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DIVISION II

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NO. 39785-4-II

STATE OF WASHINGTON

BY

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

THOMAS PAUL WILLIAMS,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

AMENDED BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

A. Procedural History

On December 14, 2001, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Thomas Paul Williams (hereafter, Williams) pursuant to RCW 71.09 *et seq.* CP 1-2. On February 1, 2002, the court found probable cause to believe Williams is an SVP and ordered him held for an "evaluation pursuant to the Court's order and RCW 71.09.040(4)." CP 46-48.

In March 2002, the State filed a motion pursuant to CR 35 requesting that the court order Williams to submit to a mental examination by the State's expert, Dr. Richard Packard. CP 52-57. This motion was based, in part, on Dr. Packard's declaration outlining the importance of the examination in order to assess Williams' current mental condition and risk. CP 58-61. On April 19, 2002, after hearing argument from counsel, the court found good cause to order the mental examination. CP 69-70. The court ordered Williams to undergo a mental examination on or before June 14, 2002, to consist of a clinical interview and standardized psychological testing as deemed appropriate by Dr. Packard. CP 69-70.

In May 2002, the State filed a motion for sanctions pursuant to CR 37(b)(2) based on Williams' refusal to meet with Dr. Packard after the

court's discovery order. CP 481-86.¹ On June 7, 2002, the court found Williams in contempt of court for refusing to undergo the examination. CP 489. Williams purged the contempt by undergoing the evaluation on June 26-27, 2002. CP 490.

After the examination was ordered, the Washington Supreme Court held that "the rules of statutory construction require a finding that the State is not entitled to a CR 35 mental examination[.]" *In re Detention of Williams*, 147 Wn.2d 476, 479, 55 P.3d 597 (2002).² The Court held that prior to commitment, the mental examination by the State's expert is limited to the evaluation required under RCW 71.09.040(4). *Id.* at 491. The interview conducted pursuant to CR 35 was subsequently suppressed by the trial court. CP 181.

Over the next several years, Williams filed multiple requests for trial continuances which were granted by the court. *See* CP 495-97; 505-15; 526.³ Trial was delayed by Williams for a variety of reasons, including: Williams' dissatisfaction and rejection of multiple experts appointed on his behalf; his refusal to cooperate with the State's expert;

¹ Respondent filed a Supplemental Designation of Clerk's Papers and Exhibits with the Superior Court and is filing this amended brief with notations to the record upon receipt of the Index from the court.

² This opinion was issued on October 10, 2002 and involves Eddie Leon Williams, not the Appellant, Thomas Paul Williams.

³ The referenced documents represent just a sampling of Williams' continuance requests over the years.

failure to timely disclose witnesses; and his refusal to work with his own attorney, resulting in the appointment of different counsel. CP 487-88; 494-512; 516-18. In 2005, Williams requested the trial be continued pending resolution of the child pornography charges he was facing in Pierce County. *See* CP 513-15. Although the State objected to yet another trial continuance, as it had done in the past, the court granted the request. CP 491-93; 498-504; 516-18. Williams subsequently filed multiple continuance requests with multiple waivers of time for trial. CP 519-527.

In April 2009, the State filed a motion to compel Williams to participate in a psychological evaluation by Dr. Packard pursuant to RCW 71.09.040(4). CP 183-206. This motion was supported by a declaration from Dr. Packard. CP 204-06. On April 16, 2009, after considering briefing and argument from counsel, the trial court ordered that Williams "shall submit to an examination by Dr. Packard" to "consist of a clinical interview and psychological testing as deemed appropriate by Dr. Packard." CP 211-12. Dr. Packard subsequently interviewed Williams on June 10-11, 2009. 9/3/09 RP at 123.

Williams' SVP trial commenced on August 31, 2009. *See* 8/31/09 RP. On September 15, 2009, a jury committed Williams as an SVP. CP 474-75; 9/15/09 RP at 1123. The Court ordered that Williams shall be

committed to the custody of the Department of Social and Health Services (DSHS) for control, care, and treatment until such time as his mental abnormality and/or personality disorder has so changed that Williams is safe to be conditionally released to a less restrictive alternative or unconditionally discharged. CP 475.

B. Sexually Violent Predator Trial

1. Prior Sex Offenses

Williams has a history of engaging in sexual behavior with non-consenting individuals. 9/3/09 RP at 135. He has been convicted of committing two sexually violent offenses. 9/10/09 RP at 801-02, 825; Ex. 4, 5, 6, 9, 10, 11; *see* RCW 71.09.020(17).

In July 1981, Williams brutally raped Joyce C., his 21-year-old ex-girlfriend. 9/3/09 RP at 135; 9/2/09 RP at 45-52; Ex. 4, 5. Williams drove to a dark, secluded road in the woods, dragged Joyce out the car, and repeatedly beat her in the face and chest. 9/2/09 RP at 59-61. He then ordered her to remove her clothes and raped her orally, vaginally, and anally over the next several hours. 9/2/09 RP at 53-70. Joyce described Williams as "vicious" and "violent to the point where I've never ever seen another human being." 9/2/09 RP at 64. Throughout the rapes, Williams repeatedly called Joyce a "whore" and "bitch" and told her that she deserved what he was doing to her. 9/2/09 RP at 66-68.

When Williams demanded more oral sex, Joyce told him that she could not open her mouth. 9/2/09 RP at 68. She was unable to open her mouth due to the swelling from the beating. 9/2/09 RP at 69. Williams responded by beating her more in her face and chest. 9/2/09 RP at 68-69. He then held a lighter to her face and looked at her injuries. 9/2/09 RP at 69. Afterwards, he became angry and violent again and raped her vaginally. *Id.* Joyce was screaming and crying. 9/2/09 RP at 70. She thought she was going to die and started to pray. *Id.* Williams gave Joyce her underwear to hold over her mouth to keep her quiet. 9/2/09 RP at 69-70. Joyce sustained numerous physical injuries as a result of the assault and rape, some of which are permanent. 9/2/09 RP at 74-76. Williams pled guilty to rape in the second degree by forcible compulsion for the offense involving Joyce.⁴ 9/10/09 RP at 801-02; Ex. 4, 5, 6.

In April 1996, Williams sexually assaulted a 12-year-old girl, Kaaren J. 9/10/09 RP at 821-25; Ex. 9, 10, 11. The State's expert, Dr. Richard Packard, testified about the non-consensual nature of the sexual contact:

[Kaaren] reported that Mr. Williams then grabbed her hand, forced it on to his penis, and rubbed her hand up and down on his penis. She told him she wanted to stop and leave, but he would not let her go. So here again we have a

⁴ Rape in the second degree by forcible compulsion is a sexually violent offense within the meaning of RCW 71.09.020(17).

forced contact with a non-consenting person.

9/3/09 RP at 136-37. Kaaren testified about the details of the sexual assault at trial.⁵ Williams pled guilty to child molestation in the second degree for this sexual offense.⁶ 9/10/09 RP at 825; Ex. 10, 11.

Williams also pled guilty to communicating with a minor for immoral purposes involving a 1996 incident with a 10-year-old boy, E.M.P. 9/10/09 RP at 825; Ex. 9, 10, 11. Dr. Packard testified about the non-consenting aspect of this incident as well as about other incidents involving E.M.P.'s 13-year old brother:

[E.M.P.] said that Mr. Williams then approached him, pulled down his shorts and touched his penis. He then reported that he told Mr. Williams, no, and that he wanted to go home. He stated Mr. Williams continued to hold him down and kept touching him. So again we have a forced sexual contact with a non-consenting person.

9/3/09 RP at 137-38. Dr. Packard also testified about another non-consensual encounter Williams had with an 11-year-old girl where he lifted up her shirt and exposed her breasts. 9/3/09 RP at 135-36. Williams was convicted of assault in the fourth degree for this incident. *See* 9/10/09 RP at 906; Ex. 7, 8.

⁵ Kaaren's testimony was presented via video deposition for the jury at trial. 9/10/09 RP at 904; CP 395-426.

⁶ Child molestation in the second degree is a sexually violent offense within the meaning of RCW 71.09.020(17).

2. Testimony from Dr. Richard Packard

At trial, the State offered the expert testimony of Dr. Richard Packard, a licensed psychologist and certified sex offender treatment provider. 9/2/09 RP at 82-83. Dr. Packard has considerable experience in the evaluation, diagnosis, treatment, and risk assessment of sex offenders. 9/2/09 RP at 83-106. Dr. Packard has been evaluating individuals under Washington's SVP Act since 1993. 9/2/09 RP at 105-06; 9/3/09 RP at 115-16.

The State retained Dr. Packard to determine whether Williams met the statutory criteria as an SVP. 9/2/09 RP at 106. As part of his evaluation, Dr. Packard interviewed Williams over a two-day period in June 2009⁷ and reviewed extensive official records involving Williams' history, including police reports, victim statements, treatment records, court records, prison records, and psychological evaluations. 9/3/09 RP at 120-26. As a result of that evaluation, Dr. Packard concluded to a reasonable degree a psychological certainty that Williams suffered from mental abnormalities and a personality disorder that cause him serious difficulty controlling his behavior and make him likely to engage in

⁷ Dr. Packard spent two days interviewing Williams and conducting psychological testing. 9/3/09 RP at 124-26. At trial, Dr. Packard testified about this interview, which he conducted pursuant to RCW 71.09.040(4). Dr. Packard did not testify about any of the information gleaned during his prior 2002 interview that was compelled under CR 35 and subsequently suppressed by the trial court. His trial testimony consisted exclusively of the 2009 interview.

predatory acts of sexual violence if not confined in a secure facility.
9/3/09 RP at 127-29, 220-21, 277.

Specifically, Dr. Packard diagnosed Williams with two mental abnormalities: Paraphilia Not Otherwise Specified (NOS), Non-consent⁸ and Pedophilia, sexually aroused to females, non-exclusive type. 9/3/09 RP at 128, 220-21. He also diagnosed Williams with Personality Disorder NOS with narcissistic and antisocial features and Alcohol Dependence in a controlled environment. 9/3/09 RP at 128-29, 171-72, 196-97. Dr. Packard based these diagnoses on the Diagnostic and Statistical Manual (DSM),⁹ which is a manual of psychological disorders that was written as a way for clinicians to communicate about disorders. 9/3/09 RP at 130-31. The DSM is not a "science," but rather an attempt to periodically represent some commonly held beliefs. 9/4/09 RP at 306.

The criteria for a paraphilia are explicitly listed in the DSM and involve recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving objects, the suffering or humiliation of others, or children or other non-consenting persons. 9/3/09 RP at 133-34. The

⁸ The diagnosis of Paraphilia NOS (Non-Consent) is also referred to in the literature as Paraphilia NOS (Rape).

⁹ The current version of the DSM is known as DSM-IV-TR, meaning 4th Edition, Text Revision. It was published in 2000. 9/4/09 RP at 302, 306-07. The experts relied on this current version at trial. References in this brief to the "DSM" are referring to the current version of the DSM.

second criterion of a paraphilia is that it occurs over a period of at least six months. 9/3/09 RP at 134. The third criterion is that it causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. *Id.* Thus, a paraphilia involves abnormal arousal that continues over time and has a cost associated with it. 9/3/09 RP at 134-35.

Although there are hundreds of different paraphilias, the DSM only lists eight specific paraphilias. 9/3/09 RP at 132. The DSM then includes a category for coding paraphilias that do not meet the criteria for any of the specific categories. 9/3/09 RP at 132-33; 9/8/09 RP at 409-10. The paraphilias that are not specifically listed are categorized as Not Otherwise Specified (NOS).¹⁰ 9/3/09 RP at 133. If a person is diagnosed with Paraphilia NOS, the evaluator should specify what the person is aroused to. 9/3/09 RP at 133. Williams' diagnosis involves arousal to non-consenting persons, otherwise known as Paraphilia NOS, Non-consent. 9/3/09 RP at 133-34; 9/8/09 RP at 409.

Dr. Packard testified in detail about the evidence he relied on in support of his Paraphilia NOS, Non-consent diagnosis for Williams.

¹⁰ The Paraphilia NOS section of the DSM lists seven examples of paraphilias that would qualify under the Paraphilia NOS diagnosis. 9/8/09 RP at 410-11. The DSM states that these "examples include, but are not limited to": necrophilia (dead bodies), partialism (exclusive focus on body parts), zoophilia (animals), telephone scatologia (obscene phone calls), coprophilia (feces), klismaphilia (enemas), and urophilia (urine). *Id.*

9/3/09 RP at 135-53.¹¹ The evidence included a variety of sexual behaviors over the years with non-consenting persons. 9/3/09 RP at 135-53. Dr. Packard described how Williams met all of the DSM criteria for Paraphilia NOS. 9/3/09 RP at 133-53. Dr. Packard also discussed research studies indicating that certain individuals have an arousal pattern specifically to non-consensual sex. 9/8/09 RP at 434-35. He testified that the kinds of diagnoses applied in these cases, including paraphilias, are reasonably reliable. *See* 9/8/09 RP at 493-95.

Dr. Packard also testified in detail about the various other diagnoses he assigned to Williams, including Pedophilia,¹² Personality Disorder NOS with antisocial and narcissistic features,¹³ and Alcohol Dependence.¹⁴ Dr. Packard outlined extensive evidence that supported his pedophilia diagnosis, including: the sexual assault of 12-year-old Kaaren J.;¹⁵ sketching his 11-year-old niece in the nude;¹⁶ pulling up the shirt of

¹¹ Additional testimony from Dr. Packard regarding paraphilias is located at 9/3/09 RP at 167, 170, 220-24; 9/8/09 RP at 408-12.

¹² Dr. Packard's testimony regarding Pedophilia is located at 9/3/09 RP at 155-71.

¹³ Dr. Packard's testimony regarding Williams' personality disorder is located at 9/3/09 RP at 128-29, 171-73, 180-96.

¹⁴ Dr. Packard's testimony regarding Alcohol Dependence is located at 9/3/09 RP at 196-202.

¹⁵ 9/3/09 RP at 159-62.

¹⁶ 9/3/09 RP at 159-60; 9/9/09 RP at 636.

an 11-year-old girl to expose her breasts;¹⁷ and possessing child pornography as recently as 2004.¹⁸

Further evidence of Williams' pedophilia presented at trial included: Williams' sexual contact with two young boys, ages 10 and 13;¹⁹ attempts in prison to get photographs of other inmates' children;²⁰ passing letters and drawings to a 13-year-old girl who was visiting her father at prison;²¹ and possession of a nude picture of a young boy while at the Special Commitment Center (SCC).²² In 2004, Williams was caught possessing child pornography at the SCC. 9/3/09 RP at 163-68; 9/10/09 RP at 843-44; Ex. 12, 13. Even Dr. Donaldson, Williams' expert, testified at trial that he generally considers "possession of child pornography to be, especially when they're incarcerated, to be an indication that the person does have a specific arousal to children." 9/8/09 RP at 539.

In explaining the various mental disorders he assigned to Williams, Dr. Packard stressed the importance of considering all of the diagnoses together:

It's not like people are divided into nice little boxes....

¹⁷ 9/3/09 RP at 161.

¹⁸ 9/3/09 RP at 163-64; 9/9/09 RP at 637; Ex. 12, 13.

¹⁹ 9/3/09 RP at 137-38.

²⁰ 9/3/09 RP at 223; 9/9/09 RP at 633.

²¹ 9/9/09 RP at 633.

²² 9/9/09 RP at 637.

[P]eople aren't boxes. So as I explain this, try to understand that these things all work together. It's not like there's a piece in a person that has this. And it's totally independent and separate from everything else. It's part of a combination, a part of a unity.

9/3/09 RP at 128. Dr. Packard explained that "people do not live in boxes" and it's the combination of these mental abnormalities that affect Williams and cause him serious difficulty controlling his behavior. 9/3/09 RP at 220-24. Dr. Packard also testified that Williams' mental disorders make him likely to engage in predatory acts of sexual violence if not confined in a secure facility. 9/3/09 RP at 224.²³

3. Testimony from Dr. Donaldson

At trial, Williams offered the testimony of his own expert, Dr. Theodore Donaldson. 9/8/09 RP at 524. Dr. Donaldson's testimony was based on a review of the records and a two-hour interview with Williams in 2004. 9/8/09 RP at 527-28.

While Dr. Donaldson did not agree with the Paraphilia NOS, Non-consent diagnosis that Dr. Packard assigned to Williams, he did not testify that the diagnosis was invalid or that it has not been accepted by the experts in the field. *See* 9/8/09 RP at 531-33. Dr. Donaldson testified that "many people do not think there is such a thing as paraphilic rape" and

²³ Dr. Packard's detailed testimony regarding Williams' risk assessment is located at 9/3/09 RP at 224-77.

that it is "very controversial in the literature." 9/8/09 RP at 531. However, he also testified that "[i]t's hard to believe that there aren't some rapists who are paraphilic." 9/8/09 RP at 531. Dr. Donaldson elaborated on this diagnosis within the framework of the DSM:

It's become fairly popular to use a notation called Paraphilia Not Otherwise Specified, Non-Consent, meaning this is a paraphilia that's not specified in the DSM, but the target of the paraphilia is non-consensual sex. Within the framework of the DSM, that means the person must be aroused by non-consent. And not simply aroused. And they don't care whether their victims consent or not. ... In [Williams'] case I didn't think there was any way to get to Paraphilia NOS for rape.

9/8/09 RP at 531-32.

Dr. Donaldson then discussed the "violent rape" of Joyce and how it had "more of the earmarks of an anger rapist," as opposed to someone who is aroused by the fact of the non-consent. 9/8/09 RP at 532; 9/9/09 RP at 658-59. Dr. Donaldson disagreed with applying the diagnosis of Paraphilia NOS, Non-consent to Williams because he only raped one adult woman. 9/9/09 RP at 659.

Thus, Dr. Donaldson disagreed with the application of the diagnosis to Williams, not with its validity as an actual diagnosis that exists amongst experts in the field. Dr. Donaldson agreed that a Paraphilia NOS, Non-consent/Rape diagnosis would be an appropriate diagnosis for certain individuals:

I think I mentioned on direct that I'm sure there are some rapists who are mentally ill who could probably be diagnosed as having some sort of compulsive disorder if not a paraphilia.

9/9/09 RP at 660. When asked if he agreed with his colleagues who wrote an article that it may be appropriate to apply a diagnosis of Paraphilia NOS to some dangerous sexual offenders whose offenses are driven by paraphilic sexual arousal patterns involving fantasies and urges to commit rape, Dr. Donaldson testified that he agreed with that within the context of the DSM if one finds a clear pattern. 9/9/09 RP at 660.

Dr. Donaldson testified that in his opinion there is "insufficient evidence" for both the diagnosis of Paraphilia NOS (Non-consent) and Pedophilia. 9/8/09 RP at 545, 562; 9/9/09 RP at 649. His alternate explanation was Williams was an "anger rapist" and an "opportunistic child molester." 9/8/09 RP at 532, 545. Dr. Donaldson described Williams' non-consensual sexual activity with children as "stupid horseplay." 9/8/09 RP at 544. Dr. Donaldson testified that his diagnosis of Williams was "dumb behavior." 9/8/09 RP at 544. He also believed that Williams has a "very wide-range preference" in sexual activity and described it as "eclectic." 9/9/09 RP at 631.

Although Dr. Donaldson did not believe that a personality disorder makes a person commit sex offenses, he agreed with Dr. Packard's

personality disorder diagnosis for Williams and opined that Williams' narcissistic features are prominent:

I think he has significant personality disturbance. I think it's more narcissistic than anything else. I would have probably diagnosed a full-blown narcissistic disorder.

9/9/09 RP at 579-80. Dr. Donaldson also agreed that Williams "definitely" has substance abuse problems. 9/9/09 RP at 580.

II. ISSUES PRESENTED

- A. **Whether the trial court violated Williams' right to privacy by ordering that he undergo a pretrial mental health evaluation under RCW 71.09.040(4)?**
- B. **Whether the trial court violated Williams' right to due process by allowing testimony regarding the diagnosis of Paraphilia Not Otherwise Specified, Non-consent?**

III. ARGUMENT

- A. **The Trial Court Properly Ordered a Pretrial Mental Health Evaluation Under RCW 71.09.040(4).**
 - 1. **Sex Offenders Have Diminished Privacy Rights.**

Williams' argument that courts "have limited authority to order mental health examinations [because] they invade an individual's right to privacy" is without merit. *See* Brief of Appellant at 6. Article I, Section 7, of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." However, the right to privacy is not absolute. *State v. Meacham*, 93

Wn.2d 735, 738, 612 P.2d 795 (1980). The State may "reasonably regulate this right to safeguard society or where it otherwise has a compelling interest." *Id. citing Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). Washington case law recognizes that sex offenders have reduced privacy interests because they threaten public safety. *In re Detention of Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999); *see also State v. Ward*, 123 Wn.2d 488, 502, 869 P.2d 1062 (1994).

Campbell addressed the issue of diminished privacy rights of convicted sex offenders facing SVP civil commitment proceedings. Campbell argued that the trial court violated his privacy rights by not sealing his court file. The Court's analysis was as follows:

Campbell's right to nondisclosure of intimate personal information by the State is not a fundamental right and is subject to diminishment when there is a legitimate state interest at stake. *O'Hartigan v. Department of Personnel*, 118 Wash.2d 111, 117, 821 P.2d 44 (1991). Case law recognizes that sex offenders threaten public safety and, therefore, have reduced privacy interests: 'Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.' *State v. Ward*, 123 Wash.2d 488, 502, 869 P.2d 1062 (1994) (quoting Laws of 1990, ch. 3, § 116).

The public has an undeniably serious interest in maintaining current and thorough information about convicted sex offenders. The specific modus operandi of sex offenders, preying on vulnerable strangers or grooming

potential victims, is markedly different from the behavior of other types of persons civilly committed and such dangerous behavior creates a need for disclosure of information about convicted sex offenders to the public. Grave public safety interests are involved whenever a known sex offender's tendency to recommit predatory sexual aggressiveness in the community is being evaluated. This substantial public safety interest outweighs the truncated privacy interests of the convicted sex offender.

Campbell, 139 Wn.2d at 355-56.

The cases cited to by Williams in support of his right to privacy argument are inapposite, as none of the cases involved a convicted sex offender with reduced privacy interest. *See* Brief of Appellant at 6-7. Moreover, the Fifth Amendment right against self-incrimination does not apply to respondents in SVP civil proceedings. *In re Young*, 122 Wn.2d 1, 50, 857 P.2d 989 (1993). In *Young*, the court noted that there are "good reasons to refuse the statutory right to remain silent to sexually violent predators[.]" *Id.* at 51. The Court indicated that their cooperation with the evaluation is essential due to the problems associated with proper diagnosis and treatment. *Id.* at 52.

"[I]t is irrefutable that the State has a compelling interest in treating sex predators and protecting society from their actions." *Id.* at 26 *citing Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Any potential privacy rights Williams may have had are trumped by the State's legitimate interest in protecting the public. At the

time of the filing of the SVP petition, Williams had previously been convicted of multiple sex offenses, including rape in the second degree by forcible compulsion, child molestation in the second degree, and communicating with a minor for immoral purposes. 9/10/09 RP, 801-02, 825; Ex. 4, 5, 6, 9, 10, 11. After the State filed the SVP petition, and while his SVP case was pending, Williams was caught possessing child pornography at the SCC and subsequently convicted of possession of depictions of a minor engaged in sexually explicit conduct. 9/10/09 RP, 843-44; Ex. 12, 13.

Williams, as a convicted sex offender, has diminished privacy rights and the State has a legitimate interest in protecting the public and obtaining a comprehensive SVP evaluation. Dr. Packard testified about the importance of conducting a personal interview of Williams and obtaining a comprehensive evaluation of him. 9/3/09 RP at 123-26. Consequently, a court-ordered evaluation of Williams pursuant to the SVP statute does not violate his right to privacy.

2. The Clear Language of the Statute and the Washington Administrative Code Anticipates a Comprehensive Evaluation Performed by an Approved Evaluator.

Williams argues that RCW 71.09.040 bars court-ordered pretrial mental health examinations. Brief of Appellant at 7. He is incorrect. The statutory and regulatory framework calls for a comprehensive evaluation

of the offender in order to determine if he is an SVP.

RCW 71.09.040(4) indicates that after a court finds probable cause to believe a person meets the definition of an SVP, the person must undergo an evaluation:

If the probable cause determination is made, the judge *shall* direct the person be transferred to an appropriate facility *for an evaluation* as to whether the person is a sexually violent predator. The evaluation *shall* be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services....

RCW 71.09.040(4) (emphasis added). Thus, the statute *requires* that an evaluation related to whether the person is an SVP be performed *after* the court finds probable cause. The explicit language in the statute indicates that the trial court must order an evaluation. The statute also indicates that DSHS is responsible for developing rules as to the scope of that examination.

DSHS has promulgated rules to effectuate the statute's requirement that the evaluation be conducted by a qualified expert. *See* WAC 388-880. These rules carry out the legislative intent of chapter 71.09 RCW, authorizing the department "to provide evaluation, care, control, and treatment of persons court-detained or court-committed to the sexual predator program." WAC 388-880-007.

A "professionally qualified" person includes a licensed

psychologist who has expertise in conducting evaluations of sex offenders and providing expert testimony relating to sex offenders. WAC 388-880-010, -033. The evaluation "must" include an "examination" of the alleged SVP, as well as a review of all pertinent available records. WAC 388-880-034. WAC 388-880-034 provides:

The evaluation done in accordance with WAC 388-880-030(1) in preparation for a trial or hearing *must* be based on the following:

(1) *Examination of the resident, including a forensic interview* and a medical examination, if necessary;

(2) Review of the following records, tests or reports relating to the person:

(a) All available criminal records, to include arrests and convictions, and records of institutional custody, including city, county, state and federal jails or institutions, with any records and notes of statements made by the person regarding criminal offenses, whether or not the person was charged with or convicted of the offense;

(b) All necessary and relevant court documents;

(c) Sex offender treatment records and, when permitted by law, substance abuse treatment program records, including group notes, autobiographical notes, progress notes, psycho-social reports and other material relating to the person's participation in treatment;

(d) Psychological and psychiatric testing, diagnosis and treatment, and other clinical examinations, including records of custody in a mental health treatment hospital or other facility;

(e) Medical and physiological testing, including plethysmography and polygraphy;

(f) Any end of sentence review report, with information for all prior commitments upon which the report or reports were made;

(g) All other relevant and necessary records, evaluations, reports and other documents from state or local agencies;

- (h) Pertinent contacts with collateral informants;
- (i) Other relevant and appropriate tests that are industry standard practices;
- (j) All evaluations, treatment plans, examinations, forensic measures, charts, files, reports and other information made for or prepared by the SCC which relate to the resident's care, control, observation, and treatment.

WAC 388-880-034 (emphasis added).²⁴

If the person being evaluated "refuses to participate in examinations, forensic interviews, psychological testing or any other interviews necessary" as part of the RCW 71.09.040(4) evaluation, the evaluator is instructed to notify DSHS so that court enforcement may be sought. WAC 388-880-035. These provisions make it clear that an examination, including a forensic interview, of the SVP detainee is required prior to trial. These provisions also make it clear that if the person refuses to comply with any part of the evaluation, the trial court may order the person to comply. *See* WAC 388-880-035. WAC 388-880-885 would have no meaning and be superfluous if the court could not order that the individual participate in the examination, interview, or other testing. Thus, a reading of the WAC provisions clearly indicates that Williams is required to participate in a pretrial evaluation after a finding of probable cause.

²⁴ WAC 388-880 was recently amended by the legislature. The WAC provisions cited in this brief reflect the provisions in effect at the time of Williams' trial. The amendments are not relevant to any issues raised by Appellant.

The State has a compelling interest both in treating sexual predators and in protecting society from their actions. *Young*, 122 Wn.2d at 25. Consequently, it is critical that the State be able to fully evaluate individuals subject to the SVP law. Citing the complexity of the sexual predator determination, the *Young* Court rejected the argument that the Fifth Amendment protected *Young* from being required to cooperate with a psychological evaluation:

The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential.

Id. at 52; *see also In re Detention of Kistenmacher*, 163 Wn.2d 166, 167-74, 178 P.3d 949 (2008) (respondents do not have a right to remain silent during the statutorily mandated precommitment psychological evaluation conducted by the State's expert under RCW 71.09.040.)

Williams' claim that RCW 71.09.040 bars court-ordered pretrial mental health examinations is simply incorrect. *See* Brief of Appellant at 7. His claim that *Williams* "implicitly held" that a records review is the "only evaluation" authorized by RCW 71.09.040(4) is inaccurate. *See* Brief of Appellant at 9. Rather, the *Williams* case merely held that the State is not entitled to a "CR 35 mental examination" of an individual

whom the State is seeking to commit as an SVP. *Williams*, 147 Wn.2d at 479. The issue in *Williams* was whether CR 35 was applicable in chapter 71.09 RCW proceedings. *Id.* at 486. The *Williams* case addressed only whether or not a prosecutor could *compel an examination under CR 35* during SVP proceedings. *In re Detention of Strand*, 167 Wn.2d 180, 190, 217 P.3d 1159 (2009).

The *Williams* Court held that "the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4)." *Williams*, 147 Wn.2d at 491; *see also In re Detention of Audett*, 158 Wn.2d 712, 718-19, 147 P.3d 982 (2006). *Williams'* strained interpretation of the *Williams* case contravenes the express language in RCW 71.09.040(4), which indicates that the post-probable cause evaluation be conducted pursuant to the rules developed by DSHS. *See* RCW 71.09.040(4). The procedures for identifying sexually violent predators have been set by the legislature with specificity. *Audett*, 158 Wn.2d at 722. "[T]he legislature has identified particular qualifications that an evaluator must possess in order to perform the evaluation." *Id.* Those qualifications are outlined in WAC 388-880-010, -033.

The *Audett* case clearly states that individuals like *Williams* are required to submit to an evaluation after probable cause has been found:

In *Williams*, 147 Wash.2d at 490-91, 55 P.3d 597, we did not preclude the use of CR 35 exams out of due process concerns. Rather, we merely held that RCW 71.09.040 provides the exclusive means for obtaining mental examinations of civil commitment respondents. We have never held that sexually violent predator civil commitment respondents have a due process right to refuse to submit to an examination of the type described in CR 35 or that such respondents have a Fifth Amendment right against self-incriminations. See, e.g., *In re Pers. Restraint of Young*, 122 Wash.2d 1, 50-51, 857 P.2d 989 (1993) (rejecting respondent's argument that he should not be required to speak to a psychologist in a mental examination; the action is not a "criminal case" for purposes of the privilege against self-incrimination); *In re Det. of Campbell*, 139 Wash.2d 341, 355-56, 986 P.2d 771 (1999) (sex offenders threaten public safety and therefore have reduced privacy interests, discussing disclosure of personal information). In fact, RCW 71.09.040(4) specifically provides that such respondents must submit to an evaluation after a court determines that there is probable cause to believe they are sexually violent predators

Audett, 158 Wn.2d at 726-27. After the SVP probable cause hearing, if a respondent refuses to submit to a pretrial mental examination, the trial court may order the respondent to submit to the examination. *In re Detention of Broer*, 93 Wn. App. 852, 863-66, 957 P.2d 281 (1998).

In Broer, the trial court found probable cause to believe Broer is an SVP and ordered that he be held for an evaluation, requiring him to answer questions posed to him during a mental examination and evaluation. *Id.* at 856. When Broer refused to submit to the examination, the court held him in contempt for violating the order and struck the trial

date until Broer complied with the order. *Id.* at 856-57. The *Broer* court rejected Broer's argument that the trial court erred by compelling a mental examination without a CR 35 showing of good cause. *Id.* at 863-64. Citing to RCW 71.09.040(4), the Court concluded that "the requirement of showing good cause in CR 35 is inconsistent with the statute's directive that upon a determination of probable cause, an examination *shall* be conducted." *Id.* at 864 (emphasis added). "[T]he statute controls and there is no requirement for a CR 35 showing of good cause for a court to order a mental examination in this special proceeding." *Id.* at 864.

The Court held that the trial court did not abuse its discretion in concluding that Broer failed to undergo the mental examination without legal justification. *Id.* at 866. The Court also held that the court had the inherent power and statutory authority to hold Broer in contempt of court for failing to undergo a post-probable cause evaluation under RCW 71.09.040(4). *See Id.* at 864-66. *Broer* provides clear authority that a pretrial evaluation conducted after probable cause pursuant to RCW 71.09.040(4) is not limited to a records review.²⁵

Here, after the trial court made a finding of probable cause to

²⁵ As previously noted, Dr. Packard's testimony at trial involved only the 2009 evaluation of Williams conducted pursuant to RCW 71.09.040(4). There was no testimony at trial regarding any information from the 2002 interview that had been ordered under CR 35 and subsequently suppressed.

believe Williams is an SVP, the court ordered that Williams be held for an evaluation under RCW 71.09.040(4). CP 46-48. That evaluation subsequently occurred and was relied on at trial. There is clear authority under the SVP statute, WACs, and case law, allowing for a pretrial mental evaluation of Williams prior to civil commitment. This pretrial evaluation is not only allowed, but required under the statute. *See* RCW 71.09.040(4). Thus, the trial court correctly ordered that Williams participate in a pretrial mental health evaluation pursuant to RCW 71.09.040(4).

B. Expert Testimony Regarding The Diagnosis Of Paraphilia NOS, Non-consent Was Properly Admitted At Trial.

Williams argues that one of the mental disorders assigned to him by the State's expert – Paraphilia NOS, Non-consent – is "invalid." Brief of Appellant at 17. He alleges that testimony regarding this diagnosis violated his right to due process. First, this issue is not properly before this Court as Williams failed to preserve the issue below. Second, even if this Court decides to address the merits of Williams' claim, his argument has been rejected by the Washington Supreme Court.

1. Williams Failed to Preserve Any Alleged Error.

Williams raises his claim that the diagnosis of Paraphilia NOS, Non-consent is an invalid diagnosis for the first time on appeal. Williams

has not properly preserved any alleged error because he failed to raise this argument below.

RAP 2.5(a) states that the appellate court may refuse to review any claim of error which was not raised in the trial court. The general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).²⁶ The Washington Supreme Court has "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Objections must be made at the time the evidence is offered. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000). "Without an objection, an evidentiary error is not preserved for appeal." *Id.* The Washington Supreme Court recently applied the preservation of error doctrine to SVP cases because, among other reasons:

[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

Audett, 158 Wash.2d at 726.

Here, although the State's expert witness laid the proper

²⁶ RAP 2.5(a) does list limited exceptions to this rule; however, none of them are applicable here.

testimonial foundation pursuant to ER 703, the State was not afforded the opportunity to address a specific *Frye* challenge.²⁷ Yet now, for the first time, appellant claims his diagnosis is not valid. Because appellant never challenged this diagnosis under ER 703, *Frye* or in any other manner at trial, he is precluded from raising this argument now.²⁸ The State could easily have established that the diagnosis meets such a challenge, but appellant waited for the appeal in the absence of a perfected record. This court must reject this effort to circumvent the rules of appellate procedure and refuse to consider the claim. This issue is not properly raised before this Court.

2. The Standard of Review is Abuse of Discretion.

Should this Court decide to consider the issue raised by appellant, the standard of review is abuse of discretion. The trial court has broad discretion in determining the admissibility of evidence. *In re Detention of Bedker*, 134 Wn. App. 775, 777, 146 P.3d 442 (2006). Expert opinion

²⁷ The *Frye* Rule is outlined in *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923) and states that if an expert's opinion is based on a scientific theory or method than it should be generally accepted in the scientific community.

²⁸ Williams references several articles in support of his claim that Paraphilia NOS, Non-consent is an invalid diagnosis. See Brief of Appellant at 20-23. However, none of these articles were part of the underlying record at trial. Williams references these articles and raises this argument for the first time on appeal. Consequently, they are not properly before this Court and should not be considered. However, even if this information was part of the record below, opposition from some members of the mental health community does not establish a lack of general acceptance. Disagreement amongst experts does not invalidate a particular diagnosis.

testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" ER 702. Appellate courts review a trial court's evidentiary rulings for abuse of discretion. *Bedker*, 134 Wn. App at 777; *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Stenson*, 132 Wn.2d at 701.

3. The SVP Statute Satisfies Due Process Because a Person Must Be Both Mentally Ill and Dangerous In Order To Be Civilly Committed.

An SVP is an individual "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).²⁹ These are the elements that the State was required to prove to the fact-finder at trial.

The definition of mental abnormality is tied directly to present dangerousness. *In re Detention of Henrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). This tie to current dangerousness is required because

²⁹ "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 unconditionally released. RCW 71.09.020(7). A mental abnormality is "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). Personality disorder is also defined in the SVP statute. RCW 71.09.020(9).

due process requires that an individual be both mentally ill and presently dangerous before he may be civilly committed. *See Young*, 122 Wn.2d at 27. Due process concerns are satisfied because the SVP statute requires dangerousness as a condition for civil commitment. *Young*, 122 Wn.2d at 27, 31; *see* RCW 71.09.010. The Washington Supreme Court has held that by properly finding all the statutory elements are satisfied to commit someone as an SVP, the fact-finder impliedly finds that the person is currently dangerous. *In re Detention of Moore*, 167 Wn.2d 113, 124-25, 216 P.3d 1015 (2009); *see also Young*, 122 Wn.2d at 32.

In order to satisfy due process, SVP commitments must be based on proof of serious difficulty controlling behavior. *In re Detention of Thorell*, 149 Wn.2d 724, 735-42, 72 P.3d 708 (2003). However, the jury need not make a separate finding to that effect. *Id.* at 730. There should be some proof that the diagnosed mental abnormality affects the person's ability to control his behavior, which combined with the person's history of sexually predatory behavior, gives rise to a finding of dangerousness. *Id.* at 736. This evidence is what justifies civil commitment and distinguishes the SVP from the typical criminal recidivist. *Id.* The United States Supreme Court noted that "the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment." *Kansas v. Crane*, 534 U.S. 407, 413,

122 S. Ct. 867, 152 L. Ed. 2d 856 (2002).

Williams' reference to some sort of a "medical recognition" or "medical justification" test is not a requirement referenced in the case law. *See* Brief of Appellant at 13-18. Furthermore, contrary to Williams' assertion, *Kansas v. Crane* does not stand for the proposition that the Court has upheld civil commitment "*only* in cases in which the diagnosed disorder was one that 'the psychiatric profession itself classifies as a serious mental disorder.'" *See* Brief of Appellant at 17 (emphasis added). Rather, *Kansas v. Crane* merely indicated that the fact that the psychiatric profession classified Hendricks' diagnosis of pedophilia as a serious mental disorder helped to distinguish him from the typical person not subject to commitment. *Kansas v. Crane*, 534 U.S. at 412-13.

Furthermore, Williams' reliance on *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) is misplaced. *Foucha* involved a defendant who was found not guilty by reason of insanity in a Louisiana Court and committed to a mental hospital.³⁰ *Id.* at 73-74. Under the law, *Foucha* could be held as long as he was mentally ill and dangerous. *Id.* at 77. Despite the fact that *Foucha* no longer had a mental illness, the State continued to confine him. *Id.* at 74, 78-80. The *Foucha*

³⁰ *Foucha* is not an SVP case. In fact, the SVP statute did not exist at the time of the opinion.

Court merely held that it was a violation of due process to confine Foucha since he was no longer mentally ill.³¹ *Id.* at 77. Here, there was an abundance of evidence at trial that Williams was both mentally ill and dangerous.

4. The Diagnosis of Paraphilia NOS is a Valid Diagnosis in the DSM.

Williams claims that the diagnosis of Paraphilia NOS, Non-consent is invalid and violates due process because it is not generally accepted by the medical profession. Brief of Appellant at 17. He bases his claim in part on his assertion that the diagnosis is not found in the DSM. *Id.* at 12. Williams' claim lacks merit.

Williams' diagnosis *is* in the DSM. All paraphilias involve recurrent, intense sexually-arousing fantasies, sexual urges, or behaviors towards either an object or person, such as a non-consenting person. 9/3/09 RP at 133-34. Second, they persist for at least six months. 9/3/09 RP at 134. Third, they cause the person to have impairment or distress in important areas of his life, such as incarceration. 9/3/09 RP at 134. For most disorders, there are too many variants to be explicitly listed in the DSM. *See* 9/3/09 RP at 132. For example, there are hundreds of different

³¹ Although Foucha did have antisocial personality disorder, under Louisiana law that was not considered a mental disease and was considered untreatable. *Foucha*, 504 U.S. at 75. Washington's SVP statute differs in that a commitment under RCW 71.09 may be based on a "mental abnormality *or* personality disorder." *See* RCW 71.09.020(18) (emphasis added).

paraphilias. *Id.* Additional diagnoses beyond those explicitly defined fall into the NOS category. 9/3/09 RP at 133.

The diagnosis of Paraphilia NOS, Non-Consent is included in the DSM under the criteria for a paraphilia. *See* 9/8/09 RP at 410. The NOS category includes any paraphilia that does not meet the criteria for any of the specific categories. 9/3/09 RP at 132-33; 9/8/09 RP at 410. The Paraphilia NOS section of the DSM lists seven examples of paraphilias that would qualify under the Paraphilia NOS diagnosis. 9/8/09 RP at 410-11. Even for these NOS paraphilias that are explicitly listed in the DSM, there are no specific diagnostic criteria to use for making a diagnosis. 9/8/09 RP at 410. An evaluator would use the general criteria for paraphilia. *Id.* This is the same process that is used for any of the hundreds of other paraphilias, including arousal to non-consenting persons. *Id.*

Because paraphilias involve deviant arousal to, e.g., children, non-consenting persons or inanimate objects, evaluators use the Paraphilia NOS diagnosis, combined with a descriptor, to communicate the specific type of person or object that is the stimulus for deviant arousal. *See* 9/3/09 RP at 133. The fact that the DSM provides some examples of diagnoses that belong in the NOS category does not mean those not mentioned are invalid. For example, Dr. Packard testified that there are other disorders

and syndromes, such as Fetal Alcohol Syndrome, that are not only well-established in the research literature but also have no debate about their existence, and yet they still have not been included in the DSM. 9/4/09 RP at 307-08.

Williams is clearly aroused to "non-consenting persons" - the descriptor Dr. Packard used for the Paraphilia NOS diagnosis. *See* 9/3/09 RP at 135-53. Williams' primary diagnosis, however, is Paraphilia NOS, which means that he (1) experiences recurrent, intense sexually arousing fantasies, sexual urges, or behaviors (2) for a period of more than six months (3) that cause him clinically significant distress or impairment in important areas of functioning. In diagnosing Williams with Paraphilia NOS, Dr. Packard specified that Williams is aroused to non-consenting persons in order to accurately describe his deviant arousal system. *See* 9/3/09 RP at 133.

The lack of the specifier "Non-Consent" in the DSM for Paraphilia NOS does not invalidate the diagnosis. *See Young*, 122 Wn.2d at 28-29. This diagnosis has long been accepted by the Washington Supreme Court, even as far back as the seminal SVP case in Washington. *See Young*, 122 Wn.2d 1. In *Young*, the Supreme Court rejected essentially the same challenge Williams asserts here: that a mental disorder is required to be included in the DSM. *Young*, 122 Wn.2d at 28-29. Recognizing the

limitations of the DSM, the Washington Supreme Court found that a diagnosis need not be included in the DSM to be valid:

In using the concept of "mental abnormality" the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the DSM-III-R; others are not. 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. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities. *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.*

Young, 122 Wn.2d at 28 (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 733 (1992) (emphasis in opinion)). Testimony regarding the APA's potential political reasons for not explicitly labeling a paraphilic rape condition in the DSM was elicited at trial.³² 9/4/09 RP at 335-37. Dr. Packard testified that it was more about politics as opposed to an argument as to the validity of whether the disorder exists. 9/4/09 RP at 337. Moreover, just because a specific diagnosis is not included in the DSM, does not mean it is an invalid

³² The DSM is published by the APA. 9/4/09 RP at 293.

diagnosis or does not exist. *See Young*, 122 Wn.2d at 28. Dr. Packard's testimony drove home this point:

Q: Let's say it [the DSM] changed and they took all the paraphilias out of the new version of the DSM for whatever reason. Would you have any doubt, then, that there would still be men out there who like to have sex with children?

A: No. I would have no doubt that there would still be men who like to have sex with children.

Q: If they took Paraphilia NOS out of the DSM, would there be any doubt in your mind that there would be men still out there who like to force themselves sexually upon other people?

A: No. I would have no doubt of that.

9/8/09 RP at 511.

As long ago as 1993, the Washington Supreme Court rejected a constitutional challenge to the paraphilic rape diagnosis and noted that the "specific diagnosis" was Paraphilia NOS:

The specific diagnosis offered by the State's experts at each commitment trial was "paraphilia not otherwise specified." This is a residual category in the *DSM-III-R* which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the *DSM-III-R*.

Young, 122 Wn.2d at 29. As in *Young*, Williams' primary diagnosis is Paraphilia NOS, which is a generally accepted valid diagnosis that is included in the DSM. Since *Young*, Washington appellate courts have upheld numerous SVP commitments based on a diagnosis of Paraphilia

NOS by various qualified experts.³³

Furthermore, Williams' own trial expert, Dr. Donaldson, testified that while the Paraphilia NOS, Non-Consent diagnosis may be controversial in the literature, it's "hard to believe that there aren't some rapists who are paraphilic." *See* 9/8/09 RP at 531. He also testified that it has become "fairly popular" to diagnose an individual with Paraphilia NOS, Non-consent. 9/8/09 RP at 531-32. "Within the framework of the DSM, that means the person must be aroused by non-consent." *Id.* Dr. Donaldson's opinion was not that the diagnosis does not exist, but rather that, in his opinion, there was insufficient evidence to apply the diagnosis to Williams. *See* 9/8/09 RP at 531-32, 545, 562. Dr. Donaldson

³³ *See e.g. In re Detention of Stout*, 159 Wn.2d 357, 363, 150 P.3d 86, 90 (2007) (Dr. Packard testified that Stout suffered from Paraphilia NOS, Non-Consent); *In re Detention of Halgren*, 156 Wn.2d 795, 800-01, 132 P.3d 714 (2006) (Dr. Wheeler testified that Halgren suffered from at least one mental abnormality: Paraphilia NOS, Non-Consent); *In re Detention of Marshall*, 156 Wn.2d 150, 155, 125 P.3d 111, 113 (2005) (Dr. Phenix testified that Marshall suffered from multiple mental abnormalities described in the DSM-IV-TR, including Pedophilia, Sexual Sadism, and Paraphilia NOS (Non-consenting adults or rape-like behavior); *In re Detention of Campbell*, 139 Wn.2d 341, 357, 986 P.2d 771, 779 (1999) (Roger Wolfe diagnosed Campbell as suffering from a "paraphilia"); *In re Detention of Paschke*, 136 Wn. App. 517, 520, 150 P.3d 586, 587 (2007) (Dr. Rawlings testified that Paschke suffered from a mental abnormality known as Rape, Paraphilia NOS Rape); *In re Detention of Taylor*, 132 Wn. App. 827, 832, 134 P.3d 254, 257 (2006) (Dr. Packard diagnosed Taylor with the mental abnormality Paraphilia NOS, Non-consenting persons); *In re Detention of Broten*, 130 Wn. App. 326, 332, 122 P.3d 942, 945 (2005) (Dr. Judd testified that he diagnosed Broten with Paraphilia NOS); *In re the Detention of Hoisington*, 123 Wn. App. 138, 143, 94 P.3d 318, 320 (2004) (Dr. Doren testified that Hoisington suffered from a mental abnormality, paraphilia.) *In re Detention of Strauss*, 106 Wn. App. 1, 6, 20 P.3d 1022, 1024 (2001) (Dr. Doren testified that Strauss suffers from Paraphilia NOS, Non-consent); *In re the Detention of Mathers*, 100 Wn. App. 336, 336, 998 P.2d 336, 337 (2000) (Roger Wolfe diagnosed Mathers with Paraphilia NOS: Rape and an Antisocial Personality Disorder); *In re the Detention of Aqui*, 84 Wn. App. 88, 94, 929 P.2d 436, 441 (1996) (Dr. Dreiblatt testified that Aqui suffered from paraphilia disorder).

preferred to describe Williams as an "anger rapist" and an "opportunistic child molester." See 9/8/09 RP at 532, 545. His official diagnosis of Williams was "dumb behavior." RP 9/8/09 at 544.

Thus, Dr. Donaldson disagreed with the *application* of the diagnosis to Williams, not with its validity as an actual diagnosis that exists amongst experts in the field. In fact, Dr. Donaldson agreed that a Paraphilia NOS, Rape/Non-consent diagnosis would be an appropriate diagnosis for certain individuals:

I think I mentioned on direct that I'm sure there are some rapists who are mentally ill who could probably be diagnosed as having some sort of compulsive disorder if not a paraphilia.

9/9/09 RP at 660. Dr. Donaldson agreed that it would be appropriate to diagnose certain individuals with Paraphilia NOS who are driven by paraphilic sexual arousal patterns involving fantasies and urges to commit rape.³⁴ See 9/9/09 RP at 660.

5. Washington State Has The Authority to Define the Mental Conditions Relevant to Commitment Under RCW 71.09

States contain considerable leeway in defining mental abnormalities and disorders that make an individual eligible for SVP

³⁴ Dr. Packard was not the only evaluator to diagnose Williams with Paraphilia NOS. Two prior evaluators diagnosed Williams with a similar Paraphilia NOS, Non-Consent diagnosis. See 9/8/09 RP at 373, 377, 488-89.

commitment. *Thorell*, 149 Wn.2d at 735. The United States Supreme Court has rejected the contention that due process requires states to define "mental disorder" or similar terms in their civil commitment statutes in such a way that they are consistent with the standards of the mental health community. *Kansas v. Hendricks*, 521 U.S. 346, 358-59, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

The *Hendricks* Court specifically rejected Hendricks' claim that the use of the term "mental abnormality" by the Kansas SVP law did not comport with earlier cases requiring a finding of "mental illness" because "mental abnormality" is a term adopted by the Kansas Legislature and not the psychiatric community. *Id.* The Court noted that "psychiatrists disagree widely and frequently on what constitutes mental illness" and that the Court itself has used a variety of terms to describe the mental condition of those civilly committed. *Id.* at 359 (quoted sources omitted). The Court recognized that "psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as 'mental illness.'" *Id.* at 360, FN3. The Court observed:

Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit

precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession.

Id. at 359 (citations omitted); *see also Kansas v. Crane*, 534 U.S. at 413-14 (reaffirming that psychiatric and legal standards need not be identical).

Washington's definition of "mental abnormality" meets constitutional requirements and does not place the limitations on acceptable diagnoses that Williams would have this Court impose. "Mental abnormality" is defined in a way that distinguishes mentally ill offenders from those who are not mentally ill. *See* RCW 71.09.020(8). Dr. Packard testified to a reasonable degree of psychological certainty that Paraphilia NOS, Non-consent is a mental abnormality. 9/3/09 RP at 128, 220-21, 277. He further testified that this disorder, along with Williams' other mental disorders, cause him serious difficulty controlling his behavior and make him likely to engage in predatory acts of sexual violence unless he is confined in a secure facility. 9/3/09 RP at 127-29, 220-21, 277. As *Hendricks* makes clear, the Washington Legislature is free to craft its own meaning of "mental illness" and it was up to the fact-finder to determine whether Williams' mental condition fit the definition of "mental abnormality" in RCW 71.09.020(8).

6. A Unanimity Instruction is Not Required When Several Mental Disorders Form the Basis of an SVP Commitment.

Williams implies that because there was no special verdict delineating which mental disorder the jury relied on in committing Williams as an SVP, that the verdict must be reversed. *See* Brief of Appellant at 23-24. Williams is incorrect. First, Williams failed to object to the Court's instructions, nor did he offer a proposed unanimity instruction. Second, neither the statute nor case law requires a unanimity instruction regarding what mental disorder Williams suffers from. Finally, the mental disorders diagnosed by Dr. Packard are not incongruous and together they form of the basis of commitment.

a. Williams Did Not Object to the Court's Instructions and Did Not Request an Unanimity Instruction.

Williams waived any objection to the Court's instructions of law when he failed to object at trial. *See* 9/14/09 RP at 999. There are compelling reasons to find that Williams failed to preserve the issue of whether or not a unanimity instruction was required in this case.

The preservation of error doctrine applies in SVP civil commitment cases and opposing parties should be afforded an opportunity at trial to respond to possible claims of error, rather than face newly-asserted errors for the first time on appeal. *Audett*, 158 Wash.2d at 726.

Furthermore, "it was the obligation of the parties to draw the trial court's attention to errors, issues, and theories, or be foreclosed from relying upon them on appeal." *Id.* If Williams had proposed a unanimity instruction or objected at trial, the issue could have been addressed by all parties and by the trial court. However, since Williams did not object to the State's jury instructions, or propose any instructions of his own, the State and the trial court were not given an opportunity to address the theory that he now raises. Compelling reasons dictate that Williams' failure to propose a unanimity instruction should constitute a waiver and the issue should not be addressed for the first time on appeal.

b. The Alternative Means Test is the Appropriate Analysis in SVP Cases.

Unanimity rules are applicable in SVP cases. *In re Detention of Halgren*, 156 Wn.2d 795, 809, 132 P.3d 714 (2006). However, "alternative means" analysis is appropriate when the individual suffers from multiple mental disorders either of which could form the basis of the commitment. *Id.* at 809-10.

In *Halgren*, the State's expert testified that Halgren suffered from *at least one* mental abnormality (Paraphilia NOS, Non-Consent) and one personality disorder (Antisocial Personality Disorder). *Id.* at 800 (emphasis added). At the close of trial, Halgren requested a jury

instruction that would have required unanimous agreement as to the specific mental abnormality or personality disorder necessary for SVP commitment. *Id.* The trial court rejected Halgren's argument and instructed the jury they were required to find that Halgren suffered from a mental abnormality and/or a personality disorder.³⁵ *Id.* at 801. On appeal, the Washington Supreme Court held that the trial court did not err in refusing to give Halgren's proposed unanimity instruction to the jury. *Id.* at 798. The Court did not require that the State plead which mental abnormality or personality disorder was the basis for commitment, nor did the court require that the jury indicate which mental illness was the basis for commitment. *Id.* at 810-11. The court reasoned:

[T]hese two means of establishing that a person is an SVP may operate independently or may work in conjunction. Thus, because an SVP may suffer from both defects simultaneously, the mental illnesses are not repugnant to each other and may inhere in the same transaction.

Id. at 810. Thus, the jury need not unanimously agree on the type of mental disorder that exists as long as substantial evidence exists to support the finding that Williams is an SVP. *See Id.* at 811-12.

Here, there was substantial evidence presented at trial for a reasonable jury to conclude that Williams had both mental abnormalities

³⁵ The trial court did not include the specific names of the mental abnormalities or personality disorder in the jury instruction.

and a personality disorder beyond a reasonable doubt. Dr. Packard testified that Williams suffered from two mental abnormalities, specifically Pedophilia and Paraphilia NOS, Non-consent. 9/3/09 RP 128, 220-21. Dr. Packard also testified that Williams suffered from Personality Disorder NOS with narcissistic and antisocial features and Alcohol Dependence, neither of which Dr. Donaldson disagreed with. 9/3/09 RP at 128-29, 171-72, 196-97; *see* 9/9/09 RP at 579-80. Dr. Packard testified in extensive detail about these diagnoses. Despite Williams' claim that Dr. Packard "put great emphasis" on the Paraphilia NOS, Non-consent diagnosis,³⁶ Dr. Packard actually stressed the importance of considering all of the diagnoses together:

It's not like people are divided into nice little boxes.... [P]eople aren't boxes. So as I explain [these diagnoses] try to understand that these things all work together. It's not like there's a piece in a person that has this. And it's totally independent and separate from everything else. It's part of a combination, a part of a unity.

See 9/3/09 RP at 128. Dr. Packard stressed that it's the combination of these mental disorders that affect Williams and cause him serious difficulty controlling his behavior. 9/3/09 RP at 220-24.

The jurors were properly instructed that they needed to be unanimous in their verdict that Williams is an SVP, which they were. CP

³⁶ *See* Brief of Appellant at 24.

442-72; 9/15/09 RP at 1123-26. As the Court found in *Halgren*, the substantial evidence test is satisfied if this Court is convinced that "a rational trier of fact *could* have found" that Williams suffers from each mental disorder. *See Halgren*, 156 Wn.2d at 811 (emphasis in original). Here, there was overwhelming evidence to support the commitment.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the civil commitment of Williams as a sexually violent predator.

RESPECTFULLY SUBMITTED this 21st day of September, 2010.



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NO. 39785-4-II

STATE OF WASHINGTON

WASHINGTON STATE COURT OF APPEALS, DIVISION II

BY _____
DEPUTY

In re the Detention of:

THOMAS PAUL WILLIAMS,

Appellant.

DECLARATION OF
SERVICE

I, Kelly Hadsell, declare as follows:

On this 22nd day of September, 2010, I deposited in the United States mail true and correct cop(ies) of Amended Brief Of Respondent and Declaration of Service, postage affixed, addressed as follows:

Thomas Kummerow
Washington Appellate Project
1511 Third Avenue, Suite 701
SEATTLE, WA 98101

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

DATED this 22nd day of September, 2010, at Seattle, Washington.



KELLY HADSELL