Supreme Court No.: 90000-9
Court of Appeals No.: 70692-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF:

RICHARD SCOTT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

Marla L. Zink
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

Richard Roy Scott stipulated to the criteria for indefinite civil commitment under ch. 71.09 RCW based on a mental abnormality diagnosis that is no longer valid. Mr. Scott entered into a stipulation that he satisfied the criteria for commitment under the mistaken belief that hebephilia was a valid predicate diagnosis. Since Mr. Scott entered into the stipulation, the validity of the diagnosis has been subject to much debate and its validity rejected. The recent change in law and science that demonstrates hebephilia is no longer a valid basis for commitment entitles Mr. Scott to relief from the judgment under Civil Rule 60(b)(11) and in the furtherance of justice.

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

Richard Roy Scott, the appellant below, requests this Court grant review pursuant to RAP 13.4(b)(4) of the decision of the Court of Appeals, Division One, in *In re Detention of Scott*, No. 70692-6-I, filed June 9, 2014. The Court of Appeals affirmed the trial court's denial of Mr. Scott's Civil Rule 60(b) motion to vacate despite the invalidation of the hebephilia diagnosis upon which the stipulation was premised. Review is in the substantial public interest because the stipulation affected Mr. Scott's protected interest in his liberty and because this

issue is likely to recur in the context of civil commitments. A copy of the opinion is attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Where the relevant scientific community rejects a diagnosis upon which a civil committee based his stipulation to civil commitment and upon which the indefinite commitment is based, do extraordinary circumstances exist to vacate the stipulation pursuant to Civil Rule 60(b), requiring the setting of a civil commitment trial?

D. STATEMENT OF THE CASE

The State petitioned to have Mr. Scott indefinitely committed pursuant to ch. 71.09 RCW in May 2003, after Mr. Scott had served terms of incarceration for the predicate offenses. CP 1. The State hired Richard Packard to evaluate Mr. Scott's mental condition and likelihood of reoffense, in other words, whether he satisfied the criteria for commitment. *See* CP 275. Dr. Packard opined Mr. Scott suffered from a mental abnormality or personality disorder, to include paraphilia not otherwise specified (NOS) (hebephilia). CP 276-77, 297. Based on Dr. Packard's evaluation and that of a second expert, in 2007 Mr. Scott stipulated to the criteria for commitment. CP 33-336. In particular,

Mr. Scott stipulated that hebephilia is a mental abnormality satisfying the criteria for commitment. CP 36 (¶ 9).

The hebephilia diagnosis was not explicitly included in the fourth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM). *E.g.*, CP 386-87. Since 2007, the diagnostic validity of hebephilia (and, paraphilia NOS (hebephilia)) has been subject to significant debate. *E.g.*, *id.* Hebephilia was considered but rejected for inclusion in the 2013 DSM-V. CP 386.

Within weeks of the DSM-V release, Mr. Scott moved pro se under Civil Rule 60(b) for relief from the indefinite commitment order. CP 343-45. Mr. Scott argued that his stipulation and the State's petition were based on the then-current version of the DSM, the DSM-IV, but that the just-released DSM-V constitutes a significant change in the law and demonstrates the invalidity of his initial commitment. CP 343-44. Thus, Mr. Scott argued he "never meet [sic] the statutory criteria from day one. Even the petition itself has now been proven to have relied on the bogus diagnoses of pedophilia and hebaphilia." CP 345. His motion contests the legality of his stipulation because "it was made with the mistaken belief that the diagnoses given to Scott were

valid and would meet the requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." CP 396.

Despite the change in the law and the promptness with which Mr. Scott moved for relief under CR 60(b), the superior court denied his motion without oral argument. CP 399-400.

E. ARGUMENT

The Court should grant review to consider whether the rejection of a medical diagnosis constitutes an extraordinary basis to vacate a stipulation under Civil Rule 60(b).

1. It is now clear that the hebephilia diagnosis, to which Mr. Scott stipulated as being sufficient, is not generally accepted in the psychological field and should be challenged as a sufficient basis for commitment.

The State's expert diagnosed Mr. Scott with paraphilia not otherwise specified (hebephilia). CP 297. Mr. Scott specifically stipulated that he suffered from hebephilia, which qualified as a mental abnormality and/or personality disorder. CP 350. At the time of the stipulation, the hebephilia diagnosis relied upon unforeseen vagueness in the then-current DSM-IV that had not been subject to debate or peer review because it was an unanticipated use of the DSM diagnostic categories. *E.g.*, CP 387; Frances & First, M.D.s, "Hebephilia Is Not a Mental -Disorder in DSM-IV-TR and Should Not Become One in

DSM-5," J Am. Acad. Psychiatry Law 39:1 at 78, 79, 81 (Feb. 2011).[1]

As two drafters of the DSM-IV discussed in 2011,

> The possibility of including hebephilia as a specific NOS example never arose during the development of DSM-IV or DSMIV-TR because no one suggested it. This concern did not arise until SVP evaluators started to assert that paraphilia NOS, hebephilia, was a legitimate basis for meeting the mental abnormality requirement in SVP statutes.

Frances & First, *supra*, at 81.

Since Mr. Scott's 2007 stipulation, however, hebephilia has been subject to intense debate. As noted, drafters of the DSM-IV spoke out about the abuse of the DSM-IV criteria and the bases for not including a hebephilia diagnosis in the DSM-V. Frances & First, *supra*. Hebephilia, as a medical diagnosis, was repeatedly critiqued and rejected. *E.g.*, Karen Franklin, Ph.D., "Forensic Psychiatrists Reject Hebephilia – Again," in *Witness: A blog about forensic psychology* (Nov. 1, 2012);[2] "Hebephilia," in *Wikipedia* (last visited July 8, 2014).[3] The professional community largely rejected the diagnosis during this recent examination of the diagnosis. For

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[1] *Available at* http://www.jaapl.org/content/39/1/78.full.

[2] http://www.psychologytoday.com/blog/witness/201211/forensic-psychiatrists-reject-hebephilia-again.

[3] http://en.wikipedia.org/wiki/Hebephilia#DSM-5_debate (last visited July 8, 2014).

example, "During academic conferences for the American Academy of Psychiatry and Law and International Association for the Treatment of Sexual Offenders, symbolic votes were taken regarding whether the DSM-V should include pedohebephilia, and in both cases an overwhelming majority voted against this." "Hebephilia," in *Wikipedia*.

The debate has also occurred in the courts—resounding in rejection of hebephilia as a sufficient diagnosis. The District Court of Hawai'i, refused to commit an individual on the basis of hebephilia. *United States v. Abregana*, 574 F. Supp. 2d 1145, 1150-51 (D. Haw. 2008). There, the State's expert diagnosed Mr. Abregana with paraphilia NOS (hebephilia). On the other hand, the defense experts testified hebephilia is not listed as a sexual deviance in DSM-IV-TR or other important literature in the field, and that even if it is a valid diagnosis, the degree of pathology of hebephilia is much less than that of other paraphilias such as pedophilia or sexual sadism. *Id.* at 1153. Given this conflicting evidence, the court concluded the government did not prove by clear and convincing evidence the disorder was a serious mental disorder. *Id.* at 1154, 1159.

Even more recently, a federal court ordered the government to release a detainee because the government "failed to show that hebephilia is a mental illness recognized by the mental health community." *United States v. Neuhauser*, 2012 WL 174363, *1 (E.D.N.C. Jan. 20, 2012). The court noted that hebephilia "has been rejected as a proper mental disorder by numerous psychologists." *Id.* at *2. In fact, "even the government's experts concede that characterization of hebephilia is a hotly contested issue in the mental health community." *Id.* Further, even if the government had shown hebephilia to be generally accepted, release was still required because the diagnosis did not cause Neuhauser "serious difficulty refraining from sexually violent conduct" as is constitutionally required for indefinite civil commitment. *Id.* at *1, 2.

Unsurprisingly, hebephilia was not included in the DSM-V published this year. Although formal proposals to include a hebephilia diagnosis in the DSM-V were considered, the drafters of the DSM-V rejected any inclusion of hebephilia as a mental disorder.[4] Its inclusion

[4] *E.g.*, Frances & First, *supra*, at 78-79, 82; Warren Throckmorton, "Does the APA consider hebephilia to be normal?" http://www.patheos.com/blogs/warrenthrockmorton/2013/05/16/does-the-apa-consider-hebephilia-to-be-normal/ (May 16, 2013) (reporting APA Board of Trustees rejected working group proposal to include hebephilia diagnosis); Allen

in the DSM-V was explicitly rejected. *E.g.*, CP 386-87 (Allen Frances, M.D., DSM 5 in Distress, *Psychology Today* (Feb. 22, 2013)).

This change—the outing of hebephilia as an invalid diagnosis, or at least as not generally accepted—affects the validity of Mr. Scott's stipulation. As discussed below, he should be allowed to withdraw that stipulation because it relies on a now-invalid basis for commitment.

2. Premised on a now debunked view of the science, Mr. Scott's stipulation is subject to vacatur under Civil Rule 60(b)(11) and in the furtherance of justice.

Civil Rule 60 allows persons committed pursuant to Washington's sexually violent predator law to move to vacate judgment. *In re Det. of Ward*, 125 Wn. App. 374, 379, 104 P.3d 751 (2005). Civil Rule 60(b) authorizes the court to relieve a party from a final judgment "upon such terms as are just."

Proceedings to vacate judgments are equitable in nature and the court should exercise its authority liberally to preserve substantial rights and do justice between the parties. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). "[C]ircumstances arise where finality must give way to the even more important value that justice be done

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Frances, "DSM-5 Rejects 'Hebephilia' Except for the Fine Print" in The Blog, Huffington Post, http://www.huffingtonpost.com/allen-frances/dsm-5-rejects-hebephilia-_b_1475563.html (last visited July 8, 2014).

between the parties." *Suburban Janitorial Servs. v. Clarke American*, 72 Wn. App. 302, 863 P.2d 1377 (1993). "CR 60 is the mechanism to guide the balancing between finality and fairness." *Id.* In balancing the equities within the SVP context, where a person faces extreme deprivation of liberty, this Court recognizes "[t]he interest in finality of judgments is easily outweighed by the interest in ensuring that an individual is not arbitrarily deprived of his liberty." *Ward*, 125 Wn. App. at 380.

The decision in *In re Detention of Ward* is instructive. 125 Wn. App. at 377-78. Mr. Ward had stipulated to commitment under ch. 71.09 RCW in 1991. *Id.* at 376. Two years after his stipulation, our Supreme Court held "that when a defendant has been released from confinement since his last sex offense, but before [SVP] proceedings are initiated against him, the State must prove he committed a recent overt act in order to establish his dangerousness." *Id.* at 377 (citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 41-42, 857 P.2d 989 (1993)). Ten years after *Young*, Mr. Ward filed a CR 60(b) motion in the superior court arguing his initial commitment order should be vacated based on this change in the law and the fact that he had not stipulated to, and the State had not proved, a recent over act. *Id.* at 377. Mr.

"Ward argued that there was a significant change in law that justifies relief from judgment[,]" that is, his initial commitment order. *Id.* at 378.

Similarly, Mr. Scott contests his initial commitment order based on the extraordinary circumstance of the change in diagnostic science. CR 60(b)(11). The State has conceded that CR 60(b) governs a motion to vacate an initial commitment order based on a change in scientific evidence. *In re Det. of Fox*, 138 Wn. App. 374, 399 n.17, 158 P.3d 69 (2007), *revised on remand on other grounds by* 144 Wn. App. 1050, 2008 WL 2262200 (Jun. 03, 2008).

Subsection (11) of CR 60 authorizes a trial court to grant relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment." A person committed as a sexually violent predator may move to vacate judgment under CR 60(b)(11) when his circumstances do not permit moving under another subsection of CR 60(b). *Ward*, 125 Wn. App. at 379. For the detainee to be entitled to relief under CR 60(b)(11), the case must involve "extraordinary circumstances" that constitute irregularities extraneous to the proceedings. *Id.* But again, because the infringement on a person's liberty in the sexually violent predator context is immense, the interest

in finality of judgments must give way to the interest in ensuring the deprivation of liberty is not arbitrary. *Id.* at 380.

"[A] change in the law may create extraordinary circumstances, satisfying CR 60(b)(11)." *Ward*, 125 Wn App. at 380. As discussed, the mental abnormality diagnosis upon which Mr. Scott's stipulation for commitment was based is no longer valid. Because a mental abnormality is critical to the indefinite civil commitment scheme, its validity affects the propriety of the indefinite commitment order. *See Ward*, 125 Wn. App. at 380 (discussing connection of change in law to commitment); *Foucha v. Louisiana*, 504 U.S. 71, 77, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (due process violation to continue to confine a person who is no longer both mentally ill and dangerous); *Kansas v. Hendricks*, 521 U.S. 346, 356-57, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *In re Detention of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Mr. Scott brought a CR 60(b) motion expeditiously upon learning of the change. *See Ward*, 125 Wn. App. at 380-81 (motion not timely where a decade passed between change in law and filing). Thus, unlike Mr. Ward, Mr. Scott's motion is timely. *Ward*, 125 Wn. App. at 380-81.

Moreover, "courts may, in the exercise of a sound judicial discretion and in the furtherance of justice, relieve parties from stipulations which they have entered into in the course of judicial proceedings." *State v. Superior Court*, 151 Wash. 413, 418, 276 P. 98 (1929). "Courts have frequently granted such relief in the case of stipulations which the parties have entered into improvidently, mistakenly, or as a result of fraudulent inducements, especially if the enforcement thereof would work injustice." *Id.*; *accord Stevenson v. Hazard*, 152 Wash. 104, 110, 277 P. 450 (1929); *see State v. Walsh*, 143 Wn.2d 1, 6, 17 P.3d 591 (2001) (in criminal context, withdraw of guilty plea allowed "whenever it appears that the withdrawal is necessary to correct a manifest injustice"). A civil detainee can avail himself of CR 60(b) to vacate a stipulation upon which his commitment is based. *Ward*, 125 Wn. App. at 378-79.

Here, Mr. Scott entered into a stipulation that he satisfied the criteria for commitment under the mistaken belief that hebephilia was a valid predicate diagnosis. CP 396. As set forth below, the drafters of the diagnostic manual also had not foreseen the diagnosis or its misuse as a predicate for commitment. Since Mr. Scott entered into the stipulation, the validity of the diagnosis has been subject to much

debate and heartedly rejected. The stipulation should be vacated, and Mr. Scott returned to the position he was in before the stipulated order of commitment was signed. *See Ward*, 125 Wn. App. at 378-79.

The Court of Appeals found that Mr. Scott was not entitled to relief on the additional ground that the stipulation included other diagnoses—most significantly, pedophilia. Slip Op. at 9; *see* CP 350. But as Mr. Scott set forth in his motion to the trial court, his understanding of the validity of the hebephilia diagnosis informed his decision to stipulate. CP 396. Mr. Scott has a fundamental liberty interest in not being indefinitely detained. *E.g.*, U.S. Const. amend. XIV; Const. art. I, § 3; *Hendricks*, 521 U.S. at 356-57; *Foucha*, 504 U.S. at 77. He had a right to a jury trial, and to argue the invalidity of the pedophilia diagnosis to a jury. He elected not to do so under the mistaken understanding that the State's expert's hebephilia diagnosis was valid. *See* CP 396. His waiver of these fundamental rights was not knowing, intelligent and voluntary because it was not informed by the controversy surrounding a hebephilia diagnosis. *See State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008) (due process requires criminal defendant's guilty plea to be knowing, intelligent and

voluntary); *Walsh*, 143 Wn.2d at 6. In light of the new scientific evidence, Mr. Scott should be allowed to withdraw that agreement.

Under CR 60(b)(11) and in the furtherance of justice, this Court should accept review and hold Mr. Scott is entitled to relief.

3. Mr. Scott should be allowed to withdraw his stipulation and the trial court instructed to schedule an initial commitment trial.

The trial court abused its discretion in denying Mr. Scott's motion for relief from judgment under CR 60(b) and the Court of Appeals opinion adopts that error. As set forth above, after Mr. Scott stipulated to a hebephilia diagnosis, the scientific validity of the diagnosis came under sharp critique and was rejected for inclusion in the latest version of the DSM, the DSM-V. On this basis, Mr. Scott should be allowed to withdraw his stipulation and the matter remanded for an initial commitment trial.[5] The trial court's finding that the CR 60(b) motion had no basis in the law or science was manifestly unreasonable. CP 399-400. This Court should grant review.

F. CONCLUSION

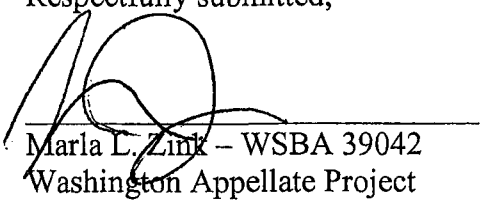
This Court should accept review of the question whether a change in diagnostic science constitutes extraordinary circumstances

[5] During the time pending trial, the State can continue to hold Mr. Scott as it did before the initial stipulation.

that merit vacating a stipulation based on the former—now debunked—science. Because the stipulation in this case affected Mr. Scott's protected interest in his liberty and because this issue is likely to recur in the context of civil commitments, this Court should accept review in the substantial public interest.

DATED this 8th day of July, 2014.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In the Matter of the Detention of	No. 70692-6-I
RICHARD ROY SCOTT.	DIVISION ONE
	UNPUBLISHED OPINION
	FILED: June 9, 2014

LEACH, J. — Richard Scott appeals the trial court's denial of his CR 60(b) motion. He claims that the rejection of the hebephilia diagnosis in the 2013 version of the Diagnostic and Statistical Manual of Mental Disorders[1] (DSM-V) constitutes newly discovered evidence and a change in the law and science. Scott argues that the court should vacate his stipulation to the criteria for commitment as a sexually violent predator because the parties based their stipulation upon a now invalid diagnosis of hebephilia that the psychiatric profession no longer accepts. Because Scott fails to show extraordinary circumstances entitling him to relief, we affirm.

[1] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

Background

In 1984, Scott was convicted of five counts of indecent liberties, a sexually violent offense, against victims 7, 8, 10, 12, and 13 years old. In 2001, he was convicted of third degree rape of a child.

On May 19, 2003, the day of Scott's scheduled release from prison, the State petitioned to commit Scott as a sexually violent predator. The court found probable cause to support this petition and detained Scott at the Special Commitment Center pending trial.

Dr. Richard Packard, a clinical and forensic psychologist, evaluated Scott to determine if he met the criteria for commitment as a sexually violent predator. Packard reviewed approximately 21,000 pages of records, including discovery materials from Scott and from the State, records from the Special Commitment Center, criminal records, prison records, medical and treatment records, previous psychological evaluations, and legal documents. Packard concluded that Scott met the diagnostic criteria "for two paraphilias": paraphilia, pedophilia—sexual attraction to prepubescent children—and paraphilia not otherwise specified (NOS) (hebephilia)—sexual attraction to pubescent children. Packard also determined that Scott met the diagnostic criteria for personality disorder NOS with antisocial, narcissistic, and histrionic features; bipolar I disorder most recent episode unspecified, without interepisode recovery; somatization disorder; alcohol abuse, by history in full remission; and malingering. Finally, Packard

concluded "that Mr. Scott is more likely than not to continue to engage in predatory acts of sexual violence if not confined to a secure facility."

Dr. Brian Judd also evaluated Scott. He reviewed over 17,997 pages of discovery from the joint forensic unit, the Special Commitment Center, Scott, and the State. He also reviewed criminal records, prison records, medical and treatment records, previous psychological evaluations, and legal documents. Judd opined that Scott met the diagnostic criteria for pedophilia, sexually attracted to males, nonexclusive type; alcohol abuse (by history); and personality disorder NOS with antisocial and narcissistic traits. He concluded that Scott "constitutes a high risk for sexually violent and violent recidivism." In their reports, both experts cited the definition of "paraphilia" stated in the fourth edition of the DSM (DSM-IV).[2]

On November 6, 2007, the first day of Scott's scheduled trial, he stipulated to meeting the criteria for commitment as a sexually violent predator and that he had a prior conviction for a sexually violent offense. He also stipulated,

> 9. Respondent suffers from the following mental abnormality and/or personality disorders: Paraphilia Pedophilia, Paraphilia Not Otherwise Specified (Hebephilia), Personality Disorder, Not Otherwise Specified, with Antisocial, Narcissistic, and Histrionic Features.
>
> 10. These mental abnormalities and personality disorders, together or separately, make it seriously difficult for him to control his behavior such that it makes him more likely than not to commit further acts of predatory sexual violence if he is not confined in a secure facility.

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[2] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (4th rev. ed. 2000).

The court ordered Scott committed as a sexually violent predator.

On June 5, 2013, Scott filed a "CR 60(b) Motion for Release Order."[3] He claimed that his stipulation was void because of a "Change in Science." Scott alleged that his stipulation relied upon the then-current version of the DSM, DSM-IV, but that the DSM-V, published in May 2013, "[i]n very strong words they clearly reject ted [sic] the use of 'NOS.' 'And Hebaphilia' [sic]. And [s]o narrowly defined pedophilia, so that it could not possibly be applied to Scott." Scott contended that he "never me[t] the statutory criteria from day one. Even the petition itself has now been proven to have relied on the bogus diagnoses of pedophilia and hebaphilia [sic]." The only evidence that Scott provided to support his motion was an article from the magazine Psychology Today.

The trial court denied this motion "[i]n accordance with the holdings of In re [Personal Restraint] of Young, 122 Wn.2d 1, 857 P.2d 989 (1993), and In re the Detention of Berry, 160 [Wn.] App. 374, 248 P.3d 592 (2011)." On its order, the court wrote, "The Respondent has not demonstrated that legally or psychologically . . . his case should be dismissed. Even were this Court to take judicial notice of the DSM V, it is not clear how it affects his commitment, his stipulation or his underlying conviction."

Scott appeals.

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[3] Scott's original motion cited no specific subsection of CR 60(b). In his reply, he cites CR 60(b)(11) as the basis for his motion.

Analysis

Scott claims that "a change in the law and science" entitles him to withdraw his stipulation.[4] We review a trial court's denial of a CR 60(b) motion for manifest abuse of discretion.[5] A trial court abuses its discretion when its decision is manifestly unreasonable or made on untenable grounds or for untenable reasons.[6] A court also abuses its discretion if it bases its decision on an erroneous view of the law.[7]

Unlike an appeal, a CR 60(b) motion does not provide a means for correcting errors of law in an underlying order.[8] Accordingly, when a party appeals the trial court's denial of a CR 60(b) motion, we review only the trial

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[4] For the first time on appeal, Scott argues that the "change in science" constitutes newly discovered evidence for the purposes of CR 60(b)(3). Because he did not raise this particular provision below, he cannot raise it now. In re Marriage of Wherley, 34 Wn. App. 344, 348, 661 P.2d 155 (1983) (citing Cameron v. Downs, 32 Wn. App. 875, 882, 650 P.2d 260 (1982)). Even if we considered this argument, a party must bring a CR 60(b)(3) motion within a reasonable time and within one year of entry of the judgment. CR 60(b); see Luckett v. Boeing Co., 98 Wn. App. 307, 310, 989 P.2d 1144 (1999). Because Scott failed to file his motion within one year of the entry of the judgment, he cannot seek relief under CR 60(b)(3).

[5] Haley v. Highland, 142 Wn.2d 135, 156, 12 P.3d 119 (2000) (citing In re Guardianship of Adamec, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983)); In re Det. of Mitchell, 160 Wn. App. 669, 675, 249 P.3d 662 (2011) (citing Highland, 142 Wn.2d at 156).

[6] Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citing Associated Mortg. Investors v. G.P. Kent Constr. Co., 15 Wn. App. 223, 229, 548 P.2d 558 (1976)).

[7] Mayer, 156 Wn.2d at 684 (citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

[8] Burlingame v. Consol. Mines & Smelting Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986) (citing State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)).

court's decision to deny the motion, not the underlying order that the party seeks to vacate.[9]

CR 60(b) allows a trial court to vacate a final judgment or order for specified reasons such as mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud. Scott based his motion on CR 60(b)(11), which authorizes a trial court to vacate an order for "[a]ny other reason justifying relief from the operation of the judgment." This court will vacate an order under CR 60(b)(11) only if the case involves extraordinary circumstances that "constitute irregularities extraneous to the proceeding."[10] A defendant can move to vacate an order under CR 60(b)(11) only when his circumstances do not permit him to move under another subsection of CR 60(b).[11]

Chapter 71.09 RCW authorizes the involuntarily commitment of a sexually violent predator.[12] A sexually violent predator is "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."[13] A "mental abnormality" is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission

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[9] Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

[10] In re Det. of Ward, 125 Wn. App. 374, 379, 104 P.3d 751 (2005) (citing In re Marriage of Knies, 96 Wn. App. 243, 248, 979 P.2d 482 (1999)).

[11] Ward, 125 Wn. App. at 379 (citing In re Marriage of Thurston, 92 Wn. App. 494, 499, 963 P.2d 947 (1998); Shum v. Dep't of Labor & Indus., 63 Wn. App. 405, 408, 819 P.2d 399 (1991)).

[12] Ward, 125 Wn. App. at 376 (citing RCW 71.09.010).

[13] Former RCW 71.09.020(16) (2006).

of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."[14]

Scott alleges,

> The hebephelia diagnosis was not explicitly included in the fourth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM). Since 2007, the diagnostic validity of hebephilia (and, paraphilia NOS (hebephilia)) has been subject to significant debate. Hebephelia was considered but rejected for inclusion in the 2013 DSM-V.
>
> Within weeks of the DSM-V release, Mr. Scott moved pro se under Civil Rule 60(b) for relief from the indefinite commitment order. Mr. Scott argued that his stipulation and the State's petition were based on the then-current version of the DSM, the DSM-IV, but that the just-released DSM-V constitutes a significant change in the law and demonstrates the invalidity of his initial commitment.

Scott contends, "At the time of the stipulation, the hebephelia diagnosis relied upon unforeseen vagueness in the then-current DSM-IV that had not been subject to debate or peer review because it was an unanticipated use of the DSM diagnostic categories."

Scott relies upon In re Detention of Ward,[15] in which the court stated, "In rare circumstances, a change in the law may create extraordinary circumstances, satisfying CR 60(b)(11)." But Scott fails to demonstrate a change in the law since his stipulation that would affect his stipulation or his commitment.

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[14] RCW 71.09.020(8). The version of RCW 71.09.020 in effect at the time of Scott's commitment did not define "personality disorder."

[15] 125 Wn. App. 374, 380, 104 P.3d 751 (2005).

In Kansas v. Crane,[16] the United States Supreme Court explained that states have considerable leeway in defining the personality disorders and mental abnormalities that make an individual eligible for commitment. The Court stated, "[T]he science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law."[17]

In Young, our Supreme Court rejected the argument that a diagnosis of paraphilia NOS (nonconsent) was invalid because it did not appear in the then-current edition of the DSM:

> "In using the concept of 'mental abnormality' the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the DSM–III–R; others are not. The fact that pathologically driven rape, for example, is not yet listed in the DSM–III–R does not invalidate such a diagnosis. The DSM is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ('APA') leaders consider to be practical realities. What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM."[18]

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[16] 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) (citing Kansas v. Hendricks, 521 U.S. 346, 359, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); Hendricks, 521 U.S. at 374-75 (Breyer, J., dissenting)).

[17] Crane, 534 U.S. at 413 (citing Hendricks, 521 U.S. at 359).

[18] 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)).

We reiterated this holding in Berry.[19] Thus, inclusion in the DSM is not definitive for diagnosing a mental illness for the purposes of commitment, and the DSM is not Washington law. Because Scott fails to show a change in Washington law since he stipulated to the criteria for commitment as a sexually violent predator, his argument fails.

Even if we accept Scott's assertion that the "diagnostic validity of hebephilia" has changed since his stipulation, he cites no authority establishing that this change in science creates "extraordinary circumstances" entitling him to withdraw his stipulation. He presents no facts showing that he no longer poses a risk to others if not confined in a secure facility or that his condition has changed such that he no longer meets the criteria for confinement.

Scott stipulated that he suffered from paraphilia pedophilia, paraphilia NOS (hebephilia), personality disorder NOS with antisocial, narcissistic, and histrionic features. He stipulated that these diagnoses "together or separately" were sufficient to meet the criteria for a sexually violent predator. Even if hebephilia were an invalid diagnosis, Washington courts have recognized the other diagnoses to which he stipulated as a sufficient basis for commitment as a sexually violent predator.[20]

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[19] Berry, 160 Wn. App. at 380-81.

[20] See In re Det. of Morgan, No. 86234-6, 2014 WL 1847790 (Wash. May 8, 2014) (involuntary commitment where defendant met diagnostic criteria for paraphilia, pedophilia, and antisocial personality disorder); State v. McCuistion, 174 Wn.2d 369, 275 P.3d 1092 (2012) (involuntary commitment where defendant met diagnostic criteria for paraphilia NOS, pedophilia, and antisocial personality disorder), cert. denied, 133 S. Ct. 1460 (2013).

In Scott's reply to the State's opposition to his CR 60(b) motion, he also asserted that he stipulated under "the mistaken belief that the diagnoses given to Scott were valid and would meet the requirements of Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923)." Because he raised this argument for the first time in his reply and he does not argue it in his brief, we do not review it.[21] Even if we were to consider this challenge, we held in Berry that testimony from a psychologist or a psychiatrist about a sex offender's mental illness or abnormality is not subject to Frye.[22]

Conclusion

Because Scott fails to demonstrate a change in Washington law or a change in science creating extraordinary circumstances entitling him to withdraw his stipulation to the criteria for commitment as a sexually violent predator, the trial court did not abuse its discretion when it dismissed his CR 60(b) motion. We affirm.

Leach, J.

WE CONCUR:

Spearman, C.J.

Becker, J.

[21] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 629, 285 P.3d 187 (2012) (quoting West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)), review denied, 176 Wn.2d 1021 (2013).

[22] Berry, 160 Wn. App. at 379-80.

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Washington Appellate Project

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