

**FILED**

NOV 29, 2012  
Court of Appeals  
Division III  
State of Washington

NO. 27194-3

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

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In re the Detention of:

RONALD D. LOVE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**OPENING BRIEF OF RESPONDENT**

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ROBERT M. MCKENNA  
Attorney General

SARAH SAPPINGTON  
Senior Counsel  
WSBA #14514  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2019

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## I. ISSUES PRESENTED

- A. **Where Love filed his CR 60(b) motion three years after his commitment as a sexually violent predator, and where substantially the same the evidence had been presented in his commitment trial, did the trial court properly deny relief?**
- B. **Where Love's show cause hearing pursuant to RCW 71.09.090 occurred three years after enactment of the 2005 amendments to RCW 71.09.090, did the trial court properly apply those amendments to him?**
- C. **Where the Washington State Supreme Court has upheld the constitutionality of the 2005 amendments to RCW 71.09.090, are those amendments properly applied to Love's case?**

## II. STATEMENT OF THE CASE

Ronald Love is a mentally disordered rapist with a history of sexual assaults against both men and women spanning 16 years, dating back to 1975. *In re the Detention of Ronald Love*, 2007 WL 1087558 (Wash. Ct. App. April 12, 2007) at \*1. In 2001, the State filed a petition to civilly commit Ronald Love (Love) as a sexually violent predator (SVP). *Id.* The matter was tried to the bench and, on August 18, 2005, the court entered a written decision committing Love as an SVP. *Id.*; CP at 824-831. Love appealed and this Court affirmed his commitment in an unpublished opinion. *Id.*

Since his commitment, Love's case has been reviewed on an annual basis as required by RCW 71.09.070. On July 13, 2007, DSHS submitted an annual review of Love's mental condition, including his

progress in treatment. That evaluation indicated that Love was not participating in treatment, and that Love “makes it clear he is not interested in any aspects [of the program] that involve treatment.” CP at 653; *see also* CP at 1194 (“It is undisputed that the Respondent has not participated in treatment since being committed on August 18, 2005.”) Because Love did not waive his right to a hearing on the issue of release, the State set the matter for hearing. CP at 741; 742-786. Love responded by filing both a petition for unconditional discharge<sup>1</sup> (CP at 547-578) and a motion to set aside the underlying order of commitment pursuant to CR 60(b).CP at 452-546. In support thereof, he filed more than 150 pages of declarations, articles, and depositions. CP at 295-451.

On May 27, 2008, after hearing argument of the parties, the Franklin County Superior Court entered an Order on Show Cause Hearing (CP at 1193-1195) and an Order Denying Respondent’s Motion to Set Aside Judgment (CP at 7-8). In its Order on Show Cause Hearing, the trial court, applying the 2005 amendments to RCW 71.09.090 to Love, determined that Love was not entitled to a new trial. The trial court found that Love’s submissions had failed to meet the requirements of amended RCW 71.09.090, and that Love “has failed to establish that his condition has changed because of a significant physiological event or a change

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<sup>1</sup> His Petition also requested conditional release to a less restrictive alternative, a fact not pertinent to this appeal.

brought about by a positive response to continuing participation in sexual offender treatment.” CP at 1195. In the Order Denying Respondent’s Motion to Set Aside Judgment, the court denied his requests for a new trial pursuant to CR 60(b), finding “that the motion was not brought within a reasonable time and that most of the information presented was available at the time of trial and would not have changed the outcome.” CP at 7. Love appealed. CP at 822-823.

In 2008, while this case was pending, the State Supreme Court accepted review of *In re the Detention of David McCuiston*, Supreme Court No. 81644-1, addressing the constitutionality of the 2005 statutory amendments to RCW 71.09.090. Because the constitutionality of those amendments was one of two central issues in Love’s appeal, the State filed a Motion To Redesignate and Stay in this Court, arguing that 1) the portion of Love’s appeal addressing review of the trial court’s order under RCW 71.09.090 should be redesignated as a motion for discretionary review; and 2) consideration of that matter should be stayed pending resolution of *McCuiston*. At the same time, the State conceded that Love had an appeal as of right as it pertained to the CR 60(b) motion. The Commissioner, treating the State’s motion to redesignate as a motion to bifurcate, denied that portion of the State’s motion but stayed the entire matter pending issuance of *McCuiston*. Commissioner’s Ruling, dated

May 8, 2009. Love filed a motion to modify the Commissioner's ruling, which was denied. Order Denying Motion To Modify Commissioner's Ruling dated July 24, 2009.

By letter dated September 13, 2012, this Court informed the parties that, the *McCuiston* mandate having issued, the stay in this case had been lifted. The Court indicated that the parties would be permitted to file supplemental briefing regarding the applicability of *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012) to this case. By letter dated October 22, 2012, Love declined to file supplemental briefing. Because the State has never filed a brief responding substantively to all claims in Love's January 9, 2009 Opening Brief, it now files this Opening Brief, addressing both the affects of *McCuiston* and the merits of Love's CR 60(b) claims.

### III. ARGUMENT

Love appeals from two orders of the trial court, the first denying his Motion to Set Aside Judgment in this case pursuant to CR 60(b), and the second applying the 2005 statutory amendments to RCW 71.09.090 to Love and denying his request for a new trial. With regard to his challenge to the trial court's order denying his CR 60(b) motion, he first disputes the trial court's determination that his motion was not brought "within a reasonable time." Br. of App. at 9; CP at 7. Second, he argues that,

substantively, he was entitled to relief pursuant to CR 60(b)(3) or, in the alternative, CR 60(b)(11). With regard to the trial court's application of the 2005 amendments to RCW 71.09.090 to him, he first argues that those amendments should not have been applied to him because his initial probable cause hearing occurred in 2001. App. Br. at 17-21. Finally, he argues that the 2005 amendments violate both the due process and separation of powers clauses of the United States Constitution. App. Br. at 21-29.

All of Love's potential claims fail on their merits. First, the trial court correctly denied Love's CR 60(b) challenge when it determined that Love's claim was time barred, and that none of the information presented would have changed the result of the initial trial. Second, the trial court properly applied the 2005 amendments to RCW 71.09.090 to Love. As has been determined by the Washington State Supreme Court, those amendments withstand constitutional scrutiny. *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012). Nor was their application to him retroactive under *In re Elmore*, 162 Wn.2d 27, 168 P.3d 1285(2007). His arguments should be rejected and the trial court's orders affirmed.

**A. Love Is Not Entitled To Relief Pursuant To CR 60(b)(3)**

**1. Standard of Review**

On appeal, a decision on a CR 60(b) motion to vacate is reviewed for abuse of discretion. *Vance v. Offices of Thurston County Comm'rs*, 117 Wn. App. 660, 671, 71 P.3d 680 (2003), *review denied*, 151 Wn.2d 1013, 88 P.3d 965 (2004). A court abuses its discretion only when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Id.*, 117 Wn. App. at 671, 71 P.3d 680. "An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial [and] not the impropriety of the underlying judgment." *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450–51, 618 P.2d 533 (1980).

**2. Legal Standard To Be Applied By The Trial Court**

Pursuant to CR 60(b)(3), the court may relieve a party or his legal representative from a final judgment, order, or proceeding based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [CR]59(b)."<sup>2</sup> A new trial on the ground of newly discovered evidence will only be granted if the moving party demonstrates that the evidence (1) will probably change the result of the trial, (2) was discovered after trial, (3) could not have been

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<sup>2</sup> In his lengthy Motion below, Love did not specify under what subsection of CR 60(b) he pursued relief. CP at 452-551. As such, the State attempted to identify the possible CR 60(b) claims he might be attempting to make (CP at 80) and address each of those in turn. CP at 81-96. On appeal, he raises only CR 60(b)(3) and (11).

discovered before trial even with the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *State v. Swan*, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990). Failure to satisfy any one of these five factors justifies denial of the motion. *Swan*, 114 Wn.2d at 642; *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). The moving party may not merely allege diligence but rather must set forth facts explaining why the evidence was not available for trial. *Vance v. Offices of Thurston County Com'rs*, 117 Wn. App. 660,671, 71 P.3d 680 (2003). For evidence to be "newly discovered" under CR 60(b)(3), it must have existed when the order was entered, not later. *In the Matter of the Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003). Trial and summary judgment proceedings provide ample opportunity for parties to present evidence and if evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to present that evidence. *Wagner Dev., Inc. v. Fid. & Deposit Co.*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999); *see also Adams v. W. Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989) (holding that the plaintiff's realization that an expert's first declaration was insufficient to defeat summary judgment does not qualify a second declaration as newly discovered evidence under CR (59)). Because Love could not demonstrate that he has met the legal

requirements of CR 60(b)(3), his request to vacate the original judgment was properly denied.

### 3. Love's CR 60(b)(3) Motion Was Time Barred

Pursuant to CR 60(b), a motion for relief pursuant to that rule "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." Even under the most charitable interpretation of that rule, Love failed to comply with that requirement when he brought his motion almost three years after his commitment, where there had been no change in his condition, and where the vast majority of the information he sought to present was or could easily have been presented at the time of trial.

The trial court correctly found that Love's CR 60(b) motion was time barred. Love now seeks to avoid this result by arguing that the one-year limitation refers to one year from his annual review, rather than to his commitment order, and poses a number of equitable arguments which, he argues, weigh against the trial court's determination. App. Br. at 10-13. There are two problems with this argument. First, Love's own motion was entitled "Motion To Set Aside Judgment," and asked the trial court "for an order setting aside the *original judgment* entered in the above-entitled cause number..." CP at 452 (emphasis added). Moreover, throughout his Motion, Love references his original commitment and not, as he now

argues, his most recent annual review. *See e.g.* CP at 455 (“the content of Dr. First’s clearly reveals [sic] that the mental health evidence provided by the State’s expert (Dr. Robert Phoenix [sic]) *in the Respondent’s original commitment trial...*”); *Id.* (the court should “grant him a new trial based on the clarifying information from Dr. First that was not available to him *at the time of trial.*”); *Id.* at 457 (“The Respondent believes that the decision in the earlier misuses in Mr. Love’s trial... [sic]...Furthermore, Dr. Phoenix [sic] also espoused actuarial prediction erroneously...”)(all emphases added). Because it is clear that Love’s motion focused on his original commitment trial, not, as he now argues, a later order or evaluation, this argument fails.

Nor does arguing that he was in fact contesting “the annual commitment evaluation and order” (App. Br. at 13) save him, in that to so argue effectively concedes that relief under CR 60(b) is not available to him. CR 60(b) is available to persons committed as sexually violent predators seeking to vacate their underlying orders of commitment. *State v. Ward*, 125 Wn. App. 374,379-80, 104 P.3d 751(2005). Where, however, the order being challenged is not the actual commitment order but rather a post-commitment order arising from an annual review hearing that does not result in the final unconditional release of the SVP, such an order is not final, and may not be challenged by means of a CR 60(b)

motion. *In re Detention of Mitchell*, 160 Wn. App. 669, 677, 249 P.3d 662 (2011).<sup>3</sup> Thus, by claiming that, contrary to the clear language of his motion below, he was in fact challenging an annual review or order, he effectively concedes that CR 60(b) is not available to him.<sup>4</sup> In any case, Love has not shown that the trial court abused its discretion by determining that his motion was time barred.

**4. Love Failed to Make the Requisite Evidentiary Showing Under CR 60(b)(3)**

**a. Trial Testimony Regarding Diagnosis**

At trial, Love presented the testimony of two experts, Drs. Richard Wollert and Robert Halon. The State presented the testimony of Dr. Amy Phenix. All testified regarding the diagnosis of Paraphilia Not Otherwise Specified (NOS) Nonconsent.

According to the DSM-IV, the essential features of a Paraphilia are:

- A. Recurrent, intense sexually arousing fantasies, sexual urges or behaviors generally involving:

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<sup>3</sup> The *Mitchell* decision came out two years after the State's 2009 Motion to Redesignate and Stay in this case. There, the State agreed that Love was entitled to review as of right on the CR 60(b) issue. That concession, in light of *Mitchell*, appears to have been in error. Regardless of the standard applied (obvious/probable error vs. abuse of discretion), Love cannot demonstrate that he was entitled to CR 60(b) relief.

<sup>4</sup> Nor does it make any sense for him to now argue that his motion was timely "because it was within one year of the annual commitment evaluation and order." App. Br. at 13. Because his CR 60(b) motion (3/11/2008, CP at 452-546) was filed before entry as the "annual commitment...order," (5/27/2008 CP at 1193-95), it cannot reasonably be seen as challenging an order that did not exist at the time the motion was filed. Nor is CR 60(b) available to challenge an "annual commitment *evaluation*."

- 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 6 months.

B. The behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

DSM-IV-TR at 566. While certain paraphilias (such as Sexual Sadism, Pedophilia, or Exhibitionism) are specified in the DSM-IV-TR, there is the residual category Paraphilia NOS category that is “included for coding Paraphilias that do not meet the criteria for any of the specific categories.” DSM-IV-TR at 576.

Dr. Phenix testified that Paraphilia NOS Nonconsent is commonly accepted and assigned to individuals by experts who practice in her field. CP at 99-100. She testified that “most rapes are not paraphilic disorders” but rather are the result of “a person who breaks the law and takes sex from another person.” *Id.* at 100.<sup>5</sup> However, she distinguished those who, like Love, suffer from a paraphilic disorder:

But in rare instances there are individuals who have recurrent, intense sexually-arousing fantasies and urges or behaviors that result in a pattern and duration of rape behaviors, sexual-assault behaviors, and it's that pattern and duration that actually indicates sexual arousal to that

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<sup>5</sup> Exhibit A to the State's Memorandum in Response To Respondent' Motion To Set Aside Judgment Pursuant To CR 60(b) (CP at 97-131) contained relevant portions of Dr. Phenix's trial testimony.

particular forced sex versus the man who rapes once, and this person is someone who is aroused to consenting sex, but couldn't get that and decided to take it.

And so in my training, we have learned and those of us who conduct these types of evaluation being trained by individuals like Dr. Fred Berlin and others, that we need to clinically distinguish between the rapist and the paraphilic rapist, and I believe that's what I have done in this case.

*Id.* at 100-101. Dr. Phenix testified that a rape disorder had been considered for inclusion in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Transcript Revision (DSM-IV-TR) but had ultimately been rejected because of opposition by groups concerned that such a diagnosis would create a mental defense in rape prosecutions.

*Id.* at 99. Dr. Phenix testified that the diagnosis she assigned to Love was nevertheless commonly used and accepted, as evidenced by the DSM-IV Casebook, which is published by the American Psychiatric Association (APA) and instructs clinicians to diagnose paraphilic rapists as having Paraphilia NOS. *Id.* at 101-102.

In response to questioning by the State, Dr. Phenix then went through Love's history of sexual offending and outlined the factors that contributed to her conclusion that Love is a paraphilic, or mentally disordered, rapist. CP at 105-122. She cited, for example, evidence that Love had developed "abnormal sexual drives for nonconsenting sex" as early as 16 years old, at which age he had been convicted of forcing a six-

year-old boy to orally copulate him. *Id.* at 106. She noted that conduct-disordered children sometimes display such behavior, but that it typically stops when they reach adulthood, whereas Love had continued committing forcible rapes well into his adult years. *Id.* at 172. His rapes were each committed soon after he had been released from custody and involved threats and increasing levels of violence against the victims. *Id.* at 108-122. He had maintained his arousal even while inflicting pain and humiliation on his victims. *Id.* at 182, 185. Dr. Phenix also saw evidence that Love followed an internal “deviant script” when he raped two victims in the same night. *Id.* 116. His behaviors were strikingly similar and he orally, anally and vaginally raped each victim, in that order. *Id.* She discussed the evidence demonstrating that Love’s Paraphilia impairs his volitional controls and causes him serious difficulty in controlling his behavior. *Id.* at 124-125, 128-129.

Likewise, Love elicited considerable testimony regarding the diagnosis of Paraphilia NOS Nonconsent from his own experts. Dr. Halon testified at length about his belief as to why a specific rape diagnosis was not included in the DSM. CP at 139-141.<sup>6</sup> Under cross-examination, he agreed with Dr. Phenix that groups opposed to inclusion of a rape diagnosis in the DSM had expressed concern to the APA – which

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<sup>6</sup> Exhibit C to the State’s Memorandum (CP at 138-151) contained relevant pages from Dr. Halon’s testimony at the original commitment trial.

Dr. Halon characterized as “a tremendous amount of pressure” – about the potential misuse of such a diagnosis in criminal cases. *Id.* at 143-144. And though he testified on direct that the diagnosis “doesn’t exist,” Dr. Halon conceded on cross that in virtually all of male rapist SVP cases in which he had been involved, the Paraphilia NOS diagnosis had been assigned. *Id.* 139, 145-146. He was aware that renowned experts such as Dr. Barbaree and Dr. Berlin used it, as had Dr. Wollert, Love’s other expert. *Id.* at 147-149.

Dr. Wollert testified there was “quite a debate going on in the field right now about the merits” of a paraphilic rape diagnosis. CP at 154.<sup>7</sup> He too discussed the history of how the diagnosis had not been included in the DSM. *Id.* at 153-157. He testified that it “was rejected because it might diminish criminal responsibility.” *Id.* at 157. He admitted it had “been applied to those convicted of rape,” but called its use “controversial.” *Id.* at 156. Dr. Wollert discussed “more recent research” about the diagnosis that he portrayed as calling it into question. *Id.* at 159-160. He testified that his skepticism about the diagnosis was based in part on “a huge amount of research” over the last three to five years, as well as “lots of personal research efforts myself[.]” *Id.* at 161. On cross, Dr. Wollert admitted that he

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<sup>7</sup> Exhibit D to the State’s Memorandum (CP at 152-197) contained relevant pages from Dr. Wollert’s testimony at the original commitment trial.

had assigned the diagnosis of Paraphilia NOS Nonconsent to individuals and had testified under oath that it was a valid diagnosis. *Id.* at 194

**b. The Acceptance Of The Diagnosis Of Paraphilia NOS Nonconsent Is Well Established**

The trial court properly determined that most of the information submitted by Love “was available at the time of trial and would not have changed the outcome of the trial.” CP at 1194. At his motion hearing in the trial court, Love argued, under a variety of theories, that the diagnosis of Paraphilia NOS Nonconsent in this case was improper. This is, however, an old argument. Indeed, it was made and rejected in the context of the first SVP case to come before our State Supreme Court, *In re Detention of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). There, Young (and Cunningham, his co-appellant) argued that Paraphilia NOS: Rape was not a legitimate diagnosis. Rejecting this argument, the Court wrote: “The fact that pathologically driven rape, for example, is not yet listed in the DSM-III-R does not invalidate such a diagnosis.” *Young*, 122 Wn. 2d at 28, citing Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L.Rev. 709, 733 (1992). Noting that “none of the experts at Mr. Young’s and Mr. Cunningham’s commitment trials challenged the acceptance of this diagnostic category,” the Court went on to observe that:

[A]ccording to the expert testimony, rape as paraphilia falls within the DSM-III-R category of ‘paraphilia, not otherwise specified’ . . . Dr. Steele, an expert for petitioners who testified at both trials agreed that rape is a paraphilia. . . . The article by Doctors Abel and Rouleau<sup>8</sup> reviews the pertinent scientific literature and concludes that “[t]he weight of scientific evidence, therefore, supports rape of adults as a specific category of Paraphilia.”

122 Wn.2d at 29,30, n.6.

Since that time, a diagnosis of Paraphilia NOS (Non-consent) has repeatedly been found sufficient to support commitment as an SVP: *See e.g., In re Stout*, 159 Wn.2d 357, 364, 150 P.3d 86 (2007); *In re Halgren*, 156 Wn.2d 795, 800, 132 P.3d 714 (2006); *In re Thorell*, 149 Wn.2d 724, 72 P.3d 708; *In re Campbell*, 139 Wn.2d 341, 357, 986 P.2d 771 (1999); *In re Paschke*, 136 Wn. App. 517, 520, 150 P.3d 586 (2007); *In re Taylor*, 132 Wn. App. 827, 832, 134 P.3d 254 (2006); *In re Mathers*, 100 Wn. App. 336, 337, 998 P.2d 336 (2000). This argument is without merit.

**c. Love’s Recycling Of Trial Evidence Relating To Diagnosis In His CR 60(b) Motion**

Love argues that Love “presented evidence through...Dr. [Michael] First that science has changed since his commitment trial,” and that Dr. First had “learned in 2006 that people

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<sup>8</sup> Gene G. Abel & Joanne-L. Rouleau, *The Nature and Extent of Sexual Assault*, in *Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender* 9, 18 (W.L. Marshall, et al. eds., 1990)

were being diagnosed with paraphilia incorrectly.” App. Br. at 14. This “newly discovered evidence,” however, was in large part no more than a recycling of the views that were presented at trial, where Love presented the testimony of two experts, and had ample opportunity to cross-examine the State’s expert.

As a preliminary matter it is not at all clear that the “new evidence” Love presented was of a sort contemplated by the Civil Rules. Rather than identifying pertinent facts that might, if presented, have proven material to the litigation, Love simply identified various articles, some by mental health experts and others by lawyers, which make essentially the same arguments that were made at trial. To the extent that the opinion of Dr. Michael First, which Love presented below in support of his position, was “discovered” after trial, Love failed to show why he could not have “discovered” this opinion prior to trial, had he exercised due diligence. Nor did he demonstrate that this opinion “will probably change the result of the trial,” or that it is “material,” as opposed to being merely “cumulative or impeaching.” *Swan*, 114 Wn.2d at 641-42. Moreover, while Dr. First is a prominent psychiatrist, his expertise is not in the field of the evaluation and assessment of sex offenders and he had

no information about the specifics of this case.<sup>9</sup> Finally, because he did not fundamentally disagree with the legitimacy of a diagnosis of paraphilic rape, his views did nothing to undermine the propriety of the decision in this case, or to suggest that a new trial is required.

Dr. First admitted in his deposition that he has no experience at all in the assessment or evaluation of sex offenders and he is not an expert in that field. CP at 209-210. He was not part of the Sexual Disorders work group for either the DSM-IV or the DSM-IV-TR. *Id.* at 214. Aside from the “Use of DSM Paraphilia Diagnosis” article which he is in the process of writing with Dr. Halon, he has never written or published any other articles about the assessment or diagnosis of sex offenders. *Id.* at 209. When he was contacted by an attorney for a respondent in another SVP case, he was provided with very little information. *Id.* at 211-212, 219. Prior to that, he “was not familiar with any of this stuff” or the authors of articles he was given. *Id.* at 212. At the time of his deposition (September, 2007), Dr. First was not familiar with the criteria one would look at to determine whether a rapist is or is not paraphilic. *Id.* at 218. There was no evidence that Dr. First knew anything whatsoever about Love, or indeed had ever heard of him.

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<sup>9</sup> As noted by Appellant, the First deposition was given in a different case (*In re Davenport*, Franklin County Cause No. 99-2-50349-2; CP at 208) having nothing to do with Love. App. Br. at 6, FN 2.

Love argued below that the definition of Paraphilias in the DSM IV and DSM IV-TR was a “mistake,” and based this argument in part on the deposition of Dr. First. This argument is problematic for two reasons: (1) Dr. First did not purport to be speaking for the APA, and (2) the argument is simply incredible on its face. Dr. First conceded that the language in the DSM-IV and DSM-IV-TR permitting diagnosis of a Paraphilia based on the presence of “fantasies, urges *or* behaviors” (emphasis added), “might lead people to make that mistake” CP at 215. The fact that diagnoses of Paraphilia NOS Nonconsent were being made on the basis of “criminally sexual behaviors alone” supposedly first came to his attention in 2006, a full 12 years after publication of the DSM-IV containing the “erroneous” language. In the intervening 12 years between the publication of this “erroneous” definition and Love’s motion, there was no publication by the APA to the effect that the definition of Paraphilia contained in the DSM-IV and DSM-IV-TR is erroneous (*Id.* at 215-216), nor was Dr. First aware of any such publication by anyone on any of the sexual disorder work groups. *Id.* at 216. Indeed, he was unaware of any writings by anyone at all, other than a yet-to-be-published article by himself and Dr. Halon, to the effect that this definition of Paraphilia, in effect since at least 1994, is erroneous. *Id.* He made clear that he did not purport to speak on behalf of the APA (*Id.* at 217), and he

was not aware of any sort of statement by the APA regarding what he and Dr. Halon regard as a misuse of diagnostic categories relating to rape as a Paraphilia. *Id.* at 218. Although he testified that the phrase “nonconsent” in the current definition of Paraphilia is not intended to include a rape victim, he conceded that the APA had never made any sort of statement to that effect. *Id.* at 218.

There was nothing in the deposition that would have required a new trial. Whatever “error” may or may not have occurred in the course of drafting the DSM criteria, all agreed that paraphilic rape exists and could, depending on the facts of the particular case, be an appropriate diagnosis.

This conclusion is nothing new, and does not differ in any significant way from the opinion of the State’s expert at trial. At trial, Dr. Phenix testified that some rapists are paraphilic and some are not. CP at 100-101. Dr. First testified in his deposition that, if a clinician believes that the client is a paraphilic rapist that “it is up to the clinician to substantiate the validity of that diagnosis.” CP at 218. At trial, Dr. Phenix, utilizing her own clinical experience as well as applying guidelines she had been trained to use, did precisely that.<sup>10</sup>

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<sup>10</sup> Dr. First’s deposition has been considered by both Divisions I and II in the context of CR 60(b) motions virtually identical to Love’s. In *In re McGary*, 155 Wn. App. 771, 231 P.3d 205 (2010), Division II upheld the trial court’s denial of McGary’s requests for a new trial pursuant to both CR 60(b) and RCW 71.09.090, referring to “the speculative nature of Dr. First’s testimony given his complete lack of familiarity with McGary’s case. Thus, the trial court properly determined that sufficient facts did not

The trial court properly rejected Love's challenge under CR 60(b)(3). First, none of the information Love sought to present constitutes the sort of "newly discovered evidence" anticipated by the Civil Rules. To the extent that the testimony is in fact "newly discovered," Love failed to demonstrate 1) that it existed at the time of trial; and 2) why due diligence would not have uncovered this "new evidence." Moreover, he failed to demonstrate that the "newly discovered evidence" is material, not-cumulative, or that it would change the result of trial. As failure to meet any one of the *Swan* criteria must result in the request for a new trial being denied (*Swan* at 642; *Go2Net*, 115 Wn. App. at 88), Love's request for a new trial pursuant to CR 60(b)(3) on the issue of diagnosis was properly rejected.

**5. The "New" Evidence Related To Risk Assessment Was Likewise Simply A Recycling Of Testimony Presented At Trial**

**a. Trial Testimony Regarding Risk Assessment**

Love also alleged that he is entitled to a new trial pursuant to CR 60(b)(3) on the issue of risk assessment. Most of his "new evidence," however, was essentially indistinguishable from that presented at trial.

At trial, Dr. Wollert testified extensively regarding the effects of age on risk. CP at 162-192. Dr. Wollert had never met Love and had only read Dr. Phenix's evaluation and a deposition of Dr. Halon. *Id.* at 194.

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support using Dr. First's deposition." 155 Wn. App at 780. See also *In re Mitchell*, 160 Wn.App. 669, 249 P.3d 662 (2011).

Nevertheless, he testified that, using his methods, Love's recidivism risk was only 31%. *Id.* at 189. He arrived at this figure by applying "Bayes Theorem" to data compiled and presented by Dr. Karl Hanson. *Id.* at 176-192. Dr. Hanson had studied 4600 individuals over eight years. *Id.* at 467. Dr. Wollert testified in great detail about his statistical methods and risk assessment. *Id.* at 176-192. He acknowledged that Dr. Hanson had written a letter opining that Dr. Wollert's use of Bayes Theorem "doesn't provide either a general solution to the problem of age-based recidivism predictions, nor does it provide a valid solution to that specific question." *Id.* at 195-196. Dr. Wollert also testified that "the base rates for sexual recidivism are going down." *Id.* at 197.

**b. Love's Recycling Of Trial Evidence Relating To Risk Assessment In His CR 60(b) Motion**

As part of his CR 60(b) motion, Love again relied upon Dr. Wollert. He presented two declarations by Dr. Wollert, and appended to one of them three of Dr. Wollert's papers, only one of which had, at the time of the hearing, been published. CP at 296--436. The gist of Dr. Wollert's arguments is that sexual recidivism decreases with age. One problem with this testimony is that it is virtually indistinguishable from the testimony presented at trial in 2005. Moreover, the vast majority of the articles upon which Dr. Wollert relies in the materials presented for the 2008 Motion were published before the 2005 commitment trial. For

example, he cites to his own 2006 article, within which he cites to Hanson (2002); Harris and Hanson (2004), Hanson (1997), Barbaree (June, 2004), Milloy (2003); Hanson, (May, 2004), Hanson (2002), Hirschi and Gottfredson (1983), Samson and Laub (2003), and Gottfredson (1983).

The other problem with Dr. Wollert's assertions is that Dr. Karl Hanson, upon whose work Dr. Wollert heavily relies, rejects both Dr. Wollert's methodologies and his conclusions. In his Declaration, Dr. Hanson, addressing Dr. Wollert's materials, notes that Dr. Wollert's testimony contains statements that are "demonstrably false," and that those false statements "include both misrepresentations of facts as well as misrepresentations of statistics and research methods." CP at 200. He goes on to note that "Dr. Wollert does not aid the audience in judging the weight to be given his various assertions because he fails to distinguish between peer-supported professional opinion and his own speculations." *Id.* Dr. Hanson concludes by stating that "The estimates of the recidivism rates should be those observed in actual recidivism studies, and not those generated by arithmetic manipulations based on incorrect assumptions, such as those proposed by Dr. Wollert. *Id.* at 203-204.

Love did not fulfill the requirements of CR 60(b)(3). The evidence he presented was not "newly discovered," and indeed, had basically been presented at trial. He did not show how it would "probably change the

result of the trial," was material, or not merely cumulative or impeaching. *Swan*, at 641-42. He was not entitled to a new trial on this basis, and the trial court properly denied his motion.

**B. Love Is Not Entitled To Relief Under CR 60(b)(11)**

Love also now claims that he is entitled to relief pursuant to CR 60(b)(11).<sup>11</sup> CR 60(b)(11) provides that the court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Motions under CR 60(b)(11) "should be confined to situations involving extraordinary circumstances not covered by any other section of the rule." *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982) (citing *State v. Scott*, 20 Wn. App. 382, 580 P.2d 1099 (1978), *aff'd*, 92 Wn. 2d 209, 595 P.2d 549 (1979)). Such circumstances amount to "reasons extraneous to the action of the court or matters affecting the regularity of the proceedings." *Id.* (citing *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 415 P.2d 501 (1966)).

Love's claims did not, however, present any sort of extraordinary circumstances, much less extraordinary circumstances sufficient to trigger review by this court under CR 60(b)(11). First and foremost, the

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<sup>11</sup> Again, this was not an express claim made below, but merely inferred by the State and, accordingly, briefed.

arguments made below were no more than variants of arguments made at the time of trial. Indeed, of the roughly 65 citations contained in his Motion, only a small portion had come into being since his trial. To the extent that the theory about the “error” in the definition of Paraphilia is “new,” it is essentially without foundation, having never been expressed or sanctioned by the body that created the DSM IV and DSM IV-TR, the American Psychiatric Association. The views, then, at the time of his Motion, existed only in a deposition by someone who, by his own admission, was not an expert in the applicable field.

Dr. Wollert, likewise, simply reiterated the views he expressed at trial, with some variations, but those views have been soundly rejected by the person upon whose research he most heavily relies, Dr. Karl Hanson. Love failed to demonstrate his claims issues constitute “extraordinary circumstances” extraneous to the actions of this court.

**C. Love Was Not Entitled To A New Trial Pursuant To RCW 71.09.090**

**1. Standard Of Review**

Orders entered pursuant to RCW 71.09.090(2) are not subject to review as of right; rather, they are subject to discretionary review pursuant to the provisions of RAP 2.3(b). *In re Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999). As such, Love is required, as a preliminary matter, to demonstrate that one of the criteria for review under that rule have been

met. Because he cannot do that, his claims fail. Even if this Court believes that he is entitled to appeal as of right on this issue, his claims still fail, as they have been conclusively resolved by the Washington State Supreme Court.

**2. The Supreme Court's Decision In *In Re Elmore* Does Not Entitle Love To An Evidentiary Hearing**

In 2005, the Legislature enacted amendments to RCW 71.09.090, that portion of the statute which deals with the circumstances under which a committed SVP can obtain a new trial on the issue of conditional or unconditional release. Citing the Supreme Court's decision in *In re Elmore* 162 Wn.2d 27, 168 P.3d 1285(2007) , Love argues that those statutory amendments could not constitutionally be applied to him because his initial probable cause hearing occurred in 2001, prior to the enactment of the amendments. App. Br. at 20.

Love's reliance on *Elmore* is misplaced. In *Elmore*, the Court addressed the question of whether the 2005 amendments could be retroactively applied to an individual whose annual show cause hearing had occurred in March of 2004, where the 2005 amendments were enacted during the pendency of the appeal. *Elmore*, 162 Wn.2d at 34. In holding that they could not, the *Elmore* court gave no indication that it was at all interested in the date of the initial probable cause hearing that had occurred prior to Elmore's commitment as an SVP; indeed, the Court does not even give the date of that hearing. Rather, it notes that Elmore's *show*

*cause* hearing—conducted pursuant to RCW 71.09.090 and at which the Respondent may offer evidence that establishes that there is *probable cause* for an evidentiary hearing-- occurred in March of 2004, and that, in May of 2005, during the pendency of Elmore’s appeal, the Legislature enacted amendments to RCW 71.09.090. *Elmore*, 162 Wn.2d at 34. While the court’s reference in footnote 7 to the “initial probable cause determination” is perhaps inartful, there is nothing in the opinion to suggest that an entire opinion devoted to interpretation of the Legislature’s amendments governing post-commitment release proceedings in fact turns on the date of the original finding of probable cause, which in most cases would have occurred years earlier. Indeed, such an interpretation would produce absurd results, in that the 2005 amendments could *never* be applied to any SVP whose initial detention and pre-trial probable cause hearing occurred before May of 2005, the effective date of the amendments. Courts must avoid absurd results when interpreting statutes. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The trial court did not err in denying Love’s claim.

**3. Love’s Remaining Constitutional Arguments All Fail Under The Supreme Court’s Recent Decision In *McCustion***

Love concludes by arguing that the 2005 amendments, which restrict the circumstances under which a committed SVP may obtain a

new trial, violate the due process and separation of powers provisions of the United States Constitution. App. Br. at 21-29. Because these issues have both been resolved against Love by the *McCuiston* decision, his claims must be rejected.

**a. The *McCuiston* Decision**

David McCuiston was committed as a sexually violent predator in 2003. *In re McCuiston*, 174 Wn.2d 369, 375, 275 P.3d 1092 (2012). In 2006, the trial court held a show cause hearing to determine whether he was entitled to a full evidentiary hearing on the issue of unconditional or conditional release. The State submitted a report indicating that McCuiston continued to meet the definition of an SVP and that conditional release to a less restrictive alternative would threaten community safety. *Id.* In response, McCuiston submitted a report from Dr. Lee Coleman, concluding that McCuiston did not meet and had never met criteria for confinement as an SVP and attacking the legitimacy of Washington's commitment scheme. *Id.* at 376. McCuiston also submitted a law review article that discussed guidelines for forensic psychologists, two articles discussing reduced recidivism rates among older offenders, and declarations from SCC staff attesting his good behavior at the facility. *Id.* McCuiston had never participated in any form of sex offender treatment. *Id.* at 376-77.

The trial court denied his request for a new trial, and the Court of Appeals affirmed. The Washington State Supreme Court, after initially reversing the Court of Appeals and determining that the 2005 statutory amendments violated substantive due process (*State v. McCuiston*, 169 Wn.2d 633, 238 P.3d 1147(2010)), granted the State’s motion for reconsideration and withdrew its original opinion on May 20, 2011.

On reconsideration, this Court rejected McCuiston’s argument that he had both a statutory and a constitutional right to an evidentiary hearing, holding that he had “failed to show a physiological change or treatment-induced change to his mental condition, as required by RCW 71.09.090(4)(b).” *McCuiston*, 174 Wn.2d at 382. Addressing his substantive due process claim, the Court held that requiring change as a prerequisite for an evidentiary hearing “does not offend substantive due process principles.” *Id.* at 384. Substantive due process, the Court noted, “requires only that the State conduct periodic review of the patient’s suitability for release.” *Id.* at 385.

A committed person’s statutory right to show his condition has “so changed” provides ***additional safeguards*** that go beyond the requirements of substantive due process... There is no substantive due process right to a full annual evidentiary hearing based upon a mere showing of a change in a single demographic factor...To conclude otherwise would lead to an endless cycle of review and re-review.

*Id.* (emphasis added; internal citations omitted).

Nor was the Court persuaded by McCuiston's argument that the amendments violate substantive due process "because they prohibit a court from ordering a new trial even when the SVP does not meet the criteria for continued confinement." *McCuiston*, 174 Wn.2d at 388. Substantive due process is satisfied, the Court reiterated, by the requirement that the State prove beyond a reasonable doubt that the SVP is mentally ill and dangerous at the initial commitment trial and then justify continued incarceration through an annual review. *Id.* "This statutory scheme comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous." *Id.* Rather than altering this "constitutionally critical annual review scheme," the amendments "only change the requirements necessary to gain a full evidentiary hearing through the statutory protections created by the show cause process." *Id.* The legislature, this Court held, "had every right to alter a scheme that provides protections beyond what is required by substantive due process to ensure committed persons do not abuse the system to receive full annual evidentiary hearings every year based solely upon a change to a single demographic factor." *Id.* at 388-89.

The Court further held that the requirements of permanent physiological or treatment-based change do not violate procedural due

process because “the procedure established by the legislature ensures that individuals who remain committed continue to meet the constitutional standard for commitment, namely dangerousness and mental abnormality” and thus is “unlikely to result in an erroneous deprivation of liberty.” *McCuiston*, 174 Wn.2d at 394. The State, the Court noted, “has a substantial interest in encouraging treatment” and “by making treatment the only viable avenue to a release trial (absent a stroke, paralysis, or other physiological change),” the State creates an incentive for participation in treatment. *Id.* at 394.

The Court likewise rejected McCuiston’s separation of powers argument. First, the Court rejected his argument that the 2005 amendments “inwad[e] the province of the fact finder by preventing it from considering relevant and otherwise admissible evidence as to an individual’s mental condition,” noting that “it is not unusual for the legislature to enact legislation mandating the exclusion of certain types of otherwise admissible evidence.” *McCuiston*, 174 Wn.2d at 397. This Court also rejected McCuiston’s argument that, by amending RCW 71.09.090 in direct response to *In re Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005), and *In re Detention of Young*, 120 Wn. App. 753, 86 P.3d 810 (2004) (*Young II*), “the legislature overstepped its authority by attempting to contradict previous judicial determinations.” *McCuiston*, 174 Wn.2d

at 397. Observing that, as Court of Appeals decisions, these two cases “did not provide the final word” on the constitutional issues involved, and as such “the legislature was free to enact the legislation it did and await a final pronouncement from this court on the constitutionality of its actions.” *Id.* The Court concluded by holding that, since the State had met its prima facie burden establishing McCuiston remained mentally ill and dangerous, and because McCuiston failed to present evidence that he had changed due to a permanent physiological condition or through a positive response to treatment, the trial court properly denied him an evidentiary hearing. *Id.* at 398.

**b. The 2005 Amendments To RCW 71.09.090 Do Not Violate Love’s Right to Due Process**

Love argues that, RCW 71.09.090 “violates constitutional due process because it limits the type of evidence that may be relied upon to obtain a review of an individual’s indefinite detention as a sexually violent predator.” App. Br. at 21.

This argument has now been conclusively rejected by the *McCuiston* Court. RCW 71.09.090 “comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous.” *McCuiston*, 174 Wn.2d at 384. The legislature, this Court held, “had every right to alter a scheme that provides protections *beyond what is required by substantive due process* to ensure

committed persons do not abuse the system to receive full annual evidentiary hearings every year based solely upon a change to a single demographic factor.” *Id.* at 388-89 (emphasis added). Because this issue has been conclusively resolved in *McCuiston*, his challenge fails.

**c. The 2005 Amendments Do Not Violate The Doctrine Of Separation of Powers**

Love next argues that “RCW 71.09.090 violates separation of powers principles because it negates due process protections enunciated by the courts.” App. Br. at 27.

This argument was also rejected by the *McCuiston* Court. Holding that, because earlier decisions in *Young* and *Ward* (*supra*) “did not provide the final word” on the constitutional issues involved, “the legislature was free to enact the legislation it did and await a final pronouncement from this court on the constitutionality of its actions.” *McCuiston*, 174 Wn.2d at 397. Because this issue has been conclusively resolved by this Court in *McCuiston*, review is not warranted.

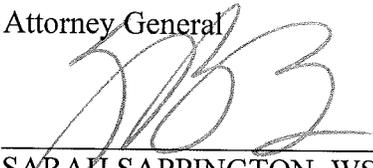
**IV. CONCLUSION**

Far from presenting this Court with “newly discovered evidence,” Love, by moving to vacate the commitment order, simply re-cycled arguments that have been repeatedly made—and rejected—since the inception of the Sexually Violent Predator Law and that were hotly debated at his trial. Nor did Love’s Motion show the extraordinary

circumstances necessary in order to obtain relief from judgment pursuant to CR 60(b)(11). As such, the trial court properly denied his motion to vacate. Likewise, Love's claim based on *Elmore* is meritless. Finally, all of Love's constitutional arguments have been resolved by the Supreme Court in *McCustion*, and as such must be rejected. For the foregoing reasons, the State requests that this Court affirm the trial court's Orders.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of November, 2012.

ROBERT M. MCKENNA  
Attorney General



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SARAH SAPPINGTON, WSBA#14514  
Senior Counsel  
Attorneys for State of Washington

NO. 27194-3-III

**WASHINGTON STATE COURT OF APPEALS, DIVISION III**

In re the Detention of:

RONALD LOVE,

Appellant

DECLARATION OF  
SERVICE

I, Allison Martin, declare as follows:

On November 29, 2012, I sent via email and deposited in the United States mail true and correct cop(ies) of Opening Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Janet Gemberling  
Gemberling, Dooris & Ladich, PS  
PO Box 20008  
Seattle, WA 98122  
[gemberlaw@comcast.net](mailto:gemberlaw@comcast.net)

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

DATED this 29<sup>th</sup> day of November, 2012, at Seattle, Washington.

  
ALLISON MARTIN