

03268-0

03268-0

NO. 63268-0-I

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

In re the Commitment of James Taylor

STATE OF WASHINGTON,

Respondent,

v.

JAMES TAYLOR

Appellant.

2010 MAR -4 PM 4:07
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Michael T. Downes, Judge

Reply BRIEF OF APPELLANT

KIRA FRANZ
CHRISTOPHER H. GIBSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u>	1
1. THE TRIAL COURT SHOULD HAVE DISMISSED THE PETITION FOR LACK OF A RECENT OVERT ACT.....	1
2. THERE WAS INSUFFICIENT EVIDENCE TO CONCLUDE TAYLOR WAS A PEDOPHILE.....	11
a. <u>The State’s Argument Regarding the Standard of Review does not Establish Any Different Standard than that used in Taylor’s Opening Brief</u>	11
b. <u>Insufficient Evidence Sustains the Pedophilia Diagnosis</u>	13
3. THE COURT ERRED BY ALLOWING THE STATE’S EXPERT TO TESTIFY REGARDING “RELATIVE” VERSUS “ABSOLUTE” RISK OF REOFFENSE.....	20
4. THE COURT ERRED BY ALLOWING THE HEARSAY CONCLUSIONS OF OTHER EXPERTS TO BE EXTENSIVELY READ TO THE JURY DURING THE CROSS-EXAMINATION OF A DEFENSE EXPERT.....	21
B. <u>CONCLUSION</u>	25

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Conejo v. State</u> 57 Wn. App. 314, 788 P.2d 554 (1990).....	23
<u>Fair v. State</u> 139 Wn. App. 532, 161 P.3d 466 (2007)	18
<u>Group Health Cooperative of Puget Sound, Inc. v. Dept. of Revenue</u> 106 Wn.2d 391, 722 P.2d 787 (1986).....	22, 24
<u>In re Detention of Albrecht</u> 129 Wn. App. 243, 118 P.3d 909 (2005) <u>review denied</u> , 17 Wn.2d 1003 (2006)	4, 5, 7, 9, 10
<u>In re Detention of Albrecht</u> 147 Wn.2d 1, 51 P.3d 73 (2002).....	4, 5
<u>In re Detention of Anderson</u> 166 Wn.2d 543, 211 P.3d 994 (2009).....	2, 9, 10
<u>In re Detention of Audett</u> 158 Wn.2d 712, 147 P.3d 982 (2006).....	19
<u>In re Detention of Broten</u> 130 Wn. App. 326, 122 P.3d 942 (2005) <u>review denied</u> , 158 Wn.2d 1010 (2006)	3, 4, 9, 10
<u>In re Detention of Brown</u> __ Wn. App. __, __ P.3d __ 2010 WL 60896 (Filed January 11, 2010, No. 62383-4-I).....	5-7, 9, 10
<u>In re Detention of Henrickson</u> 140 Wn.2d 686, 2 P.3d 473 (2000).....	2, 4, 9, 10
<u>In re Detention of Hovinga</u> 132 Wn. App. 16, 130 P.3d 830 <u>review denied</u> , 158 Wn.2d 1024 (2006)	2, 4, 9, 10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>In re Detention of Robinson</u> 135 Wn. App. 772, 146 P.2d 451 (2006) <u>review denied</u> , 161 Wn.2d 1028 (2007)	2, 4, 9, 10
<u>In re Detention of Thorell</u> 149 Wn.2d 724, 72 P.3d 708 (2003).....	19
<u>State v. Danforth</u> 97 Wn.2d 255, 643 P.2d 882 (1982).....	22
<u>State v. Descoteaux</u> 94 Wn.2d 31, 614 P.2d 179 (1980).....	22
<u>State v. DeVries</u> 149 Wn.2d 842, 72 P.3d 748 (2003).....	24
<u>State v. Fleming</u> 140 Wn. App. 132, 170 P.3d 50 (2007) <u>review denied</u> , 163 Wn.2d 1047 (2008)	12
<u>State v. Franco</u> 96 Wn.2d 816, 639 P.2d 1320 (1982).....	11
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	11, 12
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	11, 12
<u>State v. Marshall</u> 156 Wn.2d 150, 125 P.3d 111 (2005).....	1, 2, 9, 10, 24
<u>State v. Martinez</u> 78 Wn. App. 870, 899 P.2d 1302 (1995).....	24
<u>State v. McNutt</u> 124 Wn. App. 344, 101 P.3d 422 (2004) <u>review denied</u> , 156 Wn.2d 1017 (2006)	1, 2, 4, 7, 9, 10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Neidigh</u> 78 Wn. App. 71, 895 P.2d 423 (1995).....	21
<u>State v. Smith</u> 124 Wn. App. 417, 102 P.3d 158 (2004) <u>affirmed</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	12
<u>Washington Irrigation and Development Co. v. Sherman</u> 106 Wn.2d 685, 724 P.2d 997 (1986).....	22, 25
 <u>FEDERAL CASES</u>	
<u>Bobbe v. Modern Products, Inc.</u> 648 F.2d 1051(5 th Cir. 1981)	22
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
3 David Louisell & Christopher Mueller FEDERAL EVIDENCE §389 (1979).....	24
5A Karl B. Tegland Washington Practice §313 (1989).....	23
Diagnostic and Statistical Manual (4 th ed., Text Revision, 2000)	13-19
RCW 71.09	25
RCW 71.09.020	9, 10, 20
RCW 9A.44.073	9
RCW 9A.44.076	9
RCW 9A.44.079	9
RCW 9A.44.083	9

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9A.44.086	9
RCW 9A.44.089	9

A. ARGUMENTS IN REPLY

1. THE TRIAL COURT SHOULD HAVE DISMISSED THE PETITION FOR LACK OF A RECENT OVERT ACT.

Although the State spends much time explicating when and if a Recent Overt Act (ROA) must be proven, the parties fundamentally agree that the Marshall/McNutt¹ standard should have been applied by the trial court to determine whether Taylor's conviction for third degree child molestation (CM3) constituted an ROA. Brief of Appellant (BOA) at 33-34; Brief of Respondent (BOR) at 8-11. The trial court therefore had to undergo a two-step analysis:

[F]irst, an inquiry must be made into the factual circumstances of the individual's history and mental condition; second, a legal inquiry must be made as to whether an objective person knowing the factual circumstances of the individual's history and mental condition would have a reasonable apprehension that the individual's act would cause harm of a sexually violent nature.

Marshall, 156 Wn.2d at 158 (citing McNutt, 124 Wn. App. at 350-51); BOA at 33-34, BOR at 11.

In his opening brief, Taylor correctly pointed out that in all cases where a Court found an act constituted an ROA, "either the respondent committed an act functionally equivalent to a sexually violent offense, or else was incarcerated for actions clearly leading to such an offense...."

¹ State v. Marshall, 156 Wn.2d 150, 156-58, 125 P.3d 111 (2005); State v. McNutt, 124 Wn. App. 344, 347-49, 101 P.3d 422 (2004), review denied, 156 Wn.2d 1017 (2006).

BOA at 36.² The State disagrees with Taylor's conclusion, but only cites cases that support it. BOR at 11-13.

For example, the State cites In re Detention of Hovinga, 132 Wn. App. 16, 130 P.3d 830, review denied, 158 Wn.2d 1024 (2006). BOR at 12. In Hovinga, the respondent was in prison when the petition was filed because parole on his statutory rape conviction had been revoked. Id. at 19. The revocation occurred after Hovinga followed young girls around a department store while masturbating, an act caught on the store's security video. Id. at 19 n.2, 24. Hovinga admitted he had done this six or eight times in the recent past. Id. at 24. The trial court correctly found Hovinga's stalking-like behavior constituted an ROA. Id. at 24.³ Clearly Hovinga had designs on the young girls in question, thus his case falls neatly into one of the categories observed by Taylor – that one type of ROA is an action that takes a step dangerously onto the road to reoffense. Compare McNutt, Robinson, Henrickson (discussed in BOA at 35-36).

² The cases Taylor cited for this proposition included: Marshall, 159 Wn.2d at 159; McNutt, 124 Wn. App. at 351-52; In re Detention of Henrickson, 140 Wn.2d 686, 2 P.3d 473 (2000); Froats v. State, 134 Wn. App. 420, 438-39, 140 P.3d 622 (2006); In re Detention of Robinson, 135 Wn. App. 772, 775-76, 784-85, 146 P.2d 451 (2006), review denied, 161 Wn.2d 1028 (2007); and In re Detention of Anderson, 166 Wn.2d 543, 211 P.3d 994 (2009). BOA at 34-36, 40-41.

³ The primary question before the Hovinga Court was whether Hovinga's incarceration on the original statutory rape conviction obviated the need for the State to prove an ROA. 132 Wn. App. at 18-19, 23. The finding that Hovinga's actions constituted an ROA was a finding in the alternative. Id. at 23-24.

The State next cites In re Detention of Broten, 130 Wn. App. 326, 122 P.3d 942 (2005), review denied, 158 Wn.2d 1010 (2006). BOR at 12-13. The Broten respondent had been convicted of indecent liberties for molesting an eight-year old cousin when he was 30, and then, while still on parole for that crime, he digitally raped his infant daughter. 130 Wn. App. at 329. Three days after release, Broten was violated for contacting a child without a chaperone. Id. at 330. A few months later, Broten had contact with his girlfriend's 15-month old daughter. Id. Broten was incarcerated for 120 days for that violation. Id.

Broten was again released and quickly received another violation for possessing photographs of his daughter. 130 Wn. App. at 330. Two months later, Broten was pulled over by police for driving the wrong way on a one-way street in Seward Park. Id. Police had previously observed Broten's car sitting by the playground, where children were still playing. Id. Broten admitted during a polygraph that he was masturbating to fantasies about new victims and young girls. Id. He further:

stated that he masturbated to fantasies about undressing the girls and inserting his tongue into their vaginas, having sexual intercourse with them, and thinking "how tight" their vaginas would be. Broten also admitted that since his release, he had masturbated in his car and had gone to shopping malls and parks. He went to Seward Park approximately once per week.

Id. at 330-31. The jury in Broten's trial found his behavior in the park constituted an ROA, and this Court affirmed. Id. at 332, 334-36. Obviously, Broten, like McNutt, Henrickson, Robinson, and now Hovinga, show a respondent making preparations to commit sexually violent crimes against young children. These cases both therefore support Taylor's initial proposition.

The State next cites In re Detention of Albrecht, 129 Wn. App. 243, 252, 118 P.3d 909 (2005), review denied, 17 Wn.2d 1003 (2006). BOR at 13. In Albrecht, the respondent had a lengthy history of offenses. In 1969, at age 21, he lured two nine-year old girls to his home and molested one, giving her a dollar afterwards. 129 Wn. App. at 247. A few years later, Albrecht told police he had molested a girl and gave them details (including that he gave her Twinkies afterwards), but the case was not pursued by authorities. Id. Shortly thereafter, Albrecht molested three young children after frequent gifts of candy, alcohol, and money, and he subsequently pled guilty to an indecent liberties charge. Id. at 247-48.

In 1991, while still on parole, Albrecht was convicted for first degree child molestation for fondling a six-year old girl he was babysitting. 129 Wn. App. at 248. In-custody treatment providers dismissed him from treatment after only two or three months because he would not take responsibility for his actions. Id. Upon his release,

Albrecht was dissatisfied with his housing at a homeless shelter and complained to his community corrections officer (CCO) that he was the victim, not the molested children. Id. at 248-49. The same day, the CCO heard a report that Albrecht had approached some children and offered one of them 50 cents to follow him. Id. at 249-50. Albrecht then grabbed for the child, who escaped the grab and ran away. Id.

Albrecht was incarcerated for that parole violation, during which his petition for commitment was filed. 129 Wn. App. at 249. Per this Court, the jury⁴ could correctly find Albrecht's approaching the children with money and his attempt to grab the child who responded was a recent over act. Id. at 249-50, 256-57. This plainly falls into the same category of being interrupted in the initial steps towards reoffense. See BOA at 36. Citation by the State to this case – apparently for to support the State's assertion that an ROA need not be dangerous in and of itself – is bewildering. BOR at 13.

Perhaps the most interesting case cited by the State is the newest: In re Detention of Brown, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 60896 (Slip Op. filed January 11, 2010, No. 62383-4-I). BOR at 11-12. In

⁴ In a previous appeal, the Supreme Court had found that the State had to plead and prove a ROA before Albrecht could be committed. 129 Wn. App. at 246 (citing In re Detention of Albrecht, 147 Wn.2d I, 51 P.3d 73 (2002)). The cited Albrecht case is the appeal after the jury verdict that Albrecht was a SVP – thus the finding of an ROA is a jury finding, not a trial court finding. Id.

Brown, the respondent molested a pair of sisters, age 5 and 8, when he was 27 years old. Slip Op. at 1. He received a Special Offender Sentencing Alternative (SOSA), in part by concealing his contemporaneous sexual relationship with a 13-year old girl. Id. The 13-year old's subsequent pregnancy exposed their relationship. Id. Brown's SOSA was revoked, and he was convicted of second-degree rape of a child. Id. While incarcerated, Brown admitted previously molesting and raping more than 20 girls, ages 4 to 13. Id.

Upon release, probation restrictions denied Brown internet access. Slip Op. at 1. After multiple requests to be relieved of this restriction for work purposes, the request was granted. Id. Brown, however, downloaded multiple images of adult and child pornography via his work computer. Id. He was subsequently convicted of seven counts of possession of child pornography and sentenced to prison. Id.

While in prison, the State filed a petition to civilly commit Brown. Slip Op. at 1. Pre-trial, the court found that Brown's pornography offenses constituted an ROA and thus the State did not have to plead and prove an ROA at trial. Id. The jury subsequently committed Brown, and he appealed. Id.

In Brown, the State has cited a case that initially seems to fall outside Taylor's thesis, as possession of child pornography – while both

offensive and illegal – is not an action manifestly on the road to a sexually violent offense. But the Brown case instead turns out to provide dramatic support for Taylor’s contention. In Brown, the trial court – and this Court subsequently – noted that Brown had a particular offense cycle: first, he would view adult pornography, then he would escalate to viewing “barely-legal” pornography, “culminating in child pornography just before actually targeting a child.” Slip Op. at 5 (emphasis added). The possession of child pornography therefore constituted the initial steps of Brown’s offense pattern, just as inviting children to abuse him was a part of McNutt’s pattern, or giving money or gifts to children to lure them was a part of Albrecht’s pattern. McNutt, 124 Wn. App. at 351-52; Albrecht, 129 Wn. App. at 247-50.

Brown – like all of the State’s cases – therefore actually supports Taylor’s initial assertion: that in all reported cases where a Court declared an act constituted an ROA, “either the respondent committed an act functionally equivalent to a sexually violent offense, or else was incarcerated for actions clearly leading to such an offense....” BOA at 36. To expand the caselaw so that any sexually improper act constitutes an ROA – however unconnected to an offender’s offense cycle and however non-pedophilic - is to make the concept of an ROA nearly meaningless.

The trial court, moreover, made particular findings about the alleged ROA, which Taylor specifically addressed in his opening brief. BOA at 37-39. The State completely ignores the oral findings and instead quotes large chunks of the “Sexually Violent Predator Evaluation” by Dr. Longwell, an evaluation only quickly noted by the court at the beginning of its lengthy verbal findings. BOR at 13-14 (citing CP 185, 193, 187); 1RP 35-38. Importantly, none of the State’s quoted selections were noted or even referenced by the trial court in its findings.

For example, the State quotes Dr. Longwell as writing:

About a year and a half out of prison, Mr. Taylor said that he was with a girl he had been with before for sex. They resumed their relationship after she was away a few months. In November of 2001, they resumed dating. . He had known her since 2000. (The reader might note that Brittani was 13-years-old in 2000). Her name is Brittani. She was 14 the first time they had sex and he was 19. There were 4 ½ years difference between them. He knew her age but that [sic] he could “slide by” because she would soon be 15 even though he knew it was illegal.

BOR at 13 (citing CP 185) (parenthetical in original).

“The reader might [also] note” that some of Dr. Longwell’s assertions in this passage are incorrect, and she was successfully cross-examined at trial upon this very subject. See 3RP 392-94. For example, because of their relative birth dates (Taylor’s is in June, and Brittany’s is

in January), the couple could never have dated when Brittany was 14 and Taylor 19. 3RP 294.

But even assuming Brittany was 14 at the time of her first sexual act with Taylor, the appropriate charge would still be CM3 or third degree Child Rape 3 (CR3), not CM1, CM2, CR1, or CR2. See RCW 9A.44.073, .076, .079 (proper charge is CR3 if the victim is 14 or older); RCW 9A.44.083, .086, .089 (proper charge is CM3 if the victim is 14 or older). The hypothetical charge therefore would still not amount to a sexually violent offense. RCW 71.09.020(17).

The State continues in its response to quote two more sections of Dr. Longwell's 2005 report – the first of which alleges that Taylor lacks remorse, self control, or insight, is sexually promiscuous, and “appeared to take pride in rule breaking.” BOR at 13-14 (quoting CP 193). The second is a passage wherein Taylor allegedly stated that he did not think he would molest again, but “cannot say he never will.” BOR at 14 (quoting CP 187). These do not show anything specific about Taylor's offense pattern such that the trial court could reasonably believe that Taylor was likely to commit a sexually violent crime based on the CM3 against Brittany, as was the case in McNutt, Robinson, Henrickson, Hovinga, Brotten, Albrecht, and Brown. Neither did the trial court conclude, as the courts did in Marshall, Froats, and Anderson, that the

facts of Taylor's CM3 showed it was actually the equivalent of a sexually violent offense under RCW 71.09.020(17) because of some vulnerability on Brittany's part. Indeed, the facts of the offense – the fact that Brittany was a sexually mature teenager who “look[ed] and behave[d] much more mature than her years,” measuring about 5’10” and 170 pounds, who even provided the condoms for the acts with Taylor – tend to show the reverse. BOA at 39 (citing 4RP 371, 414-16; 5RP 18, 30).

As argued in the BOA – and as shown by the cases cited in the BOR – a court properly focuses on the alleged ROA and whether that specific act or acts would naturally tend to lead towards harm of a sexually violent nature. See Marshall, 156 Wn.2d at 158; McNutt, 124 Wn. App. at 350-51. This has happened previously in two circumstances: 1) where the peculiar circumstances of the prior conviction show it to be worse than the norm, somehow equating to a sexually violent offense, as in Marshall, Froats, and Anderson; or 2) where the facts of the offense, combined with the respondent's background, demonstrate the respondent was taking actions to facilitate the commission of a sexually violent offense, as in McNutt, Robinson, Henrickson, Hovinga, Brotten, Albrecht, and Brown. Taylor's CM3 falls into neither category. The CM3 therefore does not constitute an ROA, and the State should have borne the burden to plead

and prove an ROA at trial. In re Young, 122 Wn.2d 1, 31, 857 P.2d 989 (1993). This Court should therefore reverse Taylor's commitment.

2. THERE WAS INSUFFICIENT EVIDENCE TO CONCLUDE TAYLOR WAS A PEDOPHILE.

a. The State's Argument Regarding the Standard of Review does not Establish Any Different Standard than that used in Taylor's Opening Brief.

The State complains that the "substantial evidence" test – used because the jury could have used Taylor's alleged pedophilia and personality disorder as alternative means to commit him – is improper here, instead of a "sufficiency of the evidence" test. BOR at 16-17. There is no difference between these standards, as the Supreme Court clarified in State v. Kitchen, the leading case articulating the distinction between "alternative means" and "alternative acts" cases. 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988).

The Kitchen Court stated of alternative means cases:

...[W]here a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means....In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982), citing State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

110 Wn.2d at 410-11 (additional citations omitted, emphases in original). The State should note that the final case cited herein by the Kitchen Court, State v. Green, is the leading Washington case setting out the ordinary “sufficiency of the evidence” test, with all the appropriate presumptions in favor of the State. 94 Wn.2d at 221-22.

Later cases agree that Courts apply a standard “sufficiency of the evidence” test to any alternative means challenged on appeal. See, i.e., State v. Fleming, 140 Wn. App. 132, 136-37, 170 P.3d 50 (2007), review denied, 163 Wn.2d 1047 (2008); State v. Smith, 124 Wn. App. 417, 425-26, 102 P.3d 158 (2004), affirmed, 159 Wn.2d 778, 154 P.3d 873 (2007). Indeed, the only reason Taylor pointed out that pedophilia had to be supported by “substantial evidence” was to clarify that evidence of the Personality Disorder NOS would not support commitment by itself.

The test for “substantial evidence” supporting the alternative means of pedophilia and “sufficient evidence” supporting pedophilia as a single proffered means are the same, as the Kitchen case and the BOA both indicate. Kitchen, 110 Wn.2d at 410-11; BOA at 42. The State’s argument thus makes a distinction without a difference.

b. Insufficient Evidence Sustains the Pedophilia Diagnosis.

The State spends much of the next section explaining that the three clear diagnostic criteria for pedophilia cannot be applied “like a cookbook,” and cites extensively to the Diagnostic and Statistical Manual (4th ed., Text Revision, 2000) (DSM IV-TR). BOR at 17-21. Interestingly, the same sections cited by the State also support the Taylor's argument.

The State first quotes two sections of introductory material for the DSM IV-TR. BOR at 18-19 (quoting DSM IV-TR at xxxii, xxxvii). These introductory sections are not specific to pedophilia, or even to paraphilias, but apply to the entire book. Id. at i-xxxvii. The quoted portions largely indicate that clinical judgment is necessary for diagnosis. BOR at 18-19 (quoting DSM IV-TR at xxxii, xxxvii). The most relevant sentence in either passage comes after the comment that the DSM-IV is not to be used “like a cookbook,” and states:

For example, the exercise of clinical judgment may justify giving a certain diagnosis to an individual even though the clinical presentation falls just short of meeting the full criteria for the diagnosis as long as the symptoms that are present are persistent and severe.

DSM IV-TR at xxxii (emphasis added). The problem is that Taylor’s alleged symptoms of pedophilia were not shown to be “persistent and severe” into the period of time where he could be legitimately diagnosed

with pedophilia. See BOA at 43-49. Moreover, the State has excluded the last sentence of this paragraph, which continues:

On the other hand, lack of familiarity with the DSM-IV or excessively flexible and idiosyncratic application of DSM-IV criteria or conventions substantially reduces its utility as a common language for communication.

Id.

The State next quotes a paragraph from the “paraphilia” section, which generally acknowledges that paraphilias tend to begin in childhood or adolescence, and tend to be chronic and lifelong. BOR at 19 (quoting DSM IV-TR at 568). A paragraph from the “pedophilia” section makes similar findings specifically for pedophilia; the only information added is that pedophilia in those attracted to males tends to be somewhat more chronic. BOR at 19-20 (quoting DSM IV-TR at 571).

This evidence, that pedophilia usually begins in adolescence and is chronic, was brought before the jury at least twice by the State’s expert, and it is unclear why the State raises it in this portion of its brief. See, i.e., 3RP 264-66; 7RP 515-16. But an aspect not mentioned in the State’s response was mentioned by each of the expert witnesses – that most juvenile offenders do not reoffend as adults. 3RP 223, 230-31; 5RP 30, 71-73; 6RP 13, 136-38. Indeed, incest offenders like Taylor have the lowest reoffense rates of all sexual offenders. 4RP 361; 6RP 59-60.

Finally, the State cites the third sentence into the book's pedophilia-specific article, thereby taking that sentence wholly out of context. BOR at 20. The beginning of the article actually reads:

The paraphilia focus of Pedophilia involves sexual activity with a prepubescent child (generally age 13 years or younger). The individual with Pedophilia must be age 16 years or older and at least 5 years older than the child. For individuals in late adolescence with Pedophilia, no precise age difference is specified, and clinical judgment must be used; both the sexual maturity of the child and the age difference must be taken into account.

Pedophilia, DSM IV-TR at 571 (emphasis added). Only the last sentence was quoted by the State. BOR at 20.

The emphatic statement that a person with pedophilia “must be” over 16 and at least 5 years older than the child in question actually indicates that the “not a cookbook” generalization from the forward to the DSM IV-TR does not apply to these specific criteria for pedophilia. Moreover, the reference to “late adolescence” specifically cited by the State is probably a reference to those around 17 to 19 years old or even older. See, e.g., Dania S. Clark-Lempers, Jaques D. Lempers, Camilla Ho, Abstract of “Early, Middle, and Late Adolescents’ Perceptions of their Relationships with Significant Others,” Vol 6, No. 3 JOURNAL OF ADOLESCENT RESEARCH 296 (1991), abstract available at <http://jar.sagepub.com/cgi/content/abstract/6/3/296> (divides adolescence

into three stages: early (11-13), middle (14-16) and late (17-19)); Pamphlet, "Understanding Adolescence: a Time of Change," published by Pennsylvania State University, College of Agriculture, Agricultural Research, and Cooperative Extension (2001) at 3, available at <http://pubs.cas.psu.edu/freepubs/pdfs/ui356.pdf>, (divides adolescence into three stages: early (age 10-14); middle (age 15-17); and late (age 18-early 20's)).

The State and Taylor do, at least, agree on the standard criteria for a diagnosis of pedophilia:

- 1) Over a period of at least 6 months, the person has recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger); 3RP 256; 4RP 398; Ex. 31;
- 2) The person has acted on these urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty; 3RP 258; 4RP 399; Ex. 31; and
- 3) The person is at least 16 years old, and at least 5 years older than the child or children referenced in Criterion [1]. 3RP 259-60; 4RP 399; Ex. 31.

BOA at 42-43, BOR at 18. These criteria are also listed in the DSM IV-TR at 572. Interestingly, two notations on the criteria in the DSM IV-TR were not addressed at trial. First, the diagnostic criteria indicate that the evaluator should "Specify if: Limited to Incest," something which was not done in this case even though all the children molested by Taylor were

members of his family. DSM IV-TR at 572. Secondly, a notation immediately under the three criteria states:

Do not include an individual in late adolescence involved in an ongoing sexual relationship with a 12- or 13-year-old.

Id.

The State never examines the individual DSM IV criteria in the BOR, only reviewing in general evidence such as Taylor's early life, his alleged "gravitation" towards young teens, and his now-admitted dishonesty with some of his counselors. See generally, BOR at 21-25. The State demands that the DSM IV-TR criteria should not be applied strictly to Taylor's case, despite the specific requirement in the book's explanatory article on pedophilia that a pedophilic "must be" over age 16 and at least five years older than the child in question.

But even if we accept the generalized statement in the forward to the DSM IV-TR permitting clinicians to diagnose somewhat outside the criteria of the book, that same statement requires that such diagnoses only occur where the "symptoms that are present are persistent and severe." DSM IV-TR at xxxii. Taylor never, in nearly five years of individual counseling, discussed fantasizing about any child other than his sister Deborah. 3RP 168, 170-72, 177, 179, 187-89; 4RP 463; 6RP 58-59. He never, as the defense witnesses testified would be expected, showed the

typical patterns of a pedophile – collecting pictures of children, drawing children, writing stories about children, or attempting repeatedly to get close to children. 6RP 54, 56-57, 145-48. The very few instances cited by Dr. Longwell as relevant to Taylor’s diagnosis – a single carefully investigated and isolated visit to the edge of the children’s section of his local library to look at comic books (3RP 157-60, 188; 4RP 427; 6RP 25-26); one probably-fabricated story about having sexual contact with a 13-year old and then rejecting her offer of sex because he knew it was wrong (3RP 185-86, 256-57, 260-61; 4RP 412-13; 5RP 19, 20, 26; Ex. 27 (p.4-5)); and a PPG showing only 18% arousal to a single photograph of a child (5RP 26, 30-32; 6RP 35-36, 111-13, 140-41, 184)⁵ – these instances simply do not compare to the sort of evidence of pedophilia usually brought before this Court.

There are no published cases found by counsel where a Court examined a challenge to the relevant diagnosis.⁶ Usually, an attack on the

⁵ Notably, the DSM IV-TR largely rejects the PPG’s validity:
The reliability and validity of [the PPG] in clinical assessment have not been well established, and clinical experience suggests that subjects can simulate response by manipulating mental imagery.
DSM IV-TR at 567 (Paraphilias article).

⁶ But see Fair v. State, 139 Wn. App. 532, 536, 161 P.3d 466 (2007) (respondent apparently argued evidence was insufficient on pedophilia; although respondent’s argument and the Court’s response were not part of the published opinion, the published opinion did note respondent admitted to molesting about 16 children who were between the ages of eight and twelve, acknowledged frequently masturbating to fantasies of

sufficiency of the evidence targets the ROA,⁷ or else the finding of dangerousness.⁸ But given the specificity of the DSM IV-TR, there is no reason that such an unsupported diagnosis cannot be attacked.

As noted, the State did not review the diagnostic criteria or apply the facts to those criteria. Taylor therefore relies on his opening brief for such factual application. BOA at 43-49. Taylor asserts that the State's burden was unsupported on each of the criteria, but most absurdly on the second criteria, where Taylor was alleged to have suffered incarceration and the resulting interpersonal distress from his alleged "pedophilia," despite the fact that he has never been incarcerated for an act that was pedophilic under the other criteria of the DSM IV-TR. BOA at 46-47. Because the State failed to support any of the pedophilia criteria with "substantial evidence," this Court should reverse the verdict of commitment and remand with instructions to dismiss the petition.

underage children, stated he saw nothing wrong with sex with children; and reportedly did not want to stop "masturbating to minors").

⁷ See generally cases cited in Section A.1., above.

⁸ See, i.e., In re Detention of Audett, 158 Wn.2d 712, 728-29, 147 P.3d 982 (2006) (sufficient evidence supported pedophile's lack of control); In re Detention of Thorell, 149 Wn.2d 724, 759, 72 P.3d 708 (2003) (same).

3. THE COURT ERRED BY ALLOWING THE STATE'S EXPERT TO TESTIFY REGARDING "RELATIVE" VERSUS "ABSOLUTE" RISK OF REOFFENSE.

The State agrees that "[o]ne of the central issues at trial was whether or not Taylor is likely to commit a sexually violent offense if not confined to a secure facility." BOR at 25-26 (citing RCW 71.09.020(15); .060(1)). It argues, however, that the centrality of this issue would favor admission of Taylor's percentile ranking on the actuarial instruments – a ranking that was very different from the real question of Taylor's risk to reoffend. BOR at 26. Taylor argues a more convincing point – that the centrality of this issue means that the error was likely to cause significant prejudice, given the differences between the two sets of numbers and the way those numbers were discussed by both Dr. Longwell and by the State in closing. BOA at 50-55 (citing 3RP 291-95, 312; 7RP 559-661).

The State makes one curious argument that requires reply. It argues that because Taylor does not challenge the use of similar percentile data from the Psychopathy Checklist-Revised (PCL-R), that "one can only assume [sic] does not challenge this PCL-R percentile ranking testimony because it suited his case better than the other percentile ranking testimony heard by the jury." BOR at 27-28. While appellate counsel cannot speak for trial counsel, the obvious reason why the percentile rankings for the Static-99 and Static 2002 were attacked on appeal and not the PCL-R is

that trial counsel objected to the percentile rankings for the former two tests, which compared Taylor to other sex offenders, and did not specifically object to the PCL-R data. 1RP 52-54. Without an objection, Taylor could not appeal the use of the PCL-R percentiles without taking the difficult road of asserting ineffective assistance on the part of trial counsel. See e.g., State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). Such an assertion would be frivolous here based on the record.

Nonetheless, the numbers cited for Taylor's "percentiles" were irrelevant to his actual risk of reoffense. They were also significantly higher than those numbers, discussed in close proximity to those numbers, and specifically muddied by the prosecutor in closing, largely as Taylor's trial counsel warned might happen when she made her failed motion in limine. 1RP 52-54; 3RP 291-95, 312; 7RP 559-661. The admission of such evidence over objection was error.

4. THE COURT ERRED BY ALLOWING THE HEARSAY CONCLUSIONS OF OTHER EXPERTS TO BE EXTENSIVELY READ TO THE JURY DURING THE CROSS-EXAMINATION OF A DEFENSE EXPERT.

The State argues in response: 1) that because Taylor's experts read documents, they therefore "relied" upon them for purposes of the evidentiary rules; BOR at 29-31, 33; and 2) that the passages read from the underlying reports were therefore admissible as impeachment despite their

character as hearsay. BOR at 31-34. The State, correctly, never challenges the hearsay nature of these documents.

First, the Sherman court disposed of the idea that seeing a document when preparing for a case was the same as “reliance:”

Plaintiff's witness did not state that he had relied on the report, even though he had admitted that he had seen it. Until defendant established that plaintiff had relied on the report of the other doctor, it was improper for the defendant to read from that report in cross-examining plaintiff's witness.

Washington Irrigation and Development Co. v. Sherman, 106 Wn.2d 685, 688-89, 724 P.2d 997 (1986) (quoting Bobbe v. Modern Products, Inc., 648 F.2d 1051, 1056 (5th Cir. 1981)).

Second, the State cites to no cases for its proposition that large swaths of the otherwise-inadmissible reports could be read to the experts – and the jury – in the process of cross-examination. In fact, the State only cites to four cases in this six-plus page section of its brief, BOR at 28-34, as follows:

The first case, State v. Descoteaux, 94 Wn.2d 31, 39, 614 P.2d 179 (1980), overruled on other grounds, State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982), is cited merely for the standard of review. BOR at 29.

The second case, Group Health Cooperative of Puget Sound, Inc. v. Dept. of Revenue, 106 Wn.2d 391, 400, 722 P.2d 787 (1986), is cited

for the proposition that inadmissible evidence may be used to explain an expert's opinion or permit the jury to determine what weight it should be given. BOR at 29. But Group Health is a sufficiency case where the Supreme Court, in relevant part, only sustained a trial court's finding that Group Health proved its nature as a "health or social welfare organization" based on expert testimony on that ultimate fact. 106 Wn.2d at 393, 397-401. The only discussion of the underlying basis of the expert's testimony was to hold the trial court had properly determined such underlying data was of a type reasonably relied upon by experts in the field – but there was no apparent objection to the admission of the data. 106 Wn.2d at 398-400. The State's citation to Group Health for its asserted purpose is thus hard to explain and certainly inapposite to any issue in Taylor's case.

The third case listed is Conejo v. State, 57 Wn. App. 314, 325-26, 788 P.2d 554 (1990) (quoting 5A Karl B. Tegland, Washington Practice §313, at 418 (1989)), which the State cites for the proposition that "The evidence rules...leave to the [opposing] party 'the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness.'" BOR at 29. The only specific impeachment suggested by the Conejo Court, however, was to suggest the plaintiff in a wrongful death suit, when faced by the devaluation of damages to present cash value by the State's economist, could have suggested a different interest

rate or cost of annuity. 57 Wn. App. at 325-26. Nothing about Conejo implies that the impeachment committed here by the State was proper.

Finally, the State cites Marshall, supra, for the general assertion that “These concepts have been applied in previous SVP cases.” BOR at 29 (citing Marshall, 156 Wn..2d at 162-63). But Marshall, like Group Health, is a case where the respondent challenged the expert’s right to voluntarily explain what underlying data from hearsay reports, et cetera, had gone into the formation of his opinion, and even still, the Marshall Court cited with caution to another case: “““it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence.””” Marshall, 156 Wn.2d at 162-63 (citing State v. DeVries, 149 Wn.2d 842, 848 n.2, 72 P.3d 748 (2003) (quoting State v. Martinez, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995) (quoting 3 David Louisell & Christopher Mueller, FEDERAL EVIDENCE §389, at 663 (1979)))).

In short, the State cites no cases that permit the prosecutor to “reiterate all manner of inadmissible evidence” under the rubric of impeachment. The impeachment, as quoted in Taylor’s opening brief, was so flagrant and extreme in using hearsay opinions of non-testifying witnesses that no cautionary instruction could have cured it, and,

moreover, the cautionary instruction used did not appear to apply to the impeachment evidence. See BOA at 56-61. As in Sherman, this Court should find this broad use of inadmissible hearsay was prejudicial, and should reverse. 106 Wn.2d at 690, 695.

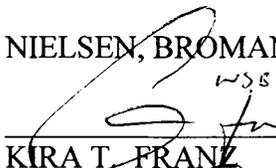
B. CONCLUSION

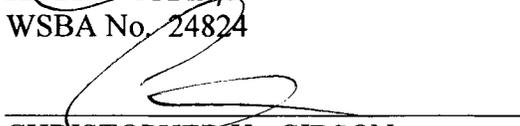
For the reason provided here and in the BOA, this Court should reverse Taylor's commitment under Chapter 71.09 RCW and dismiss the petition with prejudice due to lack of proof of a recent overt act and/or pedophilia. In the alternative, this court should reverse and remand for a new trial because evidentiary errors and instructional error deprived Taylor of a fair trial.

DATED this 4th day of March, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.


KIRA T. FRANZ
WSBA No. 24824


CHRISTOPHER H. GIBSON,
WSBA No. 25097
Office ID No. 91051

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

In re the Detention of:)	
)	
JAMES TAYLOR,)	
)	
Appellant,)	
)	
v.)	COA NO. 63268-0-I
)	
STATE OF WASHINGTON,)	
)	
Respondent.)	

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 4TH DAY OF MARCH, 2010, 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] JOSHUA CHOATE
ATTORNEY GENERAL'S OFFICE
800 5TH AVENUE
SUITE 2000
SEATTLE, WA 98104

- [X] JAMES TAYLOR
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, 4TH DAY OF MARCH, 2010.

x *Patrick Mayovsky*