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COURT OF APPEALS

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King County Superior Court
Criminal Division
Civil Commitment Unit

NO. 63122-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re Detention of Calvin Ticeson,

STATE OF WASHINGTON,

Respondent,

v.

CALVIN TICESON,

Appellant.

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

The Honorable Catharine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional right to jury unanimity.

2. The trial court violated the appellant's constitutional right to a public trial.

Issues Pertaining to Assignments of Error

1. The state's expert testified the appellant suffered from paraphilia not otherwise specified, non-consent. The expert also diagnosed the appellant with a personality disorder not otherwise specified, with antisocial traits. The existence of a mental abnormality and a personality disorder are part of alternative means of committing an offender under RCW 71.09. But neither the state's expert nor the appellant's expert linked the personality disorder with causing serious difficulty in controlling sexually violent behavior or making it likely for the appellant to engage in predatory sexual violence. Without these links, there is insufficient evidence to prove the personality disorder alternative beyond a reasonable doubt. The trial court nevertheless failed to give the jury a unanimity instruction or a special verdict form. There is thus no way to determine whether the jury or a juror relied on the insufficient alternative to find the appellant qualified for commitment under RCW

71.09. Did the trial court violate the appellant's constitutional right to a unanimous jury verdict?

2. The trial court and counsel privately discussed in chambers the deposition of a state's witness that was later read to the jury. The trial court ruled on the appellant's objections to the state's designations of the deposition and the state agreed to strike portions of the deposition. The discussion was not read into the record. Did the trial court violate the constitutional right to open, public court proceedings?

B. STATEMENT OF THE CASE

The state on April 1, 2003 filed a petition alleging the appellant, Calvin K. Ticeson, was a sexually violent predator as provided in RCW 71.09.030. CP 1-2. At the time, Ticeson was only days from being released after serving a five-year sentence for unlawful imprisonment with sexual motivation and felony harassment. CP 1-2, 13-18. The convictions resulted from an April 1998 incident wherein Ticeson met a woman in downtown Seattle, drove her to a quiet neighborhood, sexually assaulted her, and threatened to kill her. 7RP 25-32.¹

¹ The 17-volume verbatim report of proceedings is cited as follows: 1RP – 11/13/2007; 2RP 11/14/2007; 3RP 11/4/2008; 4RP 1/26/2009; 5RP 1/28/2009; 6RP – 1/30/2009; 7RP 2/3/2009 (a.m.); 8RP 2/3/2009 (p.m.); 9RP 2/4/2009; 10RP 2/5/2009 (until morning break); 11RP – 2/5/2009 (11 a.m. until end of day); 12RP 2/6/2009; 13RP – 2/9/2009; 14RP – 2/10/2009; 15RP – 2/11/2009; 16RP – 2/12/2009; 17 -- 2/13/2009.

Unlawful imprisonment with sexual motivation is a "sexually violent offense." RCW 9A.02.020(17)(c). Ticeson has also been convicted of sexually violent offenses in 1991 (second degree assault with sexual motivation) Ex. 118; 1988 (second degree rape by forcible compulsion) Ex. 120; and 1980 (indecent liberties by forcible compulsion) Ex. 119. The existence of at least one conviction for a sexually violent offense is the first of three elements the state must prove to commit an offender as a sexually violent predator. This element was not contested in Ticeson's case.

The remaining two elements, especially element (2), the mental illness element, were at issue. They are: (2) whether at the time of trial Ticeson suffered from a "mental abnormality and/or personality disorder that caused serious difficulty in controlling his sexually violent behavior;" and (3) whether the mental abnormality or personality disorder made Ticeson "likely to engage in predatory acts of sexual violence if not confined to a secure facility."²

² RCW 71.09.020(18) defines a "sexually violent predator" as

any person 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.

Both the state and the defense called expert witnesses to address these elements. The state called psychologist Dr. Brian Judd, 9RP 10-12, while Ticeson called psychologist Dr. Theodore Donaldson. 13RP 40-42. Both experts reviewed the same discovery materials provided by the parties as well as depositions and other documents. 9RP 25-28, 13RP 51-52. Both witnesses also interviewed Ticeson. 9RP 27-28, 13RP 52. And both referred extensively to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR). 9RP 30-32, 13RP 54-62.³

Judd concluded Ticeson met the statutory criteria for commitment as a sexually violent predator. 9RP 58-59, 67-68, 104. Donaldson concluded the evidence fell far short of establishing Ticeson should be committed. 13RP 52-53.

³ Judd said the DSM was the manual for diagnosis routinely employed by professionals in his field. 9RP 31. Donaldson described the DSM as "one of the major diagnostic classifications in the world." 13RP 54.

*1. Mental Abnormality*⁴

The experts disagreed whether Ticeson suffered from a mental abnormality. Judd testified Ticeson suffered from a mental abnormality called paraphilia not otherwise specified (NOS), non-consent (NC). 9RP 30-33. In other words, according to Judd, paraphilia NOS-NC predisposed Ticeson to commit sexual acts such as to make him a menace to the health and safety of others. 9RP 34-35.

Judd acknowledged there are no specific criteria for determining whether an individual suffers from paraphilia NOS-NC. 9RP 59. Nor did the DSM list paraphilia NOS-NC among recognized paraphilias. 9RP 129-30, 10RP 5-6. Judd also admitted some professionals argue there is no such diagnosis and that rape is nothing more than illegal behavior. 9RP 58-59, 130. Other professionals also question how some of their colleagues reach the diagnosis. 9RP 130-32. For example, Dr. Michael First, one of the editors of the DSM, cautioned against diagnosing a paraphilia solely on repetitive rape behavior. 9RP 132-36. Judd also

⁴ 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).

testified he rarely saw individuals with paraphilia NOS-NC in his practice. 9RP 59.

Donaldson agreed with Judd that paraphilia could fit the definition of a mental abnormality under RCW 71.09. 13RP 52-53. He said the diagnosis of paraphilia NOS-NC was "very controversial" in the field. 15RP 169. He disagreed with Judd that Ticeson suffered from paraphilia NOS-NC. 13RP 53-54.

The experts agreed a key feature of the paraphilia at issue was the preference for and arousal to non-consensual sex. 9RP 56-60; 13RP 56-57, 65; 15RP 81-82. They disagreed whether there was sufficient evidence to conclude Ticeson was aroused by non-consent. 9RP 58, 13RP 69.

Ticeson did not admit he was aroused by non-consent, so the experts agreed the evidence had to come from other sources. 9RP 56-57; 13RP 68-69, 15RP 93-94. Judd inferred Ticeson's preference for rape from several circumstances. First, during most of the time in which Ticeson sexually offended, he was either married or involved in a lengthy common law relationship. 9RP 57. Judd thus surmised Ticeson had access to consensual sexual activity but chose instead to commit sexual assaults. 9RP 57.

Second, Judd relied on the circumstances of a 1987 incident, where Ticeson purportedly approached a prostitute, Ms. King, while he had an erection, and offered to pay for sex. King declined, and Ticeson responded by assaulting her. Judd found it significant that Ticeson maintained his erection throughout the assaultive incident. 9RP 46, 57-58-137-38.⁵ While relying on this evidence to show Ticeson was aroused by non-consent, Judd recognized that Dr. First, an expert in the field, wrote in a peer-reviewed article that functioning sexually during a rape does not indicate the presence of a mental abnormality because the functioning provides no information about the offender's mental processes. 9RP 139-42.

⁵ This incident was neither prosecuted nor otherwise established by live testimony or deposition of the purported victim. Dr. Judd testified he relied on the facts of several incidents that were not proven and did not result in charges, pleas, trials, or dispositions in formulating his opinions. 9RP 38-51, 149-52. They are set forth in the state's "timeline," Exhibit 127.

The trial court permitted both experts to relate these hearsay facts for the limited purpose of serving as the basis of their expert opinions. 9RP 36-37. Ticeson objected to such testimony in a motion in limine and during trial. Supp. CP (sub. no. 197, Respondent's First Amended Motions in Limine, filed 11/2/2007) at 9-11, 28-32, 36-46, CP 259, 261-63; 1RP 141-64, 2RP 6-9, 61-70, 84-88. The trial court periodically admonished jurors as to the limited purpose for which they were to consider the testimony. 9RP 24, 36-37, 43, 51, 63-64. The court also gave a corresponding written instruction at the end of trial. CP 337.

Third, in several other incidents Ticeson assaulted prostitutes even after they had agreed to perform a sex act in exchange for money. 9RP 58. In other words, he passed up the chance to have consensual sex for money and tried to force it instead.

Donaldson agreed wives and girlfriends could provide information indicating their partner was paraphilic, such as revealing the need to pretend they were being raped in order to excite their husband or boyfriend. 13RP 68. No such disclosures were evident in Ticeson's. 13RP 69.

Another good indication would be a collection of pornography focusing on forced sex and rape. 13RP 68. More generally, signs and symptoms of paraphilia would appear in aspects of life other than simply criminal behavior. 13RP 68.

In addition, a paraphilic's criminal behavior, both charged and uncharged, would consist almost exclusively of rapes, according to Donaldson, which was not true for Ticeson because he had non-sexual convictions as well. 15RP 89-90.

Donaldson agreed that raping when the victim already consented could indicate paraphilia. 15RP 90, 93. He said the opposite was evident with Ticeson, citing one incident where the victim agreed to cooperate and Ticeson did not get "turned off." 13RP 69, 15RP 90. And although some

prostitutes purportedly agreed to accept Ticeson's money in exchange for sex, his rapes indicated he wanted sex for free, not that he wanted rape rather than consensual sex. 15RP 95-97. Donaldson said it was not unusual for rapists to target prostitutes because of a belief they will not be charged. 15RP 96.

Donaldson said Ticeson's sex-related offenses while being married or in a relationship were not relevant to determining whether he was aroused by non-consent. Rather, his offenses indicated he was nonfaithful or not monogamous. 15RP 96-97, 103.

Donaldson concluded that rather than being aroused by non-consent, Ticeson first became aroused and then acted regardless whether there was non-consent. 13RP 69.

2. *Personality Disorder*⁶

Judd diagnosed Ticeson with a personality disorder NOS, with antisocial traits. 9RP 30, 59-60, 117, 119, 121. He used an illustrative exhibit that articulated the seven DSM-IV criteria for full-blown antisocial personality disorder, Exhibit 112, to help jurors understand the nature of

⁶ A personality disorder is "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist." RCW 71.09.020(9).

Ticeson's disorder. 9RP 60-68, 117. Judd explained Ticeson met all but one of the requirements for finding the full-blown disorder, which was the reason he used the "catch-all" NOS diagnosis. 9RP 61-62, 119-21, 124-25; see DSM-IV-TR at 706 (listing diagnostic criteria for antisocial personality disorder).

Ticeson's lengthy criminal history of sexual and non-sexual offenses satisfied the first criterion, failure to conform to social norms with respect to lawful behaviors. 9RP 62-63. Ticeson also met the second factor, deceitfulness, as evidenced by reports of falsely identifying himself, using aliases, and repeated lying about his involvement in crimes. 9RP 64. Some of Ticeson's alleged assaults were opportunistic and conducted in an impulsive fashion, which was the third DSM criterion. 9RP 65. The fourth factor, irritability and aggressiveness, was met by both his sexual and non-sexual assaults as reported during the 1980s. This same assaultive conduct demonstrated Ticeson had a reckless disregard for the safety of others, which is the fifth criterion. 9RP 65-67. The sixth criterion, consistent irresponsibility, was demonstrated by Ticeson's repeated supervision violations, frequent jobs, and failure to follow through on treatment. 9RP 65-66. Finally, by repeatedly denying involvement in the assaults and asserting he had been falsely accused,

Ticeson showed a lack of remorse, which is the seventh factor in determining the existence of antisocial personality disorder. 9RP 67.

Judd acknowledged 65 percent to 80 percent of the American prison population met the criteria for full-blown antisocial personality disorder. 9RP 125. Judd said he "generally" agreed that antisocial personality disorder does not cause one to engage in predatory acts of sexual violence. 9RP 125-26. He testified that "in the majority of the cases" he had worked on, it was paraphilia that predisposed an offender to sexual violence because the antisocial personality disorder is not sex-offense specific. 9RP 127.

Donaldson agreed a person could not be specifically predisposed to sexual violence because of a personality disorder. 13RP 70-71, 15RP 168. He called the personality disorders "the most controversial points of the DSM." 13RP 72. While he agreed with Judd's diagnosis, he did not make a formal personality diagnosis in Ticeson's case. 11RP 86-87. Donaldson gave the existence of the disorder little weight because it did not cause sexual violence. 15RP 124-25, 135. He also testified Ticeson did not suffer from the disorder at the relevant time because his behavior was under control from the time of his 1998 arrest until trial. 11RP 72.

3. *Serious Difficulty Controlling Sexually Violent Behavior*

Judd testified a diagnosis of paraphilia does not necessarily imply an inability to control behavior caused by the paraphilia. 10RP 5-8. Rather, paraphilia impedes or reduces the individual's ability to inhibit acting on impulses. 11RP 29. Judd concluded Ticeson lacked the ability to control his sexually violent behavior. 9RP 67. He relied primarily on Ticeson's continued criminal behavior despite repeated incarcerations and even while he was on supervision. 9RP 67-68, 11RP 33-34. Of particular note to Judd were reports of two attempted sexual assaults against two prostitutes, Ms. King and Theresa Shuey, that occurred within a matter of minutes and only two blocks away from each other. 11RP 35. Judd testified the reports of these incidents indicated the intensity of Ticeson's sexual urges at the time and supported a finding he had difficulty controlling his sexually aggressive behavior. 11RP 35.

Donaldson saw no evidence indicating Ticeson had difficulty controlling his behavior. 13RP 101-02. He said it appeared instead that Ticeson never tried to control his behavior and did what he wanted to do. 13RP 102. Donaldson emphasized there were no scientific measures to distinguish between having difficulty controlling and simply not choosing to control the behavior. 15RP 112-13. In addition, Donaldson noted in

one incident, Ticeson lifted a woman's skirt and grabbed her crotch. But he did not rape her, which could have indicated self-control. 15RP 119-21.

4. *Future Risk, i.e., "Likely to Engage in Predatory Acts of Sexual Violence if not Confined to a Secure Facility"*⁷

Judd and Donaldson used actuarial tools to assess Ticeson's likelihood of risk for committing a predatory act of sexual violence. 9RP 72-79, 15RP 18-21. Judd said the actuarials "demonstrate moderate to in some cases good predictive validity." 9RP 90.

Judd used the "Static 99" and the "SORAG" actuarial instruments. 9RP 78-79, 92-93. The Static 99 measures for the risk of being reconvicted for a "hands-on" sexual offense. 9RP 87-88, 13RP 28. Under the original Static 99 percentages, Ticeson shared a score with individuals who reoffended at 33 percent at five years, 52 percent at 10 years, and 57 percent at 15 years. 9RP 88-90. Judd also applied revised numbers that accounted for a decline in sex offender recidivism over time; under this more updated result, the percentages were 38 at five years and about 49 at 10 years.

⁷ "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 released unconditionally from detention on the sexually violent predator petition." RCW 71.09.020(7).

The SORAG measured the likelihood of being charged with any violent crime, including a sexual one. 9RP 92-93. Ticeson shared a score with individuals who recidivated at 58 percent at seven years and 80 percent at 10 years. 9RP 98.

Donaldson used one instrument, the Static 2002. This newer version of the Static 99 used lower "base rates," or percentages of released sex offenders who are re-convicted, to reflect dramatically lower recidivism rates in the actual population. 15RP 18-21, 151. Using the same score as Judd, Donaldson calculated a recidivism rate of 24 percent at five years and 37 percent at ten years. 15RP 28.

Donaldson recommended against the use of the SORAG to determine whether an offender met the criteria for commitment under RCW 71.090.20. 15RP 42-43. He said the sample population was not comparable and the base rate was far too high. 15RP 43-50.

5. *Proceedings were Held in the Judge's Chambers.*

At the beginning of the first day testimony was presented to jurors, the trial court suggested the parties and the court meet in chambers for further discussion, objections, and rulings on outstanding depositions that were to be presented to the jury: "[M]y suggestion to get through the rest of the deposition rulings is that we do this by way of chambers conference

and reflect it in the order. . . . I'll hear from the parties on that proposal."

7RP 6-8.

The prosecutor said the suggestion was "fine," and further suggested depositions could be discussed shortly before lunch because it was likely live testimony would end "a little bit early" in the morning session. 7RP 7. Defense counsel first asked whether the conference would be on the record, then said, "I will say I would not be available over the lunch hour but we would just need a break." 7RP 8. The trial court responded, "I'm not planning to work through the whole lunch hour." 7RP 8. The jury was then called into court and the morning proceedings began. 7RP 8.

At the end of the morning's testimony, the court and parties took up depositions, but did so in open court on the record. 7RP 90-117. At the end of the session the court told the parties, "If you want to discuss the rest of this deposition informally in chambers, you're welcome to come back and visit with me." 7RP 117.

After the lunch break ended, the court recapped what went on in chambers and off the record during lunch: "We revisited the deposition of Ms. Roland just to clarify what the Court had previously ruled on. And frankly, the parties didn't need my input, they figured it out." 8RP 3. The

court also said the parties disputed the admissibility of a police officer's deposition, which the court ultimately ruled was inadmissible. 8RP 3-4.

At the start of proceedings the following morning, the trial court explained it held an in-chambers conference regarding the deposition of state's witness Tedra Howard. The defense objected to portions of the deposition and the trial court ruled on the objections. The state agreed to strike some items the defense objected to. The trial court did not note the specific objections, the rulings, or the portions of the deposition that was stricken. 9RP 2. The court gave no reason for failing to conduct this portion of trial in open court. 9RP 2.

Before the jury, the state referred to Ms. Howard on its "timeline," Exhibit 127, as being the victim of a 1991 second degree assault. The trial court later admitted Exhibit 118, the corresponding judgment and sentence for second degree assault. 13RP 33-34.

Judd testified he relied on the incident involving Tedra Howard in diagnosing Ticeson. 9RP 48. According to Judd, Ticeson boarded the same bus as Tedra Howard early one morning. He got off the bus when Ms. Howard did, followed her, disregarded a coat and purse Ms. Howard shed in an effort to rid herself of Ticeson, tackled her, and rubbed against her in a sexual manner. 9RP 48-49. A witness intervened, permitting Ms. Howard to flee. 9RP 49.

The state presented Tedra Howard's deposition to the jury. 13RP
11.

Having heard this evidence, a King County jury found Ticeson should be committed under RCW 71.09. CP 361. The trial court ordered Ticeson committed indefinitely to the Department of Social and Health Services (DSHS) in a secure facility for control, care and treatment. CP 359-60.

C. ARGUMENT

1. TICESON'S RIGHT TO JURY UNANIMITY WAS VIOLATED BECAUSE SUBSTANTIAL EVIDENCE DID NOT SUPPORT EACH ALTERNATE MEANS OF PROVING THE MENTAL ILLNESS ELEMENT.

There was insufficient evidence to support a finding of a personality disorder-NOS as an alternative means by which the mental illness element of the case was proven. As a result, the trial court needed to either instruct the jury that it must reach unanimous agreement as to which particular mental illness (abnormality or disorder) supported commitment under RCW 71.09, or issue a special verdict form specifying the illness relied upon. Reversal is required because absent these measures, there was no particularized expression of jury unanimity on each of the alternative means of proving the mental illness element.

a. *The Requirement of Jury Unanimity Applies in RCW 71.09 Proceedings with Respect to the Element of a Mental Abnormality and/or Personal Disorder.*

Although RCW 71.09 commitment proceedings are civil rather than criminal, a respondent is nonetheless entitled to due process protections that include a unanimous jury verdict. In re Detention of Halgren, 156 Wn.2d 795, 807-08, 132 P.3d 714 (2006). Because the ultimate due process concern is in ensuring the jury unanimously agrees on the basis for confinement, our Supreme Court has held unanimity rules applicable to criminal cases are also applicable to SVP cases. Halgren, 156 Wn.2d at 809.

The right to a unanimous jury verdict includes the right to a particularized expression of jury unanimity on the means by which the defendant committed the crime when there is insufficient evidence to support one of the means. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 717, 881 P.2d 231 (1994). In RCW 71.09 cases, the right to a unanimous verdict includes the right to jury unanimity on the means by which the mental illness element of the case is proven. Halgren, 156 Wn.2d at 810, In re Detention of Sease, 149 Wn. App. 66, 76, 201 P.3d 1078 (2009).

To commit someone under RCW 71.09, the state must prove that the person suffers from either a "mental abnormality" or a "personality disorder." RCW 71.09.020 (16), 71.09.060(1). Proving a respondent has a "mental abnormality" or proving such respondent suffers from a "personality disorder" are the two distinct means of establishing the mental illness element of the RCW 71.09 determination. Halgren, 156 Wn.2d at 811; In re Detention of Pouncy, 144 Wn. App. 609, 618, 184 P.3d 651, review granted, 165 Wn.2d 1007 (2008).

If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to sustain a guilty verdict. Ortega-Martinez, 124 Wn.2d at 707-08. Reversal is required where substantial evidence does not support each of the alternative means. Halgren, 156 Wn.2d at 810-11. The test for determining the necessary quantum of proof is whether a rational juror could have found each means of committing the crime proved beyond a reasonable doubt. Halgren, 156 Wn. 2d at 811.

In reaching its determination that the mental illness element had been satisfied in Ticeson's case, the jury was faced with the alternative means of a mental abnormality, i.e., paraphilia NOS-NC, and a personality disorder, i.e., personality disorder NOS, with antisocial traits. Ticeson

acknowledges the state presented sufficient evidence to prove that paraphilia NOS-NC (1) causes him serious difficulty in controlling his sexually violent behavior and (2) makes him likely to engage in predatory acts of sexual violence if not confined. The state did not, however, prove personality disorder NOS did either of those things.

b. The Jury Heard Evidence of Personality Disorder NOS at Trial.

Judd testified in depth about his diagnosis of personality disorder NOS. Judd testified the only reason he could not diagnose Ticeson with full-blown antisocial personality disorder was the absence of evidence of a conduct disorder before age 15. 9RP 60-61, 119-21. The state's expert also stated Ticeson met all seven of the behavioral criteria for antisocial personality disorder. And even defense expert Donaldson said he did not disagree with Judd's diagnosis.

There was sufficient evidence to entice jurors to find Ticeson's personality disorder sufficient to satisfy elements two and three of the RCW 71.09 standard.

c. The Evidence was not Sufficient to Link the Personality Disorder with the Remaining Requirements of Elements Two and Three.

While the jury heard evidence of personality disorder NOS, it did not hear from either Judd or Donaldson that the disorder caused Ticeson

serious difficulty in controlling sexually violent behavior or made him likely to engage in predatory sexual violence. This is fatal.

Expert testimony is generally required when an essential element is best established by an opinion that is beyond the expertise of a layperson. Berger v. Sonneland, 144 Wn.2d 91, 110, 26 P. 3d 257 (2001). "Medical facts must be proved by expert testimony unless they are observable by laypersons and describable without medical training." Berger, 144 Wn.2d at 110.

Determining whether a respondent in an RCW 71.09 proceeding possesses a mental abnormality "is based upon the complicated science of human psychology and is beyond the ken of the average juror." In re Detention of Bedker, 134 Wn. App. 775, 779, 146 P.3d 442 (2006). Expert psychiatric testimony is therefore necessary to provide sufficient evidence of mental abnormality. See In re Detention of Thorell, 149 Wn.2d 724, 761-62, 72 P.3d 708 (2003) (testimony of state's experts, by providing diagnosis of mental abnormality and linking abnormality to serious lack of control, gave jury sufficient evidence to commit person under RCW 71.09), cert. denied, 541 U.S. 990 (2004); In re Detention of A.S., 138 Wn. 2d 898, 915 n.7, 982 P.2d 1156 (1999) (physician testimony necessary to diagnose person with "mental abnormality" in involuntary commitment proceeding under Chapter 71.05 RCW).

The same is true of proving a personality disorder. RCW 71.09.020(9) requires that "evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist."

In addition to presenting expert testimony that a respondent suffers from a mental abnormality and/or a personality disorder, the state must establish a link between that mental illness and a lack of volitional control. Thorell, 149 Wn.2d at 736. There must be proof the diagnosed illness "has an impact on offenders' ability to control their behavior." Thorell, 149 Wn.2d at 736.

In other words, RCW 71.09

requires linking an SVP's serious difficulty in controlling behavior to a mental abnormality, which together with a history of sexually predatory behavior, gives rise to a finding of future dangerousness, justifies civil commitment, and sufficiently distinguishes the SVP from the dangerous but typical criminal recidivist. It is the finding of this link, rather than an independent determination, that establishes the serious lack of control and thus meets the constitutional requirements for SVP commitment.

Thorell, 149 Wn.2d at 736.

The state may have linked Ticeson's paraphilia with difficulty controlling sexually violent behavior, but it failed to make this link between personality disorder NOS, with antisocial traits, with a lack of volitional control. Judd offered no testimony to establish this link, which

is required under element two as discussed above. This deficiency in the state's case alone renders the evidence insufficient to prove the "personality disorder" alternative means of committing a respondent under RCW 71.09.

But this is not the only deficiency. With respect to element three, Judd "generally" agreed that antisocial personality disorder does not in and of itself cause one to engage in predatory acts of sexual violence. 9RP 125-26. He testified that "in the majority of the cases" he had worked on, it was paraphilia that predisposed an offender to sexual violence because the antisocial personality disorder is not sex-offense specific. 9RP 127. Although Judd used the qualifiers "generally" and "in the majority of cases," it is of critical import that he did not testify Ticeson's case fell within an exception to these general rules. Nor did Donaldson. In other words, the state failed to link Ticeson's personality disorder NOS with engaging in predatory acts of sexually violent behavior.

In summary, the state failed to present sufficient evidence to support a conclusion that Ticeson could be committed under RCW 71.09 based on the alternative means of having a personality disorder.

d. It cannot be Determined the Jury's Verdict Rested Solely on the Sufficiently Proven Paraphilia Abnormality.

If one of two alternative means is not supported by substantial evidence and there is only a general verdict, as in Ticeson's case, the verdict must be reversed unless this Court can determine the verdict was based solely on the sufficiently proven means. State v. Nicholson, 119 Wn. App. 855, 860, 863, 84 P. 3d 877 (2003), overruled on other grounds, State v. Smith, 159 Wn.2d 778, 786-88 (2007).

There was nothing in the instructions given to prevent Ticeson's jury from basing its verdict solely on the unproven means of personality disorder NOS, rather than paraphilia NOS. The jury instructed "[i]n deciding this case, you must consider all of the evidence that I have admitted." CP 332 (Instruction 1). Jurors were also instructed that every instruction was important. CP 334 (Instruction 1). The court also told jurors they were not bound by opinions of the experts. CP 337 (Instruction 4). The jury is presumed to follow the court's instructions. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007).

The jury in Ticeson's case is therefore presumed to have considered Judd's diagnosis of personality disorder NOS in reaching its verdict. Unlike in many cases, here there is tangible proof the jury considering personality disorder as an important component of the state's

case. Specifically, the jury at the end of Judd's testimony submitted the following "question:" "Please explain the difference between antisocial behavior and antisocial personality." 11RP 62. Judd answered the question by saying that "[a]ntisocial behavior refers to the behavioral manifestations." 11RP 72. Judd continued that antisocial personality disorders, in contrast, refer to "not only the behavioral components, what we see, but also we are inferring internally to what is going on in terms of those traits. Lack of empathy. Lack of remorse." 11RP 72.

The jury was given free reign to decide for itself whether the evidence was strong enough to prove Ticeson had a personality disorder that caused him serious difficulty in controlling sexually violent behavior, and that made him likely to engage in predatory acts of sexual violence. This was error, because the only evidence presented was that personality disorder was not sex-offense specific. Absent an expert diagnosis, the evidence was insufficient to prove the personality disorder alternative as a matter of law.

But the jury was not so instructed. On the contrary, the instructions commanded the jury to decide for itself the facts of the case and to apply the law to those facts. Ticeson's right to jury unanimity was therefore violated because one or more jurors may have relied solely on

personality disorder NOS, with antisocial traits, to find sufficient proof of elements two and three.

"An appellate court must be able to determine from the record that jury unanimity has been preserved." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). This Court is unable to make that determination in this case. The "to commit" instruction was all-inclusive as to the mental illness to be found. CP 338 (Instruction 5). There was no jury unanimity instruction on alternative means or a special verdict specifying which of the alternative means the jury found to prove the mental illness element. Under these circumstances, Ticeson's constitutional right to a unanimous jury verdict was violated.

Finally, although the unanimity issue was not raised at trial, this Court may address it for the first time on appeal because an error involving jury unanimity is an issue of constitutional magnitude. State v. Gitche, 41 Wn. App. 820, 822, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985); see also State v. Crane, 116 Wn.2d 315, 325, 804 P. 2d 10 (1991) (failure to give a proper unanimity instruction may be raised for the first time on appeal), cert. denied, 501 U.S. 1237 (1991). This Court should reverse the trial court's commitment order and remand for a new trial.

2. THE TRIAL COURT VIOLATED TICESON'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The trial court held a private, in-chambers session during which time the parties discussed the presentation of Tedra Howard's deposition. Ticeson made objections to some of the state's designations, the state struck some portions of the deposition, and the trial court made rulings. None of this information has been made part of the record. This private discussion of important state's evidence violated constitutional provisions that protect the right to open and public judicial proceedings.

Both civil and criminal judicial proceedings are constitutionally open to the public. Article I, section 10 of the Washington Constitution requires that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This provision gives the public and the press a right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (citing Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982)). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Criminal defendants also have a constitutional right to a “speedy public trial” under article I, section 22 of the state constitution. Although the public’s right to open access to the courts is different than a criminal

defendant's right to a public trial, article I, sections 10 and 22 serve "complementary and interdependent functions in assuring the fairness of our judicial system." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); see also State v. Momah, ___ Wn.2d ___, ___ P.3d ___ 2009 WL 3210404, at 2 (2009) ("These provisions [sections 10 and 22] have a commonality: they protect the right to a public proceeding.").

This constitutional access to the courts applies with full force to trials held under RCW 71.09. Closure of these proceedings "must be affirmatively mandated by statute or where there is a serious and imminent threat to some important issue." In re Detention of Campbell, 139 Wn.2d 341, 355, 986 P.2d 771 (1999), cert denied, 531 U.S. 1125 (2001). This follows from the constitutional right of the people to enter open courtrooms and freely observe the administration of justice. Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); see also Cohen v. Everett City Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975) (noting city council's claim that public trial right applied only in criminal proceedings "overlooks article 1, section 10 . . .").

Indeed, our Supreme Court has emphasized the "undeniably serious interest" the public has in access to information about sex offenders. Campbell, 139 Wn.2d at 356; see also In re Detention of Turay, 139 Wn.2d 379, 413, 986 P.2d 790 (1999) (In rejecting Turay's

argument the trial court erred in denying his motion to seal the RCW 71.09 commitment proceedings, the Court noted Washington’s “long tradition of keeping courtrooms open . . .”), cert. denied, 531 U.S. 1125 (2001); State v. Williams, 135 Wn. App. 915, 924, 146 P.3d 481 (2006) (convicted sex offenders have reduced expectation of privacy because of the interests of public safety), review denied, 162 Wn.2d 1001 (2007).

The requirements for protecting the public’s right to open courtrooms in civil cases are the same as those used in criminal proceedings. Easterling, 157 Wn.2d at 175. The court may not close the courtroom without “first, applying and weighing five requirements as set forth in Bone-Club and second, entering specific findings justifying the closure order.” Easterling, 157 Wn.2d at 175 (citing Bone-Club, 128 Wn.2d at 258-59; Ishikawa, 97 Wn.2d at 37).⁸ Indeed, although the Bone-

⁸ The Bone-Club requirements are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Club factors have been often discussed by reviewing courts in recent criminal appeals, those factors were first articulated in Ishikawa, a civil case, under article 1, section 10. 97 Wn.2d at 37-39; Momah, 2009 WL 3210404, at 3.

In the criminal context, courts have repeatedly overturned convictions when a trial court, as in Ticeson's case, has closed only a portion of a trial. See, e.g., State v. Strode, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3210389, at 1 (2009) (trial court's closure of a portion of voir dire violated Strode's right to a public trial); Easterling, 157 Wn.2d at 179-180 (trial court's closure of co-defendant's severance hearing to Easterling and public violated both article 1 section 22 and article 1, section 10); State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (where jury selection or a part of the jury selection is closed, the closure is not de minimis or trivial); In re Personal Restraint of Orange, 152 Wn.2d 795, 802, 812, 100 P.3d 291 (2004) (trial court's closure of voir dire to family members and public violated article 1, section 22); Bone-Club, 128 Wn.2d at 257 (trial court's closure of pretrial suppression hearing during testimony of undercover police officer required remand for new trial, citing both article 1, sections 10 and 22); State v. Erickson, 146 Wn. App. _____, _____ (2003) (trial court's closure of voir dire violated Erickson's right to a public trial); Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers, 121 Wn.2d at 210-11).

200, 208, 189 P.3d 245 (2008) (questioning of four prospective jurors who requested privacy in chambers without first applying Bone-Club factors violated right to a public trial); State v. Duckett, 141 Wn. App. 797, 801, 173 P.3d 948 (2007) (questioning of several venire members who requested privacy in jury room violated right to public trial); State v. Frawley, 140 Wn. App. 713, 719-21, 167 P.3d 593 (2007) (trial court's private portion of jury selection, which addressed each venire person's answers to a jury questionnaire, violated right to public trial).

The reasoning of these cases demonstrates the constitutional public trial rights guaranteed by article 1 sections 10 and 22 are inextricably intertwined. It cannot be seriously disputed Bone-Club and its progeny rest solidly on civil precedent. Furthermore, RCW 71.09 proceedings share other characteristics of a criminal trial, such as application of the "beyond a reasonable doubt" standard and the jury unanimity requirement. RCW 71.09.060(1); Halgren, 156 Wn.2d at 809 ("Given that the ultimate due process concern is in ensuring that the jury unanimously agrees on the basis for confinement, we hold that unanimity rules are applicable in SVP cases.").

In short, a respondent in an RCW 71.09 proceeding shares a constitutional public trial right comparable to a defendant in a criminal trial. Where a trial court violates the public trial right of a criminal

defendant, the remedy is reversal and remand for a new trial. Orange, 152 Wn.2d at 814. No less a remedy can be justified in an RCW 71.09 proceeding. For these reasons, this court should reverse the trial court's commitment order and remand for a new trial.

Having said this, Ticeson anticipates the state to contend Ticeson has no standing to assert the public's right to a public trial under article 1, section 10. See State v. Wise, 148 Wn. App. 425, 441, 200 P.3d 266, 274 (2009) ("Wise cannot appeal on the grounds of the public's right to an open trial because he lacks standing."). Ticeson urges this Court to reject any such claim.

In its 2-1 decision, the Wise majority admitted its holding conflicted with Erickson and Duckett. In Erickson, the majority disagreed with the dissent's position that Erickson lacked standing to invoke the public's right to a public trial. Erickson, 146 Wn. App. at 205-06 n.2. The Erickson majority noted the Bone-Club Court found article I, sections 10 and section 22 "interdependent means of ensuring the fairness of our judicial system." Erickson, 146 Wn. App. at 205-06 n.2 (citing Bone-Club, 128 Wn. 2d at 259).

The Duckett court rejected the same standing argument, finding "it fails to appreciate the court's independent obligation to safeguard the open administration of justice." Duckett, 141 Wn. App. at 804. Duckett went

on to state the right secured by article I, section 10, which is mandatory, “is fully present even when a defendant asserts only rights under article I, section 22 and the Sixth Amendment” Duckett, 141 Wn. App. at 804. See also Strode, 2009 WL 3210389, at 5 & n.4 (finding first that Strode “cannot waive the public’s right to open proceedings,” and second that trial courts “have the overriding responsibility to ensure that the public’s right to open trials is protected.”) (plurality).

The majority in Wise did not discuss Erickson or Duckett, but instead cited to general federal court propositions involving third party standing. Wise, 148 Wn. App. at 441-43. The majority placed particular emphasis on its conclusion Wise did not have a “sufficiently close relationship” to the public’s right to open trials and that his interests were “starkly different” than those of the public. Wise, 148 Wn. App. at 442-43.

Wise also ignored Bone-Club, which held the article I, section 10 right and the right guaranteed by article I, section 22 “serve complimentary and interdependent functions.” Bone-Club, 128 Wn. 2d at 259. Wise therefore was not a “third party” as meant by the federal standing cases. The same is true of Ticeson. He therefore has standing to assert a violation of article I, section 10.

The state may also argue because there is no showing Ticeson's counsel objected to the closed jury voir dire, the issue is waived. That argument fails. Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517; see State v. Heath, 150 Wn. App. 121, 128, 206 P.3d 712 (2009) ("[A]a defendant, by failing to object, does not waive her constitutional rights to a public trial."). Moreover, the waiver of a constitutional right must be knowing and voluntary. Frawley, 140 Wn. App. at 720. Here there was no discussion about such a right; there thus could not have been a knowing and voluntary waiver.

Neither Momah nor Strode affect these holdings. The Momah Court held Momah's failure to object to private voir dire did not constitute a waiver of the issue for purposes of appeal. Momah, 2009 WL 3210404, at 7. The Court went on, however, to affirm the convictions rather than to find structural error in part because Momah "affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it." Id.

The Strode plurality held "the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal." Strode, 2009 WL 3210389, at 4. It also cited Brightman for the proposition a timely objection at trial does not waive the public

trial right. The two concurring justices agreed; they held Strode did not waive his right to a public trial. Strode, 2009 WL 3210389, at 6.

Ticeson's case is easily distinguishable from Momah in this regard. Momah, a gynecologist, was alleged to have sexually violated several patients during medical examinations. Momah, 2009 WL 3210404, at 1. This case was heavily publicized, and the potential for biased venire members was great. To prevent possible juror taint, Momah's trial counsel not only agreed to but also affirmatively advocated for private questioning of potential jurors:

"Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury."

Momah, 2009 WL 3210404, at 1. After the court moved into chambers with individual venire members, defense counsel actively participated in individual questioning regarding knowledge of Momah's case and the ability to be fair and exercised numerous challenges for cause. Id. at 2.

The Supreme Court relied heavily on defense counsel's affirmative conduct. It distinguished Brightman, Orange and Bone-Club, for example, noting, "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated

in it, and benefited from it." Momah, 2009 WL 3210404, at 5. Later, when discussing invited error and waiver, the Court notes, "in none of the cases cited [by Momah] in support do the defendants affirmatively advocate for the closure, argue for the expansion of the closure, and benefit from it." Momah, 2009 WL 3210404, at 5. Still later, adhering to the same theme, the Court observed:

Although Momah was provided the opportunity to object to the in-chambers proposal, he never objected. Further, he gave no indication that a closed voir dire might violate his right to public trial. To the contrary, defense counsel made a deliberate choice to pursue in-chambers voir dire to avoid "contamination" of the jury pool by jurors with prior knowledge of Momah's case. Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning. As a result of this closure and defense counsel's active participation in the questioning, Momah was able to exercise numerous challenges for cause, removing biased and partial jurors from the venire. We find all of these actions by Momah's counsel and the trial judge occurred in order to promote and safeguard the right to an impartial jury.

Momah, 2009 WL 3210404, at 7.

In contrast with Momah's counsel, counsel for Ticeson did not affirmatively advocate for private, in-chambers discussion of depositions. And unlike in Momah, where limited private questioning was the best way to discover biased potential jurors while at the same time avoid contamination of the entire venire, here there is no indication private discussions were necessary to safeguard Ticeson's due process right to a

fair trial. Instead, the trial court suggested the idea primarily to save time. While Ticeson's counsel did not object, neither did she affirmatively assent to the procedure. Indeed, the first question from counsel was whether such private discussions "would be on the record." 7RP 7. And while counsel naturally participated in the in-chambers discussions, she did not push for an expansion of the proceedings like Momah's counsel did.

In sum, the circumstances relied on for closure in Ticeson's case were "unexceptional," as in Strode, and require reversal because the trial court did not first consider the Bone-Club factors. See Strode, 2009 WL 3210389, at 1 ("trial court violated right to public trial "by conducting a portion of jury selection in the trial judge's chambers in unexceptional circumstances without first performing the required Bone-Club analysis."); Bone-Club, 128 Wn.2d at 259 ("Although the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.").

The state may finally claim because the trial court's closure of Ticeson's trial was relatively short in duration, the closure was de minimis. This claim would conflict with Brightman, where this Court

held where jury selection or a part of the selection is closed, the closure is not de minimis or trivial. Brightman, 155 Wn.2d at 517.

The same is true of Easterling. The question there was whether the trial court's decision to close the courtroom to Easterling, his counsel, and to all members of the public during discussion of the codefendant's motion to sever and to dismiss violated Easterling's and/or the public's constitutional right to a public trial. Easterling, 157 Wn.2d at 173. This Court rejected the state's assertion the courtroom closure was so trivial it did not trigger the right to a public trial. The Court held it had never found a public trial right violation to be de minimis, and that even if it did, the closure was not "trivial" because it was deliberately ordered and was neither ministerial in nature nor trivial in result. Easterling, 157 Wn.2d at 180-81. *See also* Erickson, 146 Wn. App. at 210-11 (private voir dire of four prospective jurors not de minimis and, because not preceded by application of Bone-Club factors, reversal warranted); *cf.* State v. White, ___ Wn. App. ___, 215 P.3d 251, 254-55 (2009) (trial court did not violate right to public trial despite closing courtroom without first considering Bone-Club factors because the "court convened counsel for a hearing, but no hearing occurred" as witness who expressed intent to exercise Fifth amendment privilege immediately withdrew privilege and said she would testify).

Ticeson acknowledges RCW 71.09 trials are not criminal in nature. In re Detention of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). But Ticeson does not ask this Court to apply a purely criminal constitutional right to his case. Rather, he asks this Court to apply the corresponding civil constitutional right to the court's closure, to note well the decisions in Campbell, Turay, Williams, Allied Newspapers, Ishikawa, et. al., and to rely on the same remedy for unjustified closure that Bone-Club and its progeny relied on. The public trial rights involving civil and criminal proceedings have been so historically interconnected in Washington as to call for the same remedy for their violation in RCW 71.09 proceedings as for criminal trials. That remedy is reversal and remand for a new commitment hearing.

D. CONCLUSION

The trial court violated Ticeson's constitutional rights to due process, jury unanimity, and a public trial. Ticeson respectfully requests this Court to reverse the trial court's commitment order and remand his case for a new trial.

DATED this 19 day of October, 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

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|--|---|--------------------|
| In re the Detention of Calvin Ticeson, |) | |
| |) | |
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 631225-5-1 |
| |) | |
| CALVIN TICESON, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CALVIN TICESON
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF OCTOBER 2009.

x Patrick Mayovsky

FILED
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STATE OF WASHINGTON
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