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No. 71343-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF:

ROY STOUT

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The scrutiny, skepticism, and ultimate rejection of paraphilia NOS non-consent and its past misapplication illustrates the extraordinary circumstances that justify Mr. Stout's relief from the initial commitment order.

The trial court abused its discretion when denying Mr. Stout's CR 60(b) motion for relief from judgment where he established that the psychiatric community's resounding rebuke of rape as a mental disorder constituted extraordinary circumstances. The inability of the State's experts to reliably diagnose Mr. Stout further evidences the problematic nature of the paraphilia not otherwise specified (NOS) non-consent diagnosis.

a. The psychiatric community's refusal to classify rape as a mental disorder constitutes an extraordinary circumstance because Mr. Stout remains indefinitely confined based on a diagnosis that has been rejected.

Paraphilia NOS non-consent may be the most controversial concept in sexually violent predator evaluations and has a long history of misinterpretation.[1] In order for a paraphilia NOS non-consent diagnosis to be merited, it requires "considerable evidence documenting

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[1] Allen Frances, Shoba Sreenivasan, & Linda E. Weinberger, *Defining Mental Disorder When It Really Counts: DSM-IV-TR and SVP/SDP Statutes*, 36 J. Am. Acad. Psychiatry Law, Sept. 2008, at 375, 380.

that the rapes reflected paraphilic urges and fantasies linking the coercion to the arousal." Frances et al., *supra* note 1. The chair of the DSM-IV Task Force and the editor and co-chair of the DSM-IV conclusively commented:

> It is unanimous: a rapist is not someone who has a mental disorder and psychiatric commitment of rapists is not justified. This is an important message to everyone who is involved in approving psychiatric commitment under sexually violent predator (SVP) statutes. The evaluators, prosecutors, public defenders, judges, and juries must all recognize that the act of being a rapist is almost always an aspect of simple criminality and that rapists should receive longer prison sentences, not psychiatric hospitalizations.[2]

The psychiatric community's refusal to classify rape as a mental disorder demonstrates the shift that has occurred since Mr. Stout's initial commitment trial in 2003. The fact that Mr. Stout remains indefinitely confined based on a diagnosis that was controversial in the past and fully rejected today is an extraordinary circumstance that justifies relief from his original commitment order.

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[2] Allen Frances & Michael B. First, *Paraphilia NOS, Nonconsent: Not Ready for the Courtroom*, 39 J. Am. Acad. Psychiatry Law, Dec. 2011, at 558-59.

b. The inability to consistently diagnose Mr. Stout, as evidenced by the three percent agreement rate among the State's experts, further illustrates the problematic nature of the paraphilia NOS non-consent diagnosis.

The erratic diagnoses offered by the State's experts over the years further substantiates the flawed nature of the paraphilia NOS non-consent diagnosis. There has been only a three percent agreement rate among State's experts regarding Mr. Stout's diagnoses. CP 308. This inconsistency further reveals the extraordinary circumstances presented by Mr. Stout's indefinite confinement.

In its brief, the State claims that each annual report made clear that "nothing about Stout has changed" and that none of the evaluators reviewing Mr. Stout's case "believe that he 'no longer' suffers from the mental condition diagnosed at the time of trial." Br. of Resp. at 17. However, while the State's experts ultimately included a conclusory statement in their evaluations that Mr. Stout continued to satisfy confinement criteria, Dr. Spizman repeatedly declared his uncertainty regarding Mr. Stout's diagnoses:

> I previously rendered a diagnosis of Paraphilia, NOS, Nonconsent. However, as noted above, I am now uncertain in this diagnosis. Furthermore, I have some questions regarding whether an antisocial personality diagnosis is warranted. Thus, there is a degree of uncertainty whether or not Mr. Stout has an underlying

> mental abnormality or personality disorder that meets the criteria for civil commitment.

CP 255.

The inability to dependably diagnose Mr. Stout is vividly illustrated by Dr. Spizman's annual reports. CP 137-38, 250-51. Dr. Spizman acknowledged that while he previously diagnosed Mr. Stout with paraphilia NOS non-consent, he subsequently became uncertain because "the assaults did not clearly indicate a desire for non-consensual sexual activity." CP 250. The fact that Dr. Spizman could render the diagnosis one year and then seriously doubt that same diagnosis the following year, when all of the past facts and circumstances being considered are identical, exposes the problematic nature of Mr. Stout's indefinite confinement based on these prior diagnoses. This further evidences the extraordinary circumstances that merit relief from judgment.

c. <u>The courts' historical acceptance of paraphilia NOS non-consent does not necessitate denial of Mr. Stout's CR 60(b) motion, but reflects the fact that this dramatic shift in the psychiatric community only recently occurred</u>.

The State continues to rely on *In re Det. of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), to support its argument that paraphilia NOS non-consent remains an acceptable diagnosis. Br. of Resp. at 14-15.

However, *Young* was decided over 20 years ago when "pathologically driven rape" was not *yet* included in the DSM-III-R. 122 Wn.2d at 28. At the time of Mr. Stout's motion for relief from judgment, paraphilia characterized by rape behavior had been specifically *rejected* by the DSM. Frances & First, *supra* note 2. *Young* does not promote the notion that once the DSM and psychiatric community has explicitly and overwhelmingly rejected a pathology, such as rape as a mental disorder, it still may be used to indefinitely confine someone. *See Young*, 122 Wn.2d at 28.

While the State is correct when pointing out that the courts have historically allowed paraphilia NOS non-consent to be the basis for commitment under RCW 71.09, those prior cases reflect that the change in the psychiatric community's treatment of rape as a mental disorder has only recently come to fruition. As the *Young* court highlighted, "[t]he DSM is, after all, an evolving and imperfect document." *Id.* at 28. The courts must take into account the evolution of rape as a mental disorder and its past misapplication that led to its ultimate denunciation.

2. This Court should not reach the State's argument that Mr. Stout was time barred from bringing his CR 60(b) motion because it was not raised at the trial court.

The State argues for the first time on appeal that Mr. Stout was time barred from receiving relief under the provisions of CR 60(b). Br. of Resp. at 8-10. The State never asserted at the trial court level that Mr. Stout attempted to circumvent the time requirements of CR 60(b)(3) by bringing his motion for relief from judgment pursuant to CR 60(b)(11). *See* RP 15-17; CP 364-69. The State instead exclusively relied on its argument that the rejection of rape as a mental disorder by the psychiatric community did not constitute extraordinary circumstances. RP 15-17; CP 364-69.

It is well settled that appellate courts "will not review an issue, theory, argument, or claim of error not presented at the trial court level." *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, 322 P.3d 6 (2014) (quoting *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001)). A party must inform the trial court of its theory and the rules of law it wishes the court to apply. *Id.* (citing *Shannon v. Smith*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)). Failure to inform the trial court of an issue or theory precludes raising it on appeal. *Shannon*, 100 Wn.2d at 37.

"While an appellate court retains discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012). The State failed to make any timeliness objection below during the November 6, 2013 hearing or in its written materials. The State also did not present any reason why it should be permitted to raise this argument for the first time on appeal or offer an explanation why an exception to the general rule should be made. An exception is not warranted and this Court should not address the State's timeliness argument raised for the first time on appeal.

3. Even if this Court reviews the State's timeliness argument, Mr. Stout's CR 60(b) motion was brought within a reasonable time.

The State asserts that Mr. Stout's motion was not brought within a reasonable time because it was made 10 years after his initial commitment order, which entered on October 29, 2003. Br. of Resp. at 8. The State relies on *State v. Ward*, 125 Wn. App. 374, 381, 104 P.3d 751 (2005), for its argument that bringing a CR 60(b) motion 10 years after the initial commitment order is not within a "reasonable time" as required. Br. of Resp. at 9-10. In *Ward*, the Court held that his motion for relief from judgment was not brought within a reasonable time

where it was made 10 years after a change in law that was applicable to Mr. Ward. 125 Wn. App. at 380. The State then analogizes Mr. Stout's circumstances and claims that since 10 years have passed since his commitment, he is also time barred under the "reasonable time" requirement of CR 60(b)(11). Br. of Resp. at 10.

However, the triggering event in *Ward* was the change in law that occurred after his commitment, not the commitment itself. 125 Wn. App. at 380. Similarly, the triggering event is not Mr. Stout's initial commitment, but the rejection of rape as a mental disorder by the psychiatric community. This Court should reject the State's assertion that Mr. Stout's motion was brought 10 years after the triggering event.

Rather, Mr. Stout's motion for relief was brought within a reasonable time of this event. The psychiatric community's rejection of rape as a mental disorder has been an evolving process. The current change in how and whether the psychiatric community diagnoses rape as a mental disorder is not only evidenced by the literature of the DSM drafters, but also by the State's expert, Dr. Spizman, who made the paraphilia NOS diagnosis in 2010 but expressed strong uncertainty regarding the diagnosis in 2011. CP 250.

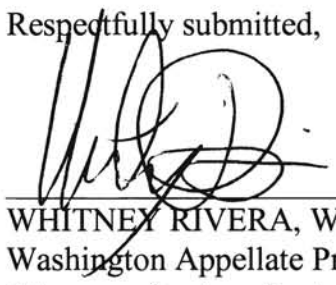
Mr. Stout's motion was also timely considering the stay that entered in 2011 while the State sought review of the trial court's previous order granting Mr. Stout a new trial. CP 28-29, 60-62. This stay was in place for over two years before Mr. Stout's case was brought back before the trial court on November 6, 2013. CP 28-29. The trial court manifestly abused its discretion when it denied Mr. Stout's CR 60(b) motion for relief, which was based on extraordinary circumstances and made within a reasonable period of time.

B. CONCLUSION

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Stout respectfully requests this Court reverse the trial court's denial of his CR 60(b) motion and remand for further proceedings.

DATED this 18th day of November, 2014.

Respectfully submitted,



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APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 18TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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