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ONE CRIME, MANY CONVICTED: DISSOCIATIVE IDENTITY DISORDER AND THE EXCLUSION OF EXPERT TESTIMONY IN *STATE v. GREENE*

Mary Eileen Crego

In *State v. Greene*, the Supreme Court of Washington held that expert testimony about Dissociative Identity Disorder (DID) was not admissible to support an insanity or diminished-capacity defense. Even though the court acknowledged DID as a generally accepted medical disorder, the court reasoned that such testimony would not be helpful to the trier of fact, as required by Washington Evidence Rule (ER) 702, because the court has not established a specific standard for determining the legal responsibility of a defendant with multiple personalities. This Note argues that the *Greene* court had sufficient scientific evidence to establish a legal standard to determine the culpability of a defendant with DID. This Note further argues that expert testimony about DID would have been helpful to the jury under ER 702 and should have been admitted. Finally, this Note concludes that the *Greene* decision denied the defendant his constitutional right, under both federal and state jurisprudence, to present evidence in his defense.

On April 29, 1994, a therapist went to the apartment of one of her patients.¹ When she arrived, a violent four-year-old boy named Tyrone attacked her. William, the patient she had gone to see, was unconscious during the assault and had no knowledge of Tyrone's actions. Under normal circumstances, an American court would not convict William for Tyrone's actions. But in this case, Tyrone and William inhabit the same body. William Greene has Dissociative Identity Disorder (DID),² commonly called Multiple Personality Disorder (MPD).³ He is the host of twenty-four different personalities, including Tyrone.

When individuals with DID, such as Greene, are accused of crimes, courts face a variety of legal challenges.⁴ Commentators and defendants

1. See *State v. Greene*, 92 Wash. App. 80, 88–89, 960 P.2d 984–85 (1998).

2. Dissociative Identity Disorder is a disorder in which multiple personalities inhabit one mind and take recurrent control of a person's behavior. See American Psychiatric Assoc., *Diagnostic & Statistical Manual of Mental Disorders* 477 (4th ed. 1994) [hereinafter *DSM-IV*].

3. Multiple Personality Disorder is the previous technical name of DID. See American Psychiatric Assoc., *Diagnostic & Statistical Manual of Mental Disorders* 269–73 (3d ed. rev. 1987) [hereinafter *DSM-III*]. Because two additional diagnostic criteria were added when MPD was renamed DID, compare *DSM-IV* at 477 with *DSM-III* at 269–72, this Note will refer to defendants diagnosed before 1994 as having MPD and those diagnosed after 1994 as having DID.

4. See generally Sarah K. Fields, *Multiple Personality Disorder and the Legal System*, 46 Wash. U. J. Urb. & Contemp. L. 261, 261–262, 276–88 (1994); Sabra McDonald Owens, *Diagnostic Evidence Admissibility and the Multiple Personality Disorder Defense*, 1 J. Health Care L. & Pol'y 236, 244 (1998).

question whether defendants with DID are competent to stand trial,⁵ responsible for crimes,⁶ or fair recipients of punishment.⁷ Defendants with DID often claim that more than one fully developed personality inhabits a single body and that one personality should not be punished for the criminal actions of other personalities.⁸ These defendants frequently raise insanity or diminished-capacity defenses,⁹ forcing courts into the challenging position of trying to evaluate the mental state of a person who claims to have many distinct personalities residing in one body.¹⁰

The Supreme Court of Washington in *State v. Greene*¹¹ recently affirmed the kidnapping and indecent-liberties conviction of a defendant with DID.¹² The court decided that evidence of the defendant's DID, including expert testimony, was not admissible because it would not help the trier of fact resolve issues of insanity or diminished capacity.¹³ Although the court agreed that DID is generally accepted within the scientific community, it concluded that more scientific evidence about how DID relates to criminal responsibility is necessary before DID evidence would be helpful to a trier of fact and admissible under Washington Evidence Rule (ER) 702.¹⁴

5. See Fields, *supra* note 4, at 280–81 (observing that amnesia between personalities could hinder defendants' ability to assist counsel).

6. See *id.* at 275–76; Owens, *supra* note 4, at 244.

7. See Fields, *supra* note 4, at 276.

8. See Sabra McDonald Owens, *The Multiple Personality Disorder (MPD) Defense*, 8 Md. J. Contemp. Legal Issues 237, 237–38 (1997); Fields, *supra* note 4, at 276 (explaining that because all personalities inhabit one body, either innocent personalities may be punished or guilty ones may go free).

9. See Sabra M. Owens, *Criminal Responsibility and Multiple Personality Defendants*, Mental & Physical Disability L. Rep. 133, 140–43 (1997) (noting that 55% of DID defendants enter insanity plea); see, e.g., *New Jersey v. Moore*, 550 A.2d 117, 141 (N.J. 1988); *State v. Greene*, 92 Wash. App. 80, 84, 960 P.2d 980, 982 (1998), *rev'd*, 139 Wash. 2d 64, 984 P.2d 1024 (1999).

10. See Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 25 U.C. Davis L. Rev. 383, 389 (1992) (observing that defendants with DID force legal system to confront issues of personhood and character).

11. 139 Wash. 2d 64, 984 P.2d 1024 (1999).

12. See *id.* at 79, 984 P.2d at 1031–32.

13. See *id.*

14. See *id.* Evidence Rule 702 governs the admissibility of expert testimony in Washington. See *State v. Copeland*, 130 Wash. 2d 244, 256, 922 P.2d 1304, 1313 (1996) (analyzing admissibility of scientific evidence using ER 702 and *Frye* test); *State v. Cauthron*, 120 Wash. 2d 879, 886, 890–91, 846 P.2d 502, 504, 507 (1993) (same). ER 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a

This Note argues that the *Greene* court erred by not admitting expert testimony about the defendant's DID. Part I describes DID, the legal standards for admitting scientific evidence, the insanity and diminished-capacity defenses, and how DID evidence has been handled in previous cases. Part II outlines the facts of *State v. Greene* and summarizes the trial court, court of appeals, and Supreme Court of Washington opinions. Part III criticizes the supreme court's failure to establish a legal standard for determining the culpability of DID defendants, explains why the court should have admitted the evidence as helpful under ER 702, and argues that the court violated the defendant's Sixth Amendment right to present relevant evidence on his own behalf.

I. DISSOCIATIVE IDENTITY DISORDER, ADMISSIBILITY OF EXPERT TESTIMONY, MENTAL-CAPACITY DEFENSES, AND USE OF DID EVIDENCE IN PREVIOUS CASES

In the last three decades, courts have confronted an increasing number of legal issues surrounding DID.¹⁵ This section will first describe DID's diagnostic criteria, symptoms, and terminology. Next, this section will summarize the legal standards for admitting scientific evidence and explain a defendant's Sixth Amendment right to present evidence. Third, this section will highlight the use of expert testimony to support insanity and diminished-capacity defenses. Finally, this section will examine how DID evidence has been handled in other jurisdictions and previous Washington cases.

A. *Dissociative Identity Disorder*

A person suffering from Dissociative Identity Disorder (DID)¹⁶ may have from two to hundreds of personalities inhabiting one body.¹⁷ The

witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

15. See Fields, *supra* note 4, at 265–266 n.27.

16. A dissociative disorder involves a break in the connection between memories or personality. It can be as simple as daydreaming or as complex as DID. See Owens, *supra* note 8, at 240–41 (citing *DSM-IV*, *supra* note 2, at 477). DID is one of five types of dissociative disorders recognized by the American Psychiatric Institute. See *id.* The other four are dissociative amnesia, dissociative fugue, depersonalization disorder, and dissociative disorder not otherwise specified. See *id.* Although symptoms corresponding to DID have been documented since 1646, the number of purported multiple-personality cases and literature surrounding them has skyrocketed in the last 20 years. See Owens, *supra* note 4, at 264–65; Saks, *supra* note 10, at 391.

personalities frequently differ in age, race, gender, and emotional state,¹⁸ and may also demonstrate different physical responses to stimuli and score differently on psychological tests.¹⁹ For example, MPD patient Billy Mulligan “had a violent personality who spoke Serbo-Croat, a teenaged personality who was an escape artist, and a helper personality who spoke with an English accent.”²⁰ Personalities are often not aware of the existence of other personalities or do not retain memories from the times other personalities control the body.²¹ The characteristics of each personality and the interaction between personalities is a complex dynamic unique to each individual with DID.²²

Psychiatrists use specialized terminology to describe DID patients.²³ The entire person, including all personalities inhabiting the body, is referred to as a “multiple.”²⁴ “Host” personality refers to the personality in control of the body the greatest amount of time.²⁵ “Alter” describes

17. See Fields, *supra* note 4, at 264. The average number of personalities is eight. See Owens, *supra* note 4, at 264. The *DSM-IV* specifies four criteria for a diagnosis of DID:

A. The presence of two or more distinct identities or personality states (each with its own relatively enduring pattern of perceiving, relating to, and thinking about the environment and self).

B. At least two of these identities or personality states recurrently take control of the person’s behavior.

C. Inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness.

D. The disturbance is not due to the direct physiological effects of a substance (e.g., blackouts or chaotic behavior during Alcohol Intoxication) or a general medical condition (e.g., complex partial seizures).

DSM-IV, *supra* note 2, at 487.

18. See Fields, *supra* note 4, at 264.

19. See Saks, *supra* note 10, at 396–97 (stating that personalities “are often different handed, wear glasses with different prescriptions, respond differently to medication, score differently on psychological tests, and even respond differently on physiological measures like the Galvanic Skin Response and [Electroencephalograms]”).

20. *Id.* (citing Daniel Keyes, *The Minds of Billy Mulligan* xv–xviii (1981)).

21. See Fields, *supra* note 4, at 263; Mark E. Hindley, Note, *United States v. Denny-Shaffer and Multiple Personality Disorder: “Who Stole the Cookie from the Cookie Jar?”*, 1994 Utah L. Rev. 961, 966.

22. See Owens, *supra* note 4, at 240.

23. See Richard P. Kluff, *An Introduction to Multiple Personality Disorder*, 14 *Psychiatric Annals* 19, 23 (1984).

24. See *id.*

25. See *id.* (noting host is personality generally recognized by society as person).

other personalities who may emerge and control the body at different times.²⁶

DID is strongly associated with childhood sexual abuse.²⁷ Scientific evidence suggests that DID emerges as a way to cope with childhood abuse, neglect, or trauma.²⁸ Unconsciously developing alter personalities may serve as an escape from reality, a containment of traumatic memories, an analgesic, or a detachment of the sense of self so the trauma happens to someone else.²⁹

The widespread agreement among mental-health professionals about DID's symptoms, the near uniformity of its roots in childhood trauma, and the positive response of patients to therapy³⁰ all support the existence of DID as a diagnosable and treatable mental disorder.³¹ Despite questions raised by skeptics about the diagnosis of individual cases,³² DID's general acceptance rate among mental-health professionals is at least eighty percent.³³ When courts consider evidence of DID, they use the rules established for admission of scientific evidence and expert testimony.

B. Rules for Admission of Scientific Evidence in Washington and Due Process Ramifications of Refusal to Admit Evidence

Washington courts use a two-step process articulated in *State v. Cauthron*³⁴ to determine the admissibility of scientific evidence such as

26. *See id.*

27. *See Saks, supra* note 10, at 394.

28. *See id.* at 394–95.

29. *See Hindley, supra* note 21, at 965 (citing Doris Bryant et al., *The Family Inside: Working with the Multiple 4* (1992)).

30. Treatment of DID often involves psychotherapy and hypnosis. The goal of the therapy is usually to reintegrate all personality states to form a cohesive whole. *See Saks, supra* note 10, at 398–99.

31. *See id.* at 401–02.

32. *See id.* at 400–01 (noting that some who are skeptical of disorder believe it can be consciously simulated, inadvertently created under hypnosis, or unconsciously adopted by patients to please their therapists).

33. *See State v. Greene*, 139 Wash. 2d 64, 72, 984 P.2d 1024, 1028 (1999) (noting both State and defense experts agree at least 80% of psychiatrists accept disorders included in *DSM-IV* including DID). Inclusion in the *DSM-IV* reflects “a consensus of current formulations of evolving knowledge” in the mental-health field. *DSM-IV, supra* note 2, at xxvii.

34. 120 Wash. 2d 879, 849 P.2d 502 (1993).

psychological theories and expert testimony.³⁵ First, they use the *Frye* test³⁶ to determine the general acceptance and reliability of the scientific theory or principle.³⁷ Second, courts evaluate the relevance of the evidence under ER 702 and 401³⁸ to determine if the expert is qualified and the information would be helpful to the jury.³⁹ In addition, courts must also consider the defendant's Sixth Amendment right to present evidence.⁴⁰

1. *Scientific Evidence Must Pass the Frye Test and Be Relevant*

As applied in Washington, the *Frye* test requires two elements. First, courts determine if the scientific theory or principle upon which the evidence is based has gained general scientific acceptance.⁴¹ Second, courts decide whether there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.⁴² To make both these determinations, Washington courts look to literature on the subject and the opinions of other jurisdictions.⁴³ By making admissibility of scientific evidence contingent on its acceptance by the scientific community, courts recognize that "judges do not have the expertise required to decide whether a challenged scientific theory is correct."⁴⁴

35. See *id.* at 886, 889–90, 846 P.2d at 505, 507; see also *State v. Janes*, 121 Wash. 2d 220, 232, 850 P.2d 495, 501 (1993).

36. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (holding novel scientific evidence inadmissible unless generally accepted by relevant scientific community). The U.S. Supreme Court has ruled that general acceptance is not required by Federal Rule of Evidence 702. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993). The Supreme Court of Washington has specifically declined to apply the Court's interpretation to Washington Rule of Evidence 702. See *State v. Copeland*, 130 Wash. 2d 244, 259, 922 P.2d 1304, 1314 (1996).

37. See *Copeland*, 130 Wash. 2d at 255–56, 922 P.2d at 1312–13.

38. Washington Rule of Evidence 401 states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wash. R. Evid. 401. Because the *Greene* court's analysis was confined to ER 702, this Note does not address ER 401.

39. See ER 401; *Cauthron*, 120 Wash. 2d at 890–91, 846 P.2d at 507.

40. See *State v. Ellis*, 136 Wash. 2d 498, 523, 963 P.2d 843, 856 (1998).

41. See *Copeland*, 130 Wash. 2d at 255–56, 922 P.2d at 1312–13.

42. See *State v. Greene*, 139 Wash. 2d 64, 70, 984 P.2d 1024, 1027 (1999).

43. See *Copeland*, 130 Wash. 2d at 256–57, 922 P.2d at 1312–13; *Cauthron*, 120 Wash. 2d at 888, 846 P.2d at 506.

44. *Copeland*, 130 Wash. 2d at 255, 922 P.2d at 1312 (citing *Cauthron*, 120 Wash. 2d at 887, 846 P.2d at 505–06).

If the scientific evidence passes the general-acceptance test, courts then consider whether it will assist the trier of fact as required by ER 702.⁴⁵ Scientific evidence is considered helpful to the trier of fact if it is relevant.⁴⁶ The Supreme Court of Washington has previously decided that evidence is considered relevant under ER 702 if it assists the trier of fact in understanding a little-known psychological problem.⁴⁷ Relevance and admissibility of expert testimony was the primary focus of *State v. Janes*,⁴⁸ where the Supreme Court of Washington reversed a trial court decision to exclude evidence of Battered Child Syndrome in the context of a self-defense claim to a murder charge.⁴⁹ The supreme court deemed the evidence relevant and helpful to the jury under ER 702, even though it acknowledged that the psychiatric community had not formally recognized the syndrome.⁵⁰ The court concluded that “[e]xpert testimony regarding the syndrome helps the jury to understand the reasonableness of the defendant’s perceptions.”⁵¹

2. *Due Process Ramifications Refusing to Admit Evidence*

Both the U.S. Supreme Court and the Supreme Court of Washington have recognized that a court’s refusal to admit certain evidence may violate defendants’ Sixth Amendment rights to secure witnesses on their own behalf.⁵² *Washington v. Texas*⁵³ made this Sixth Amendment right applicable to the states through the Due Process Clause of the Fourteenth

45. *See Greene*, 139 Wash. 2d at 70, 984 P.2d at 1027 (citing *State v. Janes*, 121 Wash. 2d 220, 232, 850 P.2d 495, 501 (1993)).

46. *See State v. Riker*, 123 Wash. 2d 351, 364, 869 P.2d 43, 50 (1994).

47. *See State v. Janes*, 121 Wash. 2d 232, 236, 850 P.2d 495, 503 (1993) (deciding that expert testimony about Battered Child Syndrome was admissible).

48. *See id.*

49. *See id.* Battered Child Syndrome is used to describe the psychological and physiological effects of prolonged patterns of abuse. *See id.* at 233, 850 P.2d at 501 (citing Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol. Rev. 103, 104 (1987)).

50. *See id.* at 233 n.5, 850 P.2d at 501 n.5.

51. *Id.* at 236, 850 P.2d at 503 (citing Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol. Rev. 103, 104 (1987)).

52. The Compulsory Process Clause of the Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor” U.S. Const. amend. VI.

53. 388 U.S. 14 (1967).

Amendment.⁵⁴ In *Rock v. Arkansas*,⁵⁵ the Court overruled a state-court decision that excluded all post-hypnosis testimony.⁵⁶ In its decision concluding that the state court's suppression of the testimony was unconstitutional,⁵⁷ the Court reasoned that the interests of justice were better served by allowing a hypnotized witness to testify and leaving the jury to decide the weight of that testimony.⁵⁸

Although state courts are limited by the Sixth Amendment, they still retain some power to restrict evidence. The Court has acknowledged that the right to present witnesses may be limited by "rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."⁵⁹ However, restrictions on the right to introduce evidence may not be "arbitrary or disproportionate to the purposes they are designed to serve."⁶⁰ For mental illnesses other than DID, the Supreme Court of Washington has recognized that failure to admit expert testimony relating to a diminished-capacity defense may deprive defendants of their constitutional right to present evidence in their own defense.⁶¹

C. *Insanity and Diminished-Capacity Defenses in Washington*

Defendants with mental disorders often seek to admit scientific evidence and expert testimony when they raise insanity or diminished-capacity defenses.⁶² Courts conduct separate legal analyses of insanity and diminished capacity because each represents a distinct theory and defense.⁶³

54. *See id.* at 17–19, *cited with approval in State v. Smith*, 101 Wash. 2d 36, 41, 677 P.2d 100, 103 (1984).

55. 483 U.S. 44 (1987).

56. *See id.* at 62; *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (overruling state court's exclusion of hearsay when hearsay was corroborated and had other indications of reliability).

57. *See Rock*, 483 U.S. at 62.

58. *See id.* at 54.

59. *Chambers*, 410 U.S. at 302.

60. *Rock*, 483 U.S. at 55–56.

61. *See State v. Ellis*, 136 Wash. 2d 498, 523, 963 P.2d 843, 856 (1998).

62. *See, e.g., State v. Rodrigues*, 679 P.2d 615, 618 (Haw. 1984) (seeking to admit evidence of MPD); *State v. Greene*, 92 Wash. App. 80, 84, 960 P.2d 980, 982 (1998), *rev'd*, 139 Wash. 2d 64, 984 P.2d 1024 (1999) (DID); *State v. Crenshaw*, 27 Wash. App. 326, 334, 617 P.2d 1041, 1046 (1980) (paranoid schizophrenia).

63. *See State v. Jamison*, 94 Wash. 2d 663, 665–66, 619 P.2d 352, 353 (1980).

1. *Insanity Defense*

To meet the statutory requirements for an insanity defense, defendants must show that due to a mental disease or defect, they were unable to appreciate the nature and quality of their actions or unable to distinguish right from wrong.⁶⁴ Insanity provides a defense in Washington not because it establishes innocence, “but because the state declines to convict or punish one shown to have committed the crime while mentally impaired.”⁶⁵ The defendant bears the burden of proving insanity by a preponderance of the evidence.⁶⁶ In insanity defense cases not involving DID, Washington courts regularly admit expert testimony to describe psychological disorders.⁶⁷ Washington courts have even admitted expert testimony where it provides only a “mere scintilla of evidence” to support insanity.⁶⁸

2. *Diminished-Capacity Defense*

Diminished capacity is the legal term used to describe a mental condition that prevents a defendant from possessing the specific mental state required by law.⁶⁹ For example, in *State v. Griffin*⁷⁰ the court held that the jury should have received a diminished-capacity instruction after an expert testified that the defendant suffered from catatonic paranoid schizophrenia and alcoholism and was incapable of forming an intent to defraud.⁷¹ Expert testimony about depression, lack of sleep, anxiety, alcohol use, and personality disorder has also been considered relevant and admissible.⁷² Before a judge will instruct a jury about diminished

64. See Wash. Rev. Code § 9A.12.010 (1998). Washington’s insanity defense uses the same criteria as the famous English insanity case *Regina v. M’Naughten*, 8 Eng. Rep. 718, 719 (H.L. 1843).

65. *State v. Box*, 109 Wash. 2d 320, 329, 745 P.2d 23, 29 (1987) (citing *Gilerist v. Kincheloe*, 589 F. Supp. 291, 294 (E.D. Wash. 1984), *aff’d*, 774 F.2d 1173 (9th Cir. 1985)).

66. See Wash. Rev. Code § 9A.12.010(2) (1998).

67. See, e.g., *State v. White*, 60 Wash. 2d 551, 564, 578–79, 374 P.2d 942, 950, 958–59 (1962); *Crenshaw*, 27 Wash. App. at 333, 617 P.2d at 1046.

68. *Jamison*, 94 Wash. 2d at 665, 619 P.2d at 353 (deciding expert testimony admitted into evidence insufficient to require jury instruction for insanity).

69. See *State v. Warden*, 133 Wash. 2d 559, 564, 947 P.2d 708, 711 (1997).

70. 100 Wash. 2d 417, 670 P.2d 265 (1983).

71. See *id.* at 418–19, 670 P.2d at 266.

72. See, e.g., *State v. Eakins*, 127 Wash. 2d 490, 493, 902 P.2d 1236, 1239 (1995) (regarding alcohol and drug use); *Griffin*, 100 Wash. 2d at 419, 670 P.2d at 266 (regarding alcohol and

capacity, a defendant must produce “substantial evidence” of the mental condition and connect the alleged mental condition to the inability to possess the requisite level of culpability.⁷³ The burden is on the State to prove beyond a reasonable doubt that the defendant had the mental state required to commit the crime charged.⁷⁴

The Supreme Court of Washington recently held in *State v. Ellis*⁷⁵ that ER 702 should be used to determine the admissibility of expert testimony in diminished-capacity cases.⁷⁶ The court reversed the trial court’s decision to exclude expert testimony related to diminished capacity.⁷⁷ Defendant Ellis was tried for aggravated first-degree murder and faced capital punishment.⁷⁸ To support his diminished-capacity defense, Ellis presented two experts prepared to testify that he suffered from a variety of mental conditions, including dissociative disorder,⁷⁹ intermittent explosive disorder, and antisocial personality disorder.⁸⁰ The state’s expert agreed that Ellis suffered from a personality disorder, but questioned its severity and relationship to diminished capacity.⁸¹ While concluding that the trial court unreasonably excluded the expert testimony,⁸² the supreme court emphasized that using factors to

schizophrenia); *State v. Edmon*, 28 Wash. App. 98, 100–01, 621 P.2d 1310, 1312 (1981) (combining lack of sleep, alcohol, and mental disorders).

73. *Griffin*, 100 Wash. 2d at 418–19, 670 P.2d at 266. Washington has classified four levels of culpability: intent, knowledge, recklessness, or criminal negligence. See Wash. Rev. Code § 9A.08.010 (1998). See *infra* note 130 for the culpability requirements of the charges in *State v. Greene*.

74. See *State v. Greene*, 92 Wash. App. 80, 106, 960 P.2d 980, 993 (1998), *rev’d on other grounds*, 139 Wash. 2d 64, 984 P.2d 1024 (1999).

75. 136 Wash. 2d 498, 963 P.2d 843 (1998).

76. See *Ellis*, 136 Wash. 2d at 521, 963 P.2d at 855. Before *Ellis*, courts analyzed admissibility of expert testimony in diminished capacity cases using a nine-factor test established in *State v. Edmon*. See *Greene*, 139 Wash. 2d at 73 n.3, 984 P.2d at 1029 n.3. The factors of the *Edmon* test focused on the expert’s qualifications and whether the expert’s opinion would show that the alleged mental condition caused an inability to form intent. See *Edmon*, 28 Wash. App. at 102–03, 621 P.2d at 1313.

77. See *Ellis*, 136 Wash. 2d at 499, 963 P.2d at 844.

78. See *id.*

79. See *supra* note 16 (explaining that dissociative disorder is in same general diagnostic category as DID).

80. See *Ellis*, 136 Wash. 2d at 508–13, 963 P.2d at 848–51. These disorders are classified in the *DSM-IV*, *supra* note 2, at 477, 612, and 649–50, respectively.

81. See *Ellis*, 136 Wash. 2d at 509, 516, 963 P.2d at 849, 852–53.

82. See *id.* at 523, 963 P.2d at 856.

determine admissibility beyond those contained in ER 702⁸³ deprived the defendant of his Sixth Amendment right to present evidence on his own behalf.⁸⁴

D. Use of Expert Testimony Regarding DID in Washington and Other Jurisdictions

Courts in Washington⁸⁵ and other jurisdictions⁸⁶ have already addressed how expert testimony about DID should be used in criminal trials and have admitted such testimony. Many courts have developed specialized legal standards for assessing the culpability of a defendant with DID.⁸⁷ The three most prominent legal standards used by courts in the assessment of a DID defendant's state of mind are the alter, host, and unified approaches.⁸⁸ Courts have admitted expert testimony using all three approaches.⁸⁹

1. Courts Face Challenges in Developing Specialized Legal Standards to Assess the Criminal Culpability of Defendants with DID

In formulating specialized legal standards regarding when and how a criminal defendant with DID can be found guilty of a crime,⁹⁰ the primary challenge courts face is how to treat each of the many alter personalities. For example, if a defendant with DID raises a diminished-capacity defense, courts must choose which personality or personalities to examine when determining the defendant's mental state at the time of the alleged crime. The legal standard courts select to assess the mental state of a defendant with DID is intertwined with issues regarding

83. ER 702 mandates that the evidence assist the trier of fact. *See* Wash. R. Evid. 702; *supra* note 14.

84. *See Ellis*, 136 Wash. 2d at 523, 963 P.2d at 856.

85. *See State v. Wheaton*, 121 Wash. 2d 347, 349, 850 P.2d 507, 508 (1993); *State v. Jones*, 82 Wash. App. 871, 871–73, 920 P.2d 225, 225–26 (1996).

86. *See, e.g., United States v. Denny-Shaffer*, 2 F.3d 999, 1018 (10th Cir. 1993); *Kirby v. State*, 410 S.E.2d 333, 334 (Ga. Ct. App. 1991); *State v. Rodrigues*, 679 P.2d 615, 617 (Haw. 1984); *Commonwealth v. Roman*, 606 N.E.2d 1333, 1334 (Mass. 1993).

87. *See, e.g., Denny-Shaffer*, 2 F.3d at 1012–13; *Rodrigues*, 679 P.2d at 617–19; *Roman*, 606 N.E.2d at 1336.

88. *See Owens*, *supra* note 8, at 247–57.

89. *See id.*

90. *See id.*

whether these defendants should be punished.⁹¹ The key question for purposes of punishment is whether courts should view “persons as constituted by their memories and other psychological characteristics” or by their physical bodies.⁹² If criminal responsibility focuses on the physical body, multiples should arguably be punished for crimes committed by just one of their alters.⁹³ One commentator suggests that punishing the entire body for the acts of a single alter is analogous to punishing Siamese twins for the acts of one twin.⁹⁴ On the other hand, if criminal responsibility and punishment focus only on the mind or a part thereof, courts must decide what part or parts of the mind are most relevant. Although the Supreme Court of Washington has declined to adopt a legal standard for defendants with DID, it has acknowledged that such a standard is necessary.⁹⁵

2. *Courts Have Used Three Different Legal Standards to Assess Criminal Responsibility of Defendants With DID*

Courts have used three basic approaches to determine if a defendant with DID should be held responsible for a crime. The alter approach, which bases criminal culpability on the state of mind of the alter in control at the time of the crime,⁹⁶ is the most frequently used⁹⁷ and has been used by Washington trial courts.⁹⁸ Although the Supreme Court of Washington has not explicitly adopted a specific approach, it has affirmed a decision that used the alter approach.⁹⁹ The host approach

91. See Saks, *supra* note 10, at 385–86. For a review of various theories of punishment, see Marc Miller and Martin Guggenheim, *Pretrial Detention and Punishment*, 75 Minn. L. Rev. 335 (1990).

92. Saks, *supra* note 10, at 410–11.

93. See *id.* at 411–14.

94. See *id.* at 414–15.

95. See *State v. Greene*, 139 Wash. 2d 64, 77, 984 P.2d 1024, 1031 (1999) (“In our view, the helpfulness of the proffered expert testimony can be determined only in relation to a legal standard for culpability in the context of DID.”).

96. See *Owens*, *supra* note 8, at 247.

97. See *id.*; see, e.g., *State v. Rodrigues*, 679 P.2d 615, 619–20 (Haw. 1984) (noting that trial court admitted testimony of five experts, resulting in acquittal by reason of insanity); *Commonwealth v. Roman*, 606 N.E.2d 1333, 1334 (Mass. 1993) (noting that testifying expert believed defendant had MPD but was able to conform behavior to law).

98. See *State v. Wheaton*, 121 Wash. 2d 347, 351, 850 P.2d 507, 509 (1993); *State v. Jones*, 82 Wash. App. 871, 871–74, 920 P.2d 225, 225–26 (1996).

99. See *Wheaton*, 121 Wash. 2d at 357, 850 P.2d at 512. The *Wheaton* court stated that it did not have sufficient information to establish a legal standard applicable to all future DID cases but nevertheless upheld the trial court’s decision to convict *Wheaton* using the alter approach. *Id.*

bases culpability on the host personality's awareness of the alleged criminal actions taken by alter personalities and the host's ability to control the alters.¹⁰⁰ Finally, the unified approach makes no legal distinctions between hosts or alters.¹⁰¹

a. The Alter Approach

The alter approach follows the common law mens rea framework, which looks to the mental state of the alter in control at the time of the alleged criminal act.¹⁰² Courts reason that criminal accountability is justified if the alter in control at the time of the crime possessed the mental state necessary to commit the crime.¹⁰³ Courts do not consider the mental state of the host when using the alter approach.¹⁰⁴

In *State v. Wheaton*,¹⁰⁵ a Washington trial court used the alter approach and the supreme court affirmed. The trial court admitted expert testimony about MPD and ruled in a bench trial on stipulated facts¹⁰⁶ that the defendant was guilty because the alter in control at the time of the alleged crime was legally sane.¹⁰⁷ The Supreme Court of Washington affirmed the trial court's guilty verdict but stated that it was not establishing a legal standard for determining the culpability of a defendant with MPD.¹⁰⁸ The court acknowledged that developing a legal standard to assess the criminal culpability of a defendant with MPD was a legal decision, but decided that it did not have sufficient scientific information to develop such a standard.¹⁰⁹ The court criticized an expert witness for testifying about approaches courts could use to determine the sanity of a defendant with MPD because such testimony encroached on the courts' responsibility to decide legal matters including criminal

100. See Owens, *supra* note 8, at 255.

101. See *id.* at 252–53.

102. See *id.* at 247.

103. See, e.g., Kirkland v. State, 304 S.E.2d 561, 564 (Ga. Ct. App. 1983).

104. See *id.*; see also United States v. Denny-Shaffer, 2 F.3d 999, 1018 (10th Cir. 1993).

105. 121 Wash. 2d 347, 850 P.2d 507 (1993).

106. See *id.* at 349–51, 850 P.2d at 508–09. Other jurisdictions using the alter approach have admitted expert testimony about DID. See, e.g., State v. Rodrigues, 679 P.2d 615, 619–20 (Haw. 1984); Commonwealth v. Roman, 606 N.E.2d 1333, 1334 (Mass. 1993).

107. See *Wheaton*, 121 Wash. 2d at 351, 850 P.2d at 509.

108. See *id.* at 357, 850 P.2d at 512.

109. See *id.* at 356, 850 P.2d at 512.

responsibility and sanity.¹¹⁰ Although the court's stated reasons for affirming the trial court's decision were lack of evidence and inadequate legal authority,¹¹¹ the result of the court's decision was affirmation of a guilty verdict based on the alter approach.¹¹²

b. The Host Approach

Although not used thus far in Washington, other jurisdictions have admitted expert testimony about DID using the host approach, which requires a court to consider only the mental state of the host personality.¹¹³ In *United States v. Denny-Shaffer*,¹¹⁴ the Tenth Circuit used the host approach to reverse a kidnapping conviction obtained using the alter approach.¹¹⁵ The court concluded that the federal insanity statute did not prevent defendants from arguing and submitting expert testimony that the host was insane even if the alter in control at the time of the crime was not.¹¹⁶ The court emphasized the maxim that penal statutes, including those related to criminal defenses, should be construed strictly against the state.¹¹⁷ The court concluded that because the insanity defense was meant to protect defendants with mental disorders, it should not be denied to defendants with DID who claim their hosts were insane.¹¹⁸

c. The Unified Approach

To date, three jurisdictions have adopted the unified approach, which holds the entire body responsible for the actions of any single

110. *See id.* at 353–54, 850 P.2d at 510 (criticizing expert witness who suggested either host or alter approach).

111. *See id.* at 356–57, 850 P.2d at 512.

112. After *Wheaton*, the court of appeals in *State v. Jones* admitted expert testimony about MPD in relation to a diminished-capacity defense where the court adopted the alter approach as its legal standard. *State v. Jones*, 82 Wash. App. 871, 871–73, 920 P.2d 225, 225–26 (1996). The court upheld the defendant's conviction because although evidence indicated the host was not aware of or able to control the alter personalities, the alter in control at the time knowingly committed indecent liberties. *See id.*

113. *See United States v. Denny-Shaffer*, 2 F.3d 999, 1016 (10th Cir. 1993).

114. *Id.*

115. *See id.* at 1012–13.

116. *See id.* at 1013–14 (citing 18 U.S.C. § 17 (1994)).

117. *See Denny-Shaffer*, 2 F.3d at 1014 (citing *Huddleston v. United States*, 415 U.S. 814, 831 (1974)).

118. *See id.* at 1014–15.

personality.¹¹⁹ Courts have used this approach primarily in a procedural sense to defeat defendants' claims that their DID prevented them from assisting counsel¹²⁰ or that they were denied their right to testify because all alters did not get the opportunity to testify.¹²¹ For example, in *State v. Halcomb*¹²² the defendant argued that statements about the crime given voluntarily by one alter personality should not be admissible against the host personality.¹²³ The court decided that statements provided voluntarily by any of the defendant's various alters were admissible against the entire body.¹²⁴

Regardless of whether an alter, host, or unified approach is used, numerous courts in Washington and throughout the country have admitted expert testimony about DID.¹²⁵ Washington courts admitted expert testimony about DID¹²⁶ until the supreme court's decision in *State v. Greene*.¹²⁷

II. *STATE v. GREENE*

State v. Greene is the most recent decision of the Supreme Court of Washington addressing DID. The Washington Court of Appeals reversed the trial court's decision to exclude evidence of the defendant's DID.¹²⁸ The supreme court agreed with the court of appeals that DID was generally accepted in the scientific community but upheld the trial court's decision to exclude the evidence.¹²⁹

119. See Owens, *supra* note 7, at 253–54 (citing *State v. Halcomb*, 510 N.W.2d 344, 351 (Neb. Ct. App. 1993); *State v. Badger*, 551 A.2d 207, 209 (N.J. Super. Ct. Law Div. 1988); *State v. Woodard*, 404 S.E.2d 6, 10 (N.C. Ct. App. 1991)).

120. See *State v. Badger*, 551 A.2d 207, 209 (N.J. Super. Ct. Law Div. 1988).

121. See *State v. Woodard*, 404 S.E.2d 6, 10 (N.C. Ct. App. 1991).

122. 510 N.W.2d 344 (Neb. Ct. App. 1993).

123. See *id.* at 351.

124. See *id.*

125. See *supra* notes 85–89 and accompanying text.

126. See *infra* note 128 and accompanying text.

127. 139 Wash. 2d 64, 984 P.2d 1024 (1999).

128. *State v. Greene*, 92 Wash. App. 80, 107, 960 P.2d 980, 994 (1998), *rev'd*, 139 Wash. 2d 64, 984 P.2d 1024 (1999).

129. See *Greene*, 139 Wash. 2d at 66–67, 984 P.2d at 1025.

A. Facts

Defendant William Greene was charged with indecent liberties and kidnapping¹³⁰ for fondling then tying up his therapist, who came to his apartment because she believed he was at risk of committing suicide.¹³¹ Greene claimed insanity and diminished capacity.¹³² He was prepared to present evidence including expert testimony that other alters were in control during the incident and that those alters were either legally insane or unable to form the requisite intent.¹³³

Greene had a long history of abuse, mental illness, and imprisonment.¹³⁴ He suffered severe physical, sexual, and emotional abuse as a child, including a gang rape by three older boys when he was twelve.¹³⁵ After a 1972 conviction for motor vehicle theft,¹³⁶ Greene spent most of his time in prison, accumulating convictions for sodomy, attempted burglary, and indecent liberties.¹³⁷ After his release in 1992, Greene continued to receive treatment, was gainfully employed, and maintained a non-abusive, intimate relationship.¹³⁸

Therapists first diagnosed Greene with DID while he was participating in a sex-offender treatment program.¹³⁹ A total of twenty-four alters were identified with different age, race, and gender characteristics.¹⁴⁰ For example, Tyrone originally manifested “as an

130. See *Greene*, 92 Wash. App. at 90, 960 P.2d at 985. The crime of indecent liberties is committed when a defendant knowingly has sexual contact with another person by forcible compulsion. See Wash. Rev. Code § 9A.44.100(1)(a) (1998). A person commits kidnapping in the first degree by intentionally abducting another person to facilitate commission of any felony or flight thereafter. See Wash. Rev. Code § 9A.40.020(1)(b) (1998).

131. See *Greene*, 92 Wash. App. at 89–94, 960 P.2d at 985–87.

132. See *Greene*, 139 Wash. 2d at 67–68, 984 P.2d at 1026.

133. See *Greene*, 92 Wash. App. at 94, 960 P.2d at 987. The therapist/victim gave an offer of proof where she testified that Tyrone, Sam and Auto/Otto were intermittently present. See *id.* She believed Tyrone had regressed to three or four years old at the time of the incident. See *id.* A police detective who questioned the defendant testified outside the presence of the jury that he identified three specific alters during questioning the day after the incident. See *id.* Dr. Robert Olsen was prepared to give expert testimony about the defendant’s DID to support a diminished-capacity defense. See *id.* at 106, 960 P.2d at 993–94.

134. See *Greene*, 92 Wash. App. at 88–89, 960 P.2d at 984–85.

135. See *id.* at 88, 960 P.2d at 984–85.

136. See *id.* at 89, 960 P.2d at 985.

137. See *id.*

138. See *id.*

139. See *id.*

140. See *id.*

adult, black male who used ‘rough and assaultive’ language,” but began regressing in age as Greene addressed his childhood abuse issues.¹⁴¹ Sam was also initially violent, but vowed not to harm others after addressing abuse issues in therapy.¹⁴² Auto/Otto had a generally flat affect and no aggressive tendencies.¹⁴³

B. Trial Court and Court of Appeals Decisions

During a pre-trial hearing, the trial court excluded all evidence relating to DID.¹⁴⁴ In a ruling that merged the *Frye* analysis with ER 702 considerations,¹⁴⁵ the court determined that DID was not generally accepted in the scientific community, was not relevant to the insanity defense,¹⁴⁶ and would not be helpful to the trier of fact.¹⁴⁷ The court permitted the therapist/victim to testify at trial, but she could not mention DID.¹⁴⁸

Applying Washington’s two-part test for determining the admissibility of expert testimony,¹⁴⁹ the court of appeals reversed the judgment and remanded to the trial court for consideration of expert testimony about DID relating to both the insanity and diminished-capacity defenses.¹⁵⁰ First, the court determined that, as a matter of law, DID was generally accepted by the scientific community and therefore passed the *Frye* test.¹⁵¹ The court based its decision on the inclusion of DID in the American Psychiatric Association’s diagnostic manual¹⁵² and acknowledgment by both state and defense experts that DID is generally

141. *Id.*

142. *See id.*

143. *See id.*

144. *See id.* at 91, 960 P.2d at 986.

145. *See id.* at 96–97, 960 P.2d at 988–89; *State v. Greene*, 139 Wash. 2d 64, 70–71, 984 P.2d 1024, 1027 (1999).

146. The court did not make a specific ruling about DID’s relation to a diminished-capacity defense, but ruled to exclude DID evidence in relation to diminished capacity following a motion by the state. *See Greene*, 92 Wash. App. at 91, 960 P.2d at 986.

147. *See id.*

148. *See id.* at 107, 960 P.2d at 994. She complained during direct examination by the State that she felt unable “to say an awful lot of things that need to be said.” *Id.* at 107 n.32, 960 P.2d at 994 n.32.

149. *See id.* at 95, 960 P.2d at 988.

150. *See id.* at 113, 960 P.2d at 997–98.

151. *See id.* at 100, 960 P.2d at 990.

152. *See id.* at 97–98, 960 P.2d at 989.

accepted.¹⁵³ Second, because DID manifests itself differently in each individual, the court adopted a case-by-case approach to determine if DID was relevant to the specific defenses asserted.¹⁵⁴

The court of appeals considered expert testimony about DID relevant because the evidence would help the trier of fact determine whether the defendant was legally insane or had diminished capacity.¹⁵⁵ The court found the expert testimony about DID relevant to Greene's insanity defense because the evidence tended to show that at the time of the alleged crime Greene was unable to perceive the nature of his actions or distinguish right from wrong.¹⁵⁶ "Arguably, his host and adult alters were unconscious and his emergent alter had the mental capacity of a young child."¹⁵⁷ The court also decided that expert testimony about DID was relevant to diminished capacity¹⁵⁸ because the evidence tended to show that, based on his DID, Greene was either in a child-like state or unable to control his behavior.¹⁵⁹ The court reasoned that "[t]o hold otherwise would be manifestly unfair in light of the legislative pronouncement that even voluntary intoxication may be considered in assessing the defendant's mental state at the time of the crime."¹⁶⁰

C. *Supreme Court of Washington Excludes Expert Testimony About DID*

The Supreme Court of Washington applied the same two-part test used by the court of appeals, but held the DID evidence inadmissible.¹⁶¹ Using the *Frye* test, the supreme court deemed DID a generally accepted, diagnosable, psychiatric condition.¹⁶² However, the court concluded that the evidence of DID was not admissible because it would not be helpful to the trier of fact under ER 702.¹⁶³

153. *See id.*

154. *See id.* at 102, 960 P.2d at 991.

155. *See id.* at 107, 960 P.2d at 994.

156. *See id.* at 105, 960 P.2d at 993.

157. *Id.* at 103, 960 P.2d at 992.

158. *See id.* at 107, 960 P.2d at 994.

159. *See id.*

160. *Id.*

161. *See State v. Greene*, 139 Wash. 2d 64, 73, 984 P.2d 1024, 1028–29 (1999).

162. *See id.* at 72, 984 P.2d at 1028.

163. *See id.* at 66–67, 984 P.2d at 1025.

The court reasoned that expert testimony about DID would not be admissible until a legal standard is developed to allow reliable assessment of the criminal culpability of defendants with DID.¹⁶⁴ The court stated that as a precondition to admissibility of expert testimony regarding DID under ER 702, the question of whether and how a person with DID should be held accountable for crimes allegedly committed by an alter personality must first be answered.¹⁶⁵ Before the jury could decide Greene's mental state at the time of the crime, the court believed the jury needed to be told which of Greene's many personalities should be evaluated.¹⁶⁶

The court refused to adopt a particular legal standard¹⁶⁷ for assessing the criminal responsibility of a defendant with DID.¹⁶⁸ Although the court acknowledged that the question of who should be held responsible for a crime is ultimately a legal decision,¹⁶⁹ it claimed to need more information from the scientific community "in understanding how DID affects individuals suffering from it and how this may be related to a determination of legal culpability."¹⁷⁰ Because the court found it impossible to connect reliably the symptoms of DID to a defendant's sanity or mental capacity, it affirmed the trial court's ruling excluding the evidence.¹⁷¹

III. THE *GREENE* COURT SHOULD HAVE ADMITTED EXPERT TESTIMONY ABOUT DID

The Supreme Court of Washington should have decided that the expert testimony that Greene offered about DID was admissible. First, the court improperly failed to establish a standard to determine the culpability of a defendant with DID. Second, even without a specific

164. *See id.* at 78–79, 984 P.2d at 1031.

165. *See id.*

166. *See id.*

167. *See supra* Part I.D.2

168. *See Greene*, 139 Wash. 2d at 78–79, 984 P.2d at 1031.

169. *See id.* at 78, 984 P.2d at 1031.

170. *Id.* In both *Greene* and *Wheaton*, the supreme court relied on the opinion of the state's expert Dr. Robert Gagliardi. In both cases, the defense experts testified that it is possible to make determinations of sanity for defendants with DID. *See id.*, 139 Wash. 2d at 75, 984 P.2d at 1030 (noting that expert was willing to testify to sanity of specific alters); *State v. Wheaton*, 121 Wash. 2d 347, 353–54, 850 P.2d 507, 510 (1993).

171. *See Greene*, 139 Wash. 2d at 79, 984 P.2d at 1032.

legal standard, the court should have admitted the expert testimony about DID. Such testimony would have been helpful to the jury under ER 702 to evaluate the defendant's sanity and mental capacity. Third, the court violated the defendant's Sixth Amendment right to present evidence on his own behalf.

A. Sufficient Scientific Evidence Already Existed For the Greene Court to Establish and Apply a Legal Standard to Determine the Culpability of a Defendant with DID

The *Greene* court failed to recognize that the existing information about DID, which the court acknowledged was a generally accepted disorder in the scientific community,¹⁷² was sufficient for the court to create a legal standard to assess the culpability of defendants with DID. Other courts have concluded that the scientific community has already produced sufficient evidence for those courts to establish legal standards regarding the criminal culpability of defendants with DID.¹⁷³ Other jurisdictions have also repeatedly recognized the ability of experts, courts, and triers of fact to apply DID evidence.¹⁷⁴ Even the Supreme Court of Washington in *Wheaton* allowed experts to testify about the ability of a multiple to perceive the nature of her actions, the personalities' knowledge of right from wrong, and what knowledge the host had of the alters' activities.¹⁷⁵

The *Greene* court claimed it needed scientific information identifying the "controlling and/or knowledgeable alters at the time of the crime" before it could determine which of Greene's personalities should be held responsible for the crime or establish a legal standard applicable to future DID cases.¹⁷⁶ However, the witnesses in *Greene* actually provided this information. Defense expert Dr. Olsen was prepared to testify about the

172. See *id.* at 72–73, 984 P.2d at 1028.

173. See, e.g., *United States v. Denny-Shaffer*, 2 F.3d 999, 1008 n.7 (10th Cir. 1993); *State v. Kirkland*, 304 S.E.2d 561, 565 (Ga. Ct. App. 1983); *State v. Rodrigues*, 679 P.2d 615, 620–21 (Haw. 1984).

174. See, e.g., *Denny-Shaffer*, 2 F.3d at 1006–10; *Kirkland*, 304 S.E.2d at 565; *Rodrigues*, 679 P.2d at 620–21.

175. See *State v. Wheaton*, 121 Wash. 2d 347, 351, 365, 850 P.2d 507, 509, 516 (1993); see also *supra* Part I.D.2.a.

176. See *Greene*, 121 Wash. 2d. at 78, 984 P.2d at 1031.

mental condition of the alter in control and the host personality.¹⁷⁷ Greene's therapist/victim was prepared to testify about which alters participated in the crime, the characteristics of the alters, and the amnesia that exists between alter and host personalities.¹⁷⁸

Additional scientific study is unlikely to provide more definitive answers about which personality should be considered for purposes of determining criminal culpability. Even Dr. Gagliardi, whom the court relied upon in reaching its conclusion that DID is incapable of reliable application to determine sanity or diminished capacity,¹⁷⁹ said that mental-health researchers have little or no reason to study the relationship between DID and legal concepts such as sanity or diminished capacity:

I don't know that anybody's done a study that investigates . . . in an empirical or scientific way how a disorder like DID affects sanity. And there's good reason for that, because sanity is, after all, a legal question . . . It's like mixing apples and oranges. They're two very different sets of concepts and ideas.¹⁸⁰

If the court in *Greene* had established a legal standard, the evidence available would have been sufficient to allow the jury to make a decision about sanity and diminished capacity. For example, if the court decided that the mental-state inquiry should focus on the alter in charge,¹⁸¹ Dr. Olsen and the therapist/victim could have testified about the four-year-old boy's personality, his understanding of right from wrong, and the ability of any other alters or the host to control his behavior. Similar to other trials focusing on mental state,¹⁸² the state's expert could have presented testimony asserting that Tyrone did know right from wrong or that another alter was able to control Tyrone's behavior. Similarly, if the court selected the host approach,¹⁸³ Dr. Olsen and the therapist/victim could have testified about whether the host was unconscious during the alleged crime and whether he had any ability to stop Tyrone. After receiving instruction regarding which personality or personalities to

177. See *id.* at 75, 984 P.2d at 1030; *State v. Greene*, 92 Wash. App. 80, 106, 960 P.2d 980, 994 (1998), *rev'd*, 139 Wash. 2d 64, 984 P.2d 1024 (1999).

178. See *Greene*, 92 Wash. App. at 103–04, 960 P.2d at 992.

179. See *Greene*, 139 Wash. 2d at 76, 984 P.2d at 1030.

180. *Greene*, 92 Wash. App. at 97, 960 P.2d at 989.

181. See *supra* Part I.D.2.a.

182. See, e.g., *State v. Ellis*, 136 Wash. 2d 498, 509, 516, 963 P.2d 843, 849, 852 (1998).

183. See *supra* Part I.D.2.b.

focus on, the jury could have applied the statutory requirements for insanity¹⁸⁴ and indecent liberties¹⁸⁵ to determine if Greene was guilty.

In sum, the scientific community has already provided courts with the building blocks necessary¹⁸⁶ to establish standards for determining sanity or mental capacity of defendants with DID. All that is missing in Washington is for the court either to establish a new legal standard or adopt one of the three standards used by courts in other jurisdictions and previous Washington cases.¹⁸⁷ Had the court enunciated or adopted such a standard in *Greene*, there was sufficient evidence about Greene's mental condition for expert witnesses to testify and jurors to apply the information to determine his ultimate criminal responsibility.¹⁸⁸

B. Expert Testimony About DID Should Have Been Admissible Because It Is Analogous to Testimony Admitted in Previous Washington Cases

Even without establishing a specific legal standard to determine the culpability of a defendant with DID, the *Greene* court should have admitted the expert testimony for two reasons. First, the court has previously admitted evidence of a mental condition when it would help the jury appreciate the difference between a defendant with that condition and one without. Second, Washington courts have admitted expert testimony in previous cases when it is relevant to the specific defenses raised.

1. Expert Testimony About DID Should Have Been Admitted Because It Would Have Been Helpful to the Trier of Fact

The court should have found expert testimony about DID helpful to the trier of fact as required by ER 702 because it would have illustrated the differences between a defendant with a mental disorder and one

184. See generally *supra* Part I.D.

185. See *supra* note 130 and accompanying text.

186. See *supra* Part I.D.

187. See *supra* Part I.D.

188. See *State v. Greene*, 139 Wash. 2d 64, 75–79, 984 P.2d 1024, 1029–31 (1999). Evidence indicated that the host personality was not in control or conscious of the actions of the other alters. See *State v. Greene*, 92 Wash. App. 80, 103, 960 P.2d 980, 992 (1998), *rev'd*, 139 Wash. 2d 64, 984 P.2d 1024 (1999). Evidence also indicated that the alter in control had the mental capacity of a small child. See *id.*

without. In analogous precedent, the court has found expert testimony about a defendant's mental condition helpful to the trier of fact¹⁸⁹ and therefore admissible.¹⁹⁰ For example, the court in *State v. Janes*¹⁹¹ decided that expert testimony regarding Battered Child Syndrome was helpful as required by ER 702 and should be admitted¹⁹² to support the defendant's diminished capacity and self-defense claims.¹⁹³ The court decided that because "[w]ithout the aid of expert testimony on the psychology of battered children, the jury will be unable to appreciate the manner in which the abused child differs from the unabused child."¹⁹⁴

Similar to *Janes*, experts were prepared to testify that Greene's actions might have been different from a person without DID because control of his body switched between alters.¹⁹⁵ The trial court permitted witnesses to testify about Greene's frequent change of voice, behavior, and mannerisms but prohibited the witnesses from explaining those actions in the context of DID.¹⁹⁶ Even the therapist/victim complained that she was unable to explain fully the actions that led to Greene's criminal charges without mentioning DID.¹⁹⁷ By refusing to allow evidence of DID and the expert testimony necessary to understand fully that evidence, the court prevented the jury from hearing relevant information about the defendant's mental state at the time of the crime.¹⁹⁸ Without knowing that the defendant suffered from DID and how that disorder may have

189. See, e.g., *State v. Ellis*, 136 Wash. 2d 498, 522, 963 P.2d 843, 855–56 (1998); *State v. Janes*, 121 Wash. 2d 220, 236, 850 P.2d 495, 503 (1993); *State v. Griffin*, 100 Wash. 2d 417, 419, 670 P.2d 265, 266 (1983).

190. See *Janes*, 121 Wash. 2d at 236, 850 P.2d at 503 (citing Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol. Rev. 103, 104 (1987)).

191. 121 Wash. 2d 220, 850 P.2d 495 (1993). See *supra* notes 47–51 and accompanying text.

192. See *Janes*, 121 Wash. 2d at 236, 850 P.2d at 503. The court determined that Battered Child Syndrome was not a recognized psychiatric disease. See *id.* at 233 n.5, 850 P.2d at 501–02 n.5.

193. See *id.* at 226, 850 P.2d at 498.

194. *Id.* at 236, 850 P.2d at 503.

195. See *State v. Greene*, 92 Wash. App. 80, 103–04, 960 P.2d 980, 992 (1998), *rev'd*, 139 Wash. 2d 64, 984 P.2d 1024 (1999) (explaining that emergent personality was small child and at least one alter tried to stop attack but could not maintain control of body).

196. See *id.* at 104–05, 960 P.2d at 992–93.

197. See *id.* at 107 n.32, 960 P.2d at 994, n.32.

198. See *id.* (citing *Lee v. Thompson*, 452 F. Supp. 165, 169 (E.D. Tenn. 1977)) (“[T]he words and acts of a defendant immediately before, during and after the offense are the best evidence of his state of mind at the time of the acts charged.”).

affected him, the jury was likely confused about what happened in Greene's apartment.¹⁹⁹

2. *Expert Testimony About DID Should Have Been Admitted Because It Was Relevant to the Specific Defenses Claimed*

The court should have conducted an explicit analysis of Greene's defenses as it had done in previous cases²⁰⁰ and concluded that expert testimony about DID was relevant to the specific defenses claimed and therefore helpful to the trier of fact as required by ER 702. Expert testimony about a defendant's mental condition is admissible when relevant to the questions of sanity or mental state.²⁰¹ Because expert testimony about DID was relevant to Greene's insanity and diminished-capacity defenses and therefore admissible, the supreme court erred in reversing the decision of the court of appeals.²⁰²

a. *The Court Should Have Determined That Expert Testimony About DID Was Helpful Under ER 702 to Evaluate the Insanity Defense*

The *Greene* court should have ruled that expert testimony about DID was admissible under ER 702 because such evidence would have helped the jury determine whether Greene met the requirements for the insanity defense. The supreme court acknowledged in *Greene* that the key question to determine if expert testimony about DID would be helpful, as envisioned by ER 702, was whether "Greene's mental condition prevented him from seeing the nature, quality, or wrongfulness of his actions."²⁰³

Expert testimony about DID was relevant to Greene's insanity defense because DID is a mental disorder that arguably made Greene unable to perceive the nature of his actions or appreciate the wrongfulness of those

199. *See id.* at 91–95, 960 P.2d at 985–88.

200. *See, e.g.,* *State v. Ellis*, 136 Wash. 2d 498, 521–22, 963 P.2d 843, 855–56 (1998); *State v. Jamison*, 94 Wash. 2d 663, 664–65, 619 P.2d 352, 352–53 (1980).

201. *See Ellis*, 136 Wash. 2d at 521–23, 963 P.2d at 855–56; *State v. Crenshaw*, 27 Wash. App. 326, 333, 617 P.2d 1041, 1046 (1980).

202. The court of appeals conducted a separate analysis of each defense and concluded that the expert testimony about DID was relevant and therefore admissible in support of either an insanity or diminished-capacity defense. *See Greene*, 92 Wash. App at 102–07, 960 P.2d at 991–94.

203. *State v. Greene*, 139 Wash. 2d 64, 73, 984 P.2d 1024, 1029 (1999) (citing *State v. Box*, 109 Wash. 2d 320, 745 P.2d 23 (1987)).

actions. Because the court has recognized DID as a generally accepted, diagnosable, mental disorder,²⁰⁴ DID evidence is relevant to the statutory insanity-defense requirement that the defendant have a mental disease or defect.²⁰⁵ Greene's DID was also relevant to the insanity-defense requirement that he be unable to perceive the nature of his actions or distinguish between right and wrong.²⁰⁶ At the time of the actions charged, Greene's four-year-old alter Tyrone was in control of the body while the host and adult alters lay unconscious.²⁰⁷ Arguably, the defendant's child alter did not know it was wrong to fondle the therapist and the other personalities did not perceive the behavior because they were unconscious.²⁰⁸ In short, expert testimony about DID was relevant for the jury to understand how and to what extent DID may have affected Greene's actions and sanity and therefore should have been admitted as helpful under ER 702.

The policy behind the insanity statute, that criminal responsibility and punishment should not be assigned to an actor who, at the time of the alleged crime, was unable to know what was being done or that it was wrong,²⁰⁹ also supports admission of DID evidence. Denying the insanity defense to defendants with diagnosable, legally recognized mental illnesses such as DID is inconsistent with that policy goal.²¹⁰ Thus, the court should have held that the expert testimony about DID was relevant to the insanity defense and therefore admissible under ER 702 because the evidence relates directly to the statutory criteria for establishing an insanity defense and is supported by the policy interests of the insanity statute.

204. See *Greene*, 139 Wash. 2d at 72, 984 P.2d at 1028.

205. See *United States v. Denny-Shaffer*, 2 F.3d 999, 1014 (10th Cir. 1993). The federal insanity-defense statute is nearly identical to the Washington statute. Compare 18 U.S.C. § 17 (1994), with Wash. Rev. Code § 9A.12.010 (1998).

206. See *supra* note 62 and accompanying text.

207. See *Greene*, 92 Wash. App. at 103–04, 960 P.2d at 992.

208. See *id.*

209. See *State v. Box*, 109 Wash. 2d 320, 329, 745 P.2d 23, 28–29 (1987); see also *Denny-Shaffer*, 2 F.3d at 1012 (interpreting nearly identical federal insanity statute).

210. See *Denny-Shaffer*, 2 F.3d at 1014; see also *State v. Crenshaw*, 27 Wash. App. 326, 341, 617 P.2d 1041, 1050 (1980) (Ringold, J., dissenting) (“We must err in the direction of maintaining insanity as a viable defense, for it is a much greater injustice to send an insane person to the penitentiary than to send a criminal to an asylum.”).

b. *The Court Should Have Determined That Expert Testimony Regarding DID Was Helpful Under ER 702 to Evaluate the Diminished-Capacity Defense*

The *Greene* court should have admitted expert testimony regarding DID because it would have helped the jury to determine whether the defendant had diminished capacity at the time of the alleged crime. Evidence is relevant²¹¹ to diminished capacity if it “logically and reasonably connects the defendant’s alleged mental condition with the inability to possess the required level of culpability.”²¹² *Greene*’s disorder is similar to conditions that courts have previously deemed relevant to diminished capacity. For example, both *Greene* and the defendant in *State v. Griffin* had periods of memory loss.²¹³ Experts have also been permitted to testify about schizophrenia, effects of which include identity confusion, indecisive thinking, and poor impulse control and are similar to DID’s effect on *Greene*.²¹⁴ *Greene* also had a dissociative disorder similar to the defendant in *State v. Ellis*,²¹⁵ although *Greene*’s condition was arguably more serious because, unlike *Ellis*, *Greene* was alleged to have been dissociated from his host personality at the time of the alleged crime.²¹⁶ *Ellis* was also described by one expert as suffering from a significant loss of ego control.²¹⁷ *Greene* should have been permitted to introduce evidence of similar lack of ego control caused by the shifting between personalities and the unconsciousness of his host.

The severity of *Greene*’s DID also supports the admissibility of such evidence. The *Greene* court acknowledged that DID creates “debilitating ruptures in the patient’s personality, behavior, thought, and memory.”²¹⁸ In addition, DID is at least as serious as previous mental conditions that prompted Washington courts to admit expert testimony.²¹⁹ In *State v.*

211. Relevant evidence is considered helpful to the jury and admissible under ER 702. See *State v. Riker*, 123 Wash. 2d 351, 364, 869 P.2d 43, 50 (1994).

212. *State v. Griffin*, 100 Wash. 2d 417, 419, 670 P.2d 265, 266 (1983).

213. See *Greene*, 92 Wash. App. at 94, 103, 960 P.2d at 987, 992; *Griffin*, 100 Wash. 2d 417, 418, 670 P.2d 265, 266 (1983).

214. See *State v. Ellis*, 136 Wash. 2d 498, 511–12, 963 P.2d 843, 850 (1998) (citing *State v. Thamert*, 45 Wash. App. 143, 723 P.2d 1204 (1986)).

215. See *id.* at 520, 963 P.2d at 854; *Greene*, 92 Wash. App. at 94, 960 P.2d at 987.

216. See *id.*

217. See *Ellis*, 136 Wash. 2d at 508–09, 963 P.2d at 848–49.

218. *State v. Greene*, 139 Wash. 2d 64, 69, 984 P.2d 1024, 1026 (1999).

219. See *supra* notes 70–72 and accompanying text.

Edmon,²²⁰ the court admitted evidence of lack of sleep, anxiety, depression, and alcohol use to support a diminished-capacity defense.²²¹ In *State v. Ellis*, the court deemed admissible expert testimony that the defendant suffered from impulse control disorder, even though the diagnosis was founded in part on the expert's belief that "it's not very common that human beings kill their mothers and little sisters."²²² If experts are permitted to testify that the extraordinary nature of the crime or lack of sleep is evidence of diminished capacity, Greene's debilitating, documented mental condition should also qualify as admissible.

C. *Exclusion of Expert Testimony About DID Violates the Compulsory Process Clause*

The Supreme Court of Washington's decision to exclude evidence of Greene's DID violated his right to present evidence in his defense as guaranteed by the Compulsory Process Clause of the Sixth Amendment because the court failed to state an acceptable reason for denying him this right.²²³ The U.S. Supreme Court has suggested that concerns about fairness, reliability, or lack of corroborating evidence would serve as legitimate bases for excluding a defendant's witnesses.²²⁴ The court in *Greene* did not express concern about any of these factors. Instead, the court acknowledged the reliability of the evidence by concluding that DID is a generally accepted medical disorder and by assuming that Greene had the disorder.²²⁵ A plethora of evidence would have corroborated the defense expert, including Greene's long history of mental illness²²⁶ and the testimony of the therapist/victim²²⁷ and the police officer who interviewed Greene.²²⁸ The defendant should not have

220. 28 Wash. App. 98, 621 P.2d 1310 (1981).

221. See *Edmon*, 28 Wash. App. at 100–02, 621 P.2d at 1312–13.

222. *Ellis*, 136 Wash. 2d at 520–21, 963 P.2d at 855.

223. The only reason the court gave for excluding the evidence was lack of a legal standard for culpability in the context of DID. See *Greene*, 139 Wash. 2d at 77–78, 984 P.2d at 1031 (1999).

224. See *Chambers v. Mississippi*, 410 U.S. 284, 301–03 (1973). See *supra* notes 56–59.

225. See *Greene*, 139 Wash. 2d at 72–73, 76–77 n.4, 984 P.2d at 1028, 1030 n.4.

226. See *id.* at 89, 960 P.2d at 985.

227. See *State v. Greene*, 92 Wash. App. 80, 107 n.32, 960 P.2d 980, 994 n.32 (1998), *rev'd*, 139 Wash. 2d 64, 984 P.2d 1024 (1999).

228. See *id.* at 94 n.19, 960 P.2d at 987 n.19.

been denied his constitutional right to present witnesses on his behalf simply because the court refused to establish a legal standard.²²⁹

The court in *Greene* should have followed its precedent in *Ellis*, where it decided it was unconstitutional to exclude testimony of a defense expert that would have helped the jury better understand the defendant.²³⁰ Rather than requiring a formulaic application of the disorder to the facts to determine culpability, the *Ellis* court ruled that experts willing to testify about a defendant's diminished capacity should be allowed to do so.²³¹ The *Ellis* court reasoned that the integrity of the trial process is sufficiently protected by cross-examination and the ability of the trier of fact to weigh the evidence.²³² The defense expert in *Greene* should have been permitted to testify on similar constitutional grounds because he was willing to testify to the diminished capacity of the defendant and the same trial protections would have been present.²³³

By refusing to establish a legal standard for admitting expert testimony about DID, the court has created an unconstitutional de facto rule that DID evidence is per se inadmissible. In declaring unconstitutional a per se rule refusing to admit post-hypnosis testimony when that rule prevented a defendant from testifying, the U.S. Supreme Court concluded that the state court failed to show that the testimony was "always so untrustworthy and so immune to traditional means of evaluating credibility" that it should be excluded per se.²³⁴ *Greene* established a similarly unconstitutional per se rule by declaring all testimony about DID inadmissible regardless of credibility or scientific validity. The *Greene* court failed to state reasons for excluding the defendant's expert testimony sufficient to overcome *Greene's* constitutional interest in presenting witnesses on his own behalf.

IV. CONCLUSION

In *State v. Greene*, the Supreme Court of Washington explicitly declined its second opportunity to address the issue of criminal

229. See *supra* Part I.D.

230. See *State v. Ellis*, 136 Wash. 2d 498, 522–23, 963 P.2d 843, 855–56 (1998).

231. See *id.* at 523, 963 P.2d at 856.

232. See *id.*

233. See *id.* at 522–23, 963 P.2d at 856.

234. *Rock v. Arkansas*, 483 U.S. 44, 61 (1987); see also *supra* notes 53–56 and accompanying text.

culpability for defendants with DID. First, the court failed to recognize that the scientific community has already provided courts with the building blocks necessary to establish an appropriate legal standard. Moreover, while Washington courts are left waiting in vain for a definitive medical answer, other courts across the country have admitted DID evidence and made difficult decisions about whether these defendants should be found culpable and punished. Second, under Washington precedent, the court should have found expert testimony about DID helpful to the jury as required by ER 702 because it was relevant to the specific defenses of insanity and diminished capacity claimed by Greene. Last, the court's decision violated Greene's right to present evidence in his defense as guaranteed by the Compulsory Process Clause of the Sixth Amendment by establishing a de facto rule that DID evidence is per se inadmissible. In the absence of concerns about fairness, reliability, or lack of corroborating evidence, Greene should not have been denied his constitutional right simply because the court refused to establish a standard.

By again refusing to address the criminal responsibility of defendants with DID, the Supreme Court of Washington has shirked its responsibility to establish legal standards, ignored scientific evidence, and violated the constitutional rights of a defendant. Defendants with DID will continue to be denied a fair trial until the court allows them to present evidence of what the court acknowledges is a debilitating, scientifically valid mental disorder.

