

NO. 42335-9

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

In re the Detention of:  
LENIER RENE AYERS,  
Appellant,  
v.  
STATE OF WASHINGTON,  
Respondent.

19 APR 11 PM 12:00  
BRIANNE J. HARRIS  
DEPUTY

---

**RESPONDENT'S BRIEF**

---

ROBERT M. MCKENNA  
Attorney General

MALCOLM ROSS  
Assistant Attorney General  
WSBA #22883  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2011

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 APR -9 PM 4:54

**ORIGINAL**

**TABLE OF CONTENTS**

I. ISSUES PRESENTED.....1

II. STATEMENT OF FACTS.....1

    A. Procedural History .....1

    B. Ayers’ Criminal Sexual History.....2

    C. Psychological Testimony .....7

        1. Dr. Dennis Doren.....7

        2. Dr. Richard Wollert.....13

III. ARGUMENT .....15

    A. Standard of Review.....15

    B. The Trial Court’s Order Should Be Affirmed Because  
    Ayers Has Not Assigned Error to Its Findings .....15

    C. The Trial Court Did Not Abuse Its Discretion When It  
    Found That Ayers’ CR 60(b)(11) Motion was Time-  
    Barred.....16

    D. The Trial Court Did Not Abuse Its Discretion Because  
    Ayers Did Not Establish Extraordinary Circumstances.....20

        1. Ayers did not Establish Irregularities Extraneous to  
        the Action of the Court.....21

        2. Ayers’ Diagnosis of Paraphilia NOS is a DSM-  
        Defined Disorder .....25

        3. Washington State has the Authority to Define the  
        Mental Conditions Relevant to Commitment Under  
        the SVPA.....27

4.	Ayers' Commitment Diagnosis is not Subject to <i>Frye</i> Because it does not Employ Novel Scientific Methods .....	32
5.	Criticisms of the Use of Paraphilia NOS (Hebephilia) do not Invalidate the Diagnosis.....	35
6.	Case Law Evidence Demonstrating the Widespread Use of Paraphilia NOS (Hebephilia) .....	37
E.	Antisocial Personality Disorder Is A Constitutionally Sufficient Basis For Ayers Commitment.....	42
F.	Ayers Has Not Established That He Received Ineffective Assistance From His Trial Counsel .....	46
IV.	CONCLUSION .....	49

## TABLE OF AUTHORITIES

### Cases

<i>Adams v. Bartow</i> , 330 F.3d 957 (7th Cir. 2003) .....	44
<i>Barr v. MacGugan</i> , 119 Wn. App. 43, 78 P.3d 660 (2003).....	21
<i>Caouette v. Martinez</i> , 71 Wn. App. 69, 856 P.2d 725 (1993).....	24, 25
<i>Commonwealth v. Dengler</i> , 843 A.2d 1241, 1244 (Pa.Super. 2004).....	33
<i>Detention of Stout</i> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	48
<i>Foucha v. Louisiana</i> , 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).....	42, 43, 44
<i>Friebe v. Supancheck</i> , 98 Wn. App. 260, 992 P.2d 1014 (1999).....	19
<i>Frye v. United States</i> , 293 F. 1013 (D.C.Cir.1923).....	passim
<i>Graves v. P.J. Taggares Co</i> , 25 Wn. App. 118, 605 P.2d 348 (1980).....	47
<i>Haley v. Highland</i> , 142 Wn.2d 135, 12 P.3d 119 (2000).....	15
<i>Hubbart v. Superior Court</i> , 969 P.2d 584 (Cal. 1999).....	44
<i>In re Ayers</i> , 2010 WL 1223091 .....	2, 17

<i>In re Berg</i> , 342 S.W.3d 374 (Mo.App. S.D. 2011) .....	38
<i>In re Civil Commitment of A.H.B</i> , 898 A.2d 1027 (N.J.Super.A.D. 2006) .....	38
<i>In re Civil Commitment of Navratil</i> , 799 N.W.2d 643 (Minn.App. 2011).....	38
<i>In re Civil Commitment of V A.</i> , 813 A.2d 1252 (N.J.Super.A.D. 2003) .....	38
<i>In re Commitment of Adams</i> , 588 N.W.2d 336 (Wis. App. 1998).....	46
<i>In re Commitment of Rachel</i> , 782 N.W.2d 443 (Wis.App. 2010).....	38
<i>In re Detention of Ayers</i> , 2006 WL 3201051 .....	2
<i>In re Detention of Barnes</i> , 689 N.W.2d 455 (Iowa 2004) .....	46
<i>In re Detention of Berry</i> , 160 Wn. App. 374, 248 P.3d 592, review denied 172 Wn.2d 1005 (2011).....	33, 34, 35
<i>In re Detention of Mitchell</i> , 160 Wn. App. 669, 249 P.3d 662 (2011).....	15
<i>In re Det. of Post</i> , 145 Wn. App. 728, 187 P.3d 803 (2008), <i>aff'd</i> , 170 Wn.2d 302, 241 P.3d 1234 (2010).....	32
<i>In re Detention of Sease</i> , 149 Wn. App. 66, 201 P.3d 1078 (2009).....	45
<i>In re Detention of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	32

<i>In re G.R.H.</i> , 711 N.W.2d 587 (N.D. 2006) .....	46
<i>In re G.R.H.</i> , 793 N.W.2d 460 (N.D. 2011) .....	38
<i>In re Hanenberg</i> , 777 N.W.2d 62 (N.D. 2010) .....	38
<i>In re Hehn</i> , 745 N.W.2d 631(N.D. 2008) .....	38
<i>In re Johnson</i> , 85 P.3d 1252 (Kan. App. 2004) .....	38
<i>In re Marriage of Yearout</i> , 41 Wn. App. 897, 707 P.2d 1367 (1985) .....	21, 24
<i>In re Martinelli</i> , 649 N.W.2d 886, (Minn. App. 2002).....	38
<i>In re Shafer</i> , 171 S.W.3d 768 (Mo. App. S.D. 2005) .....	46
<i>In re Smith</i> , 117 Wn. App. 611, 72 P.3d 186 (2003) .....	48
<i>In re Williams</i> , 253 P.3d 327 (Kan. 2011) .....	38
<i>In re Wolff</i> , 796 N.W.2d 644 (N.D. 2011) .....	46
<i>In re Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	passim
<i>Kansas v Crane</i> , 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).....	passim
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).....	passim

<i>Lane v. Brown &amp; Haley</i> , 81 Wn. App. 102, 912 P.2d 1040 (1996).....	47
<i>Little v. King</i> , 160 Wn.2d 696, 161 P.3d 345 (2007).....	25
<i>Logerquist v. McVey</i> , 1 P.3d 113, 123 (Ariz. 2000) .....	33
<i>Luckett v. Boeing Co.</i> , 98 Wn. App. 307, 989 P.2d 1144, (1999).....	17, 19
<i>Moolenaar v Government of Virgin Islands</i> , 822 F.2d 1342 (3 <sup>rd</sup> .Cir. 1987).....	18
<i>Moreman v Butcher</i> , 126 Wn.2d 36, 891 P.2d 725 (1995).....	15
<i>Murrell v. State</i> , 215 S.W.3d 96 (Mo. 2007) .....	46
<i>People v. McRoberts</i> , 101 Cal.Rptr.3d 115 (Cal.App. 2009).....	38
<i>People v. Ward</i> , 71 Cal.App.4th 368, 373 (1999) .....	33
<i>Slayton v. Department of Social &amp; Health Services</i> , 159 Wn. App. 121, 244 P.3d 997 (2010).....	15
<i>State v. Donald N.</i> , 881 N.Y.S.2d 542 (N.Y.A.D. 2009) .....	38
<i>State v. Greene</i> , 139 Wn.2d 64, 984 P.2d 1024 (1999).....	34, 35
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	15
<i>State v Keller</i> , 32 Wn. App. 135, 647 P.2d 35 (1982).....	21

<i>State v. Lamure</i> , 846 P.2d 1070, 1073 (N.M. App. 1992) .....	37
<i>State v. Red</i> , 105 Wn. App. 62, 66, 18 P.3d 615 (2001), <i>review denied</i> , 145 Wn.2d 1036 (2001) .....	48
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994) .....	33, 35
<i>State v. Scott</i> , 20 Wn. App. 382, 580 P.2d 1099 (1978), <i>aff'd</i> , 92 Wn.2d 209, 595 P.2d 549 (1979) .....	23, 24
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	48
<i>State v. Ward</i> , 125 Wn. App. 374, 104 P.3d 751 (2005) .....	22, 23
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	47, 48
<i>U.S. v. C.R.</i> , 792 F.Supp.2d 343, 408 (E.D.N.Y. 2011) .....	37
<i>U.S. v. Polizzi</i> , 549 F.Supp.2d 308, (E.D.N.Y. 2008) .....	37
<i>U.S. v. Wetmore</i> , 766 F.Supp.2d 319 (D.Mass. 2011) .....	38
<i>United States v. Abregana</i> , 574 F.Supp.2d 1145 (D. Haw. 2008) .....	40, 41
<i>United States v. Shields</i> , 2008 WL 544940 (D. Mass. 2008) .....	41, 42

**Statutes**

18 U.S.C. § 4247(a)(5) .....	39
------------------------------	----

18 U.S.C. § 4247(a)(6).....	39, 41
18 U.S.C. § 4248.....	39, 41
Pub. L. No. 109-248, § 302, 120 Stat. 587 .....	39
RCW 71.09 .....	passim
RCW 71.09.020(12).....	22
RCW 71.09.020(16).....	29, 34
RCW 71.09.020(8).....	passim
RCW 71.09.030(1)(e) .....	22
Washington’s Sexually Violent Predator Act (SVPA), RCW 71.09 .....	20

**Other Authorities**

American Psychiatric Ass'n, <i>Diagnostic and Statistical Manual of Mental Disorders, (Fourth Edition) (DSM-IV-TR)</i> .....	passim
Dennis Doren, <i>Evaluating Sex Offenders, a Manual for Civil Commitments and Beyond (2002)</i> .....	7
Thomas K. Zander, <i>Civil Commitment Without Psychosis: The Law’s Reliance on the Weakest Links in Psychodiagnosis,</i> 1 <i>Journal of Sexual Offender Civil Commitment: Science and the Law</i> 17 (2005).....	36, 37
Alexander D. Brooks, <i>The Constitutionality and Morality of Civilly Committing Violent Sexual Predators,</i> 15 <i>U. Puget Sound L.Rev.</i> 709, 733 (1992).....	31

**Rules**

CR 60(b)..... passim

CR 60(b)(11)..... passim

CR 60(b)(3)..... 17, 18

CR 60(b)11) ..... 20

## I. ISSUES PRESENTED

- A. Whether the trial court's order should be affirmed because Ayers has not assigned error to the court's findings.
- B. Whether the trial court abused its discretion denying Ayers' motion as time-barred, where Ayers filed the motion five and one-half years after his commitment order was entered.
- C. Whether the trial court abused its discretion, where Ayers' CR 60(b) motion failed to establish extraordinary circumstances and irregularities extraneous to the action of the court.
- D. Whether Ayers' claim that his trial attorney was ineffective is an irregularity extraneous to the action of the court that can be raised by a CR 60(b) motion.
- E. Whether Ayers' trial attorney was ineffective by failing to request a *Frye*<sup>1</sup> hearing, where Ayers' own expert had diagnosed Ayers with the disorder Ayers now claims is not generally recognized.

## II. STATEMENT OF FACTS

### A. Procedural History

In 2001 the State petitioned to commit Lenier Ayers (Ayers) as a sexually violent predator (SVP). CP at 1-2. After a bench trial the court concluded the State had proved beyond a reasonable doubt that Ayers is an SVP. CP at 24. The trial court entered the Findings of Fact (FF), Conclusions of Law (CL), and Order of Commitment (commitment order) on September 12, 2005. CP at 3-25.

---

<sup>1</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir 1923).

Ayers appealed the commitment order. *In re Detention of Ayers*, 2006 WL 3201051. This Court affirmed his commitment. *Id.*

In early 2008, Ayers filed a *pro se* CR 60(b) motion to vacate his commitment order, but did not serve the State. *In re Ayers*, 2010 WL 1223091 at 1. The trial court denied the motion. *Id.* Ayers' appeal of that decision and his PRP were consolidated in this Court. *Id.* This Court denied Ayers' PRP and remanded the CR 60(b) motion to the trial court so that the State could receive notice and respond. *Id.* at 6.

On remand, Ayers filed a new motion on May 5, 2011. Entitled "Amended and Restated Motion and Memorandum of Law for Relief from Judgment," it relied on CR 60(b)(11). CP at 85-348. The trial court denied the motion. CP at 461-62. Ayers timely appealed. CP at 463.

#### **B. Ayers' Criminal Sexual History**

Ayers has a history, both adjudicated and unadjudicated, of sexually assaulting females who are particularly vulnerable. His behavior displays a pattern of isolating adolescent girls for the purpose of sexual contact. CP at 17, FF 14c(5)(a)-(c). His unadjudicated offenses include pulling his 12-year-old sister's pants down when he was 15 years old, engaging in repeated sexual intercourse with a 13-year-old girl when he was 17 years old, and having sexual contact with a girl who was under the age of 16 when he was 18 years old. CP at 10, FF 12f(6)(a)-(c).

On or about December 11, 1990, Ayers sexually assaulted J.M., a 13-year-old girl, in his residence. CP at 5, FF 12a; 3RP at 275.<sup>2</sup> In 1990, Ayers was 31 years old, stood approximately 6'1", and weighed approximately 155 pounds. 3RP at 402, 409. The night Ayers assaulted J.M. was the first night she met him. CP at 5, FF 12a; 3RP at 276. Ayers provided her with alcohol and she became intoxicated. CP at 5, FF 12a; 3RP at 276. Ayers took J.M. to the shower, where she vomited. CP at 8, FF 12f(1)(a); 3RP at 403. Ayers removed her clothing, got on top of her, and orally raped her. CP at 8, FF 12f(1)(a). J.M. told him no and was crying and whimpering. CP at 8, FF 12f(1)(d); 3RP at 405. Ayers threatened to slap J.M. if she did not stop screaming. CP at 8, FF 12f(1)(e); 3RP at 405. Ayers penetrated J.M.'s vagina with his penis. CP at 5, FF 12a; 3RP at 276. The following morning, J.M. escaped from him by tricking him into believing she was leaving to purchase marijuana for him. CP at 5, FF 12a; 3RP at 277.

For his crimes against J.M., Ayers pled guilty to Child Molestation Second Degree and Communicating with a Minor for Immoral Purposes. CP at 3, FF 2.

---

<sup>2</sup> The verbatim report of proceedings was filed in No. 37822-1-II and the State has moved to transfer it to this appeal. The volumes cited in this brief correspond to the following dates: 3RP is May 16, 2005; 4RP is May 17, 2005; 5RP is May 18, 2005; 6RP is May 24, 2005; 7RP is May 25, 2005; 8RP is May 26, 2005; 9RP is May 21, 2005; and 10RP is June 1, 2005.

In September 1990, Ayers sexually assaulted S.D., a 12-year-old girl. CP at 5, FF 12b; 3RP at 242. S.D. was alone with Ayers and had only met him that day. CP at 5, FF 12b, CP at 8, FF 12f(2)(a); 3RP at 238. She was intoxicated. CP at 5, FF 12b; 3RP at 239. Ayers grabbed S.D. and made her “do things she didn’t want to do.” CP at 5, FF 12b; 3RP at 240-41. S.D. told him, “What are you doing? Don’t touch me. Stop.” CP at 5, FF 12b; 3RP at 240-41. She pushed him away and told him to leave her alone, but he would not. CP at 5, FF 12b; 3RP at 241-42. Ayers removed S.D.’s clothes and his own. CP at 6, FF 12b; 3RP at 241-42. He also touched her breasts and genital area. CP at 6, FF 12b; 3RP at 240-41.

For his crimes against S.D., Ayers pled guilty to Child Molestation Second Degree. CP at 4, FF 3. The court ordered Ayers to have no unsupervised contact with minor females for a period of two years after his release. CP at 4, FF 5.

In 1990, Ayers sexually assaulted M.L., a 14 year old girl, at his residence. CP at 6, FF 12c; 3RP at 280-81. M.L. met Ayers about a year previously, but had never been to his home before. CP at 6, FF 12c; 3RP at 280-81. Ayers provided alcohol to M.L. CP at 6, FF 12c; 3RP at 281. Ayers called M.L. into his bedroom; when she came in, he closed the door. CP at 6, FF 12c; 3RP at 282-83. He put his arms around

her, started “messaging with” her stomach, and moved his hand up to her breasts. CP at 6, FF 12c, CP at 9, FF 12f(3)(b); 3RP at 283. M.L. did not want Ayers to do this and she told him to stop. CP at 6, FF 12c; 3RP at 283-84. Ayers then put his hands down M.L.’s pants. CP at 6, FF 12c; 3RP at 284. She pulled his hands out and told him to “quit.” CP at 6, FF 12c; 3RP at 284, 410. She escaped when a friend came to the door. CP at 6, FF 12c; 3RP at 239-40, 284.

For his crimes against M.L., Ayers pled guilty and was convicted of Child Molestation Third Degree. CP at 4, FF 4.

Released in 2000, Ayers was subject to conditions prohibiting unsupervised contact with minor females. CP at 4, FFs 5-6. He signed a treatment contract with a Vancouver Clinic in which he agreed to: Abide by treatment conditions, including no unsupervised contact with minors; engage in no grooming behavior (including putting himself in a position of taking advantage of vulnerable persons); engaging in no high risk behaviors (including wandering or frequenting areas where children may be); and no use of alcohol or drugs. CP at 10, FF 13c; *See* 4RP at 456-60.

Less than six months later, Ayers was arrested for a sexual offense against a child. CP at 4, FFs 7-9, CP at 9, FF 12f(5)(d). In July 2000, Ayers saw Ebony H., a 16 year old girl, in a park in Vancouver, Washington. CP at 7, FF 12e, CP at 9, FF 12f(5)(a); 3RP at 298. She had

not met Ayers previously. CP at 7, FF 12e; 3RP at 301, 354. Ebony was about 4'11" tall and weighed approximately 115 pounds. 3RP at 293-94.

Ebony saw Ayers sitting under a tree with a yellow tobacco bag, marijuana, and beer. CP at 7, FF 12e; 3RP at 299-300. When she told him she was 16, he replied, "That's taking penitentiary chances." CP at 7, FF 12e, CP at 9, FF 12f(5)(b); 3RP at 300-01. Ayers offered her cigarettes, marijuana, and alcohol. CP at 7, FF 12e; 3RP at 299. After she got into his truck, Ayers told her he takes care of his women, buys them clothes, and has their nails done. CP at 7, FF 12e; 3RP at 303. When he told her he lived in the mountains and wanted to get some marijuana and watch a movie, she became frightened. CP at 7, FF 12e; 3RP at 303, 308-11. To convince Ayers to drive back near her home, Ebony pretended to make some telephone calls to buy marijuana. CP at 7, FF 12e; 3RP at 303, 308-11. She convinced him to drive her back to the park where she'd met him. CP at 7, FF 12e; 3RP at 366, 373. Ebony no longer felt safe and wanted to go home. CP at 7, FF 12e; 3RP at 308-311.

Ayers told her to move closer to him in the truck, then put his arm partly around her to pull her closer to him. CP at 7, FF 12e; 3RP at 312-14. He placed his hand on her inner thigh near her knee, and ran it up toward her genitals. CP at 7, FF 12e; 3RP at 312-14, 369, 379.

Ebony slapped his hand away and got out. CP at 7, FF 12e; 3RP at 313-15, 369.

For his crimes against Ebony, Ayers was charged with unlawful imprisonment, luring a child, and communicating with a minor for immoral purposes. CP at 9, FF 12f(5)(d). He pled guilty to Assault Fourth Degree. CP at 9, FF 12f(5)(e).

### **C. Psychological Testimony**

#### **1. Dr. Dennis Doren**

The State presented the testimony of Dr. Dennis Doren. CP at 11, FF 14a. Dr. Doren is a clinical psychologist licensed to practice in Wisconsin, Iowa, Florida, and Washington. 4RP at 470-71. He has conducted assessments and provided treatment to sex offenders since the early 1980's. 4RP at 472, 474. Dr. Doren has evaluated, assessed, and/or treated approximately 2,000 sex offenders. 4RP at 477-78. Since 1994 he has trained other professionals in the assessment and evaluation of sex offenders. 4RP at 478. He published a book,<sup>3</sup> authored or co-authored several chapters in professional books, and has published numerous articles in scientific journals. 4RP at 480-81.

Dr. Doren has extensive experience in sex offender civil commitment proceedings and has evaluated people in Arizona, Florida,

---

<sup>3</sup> Dennis Doren, *Evaluating Sex Offenders, a Manual for Civil Commitments and Beyond* (2002) 4RP at 481.

Iowa, Illinois, Missouri, Washington, and Wisconsin. 4RP at 486; CP at 11, FF 14a. He has performed evaluations for the State, the Court, and SVP respondents. 4RP at 486-87.

Dr. Doren diagnosed Ayers with four conditions, classified in the DSM (American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders, IV-Text Revision* (4th ed.-text rev. 2000)): (1) Paraphilia, Not Otherwise Specified (NOS); (2) Bipolar I Disorder; (3) Polysubstance Dependence; and (4) Antisocial Personality Disorder. 4RP at 518-19.

Dr. Doren added the descriptor “sexually attracted to adolescents” to Ayers’ diagnosis of Paraphilia NOS and testified this is also referred to as “hebephilia.” 4RP at 521; CP at 11, FF 14a(4). The common features of all paraphilias are: (1) recurrent, intense sexually arousing fantasies, sexual urges, or behaviors; (2) that generally involve nonhuman objects, the suffering or humiliation of oneself or one’s partner, or children or other nonconsenting persons; and (3) the fantasies, urges or behaviors occur over a period of at least six months. DSM at 566.

Dr. Doren cited some of the evidence supporting Ayers’ Paraphilia NOS diagnosis. Regarding Ayers’ fantasies, urges or behaviors involving adolescents, Dr. Doren noted that: (1) Ayers repeatedly targeted females between the ages of 13 and 19 for his criminal behaviors; (2) Ayers

admitted that he has a “problem with being attracted to girls under the age of 18 years old” and that he knows he needs to get help with it; and (3) Ayers admitted in 2000 that he has a sexual response to underage females. 4RP at 523-25. Dr. Doren also noted that some of Ayers’ sexual contacts were with non-consenting persons. 4RP at 527. He testified that Ayers’ urges and behaviors occurred over a period of at least six months. 4RP at 527. They cause Ayers clinically significant distress or impairment in two separate ways: 1) they have resulted in his incarceration on a recurrent basis, and 2) psychologically, the process of having a relationship with an adolescent is, by definition, self-defeating because it cannot be maintained. 4RP at 527-28. Dr. Doren explained that paraphilias are chronic conditions. 4RP at 555.

In Dr. Doren’s opinion, Ayers’ Paraphilia NOS constitutes a mental abnormality, causes him serious difficulty controlling his sexually violent behavior, and makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. 4RP 529-31, 576; CP at 11, FF 14a(5), CP at 12, FF 14a(6), CP at 18, FF 15a.

Dr. Doren also diagnosed Polysubstance Dependence. 4RP at 519; CP at 11, FF 14a(4). That indicates Ayers has an addiction to the use of various substances. He can replace one substance with another, but the use of substances in general is the source of the addiction. 4RP at 530-31;

CP at 13, FF 14a(18). By itself, the Polysubstance disorder does not predispose Ayers to the commission of criminal sexual acts. 4RP at 536; CP at 13, FF 14a(19). Dr. Doren explained that the use of substances can disinhibit a person and make it easier to for him to act on urges or impulses, but it doesn't determine what those impulses are. 4RP at 536; CP at 13, FF 14a(19).

The next disorder Dr. Doren diagnosed is Bipolar I Disorder. CP at 11, FF 14a(4). It is a mood disorder, formerly known as Manic-Depressive Illness. 4RP at 538; CP at 13, FF 14a(20). A person with that disorder has significant and usually rapid mood changes, shows agitation and needs to keep moving, has considerably more energy, tends to have an exaggerated self perspective, and will sometimes experience signs of more typical mental illness, such as delusions and hallucinations. 4RP at 538; CP at 13-14, FF 14a(20). Dr. Doren views the Bipolar I Disorder as affecting Ayers in a variety of ways, but does not view it as providing a drive or urge to sexually offend. 4RP at 554; CP at 14, FF 14a(21).

Antisocial Personality Disorder (APD) is a chronic, long-standing pattern of behavior that interferes with functioning and involves disregard for and violation of the rights of others. 4RP at 555-56; CP at 12, FF 14a(12)-(14). In general, a person with APD does what he wants,

when he wants to, irrespective of the effect on himself and others. 4RP at 556.

There are several categories within the diagnostic criteria for APD which must be met for diagnosis. Dr. Doren testified a person may be diagnosed with APD under Category A if he meets three of seven listed items; Ayers meets all seven of these items.<sup>4</sup> 4RP at 558; CP at 13, FF 14a(15). Category B is that the person is at least 18 years old. 4RP at 568. Category C is that there is evidence of Conduct Disorder with onset before the age of 15 years. 4RP at 568. Dr. Doren found such evidence in Mr. Ayers' records. He was in juvenile detention at age 11 for fighting with a girl. At age 14 he was charged with assault with attempt to commit bodily harm. 4RP at 568-69. In Dr. Doren's opinion, either of these incidents would be sufficient to meet Category C.

Category D requires that some of the incidents, or any three of the seven items in Category A, were occurring when Ayers was not

---

<sup>4</sup> According to the diagnostic criteria for APD contained within the DSM, Category A requires that there is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another. DSM at 706, 4RP at 558-68.

experiencing a manic period. 4RP at 569. Ayers received over 50 infractions while in DOC custody. 4RP at 570. These included Ayers threatening others, throwing objects, using a broomstick as a weapon, fighting and assault. 4RP at 558-59. He also received sanctions while at the Special Commitment Center (SCC), such as for negative attitudes towards women that did not appear to coincide with periods of mania. 4RP at 570-72. He also threatened and assaulted others; a staff member was cut below the eye. 4RP at 559-560. His criminal sexual behavior did not appear to occur exclusively during the periods of mania. 4RP at 569.

In Dr. Doren's opinion, Ayers' APD causes him serious difficulty controlling his sexually violent behavior because of two factors: (1) his APD is severe, exemplified by meeting all seven items in Category A; and (2) his pattern of disregard for and violation of the rights of others includes repetitive sexual offending. 4RP at 575-76. Dr. Doren opined that Ayers' APD makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. 4RP at 576-77; CP at 18, FF 15a.

Dr. Doren also measured Ayers' psychopathy and concluded he met the definition of a psychopath. 4RP at 607-11. Psychopathy refers to the degree to which a person is a psychopath. 4RP at 607. In essence, a

psychopath does whatever he wants to because he lacks an emotional connection to others. 4RP at 608.

Clinicians and evaluators use the Hare Psychopathy Checklist – Revised (PCL-R), developed by Dr. Robert Hare, to measure psychopathy. 4RP at 609. It consists of 20 characteristics on which a subject is scored, with a scale running from zero to 40. 4RP at 608-9. Dr. Doren has been professionally certified to use the PCL-R. 4RP at 610. He arrived at a score of 33 for Ayers. 4RP at 611. The research definition for “psychopath” is one who scores 30 or higher. 4RP at 609. High psychopathy combined with sexual deviance produces a particularly high risk of sexual recidivism. 4RP at 612. Ayers is a psychopath who is sexually deviant because of his diagnosis of Paraphilia NOS. 4RP at 612.

## **2. Dr. Richard Wollert**

Dr. Richard Wollert testified on behalf of Ayers. In sum, he testified that Ayers does not have either a mental abnormality or a personality disorder and is not likely to commit predatory acts of sexual violence if released. CP at 19-20, FF 15b.

Dr. Wollert questioned the validity of the Paraphilia NOS (hebephilia) diagnosis assigned to Ayers by Dr. Doren. He cited evidence that he believed showed it was not found in the DSM and was unreliable.

6RP at 943-48; 7RP at 1030-32; 8RP at 1182-89; 9RP at 1287; 10RP at 1412, 1420, 1429-30, 1438-39.

Initially, Dr. Wollert testified he had never diagnosed anyone with Paraphilia NOS (hebephilia). 6RP at 948; 9RP at 1288. On cross-examination he was asked if he had previously diagnosed Ayers with that condition and answered, "Where did I do that?" 9RP at 1288. He was shown his February 14, 2003, evaluation of Ayers in which he concluded that Ayers' "was positive for" Paraphilia NOS (hebephilia) in 1991 but that, at the time of the 2003 evaluation, it was "in remission." 9RP at 1288-89. Dr. Wollert then claimed that he had been referring to a diagnosis assigned to Ayers by other evaluators. 9RP at 1289. He was then impeached with his December 23, 2003, deposition, in which he had testified that Ayers suffered from that condition and that it had "led to his conviction" in 1991. 9RP at 1289-91; CP at 14, FF 14b(3).

The trial court found Dr. Doren's testimony more reliable than Dr. Wollert's on the issue of whether Ayers has a mental abnormality and/or personality disorder that causes him serious difficulty controlling his sexually violent behavior. CP at 16, FF 14c(2). He also found Dr. Doren to be more reliable than Dr. Wollert in the scoring of the Hare Psychopathy Checklist Revised (PCL-R). CP at 21, FF 15c(5).

### III. ARGUMENT

#### 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 "only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons." *Id* (quoting *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995)).

#### B. The Trial Court's Order Should Be Affirmed Because Ayers Has Not Assigned Error to Its Findings

Ayers has not assigned error to any of the trial court's findings of fact. Appellant's Opening Brief at 2. A finding to which error is not assigned is a verity on appeal. *Slayton v. Department of Social & Health Services*, 159 Wn. App. 121, 127, 244 P.3d 997 (2010); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) ("Defendant's failure to assign error to the facts entered by the trial court precludes our review of these facts and renders these facts binding on appeal.").

The following four factual findings are therefore verities in this appeal:

Having considered the foregoing, the Court finds that the motion should be denied because: 1) It was not brought within a reasonable time; 2) it does not present extraordinary circumstances; and 3) it fails on its merits because the issue it raises (validity of the respondent's diagnosis) was also raised at trial and the Court considered that issue when deciding the case. [4] The Court further finds that Respondent's trial counsel was not ineffective for failing to request a *Frye* hearing.

CP at 461. Because these findings are determinative, the trial court's order should be affirmed.

**C. The Trial Court Did Not Abuse Its Discretion When It Found That Ayers' CR 60(b)(11) Motion was Time-Barred**

The trial court did not abuse its discretion when it denied Ayers' CR 60(b)(11) motion, because it was not brought within a reasonable time.

CP at 461. 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.

Ayers' CR 60(b)(11) motion was filed May 5, 2011 – more than five and one-half years after the commitment order was entered. CP at 96. That is not a reasonable period of time.

Ayers argues that his time period began when “the commitment order became final[.]” Appellant's Opening Brief (AOB) at 12. He asserts it began when the November 7, 2007, mandate issued on his direct appeal. AOB at 10. But he cites to no authority and he is incorrect.

CR 60(b) provides 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 the filing of the motion.” *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312-313, 989 P.2d 1144, 1147 (1999). Here, the relevant time period began when the trial court entered Ayers’ commitment order: September 7, 2005. CP at 25.

Ayers then argues as though the time period concluded upon the filing of his pro se motion on February 11, 2008. But that is not the motion at issue before this Court. Ayers gave no notice of that motion to the State and never cited or relied on CR 60(b)(11). *In re Ayers*, 2010 WL 1223091 at 1. Indeed, he appeared to rely on CR 60(b)(3) because he argued that there was new evidence in his case. *Id.* Then, on remand, Ayers did not argue his original motion – he chose to file his new, May 5, 2011 “Amended and Restated Motion and Memorandum of Law for Relief from Judgment,” in which, for the first time in the trial court, he cited and relied on CR 60(b)(11). CP at 85-348.

The May 5, 2011, motion is the one relevant to determining the time period under CR 60(b). It was filed more than five and one-half years after entry of the commitment order. The trial court did not abuse its discretion denying that late motion. And, assuming for the sake of

argument that Ayers' February 11, 2008, motion is the relevant event, the trial court did not abuse its discretion in denying a motion filed nearly two and one-half years after the commitment order was entered. *See Moolenaar v. Government of Virgin Islands*, 822 F.2d 1342, 1348 (3<sup>rd</sup>.Cir. 1987) (motion brought under federal equivalent of CR 60(b)(11) two years after judgment and six weeks after remand "not made within a reasonable time.").

Furthermore, although Ayers now claims to rely on CR 60(b)(11), his argument is based on allegedly new evidence and should be subject to the one-year time limitation applicable to CR 60(b)(3):

Moreover, much of the criticism of Dr. Doren's diagnoses was not published until after Mr. Ayers's mid-2005 trial and therefore, as in *Ward*, extraordinary circumstances justify this collateral attack on the judgment.

AOB at 13. Ayers then cites what he considers to be important new evidence: Letters to the editor from 2008, a website visited in 2012, and various articles from years after his trial. *Id.* at 13-14. He then concludes:

These publications make plain what may not have been plain at the time of Mr. Ayers's trial-that Dr. Doren's use of this novel diagnosis is far from achieving general acceptance in the relevant scientific community.

*Id.* at 14.

Ayers' argument falls under CR 60(b)(3), which is subject to a one-year time limitation. His citation to CR 60(b)(11) is an attempt to

circumvent that limitation. *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).”).

Under either subsection of CR 60(b), Ayers failed to note his motion within a “reasonable time.” The major considerations in determining a motion’s timeliness are: (1) Prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner. *Luckett*, 98 Wn. App. at 312-313. Both considerations favor the State. The State would be greatly prejudiced if the motion were granted because evidence grows stale or hard to come by over time. It is now more than five years after trial and the delay will likely grow to seven years before a new initial commitment trial can begin. The victims whose testimony was so important to establishing Ayers’ diagnoses and risk may be unavailable or unable to re-testify at a new initial commitment trial.

Nor does Ayers present good reasons for delaying his motion. His citations to authors who dissent from the groundswell of clinical practice merely repeat the claim Ayers presented at trial. CP at 14, 461. The trial court did not abuse its discretion when it found that Ayers’ motion was time-barred.

**D. The Trial Court Did Not Abuse Its Discretion Because Ayers Did Not Establish Extraordinary Circumstances**

Ayers contends that the trial court abused its discretion denying his CR 60(b)(1) motion because a mental disorder testified about by the experts at trial – Paraphilia NOS, sexually attracted to adolescents, or hebephilia – is not generally accepted within the relevant scientific community. AOB at 39-42. Ayers’ arguments fail because he is not relying on “extraordinary circumstances” that are “irregularities extraneous to the action of the court.” Dr. Doren’s use of a DSM diagnosis is not subject to *Frye* and, even if it were, the criticisms of the diagnosis that Ayers cites do not establish that the diagnosis is not generally accepted. Additionally, Ayers fails to establish that his diagnosis does not meet the definition of a “mental abnormality” as defined in Washington’s Sexually Violent Predator Act (SVPA), RCW 71.09, at RCW 71.09.020(8). Finally, even if Ayers were correct that Paraphilia NOS, sexually attracted to adolescents is not a valid diagnosis, his commitment was not based solely on that condition. Ayers’ diagnosis of Antisocial Personality Disorder supports his commitment and the trial court’s order denying his CR 60(b) motion should be affirmed.

**1. Ayers did not Establish Irregularities Extraneous to the Action of the Court**

The trial court correctly denied Ayers' CR 60(b)(11) motion because Ayers' claims do not fall within that section of the rule. CR 60(b)(11) is "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)). "Such 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) (attorney's severe clinical depression and dismissal of case through neglect of attorney's practice constitutes "extraordinary ground" pursuant to CR 60(b)(11)).

Ayers does not allege irregularities that are extraneous to the action of the court. At trial, he presented evidence about the same issue he raised in his CR 60(b)(11) motion – the validity of the diagnosis assigned to him by the State's expert. Ayers' expert, Dr. Wollert, questioned the validity of the diagnosis and cited evidence he believed showed it was not in the DSM and was unreliable. 6RP at 943-48; 7RP at 1030-32; 8RP at 1182-89; 9RP at 1287; 10RP at 1412, 1420, 1429-30, 1438-39. Ayers'

CR 60(b) allegation is identical to one he presented at trial and does not constitute “irregularities extraneous to the action of the court.”

Ayers relies on *State v. Ward*, 125 Wn. App. 374, 104 P.3d 751 (2005). Mr. Ward was civilly committed as an SVP in 1991. 125 Wn. App. at 375. Two years later, the Supreme Court required proof of a “recent overt act” when an SVP respondent had been previously released into the community. *Id.* at 376-77 (citing *In re Young*, 122 Wn.2d 1, 41-42, 857 P.2d 989 (1993)); see RCW 71.09.020(12), .030(1)(e). Mr. Ward had been living in the community shortly before his SVP petition was filed. *Id.* In 2003 he attempted to vacate his 12-year-old commitment order under CR 60(b)(11), but the court held he waited too long before filing his motion. *Id.* at 377, 380-81.

*Ward* does not support Ayers’ argument. It briefly discussed a different issue: Whether a *change in the law* constitutes “extraordinary circumstances.” *Id.* at 380-81. In dicta, the court noted that it may do so in “rare circumstances,” but the court did not decide that issue because Mr. Ward’s motion was untimely. *Id.* Notably, *Ward* held that delay is fatal to a CR 60(b)(11) motion even where the State fails to allege a later-imposed element, notwithstanding that the element is a

“constitutional requirement.”<sup>5</sup> *Id.* In any event, Ayers does not rely on a change in the law and *Ward* does not help him establish “extraordinary circumstances.”

Ayers asserts that CR 60(b)(11) “allows a court to reopen a case to hear additional evidence not presented at the first trial[.]” AOB at 16. For this proposition he relies on *State v. Scott*, 20 Wn. App. 382, 580 P.2d 1099 (1978), *aff’d*, 92 Wn.2d 209, 595 P.2d 549 (1979). At issue in *Scott* were a judgment and sentence and an order revoking probation. 20 Wn. App. 383-84. The trial court entered those orders relying on information it received in a phone call it made to a drug treatment center during the sentencing/probation revocation hearing. *Id.* The following day a treatment center employee visited the judge and told him the information was incorrect. *Id.* The court reconsidered its orders on its own motion, relying on its “inherent power to reconsider a decision based on ‘erroneous and incomplete’ information.” *Id.* at 384-85. Its decision was affirmed on different grounds by the Court of Appeals and the Supreme Court. *Id.* at 388; 92 Wn.2d 209. Those courts held that, even though the trial court did not rely on CR 60(b)(11), that rule justified its decision. 20 Wn. App. at 386-87; 92 Wn.2d at 212.

---

<sup>5</sup> Division I concurrently published an opinion granting Mr. Ward an unconditional release trial for a different reason – Mr. Ward’s evidence that his condition had changed since his commitment. *In re Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005).

The *Scott* opinions are distinguishable because of the unique facts in that case: A trial judge vacated his own orders one day after sentencing a defendant and revoking his probation based on false information he obtained in a phone call. That is far different than here, where Ayers raises the same issue he presented at trial through his expert, and now, years later, offers articles and letters to the editor as additional evidence supporting his position. AOB at 13-14

Furthermore, the *Scott* opinions interpreted the Washington rule for the first time. 20 Wn. App. at 387 (“We are unable to discover any Washington cases construing subsection (11).”). Neither appellate court applied the current standard that CR 60(b)(11) is confined to “irregularities extraneous to the action of the court.” *Yearout*, 41 Wn. App. at 902. Those opinions, therefore, do not support Ayers’ argument that he is presenting “extraordinary circumstances.”

Ayers also relies on *Caouette v. Martinez*, 71 Wn. App. 69, 856 P.2d 725 (1993). *Caouette* involved vacation of a default judgment where the documentation in support of the motion for default had failed to establish the plaintiff’s legal theory. 71 Wn. App. at 78-79. *Caouette* does not support Ayers’ argument because different, equitable standards apply to vacation of a default judgment. A party moving to vacate must show:

(1) that there is substantial evidence supporting a prima facia defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

*Little v King*, 160 Wn.2d 696, 703-704, 161 P.3d 345 (2007). Default judgments are not favored and the preference is for trial on the merits. *Id.* at 703. *Caouette* is inapposite.

Ayers has not established that extraordinary circumstances exist because he fails to present irregularities extraneous to the action of the court. Thus, he fails to meet his high burden of showing that the trial court manifestly abused its discretion.

## **2. Ayers' Diagnosis of Paraphilia NOS is a DSM-Defined Disorder**

Ayers claims that the diagnosis of Paraphilia NOS, sexually attracted to adolescents (hebephilia), violates his due process rights because it is not generally accepted by mental health professionals. He claims that the American Psychiatric Association (APA) does not recognize it and it is not found in the DSM. AOB at 25-26. Because Paraphilia NOS *is* in DSM, Ayers' claim lacks merit.

Certain disorders, such as depressive disorders, anxiety disorders and paraphilias, have too many variants to be explicitly listed in the DSM.

4RP at 520-21. They therefore have an NOS section so an evaluator can assign the general diagnosis and provide a meaningful descriptor. *Id.* The primary diagnosis assigned to Ayers – Paraphilia NOS – is most certainly in the DSM and is generally accepted by mental health professionals. DSM at 576. It includes any paraphilia that “do[es] not meet the criteria for any of the specific categories.” *Id.* Because paraphilias involve deviant arousal to, e.g., children, nonconsenting persons and inanimate objects, clinicians and evaluators use the Paraphilia NOS diagnosis, combined with a descriptor, to communicate the specific type of person or object that is the stimulus for deviant arousal. DSM at 566; 4RP at 521. The DSM lists some examples of NOS diagnoses but clearly indicates it is not an exclusive list. *See* DSM at 576 (“Examples include, but are not limited to . . .”).

The fact that “hebephilia” is not included in the Paraphilia NOS non-exclusive list does not mean it is an invalid diagnosis or that the State’s expert could not assign that diagnosis in order to accurately describe Ayers’ deviant arousal system. *See In re Detention of Young*, 122 Wn.2d 1, 28, 857 P.2d 989 (1993) (lack of specifier in DSM for Paraphilia NOS, rape does not invalidate the diagnosis). Ayers, by history and his admissions, is clearly aroused to pubescent children. The descriptor for his particular Paraphilia NOS is “sexually attracted to

adolescents” which is commonly referred to as “hebephilia.” 4RP at 521. Ayers’ primary diagnosis, however, is Paraphilia NOS, which means that he (1) experiences recurrent, intense sexually arousing fantasies, sexual urges, or behaviors (2) for a period of more than six months (3) that cause him clinically significant distress or impairment in his social, occupational and other important areas of functioning. DSM at 566. The stimuli for Ayers’ deviant arousal are children who are pubescent. 4RP at 522-26.

**3. Washington State has the Authority to Define the Mental Conditions Relevant to Commitment Under the SVPA**

Ayers places great significance on the fact that the DSM has not explicitly identified sexual arousal to adolescents, or hebephilia, as an example of a Paraphilia NOS diagnosis. See AOB at 26-28. His arguments imply that a mental condition is invalid for civil commitment under the SVPA unless it is specifically identified in the DSM. The Supreme Courts of the United States and Washington State have rejected the same argument.

The U.S. Supreme Court rejected the argument that due process requires states to define “mental disorder” or similar terms in their civil commitment statutes in such a way that they are consistent with the standards of the mental health community. *Kansas v. Hendricks*, 521 U.S. 346, 358-59, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Hendricks had

challenged his civil commitment under Kansas' SVPA, which was modeled after the Washington SVPA. The Kansas SVPA also permits civil commitment of persons who, due to a "mental abnormality" or a "personality disorder" are likely to engage in "predatory acts of sexual violence." *Hendricks*, 521 U.S. at 350 (quoting Kan. Stat. Annot. § 59-29a01 et seq. (1994)). The Court concluded the Kansas SVPA was constitutional because it complied with earlier cases upholding civil commitment statutes requiring both a finding of dangerousness and the presence of mental illness. *Id.* at 358.

The Court specifically rejected the argument that the use of the term "mental abnormality" by the Kansas SVPA did not comport with earlier cases requiring a finding of "mental illness," because "mental abnormality" is a term adopted by the Kansas Legislature and not the psychiatric community. *Id.* at 358-59. The Court found that "the term 'mental illness' is devoid of any talismanic significance." *Id.* at 359. It further noted that "psychiatrists disagree widely and frequently on what constitutes mental illness" and that the Court itself had never used consistent terms in its cases involving civil commitments. *Id.* (quoted source omitted). The Court noted that:

Legal definitions, however, which must "take into account such issues as individual responsibility . . . and

competency,” need not mirror those advanced by the medical profession.

*Id.* See also *Kansas v. Crane*, 534 U.S. 407, 413-14, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (reaffirming that psychiatric and legal standards do not and need not be identical).

Washington’s definition of “mental abnormality” meets constitutional requirements and does not place the limitations on acceptable diagnoses that Ayers would have this Court impose. It defines a “sexually violent predator” 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 likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(16). The SVPA then defines “mental abnormality” in a way that distinguishes mentally ill offenders from non-mentally ill recidivists:

“Mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

RCW 71.09.020(8).

The DSM itself recognizes the limitations of diagnostic constructs in forensic settings. See DSM at xxxiii (noting the imperfect fit between

“questions of ultimate concern to the law and the information contained in a clinical diagnosis.”). The DSM also cautions that, while it reflects consensus about the classification of mental disorders, new knowledge based on research and clinical experience will undoubtedly lead to further understanding of the listed disorders, the inclusion of new ones and the removal of others. *Id.*

Indeed, despite the dissenting voices cited by Ayers, recognition of Hebephilia has only gained more traction in the last twenty years. The following is a current proposal for the forthcoming DSM-V:

#### Pedophilic Disorder

- A. Over a period of at least six months, recurrent and intense sexual arousal from **prepubescent or early pubescent children**, as manifested by fantasies, urges, behaviors, or extensive use of pornography depicting children of this age.
- B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or impairment in social, occupational, or other important areas of functioning.
- C. The person is at least age 18 years and at least five years older than the children in Criterion A or Criterion B.

Specify type:

Classic Type—Sexually Attracted to Prepubescent Children (Generally Younger than 11)

**Hebephilic Type—Sexually Attracted to Pubescent Children (Generally Age 11 through 14)**

**Pedohebephilic Type—Sexually Attracted to Both**

American Psychiatric Association, DSM-5 Development Website, “U 03 Pedophilic Disorder” (in pertinent part; emphasis added).<sup>6</sup> See also, Blanchard, R., Lykins, A. D., Wherrett, D., Kuban, M. E., Cantor, J. M., Blak, T., Klassen, P. E. (2009). *Pedophilia, hebephilia, and the DSM-V*. *Archives of Sexual Behavior*, 38, 335–350.

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.

*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:

---

<sup>6</sup> The Pedophilic Disorder proposal can be accessed at: <http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=186>

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. Washington courts have repeatedly upheld sexually violent predator commitments based on the paraphilia NOS nonconsent/rape diagnosis. *In re Det. of Post*, 145 Wn. App. 728, 756–57 n.18, 187 P.3d 803 (2008), *aff’d*, 170 Wn.2d 302, 241 P.3d 1234 (2010). As in all of those cases, Ayers’ primary diagnosis is Paraphilia NOS, which is generally accepted and found in the DSM.

**4. Ayers’ Commitment Diagnosis is not Subject to *Frye* Because it does not Employ Novel Scientific Methods**

Ayers argues that he is entitled to relief from judgment under CR 60(b) because Dr. Doren’s diagnosis of Paraphilia NOS, sexually attracted to adolescents, is a “novel diagnosis.” AOB at 14. The Court should reject his argument because the diagnosis is not subject to *Frye*.

In Washington, the standard for assessing allegedly novel scientific procedures is found in *Frye*, 293 F. at 1014. *In re Detention of Thorell*, 149 Wn.2d 724, 754, 72 P.3d 708 (2003). Pursuant to *Frye*, the trial court determines whether a scientific theory or principle is generally accepted within the relevant scientific community. *Thorell*, 149 Wn.2d at 754. “*Frye* requires only general acceptance, not *full* acceptance, of novel

scientific methods.” *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). If the methodology is generally accepted, the possibility of error in the expert opinions can be argued to the jury. *Id.*

Ayers’ commitment diagnoses are not based on novel science and *Frye* does not apply. *In re Detention of Berry*, 160 Wn. App. 374, 379, 248 P.3d 592, *review denied* 172 Wn.2d 1005 (2011) (*Frye* inapplicable to Paraphilia NOS diagnosis because “the science at issue is standard psychological analysis.”). *Berry* is consistent with Supreme Court reasoning from nearly 20 years ago:

The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial.”

*Berry*, 160 Wn. App. at 379 (quoting *In re Pers. Restraint of Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993)).<sup>7</sup> Ayers’ arguments go to the weight of the evidence, not its admissibility. *Berry*, 160 Wn. App. at 382.

---

<sup>7</sup> Persuasive authority is in accord. *See, e.g., Logerquist v McVey*, 1 P.3d 113, 123 (Ariz. 2000) (“*Frye* is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior”); *Commonwealth v Dengler*, 843 A.2d 1241, 1244 (Pa.Super. 2004) (“psychological or psychiatric testimony of an expert at an SVP proceeding is not novel scientific evidence subject to *Frye*”); *People v Ward*, 71 Cal.App.4th 368, 373 (1999) (“*Kelly-Frye* applies to cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist’s prediction of future dangerousness or a diagnosis of mental illness.”).

Ayers asks this Court to disagree with *Berry* and hold that *Frye* applies, based on *State v. Greene*, 139 Wn.2d 64, 72, 984 P.2d 1024 (1999) (dissociative identity disorder (DID) evaluated under *Frye* test). In *Greene*, a defendant sought to introduce insanity defense evidence that he suffered from DID. 139 Wn.2d at 67-68. *Greene* concluded that DID met the *Frye* test. *Id.* at 72-73. *Greene*, however, does not stand for the proposition that mental disorders diagnosed in SVPA cases are subject to *Frye*. Contrary to a criminal proceeding, the State must present expert testimony that a respondent suffers from a “mental abnormality” or personality disorder. RCW 71.09.020(16). “Mental abnormality,” as discussed supra, is “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.” RCW 71.09.020(8). In adopting this definition, the Washington Legislature exercised its considerable authority to fashion the criteria that would subject a person to civil commitment, criteria that need not “fit precisely with the definitions employed by the medical community” and that “need not mirror those advanced by the medical profession.” *Hendricks*, 521 U.S. at 359; *Crane*, 534 U.S. at 413-14. *Greene* did not address whether a condition that

meets the definition of “mental abnormality” in RCW 71.09.020(8) is subject to *Frye*.

Assuming *arguendo* that *Greene* also applies to diagnoses under the SVPA, the rationale behind *Berry* and other persuasive cases above should still apply to the use of the descriptor “sexually attracted to adolescents” or Hebephilia. Ayers’ primary diagnosis, Paraphilia NOS, unquestionably meets *Frye*. Because Ayers meets the general criteria of a Paraphilia, *ie* recurrent, intense sexually arousing fantasies, urges or behaviors for more than six months that cause him clinically significant distress or impairment (DSM at 566), Dr. Doren’s analysis of the specific stimuli to which Ayers is aroused is application of “standard psychological analysis.” *Berry*, 160 Wn. App. at 379. *Frye* does not invalidate the diagnosis Dr. Doren assigned to Ayers.

**5. Criticisms of the Use of Paraphilia NOS (Hebephilia) do not Invalidate the Diagnosis**

In attempting to show that Paraphilia NOS (hebephilia) does not meet the *Frye* test, Ayers cites to some criticisms of the diagnosis and concludes that the disorder is not generally accepted. AOB at 28-31. But the critics Ayers cites do not establish that the diagnosis is not generally accepted. Even if *Frye* applied, it requires “general acceptance,” not “full acceptance.” *Russell*, 125 Wn.2d at 41. Just as in the case of the

paraphilic rape diagnosis, opposition from some members of the mental health community does not establish a lack of general acceptance.

Consider an authority to whom Ayers repeatedly cites: Dr. Thomas Zander. See Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 *Journal of Sexual Offender Civil Commitment: Science and the Law* 17 (2005); AOB at 14, 28, 29, 31, 36 n.3, 38, 44. Dr. Zander unquestionably criticizes the use of Paraphilia NOS, sexually attracted to adolescents. Zander, *Civil Commitment Without Psychosis*, *supra*, at 48.

But Zander is a critic of all non-psychotic civil commitments and is clearly opposed to sexual predator civil commitment laws. *Id.* at 1 (“civil commitments that are based on diagnoses of such nonpsychotic disorders [paraphilias and personality disorders] have a weak foundation.”). He is highly critical of the United States Supreme Court’s decisions upholding those laws. *Id.* at 25 (“[T]he court engaged in very little analysis of the issues [raised by opponents of the Kansas SVPA]”). He criticizes the use of all Paraphilia NOS diagnoses, including the paraphilic rape diagnosis. *Id.* at 41-42. He also finds validity problems with diagnoses of personality disorders. *Id.* at 50.

Zander’s diagnostic criticisms are not limited to the Paraphilia NOS category; he also discusses the “conceptual validity” of Pedophilia.

*Id.* at 37-40. He criticizes the commentators who defend pedophilia as a mental disorder. *Id.* at 39 (“This attempted distinction ignores the reality that social judgments about whether a sexual orientation is harmful to self and others vary depending on changing cultural values”). Zander believes that “adult-child sexual behavior does not always result in harm to the child[.]” *Id.* (citation omitted). Zander’s article and views on diagnostic practices are clearly not the products of professional consensus.

**6. Case Law Evidence Demonstrating the Widespread Use of Paraphilia NOS (Hebephilia)**

Ayers and Zander wrongfully assert that Paraphilia NOS (hebephilia) “has not been recognized outside of the SVP commitment context[.]” *Id.* at 49; AOB at 31. In fact, the diagnosis has been referenced in criminal cases as early as 1992. *See, e.g.: State v Lamure*, 846 P.2d 1070, 1073 (N.M. App. 1992) (Defendant presented expert testimony about his homosexual hebephilia, which causes him to be sexually attracted to male adolescents); *U.S. v. Polizzi*, 549 F.Supp.2d 308, 337-38 (E.D.N.Y. 2008) (State’s expert diagnosed defendant with, *inter alia*, Paraphilia NOS (sexual interest in adolescents)); *U.S. v C.R.*, 792 F.Supp.2d 343, 408 (E.D.N.Y. 2011).

It is certainly true that Paraphilia NOS (hebephilia) has been frequently diagnosed and discussed in SVP cases. That is the result, and

evidence, of its general acceptance and application. It has been assigned to respondents in civil commitment cases, both state and federal, across the United States by many different experts.<sup>8 9</sup>

---

<sup>8</sup> See e.g., *In re Martinelli*, 649 N.W.2d 886, 890-891 (Minn. App. 2002) (Dr. Fox and Dr. Alberg); *In re Civil Commitment of V.A.*, 813 A.2d 1252, 1254 (N.J.Super.A.D. 2003) (Dr. LoBiondo); *In re Johnson*, 85 P.3d 1252, 1255 (Kan. App. 2004) (Dr. Huerter); *In re Civil Commitment of A.H.B.*, 898 A.2d 1027, 1030 (N.J.Super.A.D. 2006) (Dr. Zeiguer); *In re Hehn*, 745 N.W.2d 631, 633 (N.D. 2008) (Drs. Belanger and Sullivan); *State v. Donald N.*, 881 N.Y.S.2d 542, 544 (N.Y.A.D. 2009); *People v McRoberts*, 101 Cal.Rptr.3d 115, 117 (Cal.App. 2009) (Dr. Musacco); *In re Hanenberg*, 777 N.W.2d 62, 63 (N.D. 2010) (Dr. Sullivan); *In re Commitment of Rachel*, 782 N.W.2d 443, 450 (Wis.App. 2010) (Dr. Harasymiw); *In re G.R.H.*, 793 N.W.2d 460, 468 (N.D. 2011) (Dr. Coombs); *U.S. v Wetmore*, 766 F.Supp.2d 319, 329 (D.Mass. 2011) (Dr. Prentky); *In re Williams*, 253 P.3d 327, 330 (Kan. 2011) (Dr. Reid); *In re Berg*, 342 S.W.3d 374, 379 (Mo.App. S.D. 2011) (Dr. Leavitt); *In re Civil Commitment of Navratil*, 799 N.W.2d 643, 648 (Minn.App. 2011) (Dr. Hoberman).

<sup>9</sup> A party may not cite to an unpublished opinion as authority. GR 14.1(a). The following unpublished cases are presented as evidence of the widespread use of Paraphilia NOS (hebephilia) by experts across the U.S., and not for legal authority: *People v. Williams*, 2003 WL 22953646 (Cal.App. 1 Dist. 2003) (Dr. Vogensen); *State v. Piert*, 2003 WL 22994535 (Ohio App. 11 Dist. 2003) (Dr. Fabian); *People v Griego*, 2005 WL 605061 (Cal.App. 2 Dist. 2005) (Dr. Hupka); *Detention of Broer v State*, 2005 WL 894877 (Wn. App. Div. 1, 2005) (Dr. Wheeler); *In re Detention of Atwood*, 2005 WL 974042 (Iowa App. 2005) (Dr. Gratzler); *Donaghe v. State*, 2005 WL 1845669 (Wn. App. Div. 2, 2005) (Dr. Dreiblatt); *Com. v Connolly*, 2006 WL 620666 (Mass.Super. 2006) (Dr. Rouse-Weir); *In re Detention of Miller*, 2006 WL 1896293 (Iowa App. 2006) (Dr. Doren); *In re Detention of Risdal*, 2006 WL 1896255 (Iowa App. 2006) (Dr. Doren); *In re Commitment of Staats*, 2007 WL 189086 (Wis.App. 2007) (Dr. Schmitt); *In re E.G.W.*, 2007 WL 397033 (N.J.Super.A.D. 2007) (Dr. Zeiguer and Dr. Barone); *In re Commitment of L.L.B.*, 2007 WL 474311 (N.J.Super.A.D. 2007) (Dr. Shnaidman); *In re Commitment of E.J.S.*, 2007 WL 1038894 (N.J.Super.A.D. 2007) (Dr. Shnaidman); *In re Care and Treatment of Dahl*, 2007 WL 2768036 (Kan.App. 2007); (Dr. Kinlen); *In re Commitment of H.T.G.*, 2007 WL 3034257 (N.J.Super.A.D. 2007); (Dr. Carlson); *In re Commitment of R.L.*, 2007 WL 3170071 (N.J.Super.A.D. 2007) (Dr. Shnaidman); *People v. Robledo*, 2007 WL 3360165 (Cal.App. 6 Dist. 2007) (Dr. Sreenivasan); *In re Civil Commitment of R.S.*, 2008 WL 5194450 (N.J.Super.A.D. 2008) (Dr. Barone); *In re Commitment of K.H.*, 2008 WL 4648460 (N.J.Super.A.D. 2008) (Dr. Friedman); *In re Goldhammer*, 2008 WL 2967076 (Minn.App. 2008) (Dr. Hoberman); *In re Commitment of J.E.G.*, 2008 WL 2078193 (N.J.Super.A.D. 2008) (Dr. Foley); *In re Commitment of M.T.H.*, 2008 WL 2050811 (N.J.Super.A.D. 2008) (Dr. Friedman); *Bagarozzy v. Goodwin*, 2008 WL 4416455 (D.N.J. 2008) (Dr. Barone); *In re Commitment of G.B.D.*, 2009 WL 838250 (N.J.Super.A.D. 2009) (Dr. Friedman);

Federal cases Ayers relies on do not support his contention that Paraphilia NOS (hebephilia) is not generally accepted in the relevant scientific community. On July 27, 2006, Congress enacted 18 U.S.C. § 4248 as part of the Adam Walsh Child Protection and Safety Act of 2006 (the Walsh Act). See Pub. L. No. 109-248, § 302, 120 Stat. 587, 620-22. The Walsh Act provides for, *inter alia*, the civil commitment of a “sexually dangerous person” who is in federal custody. 18 U.S.C. § 4248(a)-(d). “Sexually dangerous person” is defined as one who “has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others[.]” 18 U.S.C. § 4247(a)(5). “Sexually dangerous to others” means that “the person suffers from 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.” 18 U.S.C. § 4247(a)(6)

---

*In re Commitment of Tolleson*, 2009 WL 1474730 (Tex.App. 2009) (Dr. Clayton);  
*People v. Wagner*, 2009 WL 1653422 (Cal.App. 2009) (Doctor North);  
*In re Civil Commitment of R.X.W.*, 2010 WL 42432, (N.J.Super.A.D. 2010) (Dr. McCall);  
*In re Civil Commitment of J.C.*, 2010 WL 694210 (N.J.Super.A.D. 2010) (Dr. Stanzione);  
*In re Commitment Of G.Z.*, 2010 WL 2195703 (N.J.Super.A.D. 2010) (Dr. Harris);  
*In re Commitment of Ortiz*, 2010 WL 2854249 (Tex App. 2010) (Dr. Clayton);  
*In re M.N.A.*, 2010 WL 5464299 (N.J.Super.A.D. 2010) (Dr. Zavalis);  
*In re K.H.*, 2010 WL 5376854 (N.J.Super.A.D. 2010) (Drs. Goldwaser and McCall);  
*In re Commitment of Conard*, 2011 WL 3903287 (Minn.App.,2011) (Dr. Aslsdurf);  
*U.S. v Carta*, 2011 WL 2680734 (D.Mass.,2011) (Dr. Phenix);  
*In re Commitment of G.X.R.*, 2011 WL 5137839 (N.J.Super.A.D.,2011) (Dr. Harris)

(emphasis added). The act does not further define the phrase “serious mental illness, abnormality or disorder.”

In *United States v Abregana*, 574 F.Supp.2d 1145 (D. Haw. 2008), the trial court heard testimony from three experts: Dr. Doren for the government, and Drs. Barbaree and Rosell for the defense. Dr. Doren diagnosed Abregana with Paraphilia NOS (hebephilia). 574 F.Supp.2d at 1150 -1151. Dr. Barbaree agreed with Dr. Doren. *Id.* at 1153. Dr. Rosell disagreed and testified that the diagnosis was not in the DSM. *Id.*

Significantly, Dr. Barbaree, one of Abregana’s experts, testified that “hebephilia is known in the field as indicating a sexual interest in post-pubescent individuals.” *Id.* Though he acknowledged some controversy, Dr. Barbaree testified that “there are authorities in the field who consider it a mental disorder, and . . . it has been part of the literature for a number of decades.” *Id.* Dr. Barbaree has co-authored a book chapter that characterizes hebephilia as a mental disorder. *Id.* He testified that Hebephilia is not as serious a condition as other paraphilias. *Id.*

The trial court found that: (1) Abregana suffered from paraphilia NOS; (2) his specific paraphilia was “hebephilia, which involves an intense arousal to adolescents[;] and (3) the petitioner did not prove that Abregana’s condition constituted a serious mental disorder under the federal act. *Id.* at 1153-54. That holding does not help Ayers. The court

merely found that Mr. Abregna's disorder did not meet the Walsh Act's undefined standard of "serious mental illness, abnormality or disorder[.]" 18 U.S.C. § 4247(a)(6). Washington State has the power to craft its own meaning of "mental illness" and has done so differently than has the Walsh Act. *Hendricks*, 521 U.S. at 359; RCW 71.09.020(8). If anything, *Abregana* stands for the proposition that Paraphilia NOS (hebephilia) is an accepted mental disorder involving deviant arousal to adolescents.

*United States v. Shields*, 2008 WL 544940 (D. Mass. 2008) is another Walsh Act case cited by Ayers. Mr. Shields moved to exclude evidence about hebephilia. The government offered the opinion of Dr. Niklos Tomich that Shields suffered from hebephilia, and presented little else. *Id.* at 1-2. In excluding evidence of the diagnosis, the court noted that it received no peer-reviewed literature or other materials and concluded that: "The government has not provided persuasive expert evidence that there is a mental illness, abnormality, or disorder named hebephilia." *Id.* at 2.

It is clear that the government failed to produce available evidence supporting the recognition and use of the diagnosis. Significantly, because of shortcomings in the response by the government, the trial court was unaware that "hebephilia" is a descriptor for a diagnosis of Paraphilia NOS:

The government argues that, in some circumstances, hebephilia falls within a category within the DSM-IV: Paraphilia Not Otherwise Specified (Paraphilia-NOS). As a threshold matter, Dr. Tomich does not specifically diagnose Mr. Shields with Paraphilia NOS; his diagnosis is limited to pedophilia and hebephilia. While the government's position may be true in some circumstances, this Court has an inadequate record for determining how the psychiatric community determines what may properly be included within the Paraphilia NOS category.

*Id.*<sup>10</sup>

Given the paucity of information that the *Shields* court had regarding the diagnosis, this case does not support Ayers' contention that Paraphilia NOS, sexually attracted to adolescents, is not generally accepted. Ayers has not established that Dr. Doren utilized a novel scientific methodology, the trial court below did not abuse its discretion, and this Court should affirm the order denying Ayers' CR 60(b) motion.

**E. Antisocial Personality Disorder Is A Constitutionally Sufficient Basis For Ayers Commitment**

Ayers argues that another mental disorder with which Dr. Doren diagnosed him, Antisocial Personality Disorder (APD), violates due process because it is too imprecise to provide a basis for his commitment. AOB at 34-39. He contends that *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), strongly implies that civil

---

<sup>10</sup> Ayers mistakenly represents that "Dr. Doren testified for the State that Shields had a mental disorder called 'hebephilia'." AOB at 31. In fact, it was Dr. Tomich. Had Dr. Doren been the expert, the court surely would have had more accurate information and would have learned that "hebephilia" is a descriptor for a Paraphilia NOS disorder.

commitment cannot be based on APD, and that *Hendricks* and *Crane* suggest this as well. Ayers' argument was previously rejected by our Supreme Court. *In re Young* 122 Wash.2d 1, 37-38 n.12, 857 P.2d 989 (1993) ("This argument belies a careless reading of the *Foucha* facts.").

*Foucha* addressed the constitutionality of a Louisiana statute that allowed the indefinite detention of persons who, although no longer mentally ill or insane, were dangerous to themselves or others. Discharge after the initial commitment was dependant not upon a restoration of sanity or mental health, but upon the defendant's ability to demonstrate that he presented no danger to himself or others. The defendant bore the burden of showing he was no longer dangerous.

Foucha, who had been found not guilty by reason of insanity, was later found to be no longer suffering from a "mental disease or illness." *Id.* at 447. A doctor testified, however, that Foucha had an "antisocial personality [as opposed to Antisocial Personality Disorder], a condition which is not a mental disease and is not treatable" and that he would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or other people." *Foucha*, at 445.

The *Foucha* court, therefore, began with the premise that Foucha was *not* mentally ill. All parties agreed on this. Therefore, it was not necessary for the court to 1) decide whether an "antisocial personality"

was a form of mental illness or 2) indicate what constituted a mental illness. The Court did not decide those questions or hold that Antisocial Personality Disorder does not constitute a mental disorder.

Therefore, *Foucha* did not decide whether Antisocial Personality Disorder could be the basis for civil commitment, because that question was not before the Court. *See Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003) (*Foucha* does not preclude civil commitments based on a diagnosis of APD); *Hubbart v. Superior Court*, 969 P.2d 584 (Cal. 1999) (“Nothing in . . . *Foucha* as a whole, purports to limit the range of mental impairments that may lead to the “permissible” confinement of dangerous and disturbed individuals.”).

Ayers also relies on *Hendricks* and *Crane*. Neither supports Ayers’ argument. Ayers’ modified quotation from *Hendricks* is misleading and reads as though the concurring opinion by Justice Kennedy found APD an insufficient basis for civil commitment. AOB at 34.<sup>11</sup> But *Hendricks* did nothing of the kind. Ayers employs the same technique with *Crane*, with the same results. AOB at 34-35. *Crane* does not hold that APD is an insufficient basis for civil commitment, either. Ayers’ conclusion, therefore, is grossly misleading: “[T]he Supreme Court has

---

<sup>11</sup> Ayers was perhaps trying to illustrate his belief that Justice Kennedy’s concern had come to pass, but the technique could lead to a misunderstanding about what the case actually says.

twice suggested (and perhaps once concluded) . . . antisocial personality disorder is simply too imprecise and overbroad a diagnosis to survive constitutional scrutiny.” AOB at 38.

The issue is not whether APD, in general, provides a sufficient basis for commitment, but whether it does in this particular case. And it does in this case because the State proved beyond a reasonable doubt that Ayers’ APD: (1) Causes him serious difficulty controlling his sexually violent behavior; and (2) that Ayers’ APD, independently and in combination with his Paraphilia NOS (hebephilia) disorder, makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. CP at 23, CL 5-6.

The SVPA, by requiring evidence beyond a reasonable doubt of a condition that causes serious difficulty controlling sexually violent behavior, and which makes the person likely to commit future violent offenses, provided Ayers with full due process protections against an erroneous or arbitrary commitment.

This Court has affirmed a civil commitment based on diagnoses of APD and one other personality disorder, where each constituted an alternative means for establishing a mental disorder. *In re Detention of Sease*, 149 Wn. App. 66, 79-80, 201 P.3d 1078 (2009). And, persuasive authority has held that APD is sufficient to support a sexual predator

commitment. See, e.g., *In re Commitment of Adams*, 588 N.W.2d 336, 341 (Wis. App. 1998); *In re Detention of Barnes*, 689 N.W.2d 455, 459-60 (Iowa 2004) (neither *Hendricks* nor *Crane* precludes commitments based on APD); *In re Shafer*, 171 S.W.3d 768, 771 (Mo. App. S.D. 2005); *In re G.R.H.*, 711 N.W.2d 587, 595 (N.D. 2006) (commitment based on APD satisfied due process requirements of *Crane*); *Murrell v State*, 215 S.W.3d 96, 108 (Mo. 2007); *In re Wolff*, 796 N.W.2d 644, 646 (N.D. 2011).

The trial court below found APD to be a sufficient basis for Ayers' commitment. CP at 21, FF 15c; CP at 23, CL 5-6. Therefore, Ayers' commitment should be affirmed even if this Court finds merit in his arguments about the Paraphilia NOS (hebephilia) diagnosis.

**F. Ayers Has Not Established That He Received Ineffective Assistance From His Trial Counsel**

Ayers argues that he received ineffective assistance from his trial counsel and this Court can vacate the commitment order under CR 60(b)(11). But Ayers waived this issue by not raising it in his direct appeal.

Even if Ayers did not waive his ineffective assistance of counsel claim, he has failed to establish that such a claim is cognizable under CR 60(b)(11). Ayers cites two cases for the proposition that he can raise the ineffective assistance claim through CR 60(b)(11). The first is *Graves*

*v. P.J. Taggares Co.*, 25 Wn. App. 118, 605 P.2d 348 (1980). In *Graves*, an action for damages following a motor vehicle accident, the defendant's attorney waived jury without his client's knowledge. The Court held:

We find that under the peculiar facts of this case, where the defendant demanded a jury as provided by rule, and it is of constitutional dimensions, that in a civil case where defendant's counsel, admittedly without any authority or consent and contrary to the wishes of his client, waives the right to a previously demanded jury trial, a vacation of judgment is warranted under CR 60(b)(11).

*Graves*, 25 Wn. App. at 126. *Graves* does not hold that ineffective assistance of counsel claims can be raised under CR 60(b)(11). Its holding is limited to that case's "peculiar facts" and does not support Ayers' argument. Likewise, Ayers' second case, *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040 (1996), is devoid of any holding supporting Ayers' argument.

If the Court considers Ayers' claim, the record shows that Ayers' trial counsel was not ineffective by not requesting a *Frye* hearing.

The U.S. Supreme Court established the test for analyzing ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show ineffective assistance of counsel, the claimant must establish that: 1) Counsel's performance fell below an objective standard of reasonableness; and 2) but for counsel's error, there is a reasonable probability that the outcome

would have been different. 466 U.S. at 687, 694. Washington courts have adopted the *Strickland* test. See, e.g., *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *In re Smith*, 117 Wn. App. 611, 72 P.3d 186 (2003). It applies to respondents in SVP proceedings. *Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's performance was effective. *State v. Red*, 105 Wn. App. 62, 66, 18 P.3d 615 (2001), *review denied*, 145 Wn.2d 1036 (2001).

Ayers makes two contradictory claims: (1) His counsel should have been aware at the 2005 trial that the diagnosis was novel and not generally accepted; (AOB at 19) and (2) "much of the criticism of Dr. Doren's diagnoses was not published until after Mr. Ayers's mid-2005 trial and therefore . . . extraordinary circumstances justify this collateral attack on the judgment." AOB at 13.

Ayers' counsel was not ineffective because, as argued herein, Ayers' diagnosis is not novel and is not subject to *Frye*. Even if it were, Ayers has failed to make a threshold showing that the diagnosis is not generally accepted in the relevant scientific field. Additionally, Ayers' APD diagnosis is not too imprecise to support civil commitment, so Ayers' counsel had no duty to challenge it as such.

Furthermore, in light of the testimony by Ayers' own expert, a request by Ayers' counsel for a *Frye* hearing would have been absurd. Dr. Wollert, though he initially denied doing so, had himself diagnosed Ayers with Paraphilia NOS, sexually attracted to adolescents. CP at 14, FF 14b(3); 9RP at 1288-91. Because Ayers' own expert had made that diagnosis, Ayers' trial counsel had no grounds for asserting that the diagnosis was not generally recognized by experts in the field in which Dr. Wollert practiced. Ayers' counsel was not ineffective.

#### IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the trial court's order denying Ayers' CR 60(b) motion.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of March, 2012.

ROBERT M. MCKENNA  
Attorney General



---

MALCOLM ROSS, WSBA #22883  
Assistant Attorney General  
Attorneys for Petitioner State of Washington

NO. 42335-9

WASHINGTON STATE COURT OF APPEALS,  
DIVISION II

In re the Detention of:  
  
LENIER RENE AYERS,  
  
Appellant  
  
v.  
  
STATE OF WASHINGTON,  
  
Respondent.

DECLARATION OF  
SERVICE

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 APR -9 PM 12:00  
BY  
JACKSON

I, Elizabeth Jackson, declare as follows:

On April 9, 2012, I hand delivered true and correct cop(ies) of

Respondent's Brief and Declaration of Service, addressed as follows:

Maureen Cyr  
Washington Appellate Project  
1511 Third Ave, Suite 701  
Seattle, WA 98101-3635

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

DATED this 9<sup>th</sup> day of April, 2012, at Seattle, Washington.

  
ELIZABETH JACKSON

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 APR -9 PM 4:54

**ORIGINAL**