Supreme Court No.: 91944-5
Court of Appeals No.: 71343-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF:

ROY DONALD STOUT

ON APPEAL FROM THE COURT OF APPEALS OF
WASHINGTON, DIVISION I

PETITION FOR REVIEW

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A. INTRODUCTION

Although mental health professionals have rejected the contrived diagnosis that in 2003 took away Roy Stout's freedom, he remains involuntarily committed as "mentally abnormal." Over the years, the idea of a "paraphilia, not otherwise specified, nonconsent" diagnosis has been vigorously debated in courtrooms and in the relevant scientific community. When the American Psychiatric Association concluded the diagnosis lacks sufficient reliability and validity to be recognized among the 300 disorders that appear in the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Mr. Stout appropriately sought relief from the original judgment against him.

This Court should grant review and reverse the trial court's denial of Mr. Stout's CR 60(b) motion. Giving Mr. Stout an avenue to reargue whether he currently meets RCW 71.09 commitment criteria is not only appropriate, it is in fact necessary to avoid consigning him to unconstitutional confinement.

B. IDENTITY OF PETITIONER AND THE DECISION BELOW

Roy Donald Stout, the appellant below, requests this Court grant review pursuant to RAP 13.4(b)(3), and (4), of the decision of the

Court of Appeals, Division One, in *In re Detention of Stout*, No. 71343-6-I, filed June 15, 2015. A copy of the opinion is attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Is the recent scientific community's rejection of the diagnosis that labeled Mr. Stout a "sexually violent predator" a valid reason to justify CR 60(b)(11) relief from the 2003 judgment against him?

D. STATEMENT OF THE CASE

Roy Stout has been civilly committed under RCW 71.09 for about twelve years. CP 128. At his initial commitment trial, the superior court[1] concluded that the combination of paraphilia, not otherwise specified (NOS), nonconsent, and antisocial personality disorder caused Mr. Stout difficulty controlling his behavior. CP 126. "A paraphilia of this kind is a mental disorder that causes recurrent intense sexually arousing fantasies, urges, and behaviors involving non-consenting adults, that lasts for more than six months, and results in negative consequences to the individual." CP 125.

The superior court's findings relied on the history of Mr. Stout's prior offenses and the State's expert's testimony about that history. CP

[1] Mr. Stout waived his right to a jury trial. CP 117.

117-27. The State's expert relied exclusively on Mr. Stout's behaviors and acts – not urges or fantasies – to support his "paraphilia, NOS, nonconsent" diagnosis. The trial court found:

> Mr. Stout has exhibited recurrent sexual *behaviors* involving non-consenting adults on several occasions. The *behaviors* occurred from at least 1990 through 1997, a period of longer than six months. These *behaviors* have resulted in legal consequences and disadvantages for Mr. Stout on numerous occasions.

CP 125. (Emphasis added.) The State's expert did not testify that Mr. Stout experienced urges or fantasies regarding coerced sex. CP 128, 279.

Since Mr. Stout's trial, the psychiatric community has rejected rape as a mental disorder. CP 344. In 2011, the chair of the DSM-IV Task Force, discussing the Diagnostic and Statistical Manual of Mental Disorders, publicly explained[2] that "paraphilia, NOS, nonconsent" cannot be diagnosed on the basis of behaviors alone, but requires "considerable evidence documenting that the rapes reflected paraphilic urges and fantasies linking coercion to arousal." CP 344. (As explained above, this stands in contrast with the evidence used to support Mr. Stout's commitment in 2003.) Two years later, the construct of

[2] Allen Frances & Michael B. First, "Paraphilia NOS, Nonconsent: Not Ready for the Courtroom," 39 J. Am. Acad. Psychiatry Law, Dec. 2011, at 560. (*Available at* http://www.jaapl.org/content/39/4/555.full.)

"paraphilia, NOS, nonconsent" was rejected from inclusion in the Fifth Edition of the DSM. (DSM-5.) Slip. Op. at 1.

On the heels of this global rejection of "paraphilia, NOS, nonconsent" as a diagnostic label, Mr. Stout moved the trial court for relief from judgment pursuant to CR 60(b)(11). CP 276. Slip. Op. at 1. Mr. Stout argued that the repudiation of rape as a mental disorder warranted vacation of the initial commitment order in his case. CP 283. In support of his motion, Mr. Stout provided updated academic literature establishing that "paraphilia, NOS, nonconsent" had previously been misinterpreted, misapplied, and discredited. CP 339-48. The superior court denied Mr. Stout's motion. CP 451.

The Court of Appeals affirmed, holding that "ongoing disputes about the validity of the paraphilia NOS nonconsent diagnosis" and the "exclusion of the diagnosis from the DSM" do not constitute extraordinary circumstances for CR 60(b)(11) purposes. Slip. Op. at 3.

E. ARGUMENT

This Court should grant review because the issue of whether a person may remain indefinitely committed based on a diagnostic label rejected by the scientific community is a significant question of constitutional law and a matter of substantial public interest

1. In his CR 60(b)(11) motion, Mr. Stout demonstrated that the relevant scientific community has rejected the mental abnormality for which he was committed in 2003

In 2003 the State's expert diagnosed Mr. Stout with "paraphilia, NOS, nonconsent." CP 117-27. At the time, vague language in the paraphilic disorders category of the DSM-IV ostensibly allowed such a pronouncement. However, this was an unanticipated use of the manual, rather than any reading that had been subject to debate or peer review. *See* Frances & First (2011). As these two key drafters of the DSM-IV manual made public,

> [T]his was most certainly not our intent. The phras[ing] was not meant to include rape and instead describes only the victims of exhibitionism, voyeurism, frotteurism, and pedophilia. *In fact, it was the deliberate intent of DSM-IV to exclude any reference in DSM-IV to rape as paraphilia.* That is why rape is not listed under the various examples of paraphilia NOS and is not listed in the DSM-IV Index. Complicating matters, *a small editing mistake* in the DSM-IV A criterion for paraphilias (i.e., the erroneous use of "or" instead of "and" to join the list of fantasies, sexual urges, behaviors) *has encouraged some forensic evaluators to claim that a diagnosis of paraphilia NOS, nonconsent, can be made based solely on the fact that the person*

> *committed rape, without any attempt to establish that the person is in fact sexually aroused by nonconsensual sex.*"

Id. at 557. (Emphasis added.)

In other words, the 2011 article criticizing how the DSM was being misused pointed out both that the scientific community had not intended for there to be a "paraphilia, NOS, nonconsent" diagnosis in the manual, and that in any event, rape behaviors alone (as opposed to additional evidence of specific arousal to nonconsensual sex) were insufficient support for a paraphilic disorder.

Dr. Frances then publicized the fact that "paraphilia, NOS, nonconsent" was considered for inclusion in the DSM-V, only to be explicitly rejected from the manual. *See* Allen Frances, M.D., DSM 5 in Distress, *Psychology Today* (May 26, 2011); Slip. Op. at 1. Unlike what happened at Mr. Stout's 2003 commitment hearing, any practitioner wishing to assign this label today would have to acknowledge that the diagnosis was rejected from inclusion in the current DSM and should not have been made under the prior version either.

This decisive outing of "paraphilia, NOS, nonconsent" as unacceptable and unreliable cuts at the heart of Mr. Stout's commitment. As discussed below, he should be allowed a new trial.

2. The Court of Appeals' reliance on *Young* and its progeny is misplaced because those cases predate the explicit rejection of "paraphilia, NOS, nonconsent" from the Diagnostic and Statistical Manual of Mental Disorders

More than 20 years ago, this Court noted that "[T]he DSM is, after all, an evolving and imperfect document." *In re Pers. Restraint of Young*, 122 Wn.2d 1, 28, 857 P.2d 989 (1993). When reviewing Mr. Stout's case, the Court of Appeals latched onto this language, pointing out that the Legislature's decision to use a concept of "mental abnormality" was an invocation of "a more generalized terminology that can cover a much larger variety of disorders" than what is in the DSM. *Id.*

But, the issue in *Young* was not comparable to the problem presented in this appeal. *Young* reasoned that "[t]he fact that pathologically driven rape, for example, is *not yet listed* in the DSM-III-R [Revised] does not invalidate such a diagnosis." *Id.* (Emphasis added.) In other words, *Young* anticipated that in the future, paraphilic rape would be *added* to the DSM, not *rejected* from it. The Court of Appeals deciding Mr. Stout's case missed this point. Slip. Op. at 3.

A more careful reading of *Young* suggests the opposite result. *Young* allowed that non-DSM diagnoses could serve as statutorily valid mental abnormalities under RCW 71.09 if such "sexual pathologies

[were] *as real and meaningful as other pathologies already listed in the DSM.*" *Young*, 122 Wn.2d at 28. (Emphasis added and internal citation omitted.) This is an affirmation of, not scorn for, the DSM. Indeed, this language confirms the *Young* court was open to accepting of the paraphilic rape diagnosis in anticipation of the scientific community coming together and recognizing such a disorder was as "real" and as "meaningful" as other DSM disorders. Of course, the current rejection of the concept of paraphilic rape from DSM-5 demonstrates that the scientific community sees the contrived diagnosis as less real and less meaningful than the other 300 disorders in the manual.

The DSM certainly is an authoritative source which "reflects a consensus of current formulations of evolving knowledge in the mental health field." *State v. Greene,* 139 Wn.2d 64, 71, 984 P.2d 1024 (1999) (internal citations omitted); *See also Hall v. Florida,* —— U.S. – ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014) (determining the meaning of "intellectual disability" using the DSM). By criticizing Mr. Stout for not providing "authority suggesting the DSM governs the diagnoses of mental abnormalities that permit the commitment of sexually violent predators," the Court of Appeals muddles the water. Slip. Op. at 3.

In this case, the judicial focus should be on the scientific community's authoritative rejection of "paraphilia, NOS, nonconsent" as unworthy of inclusion in the proverbial "Bible" of mental disorders.[3] Likewise, reliance on decisions that speak to the use of the diagnosis in RCW 71.09 commitment hearings *before* its rejection from the DSM-5 is misplaced. Slip. Op. at 3. Today, all that can be said about the diagnosis is that it has been debated within, and then resoundingly rejected by, the relevant scientific community. "When neither the American psychiatric community nor the international medical community recognizes a disorder, we should not do so either." *In re Det. of Meirhofer*, 182 Wn.2d 632, 657-58, 343 P.3d 731 (2015) (J. Wiggins, dissenting) (noting that the DSM–5 explicitly rejected "'coercive paraphilia'" as a diagnosis).[4]

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[3] At least one prosecution expert has testified that the DSM is "the only classification system that is used to assess diagnoses in this country." *United States v. Graham*, 683 F. Supp. 2d 129, 134-35 (D. Mass. 2010). Notably, in *Graham*, a case that predates the official rejection of this diagnosis from the DSM-5, the trial judge declined to equate repeated behavior as sufficient to justify a "paraphilia, NOS, nonconsent" diagnosis, ruling that the government failed to demonstrate that *Graham* was "part of the subgroup of rapists that rape as a result of 'a serious mental illness, abnormality, or disorder.'" *Id.* at 143.

[4] *See also* Allen Frances. "DSM-5 Rejects Coercive Paraphilia: Once Again Confirming That Rape Is Not A Mental Disorder." *Psychiatric Times*, (May 10, 2011).

3. Relief under CR 60(b)(11) is appropriate and necessary to avoid consigning Mr. Stout to unconstitutional confinement

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). CR 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 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

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http://www.psychiatrictimes.com/blogs/couch-crisis/dsm-5-rejects-coercive-paraphilia-once-again-confirming-rape-not-mental-disorder) (last accessed July 13, 2015) ("The proposal to include "coercive paraphilia" as an official diagnosis in the main body of DSM-5 has been rejected. This sends an important message to everyone 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 almost always is an indication of criminality, not of mental disorder.")

equities within the SVP context, where a person faces extreme deprivation of liberty, "[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.

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. In other proceedings, the State has correctly taken the position that CR 60(b) is the proper vehicle for challenging an initial commitment order brought

into question because of 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). Indeed, the scientific community's public repudiation of "paraphilia, NOS, nonconsent" is extraordinary. CR 60(b)(11). Mr. Stout's initial commitment order must be vacated.

As discussed earlier, the mental abnormality diagnosis, a critical element of Mr. Stout's commitment, is no longer valid, and this calls the commitment on the whole into question. *See Ward*, 125 Wn. App. at 380. (discussing connection of change in law to commitment). In this case, denying the CR 60(b) motion risks leaving Mr. Stout committed beyond constitutional limits on civil commitment as persons may only remain civilly committed if they are dangerous *and* mentally ill. *Foucha v. Louisiana*, 504 U.S. 71, 77, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *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. Stout 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 brought a

timely CR 60(b) motion which should have been granted. The initial commitment order should be vacated, with Mr. Stout returned to the position he was in before the order of commitment was signed. *See Ward*, 125 Wn. App. at 378-79.

4. Mr. Stout's 2003 commitment order should be vacated and a new trial set

The trial court abused its discretion in denying Mr. Stout's motion for relief from judgment under CR 60(b), and the Court of Appeals opinion repeats that error. The opposite of what the *Young* Court expected occurred. The DSM-5 has explicitly rejected for inclusion Mr. Stout's commitment diagnosis. He has a right to a jury trial and to argue the invalidity of the "paraphilia, NOS, nonconsent" diagnosis to a jury. Curiously, the Court of Appeals acknowledges that "[d]isputes among experts about the validity of the ["paraphilia, NOS, nonconsent"] diagnosis go to the weight of the evidence, not its admissibility," but incorrectly sees this point as detracting from Mr. Stout's CR 60(b)(11) motion. Slip. Op. at 3. It is precisely because the DSM rejections of "paraphilia, NOS, nonconsent" powerfully speak to the weight of the evidence that the motion should have been granted.

In its 2003 civil commitment action against Mr. Stout, the State painted him as an outlier so disordered as to necessitate involuntary

commitment. But the fact finder who considered that question did so without the benefit of the now-indisputable rejection of the diagnosis claimed to be a mental disorder. Given what has transpired within the scientific community in recent years, the reality is that the expert who would diagnose Mr. Stout with "paraphilia, NOS, nonconsent" is the outlier.

The trial court's finding that the CR 60(b) motion had no basis in the law or science was manifestly unreasonable. Slip.Op. at 2. Under CR 60(b)(11) and in the furtherance of justice, this Court should accept review and hold that Mr. Stout is entitled to relief. The matter should be remanded for an initial commitment trial, at which the factfinder will decide whether Mr. Stout meets criteria in light of the new information that has arisen about so-called "paraphilia, NOS, nonconsent."

F. CONCLUSION

This Court should accept review of the question whether a public repudiation within the scientific community of the alleged "mental disorder" under which Mr. Stout was committed in 2003 constitutes extraordinary circumstances that merit vacating the commitment order under CR 60(b). The decision in this case affected Mr. Stout's personal, constitutionally protected interest in his liberty

and this alone is reason to grant review. However, because the issue is likely to arise in the context of other RCW 71.09 civil commitments, this Court should accept review in the substantial public interest.

DATED this 14th day of July, 2015.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of ROY DONALD STOUT, JR.	)	No. 71343-4-I
	)	DIVISION ONE
STATE OF WASHINGTON, Respondent,	)	
v.	)	UNPUBLISHED OPINION
ROY DONALD STOUT, JR. Appellant.	)	FILED: June 15, 2015

SCHINDLER, J. – Roy Donald Stout, Jr. appeals the trial court's denial of the CR 60(b)(11) motion to vacate his 2003 commitment as a sexually violent predator. Stout claims that because the psychiatric profession has rejected the paraphilia NOS[1] nonconsent diagnosis that his commitment was partly based on and his diagnoses have changed over time, he is entitled to a new commitment trial. Because Stout has failed to demonstrate extraordinary circumstances warranting the requested relief under CR 60(b)(11), we affirm.

FACTS

Roy Donald Stout, Jr. has an extensive criminal history that includes both sexual and nonsexual offenses beginning when he was 14-years-old. On multiple occasions,

[1] Not otherwise specified.

Stout approached strangers or casual acquaintances and engaged in—or attempted to engage in—sexual acts without their consent.

In 1997, Stout visited a casual acquaintance, fondled her, and attempted to kiss her while she resisted. The State charged Stout with indecent liberties. Stout pleaded guilty to burglary in the first degree and the court imposed a 75-month sentence.

In 2001, the State petitioned to have Stout committed as a sexually violent predator, alleging the burglary was sexually motivated. At the 2003 commitment trial, Dr. Richard Packer, the State's expert, testified that he diagnosed Stout with paraphilia NOS (nonconsent) and antisocial personality disorder. Based on Dr. Packer's diagnoses and his testimony concerning the risk assessment factors, the trial court found Stout was a sexually violent predator. The court committed him to the Washington State Department of Social and Health Services Special Commitment Center Program (SCC).

This court affirmed Stout's commitment on appeal. In re Det. of Stout, 128 Wn. App. 21, 114 P.3d 658 (2005), aff'd, 159 Wn.2d 357, 150 P.3d 86 (2007). Stout has consistently refused to participate in sex offender treatment while at the SCC. In subsequent annual reviews, including the reviews in 2010, 2011, and 2012, the trial court found the State met its burden of establishing probable cause that Stout continues to satisfy the criteria for a sexually violent predator. See RCW 71.09.090.

In July 2013, the State filed a motion to schedule a review on whether Stout continued to meet the criteria for a sexually violent predator. On August 22, Stout filed a CR 60(b)(11) motion to vacate the 2003 commitment order. At the hearing on the motion, Stout's attorney asserted the psychiatric community has now completely

rejected the diagnosis of paraphilia NOS (nonconsent) that formed a primary basis for Stout's 2003 commitment, and the "last nail in the coffin for Paraphilia NOS" was its recent rejection in the 2013 version of the Diagnostic and Statistical Manual of Mental Disorders[2] (DSM). Stout maintained the "huge changes in the science in these cases over the last twelve years" constituted extraordinary circumstances under CR 60(b)(11). Stout further claimed he was entitled to a new trial because the State's most recent evaluation concluded he continued to meet the criteria for a sexually violent predator based primarily on a diagnosis of antisocial personality disorder rather than the combination of paraphilia NOS (nonconsent) and antisocial personality disorder.

The trial court denied Stout's motion, concluding he failed to identify extraordinary circumstances warranting relief under CR 60(b)(11). Stout appeals.[3]

ANALYSIS

CR 60(b) permits the trial court to relieve a party from a final judgment or order for several specified reasons, including mistake, inadvertence, surprise, excusable neglect, irregularity in obtaining a judgment, and a void judgment. Under CR 60(b)(11), the court may vacate an order for "[a]ny other reason justifying relief from the operation of the judgment." But CR 60(b)(11) is "a catchall provision, intended to serve the ends of justice in extreme, unexpected situations." In re Det. of Ward, 125 Wn. App. 374, 379, 104 P.3d 751 (2005). Relief under CR 60(b)(11) is limited to " 'extraordinary circumstances not covered by any other section of the rule.' " In re Marriage of Yearout,

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

[3] The trial court also rejected Stout's contention that he had established probable cause for a new commitment trial under chapter 71.09 RCW. On appeal, Stout does not challenge that portion of the trial court's decision.

41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (quoting State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). The circumstances must relate to irregularities that are "extraneous to the action of the court or questions concerning the regularity of the court's proceedings." Yearout, 41 Wn. App. at 902. Errors of law do not justify vacating an order under CR 60(b)(11). In re Marriage of Furrow, 115 Wn. App. 661, 674, 63 P.3d 821 (2003).

We review the trial court's denial of a motion to vacate under CR 60(b) for a manifest abuse of discretion. In re Det. of Mitchell, 160 Wn. App. 669, 675, 249 P.3d 662 (2011). The trial court abuses its discretion "only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons." Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). Our review is limited to the trial court's decision denying Stout's motion to vacate, not the underlying commitment order that he seeks to vacate. See Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980) (an appeal from the denial of a CR 60(b) motion "is limited to the propriety of the denial not the impropriety of the underlying judgment").

"In rare circumstances, a change in the law may create extraordinary circumstances, satisfying CR 60(b)(11)." Ward, 125 Wn. App. at 380. Stout does not allege or demonstrate any relevant change in the law. Rather, Stout relies on claims that the psychiatric community has completely rejected the validity of the paraphilia NOS (nonconsent) diagnosis in the years since his initial commitment and the assertion that the "agreement rate" of the State's experts in his diagnoses is "far below a reasonable degree of professional certainty." In essence, Stout's arguments are

allegations of newly discovered evidence. See CR 60(b)(3). Stout's arguments do not constitute extraordinary circumstances or irregularities extraneous to the action of the courts.

Challenges to the paraphilia NOS (nonconsent) diagnosis as a basis for sexual predator commitment are not new. Stout's brief on appeal relies heavily on a 2008 article criticizing the diagnosis. See Allen Frances, Shoba Sreenivasan, & Linda E. Weinberger, Defining Mental Disorder When It Really Counts: DSM-IV-TR[4] and SVP/SDP[5] Statutes, 36 J. Am. Acad. Psychiatry & Law, 375 (Nov. 3, 2008).

Further, long before Stout's motion to vacate, in 1993, our Supreme Court adopted the following observations in rejecting an analogous argument that a diagnosis of paraphilia NOS (nonconsent) was invalid because it was only a residual category 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[6]; 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

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

[5] Sexually violent predator/sexually dangerous person.

[6] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R (3rd rev. ed. 1987).

> identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM."

In re Pers. Restraint of Young, 122 Wn.2d 1, 28, 857 P.2d 989 (1993)[7] (quoting Alexander D. Brooks, The Constitutionality & Morality of Civilly Committing Violent Sexual Predators, 15 U. PUGET SOUND L. REV. 709, 733 (1991-92)).

Stout argues Young is distinguishable because the court was not addressing a diagnosis that the DSM had expressly rejected. But contrary to Stout's argument, the court in Young clearly emphasized that the critical issue was not whether a particular diagnosis was included in or excluded from the DSM but, rather, whether the evidence established " 'sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.' " Young, 122 Wn.2d at 28[8] (quoting Brooks, The Constitutionality & Morality of Civilly Committing Violent Sexual Predators, at 733). Stout cites no authority suggesting the DSM governs the diagnoses of mental abnormalities that permit the commitment of sexually violent predators.

More recently, this court reiterated the Young holding in rejecting the argument that the trial court must conduct a Frye[9] hearing before the State may offer a diagnosis of paraphilia NOS (nonconsent) as a basis for confinement. We noted Washington courts "have repeatedly upheld SVP commitments based upon" a diagnosis of paraphilia NOS (nonconsent). In re Det. of Berry, 160 Wn. App. 374, 379-80, 248 P.3d 592 (2011) (citing In re Det. of Post, 145 Wn. App. 728, 756-57 & n.18, 187 P.3d 803 (2008). Disputes among experts about the validity of the diagnosis go to the weight of the evidence, not its admissibility. Berry, 160 Wn. App. at 378-79, 382.

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[7] Emphasis in original.

[8] Emphasis in original.

[9] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Stout also contends he is entitled to a new commitment trial because the State's experts changed their diagnoses during subsequent annual review evaluations. At the initial commitment trial, the State's expert diagnosed Stout with a combination of paraphilia NOS (nonconsent) and antisocial personality disorder. In a 2013 evaluation, Dr. Daniel Yanisch diagnosed Stout with rule-out paraphilia NOS (nonconsent), polysubstance abuse—in a controlled environment, antisocial personality disorder, and borderline intellectual functioning.

Stout cites no authority requiring the State to rely solely on the initial diagnoses to satisfy its burden at annual review hearings to demonstrate he "continues to meet the definition of a sexually violent predator." RCW 71.09.090(2)(b). Our Supreme Court recently rejected a similar argument:

> [Petitioner] argues that because the State's experts originally testified he suffered from pedophilia and now the State's expert found insufficient evidence for that diagnosis, the State has not met its burden. His argument is unpersuasive. First, this court has affirmed commitment based on paraphilia NOS nonconsent and antisocial personality disorder, which are essentially [petitioner]'s remaining diagnoses. See [ ]Stout, 159 Wn.2d [at] 363 . . . . Second, we rejected a similar challenge to continued civil commitment after an insanity acquittal when the detainee's diagnosis changed in State v. Klein, 156 Wn.2d 102, 120-21, 124 P.3d 644 (2005). While we cautioned that " '[d]ue process requires that the nature of . . . commitment bear some reasonable relation to the purpose for which the individual is committed,' " we found sufficient connection from the "original diagnosis of 'psychoactive substance-induced organic mental disorder' . . . and the current diagnosis of polysubstance dependence" to justify continued commitment. Id. at 119-20 (first alteration in original) (quoting Foucha v. Louisiana, 504 U.S. 71, 79, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). We observed that "the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it." Id. at 120-21. Similar principles apply here. Without more, the change from a diagnosis of pedophilia to a "rule out pedophilia" and hebephilia diagnosis is not sufficient to require a new evidentiary proceeding.

In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 644, 343 P.3d 731 (2015).

Stout makes no showing that any changes in his diagnoses were not reasonably related to his original commitment or that they constituted extraordinary circumstances under CR 60(b)(11). Stout does not demonstrate that ongoing disputes about the validity of the paraphilia NOS (nonconsent) diagnosis, exclusion of the diagnosis from the DSM, or the changes in his diagnoses over time constitute extraordinary circumstances. The trial court did not abuse its discretion in denying his motion to vacate under CR 60(b)(11).[10]

Affirmed.

WE CONCUR:

[10] Because Stout failed to demonstrate extraordinary circumstances, we do not address the State's contention that Stout's CR 60(b)(11) motion was not filed "within a reasonable time" and, therefore, untimely.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71343-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Fred Wist II, AAG
[fredw@atg.wa.gov] [crjsvpef@atg.wa.gov]
Office of the Attorney General – Criminal Justice Division

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 15, 2015

WASHINGTON APPELLATE PROJECT

July 15, 2015 - 4:08 PM

Transmittal Letter

Document Uploaded: 713434-Petition for Review.pdf

Case Name: DETENTION OF ROY STOUT

Court of Appeals Case Number: 71343-4

Party Respresented: PETITIONER

Is this a Personal Restraint Petition? ◯ Yes ◉ No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

No Comments were entered.

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