



RECEIVED BY E-MAIL

NO. 89251-2

SUPREME COURT OF THE STATE OF WASHINGTON

In re:

ALAN MEIRHOFER,

Appellant.

MOTION TO STRIKE

I. IDENTITY OF MOVING PARTY

The State of Washington, respondent herein, asks for the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 10.7, the supplemental brief filed by Meirhofer is improper and the State requests that the Court order stricken from the brief 1) all references to *Frye v. United States*, 54 App. D.C. 46, 293 F.1013 (1923); and 2) the extra-record document attached to Meirhofer's Supplemental Brief as a "Supplemental Appendix" and any argument related to that attachment. This motion is made pursuant to RAP 9.11, RAP 10.3(a)(5) and (6), and RAP 10.4(f).

III. ARGUMENT

The Court should grant the State's motion to strike because Meirhofer raises new issues in his Supplemental Brief not raised to the trial court and not argued to the Court of Appeals, and because he attaches

extra-record material to his Supplemental Brief without arguing, let alone establishing, any grounds for this Court to accept new evidence.

First, Meirhofer makes extensive argument related to an issue not raised below: Whether Paraphilia NOS: Hebephilia meets standards for admissibility in *Frye v. United States*, 54 App. D.C. 46, 293 F.1013 (1923). See Appellant's Supp. Br. at 11-13. Second, Meirhofer attaches to his Supplemental Brief a superior court order in a completely unrelated case, for the apparent purpose of attempting to establish facts that are outside the record and to which the State has had no opportunity to respond. Appellant's Supp. Br., "Supplemental Appendix."

In his Supplemental Brief before this court, Meirhofer argues that "the trial court should not have considered this new diagnosis [of Paraphilia NOS: Hebephilia] at all because it fails the *Frye* standard of admissibility." Appellant's Supp. Br. at 11. Meirhofer makes no attempt to show that he requested a *Frye* hearing regarding Hebephilia at the trial court. Nor was the issue properly raised on appeal: Meirhofer's PRP in the Court of Appeals contains no mention of *Frye*, and his Motion for Discretionary Review contains only one sentence citing *Frye*: "New evidence may not be considered if it fails the *Frye* standard of admissibility. *In re Detention of Ambers*, 160 Wn.2d 543,553, n.5, 158

P.3d 1144 (2007) (citing *Frye v. United States*, 54 App. D.C. 46, 293 F.1013 (1923)).”

“Arguments not raised in the trial court generally will not be considered on appeal.” *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002). Moreover, passing reference to an argument, such as Meirhofer’s reference to *Frye* in his Motion for Discretionary Review, is insufficient to preserve the issue for judicial review. “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *State v. Johnson*, 119 Wn.2d 167,171, 829 P.2d 1082 (1992). The prohibition against raising new arguments on appeal should apply with even greater force here, where the new argument is raised for the first time in a Supplemental Brief, to which the State has no opportunity to respond. Accordingly, the State respectfully requests that the Court strike the argument in Meirhofer’s brief from the first full paragraph on page 11, beginning “Indeed, the trial court . . .” through the bottom of page 13, ending with “sufficient evidence.”

Meirhofer’s supplemental appendix (*In re the Detention of Black*, Findings of Fact and Conclusions of Law on Frye and ER 702/703) should also be stricken, as should any discussion of the appendix contained in the supplemental brief. First, it is outside the record in this case, and

Meirhofer makes no effort to establish any grounds for this Court to accept new evidence. *See* RAP 9.11. Second, it is a superior court order of no precedential value.

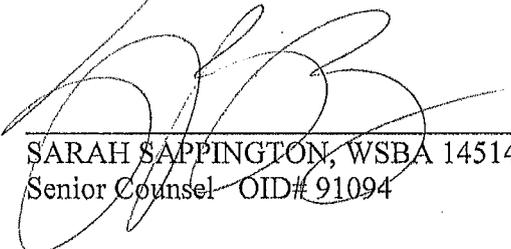
Moreover, the document is not helpful to this Court's analysis, and should be stricken as irrelevant. The facts leading up to the *Black Frye* hearing are not before the Court, but several things are apparent from the order itself: First, the only testimony offered was by the defense expert, Dr. Karen Franklin; the State did not present any expert testimony. Supp. App. at 1. While this appears odd, it is perhaps because the State's expert, Dr. Dale Arnold, did not diagnose Hebephilia at all, instead assigning a diagnosis of "Paraphilia NOS, persistent sexual interest in pubescent aged females, non-exclusive," which the trial court determined was "a permissible diagnosis." Supp. App. at 2. The reasons the defense in that case might have had for asking for, and the trial court might have had for holding, a *Frye* hearing related to the admissibility of a diagnosis that the State's expert did not assign are not clear. In any case, the most that this order can possibly be said to stand for is that, at a *Frye* hearing at which the State presented no evidence about a diagnosis their testifying expert did not assign, the trial court found that that diagnosis did not meet *Frye*. Accordingly, the order is neither relevant nor helpful to the Court and should be stricken.

IV. CONCLUSION

For the aforementioned reasons, this Court should strike the argument in Meirhofer's brief relating to *Frye*, from the first full paragraph on page 11, beginning "Indeed, the trial court . . ." through the bottom of page 13, ending with "sufficient evidence" as well as the "Supplemental Appendix" to Meirhofer's Supplemental Brief.

RESPECTFULLY SUBMITTED this 2 day of April, 2014.

ROBERT W. FERGUSON
Attorney General



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Senior Counsel - OID# 91094

NO. 89251-2

WASHINGTON STATE SUPREME COURT

In re the Personal Restraint Petition of:

ALAN MEIRHOFER,

Appellant.

DECLARATION OF
SERVICE

I, Allison Martin, declare as follows:

On April 2, 2014, I sent via electronic mail and usps a true and correct copy of Motion to Strike and Declaration of Service, postage affixed, addressed as follows:

Lila Silverstein
Washington Appellate Project
1511 Third Ave. Suite 701
Seattle, WA 98101
Lila@washapp.org

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

DATED this 2nd day of April, 2014, at Seattle, Washington.


ALLISON MARTIN

OFFICE RECEPTIONIST, CLERK

To: Martin, Allison (ATG)
Cc: Sappington, Sarah (ATG); lila@washapp.org
Subject: RE: In re Meirhofer 89521-2

Received.

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From: Martin, Allison (ATG) [mailto:AllisonM1@ATG.WA.GOV]
Sent: Wednesday, April 02, 2014 2:18 PM
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Subject: In re Meirhofer 89521-2

Good afternoon,

Attached, for filing please find the State's Motion to Strike and Declaration of Service.

Filed on behalf of:

SARAH SAPPINGTON
WSBA #14514
OID#91094
206-389-2019

Allison Martin | Legal Assistant to

Sarah Sappington | Katharine Hemann | Erin Jany
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