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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

IN RE THE DETENTION OF:

GARY ALLEN SHAW,

Appellant

On Appeal from the Pierce County Superior Court
Cause No. 06-2-13962-9
The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it concluded, and the State's evidence is insufficient to prove, that Appellant's personality disorder causes him serious difficulty controlling his sexually violent behavior.
2. The trial court erred when it concluded, and the State's evidence is insufficient to prove, that Appellant's antisocial personality disorder makes him likely to specifically commit a sex crime, as opposed to being likely to commit a crime in general.
3. The trial court erred when it concluded, and the State's evidence is insufficient to prove, that Appellant will more likely than not commit future predatory acts of sexual violence if released from confinement.
4. The trial court erred when it stated in Finding of Fact 12 that the actuarially derived risk assessments underestimate Appellant's risk to reoffend.
5. The trial court erred when it entered the order of commitment, because the evidence was insufficient to support the trial court's conclusion that Appellant is a sexually violent predator.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to present sufficient evidence to establish that Appellant's personality disorder causes him serious difficulty in controlling his behavior, where Appellant has not exhibited difficulty controlling his behavior recently, and where most of the evidence of past difficulty controlling his behavior is based on events that occurred in or before 1985?
(Assignments of Error 1 & 5)
2. Did the State fail to present sufficient evidence to establish that Appellant's personality disorder makes him likely to commit a sexually violent crime in the future, where there is no evidence that Appellant suffers from any sexual dysfunction and has not exhibited any sexually deviant behavior while incarcerated, and where the behaviors caused by his personality disorder tend to lead only to general criminal behavior rather than specifically sexual criminal behavior? (Assignments of Error 2 & 5)
3. Did the State fail to present sufficient evidence to establish that Appellant will more likely than not commit a predatory act of sexual violence if released, where the actuarial instrument results presented by the State's expert were

based on studies of all sexual offenders, not just offenders who do not have a sexual disorder; and where they only predict the likelihood that an offender will commit any sexual offense rather than an act included in the more specific subset of predatory sexually violent offenses? (Assignments of Error 3, 4 & 5)

4. Did the State fail to present sufficient evidence to establish that Appellant will more likely than not commit a predatory act of sexual violence if released, where the actuarial instrument results presented by both the State's expert and Appellant's expert showed a less than 50 percent likelihood of committing a sexual offense in the future? (Assignments of Error 3 & 5)
5. Did the State fail to present sufficient evidence to establish that Appellant will more likely than not commit a predatory act of sexual violence if released, where the State's expert based his clinical judgment on empirically based factors that are irrelevant because they are too remote in time and do not adequately consider current circumstances, and because they are already incorporated into the actuarial instruments' risk assessment? (Assignments of Error 3 & 5)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 13, 1985, Gary Allen Shaw pleaded guilty to two counts of first degree murder with sexual motivation. (CP 3, 5, 110) The court sentenced Shaw to concurrent terms of 388 months (32 years and 4 months) of confinement. (CP 5, 110; RP 389) Shaw was not yet 22 years old. (CP 3, 110)

On December 14, 2006, shortly before Shaw's scheduled release from confinement, the State filed a petition under RCW 71.09, seeking a civil commitment of Shaw as a sexually violent predator (SVP). (CP 1-2) The State alleged that Shaw suffers from several mental abnormalities or personality disorders, including drug and alcohol dependence and antisocial personality disorder, and that his conditions cause Shaw to have "serious difficulty controlling his dangerous behavior" and makes him "likely to engage in predatory acts of sexual violence unless confined to a secure facility." (CP 1-2)

A bench trial began on January 25, 2010, when Shaw was 46 years old. The judge found that Shaw met the criteria of being a SVP. (CP 107-08) The trial judge entered an order of commitment on May 14, 2010. (CP 109-12) Shaw timely appeals. (CP 113)

B. SHAW'S CRIMINAL AND SEXUAL HISTORY

Gary Shaw was born on June 18, 1963. (CP 3) Shaw's mother and step-father subsequently had two children together, and Shaw felt that his step-siblings were favored and that he was mistreated by his mother. (RP 62) At the age of five, Shaw was molested by a teenage girl. (RP 56-57) When Shaw was seven or eight years old, he was violently raped at gunpoint by a teenage boy. (RP 42, 57)

In 1978, 15-year-old Shaw was charged with indecent liberties involving an eight-year-old girl. (CP 5; RP 39) According to Shaw, the girl walked into his bedroom uninvited while he was naked and masturbating. (RP 40) Shaw became very angry and forcefully grabbed the girl and threatened to kill her. (RP 40) The charge was eventually dropped when the prosecution decided it would be unable to prove guilt. (CP 5)

Also in 1978, Shaw performed oral sex on a six-year-old boy. (RP 41; CP 5) Shaw pleaded guilty to a charge of statutory rape, and was sentenced to 13-16 weeks in juvenile detention. (CP 5) Shaw also pleaded guilty to assault when he brandished a knife while robbing a teenage boy in 1979. (RP 55)

In his late-teens and very early-twenties, Shaw had

consenting sexual relationships with a number of women. (RP 57-59) He did not have a serious intimate relationship, but dated several women. (RP 58-59)

In 1985, when Shaw was 21 years old, he lived as a transient and frequently used drugs and alcohol. (RP 50, 402) In March of that year, a woman named Vera D. was reported missing, and her body was subsequently discovered in an embankment of a rural Pierce County road. (RP 43; CP 3-4) Vera D. had been raped and beaten to death. (RP 44; CP 4) About two weeks later, a woman named Linda H. was also reported missing. (CP 4) Her body was found a week later on military property. (CP 4) She had also been raped, beaten and stabbed in the neck with a small knife. (RP 49; CP 4-5) Shaw pleaded guilty to these crimes. (RP 5)

During the psychological evaluation done in preparation for the SVP trial, Shaw explained that on the night of Vera D.'s death, he had been drinking and taking drugs at a bar. (RP 46) He left and was hitchhiking on the side of the road, when Vera D. pulled over to give him a ride. (RP 47) He tried to grab her and rape her, but she fought him. (RP 47) Shaw said that he became enraged when she struggled, and he beat her to unconsciousness. (RP 47) He then raped her, and beat her to death because he was still

angry. (RP 47-48)

Shaw explained that he met Linda H. at a bowling alley bar, where he had been drinking and smoking marijuana. (RP 48, 50) Linda agreed to give Shaw a ride to a friend's house, so they left together. (RP 51) Shaw said that he and Linda H. had consensual sex in the back of her car, but when he wanted to have intercourse a second time she refused. (RP 52, 53) Her refusal made Shaw very angry, so he stabbed her in the neck with a knife and raped her, then later disposed of her body. (RP 52, 54)

C. TESTIMONY OF STATE'S EXPERT DR. ROBERT WHEELER

Forensic psychologist Dr. Robert Wheeler was asked by the State to evaluate Shaw and determine his likelihood of reoffending if released. (RP 29) He reviewed documents detailing Shaw's history, and conducted a 10-hour interview with Shaw on October 17 and 18, 2006. (RP 31-32)

Dr. Wheeler noted that Shaw's behavior while incarcerated was, after an initial period of adjustment, positive and low-management. (RP 63-64) He had no major infractions, but was found to have overused prescription Benadryl in 2006. (RP 64) Otherwise, the comments in his DOC records were favorable. (RP 63)

During the 2006 interview, Shaw expressed resentment towards women because he felt he had been mistreated by his mother and his girlfriends. (RP 76) He acknowledged that his crimes were motivated by rage and by a desire to exercise power over women and to take something from them because he believed women used sex to humiliate men. (RP 77)

Dr. Wheeler diagnosed Shaw with several conditions, including alcohol and cannabis dependence, intermittent explosive disorder, and antisocial personality disorder (APD). (RP 66, 67, 93) Dr. Wheeler believed that Shaw's intense anger towards his victims and the "grossly disproportionate level of his violence" towards the victims supported the intermittent explosive disorder diagnosis. (RP 102-03) Dr. Wheeler's chemical dependence diagnosis was based on Shaw's heavy use of drugs and alcohol prior to his incarceration and his overuse of Benadryl in 2006. (64, 66-67)

Dr. Wheeler explained that APD is a personality disorder characterized by a consistent pattern of behavior that violates social norms and expectations, a disregard for the rights of others, pervasive rule-violating, and physically aggressive behavior. (RP 80-81) Other factors supporting this diagnosis are Shaw's history (prior to his incarceration) of impulsivity, aggressiveness, work and

personal relationship inconsistency, and deceitfulness. (RP 81-88)

Dr. Wheeler opined that Shaw's APD caused him to have serious difficulty controlling his behavior. (RP 97)

In Dr. Wheeler's opinion, APD provides a foundation for Shaw's assaultive behavior, but his assaults took the form of sexually violent acts because of his "anger towards females and the resentment he holds towards them." (RP 95) According to Dr. Wheeler, "the sexual assaultive behavior arises from those [APD] factors fueled additionally possibly by drugs and alcohol, primarily alcohol." (RP 95)

Dr. Wheeler acknowledged that Shaw had not exhibited any significant behavioral or control issues while incarcerated, and that APD tends to remit once a person reaches the age of 40. (RP 97, 174, 179) But Dr. Wheeler testified that it is common for people with APD to function well in a tightly controlled or institutional environment. (RP 97-98) Dr. Wheeler also testified that he did not see evidence of a change in Shaw's attitudes during the 2006 interview, and at that time he believed Shaw continued to meet the criteria of APD. (RP 97, 99)

Dr. Wheeler also evaluated whether or not Shaw could be

diagnosed with paraphilia,¹ a sexual disorder characterized by recurrent urges, fantasies and behaviors involving sexual conduct with non-consenting persons. (RP 105, 233) Dr. Wheeler found some evidence that supported the diagnosis, primarily the fact of the prior crimes. (RP 106) But he also found evidence contradicting the diagnosis, primarily that Shaw did not report having rape fantasies and that there was a lack of a “more extensive, unequivocal pattern of forcible assaults[.]” (RP 106) Ultimately, Dr. Wheeler did not diagnose Shaw with paraphilia. (RP 105, 107)

Dr. Wheeler concluded that Shaw’s APD more likely than not will cause him to commit predatory acts of sexual violence if not confined in a secure facility. (RP 108, 143) Dr. Wheeler based his conclusion on both actuarial instruments and clinical judgment. (RP 109-10)

In order to assess the likelihood that Shaw would reoffend, Dr. Wheeler first applied several actuarial instruments; the Static-99, the Static-99R, the Static-2002R, the MnSOSTR, and the SORAG. (RP 111-12) Except for the SORAG, which predicts any

¹ More specifically, “paraphilia not otherwise specified non-consenting persons.” (RP 105)

violent recidivism, these instruments identify a number of risk factors that, when applied to a particular offender, will result in a score that predicts the likelihood that the offender will be rearrested or reconvicted of any sexual offense in the future. (RP 111, 113-14, 117)

Dr. Wheeler's assessment placed Shaw in the moderate or high risk category on all of the instruments. (RP 117-18) His risk to reoffend fell between 26.3 and 39.9 percent within five years, and between 36 and 48.6 percent within ten years. (RP 119-20) Dr. Wheeler explained that the percentages would increase with time, but risk also decreases with age. (RP 123, 124-25)

To reach a conclusion that Shaw was more likely than not to reoffend, or that there was a greater than 50 percent chance that Shaw would reoffend, Dr. Wheeler also relied on his own clinical judgment based on consideration of several dynamic risk factors. (RP 137, 143) Those factors were Shaw's antisocial orientation, history of substance abuse, intimacy deficits, hostility, negative emotionality, and inadequate self-assessment of risk. (RP 137) But Dr. Wheeler acknowledged that these dynamic risk factors are included in the actuarial instrument scoring, so there was "some redundancy." (RP 227)

D. TESTIMONY OF SHAW'S EXPERT DR. THEODORE DONALDSON

Dr. Theodore Donaldson is also a forensic psychologist, and he reviewed the documents from Shaw's case and interviewed Shaw in person on April 2, 2008. (RP 248, 256) Dr. Donaldson agreed with Dr. Wheeler's diagnosis that Shaw has APD and a history of substance abuse. (RP 256)

Dr. Donaldson disagreed with Dr. Wheeler's opinion that Shaw had difficulty controlling his behavior due to APD, because there was no evidence that Shaw tried to control his behavior but failed. (RP 263) Dr. Donaldson explained that the mere fact that someone committed an offense does not mean that they are predisposed to commit offenses. (RP 265)

And Dr. Donaldson saw no indication that Shaw was predisposed specifically to sexual violence. (RP 266, 287) In order to find such a disposition, Dr. Donaldson testified that one would expect to see an offender continue to exhibit signs of antisocial and sexual misbehavior even while incarcerated. (RP 266) But there was no evidence of such behavior by Shaw during his long incarceration. (RP 267)

Dr. Donaldson also noted that a predisposition for sexual violence is not among the criteria for diagnosing APD. (RP 262)

And there was no evidence that Shaw was aroused by non-consent or that he otherwise met the requirements for a paraphilia disorder. (RP 309-10) And without a corresponding diagnosis of paraphilia, one cannot predict accurately whether a person with APD would commit sexually deviant acts in the future. (RP 258, 262-63, 264-65)

Dr. Donaldson found that Shaw's antisocial behaviors have decreased over the years. (RP 268) And in general, both APD behaviors and sexually deviant behaviors tend to decrease with age. (RP 268, 270-71) In Dr. Donaldson's opinion, there is insufficient evidence to conclude that Shaw meets the criteria for a sexually violent predator. (RP 287)

E. TESTIMONY OF SHAW'S LAY WITNESSES

Bradley Mix is a Native American spiritual advisor who was invited by the McNeill Island Special Commitment Center (SCC) chaplain to organize and lead a program for the residents. (RP 355-56) Mix began leading a sweat lodge ceremony, which is designed to purify and strengthen the "essence" of a person, and is a mentally and physically demanding experience. (RP 357-58) Mix also leads a program called a medicine wheel, which he described as a spiritual path to becoming the best person you can be. (RP

358) The medicine wheel requires a participant to complete several phases of personal growth; the first is a program of self-discovery and healing; the second is a program of confrontation and taking responsibility for ones past behaviors and choices; the third is designed specifically to address the needs of violent offenders. (RP 358-59, 360, 363-64, 386)

Mix met Shaw about three years before trial, when Shaw began participating in the sweat lodge and medicine wheel programs at SCC. (RP 355, 369) When Mix first met Shaw, he seemed easily prone to anger, and would turn inward if challenged or upset. (RP 369) But Mix has noticed a significant change and positive growth in Shaw since he began the programs. (RP 370) If something or someone bothers Shaw, he now expresses his anger verbally and no longer internalizes it. (RP 369-70) Shaw finds ways to stay positive and a willingness to be patient. (RP 371-72) He is better able to see the consequences of his actions and his choices. (RP 371)

Shaw has successfully completed phases one and two of the medicine wheel, which requires a great deal of dedication and commitment. (RP 366) Shaw has taken on significant responsibilities within the group and program, and has made

positive contributions to the stability of the circle. (RP 366, 374)

Casey Baugh also volunteers with the SCC Native American spiritual circle programs as a visiting elder. (RP 389) He described Shaw as respectful, helpful, and a hard worker. (RP 389-90) Both Baugh and Mix testified that they would be available for support if Shaw was released. (RP 386, 390, 391) Mix would assist Shaw in working through and completing the third phase of the medicine wheel. (RP 386)

Gregory Duncan is the chaplain at SCC and has known Shaw since 2006. (RP 429, 430) He confirmed that Shaw became active in the Native American circle shortly after he arrived at SCC in 2006. (RP 431, 432) Duncan has also seen a change in Shaw since 2006, and believes that his participation in the Native circle has been a positive experience. (RP 432) Shaw is now more relaxed and positive, and Shaw has stepped forward and taken on a leadership position within the circle. (RP 432-33)

Duncan observed situations where Shaw was faced with conflict or personal attacks, but Shaw has never become violent or aggressive in response. (RP 435) Duncan has never seen Shaw lose his temper or display a negative attitude in those situations. (RP 433, 435)

Jonnie Laux and Douglas Talley are custodial supervisors at SCC. (RP 422, 427) Shaw had been working on their custodial crew for about two years. (RP 423, 427) They both testified that Shaw has been a good, reliable, and hard worker with a positive and helpful attitude. (RP 424, 427) Neither has ever seen Shaw lose his temper or act in an aggressive manner. (RP 425, 428)

Gary Shaw also testified on his own behalf. He received a 32-year sentence in 1985, and has served 21 years after being awarded one-third of his time off for good behavior. (RP 398)

Shaw described how it seemed that Dr. Wheeler was trying to make him angry by continually calling him a liar, but he remained calm by using the techniques he learned in his anger management course. (RP 401-02) He explained that he was not initially forthcoming about the facts of the crimes because he was disgusted by his actions and had tried for so long to block them out because he did not like to think about them. (RP 402) But he takes responsibility for what he did and does not deny it, and pleaded guilty to the charges. (RP 402)

Shaw believes he has changed since the meeting in 2006 with Dr. Wheeler, mostly because of his participation in the Natick American circle programs at SCC. (RP 405) Shaw understands

how drug and alcohol use contributed to his criminal behavior, and he does not use the drugs and alcohol that can be obtained from other inmates. (RP 402, 403, 404) Shaw described how he started the Native American circle when he arrived at SCC in 2006, and for the first time in his life he has been introduced to a set of principles that he can truly believe in and live by. (RP 404)

If released, Shaw wants to continue his involvement with the Native circles, and wants to help juvenile offenders stay away from drugs and crime. (RP 406, 409) He understands that it will not be easy to reintegrate into society, and that he will have to deal with negative opinions of others because of what he has done. (RP 407-08) But he is ready to find a home, a job, and a meaningful and respectful relationship with a woman. (RP 410, 411)

IV. ARGUMENT & AUTHORITIES

The Federal and Washington State constitutions guarantee the right to due process of law. U.S. Const. amd. XIV; Wash. 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." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). The indefinite commitment of sexually violent predators is a restriction on the fundamental right of

liberty, and consequently, the State may only commit people who are *both* currently dangerous *and* suffer from a mental abnormality. Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); In re Detention of Thorell, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003).

Under RCW Ch. 71.09, a person convicted of a sexually violent offense may be committed to a secure facility indefinitely if they are found to be a “sexually violent predator.” To establish that a person is a sexually violent predator, the State must prove that the person: (1) has been convicted of or charged with a crime of sexual violence and; (2) suffers from a mental abnormality or personality disorder which; (3) makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18); Thorell, 149 Wn.2d at 758-59. The State must show that the offender is both mentally ill and that mental illness causes the offender to be presently dangerous before a civil commitment may be ordered. In re Detention of Young, 122 Wn.2d 1, 27, 857 P.2d 989 (1993).

Due process requires the State to establish these three elements beyond a reasonable doubt. In re Detention of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006); U.S. Const. amd. XIV.

A commitment order entered pursuant to Ch. 71.09 should be reversed where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements beyond a reasonable doubt. Thorell, 149 Wn.2d at 744.

In this case, no rational trier of fact could have found that Shaw is likely to engage in predatory acts of sexual violence if released from custody because: (A) the State did not establish that Shaw's personality disorder makes him currently unable to control his behavior; (B) the State did not establish that Shaw's personality disorder makes him a risk to commit sexually violent crimes in the future; and (C) the State did not establish that Shaw will more likely than not commit a sexually violent crime if released.

A. THE STATE FAILED TO ESTABLISH THAT SHAW IS CURRENTLY UNABLE TO CONTROL HIS BEHAVIOR DUE TO A PERSONALITY DISORDER.

In sexually violent predator proceedings, due process requires the State to prove the detainee has a serious mental or personality disorder that *currently* causes him difficulty in controlling his sexually violent behavior. Kansas v. Crane, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002); Thorell, 149 Wn.2d at 736, 744-45. The State failed to prove this fact here.

Dr. Wheeler testified that he believes Shaw's APD causes

him to have serious difficulty controlling his behavior. (RP 97) To support this conclusion, Dr. Wheeler relied primarily on behavior that occurred prior to Shaw's incarceration in 1985. (RP 81-89) Shaw may have had trouble controlling his behavior 25 years ago, but that does not establish that Shaw cannot control his behavior now and in the future.

Additionally, both Dr. Wheeler and Dr. Donaldson testified that APD begins to remit with age, especially once a person reaches 40. (RP 97, 268, 270-71) At the time of trial, Shaw was 46 years old. Therefore, it is less likely now that Shaw's APD will impact his ability to control his behavior than it was in 1985 or even in 2006.

Dr. Wheeler also testified that he did not see any significant evidence of a change in Shaw's attitudes during the interview so he believed Shaw still had severe APD. (RP 97, 99) But Dr. Wheeler interviewed Shaw in 2006, nearly four years before the trial and before Shaw participated in the Native American spiritual circle activities at SCC. Additionally, Shaw's behavior during that interview contradicts Dr. Wheeler's conclusion. Dr. Wheeler testified that Shaw exhibited a "low threshold of agitation" during the interview and seemed a few times to be on the verge of anger.

(RP 70) However, Shaw did not lose control of his anger, and instead was able to keep physically and mentally calm. (RP 402)

Moreover, the witnesses who have actually had contact with Shaw at SCC in the last few years paint a very different portrait of Shaw; they say Shaw is respectful, reliable, and able to resolve conflict verbally and non-aggressively. (RP 369-70, 371, 390, 424, 427, 432-33) These witnesses have never seen Shaw lose his temper, and in fact have seen him deal with frustrations and confrontation in a healthy manner. (RP 369-70, 424, 425, 427, 428, 434, 435)

Dr. Wheeler's opinions about Shaw's APD diagnosis and behavior are out of date, and do not establish that Shaw currently has serious difficulty controlling his behavior. Therefore, the record does not support the trial court's conclusion that Shaw's antisocial personality disorder causes him serious difficulty controlling his behavior.

B. THE STATE DID NOT ESTABLISH THAT SHAW'S PERSONALITY DISORDER MAKES HIM LIKELY TO COMMIT PREDATORY ACTS OF SEXUAL VIOLENCE.

The United States Supreme Court has established that involuntary civil commitment may not be based upon a diagnosis that is too imprecise to distinguish the truly mentally ill from typical

recidivists, who must be dealt with by criminal prosecution alone. Crane, 534 U.S. at 413; Hendricks, 521 U.S. at 357-58; Foucha, 504 U.S. at 82-83.

In Foucha, the Supreme Court held that a criminal defendant found not guilty by reason of insanity could not be held involuntarily in a state hospital solely “on the basis of his antisocial personality which, as evidenced by his conduct at the facility . . . rendered him a danger to himself or others.” 504 U.S. at 78, 82. The Court explained that the State’s “rationale [for commitment] would permit [it] to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true for any convicted criminal, even though he has completed his prison term.” Foucha, 504 U.S. at 82-83. The Court reasoned that if a supposedly dangerous person with a personality disorder “commit[s] criminal acts” then “the State [should] vindicate [its interests through] the ordinary criminal process” and “the normal means of dealing with persistent criminal conduct.” 504 U.S. at 82.

In Hendricks, the Supreme Court reaffirmed that “dangerousness standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment[.]” 521 U.S.

at 358. The Court upheld Hendricks' commitment under Kansas' sexually violent predator act, noting that "[t]he mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia," which is a serious mental disorder. 521 U.S. at 360. Thus, "Hendricks' diagnosis as a pedophile . . . suffice[d] for due process purposes," and furthermore, his admitted inability to control his pedophilic urges "adequately distinguish[ed] [him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." 521 U.S. at 360.

And in Crane, the Court reinforced its decision in Hendricks, that civil commitment is reserved for dangerous sexual offenders as opposed to just dangerous persons, and cited to a study finding that 40 to 60 percent of the male prison population is diagnosable with antisocial personality disorder. 534 U.S. at 412 (citing Paul Moran, The Epidemiology of Antisocial Personality Disorder, 34 SOCIAL PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999)).²

In this case, the State failed to show that having APD makes Shaw more likely to commit a new crime of sexual violence, as opposed to simply a new crime. Although Dr. Wheeler suggested

² Dr. Wheeler and Dr. Donaldson also cited statistics suggesting that the rate of diagnosable APD in the general prison population ranges anywhere from 30 to 75 percent. (RP 158, 262)

that Shaw's APD would make him likely to engage in acts of sexual violence, the facts do not support this conclusion. Dr. Wheeler testified that APD can manifest itself in aggressive and assaultive behavior. (RP 94) But Dr. Wheeler did not connect Shaw's APD with a drive to commit sex crimes; in fact, Dr. Wheeler testified that the foundation of Shaw's sexually assaultive behavior derives from Shaw's anger and resentment towards women, not from a sexual disorder or deviance. (RP 95)

Neither Dr. Wheeler nor Dr. Donaldson diagnosed Shaw with paraphilia or any other sexual disorder. (RP 107, 266) And Dr. Donaldson testified that Shaw's APD does not include a sexual component. (RP 306) Without a diagnosis of a mental abnormality or personality disorder that compels Shaw to commit a sexually violent act, as opposed to simply a violent or other criminal act, the State cannot show that Shaw meets the definition of sexually violent predator.³

The State may have shown that Shaw's APD could lead to criminal conduct, but it did not establish that Shaw's APD could

³ In fact, both Dr. Wheeler and Dr. Donaldson testified that there exists a difference of opinion within the psychological community about whether a person with APD but no sexual disorder should ever be involuntarily committed as a SVP. (RP 230-31, 258)

lead to sexually violent conduct. As in Foucha, it is improper to hold Shaw involuntarily solely on the basis of an antisocial personality disorder that may lead to general criminal conduct. 504 U.S. at 78, 82. Instead the State must show that Shaw's disorder may lead to a sexually violent criminal conduct, which it simply failed to do.

C. THE STATE DID NOT ESTABLISH THAT SHAW WILL MORE LIKELY THAN NOT REOFFEND IF RELEASED BECAUSE THE ACTUARIAL INSTRUMENT RESULTS ARE UNRELIABLE PREDICTORS OF SHAW'S RISK TO REOFFEND, AND BECAUSE THE DYNAMIC RISK FACTORS RELIED UPON BY DR. WHEELER ARE IRRELEVANT.

The State must prove that Shaw is "[l]ikely to engage in predatory acts of sexual violence if not confined in a secure facility[.]" which means that Shaw "*more probably than not* will engage in such acts" if released unconditionally from detention. RCW 71.09.020(7) (emphasis added).

Through Dr. Wheeler, the State presented results of actuarial instruments that placed Shaw's risk to reoffend between 26.3 and 39.9 percent within five years, and between 36 and 48.6 percent within ten years. (RP 119-20) If "more probably than not" means greater than 50 percent (RP 109), then these instruments do not establish that Shaw is "likely to engage in predatory acts of sexual violence if not confined[.]"

In addition, the actuarial results are unreliable in this case. First, the actuarial instruments studied a broad range of sex offenders to determine risk factors, including high risk sex offenders. (RP 126-28) So the risk-of-reoffense percentages include offenders with sexual disorders such as paraphilia and pedophilia. Persons with these types of disorders would presumably be more likely to sexually reoffend. But Shaw does not have a sexual disorder, so comparing Shaw to control groups that include offenders with sexual disorders does not accurately predict Shaw's risk to commit a sex offense in the future.

But the actuarial results are unreliable for another reason as well: they merely predict the probability of rearrest or reconviction for *any* sex offense, not specifically for the probability of "predatory" acts of "sexual violence." (RP2 183-84) A "predatory" act is specifically defined as an act "directed towards: (a) strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists." RCW 71.09.020(10).

An act of "sexual violence" is also specifically defined, and

does not include all sex crimes.⁴ RCW 71.09.020(17). For instance, under Washington statutes “sex offense” includes crimes such as third degree rape, incest, communication with a minor for immoral purposes, voyeurism, and failure to register as a sex offender. See RCW 9.94A.030(45); RCW Chapter 9A.44. But these crimes are not included in the definition of “sexually violent offense.” RCW 71.09.020(17).

Thus, while the actuarial instruments might provide insight into whether a sex offender is more likely to commit any sexual offense after release, this proves nothing about the risk that a sex offender in Washington would commit an offense included within the specific subset of sexual offenses that are “predatory” acts of “sexual violence,” as those terms are defined under RCW 71.09.020.

The actuarial instruments were created from studies using broader recidivism criteria than are relevant to the narrow legal

⁴ The term “sexually violent offense” includes first degree rape, second degree rape committed by forcible compulsion, first and second degree rape of a child, first and second degree statutory rape, indecent liberties committed by forcible compulsion, indecent liberties or incest against a child under 14, first or second degree child molestation. The term also includes the following crimes if sexually motivated: first or second degree murder, first or second degree assault, first or second degree assault of a child, first or second degree kidnapping, unlawful imprisonment, first degree burglary, and residential burglary. The term also covers attempt, solicitation, and conspiracy to commit any of these crimes. RCW 71.09.020(17).

question in Washington, and broader offender control groups than is relevant to determine Shaw's particular risk to reoffend. Accordingly, the actuarial instruments cannot establish the specific facts that the State must prove under the SVP Statute.⁵

Because the actuarial instruments placed Shaw's risk at less than 50 percent, Dr. Wheeler relied on his clinical judgment and consideration of dynamic risk factors to conclude that Shaw would "more probably than not" reoffend. (RP 109-10, 137) Dr. Wheeler considered several factors, including the fact that, prior to his incarceration, Shaw exhibited antisocial behaviors, intimacy deficits, hostility, and substance abuse issues. (RP 137, 140-41)

However, given that Shaw has been incarcerated since 1985, these risk factors are not reliable predictors of Shaw's behavior in the present or in the future if he were released from confinement. While incarcerated, Shaw has exhibited no signs of deviant sexual behavior and had no anger management or major behavior problems. (RP 63, 65, 174-75) Moreover, Dr. Wheeler conceded that most of these dynamic risk factors were already

⁵ In addition, the base rate recidivism rate for the actuarial studies is higher than the base rate for Washington offenders. (RP 204-05, 284-85) For all these reasons, the trial court was incorrect when it found that the actuarial risk predictions underestimated Shaw's risk. (CP 111)

included as risk factors used for scoring on the actuarial instruments. (RP 137, 223-24, 225-26, 227-28) So Dr. Wheeler's conclusion of risk based on these empirical factors is both admittedly redundant and hence unreliable and irrelevant as a predictor of future behavior, and is not supported by evidence in the record.

The actuarial instrument results, which are unreliable and overbroad, still rate Shaw's likelihood to reoffend at less than 50 percent. Dr. Wheeler's clinical judgment that Shaw is likely to reoffend if released is not supported by the evidence and should be disregarded. The record does not support the trial court's finding that Shaw is more likely than not to engage in predatory acts of sexual violence unless he remains confined in a secure facility.

V. CONCLUSION

The State and the courts must resist the impulse to confine Gary Shaw because of the nature of the crimes he committed in 1985. Shaw accepted responsibility for his actions, pleaded guilty to the charges, and has served his sentence with good behavior. The State has no authority to detain Shaw unless it can prove that he more likely than not will commit a sexually violent offense if released. The State did not meet that burden. The order of

commitment entered in this case should be vacated, and Shaw should be released.

DATED: October 18, 2010

Stephanie Cunningham

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CERTIFICATE OF MAILING

I certify that on 10/18/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Joshua Choate, AAG, Attorney General's Office, 800 5th Ave Ste 2000, Seattle, WA 98104-3188; and (2) Gary Allen Shaw, Special Commitment Center, PO Box 88600, Steilacoom, WA 98388.

Stephanie Cunningham

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