No. 37822-1-II

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

IN RE: DETENTION OF LENIER RENE AYERS

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

LENIER RENE AYERS,

Appellant.

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE CR 60 MOTION WAS A VIABLE MEANS FOR MR. AYERS TO PRESENT HIS CLAIMS

The State argues Mr. Ayers's CR 60(b) motion was untimely but cites no authority for its position. SRB at 16-17. Mr. Ayers, acting *pro se*, filed the motion less than four months after the commitment order was final, which is a reasonable amount of time. Moreover, the State does not show it was prejudiced by any delay or other procedural deficiency in the motion, as the trial court ultimately denied the motion.

The State contends the CR 60 motion was procedurally deficient, because Mr. Ayers did not state the grounds for the relief he was seeking, as required by CR 60(e)(1). The State contends Mr. Ayers was required to specify the subsection of the rule that he was relying upon.

But CR 60(e)(1) does not require the motion to cite a particular subsection of CR 60(b). Instead, the movant must file a motion "stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based." CR 60(e)(1).

Mr. Ayers satisfied this requirement. In his motion, he expressly moved the court for "an order dismissing petition and vacating arrest warrant insofar as the State[']s NOS paraphilia hebephilia diagnosis is comprehensively invalid, and subsequently fraudulent, and it had been irregularly obtained against scientific community standards as well as guidelines for assessment set by the Diagnostic and Statistics Manual." CP 92. Mr. Ayers further asserted, "this particular diagnosis carries no consensus or conceptual validity as being either a personality disorder or mental abnormality." CP 92. The motion alleged "violations of due process in that paraphilia NOS, hebephilia is not a mental abnormality or personality disorder" as required by the SVP statute and by United States Supreme Court and Washington Supreme Court case law. CP 93. Finally, the motion alleged "the State's hebephilia diagnosis" was "inadmissible" under Frye[1] and ER 702 and ER 703. CP 93.

Mr. Ayers's motion therefore stated the "grounds upon which relief [was] asked" and set forth a "statement of the facts or errors upon which the motion [was] based." CR 60(e)(1) was satisfied.

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[1] Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923).

The State also argues Mr. Ayers's claims do not properly fit within CR 60(b)(11). SRB at 18. CR 60(b)(11) is a residual category that applies to "[a]ny other reason justifying relief from the operation of the judgment." Mr. Ayers's claims are, essentially, that he is entitled to relief from judgment because the psychiatric diagnoses the State relied upon at the commitment hearing are not generally accepted within the relevant scientific community and do not satisfy the requirements of due process. In making his claims, he relies upon additional evidence that was available at the time of the commitment hearing but that was not presented to the trial court, developments in the case law that post-date the commitment order, and developments in the relevant scientific field that also post-date the commitment order.

To the extent the motion relies upon additional evidence not presented at the first trial, it properly falls under CR 60(b)(11). The phrase "any other reason justifying relief" allows a court to reopen a case to hear additional evidence not presented at the first trial, where the court wishes to hear all relevant evidence. State v. Scott, 20 Wn. App. 382, 580 P.2d 1099 (1978), aff'd, 92 Wn.2d 209, 595 P.2d 549 (1979); see also Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993) (rule permitting court to relieve party from

final judgment for any other reason justifying relief supports vacation of default order and judgment that are based upon incomplete, incorrect or conclusory factual information).

Further, to the extent the claims rely on developments in the case law that post-date the commitment order, they properly fall under CR 60(b)(11). A change in the law may create sufficient circumstances to justify relief from judgment under CR 60(b)(11). In re Detention of Ward, 125 Wn. App. 374, 379, 104 P.3d 751 (2005).

Finally, Washington case law strongly suggests a detainee may use CR 60(b) to collaterally attack the validity of the diagnoses the State relied upon at the initial commitment hearing. The statute permitting indefinite commitment as a sexually violent predator satisfies constitutional due process only because "the Statute's release provisions provide the opportunity for periodic review of the committed individual's current mental condition and continuing dangerousness to the community." In re Pers. Restraint of Young, 122 Wn.2d 1, 39, 857 P.2d 989 (1993). Yet in order for a detainee to successfully challenge continued commitment at an annual review hearing, the evidence must show the detainee's "condition has so changed" that either he "no longer meets the definition of a

sexually violent predator," or "conditional release to a less restrictive alternative" is in the best interest of the detainee and the community. RCW 71.09.090(1). In other words, the person cannot successfully challenge his continued detention unless he shows his condition has changed since the initial commitment order; he cannot use the procedure to collaterally attack the initial judgment. In re Detention of Fox, 138 Wn. App. 374, 399, 158 P.3d 69 (2007), rev'd in part on other grounds, 2008 WL 2262200 (Nos. 34145-0-II, 33596-4-II, 35221-4-II, June 3, 2008).

In upholding the annual review statute, this Court explained that the requirement that the detainee show his condition has changed since the initial commitment trial does not violate due process, because the detainee has "ample opportunity" to attack the initial commitment order collaterally through other means:

> These provisions are intended only to provide a method of revisiting the indefinite commitment due to a relevant change in the person's condition, not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition. Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials.

Id. at 399 n.17 (citing Laws of 2005 ch. 344 § 1).

The other procedures available to a detainee for collaterally attacking an initial commitment order on the basis of developments

in the field of psychiatry include filing a personal restraint petition or a CR 60(b) motion in the trial court, as Mr. Ayers did in this case. Id.; see also In re Detention of Elmore, 162 Wn.2d 27, 41, 168 P.3d 1285 (2007) (Bridge, J., dissenting) ("A detainee may challenge his committing diagnosis in a number of ways. Civil Rule (CR) 60(b) allows for a detainee to seek relief from judgment based on newly discovered evidence or '[a]ny other reason justifying relief.'") (citing CR 60(b)(3), (11)).

2. THE STATE'S RELIANCE UPON THE PARAPHILIA NOS (HEBEPHILIA) DIAGNOSIS VIOLATES DUE PROCESS

a. The State must prove the detainee has an actual, valid mental illness or disorder. The State argues due process does not require the State to define "mental disorder" or similar terms in a way that is consistent with the standards of the mental health community. SRB at 22-23. Similarly, the State argues State v. Greene, 139 Wn.2d 64, 984 P.2d 1024 (1999) does not apply to SVP proceedings, because the statutory definitions of "mental abnormality" or personality disorder in RCW 71.09.020(16) need not fit within the definitions employed by the medical community. SRB at 28-29.

Yet as the State acknowledges, Hendricks requires "both a finding of dangerousness and the presence of mental illness." SRB at 23 (citing Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). As explained in the opening brief, although states have considerable leeway to define "mental illness," the diagnosis the State relies upon must be medically justified.

The Washington Supreme Court recognizes that due process requires the State to prove the detainee suffers from an actual, valid, diagnosable mental abnormality or disorder. In Young, for example, the court explained that although the DSM is an evolving, imperfect document and is not "sacrosanct," "'*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 that are as real and meaningful as other pathologies already listed in the DSM.*'" In re Pers. Restraint of Young, 122 Wn.2d 1, 28, 857 P.2d 989 (1993) (quoting Alexander D. Brooks, The Constitutionality and Morality of Civilly Committing Violent Sexual Predators, 15 U Puget Sound L. Rev. 709, 733 (1991-1992) (emphasis in Young). Implicit in this requirement is that the psychological or psychiatric expert's

testimony have a valid scientific basis and that there be agreement among experts in the field.

In Thorell, the court further explained the State must present expert testimony and prove beyond a reasonable doubt the detainee has a diagnosed mental abnormality or personality disorder that is sufficiently severe to cause a serious difficulty controlling behavior. In re Detention of Thorell, 149 Wn.2d 724, 732, 740-41, 72 P.3d 708 (2003). The existence of a valid, diagnosable mental illness or disorder is an element the State must prove over and beyond its burden to prove the detainee has serious difficulty controlling behavior.

The State's burden to prove the detainee's mental condition is scientifically valid is a fundamental component of the due process requirement that the State "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary case." Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). The State's burden to prove the detainee has an actual, valid mental disorder is necessary to establish that the detention is not merely a

means to punish or deter offenders. Hendricks, 521 U.S. at 361-62.

In sum, the State must present expert testimony and prove the detainee's mental disorder or illness is scientifically valid, which requires that there be agreement among experts in the field. The State's expert's diagnosis is therefore subject to the standards set forth in Greene, 139 Wn.2d 64.

b. The State's paraphilia NOS (hebephilia) diagnosis does not satisfy *Frye*. The State contends that because paraphilia NOS is a diagnosis included in the DSM, the hebephilia designation is also valid, even though it is not specifically listed in the DSM. SRB at 20-21, 27-28. The State further contends that the disagreement among mental health professionals regarding the paraphilia NOS (hebephilia) diagnosis does not establish that the disorder is not generally accepted. SRB at 31-33.

First, although the diagnosis paraphilia NOS is contained in the DSM-IV-TR, the criteria for the diagnosis indicate the drafters of the DSM did not intend that it be used to encompass a sexual attraction to adolescents.

As explained in the opening brief, although the paraphilia NOS diagnosis is not limited to the variants specifically listed in the

DSM-IV-TR, the variants that are listed are all relatively rare and inherently nonviolent: telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine)." American Psychiatric Association, The Diagnostic and Statistical Manual of Mental Disorders, IV-Text Revision 576 (4th ed.-text rev. 2000) ("DSM-IV-TR").

Moreover, in order to justify a diagnosis of paraphilia NOS, the person must demonstrate "recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving (1) nonhuman objects; (2) the suffering or humiliation of oneself or one's partner, or (3) children or other nonconsenting persons that occur over a period of at least six months." DSM-IV-TR at 566. In addition, the person must be distressed or have impaired functioning as a result of those fantasies, urges or behaviors, except for the diagnoses of pedophilia, voyeurism, and sexual sadism, which can be made based solely on the person having acted on his or her paraphilic urges. Id. These two criteria indicate the person's sexual urges or fantasies must be deviant and uncommon, unlike a sexual attraction to adolescents. Further, the deviant arousal pattern must cause the person to be *psychologically* distressed or impaired. The

impairment may not be caused simply by societal disapproval of the person's behavior.

Here, the State's expert testified Mr. Ayers met the criteria for paraphilia NOS because: (1) he was attracted to adolescents, who are "children" in a legal sense and therefore incapable of consent; and (2) the attraction caused "impairment" because it had led to multiple incarcerations and was, by definition, "self defeating," as the adolescents to whom Mr. Ayers was attracted would necessarily grow up. 5/17/05RP 522, 527-28. The first of Dr. Doren's criteria would apply to all adult males who share the same attraction. Because the number of men who fall into that category is large, the arousal pattern cannot be labeled "deviant." Although the second criterion may distinguish Mr. Ayers from most men who share the attraction, in that he acted on it, that is not sufficient to meet the DSM diagnostic standard. Instead, as stated, the person must be psychologically distressed or have impaired psychological functioning. Dr. Doren's testimony did not establish that Mr. Ayers's arousal pattern itself was deviant or that he suffered psychological impairment as a result.

Second, as explained in the opening brief, numerous mental health professionals have leveled serious criticisms about the use

and validity of the paraphilia NOS (hebephilia) diagnosis. Contrary to the State's argument, these criticisms are sufficient to invalidate the diagnosis under Frye. As the court emphasized in Greene, the inquiry under Frye requires a showing of "*general acceptance* in the appropriate scientific community." 139 Wn.2d at 70. "If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted." Id. (citations omitted).

As explained in the opening brief, there is significant dispute among mental health experts regarding the validity of the paraphilia NOS (hebephilia) diagnosis.

The State relies on several cases where the government relied upon the paraphilia NOS (hebephilia) diagnosis, but contrary to the State's argument, those cases do not demonstrate "its general acceptance and application." SRB at 33. The relevant inquiry under Frye regarding a psychiatric disorder is not the frequency of its forensic application, but whether it is "generally accepted within the relevant scientific community as a recognized mental condition that is regularly diagnosed and treated." Greene, 139 Wn.2d at 71. Thus, even if the diagnosis has been used by experts in an SVP context, that does not demonstrate it is generally

accepted as a recognized mental condition that is regularly diagnosed and treated.

In sum, because the paraphilia NOS (hebephilia) diagnosis does not meet the diagnostic criteria of the DSM, and because there is significant dispute among the psychiatric community regarding its validity, it does not satisfy Frye.

c. The federal case law concluding that the government did not prove that hebephilia is a serious psychiatric disorder is relevant. The State contends the recent cases that Mr. Ayers relied upon, United States v. Abregana, 574 F.Supp.2d 1145 (Dist. Haw. 2008), and United States v. Shields, 2008 WL 544940 (D. Mass. 2008), are not relevant, because they address the federal commitment statute, which requires proof of a "'*serious mental illness, abnormality, or disorder* as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.'" SRB at 35 (quoting 18 U.S.C. § 4247(a)(6) (emphasis in State's brief).

In Abregana, the court concluded the government had not proved that paraphilia NOS (hebephilia) was a "serious" mental disorder, because: (1) it was not listed as a sexual deviance in the DSM-IV-TR or in some other important literature in the field; (2)

there was controversy over whether hebephilia was a valid diagnosis; and (3) an expert testified the degree of pathology of hebephilia was much less than that of other paraphilias. 574 F.Supp.2d at 1153-54.

In Shields, the court similarly concluded the government had not proved hebephilia was a serious mental illness, disorder or abnormality in part because the government did not present any peer-reviewed literature recognizing the diagnostic definition of a mental disorder called hebephilia and no expert testified that psychiatric professionals generally accept the diagnosis of hebephilia as a mental disorder. Shields, 2008 WL 544940.

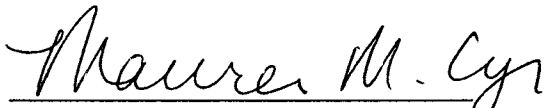
Even though the SVP statute at issue in this case is different from the federal statute at issue in the cases cited above, as discussed, the State was nonetheless required to prove that Mr. Ayers suffered from a valid, medically recognized mental disorder or abnormality. The Washington Supreme Court stated in Thorell that due process requires the State to present expert testimony and prove beyond a reasonable doubt the detainee has a serious, diagnosed, mental illness that causes him difficulty controlling his behavior. 149 Wn.2d at 732, 740-41.

The evidentiary insufficiencies identified in Abregana and Shields are similar and relevant to the evidentiary insufficiency in this case. Here, as in those cases, the State did not show that the diagnosis it relied upon was listed in the DSM-IV-TR or some other important peer-reviewed literature in the field, and the literature cited by Mr. Ayers shows there is significant controversy over whether paraphilia NOS (hebephilia) is a valid diagnosis.

B. CONCLUSION

For the reasons stated above and in the opening brief, the commitment order must be reversed.

Respectfully submitted this 8th day of June, 2009.



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DIVISION TWO

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	)	
LENIER AYERS,	)	NO. 37822-1-II
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APPELLANT.	)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JUNE, 2009.

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