

student's emergency contact, and local emergency personnel should be contacted.

In *Nguyen*, the court established that the university does not have a duty to anticipate intervention if the student has not expressed suicidal intention or plans, or the student has not had a recent suicide attempt, generally within 12 months prior to matriculation. The court did not find that the university voluntarily assumed duty of care, nor was there evidence that the school's mental health services increased the student's risk of suicide. Nonetheless, this ruling encourages universities to establish suicide protocols to protect the welfare of its students.

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Admissibility of Paraphilia NOS as Evidence of a Mental Abnormality under *Frye*

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Trial Court Did Not Err in Admitting Testimony on Paraphilia NOS or Allowing Expert to Describe Appellant's Persistent Sexual Interest in Pubescent-Age Females

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In *State v. Black*, 422 P.3d 881 (Wash. 2018), the Supreme Court of Washington considered whether expert testimony on paraphilia NOS (not otherwise specified), persistent sexual interest in pubescent-aged females, was properly admitted at trial. In Washington, admissibility of scientific testimony is guided by the standard articulated in *Frye v. United States*, 293 F. 1013 (1923). The appellant argued that evidence of this diagnosis was not admissible because it is synonymous with hebephilia, which is

not a generally accepted diagnosis in the relevant scientific community and is thus inadmissible under the *Frye* standard. The court ruled that the trial court did not abuse its discretion in admitting the expert testimony on paraphilia NOS.

Facts of the Case

In 2011, the state filed a petition for civil commitment of Mark Black as a sexually violent predator (SVP) prior to his scheduled release from prison. To secure a civil commitment under Washington's SVP statute, the state bears the burden to prove beyond a reasonable doubt that the individual "has been convicted of or charged with a crime of sexual violence and 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" (Wash. Rev. Code § 71.09.020(18) (2015)). The state relied on an evaluation of Mr. Black conducted by Dr. Dale Arnold, who provided diagnoses of sexual sadism; paraphilia NOS (i.e., diagnosis reserved for those whose paraphilic foci do not fall within the descriptions of the eight enumerated paraphilias), persistent sexual interest in pubescent aged females, nonexclusive; and personality disorder NOS with antisocial and narcissistic characteristics. These conditions were recognized in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, which was in effect at the time of Mr. Black's evaluation and trial. Dr. Arnold opined that, due to these diagnoses, Mr. Black was likely to perpetuate acts of sexual violence toward others if not confined to a facility. Mr. Black presented expert testimony from Dr. Joseph Plaud, who testified that Mr. Black's presentation "doesn't represent fundamentally disordered sexual arousal" (*Black*, p 883). Relying on the argument that the scientific community had not resolved the debate as to the validity of the diagnosis of paraphilia NOS, Dr. Plaud indicated Mr. Black did not suffer from a mental abnormality upon which to base a civil commitment.

Prior to the civil commitment trial, a *Frye* hearing was held, and Mr. Black moved to exclude evidence pertaining to hebephilia and paraphilia NOS. Mr. Black argued that hebephilia, or the "generally unaccepted diagnosis that is broadly defined as paraphilic attraction to adolescents up to ages 16 or 17," (*Black*, p 886) is not admissible pursuant to *Frye*. As a result of the *Frye* hearing, the court excluded evidence of hebephilia from being presented; however, Dr. Arnold's testimony regarding paraphilia NOS was al-

lowed on the basis that Dr. Arnold relied on methodology accepted by the psychology community to reach this diagnosis.

At the conclusion of the civil commitment trial, the jury unanimously determined that Mr. Black met criteria for commitment under the state's SVP laws. On appeal, Mr. Black argued that Dr. Arnold's diagnosis of paraphilia NOS was synonymous with hebephilia, given the perceived overlap in characteristics, and should also be considered inadmissible. Further, Mr. Black argued "the court committed reversible error" (*Black*, p 882) by allowing expert testimony on paraphilia NOS but no rebuttal information regarding the veracity of a hebephiliac diagnosis. The Court of Appeals affirmed the order of civil commitment.

The appeals court concluded that irrespective of whether testimony about the diagnosis of paraphilia NOS was improperly allowed, the other evidence presented by Dr. Arnold was sufficient to find that Mr. Black had a mental abnormality. Specifically, Dr. Arnold testified that the additional diagnoses of sexual sadism and personality disorder NOS with antisocial and narcissistic characteristics, which were not challenged by Mr. Black on appeal, independently caused Mr. Black "serious difficulty controlling his sexually violent behavior" (*Black*, p 883), and as such satisfied the definition of SVP under applicable statutes. The Supreme Court of Washington granted Mr. Black's request for review.

Ruling and Reasoning

The Washington Supreme Court affirmed Mr. Black's commitment and the admissibility of testimony regarding paraphilia NOS. The state supreme court held that the trial court did not err as a matter of law by allowing testimony regarding the diagnosis of paraphilia NOS. The court said that the diagnostic category of paraphilia NOS was generally accepted as a diagnosis in the relevant scientific community, as it is recognized in both recent and the current editions of the Diagnostic and Statistical Manual of Mental Disorders, which is a "standard reference for clinical practice in the mental health field" (Fifth Edition, 2013, p xli). The court relied on the fact that there was no testimony which asserted that Mr. Black did not meet the diagnostic criteria required for a paraphilic disorder. On the contrary, the court said

that the presentation of testimony from a subject matter expert regarding evidence that Mr. Black demonstrated persistent sexual attraction to pubescent-aged females was sufficient evidence of a "mental abnormality" given the consequences levied when acting upon the paraphilia.

The court reviewed the application of *Frye* and whether conclusions presented in court were reached by properly applying accepted "underlying principles" to the information presented, in contrast to verifying the accuracy of said conclusions, as in *State v. Copeland*, 922 P.2d 1304 (Wash. 1996). The *Black* court upheld the trial court's determination regarding the admissibility of Dr. Arnold's testimony concerning the criteria of paraphilia NOS diagnosis in accordance with *Frye* because this diagnosis is supported by the scientific community. In the dissenting opinion, Justice Madsen stated, "The problem, however, is that despite the paraphilia NOS label, the specifically identified condition substantially mirrors a diagnosis identified under another name—hebephilia—that is controversial within the same scientific community" (*Black*, p 887). Accordingly, the court also outlined that the difference between hebephilia and paraphilia NOS became an important consideration regarding the question of whether the trial court abused its discretion by permitting expert testimony on the specific nature of Mr. Black's paraphilia.

The court indicated that what elevated Mr. Black's interests in pubescent females to the level of a paraphilic disorder—and thus a mental abnormality—were the consequences of the paraphilia, including a demonstrated "inability to control his behavior to such an extent that he has committed repeated sexual offenses against multiple children who were legally incapable of giving consent" (*Black*, p 885). The court noted that paraphilic sexual urges are only considered a disorder when they persist over an extended period of time and cause significant distress or impairment for the individual in question. As evidence of this, the court referenced the numerous acts of "criminal sexual violence" (*Black*, p 885) that Mr. Black committed against individuals who could not give consent, as a matter of law, resulting in psychosocial consequences including prison sentences and the negative impact these actions have had on his relationships with others. Because the jury was

able to weigh and consider the information presented by both experts concerning the applicable arguments and controversies, the court did not find error. As such, the court ruled that a reversible error had not been committed because the trial court appropriately utilized discretion when admitting testimony regarding the diagnosis of paraphilia NOS.

Discussion

It is important to note that this ruling did not specifically consider whether evidence of hebephilia can ever be offered as evidence of a mental abnormality in accordance with *Frye* because the trial court excluded any evidence of hebephilia following a *Frye* hearing. Rather, this decision highlights the fact that the trial court has discretion in admitting expert testimony regarding paraphilia NOS as evidence of one's mental abnormality. Relevant for forensic psychiatrists, the court pointed out that Mr. Black's counsel was able to perform a robust cross-examination of the state's expert and had opportunity to present information to undermine the validity of the diagnosis without introducing testimony regarding hebephilia.

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Defense Counsel's Strategic Decision Negates an Effective Appeal Based on Ake

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In *Davis v. State*, 539 S.W.3d 565 (Ark. 2018), the Arkansas Supreme Court held that the defense counsel's strategic decision not to return to the court and pursue funds for hiring an independent mental health expert did not constitute reversible error. The defendant's motion for a stay of execution was de-

nied. The U.S. Supreme Court denied *certiorari* in October 2018.

Facts of the Case

Don William Davis shot and killed Jane Daniel in her home during a burglary. He was convicted of murder and sentenced to death. Early in the case, the court requested a mental health examination because the defense raised a possible mental disease or defect defense. A court-appointed psychiatrist, Dr. Travis Jenkins, examined Mr. Davis and diagnosed him with "Attention-deficit Hyperactivity Disorder residual ('ADHD')" (*Davis*, p 567) and a history of substance abuse. Dr. Jenkins opined that, although the ADHD "could have contributed to the commission of the offense" (*Davis*, p 567), Mr. Davis was not psychotic at the time of the offense. Dr. Jenkins' report was shared with the prosecution, defense counsel, and trial court. Both the defense and prosecution agreed that a more in-depth examination of Mr. Davis' mental health was necessary, and an order for examination at the Arkansas State Hospital was issued. The state hospital examiners concluded that Mr. Davis did not appear to "suffer from a mental disease . . . which would preclude criminal responsibility" (*Davis*, p 567). Thus, all examiners agreed that Mr. Davis did not meet criteria for "insanity," but did mention additional mental health factors.

In the sentencing phase, arguing that the state psychiatrists did not provide doctor-patient confidentiality and there was a need to explore the existence of mitigating factors, the defense twice requested that the court provide funding for the defense to hire an independent expert. The court denied the defense's requests. Following a third request for funds to hire an independent expert, the court advised the defense to review Mr. Davis' hospital records and re-interview the state hospital psychiatrists to determine if the defense continued to see a need for an independent expert. After meeting with the hospital psychiatrists, the defense team did not return to the court with a request for an independent psychiatric expert, and instead made the strategic decision to have the original psychiatrist, Dr. Jenkins, testify.

During the sentencing phase, Dr. Jenkins testified for the defense and commented on Mr. Davis' history of ADHD and substance abuse. The state argued that Mr. Davis' ADHD, substance abuse, and childhood problems paled in the face of the aggravating circumstances in the case. The jury convicted Mr.