NO. 73223-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re Detention of

ROBERT LOUGH,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The delay of Mr. Lough's trial because of an intervening criminal trial and sentence cannot be excused.

The State argues the trial court acted within its sound discretion in delaying Robert Lough's trial over his objection for nearly four years and denying his motion to dismiss. Brief of the Respondent, at 12. This argument is contrary to the fundamental requirement of due process, which requires persons to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914)).

Washington's constitution requires justice in all cases to be administered "without unnecessary delay." Const. art I, § 10. RCW 71.09.050(1) requires an initial commitment trial to be held within 45 days of the probable cause hearing. Here, the nearly four year delay took place over the objection of Mr. Lough. CP 302.

Mr. Lough made clear objections to this delay. That Mr. Lough did not seek discretionary review for the delay is an argument without merit. Brief of the Respondent, at 15. Mr. Lough made timely objections when the trial was delayed and made a motion to dismiss

within 10 days of his return to court. CP 301. This argument is preserved for appeal and the court should address it on its merits.

In arguing that the stay was proper, the State examines the procedure a court should follow when a criminal trial is pending. Brief of Respondent, at 17. This is not, however, the relevant procedure because Mr. Lough did not have a criminal trial pending the entire time his trial was stayed, but was rather serving a sentence for most of that time. The State is correct is citing *King v. Olympic Pipeline* to support the argument of what a court should do when a trial is pending, but is incorrect to argue this justifies delay beyond the pendency of the criminal court proceedings.

In fact, *King* makes clear criminal proceedings does not prevent the civil proceedings from going forward. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 352, 16 P.3d 45 (2000), *as amended on reconsideration* (Feb. 14, 2001). *King* recognizes courts must engage in a balancing process to determine whether a stay should be granted. *Id*. at 353. Trial courts are required to conduct a case-by-case analysis "in light of the particular circumstances and competing interests involved in the case." *Id*. at 353 (citing *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 901 (9th Cir. 1989)). In order to establish grounds for the

stay, the moving party must establish a clear case of hardship or inequity in being required to go forward. *Id*. at 350.

Once Mr. Lough had pled guilty and had been sentenced, the State's arguments in the trial court, including that he might assert his right to remain silent, and their arguments on Appeal, which now includes the argument that the civil commitment proceeding could have been made moot had Mr. Lough been sentenced to a term of life without parole, evaporated. Brief of Respondent, at 20-21. Likewise, the State's argument Mr. Lough caused the delay by committing a new crime cannot justify the nearly four year delay in bringing Mr. Lough to trial. Brief of Respondent, at 22.

The State has failed to establish grounds for a stay. The failure to identify a clear case of hardship or inequity in being required to go forward on the merits justifies dismissal. *See, King*, 104 Wn. App. at 350. Mr. Lough's speedy trial rights were violated. Mr. Lough asks this court to dismiss this matter.

2. The diagnosis created by the State's expert is an insufficient basis to justify continuing to confine Mr. Lough.

The State argues a diagnosis not found in psychology, based upon anti-social personality disorder and supplemented with diagnoses for other disorders which do not cause a person to have difficulty controlling sexually violent behavior is sufficient for commitment. Brief of Respondent, at 24. Due process requires more. The State must not only establish Mr. Lough suffers from a personality disorder, but that it is a mental abnormality which causes him to have difficulty controlling his sexually violent behavior. *In re Det. of Thorell*, 149 Wn.2d 724, 736, 740-41, 72 P.3d 708 (2003). The State has failed to meet this standard.

"Mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). While there is leeway in defining when a mental abnormality or personality disorder makes an individual eligible for commitment as a sexually violent person, the diagnosis must be medically justified. *See Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct.

867, 151 L.Ed.2d 856 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (States must prove not only dangerousness but also mental illness in order to "limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control"); *Thorell*, 149 Wn.2d at 732, 740-41 (State must present expert testimony and proof beyond a reasonable doubt that offender has serious, diagnosed mental illness which causes him difficulty controlling his behavior).

Mr. Lough was diagnosed with anti-social personality disorder. Justice Kennedy's caution that anti-social personality disorder is an insufficient basis for commitment rings true on the testimony presented against Mr. Lough. *See, Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring). The State was able to establish Mr. Lough had "an attitude" where he could "violate the boundaries and spaces of others". 1/27/15 AM RP 61. The disorder did not establish this was likely to cause Mr. Lough to have difficulty not being able to sexually reoffend. Although Washington has not directly addressed whether anti-social personality disorder is sufficient, other states have found "evidence that a respondent suffers from anti-social personality disorder cannot be used to support a finding that he has a mental abnormality." *State v.*

Donald DD., 24 N.Y.3d 174, 177, 21 N.E.3d 239, 996 N.Y.S.2d 610 (2014). The State did not address these cases in its response brief.

The State also failed to address the testimony of its own expert, where he stated numerous times Mr. Lough was willing to break the law. 1/15/15 RP 143, *see also id.* at 109, 112, 147-48, 153, 1/26/15 RP 43, 1/2/7 RP 32. Because RCW 71.09 requires the State to prove the likelihood to commit a sexually violent offense is based upon an inability to control behavior, this diagnosis is constitutionally insufficient to support indefinite commitment. *Crane*, 534 U.S. at 413.

That Mr. Lough suffers from other disorders which also do not cause a person to commit sexually violent acts does not improve this diagnosis, despite the State's argument to the contrary. Respondent's brief, 28. None of the diagnoses which the State identifies Mr. Lough suffers from meet the requirements of due process. None of them contribute to his propensity for sexual violence. Because the State has failed to meet this standard, it has failed to prove Mr. Lough suffers from the mental abnormality it alleges he suffered from at trial. Because the State has failed to meet this standard, he is entitled to dismissal.

There is a critical distinction between the dangerous recidivist who chooses to commit a sexually violent offense, or simply a violent offense, and a person who will commit a sexually violent act due to a mental disorder. *Hendricks*, 521 U.S. at 358; *see also Thorell*, 149 Wn.2d at 732. The State's expert did not provide a diagnosis which would cause Mr. Lough to lack the ability to control his sexually violent behavior, instead focusing upon Mr. Lough's willful behavior and his general propensity towards violence. Because the State never established a mental disorder which would cause Mr. Lough to lack the volitional control to refrain from committing a sexually violent act, this Court must find Mr. Lough's due process rights were denied. *Thorell*, 149 Wn.2d at 736.

3. Proof of likelihood to commit a violent offense is not sufficient to prove likelihood to commit a sexually violent offense.

The State argues it met its burden in establishing Mr. Lough is likely to commit a sexually violent if released from confinement. Brief of Respondent, at 33-34.

The State argues the actuarial tables were helpful in determining Mr. Lough's likelihood to commit a sexually violent offense. Respondent's brief, at 37. This is not supported by the testimony. While the State's expert testified extensively about the use of actuarial tables, he stated that the instruments could not answer the question of whether Mr. Lough met the definitions in RCW 71.09. 1/29/15 RP 96.

It is important to emphasize that none of the tools used by the State were designed to measure the likelihood a person would commit a sexually violent offense if released. The Static 99-R is a tool used by corrects to manage offenders. 1/27/15 PM RP 16-17. The State's expert agreed it was not a tool used to determine the likelihood a person will commit a sexually violent offense in the future. 1/27/15 PM RP 20. At trial, both Mr. Lough and the State agreed the Static 99-R is an incomplete tool to determine the future likelihood of a person committing a sexually violent act. 2/15/15 RP 17, 45.

The State's use of the VRAG-R also does not measure future likelihood to commit a sexually violent offense. The State continues to argue that because sexually violent offense is included in the definition of violent offense, that this tool demonstrates a person who is likely to commit a violent offense in the future is therefore likely to commit a sexually violent offense. Respondent's brief, at 37. This is not consistent with the evidence introduced at trial. The VRAG-R only establishes whether a person is likely to commit a violent offense if released. While Dr. Richard Packard attempted to avoid this distinction in his testimony, it does not exist within the tool. 1/27/15 RP 49; 1/28/15 RP 189. In fact, the VRAG-R was not designed to address the likelihood a person would commit a sexually violent offense. 1/29/15 RP 104.

The State also argues Dr. Packard's clinical judgment is sufficient to establish the likelihood Mr. Lough will commit a future sexually violent offense if released. Respondent's brief, at 38. Again, the State's expert agreed that the more clinical judgment an assessor uses, the lower the predictive accuracy of the assessment will be. 1/28/15 RP 182-83. The overconfidence of clinical judgment is well established in scientific literature. Howard Garb, Patricia Boyle,

Understanding Why Some Clinicians Use Pseudoscientific Methods: Findings from Research on Clinical Judgment, Science and Pseudoscience in Clinical Psychology, 20 (2015). The State's expert also agreed that studies have indicated an experienced clinician has no greater ability to predict future outcomes than graduate students. 2/2/15 RP 28.

Where actuarial evidence does not support a finding of future likelihood to commit a sexually violent offense, clinical judgment finding to the contrary is also insufficient. The "coin toss" that clinical judgment provides is an insufficient basis for to find the State met it burden and proving Mr. Lough is likely to commit a sexually violent offense if released.

Because the State was only able to establish Mr. Lough is likely to commit a violent offense if released from custody, he is entitled to release. Mere dangerousness cannot justify indefinite and involuntary civil commitment. *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 412. Due process requires the State to prove an individual is currently dangerous and likely to commit a sexually violent offense before they may be indefinitely confined. *See In re Det. of Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993) (citing *Addington v. Texas*, 441 U.S. 418, 99 S.Ct.

1804, 60 L.Ed.2d 323 (1979)); *Foucha v. Louisiana*, 504 U.S. 71, 82-82, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

4. Insufficient evidence exists to distinguish Mr. Lough from any other person who is likely to commit a future offense.

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

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

5. The V-RAG is not a reliable tool to measure future likelihood to commit a sexually violent offense.

The State argues this Court should not consider the admissibility of the V-RAG because trial counsel did not litigate this issue below. Respondent's brief, at 40. To the contrary, Mr. Lough moved to exclude the use of the VRAG-R arguing it did not meet the standards for reliability, was not relevant, and had the potential to mislead the jury. CP 905. The court considered the issue and denied Mr. Lough's motion to exclude this testimony. CP 1291; 1/26/15 RP 57-58. While the State argues only one page of Mr. Lough's trial brief was devoted to exclusion of this instrument, the standard of whether an issue may be reviewed on appeal does not turn on the length of the argument, but whether there was an opportunity for the court to correct the error. *State v. Scott,* 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Here, Mr. Lough's argument was considered by the court after both parties had an opportunity to be heard and was denied. 1/26/15 RP 57-58. Mr. Lough preserved the issue of whether the court erred in allowing the State to introduce evidence regarding the results of the VRAG-R. Even without the objections made by Mr. Lough, this court could still reach the issue on the manifest error standard, because use of this test by the State impacted Mr. Lough's right to a fair trial. RAP 2.5(a)(3).

While the State argues that this Court has found actuarial tables to be generally reliable, the State does not address whether the VRAG-R has been subject to such an examination, instead only noting that a different test, the VRAG, had been found to be reliable by the court. Respondent's brief, at 42.

That is not the case here. Even though the trial court found the VRAG-R to be a new scientific instrument, it admitted the testimony regarding the VRAG-R because it fell "in the field of actuarial instruments." 1/26/15 RP 58. After finding the test to be novel, especially where Mr. Lough challenged its reliability, the trial court erred in not holding a hearing before admitting the evidence. *See*, *Det. of Ritter v. State*, 177 Wn. App. 519, 521, 312 P.3d 723 (2013), *review denied sub nom.*, *In re Det. of Ritter*, 180 Wn.2d 1028, 331 P.3d 1172 (2014).

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

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

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

The VRAG-R is not designed to determine whether someone will commit a predatory act of sexual violence if released from custody. 1/28/15 RP 104. Although the State uses the phrase "including sexually violent" to demonstrate the VRAG-R's relevancy, there is no evidence that the VRAG-R was ever designed to be used to determine likelihood to commit a future sexually violent act. 1/29/15 RP 96. The VRAG-R is only able to answer the question of whether a person would commit a violent offense. This is not relevant to whether commitment should be justified under RCW 71.09. Because the VRAG-R fails to provide any

distinction between violent and sexually violent offenses, the VRAG-R fails to meet the test for minimal relevance.

Even if relevant, the evidence should have been excluded because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and of misleading the jurors. ER 403. While the results of assessment tools have been admitted despite their prejudicial nature, these tools have largely assessed the likelihood a person would commit a future sexually violent offense. *See, Thorell*, 149 Wn.2d at 758. The VRAG-R does not assess the likelihood a person will commit a future sexually violent offense, but rather the likelihood they will commit a future violent offense. 1/27/15 RP 24. Dr. Packard used the VRAG-R to find the likelihood Mr. Lough would commit a violent crime within the next fifteen years to be 90 percent. 1/27/15 RP 25. The fact that the VRAG-R establishes Mr. Lough is likely to commit future violent acts if released from custody is highly prejudicial. In addition to being unfairly prejudicial, it misleads the jurors because it focuses upon danger rather than sexual violence. The unfair prejudice results in a compromised verdict and requires a new trial.

6. The right to present a defense was denied when the trial court prevented Mr. Lough from consulting with his expert regarding the testimony of others.

The State argues the court acted within its discretion when it excluded Mr. Lough from consulting with his experts with regard to the testimony of other witnesses. Respondent's brief, at 44. While the State cites ER 615 to support this assertion, it fails to address the due process violation this order caused.

The ability to cross examine witnesses and to offer testimony is a basic due process right. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This right is only made meaningful where counsel is able to utilize the tools necessary to prepare an effective cross examination of the State's witnesses. Fundamental fairness requires that when a person's liberty interest is at stake, they must be provided with meaningful opportunity to present a defense. *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53 (1985). The restriction of the court on when Mr. Lough could consult with his experts infringed upon this liberty.

The State also argues Mr. Lough failed to show the prejudice which resulted from this violation. Respondent's brief, at 46. To the

contrary, Mr. Lough highlighted that, in forensic cases such as this, consultation with an expert is critical to mounting a defense. The court restricted Mr. Lough's ability to consult with his expert because it would not be productive. 12/19/14 RP 42. But preventing Mr. Lough from consulting with his expert with regard to the important forensic testimony presented at trial infringed upon his right to a fair trial and placed an unconstitutional restraint upon his ability to present his defense. Mr. Lough's attorneys are not experts in the likelihood to commit a sexually violent offense and relied upon experts to prepare their defense. The failure to allow them to continue to rely upon those experts prejudiced Mr. Lough and requires reversal.

B. CONCLUSION

Mr. Lough is entitled to relief for the errors argued above. Mr. Lough respectfully requests this court grant him the relief requested.

DATED this 22nd day of July 2016.

Respectfully submitted,

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DIVISION ONE

IN RE THE DETENTION OF	)	
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ROBERT LOUGH,	)	NO. 73223-4-I
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APPELLANT.	)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JULY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JULY, 2016.

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