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COURT OF APPEALS
CRIMINAL

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STATE OF WASHINGTON

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

In re the Detention of:

GEORGE MITCHELL

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. ISSUES PRESENTED

Whether the trial court abused its discretion in denying a committed sexually violent predator's motion for a new trial pursuant to CR 60(b)(3) and (11) brought more than one year after offender's commitment trial and where that motion sought to correct the trial court's alleged errors of law at an annual review hearing, make constitutional challenges to the statute, and was based on "evidence" that was neither "newly discovered" nor presented extraordinary circumstances.

II. STATEMENT OF THE CASE

A. Mitchell's Criminal Sexual History

Following his arrest in 1974 for several rapes, George Mitchell, according to Pierce County Police reports, told the Pierce County Sheriff's office that he had "been raping all [his] life". CP at 470. He stated that he "likes to rape," and that he "enjoys the woman screaming and squirming around, but that he never wanted to hurt anybody." *Id.* He told the pre-sentence investigator that he had raped at least 15 women." *Id.*

In 1974, Mitchell was charged with the rape of three women. These rapes all occurred between the period December 14, 1973 and January 20, 1974. CP at 470. In the case of the first woman, Helen, Mitchell followed a woman home, hid behind her car and followed her into her garage. *Id.* When she got out of the car, he grabbed her, put his

hands around her neck, and, when she began to scream, told her to "stop screaming or I'll kill you." *Id.* After the victim had, following his instructions, given him \$75 from her purse, he ordered her to take off her clothing, ripped off her bra and told her to put her blouse over her head. *Id.* He then told her to lie down on the ground and placed his hand over her face, making it difficult for her to breath. When she attempted to loosen the clothing around her head in order to breath, Mitchell said "don't fight or I'll kill you." *Id.* He then penetrated her and climaxed. *Id.*

The next rape occurred on January 4, 1974. The victim was 49-year-old Marie. According to Mitchell's description, he and a friend followed this victim home after she had taught a class at Bates Community College. *Id.* As she was approaching the garage door, Mitchell grabbed her throat and knocked her down. *Id.* As she hung onto her purse, Mitchell dragged her up from the floor and twisted one arm behind her back. He then made her take her shoes off and put her coat over her head, then walked her down the road to a waiting car and forced her into the back seat with her face down. *Id.* Mitchell's accomplice drove the car while Mitchell took a knife and put it up against the back of the victim, continually jabbing her with it. *Id.* In the course of discussing how much money she might have to give them, the men discussed kidnapping her and getting the money. *Id.* They also discussed raping her. *Id.*

Eventually, the men stopped the car. Mitchell cut Marie's clothes off with the knife and raped her; when the driver returned, he raped her as well. *Id.* The two men took off in the car, leaving her on the ground. *Id.*

The last rape in this series occurred on January 20, 1974. In the course of burglarizing the victim, Judy's, home, Mitchell ran into Judy in the hallway. CP at 469. When she screamed, he stated, "[s]hut up lady or I'll kill you. I've killed before." *Id.* He then hit her in the face with his fist. He asked her how much money she had and where her husband was. *Id.* She responded that she had \$5.00 and that her husband was a doctor on an emergency. *Id.* Mitchell covered her face with her coat, threatening to take her baby. *Id.* After he had raped her, he again hit her in the face with a fist and said, "[n]ow I'm going to have to kill you." *Id.* He took a glass vase and broke it against the fireplace, and then cut the victim superficially three times across the left side of her neck, noting that this was how he had killed before. CP at 470. When he left, he told her that if she called the police he would kill her. *Id.* Mitchell was charged with three counts of rape for the rapes of Judy, Helen and Marie. He pled guilty to the rape of Judy, and the other two counts were dismissed. He was sentence to 20 years prison on April 29, 1974. CP at 453, 471.

On July 11, 1989, Mitchell struck again. This time his victim was 48-year-old Joan, a real estate agent. CP at 468. Mitchell arranged to

meet Joan at a house she was showing under pretense of being a potential buyer. *Id.* Once in the house, Mitchell grabbed Joan, pushed her onto the floor, and said, "I'm going to rape you." *Id.* Mitchell removed Joan's jeans and panties, and tied her legs together. He then put a washcloth in her mouth, tied it, and carried her into another room. After he was unable to penetrate her vaginally, and after the victim had pled with him not to hurt her, he turned her over on her stomach and choked her with a piece of rope. *Id.* at 469. He strangled her to the point of near unconsciousness, and then relaxed the rope. *Id.* Joan said, "[p]lease don't kill me, I have a boy." She later told police that this appeared to infuriate Mitchell, who then turned her over on her back, put her legs back against her chest and penetrated her anally. *Id.* Mitchell stopped in the middle of raping her and choked her with the rope. *Id.* When he was done, Mitchell told Joan that he had thought about her all day, that he knew he had hurt her and that he was sorry. *Id.* He said that he did not know why he had done it. *Id.* After cleaning up the floor and helping her put on her jeans, he then took her to the front door and told her that he had a razor and that if she made one sound he would slit her throat. *Id.* Mitchell was originally charged with 1st degree rape and 1st degree burglary. He was allowed to plead guilty to Burglary in the Second Degree and Rape in the Second Degree on February 5, 1990. *Id.*; CP at 453.

B. Procedural History

The State filed a petition alleging that Respondent is a Sexually Violent Predator (SVP) on March 27, 2000, shortly before Mitchell was due to be released on his 1990 conviction for Burglary in the Second Degree and Rape in the Second Degree. CP at 1-2. Following a bench trial in April of 2003, Mitchell was committed as an SVP. Findings of Fact, Conclusions of Law and an Order indefinitely civilly committing Mitchell were entered on July 27, 2003. CP at 448-54.

Since his commitment, Mitchell has failed to engage in any treatment at the Special Commitment Center (SCC) where he is housed. CP at 458-59; 463-65. This fact was noted by Dr. Robert Saari, a licensed psychologist at the SCC who performed the 2008 annual review evaluation of Mitchell. *Id.* Dr. Saari diagnosed Mitchell as suffering from Paraphilia,¹ NOS: Nonconsent, Sexual Sadism, and an Antisocial Personality Disorder. CP at 461. Dr. Saari concludes that Mitchell continues to meet the definition of an SVP. CP at 465.

At a show cause hearing on July 25, 2008, held pursuant to RCW 71.09.090(2), Mitchell presented a recent evaluation by Dr. Robert Halon, Ph.D. as well as Dr. Halon's live testimony. CP at 98-104, 48-87.

¹ A paraphilia is a form of sexual disorder. American Psychiatric Association, *Diagnostic and Statistical Manual, 4th Edition, Text Revision (DSM-IV-TR)*, 2000. *See generally* 566-69.

Dr. Halon's evaluation and testimony reflected his opinion that Mitchell does not, and never has, met the criteria for commitment. *Id.*

After considering the evidence and applying the relevant statutory authority found at RCW 71.09.090, as amended in 2005, the trial court found no basis upon which to order a new trial. CP at 777-79. Mitchell sought appellate review of the court's July 25, 2008, order. On December 10, 2008, this Court ruled that Mitchell had not made a prima facie case of change through treatment as required by the statute, and that Dr. Halon's opinion that Mitchell was misdiagnosed at the time of commitment constituted an impermissible collateral attack under *In re the Detention of Reimer*, 146 Wn. App. 179, 199, 190 P.3d 74 (2008). *In re the Detention of Mitchell*, COA No. 38183-4-II. CP at 498-502. The Commissioner ruled that the trial court had not committed probable error and denied review. *Id.* Mitchell filed a motion to modify that Ruling, which was denied,² and a certificate of finality was issued. CP at 504.

Following issuance of the certificate of finality, Mitchell filed a "Motion to Set Aside Judgment" pursuant to CR 60(b), asking the trial court "for an order setting aside the original judgment entered in the above-entitled cause number." CP at 20-308. Although framed as a

² Per ACCORDS, the Order Denying Motion To Modify was filed 02/09/2009.

challenge to the underlying order of commitment, Mitchell seemed to challenge both that underlying judgment and the more recent Order on Show Cause entered on July 25, 2008. In his Motion, Mitchell argued that:

- A) The trial court had erred in denying him an evidentiary hearing under RCW 71.09.090 where he presented evidence that made a prima facie case that he no longer met the definition of a sexually violent predator;
- B) Mitchell had presented sufficient proof that he no longer met the definition of a sexually violent predator [at his 2008 show cause hearing] because his original diagnosis had been in error;
- C) The RCW 71.09.090 phrase "continuing participation in treatment" was unconstitutional as applied to Mitchell's case because the term is vague and ambiguous.

CP at 22-33. Attached to this CR 60 motion were Dr. Halon's April 16, 2008, report and his testimony at the July 25, 2008, hearing, as well as various materials that had not been presented to the court at the July 25 hearing. CP at 48-104. The trial court denied his motion. CP at 595; RP at 13. Mitchell appeals.

III. ARGUMENT

The trial court did not abuse its discretion by denying Mitchell's CR 60(b) motion. Mitchell's CR 60(b) motion raised a variety of issues, none of which properly formed the basis of a motion to vacate pursuant to

CR 60(b). As such, the trial court properly denied his CR 60(b) motion, and his arguments on appeal lack merit.

First, contrary to his assertion, the trial court did not "refuse to apply CR 60 to his sexually violent predator proceeding." Appellant's Brief at 1 (hereafter App. Br.). Rather, the trial court simply determined that a new trial was not merited pursuant to CR 60(b). Second, the trial court's denial of his CR 60 motion did not violate his constitutionally guaranteed access to the courts. Finally, the trial court did not abuse its discretion in denying his motions to set aside the July 25, 2008, Order on Show Cause denying Mitchell's request for a new trial pursuant to RCW 71.09.090. App. Br. at 11. The issues raised in his CR 60(b) motion were alternately untimely, related to alleged legal errors made at the July 25, 2008, show cause hearing, or constitutional challenges to the statute and its application. Because all were improperly brought within the context of a CR 60(b) motion, the trial court did not abuse its discretion.

A. Procedure and Appellate Authority Governing CR 60(b) Motions to Vacate

A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should not be overturned on appeal unless it plainly appears that this discretion has

been abused. *Martin v. Pickering*, 85 Wn.2d 241, 245, 533 P.2d 380 (1975). A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App 92, 99, 38 P.3d 1040 (2002).

1. Legal Standard Under CR 60(b)(3)

Pursuant to CR 60(b)(3), the court may relieve a party or his legal representative from a final judgment, order, or proceeding based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [CR]59(b)." A new trial on the ground of newly discovered evidence will only be granted if the moving party demonstrates that the evidence (1) will probably change the result of the trial, (2) was discovered after trial, (3) could not have been discovered before trial even with the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003).³ Failure to satisfy any one of these five factors justifies denial of the motion. *Id.* The moving party may not merely allege diligence but rather must set forth facts explaining why the evidence was not available for trial. *Vance v. Offices of Thurston County Com'rs*, 117 Wn. App. 660,

³ Although *Go2Net* addresses these criteria in the context of a CR 59 motion, the test for newly discovered evidence under CR 59 and CR 60(b)(3) is the same. 5 Karl B. Tegland, *Washington Practice: Rules Practice* CR 60 at 553 (2006).

671, 71 P.3d 680 (2003). For evidence to be "newly discovered" under CR 60(b)(3), it must have existed when the order was entered, not later. *In the Matter of the Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003). Trial and summary judgment proceedings provide ample opportunity for parties to present evidence and if evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to present that evidence. *Wagner Dev., Inc. v. Fid. & Deposit Co.*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999).

2. Legal Standard Under CR 60(b)(11)

CR 60(b)(11) provides that a court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Motions under CR 60(b)(11) "should be confined to situations involving extraordinary circumstances not covered by any other section of the rule." *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982) (citing *State v. Scott*, 20 Wn. App. 382, 580 P.2d 1099 (1978), *aff'd*, 92 Wn.2d 209, 595 P.2d 549 (1979)). Such circumstances amount to "reasons extraneous to the action of the court or matters affecting the regularity of the proceedings." *Id.* (citing *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 415 P.2d 501 (1966)). The rule has been invoked in unusual situations that typically involve

reliance on mistaken information. *In re the Marriage of Tang*, 57 Wn. App. 648, 656, 789 P.2d 118 (1990).

B. The Trial Court Did Not "Refuse To Apply" CR 60 To A Sexually Violent Predator Proceeding.

Mitchell argues that the trial court "refused to apply CR 60 to a sexually violent predator proceeding," and cites *State v. Ward*, 125 Wn. App. 374, 104 P.3d 751, *review denied* 155 Wn.2d 1025, 126 P.3d 820 (2005) for the proposition that a CR 60(b) motion is cognizable in the context of an SVP proceeding. App. Br. at 7-8. This argument mischaracterizes the proceedings below and the decision of the trial court. The trial court did not suggest in any way that a CR 60(b) motion could not be brought within the SVP process or that such relief was not available to persons confined pursuant to RCW 71.09. Rather, the trial court simply commented that, "Well, I think that **under the circumstances** that CR 60(b)(3) and CR 60(b)(11) do not apply at this juncture of the case, so I will deny his motions under those prongs." (Emphasis added) 6/19/09 RP at 13. While the court could perhaps have expanding on its thinking, there is nothing in the comment to suggest that the court believed that relief under CR 60(b) was entirely unavailable to Mitchell. This appears particularly clear in light of Mitchell's generally unfocused request for relief, attacking as it did both the underlying order

of commitment, the trial court's alleged errors of law at the previous show cause hearing, and the statute's various alleged constitutional deficiencies. Mitchell's otherwise unsupported argument is without merit and should be rejected.

C. The Trial Court's Denial Of His CR 60(b) Motion Did Not Violate Mitchell's Constitutionally Guaranteed Right Of Access To The Courts

Mitchell next argues that the trial court's denial of his CR 60(b) motion violated his constitutionally guaranteed right of access to the courts by noting that the trial court ruled that CR 60 "did not apply at this juncture" and that "we're going to be revisiting this case in another month; and he can raise those arguments...at that time." RP at 13-14. App. Br. at 9. Mitchell does not explain how a trial court's failure to grant his motion, after permitting full briefing, oral argument and a hearing at which the court made no effort to limit the argument of counsel, violated his right of access to the courts. Indeed, his argument suggests that the only way for the trial court to have protected this right of access would have been to grant him a new trial. The guarantee of access is not synonymous with a guarantee of success. The Court should decline to consider this unsupported argument.

Even if this Court were to consider the argument, it fails. A trial court may be affirmed on any basis supported by the record and the law.

LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied* 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989). At the June 19, 2009, hearing on Mitchell's CR 60(b) motion, the State argued that most of the arguments brought up in Mitchell's motion were not properly raised in the context of CR 60(b), but could be brought up at a show cause hearing, noting that another show cause hearing would be scheduled shortly. RP at 9-10.⁴ The court's oral ruling can best be understood as having accepted the arguments of the State that the issues raised by Mitchell were not properly raised under CR 60(b) and that his day in court on many of those issues could be raised at a (slightly) later date, in the proper context.

D. The Trial Court Did Not Abuse Its Discretion By Denying Mitchell's CR 60(b)(3) Motion To Vacate The July 25, 2008 Order

1. Mitchell's CR 60(b) motion was untimely

Mitchell argues that his CR 60(b)(3) motion was timely, in that, the express language of his motion notwithstanding, he sought all along to vacate the July 24, 2008 Order on Show Cause and not the underlying

⁴ At the June 19, 2009 hearing, the State argued: "Mr. Mitchell is going to have another annual review hearing in another month. That's the time to challenge the constitutionality of these amendments. That's the time to bring before this Court his allegation that—for example [*In re Detention of Elmore* [162 Wn. 2d 27, 168 P.3d 1285(2007)]] precludes application of the 2005 amendments. You bring those challenges to the constitutionality of those amendments within the context of a proceeding that is held pursuant to those amendments. Mr. Mitchell is attempting to challenge the constitutionality of the 2005 amendments within a CR 60 proceeding, and that's not how it's done." 6/19/09 RP at 10.

2003 Order of Commitment. App. Br. at 11. The State, he argues, by arguing that it was too late to vacate the underlying commitment order, was simply "seizing on the overly enthusiastic first sentence in Mr. Mitchell's CR 60(b) motion." App. Br. at 11.

The State agrees that Mitchell's CR 60(b) motion was very confusing. Mitchell began by asking the court for an order "setting aside **the original judgment** entered in the above entitled cause number pursuant to CR 60(b)." (Emphasis added) CP at 20. He then proceeded to argue that the trial court's failure to grant a new trial at the July 25, 2008, hearing in light of the prima facie evidence presented by Mitchell constituted "reversible error" because 1) pursuant to *In re the Detention of Elmore*, 162 Wn.2d 27, 168 P.3d 1285 (2007) , the 2005 amendments to RCW 71.09.090 could not be "retroactively applied" to Mitchell (CP at 23); 2) per Dr. Halon's testimony, Mitchell's paraphilia, if it had ever existed at all, as in remission (CP at 24); 3) the trial court had "weighed" the evidence in violation of *In re Petersen*, 145 Wn.2d 798, 42 P.3d 952 (2002) (CP at 25-26); 4) Dr. Halon had presented "newly discovered evidence" at the July hearing demonstrating that Mitchell's original diagnosis had been in error (CP at 26-27); 5) past evaluations of Mitchell had been "inconsistent," (CP at 29) and 6) finally, that the phrase "continuing participation in treatment" was unconstitutionally vague as

applied to Mitchell. CP at 33. Mitchell also argued that a CR 60(b) motion was appropriate because, while the diagnosis had been controversial for some years, the "widespread rebuke of the practice, of assigning Paraphilia NOS nonconsent label to rapists has only occurred in the last year." CP at 32. Mitchell concluded by argument that, "because he has made a prima facie case that he no longer meets the definition of an SVP, this court should grant him a full trial on the issue of unconditional release." CP at 39.

If indeed the CR 60(b) motion was, as Mitchell said it was, an attempt to vacate the underlying 2003 order of commitment, it was clearly untimely, in that motions made pursuant to CR 60(b)(3) must be made not more than one year after the entry of the order the moving party seeks to have vacated.

Likewise, the CR 60(b)(11) motion would likewise be untimely, in that such motions must be made "within a reasonable time." Six years is not a reasonable time in light of Mitchell's reliance, in that motion, on cases that had been issued in 2002 (*Petersen*) and 2007 (*Elmore*).

E. Even If Not Untimely, Mitchell Was Not Entitled To Relief Under CR 60(b)

Even if Mitchell's motion were not deemed untimely, it still fails. Mitchell's CR 60(b) motion, characterized at the time by the State as a

"hodgepodge of arguments," (CP at 427), appeared to attempt to do several things, none of which was cognizable under CR 60(b). Even if one accepts Mitchell's argument that the CR 60(b) motion was directed toward the July, 2008, order and not the underlying order of commitment entered in 2003, he was not entitled to relief.

1. The July, 2008 Order Was Not A Final Order

First, it is not at all clear that CR 60(b) can be used to challenge an order that is not final. By its terms, CR 60(b) allows a court to relieve a party from "a final judgment, order, or proceeding..." It is well established that "superior courts have subject matter jurisdiction to vacate judgments and final orders." *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 824, 225 P.3d 280, 290 (2009) citing *Barker v. City of Seattle*, 97 Wn. 511, 515, 166 P. 1143 (1917). It is less clear that CR 60(b) is an appropriate vehicle to vacate an order that is not final, and is by definition subject to repeated modification. See *In re Petersen*, 138 Wn.2d 70, 88-89, 980 P.2d 1204 (1999) (Decision under RCW 71.09.090(2) finding no probable cause is not a final order after judgment in light of court's continuing jurisdiction over the committed person until unconditional release).

2. Mitchell's Motion Was An Attempt To Correct Alleged Errors Of Law And Make Constitutional Attacks

Even if CR 60(b) relief is technically available to vacate an order on show cause pursuant to RCW 71.09.090(2), it was not appropriate in this case. Mitchell's CR 60(b) motion, characterizing as it did the trial court's July 25, 2008 order as "reversible error," was primarily an attempt to re-litigate the earlier show cause order. Errors of law, however, "may not be corrected by a motion pursuant to CR 60(b), but must be raised on appeal." *Tang*, 57 Wn. App. at 654, citing *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986).⁵ "The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen." *Bjurstrom v. Campbell*, 27 Wn. App.449, 451, 618 P.2d 533 (1980) (quoting 1 Henry Campbell Black, *A Treatise on the Law of Judgments* § 329, at 506 (2d ed.)).

⁵ As noted, Mitchell had sought appellate review of the trial court's July 2008 order. Discretionary review was denied with the finding that the trial court "did not commit probable error" in finding Dr. Halon's evaluation an insufficient basis upon which to order an unconditional release trial pursuant to RCW 71.09.090. CP at 502.

Nor would a CR 60(b) motion by its terms be the appropriate vehicle through which to challenge the constitutionality of a statute or its application. Although such a challenge could certainly have been brought within the context of the July 25, 2008 annual review hearing, Mitchell had not done so at that hearing and, as previously noted, the State invited Mitchell to raise these issues at his next show cause hearing. *See* FN 4, *infra*; 6/19/09 RP at 9-10.

3. Mitchell's "Evidence" Was Not "Newly Discovered"

In his CR 60(b)(3) motion, Mitchell argued that the court should have granted a new trial (at the July, 2008 show cause hearing) because Dr. Halon had presented "newly discovered evidence from the relevant scientific community" at that hearing. CP at 27. This argument, however, reveals Mitchell's fundamental confusion regarding both the annual review process and a CR 60(b) motion.

First, the question at a show cause hearing pursuant to RCW 71.09.090(2) is not whether the SVP can present "newly discovered evidence." Rather, the question is, to paraphrase, whether there was probable cause to believe that Mitchell had "so changed" through treatment or incapacitation such that he was entitled to a new trial. RCW 71.09.090(4). "Newly discovered evidence" of the sort Mitchell presented at that show cause hearing—that is, Dr. Halon's testimony that

new diagnostic practices rendered Mitchell's diagnosis of Paraphilia NOS untenable—would not, under the express terms of the statute, have been sufficient to obtain a new trial, a point succinctly made in the Commissioner's December 10, 2008, Ruling. CP at 502.

Second, a "newly discovered evidence" challenge under CR 60(b)(3) must involve evidence that 1) existed at the time of the trial but 2) was not discovered until after expiration of the time within which the moving party could have requested a new trial. CR 60(b)(3); *Knutson*, 114 Wn. App. at 872. Mitchell argued below that the diagnosis of Paraphilia NOS: Nonconsent in his case was improper at the time of his commitment trial, and remains so. CP at 28-29. By making this argument, it seems clear that he was attacking not the July, 2008, order, but the underlying order of commitment. He based this argument on the opinion of Dr. Halon and various articles CP at 28-29 (referencing articles by Prentky et al., Zander, and Frances et al.). However, all of these articles were published well after Mitchell's commitment order was entered in June 2003: Prentky et al. in 2006, Zander in 2008, and Frances et al. in 2008. As such, CR 60(b)(3) does not apply since, as noted above, "newly discovered evidence" within the meaning that rule must have been in existence at the time the order that is the focus of the motion to vacate was entered. *Knutson*, 114 Wn. App. at 872.

Even if one assumes that he was actually attacking the underlying commitment order—an assertion Mitchell now denies---the "evidence" presented does not meet the requirements of CR 60(b)(3). In his appeal, Mitchell emphasizes that "the 'newly discovered evidence' is both the ultimate diagnosis of whether or not Mr. Mitchell meets the definition of an SVP, and also the *method of making* that diagnosis." (Emphasis in original) App. Br. at 12. By the very terms of his argument, however, Mitchell is conceding that the "evidence" upon which he based his CR 60(b)(3) motion was not "newly discovered" at all, in that it had been presented to the court at the July 25, 2008, hearing, and the court "ignored" it. CP at 27. Because the evidence was not "discovered since the trial," it fails under the second prong of the test. *See Go2Net, Inc., Inc.*, 115 Wn. App. at 88-89.

Far from being a true CR 60(b) motion, Mitchell's argument was really simply an untimely motion for reconsideration under CR 59(b). Having been denied discretionary review of the July, 2008, Order three months earlier,⁶ Mitchell once again sought to again challenge a trial court order he did not like. This was an improper use of the CR 60(b) motion, and the trial court's denial was appropriate.

⁶ The Commissioner's Ruling was filed on December 10, 2008; Mitchell's CR 60(b) motion was filed on or about April 2, 2009.

4. Mitchell's "Newly Discovered Evidence" Was Cumulative And Would Not Have Changed The Result Of The Commitment Trial

Mitchell's argument regarding the validity of Paraphilia NOS: Nonconsent was cumulative and, if considered, would not have changed the result reached at trial. At trial, Mitchell asked a series of questions on cross-examination of the State's expert, Dr. Judd, casting doubt on the validity of his diagnosis of Paraphilia NOS:Nonconsent. CP at 505-15. He also argued this point to the Court in his closing. CP at 517-18. Mitchell's reliance on the three articles he cites in his motion would, in a new commitment trial, simply be cumulative of cross-examination questions and arguments he made at his 2003 commitment trial. As such, these articles cannot form the basis for an order vacating his commitment. *Go2Net, Inc.* 115 Wn. App. at 88, *See also Graves v. Dept. of Game*, 76 Wn. App. 705, 718-19, 887 P.2d 424 (1994).

Moreover, just as Mitchell presented new scientific articles supporting his position on Paraphilia NOS:Nonconsent, so did the State. For example, in a book chapter in *The Sexual Predator*, Dr. Dennis Doren criticizes those who question the validity of the Paraphilia NOS: Nonconsent diagnosis, including specifically, Zander (cited by Mitchell):

In contrast to what was reviewed by Zander, scientific support can be found in various places for a rape-related (or coercive sexual contact) paraphilia. Such support is found

in the theoretical and empirical literature (e.g., Abel, Cunningham-Rathner, Mittelman & Rouleau, 1988; Baxter, Barbaree & Marshall, 1986; Becker & Murphy, 1998; Berlin, Hunt, Malin, Dyer, Lehne & Dean, 1991; Freund & Seto, 1998; Kafka, 1991; Lalumiere & Quinsey, 1994; Lalumiere, Quinsey, Harris, Rice & Trautrimas, 2003; Levine, 2000; Marshall & Barbaree, 1995; McConaghy, 1999; Money, 1990; Seto & Kuban, 1996).

"Being Accurate About the Accuracy of Sexual Offender Civil Commitment Evaluations," *The Sexual Predator*, Vol. III, Anita Schlink, Ed. (2006), CP at 520-75.

Even an actual invalidation (as opposed to merely criticism) of the diagnosis of Paraphilia NOS: Nonconsent would not be likely to result in a different result at trial because that diagnosis was not the exclusive basis of his commitment. At trial, Dr. Brian Judd testified, and the court found, that Mitchell suffered from not only from Paraphilia NOS: Nonconsent, but from Sexual Sadism (specifically listed in the DSM-IV-TR as a form of paraphilia (DSM-IV-TR at 573)) and an Antisocial Personality disorder as well. CP at 450. The trial court determined that both Sexual Sadism and Paraphilia NOS: Nonconsent were mental abnormalities under the law and that Mitchell's mental abnormalities and Antisocial Personality Disorder made Mitchell more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. CP at 453. Under the facts of the case (see Section II(A), above), it is unlikely that the

invalidation of the diagnosis of Paraphilia NOS: Nonconsent would change the result of trial.

The argument that Paraphilia NOS: Nonconsent is not a legitimate diagnosis is not new, and has been made and rejected in other SVP cases since at least 1993. In *In re Detention of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), in which the State Supreme Court considered and upheld the SVP statute as constitutional, appellants argued that Paraphilia NOS: Nonconsent (sometimes also referred to as Paraphilia NOS: Rape) was not a legitimate diagnosis. Rejecting this argument, the court wrote.

The Statute clearly requires proof of a "mental abnormality or personality disorder" for civil commitment. RCW 71.09.020(1). Although "mental abnormality" is not defined in the American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (3d rev. ed. 1987) (DSM-III-R), the Legislature has given it a meaning which incorporates a number of recognized mental pathologies:

In using the concept of "mental abnormality" the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the DSM-III-R; others are not. **The fact that pathologically driven rape, for example, is not yet listed in the DSM-III-R does not invalidate such a diagnosis.** The DSM is, after all, an evolving and imperfect document. Nor is it sacrosanct. Furthermore, it is in some areas a political document whose diagnoses are based, in some cases, on what American Psychiatric Association ("APA") leaders consider to be

practical realities. What is critical for our purposes is that psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM.

(Italics ours.) Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. Puget Sound L.Rev. 709, 733 (1992).

Young, 122 Wn. 2d at 28.

Since the issuance of *Young* in 1993, a diagnosis of Paraphilia NOS: Nonconsent has repeatedly been admitted at trial and found sufficient to support commitment as an SVP. See e.g., *In re Stout*, 159 Wn.2d 357, 364, 150 P.3d 86 (2007); *In re Halgren*, 156 Wn.2d 795, 800, 132 P.3d 714 (2006); *In re Marshall*, 156 Wn.2d 150, 155, 125 P.3d 111 (2005); *In re Thorell*, 149 Wn.2d 724, 761, 764, 72 P.3d 708 (2003)⁷; *In re Campbell*, 139 Wn.2d 341, 357, 986 P.2d 771 (1999); *In re Pouncy*, 144 Wn. App. 609, 613, 184 P.3d 651 (2008) (reversed on other grounds, 2010 WL 817369 (Wash)); *In re Paschke*, 136 Wn. App. 517, 520, 150 P.3d 586 (2007); *In re Taylor*, 132 Wn. App. 827, 832, 134 P.3d 254 (2006); *In re Strauss*, 106 Wn. App. 1, 20 P.3d 1022 (2001),

⁷ *Thorell* actually involved 6 men committed as SVPs. Two of the men had been diagnosed as suffering from Paraphilia NOS: Nonconsent.

affd. by, In re Thorell, 149 Wn.2d at 764; *In re Mathers*, 100 Wn. App. 336, 337, 998 P.2d 336 (2000).⁸

5. The "Evidence" Offered By Mitchell Is Not Of A Type Contemplated By CR 60(b)(3)

"Evidence" of the sort proffered by Mitchell—that is, changes in scientific methodology or practice—is not of a type contemplated by CR 60(b)(3). In all fields involving scientific research, the body of knowledge grows and evolves over time, and the field of sex offender risk assessment is no exception. As both the State's and Mitchell's briefs below demonstrated, new articles in the scientific literature regarding SVP-related issues—including diagnosis—are constantly being published. It is for this reason that the mere issuance of new scientific articles such as those cited by Mitchell should rarely, if ever, form the basis for vacating a commitment order pursuant to CR 60(b).

The nature the evidence cited in support of Mitchell 's motion does not lend itself to motions brought pursuant to CR 60(b)(3). Rather, the transitory, evolving nature of scientific thought most closely resembles the

⁸ The use of this diagnosis is widespread and is not unique to Washington SVP cases. *See e.g., In re Commitment of Frankovitch*, 121 P.3d 1240, 1245 (Ariz.App. 2005); *Parker v. Sex Offender Screening and Risk Assessment Committee*, ___ S.W.3d ___, 2009 WL 1026737 (S.Ct. Ark. 2009); *People v. Evans*, 132 Cal.App.4th 950, 953, 34 Cal.Rptr.3d (Cal.App. 2005); *Sloss v. State*, 925 So.2d 419, 423 (Fla.App. 2006); *In re Detention of Lieberman*, 884 N.E.2d 160, 166 (Ill.App. 2007); *Dunivan v. State*, 247 S.W.3d 77, (Mo.App. 2008); *In re Civil Commitment of A.E.F.*, 873 A.2d 604, 611 (N.J.Super.A.D. 2005); *In re R.Y., Jr.*, 957 A.2d 780, 785 (Pa.Super. 2008).

sort of evidence rejected as a basis for a new trial by Division III in *In re Knutson, supra*. There, the (divorcing) couple's assets were divided based on a valuation of those assets as of June, 2000, and the decree entered the following September. By the time certain assets were actually transferred several months later, the value of the assets had fallen, and the former husband sought to vacate the decree pursuant to, *inter alia*, CR 60(b)(3).

Rejecting this attempt, the Court of Appeals noted that "the transitory nature of the 'evidence' does not lend itself to application of CR 60(b)(3)." *Id.*, 114 Wn. App. at 872. The value of such a plan, the court noted, "necessarily fluctuates with the ever-changing market," going on to observe that,

Following Mr. Knutson's flawed logic, "newly discovered evidence" would occur with every change in the plan's value, or any other asset previously valued, thereby justifying vacation of the decree under CR 60(b)(3). However, CR 60(b)(3) applies to evidence existing at the time the decree was entered, not later. Because Mr. Knutson has not shown the loss in value occurred before entry of the decree, his resort to CR 60(b)(3) fails.

Id. (Emphasis added). The same holds true here: Following Mitchell's (implied) logic, he is entitled to a new trial with every new development in this field.

Like the 401(k) plan at issue in *Knutson*, the scientific literature used in SVP actions is transitory, with new articles published on a regular basis. If this Court were to reverse the trial court and grant Mitchell's CR 60(b)(3) motion on the basis of the scientific articles cited, it will mean that commitment orders in SVP cases will last only as long as it takes for the next scientific article on diagnosis or risk assessment to be published (which occurs on a monthly, if not weekly, basis). Mitchell's CR 60(b)(3) motion on the basis of "newly discovered" evidence was properly denied.

F. The Trial Court Did Not Abuse Its Discretion In Failing To Grant Mitchell's Motion Pursuant to CR 60(b)(11)

Nor did the trial court abuse its discretion by denying Mitchell's CR 60(b)(11) motion. Mitchell argues that "it was an abuse of discretion to rule that CR 60(b)(11) did not apply because it was not timely." App. Br. at 16. It is not clear why Mitchell believes that the trial court's denial of his CR 60(b)(11) motion was because it was untimely, and he makes no citation to the record in support of his contention. Nor is Mitchell correct when he asserts that the State's only discussion of CR 60(b)(11) was a reference to the fact that it must be brought "within a reasonable time." App. Br. at 14. In fact, the State referred the trial court to applicable law relating to motions under CR 60(b)(11). CP at 430.

Nor is timeliness the primary problem with Mitchell's CR 60(b)(11) motion. Like the CR 60(b)(3) motion, the (b) (11) suffered from all those problems discussed in Section D, above. Motions brought pursuant to CR 60(b)(11) "should be confined to situations involving extraordinary circumstances not covered by any other section of the rule" "extraneous to the action of the court or matters affecting the regularity of the proceedings." *State v. Keller*, 32 Wn. App. at 140. While Mitchell referenced CR 60(b)(11), including the applicable legal standard, at the beginning of his brief (CP at 26, 27), he made no attempt to explain how the facts of his case fulfilled those criteria. Nor does it appear that he could have done so, in that, even now, he fails to identify any "extraordinary circumstances" or to allege facts "extraneous to the action of the court or matters affecting the regularity of the proceedings." *Keller* at 140. Mitchell's motion simply did not meet those criteria, and the court did not abuse its discretion in denying his motion.

G. 71.09 Annual Review Process Accounts For Changes In Methodology

While Mitchell is not entitled to relief pursuant to CR 60(b), this is not to say that there is no way he can ever obtain a new trial. Pursuant to the express terms of the SVP statute, Mitchell is entitled to an annual evaluation of his mental condition, and a hearing on the question of

whether he is entitled to a new trial regarding whether he continues to meet commitment criteria. *See* RCW 71.09.070-.090. If, at a hearing conducted pursuant to RCW 71.09.090, the trial court finds that probable cause exists to believe that his condition has "so changed" through treatment or incapacitation that he no longer meets the definition of a sexually violent predator, the court is required to set a hearing that issue. RCW 71.09.090(2)(c).⁹ Should Mitchell obtain a trial through the annual review process, he will be free to present the information contained in his motion even though that information, standing alone, does not satisfy the requirements of CR 60(b)(3).

It is also important to note that, should there in fact be a true "wholesale change" in the diagnostic procedures or practices such that theories such as those presented in Mitchell's motion gain genuine broad acceptance within the scientific community, it is to be expected that these changes will be apparently in the annual reviews performed by the Department of Social and Health Services pursuant to RCW 71.09.070. If the Department were to determine, based on genuine changes in diagnostic practices as well as all other relevant information, that Mitchell no longer

⁹ RCW 71.09.090(2)(c) provides in pertinent part as follows: "If the court at the show cause hearing determines that either: (i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator ... or (ii) probable cause exists to believe that the person's condition has so changed that...the person no longer meets the definition of a sexually violent predator... then the court shall set a hearing ..."

meets commitment criteria, the State would be unable to make its prima facie case for continued commitment and a new trial would be required pursuant to RCW 71.09.090(2)(c). As such, Mitchell is not without remedy in the event of a genuine change in diagnostic methodologies.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the trial court below.

RESPECTFULLY SUBMITTED this 27th day of April, 2010.



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NO. 39548-7-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

GEORGE MITCHELL,

Appellant.

DECLARATION OF
SERVICE

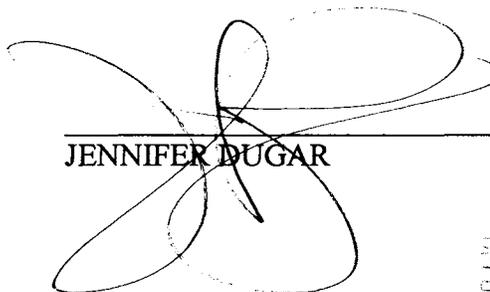
I, Jennifer Dugar, declare as follows:

On this 27th day of April, 2010, I deposited in the United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

Sheri Arnold
P.O. Box 7718
Tacoma, WA 98406

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

DATED this 27th day of April, 2010, at Seattle, Washington.



JENNIFER DUGAR

By _____
DEPUTY
STATE OF WASHINGTON

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