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No. 65436-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of

EDDIE WILLIAMS

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG 15 AM 11:21

STATE'S RESPONSE BRIEF

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I. INTRODUCTION

Appellant Eddie Leon Williams has a long history of violent and sexually predatory behaviors during the limited times that he has been at large in our community. Because the trial court committed no reversible error, Williams' civil commitment under RCW 71.09 should be affirmed.

II. ISSUES

A. Did the trial court have authority to order Williams to engage in a *current* mental health evaluation when his prior evaluation was seven years old by the time of trial? Yes.

B. Did the trial court correctly reject Williams request for a Frye hearing on a commonly accepted psychological diagnosis? Yes.

III. STATEMENT OF THE CASE

A. FACTS

Eddie Williams, who was fifty-one years old at the time of his sexual violent predator civil commitment trial, has a long and violent history of assaulting women.

As a child, he engaged in sexual contact with girls and boys, some of whom were his cousins. RP 806-807.¹ Williams recalls forcing a neighbor girl into sexual activity. RP 308. He also engaged in reciprocal

¹ The verbatim report of the 2010 SVP trial is consecutively paginated. It is referenced herein as RP.

oral sex with males. He says about half of these sexual acts were forced upon him while the other half he forced upon his victims. RP 308

At age of 9 or 10, he engaged in penile-vaginal intercourse with his eighteen year old sister, Wanda. RP 308, 807. He also peeped on his sister 6 or 8 times when she was engaging in sexual intercourse with a boyfriend. RP 312.

Williams moved to Washington when he was eight or nine years of age and met Lawrence Williams (no relation). RP 811. Together, they terrorized the neighborhood abducting and raping women. RP 811-834. Williams reports he may have raped anywhere from 5 to 20 women. RP 309, 813.

According to Williams, Lawrence would rape the woman first and Williams would watch becoming aroused when it was his turn. RP 822-826. Williams was acutely aware the victims were frightened, struggling, crying, and begging them to stop. RP 823, 830-31.

On December 7, 1972, while just 13 years of age, Williams and Lawrence followed Kathleen Foley down a dark alley. They attacked her, dragged her into a garage and took turns raping her. RP 837-838. Williams saw that Ms. Foley was "hurt and in pain." RP 839. He says raping her was "something I wanted to do." RP 840. Asked why he raped her, Williams said that he enjoyed having control over her and having sex.

RP 310.

In one undetected rape, Williams says that the victim, despite the distress of being raped, took the time to correct his clumsy intercourse techniques. RP 310, 949. She told Williams to stop doing it in circles and to start thrusting instead. RP 310 949

Williams was adjudicated as a juvenile for the rape of Kathleen Foley and was placed on supervised probation. RP 318.

From his early teens into adulthood Mr. Williams established a pattern of stalking women. On June 30, 1979, he attacked seventeen year old Ilona Zob at the Seattle Center when she rejected him. RP 150-160. He punched her repeatedly in the face, fracturing her jaw. RP 160

On the night of July 16, 1980, Williams followed Doris Dailey to her home, snuck up behind her as she walked across her yard, and tried to snatch her purse. RP 886-887, 890. During the attack, he grabbed her around the neck, dragged her into the bushes, got on top of her and choked her. RP 887. He also unbuttoned her blouse. RP 891.

Williams said he became sexually aroused during the attack and thought about raping her. RP 320, 891-892. "There is good pleasure in forcing people to give it up," he said. "The sex can be good even while you are raping someone - there is good pleasure in doing wrong." RP 321.

Though charged with attempted rape, Williams entered a guilty

plea to Assault in the Second Degree. He was paroled after serving approximately three years in custody. RP 321-322.

On July 31, 1985, just days after being released from jail for assaulting a store clerk, Williams spotted eighteen year old Deborah Carter leaving the Public Safety Building. RP 866- 867. Williams says he had sex on his mind and wanted to "get with" her so he invited her to join him for a beer. *Id.* Ms. Carter initially accepted Williams' invitation, but while sharing the beer changed her mind and tried to get away from him. *Id.* Williams followed her. *Id.*

To escape Williams, Ms. Carter got onto a bus. RP 868 Undaunted, Williams followed. RP 868. When she disembarked in Kent an hour later, Williams again followed. RP 869. When she walked by an open field, Williams grabbed her by the head and dragged her to onto the field. RP 870. Ms. Carter struggled and begged, "No, no, no, don't do this to me." Williams covered her mouth and said, "Bitch, if you scream, I'll kill you." RP 324, 870.

Williams pulled her clothes off and raped her. RP 872. He admitted that her crying, struggling and fear did not adversely impact his ability to maintain an erection throughout the rape. RP 872-873. "I knew what I wanted to do." RP 873. He said the sex was both "good and bad." "The bad part was me wrongfully doing an innocent person. The good

part was the sexual pleasure," he said. RP 326.

Williams pleaded guilty to Rape in the Second Degree and was sentenced to 31 months incarceration. RP 875. While in prison, Williams fantasized about raping and sexually assaulting women. RP 327. He says he received control and sexual pleasure from the fantasies. *Id.*

Williams was paroled in 1988. Williams says he saw Ms. Carter again at a friend's house. RP 877. Williams obtained her address, boarded a bus for Kent and planned on having sex with her, albeit in exchange for drugs this time. RP 878-879. Initially, Williams said he would have had sex with her first and then revealed that he had raped her ten years ago to serve as a warning to "show her how loose she would be . . . you get out on the streets and do drugs and things happen to you." RP 326-327. At trial, Williams said he would have revealed that he was her rapist either before or after they had sex. RP 879.

Williams found the house but Ms. Carter was not home. RP 883. He waited for her, but when she did not show up after an hour or two, he left. *Id.*

Williams began a sexual, and turbulent, relationship with Tanya Lewis almost immediately upon his 1988 release from DOC. RP 331. Williams was jailed on at least 10 separate occasions for physically assaulting her. RP 332, 382-383. He knocked out her tooth with a jar of

cocoa butter because she disrespected him. RP 855-864. During an argument in a car, he grabbed Tanya by the throat, shook her, and bit her on the cheek. RP 382. In another incident, he chased her around a car, tore her clothing and struck her several times in the head, even after she fell to the ground. RP 382-383. Williams insists that he was the victim in that relationship and was acting only in self-defense. RP 855-860.

Williams, however, has a long history of domestic violence related assaults. In 1979 he struck one of his sisters several times about the head and face. When Mr. Williams was arrested, he told the officer "Yeah, I get off on hitting women. If I have to knock some teeth out, I will. They better put me away for five years as I'm going to hurt somebody." RP 380.

Williams also physically assaulted Stephanie Kercheval² when she walked out of a restaurant during an argument. RP 792. Williams followed, knocked her down, got on top of her and punched her. A passerby pulled Williams off of her. She ran home. Williams followed and tried fight with her again at her home. This time her mother intervened and forced Williams to leave. RP 802-803.

In 1995, after being kicked out of a movie theater for rude and obnoxious behavior, Williams followed another woman to her home. As she stood on a porch waiting for someone to open the door, Williams

approached and said "I've got you now." At that moment, the door opened. RP 335, 910. Williams admitted he thought about raping the woman. Ex. 102. RP 334.

On August 17, 1997, Williams was accused, but never convicted, of raping of Vicki Crawford. RP 912. Williams bought the drugs for Ms. Crawford. He became angry with her when he saw her rummage through his bags. So, he told her that if she wanted the drugs she would have to give him oral sex, which she did. RP 337, 915. Williams admits he victimized Ms. Crawford and manipulated her into performing oral sex. RP 915-916. He also concedes that he assaulted her. RP 917. He says he found pleasure in assaulting her. RP 338.

On March 8, 1998, Williams was involved in two more sexual assaults. Gloria Gridas (a.k.a. Lana Cortez) reported that Williams forced her to perform oral sex and penile-vaginal intercourse; and, that he chased her when she escaped from him. RP 339-340.

Williams denies raping Ms. Gridas. He says that he and Ms. Gridas entered into a sex-for-drugs agreement. RP 922. He does admit he manipulated Ms. Gridas into having sex with him. RP 926. Williams also concedes that Gridas ran from him when she saw him on the street and that he chased after her with his fly open and still wearing the condom she

² They had a two year relationship between 1985 and 1987. RP 792.

placed on him. RP 925-926. He says he chased her because he had to keep "moving her mind to get her to continue doing this with him." *Id.*

Within 30 minutes after giving chase to Ms. Gridas, Williams approached Lisa McKinny, as she walked home. RP 341, 928. Williams asked her to get high with him and she accepted. RP 928-929. When she got up to leave, Williams became upset and demanded she have sex with him. She repeatedly told him said no, but out of fear she eventually agreed to masturbate him. RP 930-931.

Williams saw that Ms. McKinny trembling and admits he knew she was afraid of him. RP 931. Williams says he felt bad and made her stop masturbating him, but not before he ejaculated. *Id.*

Williams was initially charged with Rape in the Second Degree for raping Gloria Gridas. The charges were amended to Assault in the Third Degree. Williams pleaded guilty and sentenced to 16 months confinement. RP 345.

The State filed its Petition to commit Eddie Williams as a sexually violent predator on January 25, 1999. CP 1. Since his confinement to the Special Commitment Center (SCC) awaiting his commitment trial, Williams has continued to stalk and threaten women. When Mr. Williams arrived at the SCC in 2000, he repeatedly told Coral Brocka, RRC, that it says in the Bible, "it is not rape if the woman doesn't scream." RP 229.

Between 2000 and 2006 Williams would follow Ms. Brocka during her shift. RP 242-243. Ms. Brocka says felt threatened by Williams. RP 245.

When Williams was ordered not to have any contact with her, Williams became very angry and tried to have contact with her despite the order. RP 245-246.

Williams also made Shannon Moore, an administrative assistant at the SCC, very uncomfortable when he told her that he had seen her wearing baby blue colored pants and he thought she looked really good in them. RP 162-164.

When Williams again approached Ms. Moore and told her that she "looked good in the rain," Ms. Moore again felt uncomfortable. Shannon Smit, another administrative assistant told Williams that his comment was "inappropriate." Williams became very angry, yelling and flaying his arms aggressively charging the chain-link fence that separated and protected the women from him. RP 167. Both women felt unsafe and threatened by Williams. RP 168. Ms. Smit was extremely shaken when Williams glared at her after the incident. RP 173.

Williams also unnerved Linda Barker, a cook in the kitchen at the SCC. Ms. Barker noticed him staring at her in the lunch room each day. She also noticed that he was at the gate each day when she ended her shift. RP 179-182.

B. EXPERT TESTIMONY

The State presented expert testimony from J. Robert Wheeler, PhD., a member of the Joint Forensic Unit. Based on all the evidence in this case, Dr. Wheeler reached the opinion that Williams suffered from a mental abnormality (Paraphilia Not Otherwise Specified (Non-consenting persons) (VRP 298) and Antisocial Personality Disorder that causes him serious difficulty in controlling his sexually violent behavior making him likely to engage in predator acts of sexual violence if not confined to a secure facility. RP 510.

Dr. Wheeler gave an overview of the history and debates surrounding the diagnosis of Paraphilia NOS (nonconsent). RP 301-306. He also discussed the current proposal to include paraphilic coercive disorder in the next version of the DSM instead of Paraphilia NOS nonconsent. RP 346 -352. Dr. Wheeler was able to reach the opinion that Williams would also meet criteria for paraphilic coercive disorder as well. RP 372. Dr. Wheeler also diagnosed Williams with antisocial personality disorder. RP 415.

Williams obtained a score of 33 on the Hare Psychopathy Checklist-Revised (PCL-R). RP 439. This score indicates significantly increased risk of sexual and violent recidivism for sex offenders. It also falls above the conventional cut-off score of 30 for classification of an

individual as a psychopath. RP 441.

According to Dr. Wheeler, research has demonstrated that the joint presence of sexual deviancy and psychopathy magnifies risk of sexual recidivism in a manner that is essentially multiplicative rather than additive. Williams presents both psychopathy and deviancy in this case. RP 509-510.

In addition to the four actuarial instruments – the MnSOST-R, the Static-99R, the Static-2002R, and the SORAG – that Dr. Wheeler utilized to reach the opinion that Williams was more likely than not to engage in predatory acts of violence if not confined to a secure facility (RP 462-497), Dr. Wheeler also identified several risk factors that actually increase Williams risk to reoffend. RP 502-508.

Dr. Wheeler also explained that actuarial instruments are an underestimation of true risk because they only take into account detected and prosecuted crimes. RP 498-501.

Williams retained Dr. Richard Wollert. However, in contrast to Dr. Wheeler's extensive evaluation, Dr. Wollert did not evaluate Williams. He did not meet Williams. RP 702. He did not review any police reports, victim statements, medical records or other psychological evaluations related to this case. *Id.* He did not generate a report. RP 700. Dr. Wollert simply reviewed Dr. Wheeler's report and wrote notes in the

margin. RP 683, 700. He testified about his opinion of the reliability of the actuarials and validity of the paraphilia NOS nonconsent diagnosis. RP 686. However, he conceded that in conducting evaluations on behalf of the sexual violent predators he uses the actuarial instruments. RP 687. He also concedes he has diagnosed people with paraphilia NOS nonconsent. RP 693.

On May 19, 2010, a jury found the State proved, beyond a reasonable doubt, that Williams is a sexually violent predator. CP 643. The court committed him to the custody of the Department of Social and Health Services in a secure facility for control, care and treatment pursuant to RCW 71.09.060 until further order of this court. CP 641-642.

C. PROCEDURAL HISTORY

The State filed its Petition to commit Williams as a sexually violent predator pursuant to RCW 71.09 on January 25, 1999. CP 1-2. The State also filed its Certification for Determination of Probable Cause with the Petition and included two exhibits: 1) The Declaration of Leslie Rawlings, PhD; and 2) evaluations relied upon by Dr. Rawlings. CP 3-54. Dr. Rawling's evaluation was based solely on a records review.

The court found probable cause on February 9, 1999. CP 55-56. Williams appealed the probable cause order asserting the State was required to plead and prove a recent overt act in order to file its petition.

Supp CP ___ (SUB #37A).³ It was assigned COA No. 44394-1-I. The Court of Appeals denied Williams appeal on February 4, 2000 because *In re Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000) and *In re Halgren*, 137 Wn.2d 340, 971 P.2d 512 (1999) were pending Supreme Court review. CP 86-93.

While Williams ROA appeal was pending, the State filed a motion to compel a mental exam pursuant to CR35. Supp CP ___ (SUB# 42C, 53). It was originally denied by the trial court, (Supp CP ___ (SUB# 48)), but the State renewed its motion on November 23, 1999 based on the Supreme Court's decision in *Turay and Campbell*. Supp CP ___ (SUB# 67). The State also sought to compel Williams participate in his deposition. *Id.*

The day before the State renewed its CR 35 motion, Williams filed a motion to dismiss based on ex post facto and double jeopardy. Supp CP ___ (SUB# 66). The court denied the State's evaluation and deposition on December 10, 1999: Supp CP ___ (SUB# 75A, 75B). The State sought discretionary review. Supp CP ___ (SUB# 76). The Court of Appeals accepted the States appeal and reversed the trial court. *In re Williams*, 106 Wn. App. 85, 22 P.3d 283 (2001). The Supreme Court accepted review.

³ The State filed a Supplemental Designation Of Clerk's Papers and Exhibits along with this brief.

On October 10, 2002, it issued its ruling denying a CR 35 evaluation, but ordering Williams to participate in a deposition. *In re Williams*, 147 Wn.2d 476, 55 P.2d 597 (2002).

On September 3, 2003, Williams was found in contempt of court for refusing to participate in a video deposition. The court struck the trial date. Supp CP ____ (SUB# 132). His contempt of court was purged a year later on September 14, 2004, when Williams agreed to participate in a deposition. Supp CP ____ (SUB# 148). The parties agreed to continue Williams' trial until September 9, 2005. Williams signed a waiver through October 30, 2005. Supp CP ____ (SUB# 151, 155)

In August 2005, Williams moved to continue his case again. The court granted the motion setting the trial on May 22, 2006. Williams signed a waiver through May 30, 2006.

In March 2006, Williams fired his counsel. Society of Counsel Representing Accused Persons was appointed. Williams requested a continuance of his trial date to May 21, 2007 and filed a waiver through May 31, 2007. Supp CP ____ (SUB# 168, 169, 170)

Williams again requested continuances of his trial date on May 16, 2007 and November 21, 2007. Supp CP ____ (SUB 178, 182). These were granted

On February 11, 2008, the parties agreed to continue the trial date

to October 31, 2008. Williams signed a waiver through November 15, 2008. Supp CP ____ (SUB 187, 188). Williams was deposed on February 26, 2008. RP 917.

In the fall of 2008, Williams was diagnosed with prostate cancer and his trial was continued to May 26, 2009 due to health issues.

Williams signed a waiver through July 15, 2009. Supp CP ____ (SUB# 192, 193, 195, 196, 197, 198).

With the prior evaluation years out of date, the State filed a Motion for a Compelled Forensic Interview on March 13, 2009. Supp CP ____ (SUB# 200). Since being remanded to the SCC in 1999 Williams had refused to participate in a forensic interview pursuant to RCW 71.09.040(4), which provides authority separate from CR 35. The court granted the motion and Williams met with J. Robert Wheeler PhD on April 6 and 7, 2009. CP 146-148, RP 284.

On May 11, 2009, just weeks away from the May 26, 2009 trial, for which the State was prepared, Williams filed another motion to continue the trial date. The court granted the motion, over the State's objection, and set the hearing for May 3, 2010. Supp CP ____ SUB# 213, 219, 220, 224.

Williams' trial finally began on May 4, 2010. On May 19, 2010, a jury found Williams to be a sexually violent predator.

**IV. THE TRIAL COURT ACTED WITHIN ITS DISCRETION
BY ORDERING A CURRENT EVALUATION UNDER RCW
71.09.040**

The commitment trial in this matter was substantially delayed due to a lengthy interlocutory appeal, William's refusal to submit to a deposition, his illness, and other defense continuance requests. By the time the matter came on for trial, the prior evaluations of Williams under RCW 71.09.040 were no longer current and lacked direct input from Williams. Under these circumstances, the trial court acted well within its discretion by ordering a current evaluation of Williams that complied with the statutory requirements of RCW 71.09.040.

A. STANDARD OF REVIEW

The evaluation procedure mandate by RCW 71.09.040 provides a statutory discovery mechanism for evaluating an SVP respondent's current mental state and dangerousness. Such discovery rulings are reviewed for abuse of discretion. *In re Detention of Halgren*, 156 Wn.2d 795, 132 P.3d 714, 717 (2006); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 p.2d 775 (1971). Abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97 935 p.2d 1353

(1997). Here, as argued below, Williams has failed to demonstrate that the trial court abused its discretion by ordering a current evaluation under the statute.

B. WILLIAMS FAILED TO PRESERVE ERROR ON HIS CLAIM THAT THE COURT LACKED STATUTORY AUTHORITY TO ORDER A CURRENT EVALAUTION

In proceedings below, Williams failed to preserve his argument on appeal that the trial court lacked "statutory authority" to order a current evaluation when the prior evaluation was seven years old by the time of trial. *See* Assignment of Error No. 1. Williams briefing in the trial court opposed the State's motion for a current evaluation by arguing that an updated evaluation was unnecessary and that it was barred by "law of the case." *See* CP 734-737 (Response to Prosecution's Motion for Compelled Interview). He made no argument in his written briefing below that the trial court lacked statutory authority to order a current evaluation. *Id.*

The closest that Williams came in proceedings below to arguing a lack of statutory authority by the trial court was a single sentence during oral argument on the State's motion where Williams stated: "The other thing I do want to point out is that there is no clear statutory authority *compelling him* to participate." VRP 3/20/2009 at 7 (emphasis added). Rather than arguing that the trial court lacks of authority to order a current

evaluation, Williams' oral claim is more that the court is permitted to order DSHS to conduct the evaluation, but that it cannot order Williams to participate in that evaluation. *Id.* at 9.

In any event, Williams has failed to preserve his current argument that the trial court lacked authority under RCW 71.09.040 to order a current evaluation. An appellate court generally does not consider theories that were not raised below:

Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wash.2d 432, 441, 191 P.3d 879 (2008). The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983). Similarly, we do not consider theories not presented below. *474 *Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 780, 819 P.2d 370 (1991).

Wilson Son Ranch, LLC v. Hintz, ___ Wn. App. ___, 253 P.3d 470, 473 - 474 (2011). “We will not consider a theory as ground for reversal unless ... the issue was first presented to the trial court.” *Doe v. Puget Sound Blood Center*, 117 Wash.2d 772, 780, 819 P.2d 370, 374 (1991) (*quoting Talps v. Arreola*, 83 Wash.2d 655, 658, 521 P.2d 206 (1974)).

Similarly, even if Williams' vague statements at oral argument are construed to support his current appellate claims, they are not sufficient to preserve those arguments for appeal. In *Sturgeon v. Celotex Corp.*, 52 Wash.App. 609, 623, 762 P.2d 1156, 1164 (1988), this court found that

arguments made at oral argument before the trial court, but not included in written briefing, failed to preserve the argument for appeal. In the appellate context, Washington courts have repeatedly held that "[w]e do not consider arguments that the parties do not brief and then subsequently raise for the first time during oral argument." *Heller Bldg., LLC v. City of Bellevue*, 147 Wn.App. 46, 59, 194 P.3d 264, 271 (2008); *State v. Johnson*, 119 Wash.2d 167, 170-71, 829 P.2d 1082 (1992) (issues raised for the first time in oral argument before the Court of Appeals need not be considered). The vague oral statements made by Williams did not preserve for review the broad claims that Williams now makes.

Further, error was not preserved because Williams nowhere objected to actual testimony regarding the updated evaluation. Williams' objection to the updated RCW 71.09.040 evaluation during the pre-trial discovery phases does not save him from operation of the error preservation doctrine. Objections made during discovery are not sufficient to preserve error for appeal if the evidence is offered at trial. *See e.g. State v. Powell*, 126 Wash.2d 244, 893 P.2d 615 (1995) (party who has lost evidentiary ruling must object again at trial to preserve the error); *State v. Davis*, 141 Wash.2d 798, 850, 10 P.3d 977 (2000) (objections must be made at the time the evidence is offered). Even objections raised during motions *in limine* are not sufficient to preserve the error for appeal, even in

cases where the court issues tentative pre-trial rulings. *Eagle Group v. Pullen*, 114 Wash.App. 409, 416-17, 58 P.3d 292 (2003). The objection must be raised at the time the evidence is offered. *Id.* at 417.

In *In re Audett*, 158 Wash.2d 712, 726, 147 P.3d 982, 988 (2006), the Supreme Court agreed with the State that an SVP failed to preserve error when he objected to an evaluation pre-trial, but did not object to admission of testimony regarding matters learned in the evaluation. "In this case we agree that the State has offered compelling reasons to find that Audett failed to preserve the issue of whether evidence derived from a CR 35 exam ordered in a sexually violent predator proceeding must be excluded." *Id.* As in *Audett*, the only objection Williams ever made to the updated RCW 71.09.040 evaluation was during the discovery phase - over one full year before the trial occurred -- and that motion pertained only to whether the evaluation could take place, not whether the any information gleaned would be admissible. CP 734-37.

One reason that parties are required to lodge objections at appropriate times below is so that parties and trial courts can operate to protect the record and correct any error. *Smith v. Shannon*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983), citing *Estate of Ryder v. Kelly-Springfield Tire, Co.*, 91 Wash.2d 111, 114, 587 P.2d 160 (1978). Here, Williams' failure to clearly argue below that the trial court lacked authority to order a

current evaluation prejudiced the State by preventing submissions from the State that undermine Williams current claims.⁴

On appeal, a substantial theme in Williams' lack of authority briefing is that a current evaluation "violated Williams' right to due process of law and his right to be free from compelled invasions into his private affairs." Opening Br. at 7. However, Williams claim that a current SVP evaluation works to his detriment is contrary to established SVP practice. Had this argument been properly made below, the State would have pointed out (and submitted record materials demonstrating) that updated evaluations often result in a *change* in the expert's opinion and a *dismissal* of the SVP action. For example, in King County, six SVP cases have been dismissed pre-commitment since 2008 following expert re-evaluation of the case. *In re Tony Gross*, No. 05-2-14579-0 SEA, *In re Rutherford*, No. 06-2-23737-4 SEA, *In re Lawless*, No. 06-2-29166-2 SEA, *In re Abolafya*, No. 08-2-06795-5 SEA, *In re Keith*, No. 07-2-28601-2 SEA, and *In re Rojas*, No. 08-2-06792-1 SEA. Thus, the ability to conduct a current evaluation is actually a safeguard that operates to

⁴ RAP 2.5(a) does not provide an alternative avenue for Williams' current appeal. Williams provides no argument on why this is a "manifest error affecting a constitutional right." RAP 2.5(a). In *Audett*, the Supreme court rejected application of the manifest error doctrine to the situation where a trial court had ordered the evaluation of an SVP without authority under CR 35. 158 Wn.2d at 725.

protect Williams' due process rights by guarding against an erroneous commitment.

This court should refuse to consider the authority and due process issues raised by Williams on appeal because they were not raised in proceedings below.

C. COMPLIED-WITH DISCOVERY ORDERS ARE OUTSIDE THE COURT'S JURISDICTION BECAUSE THEY ARE MOOT.

The court should decline to review this issue because the issue of Williams meeting with Dr. Wheeler for a current evaluation became moot once he completed the evaluation.; this court cannot undo discovery that has already occurred. Absent satisfaction of specialized criteria that have no application in this case,⁵ an appellate court lacks jurisdiction to consider moot issues. *Milton v. Waldt*, 30 Wn.App. 525, 526 (1981); RAP 18.9(c). A case is moot when the court cannot provide the basic relief originally sought in proceedings below. *In re Swanson*, 115 Wn.2d 21, 24,

⁵ The court may review a moot issue only after satisfying the following three-part test: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination, and (3) the likelihood that the question will recur. *In re Swanson*, 115 Wn.2d at 25. Because *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002) already provides an authoritative determination on the availability of CR 35 interviews, the prong two test is not satisfied. Prong three also fails because there is little or no chance that this situation will reoccur. After *Williams*, the State no longer seeks CR 35 compelled interviews. The current case, properly understood as a review of the CR 35 order, fails to satisfy the mootness exception and should not be reviewed

804 P.2d 1 (1990).

Here, appellant's sole objection in the proceedings below was to a discovery order that required him to meet with Dr. Wheeler. He did not seek discretionary review of this order, nor did he resist the order through contempt proceedings and appeal of the contempt order. Instead, he chose to meet with Dr. Wheeler for the interview. Because the question of whether respondent should be forced to meet with Dr. Wheeler is entirely moot, this court should not have reviewed the issue.

Federal case law holds that a complied-with discovery order cannot be appealed because it is moot. *E.E.O.C. v. St. Regis Paper Company*, 717 F.2d 1302, (9th Cir. 1983); *Securities and Exchange Commission v. Laird*, 598 F. 2d 1162, 1163 (1979). (See also *Baldrige v. United States*, 406 F.2d 526 (5th Cir. 1969); *Grathwohl v. United States*, 401 F.2d 166 (5th Cir.1968); *Lawhon v. United States*, 390 F.2d 663 (5th Cir. 1968); *Kurshan v. Riley*, 484 F.2d 952 (4th Cir. 1973); *United States v. Lyons*, 442 F.2d 1144 (5th Cir. 1971); *Barney v. United States*, 568 F.2d 116 (8th Cir. 1978). "A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order." *Church of Scientology v. United States*, 506 U.S. 9, 113 S.Ct. 447, 121 L.Ed, 2d 313 (1992) citing

because this court cannot undo the interview.

United States v. Ryan, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971).

The federal courts take this approach because appellate review of complied-with discovery orders is highly problematic for courts and litigants. As a practical matter, the bell cannot be unrung and should not be unrung following a trial where the discovery was used without objection. Otherwise, a litigant is left with a free attempt to win a jury verdict backstopped by a post verdict appeal of the pre-trial discovery order. The time to seek review of discovery issues should be through pre-trial interlocutory proceedings, which the parties actually did in this case on other discovery orders. Application of the mootness doctrine, as explained in the federal case law, avoids the problems that Williams current appeal creates.

D. THE TRIAL COURT HAD AMPLE AUTHORITY UNDER RCW 71.09.040(4) TO ORDER A CURRENT EVALUATION

The sexually violent predator civil commitment law places the burden on the State to prove, beyond a reasonable doubt, that an SVP respondent is *currently* mentally ill and dangerous. *See, e.g. State v. McNutt*, 124 Wn.App. 344, 347, 101 P.3d 422, 423 (2004) ("To satisfy due process, the indefinite civil detention of sexually violent predators must be based on findings of current mental illness and present dangerousness."); *In re Detention of Scott*, 150 Wn.App. 414, 419, 208

P.3d 1211, 1214 (2009) (same). As a result, "reliable, up-to-date information" on an SVP respondent's psychological state is "highly relevant." *In re Detention of Duncan*, 142 Wn.App. 97, 105, 174 P.3d 136, 140 (2007).

The statute, RCW 71.09, is set up to ensure that the jury hears current information about the SVP respondent's current mental condition and dangerousness to commit sexually violent acts. An agency is required to refer any person who "appears" to meet criteria for civil commitment within 90 days of the person's release date. RCW 71.09.025(1). The referral from the agency is to include a "current" mental health evaluation or mental health records review. RCW 71.09.025(1)(a)(v).

Once a case is filed and following a contested probable cause hearing, an SVP respondent is to "be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator." RCW 71.09.040(4). The Legislature specifically delegates authority to DSHS to determine the conduct of the evaluation: "The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services." *Id.* DSHS has adopted such rules. *See* WAC 388-880.

The Legislative mandate for current information on a person's

mental abnormality and likelihood of reoffense is further reflected in the statutory mandate for trial "[w]ithin forty-five days after the completion" of the contested probable cause hearing. RCW 71.09.050. Thus, as envisioned in the statutory framework adopted by the Legislature, a pre-filing evaluation and a post-filing evaluation would both be current at the time of a 45 day SVP jury trial.

The reality, of course, is that few SVP respondent's exercise their right to a jury trial within 45 days of the contested probable cause hearing. The result is that the Legislative preference for current evaluations is thwarted unless a trial court has the ability to order an updated evaluation. In order to prevent this problem, pursuant to its legislative delegation, the rules established by DSHS explicitly recognize a procedure for updating evaluations that are more than 12 months old.

The Legislature makes two broad delegations to DSHS for the purpose of enacting RCW 71.09. First, RCW 71.09.800 grants the DSHS Secretary broad authority to make rules regarding operation of the SVP civil commitment law. Second, as noted above, RCW 71.09.040(4), requires DSHS to adopt rules governing how pre-commitment evaluations are conducted under the statute. WAC 388-880; 388-885.

With regard to the RCW 71.09.040(4) evaluation, the legislative delegation authorizes DSHS to adopt legislative rules regarding how the

.040 evaluation is to be conducted. The DSHS rules regulate the qualifications of the evaluator and the steps that are necessary to conduct the evaluation. *See* WAC 880-880-031 *et seq.* Such legislative rules "bind the court if they are within the agency's delegated authority, are reasonable, and were adopted using the proper procedure." *Association of Washington Business v. State of Washington, Dept. of Revenue*, 155 Wash.2d 430, 447, 120 P.3d 46, 53 - 54 (2005).

DSHS is also responsible for all costs related to the evaluation and treatment of persons subject to RCW 71.09. RCW 71.09.110. Consistent with its regulatory authority, DSHS has adopted rules addressed to reimbursable costs for evaluation. Recognizing the need for current evaluations, DSHS allows reimbursement for the cost of a current evaluation, unless "the evaluator has previously conducted a full evaluation of the same person within the past twelve months." WAC 388-885-016(7). Through this provision, a payment mechanism -- funded by the Legislature -- is allowed anytime a prior evaluation is more than 12 months old. *See also Litmon v. Superior Court*, 123 Cal.App.4th 1156, 1169, 21 Cal.Rptr.3d 21, 29 (2004) (noting that SVP evaluation is "stale" if over 12 months old).

The primary objective of any statutory construction inquiry "is to ascertain and carry out the intent of the Legislature." *Rozner v. City of*

Bellevue, 116 Wash.2d 342, 347, 804 P.2d 24 (1991). The statutory provision for current evaluations and the DSHS rules support the trial court's actions in updating Williams' SVP evaluation prior to trial.

When faced with the same issue, the California Supreme Court recognized that a provision for current evaluations and information was central to the SVP statute. *Albertson v. Superior Court*, 25 Cal.4th 796, 801, 23 P.3d 611, 615-616, 107 Cal.Rptr.2d 381, 386 - 387 (2001). In *Albertson*, the court recognized that a current evaluation helps further important state interests:

The SVPA reflects the Legislature's determination of the importance of identifying and controlling persons whose criminal history and mental state render them sexually violent predators.

* * *

The district attorney has an interest in obtaining information concerning the individual's current mental state for two reasons: to avoid committing a person who does not currently suffer from a qualifying mental disorder, and to support the commitment of a person who does suffer from a qualifying mental disorder.

Id.

Absent a current evaluation, a prosecutor not only risks committing people who should not be committed, but is also placed in the position of being unable to commit individuals who should be committed:

[3] In light of these provisions of the SVPA, it is evident why the district attorney in this matter, faced with an evaluation of petitioner that was more than one year old, considered it of vital importance to obtain a current evaluation, supported by a current

interview and access to current treatment information, concerning petitioner's current mental condition. . . . Quite simply, a county seeking commitment needs information concerning an alleged SVP's current mental status in order to have a fair opportunity to satisfy its own statutory and constitutional burden in SVPA litigation.

Id.

The very recent decision of *In re Thomas Williams*, ___ Wn.App. ___, No. 39785-4-II (Aug. 9, 2011) supports the trial court's decision to order an updated and current evaluation in the present case. As a result of various continuances,⁶ "the State moved to compel Williams to participate in a current psychological evaluation under RCW 71.09.040(4)." Slip op. at 3. The State argued that an updated and current evaluation was necessary because "the case had been pending for more than seven years and that the issue for the pending SVP trial was Williams' *current* mental condition." *Id.* (*emphasis in original*). As in the present case, Williams had undergone prior evaluations. *Id.* At trial -- unlike the in the current case -- Williams objected to any testimony drawn from the compelled evaluation. Slip. op. at 4.

In the published portion of the opinion, this court rejected the SVP respondent's claim that the pretrial mental health evaluation order by the

⁶ A footnote on page 3 of the slip opinion notes the various reasons that Williams case was delayed. As in the current case, the delays are largely attributable to the SVP respondent.

trial court "unconstitutionally invaded his privacy" and "exceeded its authority under RCW 71.09.040." Slip op. at 7. Because sex offenders have reduced privacy interests due to their threat to public safety, this court held that "the court-ordered examination did not improperly infringe on Williams's constitutional right to privacy." *Id.* at 9. On this point, the *Thomas Williams* case is consistent with *In re Campbell*, 139 @n.2d 341, 355-56, 986 P.2d 771 (1999), which similarly found that the "substantial public safety interest outweighs the truncated privacy interests" of SVP respondents.

On the authority question, this court found that the trial court had authority under RCW 71.09.040 to order a *current* evaluation. Slip op. at 9-10. In reaching this conclusion, the appellate opinion points to both the statute and the DSHS regulations. "We hold that the trial court appropriately followed both the authorizing statute and implementing rules when it ordered Williams's mental health examination after finding probable cause to believe that he met the criteria for an SVP." *Id.* at 12.

The compelling interests of the SVP statute are plainly thwarted if the State is forced to proceed to trial with a stale evaluation. In this case, an updated and current evaluation was particularly important because Williams had refused to participate in the prior evaluations. By ordering a current evaluation, the trial court ensured that the jury was getting the best

information available for its important work. The trial court's decision should be affirmed.

E. UNDER 2010 AMENDMENTS TO RCW 71.09.050(1) WHICH ABROGATE THE *WILLIAMS* DECISION, THE TRIAL COURT HAD AUTHORITY TO GRANT THE STATE'S REQUEST FOR A CURRENT EVALUATION

Although not argued below, this court has authority to *affirm* a trial court decision on any theory supported by the record. *Heidgerken v. Dep't of Natural Res.*, 99 Wash.App. 380, 388, 993 P.2d 934 (2000). In proceedings below, the State sought a current evaluation from Dr. Wheeler under RCW 71.09.040(1), because Dr. Wheeler had been appointed by DSHS to evaluate Williams on behalf of the Joint Forensic Unit. Apart from the authority for a current evaluation under RCW 71.09.040(4), the trial court's decision ordering a current evaluation is also supported by 2010 amendments to RCW 71.09.050(1) that grant the State a direct right to a current evaluation of the respondent. The amendatory language legislatively abrogates the portion of the *Williams* opinion that rejected the State's ability to obtain a pre-trial evaluation of the SVP respondent.

The issue in *Williams* was whether the State could seek a CR 35 compelled mental health evaluation of an SVP respondent. 147 Wn.2d at 486. The court rejected application of CR 35 because RCW 71.09 establishes a "special proceeding" with respect to evaluations that is

inconsistent with the court rule. *Id.* at 489-90. The court pointed out that RCW 71.09.040 and .050 were "silent about mental examinations" afforded the State during pre-trial discovery. " *Id.* at 490.

Such silence stood in direct contrast to the right afforded the State in post-commitment proceeding to have the SVP respondent "evaluated by experts chosen by the State." *Id.* Applying the hoary statutory construction rule of "expressio unius est exclusio alterius," the Supreme Court held that the pre-trial silence in RCW 71.09.040 and .050 precluded the trial court from ordering an evaluation directly for the State:

The Legislature has expressly provided that evaluations by experts are allowed in the proceeding following commitment as a sexually violent predator. In the absence of such statutory language for pretrial discovery, it can be inferred that the Legislature did not intend for the State to conduct such evaluations before commitment. Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 571, 980 P.2d 1234 (1999). Omissions are deemed to be exclusions. *State v. Williams*, 29 Wash.App. 86, 91, 627 P.2d 581 (1981).

The statute expressly provides for postcommitment evaluation, but it makes no mention of evaluations during pretrial discovery. CR 35 is inconsistent with the special proceedings set out in chapter 71.09 RCW. We hold that the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4).

147 Wash.2d at 491 (emphasis added).

Amendatory language adopted by the Legislature in 2010 abrogates this holding from *Williams* by rectifying the "silence" in RCW 71.09.050 regarding the State's right to a pre-commitment evaluation. Laws of 2010, ch. 28, s. 1. The amendment inserts a sentence in RCW 71.09.050(1) providing that: "The department is responsible for the cost of one expert or professional person *to conduct an evaluation on the prosecuting agency's behalf.*" *Id.*

Thus, the statute is no longer silent on the prosecution's right to a pre-commitment evaluation, but now recognizes that the prosecution, like the SVP respondent, is entitled to a single evaluation paid for by DSHS. *Id.* The result of the amendatory language is to abrogate the portion of the *Williams* that finds no prosecution right to a pre-commitment evaluation.⁷ *See In re QLM*, 105 Wn.App. 532, 540, 20 P.3d 465, 469 (2001) (Legislature "overrules" the result of a Supreme Court case by adding amendatory language to a statute).

In the current case, the amendatory language to RCW 71.09.050(1) adopted in 2010 supports the trial court's ruling. Although the amended law did not become effective until July 13, 2010, it had already passed the

⁷ The *Williams* case remains correct that CR 25 does not apply. Rather, the right to a pre-commitment evaluation flows from the statutory "special proceeding" and requires no good cause showing. *See In re Broer*, 93 Wn.App. 852, 864, 957 P.2d 281 (1998) (CR 35 "good cause" requirement does not apply when

Legislature and obtained the signature of the Governor by the time the jury considered Williams' commitment case. As a result of this amended law, it was appropriate to allow admission of Dr. Wheeler's testimony, even if Williams had made a proper objection.

If nothing else, the 2010 amendment renders Williams' appeal moot and/or harmless error. It would be a purely pyrrhic act for this court to reverse the current commitment based on a supposed lack of trial court authority to order an updated evaluation in 2009, when such an evaluation would be readily available on remand under the amendments adopted in 2010. In this situation, the California Supreme Court has correctly held that the proper approach is to affirm the trial court:

We conclude that the enactment of section 6603(c) renders it unnecessary for this court to decide whether the Court of Appeal below erred, because as both parties have expressly acknowledged, the new statute applies in any event to any future pretrial and/or trial proceedings in this litigation. (Cf. *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 299–300, 279 Cal.Rptr. 592, 807 P.2d 434 [legislation affecting conduct of criminal trials applies to pending cases].) Moreover, under the new legislation, it is clear that the district attorney has a right to the essence of what he has sought in this litigation.

Albertson v. Superior Court, 25 Cal.4th 796, 804, 23 P.3d 611, 617, 107 Cal.Rptr.2d 381, 388 (2001).

evaluation is statutory).

F. ANY ERROR BY THE TRIAL COURT WAS HARMLESS AND DOES NOT MERIT REVERSAL

Trial court rulings relating to discovery matters are subject to harmless error analysis. *Miller v. Peterson*, 42 Wn. App. 822, 827, 714 P.2d 695 (1986); *State v. Hamilton*, 24 Wn. App. 927, 936-37, 604 P.2d 1008 (1979). Before disturbing a trial court's ruling on a discovery matter, a showing of prejudice must be made. *Doe v Puget Sound Blood Center*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). Erroneous admission of evidence is not reversible unless appellant can show prejudice. *State v. Aaron*, 57 Wash.App 277, 787 P.2d 949 (1990) (citing *Floyd v. Myers*, 53 Wash.2d 351, 333 P.2d 654 (1959)). Only those errors that are prejudicial are grounds for reversal. *Northington v. Sivo*, 102 Wn. App. 545, 551, 8 P.3d 1067 (2000). Three separate analyses demonstrate that admission of testimony regarding a current evaluation was harmless and did not affect the integrity of the jury's verdict.

First, alternate means of discovery were available for all information learned by Dr. Wheeler in his interview with Williams. Under CR 26, if relevant matters are not privileged, they are generally discoverable. CR 26. The decision in *In re Williams*, 147 Wn.2d 476, 55 P.3d (2002) did not alter the State's ability to obtain information about an individual or his psychological make-up. *Williams* did not declare that

RCW 71.09 detainees have any privilege or right to refuse to answer questions posed by the State. To the contrary, *Williams* upheld both the psychological examination authorized by RCW 71.09.040 and the videotaped depositions of SVP detainees. *In re Williams*, 147 Wash. 2d at 491- 492.

Even if admission of Dr. Wheeler's testimony was error, there is no prejudice to Williams because the information in the interview was available for discovery through alternate means. Those means--including a deposition of Williams and interviews by other experts--were used in this case. Therefore, Williams can not claim that any information learned in the updated evaluation left him at any disadvantage or prejudiced in any way.

Second, there was no prejudice to Williams because the updated evaluation did not alter the opinion of the DSHS opinion under RCW 71.09.040. The results of the updated evaluation were entirely consistent with the 2000 and 2003 evaluations.

Finally, the evidence supporting Williams' civil commitment was overwhelming. Williams was unable to find any expert to testify that he did not meet criteria after reviewing his actual records. CP 763. Instead, he was limited to calling an expert (Dr. Wollert) to critique Dr. Wheeler's

opinion without exposing Dr. Wollert to the actual facts of the case.⁸ CP 768.

V. THE TRIAL COURT DID NOT ERR BY REFUSING A FRYE HEARING

Williams argues that the trial court erred by refusing to conduct a *Frye* hearing when presented with challenges to the Paraphilia NOS(nonconsent) diagnosis. Relying on a number of extra-record materials, Williams argues that the trial court committed error by both refusing to conduct a *Frye* hearing and admitting this evidence. The trial court committed no error.

A. THE COURT SHOULD NOT CONSIDER EXTRA-RECORD MATERIALS CITED IN WILLIAMS' OPENING BRIEF

In accord with RAP 10.7, the court should not consider Williams' references various extra record "articles" in his opening brief. Under RAP 9.1(a) the record on review is limited to materials that were before the trial court. Supplementation of this basic record is allowed only through the procedures and criteria outlined in RAP 9.11. It has been recognized that "RAP 9.11 is a limited remedy." *Harbison v. Garden Valley Outfitters*,

⁸ The decision to limit Dr. Wollert to a "pure science" evaluation is a strategic decision to limit the State's cross-examination opportunities. Although Dr. Wollert's usefulness was limited to the defense, he also could not be crossed on the extreme facts supporting Williams civil commitment because he was largely shielded from those facts.

Inc., 69 Wn. App. 590, 849 P.2d 669 (1993). The various articles referenced in his brief were not part of the record before the trial court. There is currently no RAP 9.11 motion before the court. Absent supplementation of the record, the court should refuse to consider extra-record materials that are cited in Williams' opening brief.

B. UNDER *BERRY*, THE TRIAL COURT COMMITTED NO ERROR

The issue raised by Williams -- that the trial court erred in not holding a *Frye* hearing -- was recently rejected by *In re Detention of Berry*, 160 Wn.App. 374, 377-382, 248 P.3d 592, 594 - 597 (2011). As in the current case, *Berry* argued that "Paraphilia NOS nonconsent does not satisfy the *Crane* standard because it does not satisfy *Frye*." *Id.* at 594.

This court held that the trial court correctly denied a *Frye* hearing addressing the paraphilia NOS diagnosis:

¶ 12 We conclude *Frye* does not apply to Dr. Phenix's diagnosis. First, the proper focus of *Frye* is the science upon which the expert's opinion is founded. Here, the science at issue is standard psychological analysis. Dr. Phenix rendered her opinion based on Berry's offense and treatment history, his previous evaluations, interviews with Berry, the psychological literature including the DSM-IV-TR, and her own experience in the field. As the Supreme Court observed in *In re Personal Restraint of Young* nearly 20 years ago, nothing about this is novel:

The sciences of psychology and psychiatry are not novel; they have been an integral part of the American legal system since its inception. Although testimony relating to mental illnesses and disorders is not amenable to the types of precise and verifiable

cause and effect relation petitioners seek, the level of acceptance is sufficient to merit consideration at trial.^[FN14]

Berry presents nothing new about psychological/psychiatric evaluation or the paraphilia NOS nonconsent/rape diagnosis to call *Young's* holding into question.

¶ 13 The courts of many other states have held that expert testimony from psychologists and psychiatrists about a sex offender's mental illness or abnormality is not subject *380 to *Frye*.^{FN15} The courts of this state have **596 repeatedly upheld SVP commitments based upon this diagnosis.^{FN16}

¶ 14 Though Berry identifies scientific criticism of the criteria and reliability of the diagnosis, he does not establish that it is no longer generally accepted. Dr. Phenix testified that critics, including Dr. Wollert, were among “two or three psychologists” who decry the diagnosis.^{FN17}

¶ 15 Berry relies heavily on the fact that “paraphilia NOS nonconsent” is not included in the DSM–IV–TR. But the *Young* court specifically rejected the argument that paraphilia NOS nonconsent/rape was an “invalid” diagnosis, offensive to substantive due process, because it did not appear in the then-current edition of the DSM:

“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 *381 document whose diagnoses are based, in some cases, on what American Psychiatric Association ... 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.”^[FN18]

Indeed, both Drs. Phenix and Wollert testified that rape paraphilia was proposed for inclusion in the DSM and rejected because of concern that criminal defendants would avoid punishment by

claiming the affliction. That the diagnosis is nonetheless generally accepted is evident from the inclusion of paraphilic rape in the casebook “learning companion” to the DSM–IV.^{FN19}

¶ 16 Moreover, as the State points out, “paraphilia NOS” does appear in the DSM–IV–TR. The DSM–IV–TR defines paraphilia as “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving (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.”^{FN20} “Paraphilia not otherwise specified” is a “residual category in the DSM–III–R which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the DSM–III–R.”^{FN21} The DSM–IV–TR provides a number of examples of paraphilia NOS, but clearly states that the category is “not limited to” that list.^{FN22} The omission of “nonconsent” or “rape” from these examples *382 does not prove it is an invalid diagnosis. In fact, as *Young* points out, the seminal 1990 article on rape paraphilia “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.’”^{FN23}

¶ 17 The trial court properly denied Berry's motion for a *Frye* hearing. His arguments thus went to the weight of the evidence, not its admissibility.^{FN24} Berry cross-examined Dr. Phenix about the diagnosis and presented his own expert to testify to its shortcomings. There was no evidentiary error and no violation of due process.

¶ 18 We affirm.

Id. at 377-382 (footnotes omitted). Given *Berry*, this court should deny

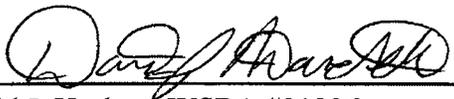
Williams's *Frye* argument and affirm the trial court.

VI. CONCLUSION

For the foregoing reasons, appellant Williams's civil commitment as a sexually violent predator should be affirmed.

DATED this 12th day of August 2011.

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