substantive due process principles require that indefinite civil commitment be premised upon a showing of sustained impairment of volitional control. As the United States Supreme Court has recognized, science now explicitly shows that a juvenile's mind does not fully develop until his or her late teens or early twenties.[3] One of the last stages of development is volitional control. Throughout adolescence and into the age of majority, humans generally lack the ability to

[3] The term "juvenile" refers to the common English word, meaning "a young person" or "physiologically immature or underdeveloped," and not to the legal definition of "a person who has not reached the age (usu. 18) at which one should be treated as an adult by the criminal-justice system." *Compare Webster's Third New International Dictionary* 1229 (1993) *with Black's Law Dictionary* (9th ed. 2009).

effectively control their behaviors to the degree of fully-developed adults. It follows, therefore, that indefinite commitment cannot comport with due process if premised upon conduct that occurred when the respondent was in a state of continuing development because lack of volitional control likely resulted from that temporary state rather than a more permanent impairment.

a. Principles of substantive due process prohibit involuntary commitment unless predicated on a lack of volitional control.

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. *Id.* at 77; *In re Det. of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Principles of substantive due process therefore prohibit indefinite civil commitment except in the narrowest of circumstances. *See Kansas v. Hendricks*, 521 U.S. 346, 356-57, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

Mere dangerousness is insufficient to justify indefinite, involuntary civil commitment. *Id.*. at 358; *Kansas v. Crane*, 534 U.S. 407, 412, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). Commitment premised upon proof of volitional impairment, which increases the risk of future harm, however, can constitute a sufficient basis to civilly curtail one's physical liberty. *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 412; *Thorell*, 149 Wn.2d at 731-32, 735-36. Volitional impairment means serious difficulty in controlling behavior. *E.g.*, *Thorell*, 149 Wn.2d at 732. The serious difficulty controlling behavior must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." *Crane*, 543 U.S. at 413. Due process requires volitional impairment to be proved before an individual can be indefinitely confined. *Id.*

b. Juveniles are insufficiently mentally developed to exhibit a lack of volitional control.

Science demonstrates that young adults as a class temporarily lack volitional control while their brain continues to develop. "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." *Graham v. Florida*, __ U.S. __, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825

(2010). Indeed, "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)). This is true for three reasons.

First, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). Second, they are more susceptible to outside pressures, negative influences, and psychological damage. *Roper*, 543 U.S. at 569; *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982). Third, a juvenile's character is not as "well formed" as an adult's; his traits are "less fixed." *Roper*, 543 U.S. at 570.

As one psychology professor analogized, "[t]he teenage brain is like a car with a good accelerator but a weak brake. With powerful impulses under poor control, the likely result is a crash." Michele Deitch et al., The Univ. of Tex. at Austin, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, at 13

(2009) (quoting Temple University Professor Laurence Steinberg), available at http://www.campaignforyouthjustice.org/documents /NR_TimeOut.pdf. Because their brains are still developing, juveniles age 18 and older "react based on emotional impulses rather than by thoroughly processing thoughts and ideas." Deitch et al., *supra*, at 14; *accord* Marsha Levick, et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285, 298-99 (2012) (discussing neuro-imaging research). Put simply, they are less likely than mature adults to be able to restrain their own impulses. Deitch et al., *supra*, at 14. Studies show that "even when adolescents are familiar with the law, they still act as risk takers who magnify the benefits of crime and disregard the consequences associated with illegal actions." *Id.* at 15.

In addition to acting with a developing brain, adolescents undergo hormonal changes and fluctuations that impact their behavior. "Testosterone, the hormone that has the most significant effect on the body and is most closely associated with aggression, increases tenfold in adolescent boys." *Id.* "Such hormonal impairments reduce the decision-making capacity of young offenders." *Id.*

As a result, a juvenile's actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." *Roper*, 543 U.S. at 570. Unlike their adult counterparts, juveniles or young adults who demonstrate an inability to control their behavior or act in a risky manner generally do so not because of an entrenched characteristic but because of developmental and hormonal changes that will subside with age.

Clearly, most youth outgrow the recklessness, impulsivity and heedless risk-taking of their young lives. Studies show that "'[o]nly a relatively small proportion of adolescents'" who engage in illegal activity "'develop entrenched patterns of problem behavior.'" *Roper*, 543 U.S. at 570 (quoting Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

Though the law at times requires assessments be made of an individual's future character, such an assessment is particularly challenging when faced with a biologically developing subject. "Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but 'incorrigibility is inconsistent with youth.'" *Miller v. Alabama*, __ U.S.

__, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012) (quoting *Graham*, 130 S. Ct. at 2029 (internal quotation omitted)). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 573).

The Supreme Court has accordingly held it unconstitutional to sentence a juvenile offender to death. *Roper*, 543 U.S. at 578. Similarly, mandatory life-without-parole sentences are unconstitutional when imposed on juveniles. *Miller*, 132 S. Ct. at 2465. And the constitution outright "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 130 S. Ct. at 2034.

c. Because volitional impairment is a prerequisite for commitment and juveniles are insufficiently developed to exhibit chronic volitional impairment, due process prohibits the indefinite civil commitment of juvenile offenders.

Just as youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole or imposition of the death penalty, so to should it matter in determining the constitutionality of indefinite civil commitment premised on serious

difficulty controlling behavior. *See Miller*, 132 S. Ct. at 2465; *Graham*, 130 S. Ct. at 2034; *Roper*, 543 U.S. at 578.

"The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570; *accord* Levick et al., *supra*, at 297-98 (reviewing empirical data showing the majority of youths who engage in delinquent acts desist as they mature). The State's expert here, Dr. Arnold, agreed with this premise. RP 904. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570; *accord* Steinberg & Scott, *supra* at 1014 ("Making predictions about the development of relatively more permanent and enduring traits on the basis of patterns of risky behavior observed in adolescence is an uncertain business."). "Combining the physical immaturity of the brain with the underdevelopment of cognitive and psychological skills, adolescents are at a severe disadvantage compared to adults." Deitch et al., *supra*, at 15.

Because the young adult mind continues to develop, the American Psychiatric Association prohibits diagnosing juveniles with antisocial personality disorder. As discussed, even expert psychologists have trouble differentiating between juvenile offenders whose crimes reflect "unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. *See* Steinberg & Scott, *supra* at 1014-1016. "[T]his difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. *Roper*, 543 U.S. at 573 (citing DSM-IV-R at 701–706; Steinberg & Scott, *supra* at 1015). As the United State Supreme Court reasoned, "If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder," the courts cannot impose even more severe condemnation on young adult offenders, such as the death penalty. *Id.*

Indefinite confinement must be premised upon a finding of serious difficulty controlling behavior to pass constitutional muster.

Further, the serious difficulty controlling behavior must derive from a mental illness that distinguishes the respondent from the "typical recidivist in an ordinary criminal case." *Crane*, 543 U.S. at 413. But such a finding cannot be scientifically proven based upon conduct prior to mature brain development. Accordingly, this 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. As discussed below, Mr. Ritter constitutes precisely such a case.

d. Because Mr. Ritter's volitional capacity was still developing at the time of the predicate offenses alleged here, his commitment order should be reversed.

Here, Mr. Ritter was confined by age 19 on the predicate offense, which was committed when he was 18 years old. Exhibit 1.9 (judgment and sentence). To prove Mr. Ritter was a pedophile with antisocial personality disorder and volitional impairment, the State relied nearly exclusively on conduct from age 18 and prior. As discussed above, during this time, Mr. Ritter's brain was continuing to develop and he was undergoing hormonal changes that rendered him temporarily unable to control his behaviors as society and science expects of a 30 or 40 year old.

For example, the State relied upon a test which incorporated psychological risk factors that exhibited only prior to being in custody. CP 642-43 (discussing the SRA: FV instrument relied upon by Dr. Arnold). Thus, under the State's view, Mr. Ritter could be indefinitely committed based on actions taken while his volitional capacity remained developmentally infirm as well as psychological risk factors that exhibited only during adolescence, the height of his behavioral development. Further, Dr. Arnold judged Mr. Ritter based on tests with limited or untested applicability to juveniles. RP 909-10 (discussing the Static-99R).

In fact, the State's expert found it critical that Mr. Ritter was young when his predicate offense occurred. Dr. Arnold seemed persuaded that a higher recidivism rate among juveniles should be used to increase Mr. Ritter's recidivism risk rate and justify confinement. RP 872-73.

The State also drew on pre-maturity incidents to support its theory that Mr. Ritter lacks volitional control and should be committed. For example, Dr. Arnold testified that Mr. Ritter's incident with his 46-year-old aunt showed a lack of volitional control (rather than a pedophiliac interest). RP 857 ("[T]he thing that was driving that

behavior was more related to impulsivity and antisocial personality . . . another boundary violation."). In determining volitional control, Dr. Arnold examined Mr. Ritter's juvenile conduct, including his "pattern of behavior over time, what kinds of consequences [he has] gotten for prior sexual offenses, how [he] responded to those consequences." RP 916-17, 921.

Mr. Ritter's commitment is based on very limited and ambiguous information from his adult life. For example, Dr. Arnold testified Mr. Ritter received a picture of a young female in the mail to SCC in 2010. RP 869. While confined, Mr. Ritter has been writing a 1482-page fantasy book about a monarchy, a war, "all hell . . . breaking loose," and a hero, which the State alleges contains explicit content; Mr. Ritter disputed that conclusion. RP 869-70, 894-96 (Arnold clarified he "do[es]n't have a really clear understanding of the entire story."), 1147-51 (testimony of Dr. Robert Halon), 1170-72 (same); RP 652 & CP 1322-26,1328-29 (Verbatim Report of Proceedings of Ritter testimony at 103-07, 109-10). Mr. Ritter also had a previously-mentioned sexual relationship with an adult male prisoner in the Yakima County jail. These accusations comprise the sole evidence against Mr. Ritter derived from his adult life.

The State will likely argue Mr. Ritter no longer legally qualified as a juvenile at the time he committed the offense against Ms. Barnes. *See* Exhibit 1.9 (Ritter had turned 18 at time of offense). But as the Supreme Court has recognized, "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. In fact, "the brain does not reach full maturation until the age of 25." Deitch et al., *supra*, at 13; *accord* Levick, et al., *supra* at 298-99 (discussing neuro-imaging research). The brain's frontal lobe, which controls advanced functions including imagination, abstract thought, judgment of consequences, planning and controlling impulses, continues to develop into an individual's early twenties. Deitch et al., *supra*, at 13-14. Though a steady decline in impulsivity begins in adolescence, it remains elevated into an individual's mid-twenties. Levick, et al., *supra* at 295.

Mr. Ritter does not contend that twenty-five-year-olds should necessarily be treated differently than other adults in the civil commitment context. But this case presents a much narrower issue. Mr. Ritter was only 18 when he committed the predicate offense at issue here. *Cf.* RP 681 (testimony of mental health unit supervisor that Mr. Ritter was not fully mature at age 25 when she knew him). He was

even younger—between 14 and 18 years old—when he committed most of the actions on which the State judged him. *E.g.*, Exhibit 1.9 (judgment and sentence); RP 641-45, 732.

Mr. Ritter's tumultuous upbringing further informs an understanding of his development. "In addition to cognitive characteristics that differentiate adolescents' functioning from that of adults, developmental immaturity is characterized by differences in the ability to regulate emotions. Adolescents tend to demonstrate difficulties recognizing and expressing feelings, managing their emotions, and coping with undesirable feelings." Levick, et al., *supra* at 296. As a result, "adolescents [are] at a disadvantage in high stress situations, and consistent or chronic exposure to stressful stimuli can, in turn, reduce adolescents' opportunities to develop successful emotional regulation abilities." *Id.*

Poor regulation of emotion generally stems from factors such as childhood maltreatment, maternal depression, exposure to violence, and economic deprivation. *Id.* "Empirical evidence also has shown that adolescents with poor emotion regulation often demonstrate both internalizing (e.g., depression and anxiety) and externalizing (e.g., aggressive behaviors) symptoms, and rates of these symptoms and

associated mental health diagnoses are elevated among youth involved in the justice system." *Id.* at 296-97.

Thus prior to confinement on the predicate offense at issue here, Mr. Ritter faced not only the normal adolescent obstacles to controlling one's behavior but was further disadvantaged by his childhood abuse and instability, lack of exposure to meaningful relationships and resulting attachment issues. Any lack of volitional control prior to incarceration very likely stemmed from continuing brain development and hormonal changes experienced by all adolescents, which in Mr. Ritter's case was stilted by his severely disadvantaged childhood. In short, his difficulty controlling behavior was a temporary and evolving state, which is a constitutionally insufficient basis for indefinite commitment as a matter of law.

2. Mr. Ritter's involuntary commitment violates due process because it is premised upon a personality disorder diagnosis that is overbroad and insufficiently precise.

Due process requires that indefinite civil commitment be based on a diagnosis that is not overbroad or insufficiently precise. Mr. Ritter argued the State's diagnosis of antisocial personality disorder was an insufficient basis for commitment because the diagnosis is overbroad and imprecise. CP 844-54; RP 503. Nonetheless, the State pursued

commitment on this basis either standing alone or in combination with pedophilia. Because this Court cannot find that the jury verdict is not based on this improper diagnosis, Mr. Ritter's indefinite commitment violates due process.

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

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; *Crane*, 534 U.S. 407. 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 Supreme Court reemphasized that an individual cannot be involuntarily committed unless he suffers from a mental abnormality "sufficient to distinguish . . . him . . . from the

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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.*

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

The Washington Supreme Court similarly recognizes that in RCW 71.09 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, the diagnosis must nonetheless be medically justified. *See Crane*, 534 U.S. at 413; *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. Basing Mr. Ritter's commitment on a diagnosis of antisocial personality disorder violates due process because it is too imprecise a diagnosis.

Mr. Ritter'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 has "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); Jack Vongsen & Amy Phenix, *Antisocial Personality Disorder is Not Enough: A Reply to Screenivasan, Weinberger, and Garrick*, J. Am. Acad. Psychiatry & L. 32:440, 442 (2004) (antisocial personality disorder afflicts 50 to 70 percent of prison population). 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. Such a diagnosis is premised on 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* Sentencing Guidelines Commission,

[5] The remaining "diagnostic criteria" are that the individual must be at least 18 years of age, there must be "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, *supra*, at 55.

Recidivism of Adult Felons 2007 at 1 (April 2008) (recidivism rate among adult males is 63.3 percent).[6]

The APA also regards antisocial personality disorder as 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. Br. for the APA 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, numerous mental health professionals and commentators have leveled similar criticisms. *E.g.*, Daniel F. Montaldi, *The Logic of Sexually Violent Predator Status in the United States of America*, 2(1) Sexual

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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 <u>necessary</u> condition for civil commitment under the Due Process Clause, it should not be viewed as a <u>sufficient</u> condition.

Offender Treatment (2007), *available at* http://www.sexual-offender-treatment.org/57.0.html (last visited Nov. 17, 2012); Bruce Winick et al., *Should Psychopathy Qualify for Preventive Outpatient Commitment?*, in Int'l Handbook on Psychopathic Disorders & 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; Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 Journal of Sexual Offender Civil Commitment: Science and the Law 17, 52-62 (2005) (summarizing studies and scholarly opinion).

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. Ritter's continued detention on that ground violates due process.

c. Mr. Ritter's commitment should be reversed.

The State argued commitment was justified based either on (a) the antisocial personality disorder diagnosis, (b) a mental abnormality

diagnosis of pedophilia or (c) the combination of the two diagnoses. RP 1223 (State's closing argument); CP 978. But the State did not request the jury answer a special verdict identifying the basis of its commitment verdict. *See* CP 978 (jury instruction # 5 (to-commit instruction)). Accordingly, there is insufficient record to determine the diagnosis or combination thereof upon which the jury determined commitment was justified.

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 it 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). Similarly, Mr. Ritter's commitment should be reversed if the diagnosis of antisocial personality disorder is held invalid. *Cf. 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 by Smith*, 159 Wn.2d 778.

3. The trial court abused its discretion by admitting statistical theories and actuarial instruments that are not generally accepted, have not been subject to peer review, are not helpful to the finder of fact, and are not reasonably relied upon by experts in the field.

Mr. Ritter moved to exclude the State from relying on statistical theories and actuarial instruments that were unreliable, not peer reviewed, not generally accepted in the scientific community and that would not be helpful to the trier of fact. CP 633-70, 725-35, 820-43 (moving under ER 401, 402, 403, 702, 703, *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and constitutional principles of due process and effective assistance of counsel); RP 501-02, 590-97. The court denied the motion without holding a *Frye* hearing, allowing the State to premise its argument for commitment on unreliable theories. RP 595-97.[8]

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[8] At trial, the State argued *Thorell* forecloses Mr. Ritter's argument that the actuarial instruments and statistical theories do not satisfy *Frye*. In *Thorell*, the Washington Supreme Court considered whether actuarial instruments may be admitted at commitment trials to aid in the prediction of future dangerousness. 149 Wn.2d at 753. The Court held actuarial tests generally admissible and not subject to *Frye* but still subject to the strictures of ER 403, 702 and 703. *Id.* at 725-26. Though the Court's holding purports to apply broadly to any actuarial test, the decision cannot stand for the overly broad proposition that any statistical analysis deemed by its authors or subsequent users to be an "actuarial test" is per se not subject to *Frye*, which requires that scientific evidence have achieved general acceptance. Such a broad interpretation of *Thorell* would allow a plethora of unreliable evidence to come in under the guise of a generally accepted actuarial test. The tests and theories at issue here are not generally accepted in the field and should be subject to *Frye*'s reliability standards.

a. Standards of admissibility require scientific evidence be generally accepted among qualified experts, helpful to the trier of fact, of the type relied upon by experts in the field, and not substantially more prejudicial than probative.

Evidence Rule 402 requires the exclusion of irrelevant evidence. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Further, evidence that is more unfairly prejudicial than probative is inadmissible under ER 403.

In determining the reliability and admissibility of scientific evidence, Washington courts apply the *Frye* standard. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 600-01, 260 P.3d 857 (2011); *State v. Greene,* 139 Wn.2d 64, 70, 984 P.2d 1024 (1999); *see Frye*, 293 F. at 1014. *Frye* directs courts to apply certain criteria in assessing the reliability and admissibility of expert testimony. Evidence based on a scientific theory or principle must have "achieved general acceptance in the relevant scientific community" before it is admissible at trial. *State v. Gentry*, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995). "[T]he core concern . . . is only whether the evidence being offered is based on established scientific methodology." *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993).

Frye hearings are unnecessary when a scientific practice has been previously found to be generally accepted in the scientific community. *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994). However, general acceptance may change over time and the *Frye* admissibility determination must take into account any recent changes in the perceived reliability of the instrument or theory in question. *State v. Kunze*, 97 Wn. App. 832, 853, 988 P.2d 977, *rev. denied*, 140 Wn.2d 1022 (2000). General acceptability is not satisfied "if there is a significant dispute between qualified experts as to the validity of scientific evidence." *Id.* (citing *Cauthron*, 120 Wn.2d at 887).

In addition, ERs 702 and 703 limit the introduction of expert testimony. Under rule 702, expert evidence may be admitted only if "helpful to the jury in understanding matters outside the competence of ordinary lay persons." *Anderson*, 172 Wn.2d at 600. Rule 703 requires that the facts or data relied on by an expert must be admissible into evidence unless they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

This court normally reviews a lower court's evidentiary rulings for an abuse of discretion. *E.g.*, *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). However, admissibility of evidence under

Frye is a mixed question of law and fact subject to de novo review. *Anderson*, 172 Wn.2d at 600 (citing *State v. Copeland*, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996)).

b. The statistical theories and actuarial instruments relied on by the State did not satisfy these standards.

Here, the contested statistical theories and actuarial instruments did not satisfy the above evidentiary standards.

i. The SRA: FV

The Structured Risk Assessment: Forensic Version (SRA: FV) is a statistical theory first introduced in 2010 at an internal training session for the Association for the Treatment of Sexual Abusers. CP 645; RP 592 (prosecutor concurring SRA: FV is not an actuarial but a "structured method"). This instrument is not premised on an accepted body of technology and is not accepted as a "best practice" for the estimation of sexual recidivism. CP 823. The SRA: FV depends upon another actuarial instrument, the Static-99R, the unreliability of which is discussed further below. *E.g.*, CP 823-24; RP 904. The method has not been published in a peer-reviewed scientific journal. RP 590, 905-06, 995; CP 824. It is too new and untested to be considered generally accepted in the field.

Though no peer-reviewed article approves of the SRA: FV, a paper has been accepted for publication that demonstrates the falsity of the theory underlying a critical step in the SRA: FV test. CP 826. An expert in the field, Richard Wollert, Ph.D, asserts that such an error requires the presumption that other errors abound in the SRA: FV. CP 826. Moreover, Dr. Arnold admits he does not have information on key standards relied on in the SRA: FV and thus is unable to thoroughly judge reliability. RP 907-08.[9]

Further, the instrument is based upon an outdated Massachusetts sample group with a recidivism rate of 25 percent, which is more than three times higher than the current 7 percent national sex offender recidivism rate. CP 823 ¶ 3, 824-25; RP 994.[10] No cross-validation of the actuarial tables associated with the SRA: FV has been documented. CP 825; RP 995-96. In other words, the theory has not been tested on an independent population to ensure the results are scientifically valid. *E.g.*, RP 590; *see* RP 837-38 (Arnold noting he would not rely on revised actuarial that had not been cross-validated). Additionally, no

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[9] Dr. Arnold testified on redirect that he uses data that is up-to-date, even if not subject to peer-review publication or other testing. RP 1004.

[10] The current recidivism rate in Washington State is only 3.7 percent. RP 842-43.

data has been produced to show the accuracy of the method across varied users (a.k.a. inter-rater reliability). CP 652-55.

"Overall, the SRA:FV is not grounded in an accepted body of technology for the development of an instrument for estimating sexual recidivism risk." CP 826. It relies on "many unverified assumptions that are purely speculative." CP 826. Critically, "[t]esting subsequent to the promulgation of the SRA:FV has shown that some of these assumptions are wrong." CP 826. In sum, the "SRA:FV system . . . does not meet the criteria that define a reliable and valid measurement technique for the accurate estimation of sexual recidivism." CP 826; *accord* RP 1118 (testimony of Halon that SRA: FV not appropriate for analyzing recidivism risk).

Nevertheless, the State's expert, used this "new" statistical model in assessing Mr. Ritter's risk profile. RP 781-83, 809-10.

ii. The Static-99R

The Static-99R actuarial is subject to similar dispute. It has been criticized because it uses base recidivism rates that have changed over time and because it has been used in jurisdictions without normalization on a target population. CP 726. As Dr. Arnold acknowledged, the Static-99R is based on older data from England and

Canada. RP 840-41. The recidivism rate for a routine sample in the Static-99R is 15 percent whereas the current recidivism rate in Washington is 3.7 percent. RP 842-43. In 2008, the developer of the Static-99R acknowledged the base recidivism rate issue as significant. CP 726. Relying on new data, the developer found the Static-99R produced abnormally high results. CP 726-27. Like the SRA: FV, the Static-99R has not been fully published in a peer-reviewed journal. RP 982-83 (first part published online in August 2011).

Even more critical to this case, the Static-99R is to be applied cautiously to those whose offenses occurred between 16 and 18 years of age and not at all to those under 16. RP 910.

Despite these serious flaws, the State's expert relied on the Static-99R and the Static 2002 in formulating his opinion as to Mr. Ritter. RP 766, 774-75. According to Dr. Arnold, Mr. Ritter fell into the high risk category on both tests. RP 774-75.

iii. The MnSOST-R

The MnSOST-R is not premised upon accepted actuarial technology. CP 822. Faulty sampling methods caused inflated risk estimates and there is no cross-validation sample. CP 822. Research leading to the development of the MnSOST-R was never published in a

peer-reviewed journal. CP 822-23. Significantly, the Minnesota Department of Corrections, who originally developed the MnSOST-R, has since abandoned the instrument. CP 822. It is not generally accepted in the field.

Though Dr. Arnold used to rely on the MnSOST-R, including when he evaluated Mr. Ritter prior to the probable cause hearing, even he no longer considers the actuarial to be reliable. RP 836-37. Dr. Arnold noted that he would not use the newer version of this test because it had not been cross-validated. RP 837-38. Nonetheless, he continued to rely on it in evaluating Mr. Ritter. RP 966-68.

c. The trial court erred by admitting evidence that failed to comply with *Frye* and the Rules of Evidence, requiring reversal of Mr. Ritter's commitment order.

As demonstrated, the above statistical theories and actuarial instruments are unreliable, not peer reviewed, not generally accepted in the scientific community, and for these reasons would not be helpful to the trier of fact. Further, the admission of such unscientific tests and results is irrelevant and the danger of unfair prejudice substantially outweighs any probative value. The trial court accordingly erred by admitting them at Mr. Ritter's indefinite commitment trial. At the very least, the court should have held a *Frye* hearing to determine

admissibility as requested by Mr. Ritter's counsel. These failures were an abuse of discretion and commitment should be reversed.

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

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.

Using his statistical models, Dr. Arnold testified here that Mr. Ritter falls into a category of a 42 percent recidivism rate over 10 years. RP 831. In other words, 42 percent of a statistical set of offenders Dr. Arnold assessed to be similar to Mr. Ritter reoffends within 10 years. Though 42 percent is not more likely than not, Dr. Arnold justified

bumping Mr. Ritter over the 50 percent threshold because (1) sex offenses are underreported and (2) the statistical models he relied on only projected out 10 years but Dr. Arnold is concerned with considering an entire lifetime. RP 831-33. Thus, in Dr. Arnold's opinion, the better estimate is a 51 percent chance of recidivism—or just slightly more likely to reoffend than not. RP 833. However, as Dr. Arnold conceded, these percentages simply put Mr. Ritter in a "bin that has a certain recidivism rate" but does not provide his precise likelihood of reoffending. RP 968, 971-72 (the percentage represents "the percent of the individuals within a group who were charged or convicted of a new sexual crime within a specific timeframe"). "He's a member of a group. He could be higher; he could be lower." RP 968.[11]

This 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

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[11] A study that looked at the capability of making predictions on an individual basis, i.e. extrapolating from a group recidivism rate to an individualized risk, concluded "on the basis of empirical findings, statistical theory and logic, it is clear that predictions of future offending cannot be achieved with any degree of confidence in the individual case." RP 1108-09.

the evidence." *Addington v. Texas*, 441 U.S. 418, 427, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). The Constitution requires proof of present dangerousness by at least 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, 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.[12]

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 ("[A]lthough 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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[12] 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 Washington Supreme 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, 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 a mere preponderance standard.

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. But 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.

5. Cumulative error denied Mr. Ritter his constitutional right to a fair trial.

Each of the errors discussed in the sections above require reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Ritter a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *In re Det. of Coe*, __ Wn.2d __, 286 P.3d 29, 45 (2012) (applying same to civil commitment trial). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the errors set forth above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict.

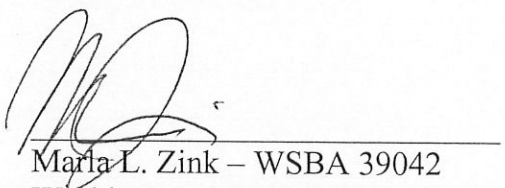
Mr. Ritter's commitment should be reversed on this independent ground.

F. CONCLUSION

Mr. Ritter's commitment violates due process and should be reversed. He was committed based on conduct arising before his capacity to control volition had developed, and his commitment is predicated on an overly broad and imprecise personality disorder. The trial court also erred in admitting unreliable statistical theories and actuarial tests over Mr. Ritter's objection. Moreover, the "more likely than not" standard is unconstitutional;. Alternatively, even if no one of these errors is sufficient standing alone to require reversal, cumulative error compels reversal of the commitment order.

DATED this 19th day of November, 2012.

Respectfully submitted,



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

IN RE THE DETENTION OF:	)	
	)	COA NO. 30845-6-III
STEVEN RITTER	)	
	)	
	)	
APPELLANT.	)	
	)	

CERTIFICATION OF SERVICE

I, ANN JOYCE, CERTIFY THAT ON THE 19TH DAY OF NOVEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARAH SAPPINGTON OFFICE OF THE ATTORNEY GENERAL 800 5TH AVENUE, STE. 2000 SEATTLE, WA 98104-3188	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] STEVEN RITTER SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF NOVEMBER, 2012

x Ann Joyce