

NO. 37822-1-II

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

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STATE OF WASHINGTON
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IN RE THE DETENTION OF:

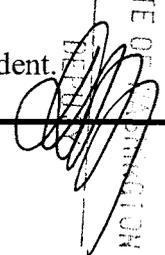
LENIER RENE AYERS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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DIVISION II
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BY 

**STATE RESPONDENT'S BRIEF AND
MOTION TO DISMISS**

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I. ISSUES PRESENTED

- A. Whether the trial court abused its discretion, where Ayers' CR 60(b) motion was time-barred and procedurally deficient.
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- C. Whether Ayers' trial attorney was ineffective for failing to request a *Frye* hearing, where Ayers' own expert had diagnosed Ayers with the disorder Ayers now claims is not generally recognized.

II. STATEMENT OF FACTS

A. Procedural History

The State filed a petition alleging that Lenier Ayers (Ayers) is a sexually violent predator (SVP). CP at 643. After a bench trial, the Honorable John F. Nichols, Clark County Superior Court, found that the State had proved, beyond a reasonable doubt, that Ayers is an SVP. CP at 662. The trial court entered the Findings of Fact (FF), Conclusions of Law (CL), and Order of Commitment (commitment order) on September 12, 2005. CP at 641-63.

Ayers appealed the commitment order. *In re Detention of Ayers*, 135 Wn. App. 1040, 2006 WL 3201051 (No. 33604-9-II, Nov. 7, 2006).

In his direct appeal, Ayers raised the following issues:

[T]hat (1) the State violated his constitutional rights to due process and to confront the witnesses when it played a videotaped deposition that he participated in by conference call, (2) the State failed to prove a recent overt act with

evidence that he put his hand on a young girl's leg, (3) the trial court incorrectly focused on the victim's subjective perspective in finding a recent overt act, and (4) the State failed to prove that he suffered from antisocial personality disorder because it presented no evidence that the disorder started before Ayers turned 15 years of age, one of the diagnostic criteria.

Ayers, 2006 WL 3201051 at 1. This Court rejected his arguments and affirmed. *Id.* The mandate on Ayers' direct appeal issued on October 31, 2007. CP at 78.

In early 2008, Ayers apparently filed a *pro se* motion to vacate his commitment order in early 2008. CP at 92-180. The State was not served with the Ayers' motion, did not receive notice of any hearing regarding it and never had an opportunity to file a response. The trial court denied the motion. CP at 227.

Ayers filed a PRP and an appeal of the trial court's denial of his CR 60(b) motion that were consolidated by this Court.

B. Ayers' Criminal Sexual History

Ayers has a lengthy history, both adjudicated and unadjudicated, of sexually assaulting females who are particularly vulnerable.¹ His behavior displays a pattern of isolating adolescent girls for the purpose of sexual contact. CP at 69, FF 14c(5)(a)-(c).

¹ The unadjudicated offenses include pulling his 12-year-old sister's pants down when he was 15 years old, engaging in repeated sexual intercourse with a 13-year-old girl when he was 17 years old, and having sexual contact with a girl who was under the age of 16 when he was 18 years old. CP at 62, FF 12f(6)(a)-(c).

On or about December 11, 1990, Ayers sexually assaulted J.M., a 13-year-old girl, in his residence. CP at 57, FF 12a; 3RP at 275. In 1990, Ayers was 31 years old, stood approximately 6'1", and weighed approximately 155 pounds. 3RP at 402, 409. The night Ayers assaulted J.M. was the first night she met him. CP at 57, FF 12a; 3RP at 276. Ayers provided her with alcohol and she became intoxicated. CP at 57, FF 12a; 3RP at 276. Ayers took J.M. to the shower, where she vomited. CP at 60, FF 12f(1)(a); 3RP at 403. Ayers removed her clothing, got on top of her, and orally raped her. CP at 60, FF 12f(1)(a). J.M. told him no and was crying and whimpering. *Id.*, FF 12f(1)(d); 3RP at 405. Ayers threatened to slap J.M. if she did not stop screaming. CP at 60, FF 12f(1)(e); 3RP at 405. Ayers penetrated J.M.'s vagina with his penis. CP at 57, FF 12a; 3RP at 276. The following morning, J.M. escaped from Ayers by tricking him into believing she was leaving to purchase marijuana for him. CP at 57, FF 12a; 3RP at 277.

Ayers was charged with Rape in the Second Degree, Rape of a Child in the Second Degree, and Unlawful Imprisonment for his offending against J.M.. Ayers entered a plea agreement and was convicted of Child Molestation in the Second Degree and Communicating with a Minor for Immoral Purposes. CP at 55, FF 2; CP at 60, 12f(1)(f). On December 26, 1991, Ayers was sentenced to 101 months confinement for

these offenses.

On or about September 1990, Ayers sexually assaulted S.D., a 12-year-old girl. CP at 57, FF 12b; 3RP at 242. S.D. was alone with Ayers and had only met him that day. CP at 60-61, FF 12b, 12f(2)(a); 3RP at 238. She was intoxicated. CP at 57, FF 12b; 3RP at 239. Ayers grabbed S.D. and made her “do things she didn’t want to do.” CP at 57, FF 12b; 3RP at 240-41. S.D. told him, “What are you doing? Don’t touch me. Stop.” CP at 57, FF 12b; 3RP at 240-41. She pushed him away and told him to leave her alone, but he would not. CP at 57, FF 12b; 3RP at 241-42. Ayers removed S.D.’s clothes and his own. CP at 58, FF 12b; 3RP at 241-42. He also touched her breasts and genital area. CP at 58, FF 12b; 3RP at 240-41.

Ayers was charged with Rape of a Child in the Second Degree and Child Molestation in the Second Degree for his offending against S.D.. By a plea agreement, Ayers was convicted of Child Molestation in the Second Degree and the other charge was dismissed. CP at 56, FFs 3, CP at 60, FF 12f(2)(b). On December 26, 1991, Ayers was sentenced to 101 months confinement for this offense, to run concurrent with his sentence for the offenses against J.M. One of the conditions imposed by the court was that Ayers was to have no unsupervised contact with minor females for a period of two years after his release. CP at 56, FF 5.

In 1990, Ayers sexually assaulted M.L., a 14-year-old girl, at his residence. CP at 58, FF 12c; 3RP at 280-81. M.L. met Ayers about a year previously, but had never been to his home before. CP at 58, FF 12c; 3RP at 280-81. Ayers provided alcohol to M.L. CP at 58, FF 12c; 3RP at 281. Ayers called M.L. into his bedroom; when she came in, he closed the door. CP at 58, FF 12c; 3RP at 282-83. He put his arms around her, started “messaging with” her stomach, and moved his hand up to her breasts. CP at 58, FF 12c, CP at 61, FF 12f(3)(b); 3RP at 283. M.L. did not want Ayers to do this and she told him to stop. CP at 58, FF 12c; 3RP at 283-84. Ayers then put his hands down M.L.’s pants. CP at 58, FF 12c; 3RP at 284. She pulled his hands out and told him to “quit.” CP at 58, FF 12c; 3RP at 284, 410. She escaped when a friend came to the door. CP at 58, FF 12c; 3RP at 239-40, 284.

Ayers pled guilty and was convicted of Child Molestation in the Third Degree for his offending against M.L. CP at 56, FF 4, CP at 61, 12f(3)(c). On December 2, 1991, Ayers was sentenced to 60 months of confinement, to run concurrently with his sentences for the offenses against J.M., and S.D.

When Ayers was released from these sentences in early 2000, he was still subject to the terms of his 1991 convictions which prohibited him from having unsupervised contact with minor females. CP at 56, FFs 5-6.

During his period in the community after this release, Ayers signed a treatment contract with the Vancouver Guidance Clinic in which he agreed to abide by treatment conditions, including no unsupervised contact with minors, no grooming behavior (including putting himself in a position of taking advantage of vulnerable persons), no high risk behaviors (including wandering or frequenting areas where children may be), and no use of alcohol or drugs. CP at 62, FF 13c; *See* 4RP at 456-60.

Less than six months later, Ayers was arrested and charged as a result of additional sexual offending. CP at 56, FFs 7-9, CP at 61, FF 12f(5)(d). On or about July 14, 2000, Ayers saw Ebony H., a 16-year-old girl, in a local park in Vancouver, Washington. CP at 59, FF 12e, CP at 61, FF 12f(5)(a); 3RP at 298. She had not met Ayers previously. CP at 59, FF 12e; 3RP at 301, 354. At that time, Ebony was no more than 4'11" tall and weighed approximately 115 pounds. 3RP at 293-94.

Ebony saw Ayers sitting under a tree with a yellow tobacco bag, marijuana, and beer. CP at 59, FF 12e; 3RP at 299-300. When Ebony told Ayers that she was 16 years old, he replied, "that's taking penitentiary chances." CP at 59, FF 12e, CP at 61, FF 12f(5)(b); 3RP at 300-01. Ayers offered to provide Ebony cigarettes, marijuana, and alcohol. CP at 59, FF 12e; 3RP at 299. After Ebony got into his truck with him,

Ayers told her he takes care of his women, buys them clothes, and has their nails done. CP at 59, FF 12e; 3RP at 303. When Ayers told Ebony that he lived in the mountains and he wanted to get some marijuana and go watch a movie, she became frightened. CP at 59, FF 12e; 3RP at 303, 308-11. In an attempt to convince Ayers to drive back near her home, Ebony pretended to make some telephone calls to arrange a marijuana purchase. CP at 59, FF 12e; 3RP at 303, 308-11. She convinced Ayers to drive her back to the park area, where she'd met him. CP at 59, FF 12e; 3RP at 366, 373. Ebony no longer felt safe and wanted to go home. CP at 59, FF 12e; 3RP at 308-311.

Ayers told Ebony to move closer to him in the truck, then put his arm partially around her to pull her closer to him. CP at 59, FF 12e; 3RP at 312-14. He placed his hand between Ebony's legs, on her inner thigh near her knee, and ran his hand up her inner thigh toward her genital region. CP at 59, FF 12e; 3RP at 312-14, 369, 379. Ebony slapped his hand away and got out. CP at 59, FF 12e; 3RP at 313-15, 369.

Ayers was charged with unlawful imprisonment, luring a child, and communicating with a minor for immoral purposes, for his offending against Ebony H. CP at 61, FF 12f(5)(d). He pled guilty to a reduced charge of Assault in the Fourth Degree. CP at 56, FF 9, CP at 61, FF 12f(5)(e).

C. Psychological Testimony

1. Dr. Dennis Doren

At trial, the State presented the testimony of Dr. Dennis Doren. CP at 63, FF 14a. Dr. Doren is a clinical psychologist who is licensed to practice in Wisconsin, Iowa, Florida, and Washington. 4RP at 470-71. He has been conducting assessments and providing treatment to sex offenders since the early 1980's. 4RP at 472, 474. Dr. Doren has evaluated, assessed, and/or treated approximately 2,000 sex offenders. 4RP at 477-78. In addition, since 1994 he has conducted training for other professionals in the assessment and evaluation of sex offenders. 4RP at 478. He has published a book,² authored or co-authored several chapters in professional books, and has published numerous articles in scientific journals. 4RP at 480-81.

Dr. Doren has extensive experience in sex offender civil commitment proceedings and has conducted evaluations in Arizona, Florida, Iowa, Illinois, Missouri, Washington, and Wisconsin. 4RP at 486; CP at 63, FF 14a. He has performed evaluations for the State, the Court, and SVP respondents. 4RP at 486-87.

Dr. Doren diagnosed Ayers with four conditions, classified in the DSM (American Psychiatric Association, *The Diagnostic and Statistical*

² Dennis Doren, *Evaluating Sex Offenders, a Manual for Civil Commitments and Beyond* (2002). 4RP at 481.

Manual of Mental Disorders, IV-Text Revision (4th ed.-text rev. 2000)); Paraphilia, Not Otherwise Specified (NOS); Bipolar I Disorder; Polysubstance Dependence; and Antisocial Personality Disorder. 4RP at 518-19.

Dr. Doren added the descriptor “sexually attracted to adolescents” to Ayers’ diagnosis of Paraphilia NOS and testified that this is also referred to as “Hebephilia.” 4RP at 521; CP at 63, FF 14a(4). The common features of all paraphilias are: (1) recurrent, intense sexually arousing fantasies, sexual urges, or behaviors; (2) that generally involve nonhuman objects, the suffering or humiliation of oneself or one’s partner, or children or other nonconsenting persons; and (3) the fantasies, urges or behaviors occur over a period of at least six months. DSM at 566.

Dr. Doren cited some of the evidence supporting Ayers’ Paraphilia NOS diagnosis. Regarding evidence of Ayers’ fantasies, urges or behaviors involving adolescents, Dr. Doren noted that: (1) Ayers repeatedly targeted females between the ages of 13 and 19 for his criminal behaviors; (2) Ayers admitted that he has a “problem with being attracted to girls under the age of 18 years old” and that he knows he needs to get help with it; and (3) Ayers admitted to the Vancouver Guidance Clinic in 2000 that he has a sexual response to underage females. 4RP at 523-25. Dr. Doren also noted that some of Ayers’ sexual contacts have been with

non-consenting persons. 4RP at 527. Dr. Doren testified that Ayers' urges and behaviors occurred over a period of at least six months, as required for diagnosis. 4RP at 527. They also cause him clinically significant distress or impairment in two separate ways: 1) they have resulted in his incarceration on a recurrent basis, and 2) psychologically, the process of having a relationship with an adolescent is, by definition, self-defeating because it cannot be maintained. 4RP at 527-28. Dr. Doren explained that paraphilias are chronic conditions. 4RP at 555.

In Dr. Doren's opinion, Ayers' Paraphilia NOS constitutes a mental abnormality, causes him serious difficulty controlling his sexually violent behavior, and makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. 4RP 529-31, 576; CP at 63, FF 14a(5), CP at 64, FF 14a(6), CP at 70, FF 15a.

Dr. Doren also diagnosed Ayers as suffering from Polysubstance Dependence. 4RP at 519; CP at 63, FF 14a(4). Polysubstance Dependence means that the person has an addiction to the use of various substances. He can replace one substance with another, but the use of substances in general is the source of the addiction. 4RP at 530-31; CP at 65, FF 14a(18). By itself, the Polysubstance disorder does not predispose Ayers to the commission of criminal sexual acts. 4RP at 536; CP at 65, FF 14a(19). Dr. Doren explained that the use of substances can

disinhibit a person and make it easier to for him to act on urges or impulses, but it doesn't determine what those impulses are. 4RP at 536; CP at 65, FF 14a(19).

The next disorder Dr. Doren diagnosed is Bipolar I Disorder. CP at 63, FF 14a(4). It is a mood disorder, formerly known as Manic-Depressive Illness. 4RP at 538; CP at 65, FF 14a(20). Essentially, a person suffering from this disorder goes through significant and usually rapid mood changes, shows agitation and needs to keep moving, has considerably more energy, tends to have an exaggerated self perspective, and will sometimes experience signs of more typical mental illness, such as delusions and hallucinations. 4RP at 538; CP at 65-66, FF 14a(20). Dr. Doren views the Bipolar I Disorder as affecting Ayers in a variety of ways, but does not view it as providing a drive or urge to sexually offend. 4RP at 554; CP at 66, FF 14a(21).

Antisocial Personality Disorder (APD) is a chronic, long-standing pattern of behavior that interferes with functioning and involves disregard for and violation of the rights of others. 4RP at 555-56; CP at 64, FF 14a(12)-(14). In general, a person with APD does what he wants, when he wants to, irrespective of the effect on himself and others. 4RP at 556.

There are several categories within the diagnostic criteria for

Antisocial Personality Disorder, or “APD,” in the DSM which must be met for diagnosis. Dr. Doren testified that a person may be diagnosed with APD under Category A if he meets three of seven listed items; Ayers meets all seven of these items.³ 4RP at 558; CP at 65, FF 14a(15). Category B is that the person is at least 18 years old. 4RP at 568. Category C is that there is evidence of Conduct Disorder with onset before the age of 15 years. 4RP at 568. Dr. Doren found that there was evidence of Conduct Disorder with onset before the age of 15, pointing to evidence in Mr. Ayers’ records that he was in juvenile detention at the age of 11 for fighting with a girl and that, when he was 14, he was charged with assault with attempt to commit bodily harm in California. 4RP at 568-69. In Dr. Doren’s opinion, either of these incidents would be sufficient to meet Category C.

Category D requires that some of the incidents, or any three of the seven items in Category A, were occurring when Ayers was not

³ According to the diagnostic criteria for APD contained within the DSM, Category A requires that there is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another. DSM at 706; 4RP at 558-68.

experiencing a manic period. 4RP at 569. Dr. Doren noted that Ayers received over 50 infractions while in the custody of DOC. 4RP at 570. They involved, among other things, Ayers threatening others, throwing objects, using a broomstick as a weapon, fighting and assault. 4RP at 558-59. He also received sanctions while at the Special Commitment Center (SCC), for negative behavior, including negative attitudes involving women that did not appear to coincide with periods of mania. 4RP at 570-72. SCC incidents also included Ayers threatening and assaulting others; in one incident a staff member was cut below the eye. 4RP at 559-560. It also appears that Ayers' criminal offending behavior for which he was convicted did not appear to occur exclusively during the course of periods of mania. 4RP at 569.

In Dr. Doren's opinion, Ayers' APD causes him serious difficulty controlling his sexually violent behavior because of a combination of two factors: (1) his APD is severe, exemplified by meeting all seven items in Category A, even though only three were required for diagnosis, and (2) his pattern of disregard for and violation of the rights of others includes repetitive sexual offending. 4RP at 575-76. Dr. Doren opined that Ayers' APD makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. 4RP at 576-77; CP at 70, FF 15a.

Dr. Doren also measured Ayers' level of psychopathy and

concluded that he met the definition of a psychopath. 4RP at 607-11. Psychopathy refers to the degree to which a person is a psychopath. 4RP at 607. In essence, a psychopath does whatever he wants to because he lacks an emotional connection to others. 4RP at 608.

Clinicians and evaluators use the Hare Psychopathy Checklist – Revised (PCL-R), developed by Dr. Robert Hare, to measure psychopathy. 4RP at 609. It consists of a list of 20 characteristics on which a subject is scored, with a scale running from zero to 40. 4RP at 608-9. Dr. Doren has been professionally certified to use the PCL-R. 4RP at 610. He arrived at a score of 33 for Ayers. 4RP at 611. The research definition for “psychopath” is an individual who attains a score of 30 or higher. 4RP at 609. A combination of high psychopathy and sexual deviance produces a particularly high risk for sexual recidivism. 4RP at 612. Ayers is a psychopath who is considered sexually deviant because of his diagnosis of Paraphilia NOS. 4RP at 612.

2. Dr. Richard Wollert

Dr. Richard Wollert testified on behalf of Ayers. In sum, he testified that Ayers does not have either a mental abnormality or a personality disorder, is not likely to commit predatory acts of sexual violence if not confined in a secure facility, and has not committed a recent overt act. CP at 71-72, FF 15b.

Dr. Wollert testified that questioned the validity of the Paraphilia NOS (hebephilia) diagnosis assigned to Ayers by Dr. Doren. He cited evidence that he believed showed it was not found in the DSM and was unreliable. 6RP at 943-48.

Initially, Dr. Wollert testified that he had never diagnosed anyone with Paraphilia NOS (hebephilia). 6RP at 948; 9RP at 1288. On cross-examination he was asked whether he had previously diagnosed Ayers with that condition and he answered, "Where did I do that?" 9RP at 1288. He then read portions of his February 14, 2003 evaluation of Ayers in which he concluded that Ayers' "was positive for" Paraphilia NOS (hebephilia) in 1991 but that, at the time of the 2003 evaluation, it was "in remission." 9RP at 1288-89. Dr. Wollert then claimed that he had been referring to a diagnosis assigned to Ayers by other evaluators. 9RP at 1289. He was then impeached with his December 23, 2003 deposition, in which he had testified that Ayers suffered from that condition and that it had "led to his conviction" in 1991. 9RP at 1289-91.

The trial court found Dr. Doren's testimony more reliable than Dr. Wollert's on the issue of whether Ayers has a mental abnormality and/or personality disorder that causes him serious difficulty controlling his sexually violent behavior. CP at 68, FF 14c(2). He also found Dr. Doren to be more reliable than Dr. Wollert in the scoring of the Hare

Psychopathy Checklist Revised (PCL-R). CP at 73, FF 15c(5).

III. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion Because Ayers' CR 60(b) Motion was Time-Barred and Procedurally Deficient**

The trial court did not abuse its discretion in denying Ayers' CR 60(b) motion because it was time-barred. CR 60(b) provides, in pertinent part:

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

Ayers' order of commitment was entered on September 7, 2005. CP at 77. His CR 60(b) motion was filed on February 11, 2008 – two and one-half years later. CP at 89. That is not a reasonable period of time.

“What constitutes a reasonable time depends on the facts and circumstances of each case.” *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312-313, 989 P.2d 1144, 1147 (1999). The relevant time period is “the period between when the moving party became aware of the judgment and the filing of the motion.” *Id.* The major considerations in determining a motion's timeliness are:

- (1) Prejudice to the nonmoving party due to the delay; and
- (2) whether the moving party has good reasons for failing to take appropriate action sooner.

Id. There is inherent prejudice to a non-moving party from an untimely

motion because finality is denied. More importantly, the State was unquestionably prejudiced because Ayers never served the State and the State never had an opportunity to be heard or to make a record. Nor has Ayers provided any reason for his delay. He simply argues that his motion was timely. The trial court properly denied Ayers' motion where Ayers provided no justification for his delay in seeking relief, and failed to serve the State. Though the trial court did not state these grounds, this Court can affirm on any grounds that the record supports. *State v. Lawson*, 135 Wn. App. 430, 444, 144 P.3d 377 (2006) (citing *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004)).

The trial court also properly denied Ayers' motion because he did not "stat[e] the grounds upon which relief is asked[.]" CR 60(e)(1). Ayers did not specify which section of the rule his motion relied upon. CP at 92-108. After his motion was denied by the trial court, he has decided on appeal that he relied on CR 60(b)(11). Appellant's Opening Brief (AOB) at 9. But Ayers' motion alleged "fraud." CP at 92. Fraud is covered by CR 60(b)(4), but Ayers does not cite that section of the rule on appeal. And though he now claims his motion was brought under CR 60(b)(11), he is also claiming that there is new evidence that shows that his diagnosis is not generally recognized by mental health professionals. AOB at 12. "Newly discovered evidence" is covered by

CR 60(b)(3). Because Ayers did not identify the specific grounds by which he was requesting relief, the trial court did not abuse its discretion by denying his motion. Ayers cannot wait until his appeal to choose the grounds that he relied upon.

Additionally, the trial court correctly denied Ayers' motion because, even if it considered the motion to be referencing CR 60(b)(11), Ayers' claims do not fit within that section of the rule. CR 60(b)(11) is to be "confined to situations involving extraordinary circumstances not covered by any other section of the rule." *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (quoting *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)). "Such circumstances must relate to *irregularities extraneous to the action of the court.*" *Yearout*, 41 Wn. App. at 902 (emphasis added); *Barr v. MacGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003) (severe clinical depression of attorney that resulted in dismissal of case through neglect of attorney's practice constitutes "extraordinary ground" pursuant to CR 60(b)(11)).

Ayers does not allege irregularities that are extraneous to the action of the court. At trial, Ayers presented evidence about the same issue he raises in his CR 60(b) motion – the validity of the diagnosis assigned to him by the State's expert. Ayers' expert, Dr. Wollert, questioned the validity of the diagnosis and cited evidence that he believed showed it was

not found in the DSM and was unreliable. 6RP at 943-48. The allegation Ayers now raises through his motion is identical to that which he presented at trial. Ayers is simply attempting to have another bite at the apple through a procedurally deficient collateral attack on his commitment order. Even if the court considers his motion to have implicated CR 60(b)(11), Ayers does not allege “irregularities extraneous to the action of the court.” *Yearout*, 41 Wn. App at 902. The trial court did not abuse its discretion by denying Ayers’ motion.

B. The Trial Court Did Not Abuse Its Discretion Because Ayers’ CR 60(b) Motion Reiterated Challenges Ayers Made at Trial and Ayers Failed to Establish Any Grounds for Vacating His Commitment Order

Ayers contends that the trial court abused its discretion by denying his CR 60(b) motion, because one of the mental conditions testified to by the experts at trial – Paraphilia NOS, sexually attracted to adolescents, or hebephilia – is not generally accepted within the relevant scientific community. AOB at 39-42. Ayers’ arguments fail because Dr. Doren’s use of a DSM diagnosis is not subject to *Frye*⁴ and, even if it were, the criticisms against the diagnosis that Ayers cites to do not establish that the diagnosis is not generally accepted. Additionally, Ayers fails to establish that his diagnosis does not meet the definition of a “mental abnormality”

⁴ *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

as defined in Washington's Sexually Violent Predator Act (SVPA), RCW 71.09, at RCW 71.09.020(8). Finally, even if Ayers were correct that Paraphilia NOS, sexually attracted to adolescents is not a valid diagnosis, his commitment was not based solely on that condition. Ayers' diagnosis of Antisocial Personality Disorder supports his commitment and the trial court's order should be affirmed.⁵

1. Standard of review

This Court reviews a trial court's decision on a CR 60(b) motion for abuse of discretion. *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 708, 934 P.2d 715 (1997). A court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *Vance v. Offices of Thurston County Comm'rs*, 117 Wn. App. 660, 671, 71 P.3d 680 (2003).

2. Ayers' diagnosis of Paraphilia NOS is a DSM-defined disorder

Ayers claims that the diagnosis of Paraphilia NOS, sexually attracted to adolescents (hebephilia), violates due process because it is not generally accepted by mental health professionals, specifically claiming that the American Psychiatric Association (APA) does not recognize it and it is not found in the DSM. Because Paraphilia NOS is, in fact, included

⁵ Ayers claim in his PRP is essentially identical to that in his CR 60(b) motion – that his diagnoses are invalid for civil commitment. The Responses herein to the CR 60(b) arguments are also the State's responses to Ayers' PRP.

in the DSM, his claim lacks merit.

Ayers' diagnosis *is* found in the DSM. For certain disorders, such as depressive disorders, anxiety disorders and paraphilias, there are too many variants to be explicitly listed in the DSM. 4RP at 520-21. Those disorders therefore have an NOS section so that an evaluator can assign the general diagnosis and provide a meaningful descriptor. *Id.* The primary diagnosis assigned to Ayers – Paraphilia NOS – is most certainly in the DSM and is generally accepted by mental health professionals. DSM at 576. It includes any paraphilia that “do[es] not meet the criteria for any of the specific categories.” *Id.* Because paraphilias involve deviant arousal to, e.g., children, nonconsenting persons and inanimate objects, clinicians and evaluators use the Paraphilia NOS diagnosis, combined with a descriptor, to communicate the specific type of person or object that is the stimulus for deviant arousal. DSM at 566; 4RP at 521. The fact that the DSM provides some examples of diagnoses that belong in the NOS category does not mean those not mentioned are invalid. *See* DSM at 576.

Ayers, by his history and his admissions, is clearly aroused to post-pubescent children. The descriptor for his particular Paraphilia NOS is “sexually attracted to adolescents” which is commonly referred to as “hebephilia.” 4RP at 521. Ayers' primary diagnosis, however, is

Paraphilia NOS, which means that (1) he experiences recurrent, intense sexually arousing fantasies, sexual urges, or behaviors (2) for a period of more than six months (3) that cause him clinically significant distress or impairment in his social, occupational and other important areas of functioning. DSM at 566. The stimuli for Ayers' deviant arousal are children who are post-pubescent. 4RP at 522-26. The fact that hebephilia is not specifically listed in the DSM as a Paraphilia NOS did not preclude Dr. Doren from assigning that diagnosis in order to accurately describe Ayers' deviant arousal system. *See In re Detention of Young*, 122 Wn.2d 1, 28, 857 P.2d 989 (1993) (lack of specifier in DSM for Paraphilia NOS, rape does not invalidate the diagnosis).

3. Washington State has the authority to define the mental conditions relevant to commitment under the SVPA

Ayers places great significance on the fact that the DSM has not explicitly identified sexual arousal to adolescents, or hebephilia, as an example of a Paraphilia NOS diagnosis. His arguments imply that a mental condition is invalid for civil commitment under the SVPA unless it is specifically identified in the DSM. The Supreme Courts of the United States and of Washington State have rejected the same argument.

The United States Supreme Court has rejected the contention that due process requires states to define "mental disorder" or similar terms in

their civil commitment statutes in such a way that they are consistent with the standards of the mental health community. *Kansas v. Hendricks*, 521 U.S. 346, 358-59, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). Hendricks had challenged his civil commitment under Kansas' SVPA, which was modeled after the Washington SVPA. The Kansas SVPA also permits civil commitment of persons who, due to a "mental abnormality" or a "personality disorder" are likely to engage in "predatory acts of sexual violence." *Hendricks*, 521 U.S. at 350 (quoting Kan. Stat. Annot. § 59-29a01 et seq. (1994)). The Court concluded that the Kansas SVPA was constitutional because it complied with earlier cases upholding civil commitment statutes that required both a finding of dangerousness and the presence of mental illness. *Id.* at 358.

The Court specifically rejected Hendricks' claim that the use of the term "mental abnormality" by the Kansas SVPA did not comport with earlier cases requiring a finding of "mental illness," because "mental abnormality" is a term adopted by the Kansas Legislature and not the psychiatric community. *Id.* at 358-59. The Court found that "the term 'mental illness' is devoid of any talismanic significance." *Id.* at 359. It further noted that "psychiatrists disagree widely and frequently on what constitutes mental illness" and that the Court itself had never used consistent terms in its cases involving civil commitments. *Id.* (quoted

source omitted). The Court observed:

Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of “insanity” and “competency,” for example, vary substantially from their psychiatric counterparts. See, e.g., Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 Rutgers L.Rev. 377, 391-394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). *Legal definitions, however, which must “take into account such issues as individual responsibility . . . and competency,” need not mirror those advanced by the medical profession.* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* xxiii, xxvii (4th ed.1994).

Id. (emphasis added). See also *Kansas v. Crane*, 534 U.S. 407, 413-14, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (reaffirming that psychiatric and legal standards do not and need not be identical).

Washington’s definition of “mental abnormality” meets constitutional requirements and does not place the limitations on acceptable diagnoses that Ayers would have this Court impose. It defines a “sexually violent predator” as “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental

abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(16). The SVPA then defines “mental abnormality” in a way that distinguishes mentally ill offenders from non-mentally ill recidivists:

“Mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

RCW 71.09.020(8).

As *Hendricks* makes clear, the Washington Legislature is free to craft its own meaning of “mental illness” and it was up to the fact-finder – here the Honorable John F. Nichols of the Clark County Superior Court – to determine whether Ayers’ mental condition fit the definition of “mental abnormality” in RCW 71.09.020(8).

The DSM itself recognizes the limitations of diagnostic constructs in forensic settings. *See* DSM at xxxiii (noting the imperfect fit between “questions of ultimate concern to the law and the information contained in a clinical diagnosis.”). The DSM also cautions that, while it reflects a consensus about classification of mental disorders, new knowledge based on research and clinical experience will undoubtedly lead to further understanding of the listed disorders, the inclusion of new ones and the

removal of others. *Id.*

In part due to these limitations of the DSM, the Washington Supreme Court has rejected an identical challenge to the diagnosis of Paraphilia NOS, rape, which is often assigned to serial rapists in SVP cases:

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.

Young, 122 Wn.2d at 28 (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L.Rev. 709, 733 (1992)). In rejecting the challenge to the paraphilic rape diagnosis, the *Young* court also noted that the “specific diagnosis” was Paraphilia NOS:

The specific diagnosis offered by the State’s experts at each commitment trial was “paraphilia not otherwise specified.” This 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*. *DSM-III-R*, at 280. . . .

Young, 122 Wn.2d at 29. As in *Young*, Ayers’ primary diagnosis is Paraphilia NOS, which is generally accepted and found in the DSM.

4. Dr. Doren's use of a descriptor with a DSM diagnosis is not subject to *Frye* because it is not a novel scientific methodology

Ayers argues that he is entitled to relief from judgment under CR 60(b) because Dr. Doren's diagnosis of Paraphilia NOS, sexually attracted to adolescents, is a "novel psychiatric diagnosis." AOB at 41. The Court should reject this argument because Paraphilia NOS is not a novel psychiatric diagnosis, Dr. Doren's use of the descriptor "sexually attracted to adolescents" is not subject to *Frye*, and the primary test is whether a condition meets the definition of "mental abnormality" in RCW 71.09.020(8).

In Washington, the standard for assessing allegedly novel scientific procedures is set out in *Frye*, 293 F. at 1014. *In re Detention of Thorell*, 149 Wn.2d 724, 754, 72 P.3d 708 (2003). Pursuant to *Frye*, the trial court determines whether a scientific theory or principle is generally accepted within the relevant scientific community. *Thorell*, 149 Wn.2d at 754. "*Frye* requires only general acceptance, not *full* acceptance, of novel scientific methods." *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). If the methodology is generally accepted, the possibility of error in the expert opinions can be argued to the jury. *Id.*

As argued *supra*, Ayers's diagnosis is Paraphilia NOS. This diagnostic category is found in the DSM and is generally accepted. Ayers

has not shown, or argued, that Paraphilia NOS is a novel scientific methodology. *Frye* does not apply.

Nor does Dr. Doren's use of the descriptor "sexually attracted to adolescents" or hebephilia, implicate *Frye*, in that it merely describes the stimuli that are the object of Ayers' deviant sexual interests. It does not transform Paraphilia NOS into a novel diagnosis.

Ayers argues, however, that the diagnosis is subject to *Frye*, pursuant to *State v. Greene*, 139 Wn.2d 64, 72, 984 P.2d 1024 (1999) (dissociative identity disorder (DID) evaluated under *Frye* test). In *Greene*, a criminal defendant sought to introduce evidence that he suffered from DID, as an insanity defense. 139 Wn.2d at 67-68. *Greene* reversed the trial court, concluding that DID met the *Frye* test. *Id.* at 72-73. *Greene*, however, does not stand for the proposition that mental disorders diagnosed in SVPA cases are subject to *Frye*. Contrary to a criminal proceeding, the State must present expert testimony that a respondent suffers from a "mental abnormality" or personality disorder. RCW 71.09.020(16). "Mental abnormality," as discussed supra, is "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). In adopting this definition, the

Washington Legislature exercised its considerable authority to fashion the criteria that would subject a person to civil commitment, criteria that need not “fit precisely with the definitions employed by the medical community” and that “need not mirror those advanced by the medical profession.” *Hendricks*, 521 U.S. at 359; *Crane*, 534 U.S. at 413-14. *Greene* did not address whether a condition that meets the definition of “mental abnormality” in RCW 71.09.020(8) is subject to *Frye*.

Persuasive authority holds that diagnostic testimony is not subject to *Frye*. See, e.g., *Logerquist v. McVey*, 1 P.3d 113, 123 (Ariz. 2000) (“*Frye* is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior”); *Commonwealth v. Dengler*, 843 A.2d 1241, 1244 (Pa.Super. 2004) (“psychological or psychiatric testimony of an expert at an SVP proceeding is not novel scientific evidence subject to *Frye*”).

In a case involving California’s SVPA, the appellate court rejected a claim that the expert psychiatric or psychological testimony in that case was novel scientific evidence, holding that *Frye* standards do not apply to “expert medical testimony, such as a psychiatrist’s prediction of future dangerousness or a diagnosis of mental illness.” *People v. Ward*, 71 Cal.App.4th 368, 373 (1999). The *Ward* court explained why a

psychologist's expert opinion testimony is not subject to *Frye*:

The threshold question is whether expert psychiatric or psychological testimony in this case is scientific evidence subject to *Kelly-Frye*. We hold it is not. California distinguishes between expert medical opinion and scientific evidence; the former is not subject to the special admissibility rule of *Kelly-Frye*. (*People v. McDonald* (1984) 37 Cal.3d 351, 372-373 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011].) *Kelly-Frye* applies to cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist's prediction of future dangerousness or a diagnosis of mental illness. (37 Cal.3d at pp. 372-353; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1293-1294 [245 Cal.Rptr. 553].)

Similarly, the testimony of a psychologist who assesses whether a criminal defendant displays signs of deviance or abnormality is not subject to *Kelly-Frye*. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1159 [265 Cal.Rptr. 111, 783 P.2d 698].) In the latter case, the court observed: "No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior." (*Id.*, at p. 1154.) It also described a psychological evaluation as "a learned professional *art*, rather than the purported exact 'science' with which *Kelly/Frye* is concerned. . . ." (*Id.*, at p. 1159.)

Ward, 71 Cal.App.4th at 373.

Assuming *arguendo* that *Greene* also applies to diagnoses under the SVPA, the rationale behind the persuasive cases above should still apply to Dr. Doren's use of the descriptor "sexually attracted to adolescents." Ayers' primary diagnosis, Paraphilia NOS, unquestionably meets *Frye*. Because Ayers meets the general criteria of a Paraphilia, i.e. recurrent, intense sexually arousing fantasies, urges or behaviors for more

than six months that cause him clinically significant distress or impairment (DSM at 566), Dr. Doren's analysis of the specific stimuli to which Ayers is aroused is application of "a learned professional art," not application of novel scientific methodology. *Ward*, 71 Cal.App.4th at 373. *Frye* does not invalidate the diagnosis Dr. Doren assigned to Ayers.

5. Criticisms of the use of Paraphilia NOS (hebephilia) do not invalidate the diagnosis

In attempting to show that Paraphilia NOS (hebephilia) does not meet the *Frye* test, Ayers cites to some criticisms of the diagnosis and concludes that the disorder is not generally accepted. AOB at 12-14. But the critics Ayers cites do not establish that the diagnosis is not generally accepted. *Frye* requires "general acceptance," not "full acceptance." *Russell*, 125 Wn.2d at 41. Just as in the case of the paraphilic rape diagnosis, opposition from some members of the mental health community does not establish a lack of general acceptance.

Consider the person Ayers relies on most prominently: Dr. Thomas Zander. See Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 Journal of Sexual Offender Civil Commitment: Science and the Law 17 (2005); AOB at 12-13, 26, 28, 29-30, 31, 35, 36, 38,49. Dr. Zander unquestionably criticizes the use of Paraphilia NOS, sexually attracted to

adolescents. Zander, *Civil Commitment Without Psychosis*, *supra*, at 48.

But Zander is a critic of all non-psychotic civil commitments and is clearly opposed to sexual predator civil commitment laws. *Id.* at 1 (“civil commitments that are based on diagnoses of such nonpsychotic disorders [paraphilias and personality disorders] have a weak foundation.”). He is highly critical of the United States Supreme Court’s decisions upholding those laws. *Id.* at 25 (“[T]he court engaged in very little analysis of the issues [raised by opponents of the Kansas SVPA]”). He criticizes the use of all Paraphilia NOS diagnoses, including the paraphilic rape diagnosis. *Id.* at 41-42. He also finds validity problems with diagnoses of personality disorders. *Id.* at 50.

Zander’s diagnostic criticisms are not limited to the Paraphilia NOS category; he also discusses the “conceptual validity” of Pedophilia. *Id.* at 37-40. Citing several sources that question the validity of the diagnosis without criticism, he then criticizes the commentators who defend pedophilia as a mental disorder. *Id.* at 39 (“This attempted distinction ignores the reality that social judgments about whether a sexual orientation is harmful to self and others vary depending on changing cultural values”). Zander notes that “adult-child sexual behavior does not always result in harm to the child[.]” *Id.* (citation omitted). Zander’s article and views on diagnostic practices are clearly not the products of

professional consensus.

6. Case law evidence on the widespread use of Paraphilia NOS (hebephilia)

Ayers and Zander wrongfully assert that Paraphilia NOS (hebephilia) “has not been recognized outside of the SVP commitment context[.]” *Id.* at 49; AOB at 31. In fact, the diagnosis has been referenced in criminal cases as early as 1992. *See, e.g.: State v. Lamure*, 846 P.2d 1070, 1073 (N.M.App. 1992) (Defendant presented expert testimony about his homosexual hebephilia, which causes him to be sexually attracted to male adolescents); *U.S. v. Polizzi*, 549 F.Supp.2d 308, 337-38 (E.D.N.Y. 2008) (State’s expert diagnosed defendant with, *inter alia*, Paraphilia NOS (sexual interest in adolescents)).

It is certainly true, however, that Paraphilia NOS (hebephilia) has been frequently diagnosed and discussed in SVP cases. That is the result, and evidence, of its general acceptance and application. It has been assigned to respondents in civil commitment cases across the United States by many different experts. *See e.g., In re Martinelli*, 649 N.W.2d 886, 890-891 (Minn. App. 2002) (Dr. Fox and Dr. Alberg); *In re Civil Commitment of V.A.*, 813 A.2d 1252, 1254 (N.J.Super.A.D. 2003) (Dr. LoBiondo); *In re Johnson*, 85 P.3d 1252, 1255 (Kan.App. 2004) (Dr. Huerter); *In re Civil Commitment of A.H.B.*, 898 A.2d 1027,

1030 (N.J.Super.A.D. 2006) (Dr. Zeiguer); *In re G.R.H.*, 758 N.W.2d 719, 720 -721 (N.D. 2008) (Dr. Coombs); *In re Hehn*, 745 N.W.2d 631, 633 (N.D. 2008) (Dr. Belanger and Dr. Sullivan).⁶

The two cases Ayers relies on do not support his contention that Paraphilia NOS (hebephilia) is not generally accepted in the relevant scientific community: *United States v. Abregana*, 574 F.Supp.2d 1145 (D. Haw. 2008) and *United States v. Shields*, 2008 WL 544940 (D. Mass. 2008). Both of these Federal District Court decisions address the federal government's new civil commitment statute for sexual offenders. 18 U.S.C. § 4248. Neither case supports Ayers' arguments.

⁶ A party may not cite to an unpublished opinion as authority. GR 14.1(a). The following unpublished cases are presented as evidence of the widespread use of Paraphilia NOS (hebephilia) by experts across the U.S., and not for legal authority: *People v. Williams*, 2003 WL 22953646 (Cal.App. 1 Dist. 2003) (Dr. Vognsen); *State v. Piert*, 2003 WL 22994535 (Ohio App. 11 Dist. 2003) (Dr. Fabian); *People v. Griego*, 2005 WL 605061 (Cal.App. 2 Dist. 2005) (Dr. Hupka); *Detention of Broer v. State*, 2005 WL 894877 (Wn. App. Div. 1, 2005) (Dr. Wheeler); *In re Detention of Atwood*, 2005 WL 974042 (Iowa App. 2005) (Dr. Gratzner); *Donaghe v. State*, 2005 WL 1845669 (Wn. App. Div. 2, 2005) (Dr. Dreiblatt); *Com. v. Connolly*, 2006 WL 620666 (Mass.Super. 2006) (Dr. Rouse-Weir); *In re Detention of Miller*, 2006 WL 1896293 (Iowa App. 2006) (Dr. Doren); *In re Detention of Risdal*, 2006 WL 1896255 (Iowa App. 2006) (Dr. Doren); *In re Commitment of Staats*, 2007 WL 189086 (Wis.App. 2007) (Dr. Schmitt); *In re E.G.W.*, 2007 WL 397033 (N.J.Super.A.D. 2007) (Dr. Zeiguer and Dr. Barone); *In re Commitment of L.L.B.*, 2007 WL 474311 (N.J.Super.A.D. 2007) (Dr. Shnaidman); *In re Commitment of E.J.S.*, 2007 WL 1038894 (N.J.Super.A.D. 2007) (Dr. Shnaidman); *In re Care and Treatment of Dahl*, 2007 WL 2768036 (Kan.App. 2007); (Dr. Kinlen); *In re Commitment of H.T.G.*, 2007 WL 3034257 (N.J.Super.A.D. 2007); (Dr. Carlson); *In re Commitment of R.L.*, 2007 WL 3170071 (N.J.Super.A.D. 2007) (Dr. Shnaidman); *People v. Robledo*, 2007 WL 3360165 (Cal.App. 6 Dist. 2007) (Dr. Sreenivasan); *In re Civil Commitment of R.S.*, 2008 WL 5194450 (N.J.Super.A.D. 2008) (Dr. Barone); *In re Commitment of K.H.*, 2008 WL 4648460 (N.J.Super.A.D. 2008) (Dr. Friedman); *In re Goldhammer*, 2008 WL 2967076 (Minn.App. 2008) (Dr. Hoberman); *In re Commitment of J.E.G.*, 2008 WL 2078193 (N.J.Super.A.D. 2008) (Dr. Foley); *In re Commitment of M.T.H.*, 2008 WL 2050811 (N.J.Super.A.D. 2008) (Dr. Friedman).

On July 27, 2006, Congress enacted 18 U.S.C. § 4248 as part of the Adam Walsh Child Protection and Safety Act of 2006 (the Walsh Act). *See* Pub. L. No. 109-248, § 302, 120 Stat. 587, 620-22. The Walsh Act provides for, *inter alia*, the civil commitment of a “sexually dangerous person” who is in federal custody. 18 U.S.C. § 4248(a)-(d).⁷ “Sexually dangerous person” is defined as one who “has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others[.]” 18 U.S.C. § 4247(a)(5). “Sexually dangerous to others” means that “the person suffers from a *serious mental illness, abnormality, or disorder* as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” 18 U.S.C. § 4247(a)(6) (emphasis added). The act does not further define the phrase “serious mental illness, abnormality or disorder.”

In *Abregana*, the trial court heard testimony from three experts: Dr. Doren for the government, and Drs. Barbaree and Rosell for the defense. Dr. Doren diagnosed Abregana with Paraphilia NOS (hebephilia). 574 F.Supp.2d at 1150 -1151. Dr. Barbaree agreed with Dr. Doren. *Id.* at 1153. Dr. Rosell disagreed and testified that the

⁷ The U.S. Court of Appeals, 4th Circuit, has recently held that 18 U.S.C. § 4248 exceeds the authority of Congress because it is not within any of the enumerated powers of the federal government. *See U.S. v. Comstock*, 551 F.3d 274, 276 (C.A.4 (N.C.) 2009).

diagnosis was not in the DSM. *Id.*

Significantly, Dr. Barbaree, one of Abregana's experts, testified that "hebephilia is known in the field as indicating a sexual interest in post-pubescent individuals." *Id.* Though he acknowledged some controversy, Dr. Barbaree testified that "there are authorities in the field who consider it a mental disorder, and . . . it has been part of the literature for a number of decades." *Id.* Dr. Barbaree has co-authored a book chapter that characterizes hebephilia as a mental disorder. *Id.* He testified that Hebephilia is not as serious a condition as other paraphilias. *Id.*

The trial court entered the following finding regarding the diagnosis of Paraphilia NOS (hebephilia):

The Court having considered the foregoing testimony, as well as the supporting documentation, finds that Abregana suffers from the mental disorder of paraphilia NOS within the meaning of the DSM-IV-TR. The Court further finds that Abregana's specific paraphilia is hebephilia, which involves an intense arousal to adolescents. In Abregana's case, there is controversy among the experts whether the mental disorder is "serious." It is true it has caused significant distress and impairment in his life, but the Court cannot conclude it has been proven by clear and convincing evidence that his condition reaches a level of serious mental disorder.

Id. at 1153-54.

Abregana's holding does not help Ayers. The *Abregana* court found the disorder, as manifested by Abregana, did not meet the Walsh

Act's undefined standard of "serious mental illness, abnormality or disorder[.]" 18 U.S.C. § 4247(a)(6). If anything, *Abregana* stands for the proposition that Paraphilia NOS (hebephilia) is an accepted mental disorder involving deviant arousal to adolescents. Dr. Barbaree confirms that it is generally recognized, that it has been discussed in the professional literature for "decades" and he has even authored a text chapter on the disorder.

Washington State has the power to craft its own meaning of "mental illness" and has done so differently than has the Walsh Act. *Hendricks*, 521 U.S. at 359; RCW 71.09.-2-(8). In the instant case, the State proved beyond a reasonable doubt that Ayers' Paraphilia NOS (hebephilia) is a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8). *Abregana* applied an entirely different and undefined standard to a unique individual's condition. It has no relevance other than to confirm that Paraphilia NOS (hebephilia) is generally recognized.

United States v. Shields, 2008 WL 544940 (D. Mass. 2008) is another Walsh Act case relied on by Ayers. *Shields* moved to exclude evidence about hebephilia. The government offered the opinion of

Dr. Niklos Tomich that Shields suffered from hebephilia, and presented little else. *Id.* at 1-2. In excluding evidence of the diagnosis, the court noted that it received no peer-reviewed literature or other materials and concluded that: “The government has not provided persuasive expert evidence that there is a mental illness, abnormality, or disorder named hebephilia.” *Id.* at 2.

It is clear that the government failed to produce available evidence supporting the recognition and use of the diagnosis. Significantly, because of shortcomings in the response by the government, the trial court was unaware that “hebephilia” is a descriptor for a diagnosis of Paraphilia NOS:

The government argues that, in some circumstances, hebephilia falls within a category within the DSM-IV: Paraphilia Not Otherwise Specified (Paraphilia-NOS). As a threshold matter, Dr. Tomich does not specifically diagnose Mr. Shields with Paraphilia NOS; his diagnosis is limited to pedophilia and hebephilia. While the government’s position may be true in some circumstances, this Court has an inadequate record for determining how the psychiatric community determines what may properly be included within the Paraphilia NOS category.

*Id.*⁸

Given the paucity of information that the *Shields* court had

⁸ Ayers mistakenly represents that “Dr. Doren testified for the State that Shields had a mental disorder called ‘hebephilia’.” AOB at 31. In fact, it was Dr. Tomich. Had Dr. Doren been the expert, the court surely would have had more accurate information and would have learned that “hebephilia” is a descriptor for a Paraphilia NOS disorder.

regarding the diagnosis, this case does not support Ayers' contention that Paraphilia NOS, sexually attracted to adolescents, is not generally accepted. Ayers has not established that Dr. Doren utilized a novel scientific methodology, the trial court below did not abuse its discretion, and this Court should affirm the order denying Ayers' CR 60(b) motion.

C. Antisocial Personality Disorder is a Constitutionally Sufficient Basis for Ayers Commitment

Ayers argues that another mental disorder with which Dr. Doren diagnosed him, Antisocial Personality Disorder (APD), violates due process because it is too imprecise to provide a basis for his commitment. AOB at 39. He contends that *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), strongly implies that civil commitment cannot be based on APD, and that *Hendricks* and *Crane* suggest this as well. Ayers is incorrect because he reads these cases far too broadly.

The question of whether an "antisocial personality" or an Antisocial Personality Disorder constitutes a form of mental illness was not before the court in *Foucha*. Nor did the court attempt to define what *did* constitute a mental illness. Neither issue was addressed because neither issue was necessary to the disposition of the case.

Foucha addressed the constitutionality of a Louisiana statute that allowed the indefinite detention of persons who, although no longer

mentally ill or insane, were dangerous to themselves or others. Discharge after the initial commitment was dependant not upon a restoration of sanity or mental health, but upon the defendant's ability to demonstrate that he presented no danger to himself or others. The defendant bore the burden of showing he was no longer dangerous.

Foucha, who had been found not guilty by reason of insanity, was later found to be no longer suffering from a "mental disease or illness." *Id.* at 447. A doctor testified, however, that Foucha had an "antisocial personality, a condition which is not a mental disease and is not treatable" and that he would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or other people." *Foucha*, at 445.

The *Foucha* court, therefore, began with the premise that Foucha, although suffering from an "antisocial personality," was *not* mentally ill. This was a premise that all parties agreed upon and that both the trial court and the Supreme Court appear to have adopted. Because all parties agreed, it was not necessary at any point for the court to 1) consider whether an antisocial personality was in fact a form of mental illness or 2) indicate what, in the court's view, constituted a mental illness. Accordingly, it cannot fairly be said that the Court decided this question, or that the Court held that, as a matter of law, an Antisocial Personality Disorder does not constitute a form of mental disorder, or mental illness.

Nor should it be inferred from *Foucha* that an antisocial personality cannot, when combined with a showing of dangerousness, form the basis for civil commitment. This question was not before the Court. *See Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003) (*Foucha* does not preclude civil commitments based on a diagnosis of APD); *Hubbart v. Superior Court*, 969 P.2d 584 (Cal. 1999). Indeed, the California Supreme Court flatly rejected the same argument Ayers raises here:

Nothing in . . . *Foucha* as a whole, purports to limit the range of mental impairments that may lead to the “permissible” confinement of dangerous and disturbed individuals. (504 U.S. at p. 83, 112 S.Ct. 1780.) Nor did *Foucha* state or imply that antisocial personality conditions and past criminal conduct play no proper role in the commitment determination. The high court concluded only that *Foucha*’s due process rights were violated because the State had sought to continue his confinement as an insanity acquittee without proving that he was *either* mentally ill *or* dangerous.

969 P.2d at 599 (emphasis in original).

Ayers also relies on *Hendricks*. But *Hendricks* does not support Ayers’ argument, as it appears to in Ayers’ brief. Ayers’ quotation from *Hendricks* on this issue could be misread as implying that the concurring opinion by Justice Kennedy found APD an insufficient basis for civil commitment. AOB at 33. The partial quote by Ayers and the actual quote are compared below:

APD is simply “too imprecise a category to offer a solid

basis for concluding that civil detention is justified.”

AOB at 33 (quoting *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring)). The quoted passage actually reads as follows:

On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, *or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.*

Hendricks, 521 U.S. at 373 (emphasis added). *Hendricks* does not hold that APD is too imprecise to be the basis for civil commitment.⁹

Ayers employs the same technique with *Crane*, with equally misleading results:

For this reason, the diagnosis is fatally “[in]sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorders subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”

AOB at 33-34 (quoting *Crane*, 534 U.S. at 413). The quoted passage reads as follows:

It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be *sufficient to distinguish the dangerous sexual offender whose serious mental illness,*

⁹ Ayers was perhaps trying to illustrate his belief that Justice Kennedy’s concern had come to pass, but the technique could lead to a misunderstanding about what the case actually says.

abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

Crane, 534 U.S. at 413. *Crane* does not hold that APD is an insufficient basis for civil commitment, either.

Ayers' conclusion, therefore, that "the Supreme Court has twice suggested (and perhaps once concluded) . . . APD is simply too imprecise and overbroad a diagnosis to survive constitutional scrutiny" is grossly misleading.

Additionally, Ayers relies on transcripts of oral argument in *Crane*, estimates about the high percentage of antisocial inmates in prison populations, and APA and academic opposition to APD as a basis for commitment. AOB at 34-38. Ayers uses these sources to construct a fallacious, straw man argument. Because a parking ticket scofflaw could potentially be diagnosed with APD, goes his reasoning, APD is overbroad and too imprecise to warrant civil commitment.

The issue, however, is not whether APD, in general, provides a sufficient basis for commitment, but whether it does in this particular case. And it does in this particular case because the State proved beyond a reasonable doubt that Ayers' APD: (1) Causes him serious difficulty controlling his sexually violent behavior; and (2) that Ayers' APD, independently and in combination with his Paraphilia NOS (hebephilia)

disorder, makes him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility. CP at 75, CL 5-6. The parking ticket scofflaw is safe from civil commitment unless his condition can be shown beyond a reasonable doubt to also render him a sexual predator with seriously impaired control over his sexually violent behavior:

[A] diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury to find a serious lack of control. Such a diagnosis, however, when coupled with evidence of prior sexually violent behavior and testimony from mental health experts, which links these to a serious lack of control, is sufficient for a jury to find that the person presents a serious risk of future sexual violence and therefore meets the requirements of an SVP.

In re Detention of Thorell, 149 Wn.2d 724, 761-762, 72 P.3d 708, 728 (2003).

The SVPA, by requiring evidence beyond a reasonable doubt of a condition that causes serious difficulty controlling sexually violent behavior, and which makes the person likely to commit future violent offenses, provided Ayers with full due process protections against an erroneous or arbitrary commitment.

The Supreme Court of North Dakota has rejected the same argument Ayers raises in this appeal. *In re G.R.H.*, 711 N.W.2d 587, 595 (N.D. 2006). In *G.R.H.*, the appellant claimed that commitment based on his sole diagnosis of APD violated his due process rights under the state

and federal constitutions. 711 N.W.2d 591. The court analyzed both *Hendricks* and *Crane* and found that sufficient evidence in the record established a nexus between G.R.H.'s APD and his difficulty controlling his sexually violent behavior. *Id.* at 594-95. The court concluded that commitment based on G.R.H.'s APD satisfied the due process requirements of *Crane*. *Id.* at 595.

Nothing prevents a civil commitment based on APD, where these due process protections are in place. This Court has affirmed a civil commitment based on diagnoses of APD and at least one other personality disorder, where each constituted an alternative means for establishing a mental disorder. *In re Detention of Sease*, 201 P.3d 1078, 1085 (2009). Other courts have found APD a sufficient basis for SVP civil commitment, as well. *See, e.g. In re Commitment of Adams*, 588 N.W.2d 336, 341 (Wis.App. 1998); *In re Shafer*, 171 S.W.3d 768, 771 (Mo.App. S.D. 2005); *Murrell v. State*, 215 S.W.3d 96, 108 (Mo. 2007); *In re Detention of Barnes*, 689 N.W.2d 455, 459-60 (Iowa 2004).

In affirming a commitment based on APD, the *Barnes* court concluded that neither *Hendricks* nor *Crane* precluded commitments based on that diagnosis. Regarding *Hendricks*, the opinion noted that “the Court did not hold that due process requires a diagnosis of a condition that generally correlates with sex offending, such as pedophilia.” 689 N.W.2d

at 460 n.2. Regarding *Crane*, the court said:

However, as in *Hendricks*, the Court in *Crane* did not limit the scope of mental abnormalities for which due process may allow civil commitment to those generally correlated with sex offending.

Id. at n.3.

Ayers' argument that APD cannot be the sole basis for civil commitment fails. Because APD can be a sufficient basis, and because the trial court in the instant case found it to be so, Ayers' appeal and PRP fail, even if this Court finds merit in his arguments about the Paraphilia NOS (hebephilia) diagnosis.

D. Ayers Has Not Established That He Received Ineffective Assistance From His Trial Counsel

Ayers argues that he received ineffective assistance from his trial counsel and this Court can vacate the commitment order under CR 60(b)(11). But Ayers waived this issue by not raising it in his direct appeal.¹⁰ Ayers does not claim that his appellate counsel was ineffective, only his trial counsel, so he has waived that issue, as well.

Also, Ayers does not appear to have made this claim in his CR 60(b)(11) motion. The State cannot find any reference therein to a claim of ineffective assistance of counsel based on a failure to request a *Frye* hearing. Ayers does appear to make some ineffective assistance

¹⁰ Ayers' counsel for his direct appeal was Nancy Collins who, like his current counsel, is with the Washington Appellate Project.

claims against his trial counsel in his CR 60(b) motion,¹¹ but the State cannot find one addressing a *Frye* hearing. Because this issue was not before the trial court on Ayers' CR 60(b) motion, Ayers cannot raise it now.

Even if Ayers did not waive his ineffective assistance of counsel claim, he has failed to establish that such a claim is cognizable under CR 60(b)(11). Ayers cites two cases for the proposition that he can raise the ineffective assistance claim through CR 60(b)(11). The first is *Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 605 P.2d 348 (1980). In *Graves*, an action for damages following a motor vehicle accident, the defendant's attorney waived jury without his client's knowledge. The Court held:

We find that under the peculiar facts of this case, where the defendant demanded a jury as provided by rule, and it is of constitutional dimensions, that in a civil case where defendant's counsel, admittedly without any authority or consent and contrary to the wishes of his client, waives the right to a previously demanded jury trial, a vacation of judgment is warranted under CR 60(b)(11).

Graves, 25 Wn. App. at 126. *Graves* does not say that ineffective assistance of counsel claims can be raised under CR 60(b)(11). Its holding is a very limited to that case's "peculiar facts" and it does not support Ayers' argument. Likewise, Ayers' second case, *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040 (1996), is devoid of any holding

¹¹ See CP at 107, claim nos. 6-8.

supporting Ayers' argument.

If the Court were to consider Ayers' claim, the record shows that Ayers' trial counsel was not ineffective by not requesting a Frye hearing.

The U.S. Supreme Court established the test for analyzing ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show ineffective assistance of counsel, the claimant must establish that: 1) counsel's performance fell below an objective standard of reasonableness; and 2) but for counsel's error, there is a reasonable probability that the outcome would have been different. *Id.* at 687, 694. Washington courts have adopted the *Strickland* test. *See, e.g., State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *In re Smith*, 117 Wn. App. 611, 72 P.3d 186 (2003). It applies to respondents in SVP proceedings. *Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's performance was effective. *State v. Red*, 105 Wn. App. 62, 66, 18 P.3d 615 (2001), *review denied*, 145 Wn.2d 1036 (2001).

In arguing ineffective assistance of counsel, Ayers makes two contradictory claims: (1) His counsel should have been aware at the 2005 trial that the diagnosis was novel and not generally accepted; (AOB at 47) and (2) "much of the criticism of Dr. Doren's diagnoses was not published

until after Mr. Ayers's mid-2005 trial and therefore . . . extraordinary circumstances justify this collateral attack on the judgment." AOB at 12.

Ayers' counsel was not ineffective because, as argued herein, Ayers' diagnosis is not novel and is not subject to *Frye*. Even if it were, Ayers has failed to make a threshold showing that the diagnosis is not generally accepted in the relevant scientific field. Additionally, Ayers' APD diagnosis is not too imprecise to support civil commitment, so Ayers' counsel had no duty to challenge it as such.

Furthermore, in light of the testimony by Ayers' own expert, a request by Ayers' counsel for a *Frye* hearing would have been absurd. Dr. Wollert, though he initially denied doing so, had himself diagnosed Ayers with Paraphilia NOS, sexually attracted to adolescents. 9RP at 1288-91. Because Ayers' own expert had made that diagnosis, Ayers' trial counsel had no grounds for asserting that the diagnosis was not generally recognized by experts in the field in which Dr. Wollert practiced. Ayers' counsel was not ineffective.

E. Should the Court Find Merit In Any of Ayer's Claims, Remand for a Contested Hearing is the Proper Remedy

If the Court concludes that any of Ayers' arguments have merit, it should remand the matter back to the trial court for a contested hearing on Ayers' CR 60(b) motion, or a *Frye* hearing, if the Court finds it necessary.

Contrary to Ayers' assertions, it is the State that has suffered a procedural due process violation, because Ayers has never served his CR 60(b) motion on the State and the State did not have an opportunity to be heard on that motion in the trial court or to create any kind of record. If the Court does not dismiss this appeal and the PRP, it should remand the CR 60(b) motion back to the trial court for a hearing in which the State can participate and create a record.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the trial court's order denying Ayers' CR 60(b) motion, and dismiss his PRP.

RESPECTFULLY SUBMITTED this 1st day of April, 2009.

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NO. 37822-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of
LENIER RENE AYERS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

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STATE OF WASHINGTON
DIVISION II

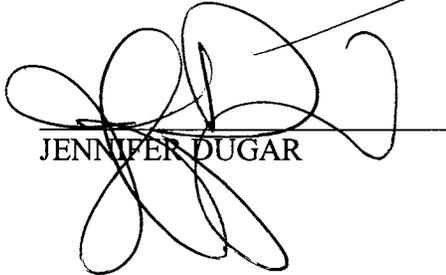
I, Jennifer Dugar, declare as follows:

On April 1, 2009, I deposited in the United States mail true and correct cop(ies) of State Respondent's Brief and Motion To Dismiss, postage affixed, addressed as follows:

Maureen Cyr
Washington Appellate Project
1511 Third Ave, Suite 701
Seattle, WA 98101-3635

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

DATED this 1st day of April, 2009, at Seattle, Washington


JENNIFER DUGAR

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