

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/6/2017 4:04 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 94494-6

SUPREME COURT OF THE STATE OF WASHINGTON

---

In re the Detention of  
MARK BLACK

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE CAROL A. SCHAPIRA

---

SUPPLEMENTAL BRIEF OF RESPONDENT

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANDREA R. VITALICH  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
Sexually Violent Predator Unit  
King County Administration Building  
500 Fourth Avenue, 9<sup>th</sup> Floor  
Seattle, Washington 98104  
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u> .....	1
B. <u>ISSUES PRESENTED</u> .....	2
C. <u>STATEMENT OF THE CASE</u> .....	2
D. <u>ARGUMENT</u> .....	10
1. ON THIS RECORD, BOTH THE TRIAL COURT AND THE COURT OF APPEALS RULED CORRECTLY REGARDING THE <u>FRYE</u> /"HEBEPHILIA" ISSUE .....	10
2. BECAUSE AMPLE EVIDENCE SUPPORTS BOTH ALTERNATIVE MEANS, THE COURT OF APPEALS CORRECTLY AFFIRMED THE JURY'S VERDICT .....	19
E. <u>CONCLUSION</u> .....	23

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Frye v. United States, 293 F. 1013  
(D.C. Cir. 1923) ..... 4, 5, 10, 11, 12, 16, 17

Washington State:

In re Detention of Audett, 158 Wn.2d 712,  
147 P.3d 982 (2006)..... 21

In re Detention of Belcher, 189 Wn.2d 280,  
399 P.3d 1179 (2017)..... 12

In re Detention of Black, 189 Wn. App. 641,  
357 P.3d 91 (2015)..... 9

In re Detention of Black, 187 Wn.2d 148,  
385 P.3d 765 (2016)..... 9

In re Detention of Black, 198 Wn. App. 1023  
(2017 WL 1137114)..... 10, 19, 21

In re Detention of Coe, 160 Wn. App. 809,  
250 P.3d 1056 (2011), *aff'd*,  
175 Wn.2d 482, 286 P.3d 29 (2012)..... 18

In re Detention of Halgren, 156 Wn.2d 795,  
132 P.3d 714 (2006)..... 21

In re Detention of Meirhofer, 182 Wn.2d 632,  
343 P.3d 731 (2015)..... 13

In re Detention of Reyes, 184 Wn.2d 340,  
358 P.3d 394 (2015)..... 20

In re Detention of Sease, 149 Wn. App. 66,  
201 P.3d 1078, review denied,  
166 Wn.2d 1029 (2009)..... 22

<u>In re Detention of Thorell</u> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	12, 13
<u>In re Detention of Young</u> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	12
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	21
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	18
<u>State v. Salinas</u> , 119 Wn.2d 192, 929 P.2d 1068 (1992).....	21
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	21
<u>State v. Woodlyn</u> , 188 Wn.2d 157, 392 P.3d 1062 (2017).....	19, 20, 21

Other Jurisdictions:

<u>In re Commitment of Walker</u> , 385 Ill. Dec. 647, 19 N.E.3d 205 (Ill. Ct. App. 2014).....	17
<u>In re Detention of New</u> , 372 Ill. Dec. 677, 992 N.E.2d 519 (Ill. Ct. App. 2013), <i>aff'd</i> , 386 Ill. Dec. 643, 21 N.E.3d 406 (Ill. 2014).....	16, 17

Statutes

Washington State:

Chapter 71.09 RCW.....	2
RCW 9A.44.073 .....	16
RCW 9A.44.074 .....	16
RCW 9A.44.079 .....	16

RCW 9A.44.083 .....	16
RCW 9A.44.086 .....	16
RCW 9A.44.089 .....	16
RCW 71.09.020.....	16

Other Authorities

Brooks, Alexander D., <i>The Constitutionality and Morality of Civilly Committing Violent Sexual Predators</i> , 15 U. Puget Sound L. Rev. 709 (1991-1992).....	12
<u>Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – Text Revision</u> .....	3, 13, 15
<u><a href="http://apps.who.int/classifications/icd10/browse/2016/en#/F60-F69">http://apps.who.int/classifications/icd10/browse/2016/en#/F60-F69</a></u> .....	4
<i>ICD vs. DSM</i> , Monitor on Psychology, Vol. 40, No. 9 (Oct. 2009), available at: <u><a href="http://www.apa.org/monitor/2009/10/icd-dsm.aspx">http://www.apa.org/monitor/2009/10/icd-dsm.aspx</a></u> .....	15
ICD-10, § F65.4.....	14
<u>International Statistical Classification of Diseases and Related Health Problems, 10th Revision</u> .....	4, 6, 14, 15, 17
<u>The ICD-10 Classification of Mental and Behavioral Disorders, Clinical descriptions and diagnostic guidelines</u> , at 171, available at: <u><a href="http://www.who.int/classifications/icd/en/bluebook.pdf">http://www.who.int/classifications/icd/en/bluebook.pdf</a></u> .....	14

**A. INTRODUCTION**

All of Black's arguments stem from the premise that the trial court should have suppressed the State's expert's testimony regarding "hebephilia"—a psychological construct that Black's expert described as an ill-defined sexual attraction to adolescents up to 17 years old. This premise is faulty for two primary reasons. First, the trial court granted Black's motion to suppress evidence of "hebephilia." Second, the State's expert did not diagnose Black with "hebephilia."

The State's expert diagnosed Black with a paraphilic disorder based on his admitted sexual preference for girls at the very beginning of puberty, whose breasts were "just starting to bud." The expert also diagnosed Black with sexual sadism and a personality disorder. The validity and admissibility of these additional diagnoses has never been challenged. Each diagnosis independently supported the expert's opinion that Black meets the definition of a sexually violent predator. Because the premise underlying all of Black's arguments is faulty, those arguments fail.

**B. ISSUES PRESENTED**

1. Whether the trial court properly admitted expert testimony about Black's paraphilic disorder, and whether the Court of Appeals correctly held that it was unnecessary to address the issue because Black's civil commitment is also based on two other uncontested diagnoses.

2. Whether the Court of Appeals correctly held that Black's civil commitment is supported by ample evidence of both a mental abnormality and a personality disorder, even if the paraphilic disorder is disregarded entirely.

**C. STATEMENT OF THE CASE**

The State filed a petition to civilly commit Mark Black as a sexually violent predator under chapter 71.09 RCW at the end of his prison sentence for, among other crimes, child molestation in the second degree and attempted child molestation in the second degree. CP 1-87. Pretrial motions and a jury trial occurred in late 2013 before the Honorable Carol Schapira.

The State's expert, psychologist Dale Arnold, Ph.D., evaluated Black and diagnosed him with three disorders as

described in the DSM-IV-TR<sup>1</sup>: 1) sexual sadism; 2) paraphilia not otherwise specified (NOS), “persistent sexual interest in pubescent aged females, non-exclusive”; and 3) personality disorder NOS with antisocial and narcissistic traits. CP 49. With respect to the paraphilia diagnosis, Dr. Arnold stated in his report and in a pretrial deposition that researchers have used the term “hebephilia” to describe this disorder, although Dr. Arnold does not use that term himself. CP 143, 466. Dr. Arnold explained that Black’s paraphilia differs from the strict DSM definition of pedophilia due to Black’s arousal to “early breast development more associated with a pubescent aged female than a prepubescent female.”<sup>2</sup> CP 143. Black candidly admitted to Dr. Arnold that he was most attracted to girls at the very beginning of puberty because “[t]heir breasts were

---

<sup>1</sup> “DSM-IV-TR” is the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition – Text Revision. Dr. Arnold used the DSM-IV-TR when he conducted his evaluations in this case; therefore, some of the discussion in this brief refers to that edition of the DSM. By the time Black’s trial took place, the American Psychiatric Association had published the fifth edition of the DSM, called the “DSM-5,” which will also be discussed. Undersigned counsel has endeavored to make clear where the two editions of the DSM differ.

<sup>2</sup> Both the DSM-IV-TR and the DSM-5 describe “pedophilia” and “pedophilic disorder” (respectively) as persistent sexual arousal involving “a prepubescent child or children (generally age 13 years or younger).” As Dr. Arnold explained, this definition contains “an intrinsic contradiction”: it is purportedly limited to “prepubescent” children, yet it specifies children who are “generally age 13 and younger,” which would necessarily include the early stages of puberty as well as prepubescence. CP 470.

just starting to bud.”<sup>3</sup> CP 471. Given Black’s specific description of his own sexual preference, Dr. Arnold wanted to be as accurate as possible when describing Black’s disorder as paraphilia NOS rather than pedophilia. CP 471, 842. Dr. Arnold also observed that Black’s disorder *would be* defined as pedophilia by the ICD-10,<sup>4</sup> which includes both “prepubertal” and “early pubertal” children as the objects of the abnormal sexual focus. CP 470.

Black filed a pretrial motion to suppress Dr. Arnold’s testimony regarding paraphilia NOS under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).<sup>5</sup> Black’s motion was based on the premise that Dr. Arnold had diagnosed Black with “hebephilia,” and that “hebephilia” is not a generally accepted diagnosis in the psychiatric community because sexual attraction to adolescents is

---

<sup>3</sup> Breast buds correspond with Tanner Stage 2, which is the first stage of sexual development immediately following prepubescence. See CP 1887-88 (attached).

<sup>4</sup> “ICD-10” is the International Statistical Classification of Diseases and Related Health Problems, 10th Revision, which is a comprehensive classification system promulgated by the World Health Organization (WHO) and used by over 100 of its member nations. The ICD-10 is available free of charge online; the definition of “paedophilia” may be accessed at the following web address: <http://apps.who.int/classifications/icd10/browse/2016/en#/F60-F69> (last accessed 11/1/17).

<sup>5</sup> Black did not challenge the admissibility of Dr. Arnold’s testimony regarding sexual sadism and personality disorder NOS in the trial court, and he has not challenged that testimony on appeal.

not abnormal. CP 1658-2113. The State filed substantial briefing and materials in opposition to the motion. CP 94-166, 365-571.

Psychologist Karen Franklin, Ph.D., testified for the defense at the Frye hearing. Dr. Franklin advocates against the legitimacy of “hebephilia,”—a construct she described as “something to do with sexual attraction or sexual activity or both with either adolescents, or in some cases defined only as female adolescents.” RP (9/13/13) 35. According to Dr. Franklin, “hebephilia” has also been described in different cases as sexual attraction to “male teens,” “children older than 13 years of age,” or “adolescent individuals under the age of consent.”<sup>6</sup> RP (9/13/13) 76-77. Dr. Franklin opined that this ill-defined construct of “hebephilia” was not generally accepted in the scientific community, and she criticized the efforts that had been made to include “hebephilia” as

---

<sup>6</sup> Dr. Franklin also provided a declaration in support of Black’s Frye motion, in which she described “hebephilia” as an undefined level of sexual attraction to “adolescent” or “postpubescent” children. *See, e.g.*, CP 6, 7, 13, 17, 23. The entire record in this case amply demonstrates that much of the criticism of “hebephilia” stems from the notion that it is “normal” for adults to find adolescents sexually attractive. However, this criticism does not address Black’s specific sexual preference for girls at the earliest stage of puberty—*i.e.*, girls whose “breasts were just starting to bud”—rather than a generalized sexual attraction to adolescents of varying ages. CP 470-71.

an enumerated disorder in the DSM-5.<sup>7</sup> RP (9/13/13) 34-95. On cross-examination, however, Dr. Franklin agreed that the ICD-10 is also a generally accepted classification system that is widely used in countries other than the United States, and that the ICD-10 includes both “prepubescent” and “early pubescent” children in its definition of pedophilia. RP (9/13/13) 124-25. When Dr. Franklin was then asked if a paraphilia diagnosis based on attraction to early pubescent children was generally accepted internationally, she could not provide an answer. RP (9/13/13) 131.

At the conclusion of the hearing, the trial court granted Black’s motion to suppress evidence regarding “hebephilia,” but ruled that Dr. Arnold’s diagnosis of paraphilia NOS was admissible because it was a valid diagnosis under both the DSM and the ICD-10. RP (9/13/13) 149-59; CP 1412-14. The court found that “hebephilia” as described by Dr. Franklin lacked a standardized definition, and it could potentially include teenagers up to age 17. RP (9/13/13) 153, 155; CP 1413. Conversely, the court found that

---

<sup>7</sup> Dr. Franklin also opined that “paraphilias in general are a very controversial category” of disorders, and that there are “[v]ery, very many scholars that believe that they’re outdated, and that they’re more signifying a moral disapproval rather than an actual medical malady.” RP (9/13/13) 109. When asked what paraphilias, if any, could properly be included in the NOS category, she responded that “attraction to nails and bugs and outer space aliens and amputees and a lot of other really bizarre paraphilias” could properly be included, but that “hebephilia” could not. RP (9/13/13) 110.

Dr. Arnold's far more specific diagnosis was based on known criteria and standards. RP (9/13/13) 151; CP 1413.

At trial, Dr. Arnold testified consistently with his report and his deposition that he had made three diagnoses that explained Black's behavior, and that each disorder has an independent causal connection to Black's propensity to commit predatory acts of sexual violence.

First, Dr. Arnold explained that the features of Black's personality disorder include a sense of entitlement, manipulation of others for personal gain, lack of empathy, deceitfulness, and irresponsibility. RP-V (10/28/13) 405-06. Dr. Arnold explained that Black's very high score on the Hare Psychopathy Checklist – Revised (PCL-R)<sup>8</sup> indicates that his personality disorder is severe, and that he is more likely to reoffend than most other offenders in spite of negative consequences. RP-V (10/28/13) 426-27.

Dr. Arnold explained that Black's personality disorder "has a direct link to sexual offending" because he enjoys "the adventure" of finding women, "inserting himself" into their lives, manipulating them, and grooming their daughters and their daughters' friends for sexual victimization and exploitation. RP-V (10/28/13) 427-28.

---

<sup>8</sup> Black scored 34 out of a possible 40 points. RP-V (10/28/13) 427. This is well above the cutoff score for finding that the subject is a psychopath.

Dr. Arnold stated unequivocally that Black's personality disorder, by itself, causes him serious difficulty controlling his sexually violent behavior. RP-V (10/28/13) 445.

Second, Dr. Arnold testified about Black's paraphilic disorder NOS. Dr. Arnold highlighted Black's admission that he was aroused by early pubescent girls "because of the budding breasts and the emotional connection he gets from them." RP-V (10/28/13) 433. Dr. Arnold explained that Black's paraphilia impairs his volitional control, noting that he went to prison for child molestation, participated in two years of sex offender treatment, and upon his release "he does almost exactly the very same thing. It's like he just didn't learn at all." RP-V (10/28/13) 442-43. Dr. Arnold concluded that Black's paraphilia, by itself, is a mental abnormality that causes Black serious difficulty controlling his sexually violent behavior. RP-V (10/28/13) 445.

Third, Dr. Arnold explained that he had diagnosed Black with sexual sadism because Black enjoyed choking, striking, and causing pain to his adult female sexual partners, and he was sexually aroused by the physical abuse he inflicted upon them. RP-V (10/28/13) 436-39. Dr. Arnold observed that Black's sexual arousal to these sadistic behaviors persisted, even if his adult

female partner was crying or injured. RP-V (10/28/13) 438-39.

Dr. Arnold noted that Black had admitted he continued to have sex with women “even though they were crying and he knew they didn’t like it”; in fact, one of Black’s adult partners was injured badly enough that she went to the hospital. RP-V (10/28/13) 438-39.

Dr. Arnold explained that Black’s sexual sadism disorder, by itself, constitutes a mental abnormality that predisposes him to commit criminal sexual acts and causes him serious difficulty controlling sexually violent behavior. RP-V (10/28/13) 441-42, 445-46.

Based on all the evidence presented at trial, which also included the testimony of several of Black’s victims (both girls and adult women), the jury found beyond a reasonable doubt that Black is a sexually violent predator. CP 1411.

The Court of Appeals initially reversed the jury’s verdict in a published decision that did not address the two claims currently at issue. In re Detention of Black, 189 Wn. App. 641, 357 P.3d 91 (2015). This Court granted the State’s petition for review, and reversed the Court of Appeals. In re Detention of Black, 187 Wn.2d 148, 385 P.3d 765 (2016). On remand, the Court of Appeals affirmed Black’s civil commitment in an unpublished decision, holding that 1) sufficient evidence supported the alternative means

of a mental abnormality and a personality disorder, even if the paraphilia diagnosis were disregarded, and 2) it was unnecessary to address the Frye issue on appeal because the jury's verdict was supported by the additional, uncontested diagnoses of a personality disorder and sexual sadism. In re Detention of Black, 198 Wn. App. 1023 (2017 WL 1137114) (hereinafter "Slip op.").

**D. ARGUMENT**

**1. ON THIS RECORD, BOTH THE TRIAL COURT AND THE COURT OF APPEALS RULED CORRECTLY REGARDING THE FRYE/"HEBEPHILIA" ISSUE.**

Black first claims that the trial court erred by allowing Dr. Arnold to testify regarding paraphilia NOS, and that the Court of Appeals erred by affirming the jury's verdict without considering this issue on the merits. Petition for Review at 7-11. Black's claim should be rejected on multiple bases.

As a preliminary matter, contrary to what Black's petition for review suggests, the question of whether "hebephilia" meets the Frye standard is not at issue in this case. First, and most obviously, the trial court suppressed evidence of "hebephilia" based

on Frye, and the State had no need to seek review of that ruling because Dr. Arnold's testimony was not based on "hebephilia."

Second, the record does not support Black's claim that "hebephilia" and the discrete paraphilia NOS diagnosis offered by Dr. Arnold are the same thing. There is no dispute that Dr. Arnold focused his testimony on Black's propensity to target girls who are technically not prepubescent, but are still children by any rational physical or legal standard. By contrast, the "hebephilia" construct criticized by Dr. Franklin would include adolescents who are much further along in their physical development. Thus, the entire premise of Black's claim—*i.e.*, that "hebephilia" and paraphilia NOS are one and the same—is fatally flawed because his own expert's testimony undercuts it.

Finally, as the Court of Appeals held, it is unnecessary to address Black's complaints about paraphilia NOS because the evidence of Black's sexual sadism and personality disorder—each of which independently supports the jury's verdict—remains unchallenged on appeal. Substantial evidence supports the commitment. Thus, although Black has framed the issue as a

question of whether “hebephilia” meets the Frye standard, that issue is not presented in this case.<sup>9</sup>

Black’s claim is without merit for other reasons as well. As this Court recently observed, “[t]he law recognizes that psychiatric medicine is an imprecise science and is subject to differing opinions as to what constitutes mental illness.” In re Detention of Belcher, 189 Wn.2d 280, 290, 399 P.3d 1179 (2017). Accordingly, this Court has described the DSM as “an evolving and imperfect document” that is not “sacrosanct.” In re Detention of Young, 122 Wn.2d 1, 28, 857 P.2d 989 (1993) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L. Rev. 709, 733 (1991-1992)). As a result, this Court recognizes that “there is no ‘talismanic significance’ to any particular diagnosis” in SVP civil commitment cases. In re Belcher, 189 Wn.2d at 290 (quoting In re Detention of Thorell, 149 Wn.2d 724, 762, 72 P.3d 708 (2003)).

Put another way, “[n]o technical diagnosis of a particular ‘mental

---

<sup>9</sup> To be clear, the State does not concede that hebephilia as *properly* defined fails to meet the Frye standard; to the contrary, the record contains substantial evidence and case law that the State provided to the trial court in opposition to Black’s motion, most of which flatly contradicts Dr. Franklin’s testimony that it is an ill-defined and baseless construct. See CP 365-571. The State’s position is that the issue is not squarely presented on appeal for both procedural and factual reasons.

abnormality' definitely renders an individual either an SVP or not."

In re Thorell, 149 Wn.2d at 762.

But even within the limitations of the DSM system, Dr. Arnold's testimony regarding paraphilia NOS was properly admitted. First, under the DSM-IV-TR, the "not otherwise specified" category is a well-accepted way to describe a paraphilia that does not fit within an enumerated disorder, and this Court has recognized the validity of the NOS category on multiple occasions. See In re Detention of Meirhofer, 182 Wn.2d 632, 644, 343 P.3d 731 (2015).<sup>10</sup> Under the DSM-5, Black's disorder would be termed an "other specified paraphilic disorder," which is the diagnostic category for cases "in which symptoms characteristic of a paraphilic disorder that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning predominate but do not meet the full criteria for any of the disorders" specifically enumerated. DSM-5 at 705. Notably, the DSM-5 expressly states that a paraphilia is "any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal,

---

<sup>10</sup> Although the specifier in Meirhofer was "nonconsent" rather than "pubescent aged females," it strains reason to suggest that this Court must approve each individual specifier within a paraphilia NOS diagnosis.

*physically mature*, consenting human partners.” DSM-5 at 685. By definition, a girl with breast buds is not “physically mature.” See CP 1888 (attached). Therefore, Dr. Arnold’s diagnosis is proper under the DSM classification system.

Moreover, as the trial court found, the DSM is not the only generally-accepted classification system that supports this diagnosis. Under the ICD-10, Black’s paraphilic disorder fits squarely within the definition of “paedophilia,” to wit: “A sexual preference for children, boys or girls or both, usually of prepubertal or early pubertal age.” ICD-10, § F65.4. Importantly, the WHO acknowledges in the ICD diagnostic handbook (also known as the “Blue Book”) that “[c]ontacts between adults and *sexually mature* adolescents are socially disapproved . . . *but are not necessarily associated with paedophilia.*”<sup>11</sup> In other words, the ICD diagnostic criteria eliminate the primary criticism of “hebephilia” as expressed by Dr. Franklin and by Black’s trial expert Dr. Joseph Plaud, *i.e.*, that men who find adolescents sexually attractive are “normal.” Conversely, the WHO expressly recognizes that a sexual

---

<sup>11</sup> The ICD-10 Classification of Mental and Behavioral Disorders, Clinical descriptions and diagnostic guidelines, at 171, available at: <http://www.who.int/classifications/icd/en/bluebook.pdf> (last accessed 11/1/17) (emphasis supplied).

preference for children in the earliest stage of puberty—*e.g.*, girls whose breasts are “just starting to bud”—is a paraphilic disorder.

Thus, under the ICD-10, Black’s paraphilia is simply “paedophilia,” *i.e.*, a sexual preference for children—a disorder whose existence and validity cannot seriously be questioned.

Indeed, Dr. Franklin acknowledged during her testimony that the ICD-10 is generally accepted in the field of clinical psychology,<sup>12</sup> and that its definition of a pedophile includes persons who, like Black, prefer “early pubescent” children. RP (9/13/13) 124-25.

This is a sufficient basis in itself to find that the trial court properly admitted Dr. Arnold’s testimony.

It is also worth noting that both the ICD-10 definition of pedophilia and Dr. Arnold’s paraphilia NOS diagnosis correlate with sexual offenses against children that are designated as “sexually violent offenses” for purposes of the SVP statute. Rape of a child

---

<sup>12</sup> According to the American Psychological Association, the ICD system may—and should—supersede the DSM eventually: “There is little justification for maintaining the DSM as a separate diagnostic system from the ICD in the long run, particularly given the U.S. government’s substantial engagement with WHO in the area of classification systems.” *ICD vs. DSM*, Monitor on Psychology, Vol. 40, No. 9 (Oct. 2009), available at: <http://www.apa.org/monitor/2009/10/icd-dsm.aspx> (last accessed 11/1/17). Notably, one of the differences between the DSM-IV-TR and the DSM-5 is that there have been significant efforts to harmonize the DSM with the ICD. See DSM-5 at 11-12 (describing efforts to harmonize the DSM-5 with the ICD-11, and noting that “most of the salient differences between the DSM and the ICD classifications do not reflect real scientific differences, but rather represent historical by-products of independent committee processes”). The DSM-5 also cross-references ICD diagnostic codes.

and child molestation in the first and second degrees are sexually violent offenses;<sup>13</sup> these crimes involve victims who are no older than 13 years of age.<sup>14</sup> By contrast, rape of a child and child molestation in the third degree are *not* sexually violent offenses; these crimes involve victims who are 14 and 15 years old.<sup>15</sup> Thus, as defined and classified by the legislature, sexual assaults against prepubescent *and* early pubescent children are sexually violent offenses for purposes of the SVP statute, whereas sexual assaults against older adolescents are not. Although the legislature does not define what constitutes a paraphilic disorder, the legislature's classification of these crimes reflects the reality that early pubescent children are far from being sexually mature. The trial court's ruling is correct for this reason as well.

Nonetheless, Black cites In re Detention of New, 372 Ill. Dec. 677, 992 N.E.2d 519 (Ill. Ct. App. 2013), *aff'd*, 386 Ill. Dec. 643, 21 N.E.3d 406 (Ill. 2014), for the proposition that "hebephilia" does not meet the Frye standard. This case is unpersuasive for multiple reasons. First, New does not squarely address the discrete

---

<sup>13</sup> RCW 71.09.020(17).

<sup>14</sup> RCWs 9A.44.073 and 9A.44.074; RCWs 9A.44.083 and 9A.44.086.

<sup>15</sup> RCW 9A.44.079; RCW 9A.44.089.

paraphilia NOS diagnosis proffered and explained by Dr. Arnold. Second, the issue presented in New was not whether “hebephilia” is a valid diagnosis, but whether the trial court should have held a Frye hearing before admitting evidence of “hebephilia” at trial after the issue was raised in a motion *in limine*. In re New, 372 Ill. Dec. at 689, 992 N.E.2d at 521. Thus, New is inapposite, as a Frye hearing was held in this case. In addition, the New opinion’s analysis has been soundly criticized by another division of the Illinois appellate court. See In re Commitment of Walker, 385 Ill. Dec. 647, 19 N.E.3d 205 (Ill. Ct. App. 2014) (holding that “the New court’s reasoning does not comport with a proper analysis pursuant to Frye”). Also, New contains not even one citation to the ICD-10. In short, New sheds little if any light on the issue raised here.

Black also argues that because the trial court suppressed “hebephilia” yet allowed testimony regarding paraphilia NOS, he was hampered in his ability to present a defense. This argument is not supported by the record. Dr. Franklin was not called as a trial witness because the defense never intended to call her as a trial witness unless the State offered evidence about “hebephilia.” CP 788; RP (9/26/13) 38, 107-26. If paraphilia NOS were truly the same thing as “hebephilia,” Dr. Franklin still could have been used

as part of the defense strategy to contest it. As it was, defense counsel cross-examined Dr. Arnold extensively regarding his paraphilia NOS diagnosis. RP-VI (10/29/13) 513-32. Moreover, although no evidence of “hebephilia” was admitted, Dr. Plaud testified during the defense case that “[m]en are attracted to pubescence,” and thus, an adult male who experiences sexual attraction to pubescent girls does not have a paraphilic disorder. RP-IX (11/4/13) 946-47. In short, the record shows that Black was not deprived of his ability to mount a defense, even if the jury ultimately found that defense unpersuasive.

Lastly, even if this Court were to conclude that the trial court erred, any such error is harmless. Evidentiary error is harmless if there is no reasonable probability that the outcome of the trial would have been different had the error not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). When an expert in an SVP case would have reached the same conclusions without considering the evidence that is challenged on appeal, any error in admitting that evidence is harmless. See In re Detention of Coe, 160 Wn. App. 809, 836-37, 250 P.3d 1056 (2011), *aff'd*, 175 Wn.2d 482, 286 P.3d 29 (2012). Such is the case here, as Dr. Arnold was clear that both sexual sadism and a personality disorder

independently supported his opinion that Black is a sexually violent predator. Thus, the Court of Appeals' holding is correct.

In sum, there are myriad reasons for this Court to reject Black's claim regarding "hebephilia." For any one or more of those reasons, this Court should affirm.

**2. BECAUSE AMPLE EVIDENCE SUPPORTS BOTH ALTERNATIVE MEANS, THE COURT OF APPEALS CORRECTLY AFFIRMED THE JURY'S VERDICT.**

The Court of Appeals correctly held that the evidence produced at trial proved that Black suffers from both a mental abnormality and a personality disorder, and thus, the jury's verdict should be affirmed. Slip op. at 3-6. The Court of Appeals also correctly held that even if the evidence regarding paraphilia NOS is disregarded entirely, the jury's verdict is supported by the independent diagnoses of sexual sadism and personality disorder NOS—neither of which Black has contested at any point in the appellate proceedings. Slip op. at 9-10. Nonetheless, Black contends that the jury's verdict should be overturned based on State v. Woodlyn, 188 Wn.2d 157, 392 P.3d 1062 (2017). Petition for Review at 11-15. But Woodlyn is inapposite, and Black's argument misconstrues the Court of Appeals' opinion.

In Woodlyn, this Court reaffirmed the well-settled rule that in cases where the jury is instructed that the charged crime can be committed in multiple ways—*i.e.*, by *alternative means*—jury unanimity is not required as to a particular means of committing the crime in order to affirm a general guilty verdict, “so long as each alternative means is supported by sufficient evidence.” Woodlyn, 188 Wn.2d at 165. This Court also rejected the Court of Appeals’ assertion “that a complete *lack* of evidence for one alternative allows courts to ‘rule out’ the possibility that any member of the jury relied on the factually unsupported means.” Id. at 165-66 (emphasis in original). Instead, this Court held that “[i]f there is insufficient evidence to support *any* of the means, a ‘particularized expression’ of jury unanimity is required” in order to affirm the conviction. Id. at 165 (emphasis in original) (citations omitted). Ultimately, this Court *did* affirm the conviction because sufficient evidence supported both alternative means of committing theft that were submitted to the jury. Id. at 167-70.

Although SVP cases are “resolutely civil in nature,”<sup>16</sup> this Court has held that “mental abnormality” and “personality disorder” constitute alternative means of meeting the definition of a sexually

---

<sup>16</sup> In re Detention of Reyes, 184 Wn.2d 340, 347, 358 P.3d 394 (2015).

violent predator. In re Detention of Halgren, 156 Wn.2d 795, 809-11, 132 P.3d 714 (2006). In this case, both alternative means were submitted to the jury, and the jury rendered a general verdict. CP 1385, 1411. Accordingly, Woodlyn would require reversal only if insufficient evidence supported either of these alternative means.<sup>17</sup>

But this is not the case. As the Court of Appeals correctly explained, Dr. Arnold testified that Black suffered from *two* conditions that qualify independently as a mental abnormality—paraphilia NOS and sexual sadism—as well as a personality disorder. Slip. op. at 4-6. Dr. Arnold's testimony established that any one of these three diagnoses, standing alone, supports the conclusion that Black is a sexually violent predator. Under the well-settled test for evidentiary sufficiency, this testimony provides

---

<sup>17</sup> Under the well-established test for evidentiary sufficiency on appeal, evidence is sufficient to sustain an SVP civil commitment so long as a rational factfinder could have found that the statutory elements were proved beyond a reasonable doubt. In re Detention of Audett, 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006). An appellant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences from the evidence must be drawn in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992). Also, the reviewing court must defer to the jurors' judgment as to the weight and credibility of the evidence and their resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. Circumstantial evidence is to be considered as reliable and probative as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In short, any question as to the weight or the meaning of the evidence should be resolved in favor of the verdict whenever such an interpretation is reasonable.

sufficient evidence of both a mental abnormality and a personality disorder, even if the evidence of paraphilia NOS is disregarded.

Nonetheless, Black seems to suggest in his petition for review that reversal is still required because it cannot be determined which specific diagnosis or combination of diagnoses formed the basis for the jury's verdict in this case. But a jury need not be unanimous as to a specific diagnosis when more than one diagnosis supports an alternative means in an SVP case. In re Detention of Sease, 149 Wn. App. 66, 76-79, 201 P.3d 1078, review denied, 166 Wn.2d 1029 (2009). Rather, when more than one diagnosis could support finding a mental abnormality or a personality disorder, the individual diagnoses are "means within means," for which unanimity is not required. Id.

In summary, Woodlyn does not require reversal here because sufficient evidence supports both alternative means, and because sufficient evidence supports the mental abnormality alternative means even if paraphilia NOS is disregarded and only the unchallenged evidence of sexual sadism is considered.

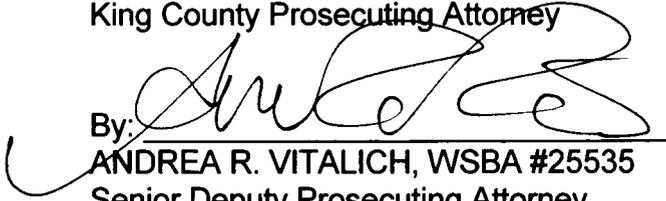
E. CONCLUSION

Black's civil commitment as a sexually violent predator should be affirmed.

DATED this 6th day of November, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA #25535  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

**Attachment:**

CP 1887-88, "The Tanner Stages" illustrations with text

(filed in the trial court as Exhibit 7 to Black's "Motion to Exclude State Evaluator's Diagnosis of 'Hebephilia' and His Use of the SRA-FV")

# The Tanner Stages

Because the onset and progression of puberty are so variable, Tanner has proposed a scale, now uniformly accepted, to describe the onset and progression of pubertal changes (Fig. 9-24). Boys and girls are rated on a 5 point scale. Boys are rated for genital development and pubic hair growth, and girls are rated for breast development and pubic hair growth.

Pubic hair growth in females is staged as follows (Fig 9-24, B):

- **Stage I (Preadolescent)** - Vellus hair develops over the pubes in a manner not greater than that over the anterior wall. There is no sexual hair.
- **Stage II** - Sparse, long, pigmented, downy hair, which is straight or only slightly curled, appears. These hairs are seen mainly along the labia. This stage is difficult to quantitate on black and white photographs, particularly when pictures are of fair-haired subjects.
- **Stage III** - Considerably darker, coarser, and curlier sexual hair appears. The hair has now spread sparsely over the junction of the pubes.
- **Stage IV** - The hair distribution is adult in type but decreased in total quantity. There is no spread to the medial surface of the thighs.
- **Stage V** - Hair is adult in quantity and type and appears to have an inverse triangle of the classically feminine type. There is spread to the medial surface of the thighs but not above the base of the inverse triangle.

The stages in male pubic hair development are as follows (Fig. 9-24, B):

- **Stage I (Preadolescent)** - Vellus hair appears over the pubes with a degree of development similar to that over the abdominal wall. There is no androgen-sensitive pubic hair.
- **Stage II** - There is sparse development of long pigmented downy hair, which is only slightly curled or straight. The hair is seen chiefly at the base of penis. This stage may be difficult to evaluate on a photograph, especially if the subject has fair hair.
- **Stage III** - The pubic hair is considerably darker, coarser, and curlier. The distribution is now spread over the junction of the pubes, and at this point that hair may be recognized easily on black and white photographs.
- **Stage IV** - The hair distribution is now adult in type but still is considerably less that seen in adults. There is no spread to the medial surface of the thighs.
- **Stage V** - Hair distribution is adult in quantity and type and is described in the inverse triangle. There can be spread to the medial surface of the thighs.

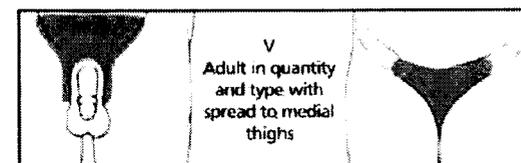
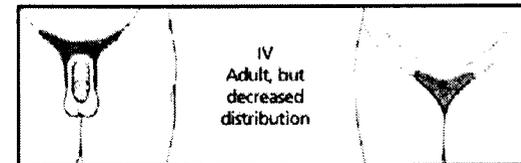
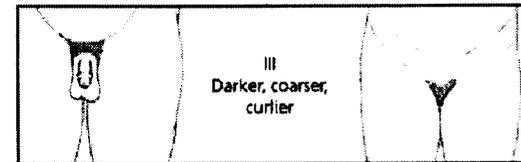
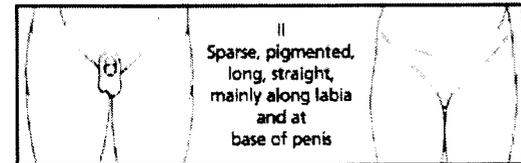


Fig. 9-24, B

In young women, the Tanner stages for breast development are as follows (Fig. 9-24, C):

- **Stage I (Preadolescent)** - Only the papilla is elevated above the level of the chest wall.
- **Stage II - (Breast Budding)** - Elevation of the breasts and papillae may occur as small mounds along with some increased diameter of the areolae.
- **Stage III** - The breasts and areolae continue to enlarge, although they show no separation of contour.
- **Stage IV** - The areolae and papillae elevate above the level of the breasts and form secondary mounds with further development of the overall breast tissue.
- **Stage V** - Mature female breasts have developed. The papillae may extend slightly above the contour of the breasts as the result of the recession of the areolae.

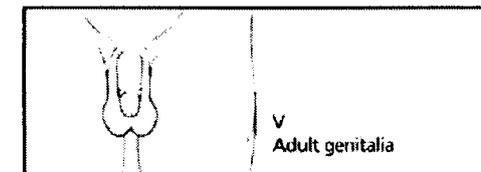
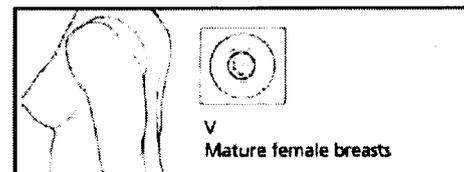
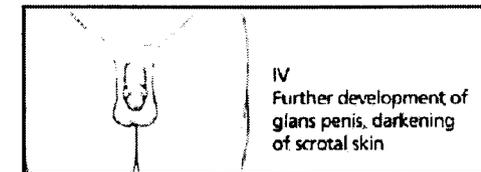
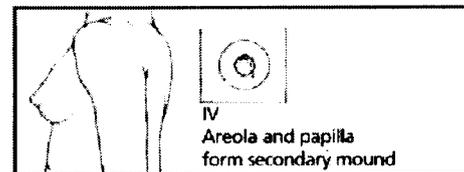
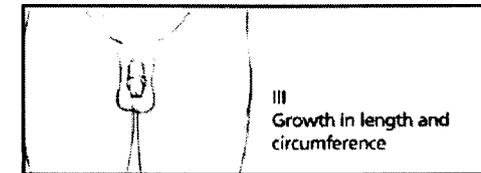
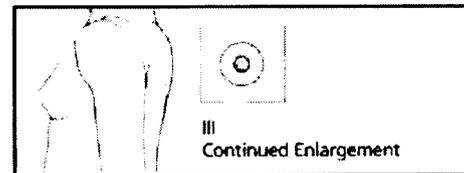
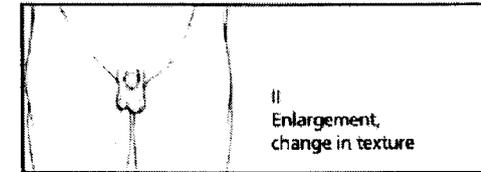
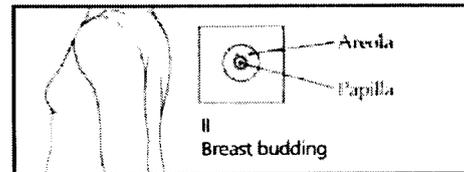
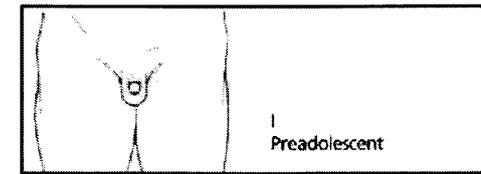
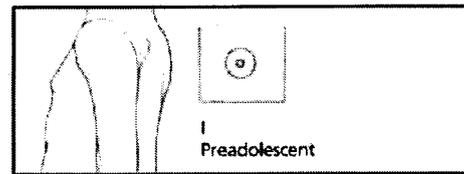


Fig. 9-24, C

Fig. 9-24, A

The stages for male genitalia development are as follows: (Fig. 9-24, A):

- **Stage I (Preadolescent)**- The testes, scrotal sac, and penis have a size and proportion similar to those seen in early childhood.
- **Stage II** - There is enlargement of the scrotum and testes and a change in the texture of the scrotal skin. The scrotal skin may also be reddened, a finding not obvious when viewed on a black and white photograph.
- **Stage III** - Further growth of the penis has occurred, initially in length, although with some increase in circumference. There also is increased growth of the testes and scrotum.
- **Stage IV** - The penis is significantly enlarged in length and circumference, with further development of the glans penis. The testes and scrotum continue to enlarge, and there is distinct darkening of the scrotal skin. This is difficult to evaluate on a black-and-white photograph.
- **Stage V** - The genitalia are adult with regard to size and shape.

#### Source:

Reprinted with permission from Feingold, David. "Pediatric Endocrinology" In *Atlas of Pediatric Physical Diagnosis, Second Edition*, Philadelphia. W.B. Saunders, 1992, 9.16-19

**KING COUNTY PROSECUTING ATTORNEY SVP UNIT**

**November 06, 2017 - 4:04 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 94494-6  
**Appellate Court Case Title:** In re the Detention of Mark A. Black  
**Superior Court Case Number:** 11-2-36238-8

**The following documents have been uploaded:**

- 944946\_Briefs\_20171106160032SC086065\_4937.pdf  
This File Contains:  
Briefs - Respondents Supplemental  
*The Original File Name was 2017-11-06 Supplemental Brief of Respondent.pdf*
- 944946\_Motion\_20171106160032SC086065\_8155.pdf  
This File Contains:  
Motion 1 - Overlength Brief  
*The Original File Name was 2017-11-06 Motion to File Overlength Supplemental Brief of Resp..pdf*

**A copy of the uploaded files will be sent to:**

- jennifer.ritchie@kingcounty.gov
- nancy@washapp.org
- paoappellateunitmail@kingcounty.gov
- wapofficemail@washapp.org

**Comments:**

---

Sender Name: Kelly Lorenzen - Email: Kelly.Lorenzen@kingcounty.gov

**Filing on Behalf of:** Andrea Ruth Vitalich - Email: Andrea.Vitalich@kingcounty.gov (Alternate Email: paosvpstaff@kingcounty.gov)

Address:  
500 Fourth Avenue, 9th Floor  
Seattle, WA, 98104  
Phone: (206) 477-8519

**Note: The Filing Id is 20171106160032SC086065**