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NO. 71343-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Detention of Roy Stout:

STATE OF WASHINGTON,

Respondent,

v.

ROY STOUT,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED FOR REVIEW

Where Stout, a civilly committed sexually violent predator, brought a motion to vacate his commitment order under CR 60(b)(11) nearly ten years after the order was entered, and his motion was based on allegedly new evidence and not extraordinary circumstances, did the trial court abuse its discretion by denying his motion?

II. STATEMENT OF THE CASE

A. Factual Background

Stout has a lengthy history of approaching strangers or casual acquaintances for sex and becoming violent when rebuffed. CP at 117. He also has a substantial history of other criminal behavior, beginning when he was age 14 and continuing until his confinement as an adult, including offenses such as forgery, theft, arson and burglary. *Id.*

In January 1982, Stout had been drinking at the 4 Aces Tavern in Sedro Wooley when he approached a female stranger, K.W., outside the bar. CP at 117. After that, he testified, he and K.W. were attempting sexual intercourse in the snow under bushes next to Lemley's Funeral Home. CP at 117; *In re Detention of Stout*, 128 Wn. App. 21, 24, 114 P.3d 658 (2005). When police arrived, K.W. yelled for help and said she was being raped; her face was swollen and her lip was bloody. CP at 117. Stout was acquitted of rape. *Id.*

R.S. was driving home late at night in April 1990, when a pickup truck behind her flashed its lights. CP at 118. Thinking it was a friend, R.S. pulled over, as did the truck, and R.S. got out and took a few steps towards it before she realized she did not know the driver, Stout, who was walking towards her. *Id.* Stout asked her if she wanted to make some money, then told her he wanted her to go home with him and have sex. *Id.* R.S. swore at him and turned to get back in her car, when Stout grabbed her by the shoulder, turned her around and punched her in the face by her left eye. *Id.* R.S. got away by getting in her car and driving away. *Id.*

J.G. did not know Stout when she accompanied her friend and her friend's boyfriend to Stout's residence in August 1990. CP at 118. Her friend wanted privacy with her boyfriend and encouraged J.G. to let Stout drive her back her friend's home. CP at 119. During the drive there, Stout raped J.G. *Id.* He entered an *Alford* pled guilty to an amended charge of assault third degree in that he caused bodily harm to an adult female by having intercourse without consent. *Id.*

In January 1992, Stout again flagged down a female stranger in a car by flashing his pickup truck's lights at her. CP at 119. Like R.S., K.O. mistakenly thought she must know the driver and pulled into a convenience store parking lot. *Id.* Stout walked to her open driver's window and offered her twenty dollars to feel her "pussy." CP at 120.

When she said "no," Stout grabbed her arm and threatened to break it. *Id.* Stout then grabbed her breast, but K.O. pushed at his hand and broke his grasp by backing her car away; she then escaped. *Id.* Stout was convicted of indecent liberties by forcible compulsion. *Id.*

In 1996 Stout called a female stranger, J.B., in the middle of the night and asked to pay her for sex. CP at 120. He was charged with telephone harassment but the charges were dismissed. *Id.*

In spring 1997, T.D., who was pregnant, lived with her husband and three children when she met Stout, who helped deliver firewood to her house. CP at 121. The D.s agreed to take in a dog Stout had that needed a home. *Id.* In June that year T.D. delivered her baby and Stout unexpectedly visited her in the hospital late one night. CP at 121-22. T.D. was uncomfortable, so she called for a nurse, who asked Stout to leave. CP at 122. On July 6, 1997, Stout came to T.D.'s home, she let him in and they talked. *Id.* Stout then spoke sharply to T.D.'s children and directed them into another room. *Id.* He put his hand on T.D.'s thigh and tried to move it up her leg. *Id.* Then he put his hand on her breast and tried to kiss her and force his tongue into her mouth. *Id.* He bruised her neck by putting his hand on her throat and pushing her back on the couch. *Id.* T.D. said "no," tried to escape and eventually got free. *Id.* Stout left but

came back and knocked at the door, saying he wanted to apologize. *Id.* He pled guilty to an amended charge of Burglary First Degree. *Id.*

Stout was evaluated for the SVP trial by the State's expert, Dr. Richard Packard. At Stout's 2003 commitment trial, Dr. Packard testified that Stout suffers from the mental disorder of paraphilia, not otherwise specified, (NOS) non-consent. CP at 124. He also testified that Stout suffers from antisocial personality disorder. CP at 125. Dr. Packard used a wide-ranging risk assessment, including three actuarial assessment instruments and an assessment of empirically derived risk factors. CP 125. Dr. Packard testified that, based on his risk assessment, Stout is more likely than not to engage in acts of sexual violence if not confined in a secure facility. *Id.* Dr. Packard testified, and the court found, that the combination of Stout's paraphilia and APD makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility and causes him serious difficulty controlling his behavior of engaging in sex with non-consenting others. CP at 126. Annually since Stout's commitment in 2003, SCC evaluators have continued to conceptualize his array of mental disorders in a similar fashion.[1]

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[1] *See* CP at ____ (Sub No. 134, DSHS 2004 Annual Review, filed 11/12/04); CP at ____ (Sub No. 142, DSHS 2005 Annual Review, filed 02/06/06); CP at ____ (Sub No. 152, DSHS 2006 Annual Review, filed 09/05/06); CP at ____ (Sub No. 168, DSHS 2007 Annual Review, filed 10/19/07); CP at ____ (Sub No. 192, DSHS 2008 Annual Review, filed 12/02/08); CP at ____ (Sub No. 202, DSHS 2009 Annual Review, filed

B. Procedural History

The State filed its sexually violent predator (SVP) petition in October 2001. CP at 116. The matter was tried to the court on September 15-17, 2003. *Id.* The trial court concluded that the State had proved that Stout is an SVP and civilly committed him to the Special Commitment Center (SCC) on McNeil Island. CP at 127. This Court and the Washington Supreme Court affirmed Stout's commitment. *In re Detention of Stout*, 128 Wn. App. 21, 114 P.3d 658 (2005); *In re Detention of Stout*, 159 Wn.2d 357, 150 P.3d 86 (2007). Since his commitment, DSHS has conducted annual reviews of Stout's mental condition pursuant to RCW 71.09.070. During each review period, Stout has been found to continue to meet SVP criteria. Stout has never participated in sex offender treatment, including the treatment available to him at the SCC. CP at 425.

On March 24, 2011, following a show cause hearing, the trial court found that Stout met his burden under RCW 71.09.090 to show that he had so changed such that he was entitled to a new trial under RCW 71.09.090. CP at 60-62. The State requested and was granted discretionary review of the trial court's ruling granting a new trial and subsequently obtained a stay to await the Supreme Court's decision in *State v. McCuistion*,

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10/06/09); CP at 129-54 (2010 Annual Review); CP at 244-64 (2011 Annual Review); CP at 216-34 (2012 Annual Review).

174 Wn.2d 369, 275 P.3d 1092 (2012). CP at 28-29. After the opinion in *McCuistion*, Stout's matters were returned to the trial court for hearing. CP at 1.

In July 2013, the State set a show cause hearing, requesting an order that the State had met is annual burden to show that Stout continued to meet SVP criteria, pursuant to RCW 71.09.090. CP at 236-264.

On August 21, 2013, nearly ten years after his initial commitment, Stout moved to vacate his commitment order, relying on CR 60(b)(11). CP 276-361. He claimed that a change in the psychiatric community's acceptance of one of his diagnoses and erroneous application of it entitled him to a new trial. CP 278-86. In support of his motion, Stout attached a report from his expert, Dr. Wollert, dated May 7, 2013. CP at 302-337. In addition, Stout attached academic literature from 2008, criticizing the paraphilia NOS, non-consent diagnosis.[2] CP at 339-48. The State filed its Memorandum in Response to Respondent's Request for New Trial. CP at 362-440.

Following a contested hearing on November 6, 2013, after considering the evidence and applying the standards of RCW 71.09.090, the trial court concluded that the State's 2011 and 2012 annual reviews

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[2] Allen Frances, Shoba Sreenivasan, & Linda E. Weinberger, *Defining Mental Disorder When It Really Count: DSM-IV-TR and SVP/SDP Statutes*, 36 J. Am. Acad. Psychiatry Law (Sept. 2008)

constituted prima facie evidence that Stout continued to meet the criteria for civil commitment, and ordered his continued confinement. CP at 441-47. On December 4, 2013, the trial court also found the State had met its burden for the 2010 evaluation. CP at 448-50. Also on December 4th, the trial court entered an order denying Stout's request for a new trial, under either CR 60(b)(11) or RCW 71.09.090. CP at 451-52. On December 16, 2013, Stout timely appealed the order denying his CR 60(b)(11) motion. CP at 453-55.

III. ARGUMENT

The trial court did not abuse its discretion by denying Stout's CR 60(b)(11) motion. His motion alleged that new evidence and differences in the diagnostic opinions of experts who have evaluated Stout warrant vacating the 2003 commitment order. The trial court should be affirmed because Stout's motion was brought far too late, he attempts to circumvent the time limitations of CR 60(b)(3) for presenting allegedly new evidence, and he has failed to establish the "extraordinary circumstances" required by 60(b)(11).

A. Standard Of Review

This Court reviews a trial court's decision on a CR 60(b) motion for a manifest abuse of discretion. *In re Detention of Mitchell*, 160 Wn. App. 669, 675, 249 P.3d 662 (2011) (citing *Haley v. Highland*,

142 Wn.2d 135, 156, 12 P.3d 119 (2000)). A trial court abuses its discretion when its decision is manifestly unreasonable or made on untenable grounds or for untenable reasons." *Mayer v. Sto. Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citing *Associated Mortg. Investors v. G.P. Kent Constr. Co.*, 15 Wn. App 223, 229, 548 P.2d 558 (1976)). A court also abuses its discretion if it bases its decision on an erroneous view of the law. *Id.* (citing *State v. Rorhrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

B. The Trial Court Did Not Abuse Its Discretion By Denying Stout's CR 60(b) Motion Because It Was Time Barred

The trial court did not abuse its discretion when it denied Stout's CR 60(b) motion, because the motion was not brought within statutory time limits. CR 60(b) provides, in pertinent part:

> The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

CR 60(b) states that the time period begins "after the judgment, order, or proceeding was entered or taken." Thus, the relevant time period is "the period between when the moving party became aware of the judgment and filing of the motion." *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312-13, 989 P.2d 1144, 1147 (1999). Stout's commitment order was entered on October 29, 2003. CP at 127. His

motion was filed on August 22, 2013, nearly ten years after the commitment order was entered. CP at 276.

Stout relies on CR 60(b)(11), a catch-all provision which allows a motion for relief from judgment to be brought "within a reasonable time" and not limited to one-year after judgment. But Stout's claim that "rejection of rape as a mental disorder by the psychiatric community" is an evidentiary argument governed by CR 60(b)(3). He is therefore attempting to circumvent the one-year limitation of that section of the rule. *See Friebe v. Supancheck*, 98 Wn. App 260, 267, 992 P.2d 1014 (1999) ("CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1)."). And Stout is not even relying on evidence newly discovered in the past year. Indeed, the same arguments Stout raises here were evident in cases published well more than a year prior to his CR 60(b) motion. *See In re Detention of McGary*, 155 Wn. App. 771, 778-79, 231 P.3d 205 (2010) and *In re Detention of Mitchell*, 160 Wn. App. 669, 673-75, 249 P.3d 662 (2011). To the extent Stout relied on allegedly new evidence, his motion was time-barred by CR 60(b)(3).

Nor is ten years a "reasonable time" under CR 60(b)(11). This Court has previously held that a CR 60(b)(11) motion filed by an SVP ten years after the triggering event was not brought within a reasonable

amount of time. *State v. Ward*, 125 Wn. App. 374, 381, 104 P.3d 751 (2005). In *Ward*, where a decade passed between a change in the law and Ward's CR 60(b)(11) motion, this Court affirmed the trial court's order denying the motion. *Id.* As in *Ward*, the order denying Stout's CR 60(b) motion should be affirmed.

C. Even Assuming Stout's Motion Was Timely, He Was Not Entitled To Relief Under CR 60(b)(11)

The trial court did not abuse its discretion in denying Stout's CR 60(b)(11) motion because (1) the fact that Paraphilia NOS, Non-consent has been criticized and rejected for inclusion in the DSM as a specific diagnosis is of no legal significance; (2) Washington State and Federal courts have repeatedly admitted in SVP proceedings expert testimony regarding Paraphilia Not Otherwise Specified (Rape); and (3) there is no requirement that all subsequent diagnoses be identical to that assigned at the time of trial.

1. CR 60(b)(11) Requires "Extraordinary Circumstances" That Are "Irregularities Extraneous to the Action of the Court

CR 60(b) allows a trial court to vacate a final judgment or order for specified reasons such as mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud. Stout's motion relied on CR 60(b)(11). The trial court's inquiry, therefore, was "confined to situations involving

extraordinary circumstances not covered by any other section of the rule." *In re Marriage of Yearout,* 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (quoting *State v. Keller,* 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). These extraordinary circumstances must relate to "irregularities extraneous to the action of the court." *Yearout*, 41 Wn. App. at 902; *Barr v. MacGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003) (severe clinical depression of attorney that resulted in dismissal of case through neglect of attorney's practice constitutes "extraordinary ground" pursuant to CR 60(b)(11)).

2. This Court's Review is Limited to the Trial Court's Order Denying Stout's CR 60(b) Motion

Stout fails to recognize that his appeal is limited to review of the trial court's denial of his motion and is not a mechanism to attack his underlying commitment. Unlike an appeal, a CR 60(b) motion does not provide a means for correcting alleged errors of law in an underlying order. *Burlingame v. Consol. Mines & Smelting Co.*, 106 Wn.2d 328, 336, 772 P.2d 67 (1986) (citing *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). Accordingly, when a party appeals the trial court's denial of a CR 60(b) motion, an appellate court's review is limited only to the trial court's decision to deny the motion, not the underlying order that the party seeks to vacate. *Bjurstrom v. Campbell*, 27 Wn. App. 449,

450-51, 618 P.2d 533 (1980) (quoting 1 Henry Campbell Black, *A Treatise on the Law of Judgments* § 329, at 506 (2d ed.)). "An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment." *Id.* (citing *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263, 98 S. Ct. 556, 560, 54 L. Ed. 2d 521, 530, n.7 (1978) (Supreme Court holding that an appeal from an order denying a Rule 60(b) motion brings up for review only the correctness of that denial and does not bring up for review the final judgment.)).

3. Criticism Of The Paraphilia NOS Non-consent Diagnosis Constitute Neither "Extraordinary Circumstances" Nor "Irregularities Extraneous to the Action of the Court"

Rather than limiting his argument to whether the trial court abused its discretion by denying the motion, Stout relies on two articles from The Journal of the American Academy of Psychiatry and the Law, both authored by Dr. Allen Frances, discussing the alleged error in and misapplication of the DSM-IV-TR's paraphilia diagnostic criteria.[3] In fact, the only article actually presented to the trial court, defeats the entire premise of Stout's appellate argument that criticism of the paraphilia NOS

[3] Stout's argument regarding the DSM task force and work groups relies on the following article which was never before the trial court: Allen Frances & Michael B. First, *Paraphilia NOS, Nonconsent: Not Ready for the Courtroom,* J. Am. Acad. Psychiatry Law (Dec. 2011).

non-consent diagnosis is of any legal significance at all. In the article, Dr. Frances writes that, "forensic applications of DSM diagnoses are left largely to the individual clinician and that consensus between clinical examiners in the SVP field would increase the reliability and credibility of the evaluations and facilitate communication across the psychiatric/legal interface." CP at 346. Significantly, he writes that the two areas of controversy, paraphilia NOS and antisocial personality disorder, may be appropriate in some circumstances and inappropriate in others. *Id.* at 346-47. Frances' commentary boils down to his statement that, "[G]reater clarity and standardization must come from both sides: the legalists who interpret the law and the clinicians who apply and work under it." *Id.* at 383.

Frances' acknowledgment of the long standing argument over the paraphilia NOS diagnosis, does not constitute extraordinary circumstances that would afford Stout relief pursuant to CR 60(b)(11).

Nor has Stout established, as he claims, that his paraphilia NOS diagnosis has been "fully rejected today[.]" Corrected Brief of Appellant at 12. The event relied on by Stout is actually a non-event: The "rejection" of paraphilia NOS non-consent for inclusion as a separate formal diagnosis in the latest version of the DSM. As Stout must acknowledge, paraphilia NOS non-consent was not included in the

DSM-IV as of the time of his initial commitment trial in 2003, just as it is not part of the latest version of the manual. The status of paraphilia NOS non-consent as a formal diagnosis has not changed.

Despite the fact that coercive paraphilia is not in the DSM and has been rejected for inclusion on several occasions, it is well established that expert testimony that includes the diagnosis of Paraphilia Not Otherwise Specified (Rape) is admissible in SVP cases.[4] The acceptance of this testimony dates to the seminal case upholding the Sexually Violent Predator Act, *In re Detention of Young*, 122 Wn.2d 1, 28, 857 P.2d 989 (1993). Recognizing the DSM's limitations and the political nature of some of the debate surrounding certain diagnoses, the Washington Supreme Court rejected an identical challenge to the diagnosis of Paraphilia NOS (rape), which is sometimes assigned to serial rapists in SVP cases:

> The fact that pathologically driven rape, for example, is not yet listed in the *DSM-III-R* does not invalidate such a diagnosis. The *DSM* is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be practical realities. What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies

[4] The diagnosis is also referred to as Paraphilia Not Otherwise Specified (Nonconsent) and Paraphilia Not Otherwise Specified (Coercive Disorder).

> that are as real and meaningful as other pathologies already listed in the DSM.

Young, 122 Wn.2d at 28 (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators,* 15 U. Puget Sound L.Rev. 709, 733 (1992)). In rejecting the challenge to the paraphilic rape diagnosis, the *Young* court also noted that the "specific diagnosis" was Paraphilia NOS:

> The specific diagnosis offered by the State's experts at each commitment trial was "paraphilia not otherwise specified." This is a residual category in the *DSM-III-R* which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the *DSM-III-R. DSM-III-R,* at 280. . . .

Young, 122 Wn.2d at 29. This Court reiterated this holding in *In re the Detention of Berry,* 160 Wn. App. 374, 380-381, 248 P.3d 592 (2013) ("Though Berry identifies scientific criticism of the criteria and reliability of the diagnosis, he does not establish that it is no longer generally accepted."). Washington courts have repeatedly upheld SVP commitments based on paraphilia NOS nonconsent/rape diagnoses. *In re Detention of Post,* 145 Wn. App. 728, 756-57 n.8, 187 P.3d 803 (2008), *aff'd,* 170 Wn.2d 302, 241 P.3d 1234 (2010).

That paraphilia NOS non-consent was rejected for inclusion as a specific diagnosis in the DSM-V is of no legal significance and does not

constitute extraordinary circumstances that would afford Stout relief pursuant to CR 60(b)(11).

4. The Criticisms by Stout's Expert of the Diagnoses by the State's Expert, and the Degree of Complete Agreement By Subsequent Evaluators Does Not Establish Extraordinary Circumstances

Like his argument that articles exist criticizing the paraphilia NOS, non-consent diagnosis, Stout asserts that (1) criticism of the State's expert by Stout's retained expert and (2) inconsistency in diagnoses establish extraordinary circumstances warranting relief from judgment. His arguments are without merit.

Psychology is clearly not science of precision like mathematics. The fact that Stout's retained expert disagrees with the diagnoses rendered by the State's expert is neither surprising nor extraordinary. By relying on his expert's opinions, Stout merely attempts a veiled collateral attack on the underlying commitment.

Stout's focus on the alleged agreement rate between evaluators over the years misapprehends the true question: Does Stout suffer from a mental abnormality **or** personality disorder? Annually since Stout's commitment in 2003, SCC evaluators have continued to conceptualize his array of mental disorders in a similar fashion.[5] Each of their annual

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[5] *See* CP at ____ (Sub No. 134, DSHS 2004 Annual Review, filed 11/12/04); CP at ____ (Sub No. 142, DSHS 2005 Annual Review, filed 02/06/06); CP at ____ (Sub

reports have been submitted to the same judge who presided over Stout's 2003 bench trial (*see* CP at 127) and who denied Stout's CR 60(b)(11) motion.[6] And those reports were undoubtedly part of the record considered by the court when entering its November 13, 2013 Order. They make clear that nothing about Stout has "changed," nor do any of those reviewing his case believe that he "no longer" suffers from the mental condition diagnosed at the time of trial.

To order a new trial, when (1) Stout has never been involved in sex offender treatment in or out of institutional settings; (2) Stout's mental condition has not changed; or (3) because different professionals criticize the diagnosis of paraphilia NOS, non-consent, does not fall within the scope of CR 60(b)(11), and the trial court correctly rejected Stout's arguments.

5. There Is No Requirement that All Subsequent Diagnosis Be Identical To That Assigned At The Time Of Trial

Stout essentially argues that, because his mental condition was once described as a combination of paraphilia NOS non-consent and antisocial personality disorder, but is *now* described as rule out diagnosis of paraphilia NOS (nonconsent), coupled with antisocial personality disorder and

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No. 152, DSHS 2006 Annual Review, filed 09/05/06); CP at ____ (Sub No. 168, DSHS 2007 Annual Review, filed 10/19/07); CP at ____ (Sub No. 192, DSHS 2008 Annual Review, filed 12/02/08); CP at ____ (Sub No. 202, DSHS 2009 Annual Review, filed 10/06/09); CP at 129-54 (2010 Annual Review); CP at 244-64 (2011 Annual Review); CP at 216-34 (2012 Annual Review).

[6]The Hon. Susan Cook presided over both Stout's commitment trial and has retained his case for purposes of annual review hearings.

borderline intellectual functioning, he is entitled to a new trial. This Court should reject this argument because neither the statute nor the Constitution require that continued confinement be predicated on the identical diagnosis rendered at the time of the initial commitment. A minor adjustment of diagnosis that simply reflects a slightly different conceptualization of the underlying pathology that drives an individual to offend in a sexually violent manner does not require a new trial.

Neither the SVP statute nor the Constitution requires that all subsequent evaluators submit evaluations identical to that submitted as the time of the commitment trial. Indeed, such a requirement would effectively strip the annual evaluation process of any meaning, essentially reducing it to a single question: "Do you believe that X continues to suffer from precisely the same mental disorder that was diagnosed at the time of trial? Yes or no." Under Stout's theory, if the answer is "no", the required result would be an entirely new trial. Such a requirement would eliminate the potential for meaningful assessment of an individual's mental condition, fly in the face of well-established jurisprudence in this area, and produce absurd results.

RCW 71.09 requires an annual review that includes "consideration of whether the committed person currently meets the definition of a sexually violent predator[.]" RCW 71.09.070(1). "Sexually violent predator" is defined as "any person who has been convicted of or charged with a crime of

sexual violence and who suffers from **a** mental abnormality or personality disorder which makes the person more likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18) (emphasis added). By statute, then, the evaluator must determine whether the SVP currently suffers from "a" mental abnormality or "a" personality disorder, not "the" mental abnormality or personality disorder that was assigned at the time of trial.

Nor does the Constitution require that the current diagnosis be identical to that assigned earlier. Due Process requires that the State demonstrate that Stout suffers from a mental condition that makes him likely to reoffend. *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). Washington's SVP commitment statute "comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous." *McCuistion*, 174 Wn.2d at 388. The statute requires the State to prove that the SVP is mentally ill and dangerous at the initial commitment hearing, and it requires the State to justify continued commitment through an annual review. *Id.* The identified disorder, however, need not be identical to the condition diagnosed at the time of initial commitment.

Indeed, our Supreme Court has rejected precisely this argument in *State v. Klein*, 156 Wn.2d 103, 124 P.3d 644 (2005). There, an insanity

acquittee argued that, because her current diagnosis ("psychoactive substance induced organic mental disorder") was not identical to that diagnosed at the time of her initial commitment ("polysubstance dependence"), she no longer suffered from a "mental disease or defect" and was entitled to release. *Id.* at 112. The Court rejected this argument, noting that "Klein's construction of the statute would require difficult, if not impossible, comparisons between the original and present mental conditions of an acquittee," and noted that the "feasibility of such comparisons is doubtful" in light of the "uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Id.* at 120 (citing *Jones v. United States*, 463 U.S. 354, 365 n.13, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)). Noting that the DSM-IV-TR "candidly acknowledges that each category of mental disorder is not a completely discrete entity," the Court observed that "the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it." *Id.* at 120-21. "[R]elease based on mere semantics," the Court continued, "would lead to absurd results and risks to the patient and public[.]" *Id.* *Klein* cited *Foucha v. Louisiana*, 504 U.S. 71, 79, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), for the proposition that "due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." And *Klein*

found that such a "reasonable relation" existed between Klein's original and subsequent diagnoses, "both of which derive from Klein's continued addiction to controlled substances." *Id.* at 120. This conclusion, the court went on, "is also strengthened by the fact that 'the purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness." *Id.* (citing *Jones*, 463 U.S. at 368).

> If our sole inquiry focused on whether the release candidate continued to suffer from the exact same condition, one of the central purposes of commitment, the protection of society, could be undermined. For it is quite conceivable that an insanity acquittee could "partially recover" from the originally diagnosed condition, yet maintain a related condition that manifests itself in equally dangerous behavior.

Id.

This conclusion is consistent with Supreme Court precedent. After initial commitment, the constitution requires that continued detention be "subject to periodic review of the patients' suitability for release." *Jones*, 463 U.S. at 368. As noted by *Klein*, however, there is no requirement that the condition be precisely the same condition diagnosed at the time of his initial commitment, and the United States Supreme Court has never relied on the semantics of particular diagnostic classifications. Rather, the Court has repeatedly acknowledged "the uncertainty of diagnosis in this field and the tentativeness of professional judgment" (*Greenwood v. United States*,

350 U.S. 366, 375, 76 S. Ct. 410, 100 L. Ed. 412 (1956)) and has noted that reported cases "are replete with evidence of the divergence of medical opinion in this vexing area." *O'Conner v. Donaldson*, 422 U.S. 563, 579, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) (C.J. Burger, concurring). Psychiatry "is not. . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma*, 470 U.S. 68, 81, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). More recently and in the SVP context, the Court has observed that the term "mental illness" is devoid of any talismanic significance." *Hendricks*, 521 U.S. at 358-59. And, "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

Even with the latest diagnosis by State evaluator Dr. Yanisch (rule out paraphilia NOS, nonconsent and diagnosis of antisocial personality disorder), there is no doubt that the nature of Stout's commitment continues to bear a reasonable relation to the purpose for which he was committed. The original purpose of Stout's commitment was to protect the public and offer treatment for his mental disorders, conditions that clearly constitute a

pathology that makes him likely to sexually offend. His continued commitment is based on the continued presence of a dangerous constellation of conditions, which have gone unmitigated due to his complete refusal to engage in any treatment. As such, the nature of his continued commitment does not violate the Constitution.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order denying Stout's CR 60(b)(11) motion to vacate his 2003 commitment order.

RESPECTFULLY SUBMITTED this 29th day of September, 2014.

ROBERT W. FERGUSON
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NO. 71343-4

WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Detention of: ROY STOUT, Appellant.	DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On this 29th day of September, 2014, I sent via electronic mail and deposited in the United States mail true and correct cop(ies) of Brief Of Respondent and Declaration of Service, postage affixed, addressed as follows:

WHITNEY RIVERA
WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98102
whitney@washapp.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of September, 2014, at Seattle, Washington.

COURT OF APPEALS
STATE OF WASHINGTON
2014 SEP 29 PM 2:46

Kelly Hadsell
KELLY HADSELL

ORIGINAL