

No. 42335-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IN RE: DETENTION OF LENIER RENE AYERS

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

LENIER RENE AYERS,

Appellant.

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

The Honorable John F. Nichols

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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APA Final Action Paper, <u>Eliminating the Use of Antisocial Personality Disorder as a Basis for Civil Commitment</u> (APA Assembly, May 19-	

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A. SUMMARY OF ARGUMENT

Lenier Ayers was committed indefinitely pursuant to RCW 71.09 on the basis of expert testimony alleging two mental disorders: paraphilia not otherwise specified (hebephilia) and antisocial personality disorder. The first alleged mental disorder has not been accepted by the psychiatric community and is not contained in the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), which reflects the consensus of the profession. The second diagnosis describes up to 80 percent of the United States prison population and more than seven million Americans. The APA's position is that a diagnosis of antisocial personality disorder is an over-broad and inappropriate basis for involuntary civil commitment. Because the first diagnosis is not medically recognized and the second diagnosis is overbroad and imprecise, Mr. Ayers's civil commitment violates due process.

In addition, trial counsel provided ineffective assistance of counsel for failing to request the first diagnosis be subject to a Frye¹ hearing and failing to object to the second diagnosis under ER 702. For these reasons, the trial court abused its discretion in denying Mr. Ayers's CR 60(b) motion for relief from judgment.

¹ Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).

B. ASSIGNMENTS OF ERROR

1. Mr. Ayers's indefinite civil commitment based on the diagnoses of paraphilia NOS (hebephilia) and antisocial personality disorder violated his constitutional right to due process.

2. Mr. Ayers received constitutionally ineffective assistance of counsel where his attorney failed to request a Frye hearing regarding the novel diagnosis of paraphilia NOS (hebephilia).

3. Mr. Ayers received constitutionally ineffective assistance of counsel where his attorney failed to object under ER 702 to the expert's unhelpful testimony about antisocial personality disorder.

4. The trial court abused its discretion in denying the CR 60(b) motion for relief from judgment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the significant deprivation of liberty at issue, as well as the interest in avoiding arbitrary civil detention, tips the balance of equities in favor of recognizing Mr. Ayers's claims through a CR 60(b) motion.

2. Whether Ayers's civil commitment violates due process because the State expert's first diagnosis is not medically recognized and the second diagnosis is overbroad and too imprecise.

3. Whether trial counsel was ineffective for failing to request that the novel hebephilia diagnosis, which is not generally recognized by the psychiatric community, be subject to a Frye hearing.

4. Whether trial counsel was ineffective for failing to object to the antisocial personality diagnosis under ER 702 as unhelpful to the trier of fact because it does not distinguish the dangerous sexual offender from the dangerous but typical recidivist convicted in the ordinary criminal case.

D. STATEMENT OF THE CASE

On December 26, 1991, Lenier Ayers pled guilty to sexual offenses involving three girls. First, he pled guilty to third degree child molestation for an incident involving 14-year-old Marlo L. CP 4. Marlo testified one day Mr. Ayers invited her to his home to drink alcohol. CP 6. Once there, he gave her alcohol, asked her to come into the bedroom, and touched her breasts and put his hands down her pants. CP 6.

Mr. Ayers also pled guilty to second degree child molestation for an incident involving Sherry D., a 12-year-old girl. CP 4. Sherry D. testified that one night she and a friend went to a party at Mr. Ayers's home, where she drank alcohol, smoked marijuana and became intoxicated. CP 5. Mr. Ayers removed her clothes and his own clothes, grabbed her, and touched her breasts and genital area. CP 6.

Finally, Mr. Ayers pled guilty to second degree child molestation and communication with a minor for immoral purposes for an incident involving 13-year-old Jami M. CP 3. According to Jami, one day when she was at Mr. Ayers's home, he provided her with alcohol and she became intoxicated and passed out. RP 5. When she awoke, he was on top of her with his penis inside her vagina. CP 5.

Ten years later, on April 19, 2001, Mr. Ayers pled guilty to two counts of fourth degree assault for incidents involving Stephanie A., a 14-year-old girl, and Ebony H., a 16-year-old girl. CP 4. Stephanie testified that one day while she was walking home with her older sister, Mr. Ayers pulled up beside them in a truck and began talking with them. CP 6. A few days later, she was in the park with some friends when Mr. Ayers walked up behind her and pulled on her leg. CP 6-7.

Ebony testified that one day she and a friend were in a park and Mr. Ayers offered them cigarettes and offered to buy them marijuana and alcohol. CP 7. She got into his truck, where he placed his hand between her legs and ran his hand up her inner thigh. CP 7.

While Mr. Ayers was incarcerated for these offenses, the State filed a petition alleging he had a mental abnormality or personality disorder that made him likely to engage in acts of sexual violence directed toward strangers and he should be committed indefinitely pursuant to

RCW 71.09. CP 1-2. Mr. Ayers waived his right to a jury trial and a bench trial followed. CP 3.

At trial, Dr. Dennis Doren testified for the State. CP 11. According to Dr. Doren, Mr. Ayers suffered from paraphilia NOS, involving sexual attraction to adolescents (hebephilia), and antisocial personality disorder. CP 11. Dr. Doren testified Mr. Ayers's paraphilia NOS and antisocial personality disorder, both independently and in combination, caused him serious difficulty controlling his sexually violent behavior. CP 12.

Dr. Richard Wollert testified for Mr. Ayers. CP 14. Dr. Wollert acknowledged he had originally diagnosed Mr. Ayers with the same disorder as Dr. Doren—paraphilia NOS, involving sexual attraction to adolescents (hebephilia)—but later withdrew the diagnosis after determining it was not a valid diagnosis in general and was not appropriate to apply to Mr. Ayers specifically. CP 14. Dr. Wollert pointed out the diagnosis is not contained in the DSM-IV-TR. CP 450. He also testified that Mr. Ayers did not suffer from antisocial personality disorder, or any disorder, that predisposed him to commit criminal sexual acts. CP 15.

Trial counsel did not argue, and the trial court did not address, whether the use of the paraphilia NOS (hebephilia) diagnosis violated due process due to the lack of consensus in the psychiatric community about

the validity of the diagnosis. Trial counsel did not request the diagnosis be subject to a Frye hearing.

The trial court accepted Dr. Doren's testimony and found Mr. Ayers suffered from paraphilia NOS, involving sexual attraction to adolescents (hebephilia), and antisocial personality disorder. CP 16. The court found that both disorders, independently and in combination, caused Mr. Ayers serious difficulty controlling his sexually violent behavior. CP 16-17. The court found that as a result of his mental abnormality and/or personality disorder, Mr. Ayers was likely to engage in predatory acts of sexual violence if not confined in a secure facility. CP 21. Therefore, on September 12, 2005, the court entered an order requiring Mr. Ayers be detained indefinitely pursuant to RCW 71.09. CP 24.

Mr. Ayers appealed the order of commitment, arguing (1) the State violated his constitutional rights to due process and to confront the witnesses when it relied upon a videotaped deposition of a witness that Mr. Ayers had participated in by conference call; (2) the State did not prove his contact with Ebony H. was a recent overt act; and (3) the State did not prove he suffered from antisocial personality disorder, because it presented no evidence the disorder began before he was 15 years old, a necessary diagnostic criterion. In an unpublished decision, this Court

rejected those arguments and affirmed the commitment order. In re Det. of Ayers, 2006 Wash. App. LEXIS 2434 (No. 33604-9-II, Nov. 7, 2006).

This Court issued a mandate on November 7, 2007. CP 29.

On February 11, 2008, Mr. Ayers, *pro se*, filed a CR 60 motion for relief from judgment in the trial court. CP 99-168. He argued he was entitled to a new trial or unconditional release because use of the diagnosis of paraphilia NOS (hebephilia) at his commitment trial violated constitutional due process and ER 702 and 703. CP 100, 110-11. He argued new published materials showed a lack of consensus in the scientific community about the diagnosis. CP 147-64. The trial court denied the motion without explanation. CP 30.

Mr. Ayers appealed. CP 28-39. This Court determined Mr. Ayers had not provided notice of the CR 60 motion to the State. CP 31. Therefore, the Court remanded for a new hearing on the motion. CP 28.

On remand, after a hearing, the trial court denied the CR 60(b) motion for relief from judgment. CP 461-62. The court ruled the motion (1) was not brought within a reasonable time; (2) did not present extraordinary circumstances as required by the rule; and (3) failed on the merits because the issue it raised, the validity of Mr. Ayers's diagnosis, was already raised at trial and rejected by the trial court when deciding the

case. CP 461. The court also found trial counsel was not ineffective for failing to request a Frye hearing. CP 461.

Mr. Ayers appeals the trial court's denial of his CR 60(b) motion. CP 463.

E. ARGUMENT

1. CR 60(b)(11) PROVIDES A VIABLE AVENUE
FOR MR. AYERS TO CHALLENGE THE
ORIGINAL COMMITMENT ORDER

Civil Rule 60 allows persons committed pursuant to RCW 71.09 to move to vacate judgment. In re Det. of Ward, 125 Wn. App. 374, 379, 104 P.3d 751 (2005). CR 60(b) authorizes the court to relieve a party from a final judgment "upon such terms as are just."

Proceedings to vacate judgments are equitable in nature and the court should exercise its authority liberally to preserve substantial rights and do justice between the parties. Haller v. Wallis, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). "[C]ircumstances arise where finality must give way to the even more important value that justice be done between the parties." Suburban Janitorial Servs. v. Clarke Am., 72 Wn. App. 302, 313, 863 P.2d 1377 (1993). "CR 60 is the mechanism to guide the balancing between finality and fairness." Id. In balancing the equities within the RCW 71.09 context, where a person faces extreme deprivation of liberty, this Court recognizes "[t]he interest in finality of judgments is easily

outweighed by the interest in ensuring that an individual is not arbitrarily deprived of his liberty." Ward, 125 Wn. App. at 380.

Subsection (11) of CR 60 authorizes a trial court to grant relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment." A person committed under RCW 71.09 may move to vacate judgment under CR 60(b)(11) when his circumstances do not permit moving under another subsection of CR 60(b). Ward, 125 Wn. App. at 379. For the detainee to be entitled to relief under CR 60(b)(11), the case must involve "extraordinary circumstances" that constitute irregularities extraneous to the proceedings. Id. But because the infringement on a person's liberty in the context of RCW 71.09 proceedings is immense, the interest in finality of judgments must give way to the interest in ensuring the deprivation of liberty is not arbitrary. Ward, 125 Wn. App. at 380.

A trial court's decision whether to vacate judgment pursuant to CR 60 is reviewed for abuse of discretion. In re Marriage of Tang, 57 Wn. App. 648, 653, 789 P.2d 118 (1990). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "The range of discretionary choices is a question of law and the

judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

a. Mr. Ayers's CR 60(b)(11) motion was timely.

CR 60(b)(11) motions must be made within a "reasonable time." A determination of what constitutes a "reasonable time" depends on the facts and circumstances of each case. State ex rel. Campbell v. Cook, 86 Wn. App. 761, 766, 938 P.2d 345 (1997). In Ward, this Court concluded the CR 60(b) motion was not brought within a reasonable time, where a decade had passed since the Washington Supreme Court issued its decision that Ward claimed constituted a significant change in the law, and Ward did not provide a good reason for failing to take action sooner. 125 Wn. App. at 380-81.

Here, Mr. Ayers filed his *pro se* motion in the trial court within a reasonable time. The trial court entered the order of commitment on September 12, 2005. CP 24. Mr. Ayers filed a direct appeal, which was mandated on November 7, 2007. CP 29. Mr. Ayers, *pro se*, filed the CR 60(b) motion in the trial court on February 11, 2008, less than four months after the mandate was issued. CP 99. Because Mr. Ayers acted promptly after the judgment became final, his motion must be considered timely.

In its response, the State argued the CR 60(b) motion was untimely because Mr. Ayers did not specify a particular subsection of CR 60(b) in

his original *pro se* motion and the first time he cited subsection (11) was on appeal. CP 356. Therefore, according to the State, the motion was not brought until the opening brief was filed in the direct appeal, more than five and one-half years after the commitment order.² CP 356.

But Mr. Ayers should not be penalized for failing to specify a particular subsection of CR 60(b) in his *pro se* motion. CR 60 does not require the movant to cite a particular subsection of the rule. Instead, he must file a motion "stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based." CR 60(e)(1).

Mr. Ayers satisfied this requirement in his original *pro se* motion. He argued he was entitled to a new trial or unconditional release "for violations of due process in that paraphilia NOS, hebephilia, is not a mental abnormality or personality disorder." CP 100. He claimed violations of ER 702 and Frye because "the State's hebephilia diagnosis carries no consensus, nor conceptual validity." CP 100.

Mr. Ayers's *pro se* motion therefore stated the "grounds upon which relief [was] asked" and set forth a "statement of the facts or errors

² Actually, the opening brief of the direct appeal of the trial court's denial of the CR 60(b) motion was filed December 31, 2008. This was only three years and three months after the commitment order.

upon which the motion [was] based." Because he filed the motion less than four months after the commitment order became final, it was timely.

- b. Mr. Ayers is entitled to relief under CR 60(b)(11) for the due process violation.

In Ward, the detainee argued he was entitled to relief from judgment under CR 60(b)(11) because the State had not met its burden of proving he was subject to commitment under RCW 71.09. 125 Wn. App. 374. At the time of his initial commitment, Ward had stipulated to being a sexually violent predator but did not admit to committing a recent overt act. The Washington Supreme Court subsequently decided that, in order to prove the necessary element of present dangerousness, the State was required to prove a person released into the community had committed a recent overt act. See In re Pers. Restraint of Young, 122 Wn.2d 1, 41, 857 P.2d 989 (1993). The Ward Court noted such a change in the law regarding the State's burden of proof, which "goes to the very basis of Ward's commitment," may constitute extraordinary circumstances justifying relief under CR 60(b)(11) and that "the equities balance in Ward's favor." 125 Wn. App. at 380. But as noted, this Court did not grant relief, finding instead that Ward had failed to file his motion within a "reasonable time." Id.

Much like Ward, who claimed the State had not met its due process burden of proving all of the elements of the RCW 71.09

designation, Mr. Ayers is ineligible for involuntary commitment because the State did not prove the required element of "mental abnormality" or "personality disorder." As discussed in the sections below, Dr. Doren's diagnoses are not valid bases for commitment under the Due Process Clause and the State may not rely upon them to sustain its burden of proof.

Moreover, much of the criticism of Dr. Doren's diagnoses was not published until after Mr. Ayers's mid-2005 trial and therefore, as in Ward, extraordinary circumstances justify this collateral attack on the judgment. Of particular note is an article by Thomas Zander, published in December 2005, which discusses the relevant academic and professional literature and specifically criticizes Dr. Doren's use of the diagnoses of paraphilia NOS (hebephilia) and antisocial personality disorder in civil commitment trials. 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), available at <http://www.soccjournal.org> (last visited Jan. 23, 2012).

Also of note are several 2008 letters to the editor of the online journal "Archives of Sexual Behavior," written by commentators who forcefully critique the validity of Dr. Doren's idiosyncratic diagnosis of paraphilia NOS (hebephilia). See Gregory DeClue, Should Hebephilia be a Mental Disorder? A Reply to Blanchard et al., 38 Archives of Sexual

Behavior 317-18 (June 2009); Karen Franklin, The Public Policy Implications of "Hebephilia": A Response to Blanchard et al., 38 Archives of Sexual Behavior 319-20 (June 2009); Joseph J. Plaud, Are There "Hebephiles" Among Us? A Response to Blanchard et al., 38 Archives of Sexual Behavior 326-27 (June 2009); P. Tromovitch, Manufacturing Mental Disorder by Pathologizing Erotic Age Orientation: A Comment on Blanchard et al., 38 Archives of Sexual Behavior 328 (June 2009); Thomas K. Zander, Adult Sexual Attraction to Early-Stage Adolescents: Phallometry Doesn't Equal Pathology, 38 Archives of Sexual Behavior 329-30 (June 2009). These publications make plain what may not have been plain at the time of Mr. Ayers's trial—that Dr. Doren's use of this novel diagnosis is far from achieving general acceptance in the relevant scientific community.

Articles by experts in the field criticizing the use of the paraphilia NOS (hebephilia) diagnosis in involuntary commitment proceedings have continued to accumulate. See, e.g., John M. Fabian, Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings, 39 J. Am. Acad. Psychiatry & Law 496, 501 (2011), available at <http://www.jaapl.org> (last visited Jan. 23, 2012) (explaining "the paraphilia NOS category in the DSM-IV-TR does not include evidence suggesting that it is intended to include hebephilia as a

paraphilia. Since hebephilia is absent from the DSM-IV-TR, its reliability and validity as a diagnosis is negated."); Allen Frances and Michael B. First, Hebephilia is Not a Mental Disorder in DSM-IV-TR and Should Not Become One in DSM-5, 39 J. Am. Acad. Psychiatry & Law 78, 84 (2011), available at <http://www.jaapl.org> (last visited Jan. 23, 2012) (explaining hebephilia does not qualify as a paraphilia because "[t]he essence of a paraphilia is that the sexual interest in deviant").

It is only recently that courts have issued published decisions specifically addressing use of the diagnosis of paraphilia NOS (hebephilia) in involuntary commitment proceedings. See United States v. Carta, 592 F.3d 34, 41-42 (1st Cir. 2010) (holding government provided sufficient evidence to show Carta's sexual attraction to teenagers fell within DSM definition of paraphilia NOS); United States v. Abregana, 574 F. Supp. 2d 1145 (D. Haw. 2008) (holding government did *not* prove hebephilia was a serious mental disorder); United State v. Shields, 2008 U.S. Dist. LEXIS 13837, at *4-6 (D. Mass. 2008) (holding State did *not* show hebephilia was generally accepted as a mental disorder by professionals who assess sexually violent offenders). Mr. Ayers is aware of no published case prior to his trial that specifically addressed the appropriateness of using the diagnosis in an involuntary commitment proceeding.

To the extent the motion relies upon additional evidence not presented at the first trial, it properly falls under CR 60(b)(11). The phrase "any other reason justifying relief" allows a court to reopen a case to hear additional evidence not presented at the first trial, where the court seeks to hear all relevant evidence. State v. Scott, 20 Wn. App. 382, 580 P.2d 1099 (1978), aff'd, 92 Wn.2d 209, 595 P.2d 549 (1979); see also Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993) (rule permitting court to relieve party from final judgment for any other reason justifying relief supports vacation of default order and judgment that are based upon incomplete, incorrect or conclusory factual information).

Also, to the extent the claims rely on developments in the case law that post-date the commitment order, they fall under CR 60(b)(11). As discussed, a change in the law may create sufficient circumstances to justify relief from judgment under CR 60(b)(11). Ward, 125 Wn. App. at 379.

Finally, Washington case law strongly suggests a detainee may use CR 60(b) to collaterally attack the validity of the diagnoses the State relied upon at the initial commitment hearing. The statute permitting indefinite commitment satisfies constitutional due process only because "the Statute's release provisions provide the opportunity for periodic review of the committed individual's current mental condition and continuing

dangerousness to the community." In re Pers. Restraint of Young, 122 Wn.2d 1, 39, 857 P.2d 989 (1993). Yet in order for a detainee to successfully challenge continued commitment at an annual review hearing, the evidence must show the detainee's "condition has so changed" that either he "no longer meets the definition of a sexually violent predator," or "conditional release to a less restrictive alternative" is in the best interest of the detainee and the community. RCW 71.09.090(1). In other words, the person cannot successfully challenge his continued detention unless he shows his condition has changed since the initial commitment order; he cannot use the procedure to collaterally attack the initial judgment. In re Det. of Fox, 138 Wn. App. 374, 399 n.17, 158 P.3d 69 (2007), rev'd in part on other grounds, 2008 WL 2262200, Nos. 34145-0-II, 33596-4-II, 35221-4-II (June 3, 2008).

In upholding the annual review statute, this Court explained the requirement that the detainee show his condition has changed since the initial commitment trial does not violate due process because the detainee has "ample opportunity" to attack the initial commitment order collaterally through other means:

These provisions are intended only to provide a method of revisiting the indefinite commitment due to a relevant change in the person's condition, not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition. Where necessary, other existing statutes and court rules provide

ample opportunity to resolve any concerns about prior commitment trials.

Id. at 399 n.17 (citing Laws of 2005 ch. 344 § 1).

The other procedures available to a detainee for collaterally attacking an initial commitment order on the basis of developments in the field of psychiatry include filing a personal restraint petition or a CR 60(b) motion in the trial court, as Mr. Ayers did in this case. Id.; see also In re Det. of Elmore, 162 Wn.2d 27, 41, 168 P.3d 1285 (2007) (Bridge, J., dissenting) ("A detainee may challenge his committing diagnosis in a number of ways. Civil Rule (CR) 60(b) allows for a detainee to seek relief from judgment based on newly discovered evidence or '[a]ny other reason justifying relief.'" (citing CR 60(b)(3), (11)).

In sum, only since Mr. Ayers's trial has it become clear that there is widespread disagreement among experts in the field about the diagnosis of paraphilia NOS (hebephilia) and its use in civil commitment proceedings. Given the enormity of the liberty interest at stake, "the equities [therefore] balance in [Ayers's] favor." Ward, 125 Wn. App. at 380. Because the due process violation "goes to the very basis of [Ayers's] commitment," it is an extraordinary circumstance that justifies relief under CR 60(b)(11). Id.

- c. Mr. Ayers is entitled to relief under CR 60(b)(11) because he received ineffective assistance of counsel.

As discussed more fully below, Mr. Ayers received ineffective assistance of counsel based on his attorney's failure to challenge Dr. Doren's diagnoses at trial. This provides an independent basis for relief under CR 60(b)(11).

This Court recognizes that a person may challenge a judgment under CR 60(b)(11) based on his attorney's unauthorized surrender of substantial rights, and that such a violation creates the kind of extraordinary circumstances that warrant vacation of the judgment pursuant to CR 60(b)(11). Graves v. P.J. Taggares Co., 25 Wn. App. 118, 126, 605 P.2d 348 (1980); Lane v. Brown & Haley, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996).

Here, Mr. Ayers's attorney failed to note the lack of consensus among experts in the field or request the diagnosis be subjected to a Frye hearing. Counsel also failed to object to the expert testimony regarding antisocial personality disorder under ER 702 on the basis it was unhelpful to the trier of fact. Because counsel therefore surrendered, without authorization, Mr. Ayers's substantial right to challenge the diagnoses, Mr. Ayers is entitled to relief under CR 60(b)(11).

2. MR. AYERS'S INVOLUNTARY COMMITMENT VIOLATES DUE PROCESS BECAUSE IT IS PREMISED ON DIAGNOSES THAT ARE NOT ACCEPTED BY THE PROFESSION AND ARE OVERBROAD AND TOO IMPRECISE
 - a. The issue of the validity of Dr. Doren's diagnoses and whether they violated due process was not addressed at trial.

The trial court denied Mr. Ayers's CR 60(b) motion in part because it found that "the issue it raises (validity of the respondent's diagnosis) was also raised at trial and the Court considered that issue when deciding the case." CP 461. This is incorrect because the parties never raised the issue of whether the diagnoses were invalid in violation of due process or whether they were admissible under Frye or ER 702. The trial court found only "the testimony of Dr. Doren [is] more reliable than that of Dr. Wollert on the question of whether the Respondent has a mental abnormality and/or personality disorder that causes him serious difficulty controlling his sexually violent behavior." CP 16. The court did not consider whether there was widespread disagreement among experts in the field regarding the validity of the diagnoses, or whether such widespread disagreement affected Mr. Ayers's due process rights. Thus, because the issue was not raised at trial, it may be raised in Mr. Ayers's CR 60 motion.

- b. Due process requires the State prove an involuntary civil committee has a valid, medically recognized mental disorder.

The state and federal constitutions guarantee the right to due process of law. U.S. Const. amend XIV; Const. art. I, § 3. A person's right to be free from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). Indefinite civil commitment is a restriction on the fundamental right of liberty, and consequently, the State may only commit persons who are *both* currently dangerous *and* have a mental abnormality. Id. at 77; Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); In re Det. of Thorell, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Current mental illness is a constitutional requirement of continued detention. O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).

The United States Supreme Court established that involuntary civil commitment may not be based on a diagnosis that is either not medically recognized or is too imprecise to distinguish the truly mentally ill from typical recidivists who must be dealt with by criminal prosecution alone.

In Foucha, the Court held a criminal defendant found not guilty by reason of insanity could not be held involuntarily in a state mental hospital

solely "on the basis of his antisocial personality which, as evidenced by his conduct at the facility, . . . rendered him a danger to himself or others." 504 U.S. at 78; see also id. at 82 (rejecting the argument that "because [an individual] once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, . . . he may be held indefinitely"); id. at 83 n.6 (rejecting contention that a state may detain an individual based on a "finding of dangerousness . . . based solely on the detainee's antisocial personality that apparently has caused him to engage in altercations from time to time").

The Court explained the State's "rationale [for commitment] would permit [it] to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term." Id. at 82-83. The Court reasoned if a supposedly dangerous person with a personality disorder "commit[s] criminal acts," then "the State [should] vindicate[] [its interests through] the ordinary criminal processes . . . , the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct," i.e., "the normal means of dealing with persistent criminal conduct." Id. at 82.

In Hendricks, the Court reaffirmed that "dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment"; rather, "proof of dangerousness [must be coupled] with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" 521 U.S. at 358. The Court held "Hendricks' diagnosis as a pedophile . . . suffice[d] for due process purposes" and, further, his admitted inability to control his pedophilic urges "adequately distinguish[e]d [him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." Id.

Most recently, in Kansas v. Crane, the Court held "there must be proof of serious difficulty in controlling behavior" in order to support involuntary civil commitment. 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). The Court reemphasized its decision in "Hendricks underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'" Crane, 534 U.S. at 412 (quoting Hendricks, 521 U.S. at 360). Thus, an individual cannot be involuntarily committed unless he suffers from a mental abnormality 'sufficient to distinguish . . . him . . . from the dangerous but typical recidivist convicted in an ordinary criminal case." Id. at 413. In reaffirming the significance of this distinction, the

Court specifically cited a study finding that forty to sixty percent of the male prison population is diagnosable with antisocial personality disorder. Id. at 412 (citing Paul Moran, The Epidemiology of Antisocial Personality Disorder, 34 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999)).

In light of these United States Supreme Court cases, the Washington Supreme Court similarly recognizes that, in RCW 71.09 civil commitment proceedings, due process requires the State to prove the detainee has a serious, diagnosed mental disorder that causes him difficulty controlling his sexually violent behavior. In re Det. of Thorell, 149 Wn.2d 724, 736, 740-41, 72 P.3d 708 (2003). "Lack of control" requires proof "sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." Id. at 723 (quoting Crane, 534 U.S. at 413).

Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for indefinite commitment, see Crane, 534 U.S. at 413, the diagnosis must nonetheless be medically justified. See Hendricks, 521 U.S. at 358 (explaining that states must prove not only dangerousness but also mental

illness in order to "limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control"); Thorell, 149 Wn.2d at 732, 740-41 (explaining State must present expert testimony and prove beyond a reasonable doubt that offender has serious, diagnosed mental illness that causes him difficulty controlling his behavior).

- c. Mr. Ayers's commitment based on the diagnosis of paraphilia NOS (hebephilia) violates due process because it is an invalid diagnosis not accepted by the profession.

The State's expert's diagnosis of "paraphilia NOS (hebephilia)" is invalid, and its use as a predicate for Mr. Ayers's involuntary civil commitment therefore violates due process. The United States Supreme Court has upheld involuntary civil commitment only in cases in which the diagnosed disorder was one that "the psychiatric profession itself classifies as a serious mental disorder." Hendricks, 521 U.S. at 360; id. at 372 (Kennedy, J., concurring); id. at 375 (Breyer, J., dissenting); Crane, 534 U.S. at 410, 412; see also Foucha, 504 U.S. at 88 (O'Connor, J., concurring in part and concurring in the judgment) (involuntary civil commitment requires "some medical justification").

"Paraphilia NOS (hebephilia)" fails the Court's "medical recognition" or "medical justification" test because it is not recognized by either the psychiatric profession in general, or the APA or DSM-IV-TR in

particular. Put simply, it is an unreliable and invalid diagnosis that fails to distinguish Mr. Ayers from any "dangerous but typical recidivist" who cannot be civilly committed under the Due Process Clause. Crane, 534 U.S. at 413.

The diagnostic criteria set forth in the DSM-IV-TR show the diagnosis of "paraphilia" was not intended to encompass "hebephilia." In order to justify a diagnosis of "paraphilia," the person must demonstrate "recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving (1) nonhuman objects; (2) the suffering or humiliation of oneself or one's partner, or (3) children or other nonconsenting persons that occur over a period of at least six months." DSM-IV-TR at 566. The person must also be distressed or have impaired functioning as a result of those fantasies, urges or behaviors, except for the diagnoses of pedophilia, voyeurism, and sexual sadism, which can be based solely on the person having acted on his paraphilic urges. Id.

Although a person with fantasies or urges involving "children" may be diagnosed with paraphilia, the term "children" was not intended to include pubescent or post-pubescent adolescents, even those under the age of legal consent. The use of the word "children" "was intended to be entirely congruent with its use in the diagnostic criteria set for pedophilia, which state 'recurrent, intense sexually arousing fantasies, sexual urges, or

behaviors with a prepubescent child or children (generally age 13 years or younger)."¹ Frances & First, Hebephilia is Not a Mental Disorder in DSM-IV-TR, *supra*, at 80-81 (quoting DSM-IV-TR at 572). The phrase "13 years or younger" was "included simply for the purpose of providing a general upper age limit for the construct prepubescent," which is based on the absence of puberty, not on any arbitrary age cutoff that could be misinterpreted to include pubescent individuals. *Id.* at 81.

Nor were fantasies or urges involving pubescent or post-pubescent adolescents meant to be included in the residual category of "paraphilia NOS." The diagnosis of paraphilia NOS was included in the DSM-IV-TR "for coding Paraphilias that do not meet the criteria for any of the specific categories," the "specific categories" being, for example, pedophilia, exhibitionism, and sexual sadism. DSM-IV-TR at 566-75. Examples of paraphilia NOS "include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine)." *Id.* at 576.

While, by its terms, this diagnosis "is not limited to" the variants specifically listed, "the underlying principle governing inclusion in this category [paraphilia] is that a person's focus of sexual arousal be considered deviant, bizarre, and unusual." Frances & First, Hebephilia is

Not a Mental Disorder in DSM-IV-TR, *supra*, at 79; *see also, e.g.*, Marilyn Price, et al., Redefining Telephone Scatologia: Comorbidity and Theories of Etiology, 31 *Psychiatric Annals* 226, 226 (2001) (describing the paraphilia NOS category as "reserved for sexual disorders that are either so uncommon or have been so inadequately described in the literature that a separate category is not warranted"). Thus, "*the use of an NOS category in a forensic setting should always be seen as extraordinary.*" Frances & First, Hebephilia is Not a Mental Disorder in DSM-IV-TR, *supra*, at 82 (emphasis added).

"Hebephilia" does not qualify as a type of paraphilia because "[t]he essence of a paraphilia is that the sexual interest is deviant." *Id.* at 84. "[H]aving sexual urges involving pubescent youngsters is [in]sufficient for a diagnosis of a mental disorder. Having such urges is normal; acting on them is a serious crime, not a mental disorder." *Id.*

In addition to the failure of the APA to recognize the disorder of paraphilia NOS (hebephilia), numerous professionals and commentators conclude it is invalid and diagnostically unreliable. Dr. Doren is the most widely-recognized proponent of using the diagnosis for sex offenders. Zander, Civil Commitment Without Psychosis, *supra*, at 41. In his 2002 book written specifically for forensic evaluators in sexually violent predator proceedings, Dr. Doren advocated the use of the diagnosis of

paraphilia NOS (hebephilia) for offenders who have had sexual contact with, and are sexually attracted to, adolescents. Dennis M. Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond 80 (2002). Dr. Doren acknowledged studies showing that up to one-third of adult men are sexually attracted to adolescents as well as adults, but argued whether this represents a pathological condition depends on the degree to which the person is impaired by that attraction. Id. at 80-81. Consistent with his testimony in this case, Dr. Doren argued men who repeatedly have sexual contact with adolescents "despite the ongoing risk of legal consequences and inability to maintain such relationships on a long-term basis due to the adolescents' growing beyond the age of interest," can receive the diagnosis of hebephilia. Id. at 81.

Commentators have identified several logical flaws in Dr. Doren's theories. For instance, Zander recognized that if the diagnosis of hebephilia is justified primarily by the "impairment" or "consequences" of an adult's sexual attraction to adolescents, and not by the attraction itself, this raises the question, is it conceptually valid to label a behavior a mental disorder when it is primarily defined by societal intolerance of it? If so, Zander pointed out, then arguably homosexuality should be redesignated as a mental disorder, as there continues to be widespread intolerance of it. Zander, Civil Commitment Without Psychosis, *supra*, at 48.

Further, there is no professional consensus that the diagnosis is justified merely because the adolescent with whom the adult had sexual contact was under the legal age of consent. Given that the sexual attraction is common, those offenders should be considered diagnostically the same as adults who sexually assault other adults, and they should not be diagnosable if the sexual contact is mutual. *Id.* at 48-49. The fact that the legal age of consent varies from jurisdiction to jurisdiction underscores the conceptual invalidity of the diagnosis, as "diagnosis of psychopathology is wholly dependent upon the social response to the behavior that constitutes the diagnosis." *Id.* at 49. The contextual variability of Dr. Doren's diagnosis appears to contradict the admonition in DSM that "[n]either deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual." *Id.* (quoting DSM-IV-TR at xxxi).

Other commentators have leveled similar criticisms at the use of the diagnosis in the sexually violent predator context. *See* Frances & First, [Hebephilia is Not a Mental Disorder in DSM-IV-TR](#), *supra*; Fabian, [Diagnosing and Litigating Hebephilia in Sexually Violent Predator Commitment Proceedings](#), *supra*; DeClue, [Should Hebephilia be a Mental Disorder?](#), *supra*; Franklin, [Invasion of the Hebephile Hunters: Or, the](#)

Story of How an Archaic Word Got a New Lease on Life, *supra*; Franklin, The Public Policy Implications of "Hebephilia", *supra*; Plaud, Are There "Hebephiles" Among Us?, *supra*.

The paucity of support for the diagnosis in the DSM-IV-TR and in the professional literature, as well as its contextual variability, suggest it lacks conceptual validity and reliability. Zander, Civil Commitment Without Psychosis, *supra*, at 49; Fabian, Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings, *supra*, at 501 ("Since hebephilia is absent from the DSM-IV-TR, its reliability and validity as a diagnosis is negated."). The diagnosis has not been recognized outside of the sexually violent predator commitment context. Zander, Civil Commitment Without Psychosis, *supra*, at 49. Further, there are no published studies reporting inter-rater reliability of the diagnosis in clinical practice, research settings, or in any context other than SVP cases. *Id.* In sum, the psychiatric community is far from recognizing the validity or reliability of the diagnosis of paraphilia NOS (hebephilia).

Courts have recently acknowledged such problems with relying on the diagnosis of hebephilia in the sexually violent predator context. For instance, in United States v. Shields, Dr. Doren testified for the government that Shields had a mental disorder called "hebephilia." 2008

U.S. Dist. LEXIS 13837, at *4 (D. Mass., No. 07-12056-PBS, Feb. 26, 2008). The District Court found that although the government presented expert evidence showing hebephilia is generally accepted in the field as a group identifier or label, that literature "does not establish that hebephilia is generally accepted as a mental disorder by professionals who assess sexually violent offenders. In fact, both sides agree that the attraction of an adult male to a pubescent adolescent is not, without more, indicative of a mental disorder." Id. Dr. Doren's book, which was not peer-reviewed, was the lone source cited by the government for the proposition that some kinds of hebephilia fall under the diagnosis of paraphilia NOS. The court found that evidence "does not suffice." Id. at *6. Therefore, the court concluded the government did not prove Shields was a sexually dangerous offender. Id.

Similarly, in United States v. Abregana, Dr. Doren diagnosed Abregana with paraphilia NOS (hebephilia). 574 F. Supp. 2d 1145, 1150-51 (D. Haw. 2008). On the other hand, the defense experts testified hebephilia is not listed as a sexual deviance in DSM-IV-TR or other important literature in the field, and that even if it is a valid diagnosis, the degree of pathology of hebephilia is much less than that of other paraphilias such as pedophilia or sexual sadism. Id. at 1153. Given this conflicting evidence, the court concluded the government did not prove by

clear and convincing evidence the disorder was a serious mental disorder. Id. at 1154, 1159.

In contrast, in United States v. Carta, 592 F.3d 34, 40 (1st Cir. 2010), the First Circuit held the hebephilia diagnosis properly fell under the DSM's "catch-all category called 'paraphilia not otherwise specified.'" But as stated, "the question of whether hebephilia is a type of paraphilia NOS, depends on whether it is considered deviant and abnormal to have a sexual attraction and to engage in subsequent sexual behaviors toward pubescent and postpubescent minors." Fabian, Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings, supra, at 504. "Hebephilia" does not fall under the "catch-all" category of paraphilia NOS because "[t]he essence of a paraphilia is that the sexual interest is deviant," and having sexual urges involving prepubescent youngsters is "normal" even if acting on those urges is a crime. Frances & First, Hebephilia is Not a Mental Disorder in DSM-IV-TR, supra, at 84. To this date, neither the case law nor clinical research on sex offenders clearly supports classifying hebephilia as an abnormal pathology. Fabian, Diagnosing and Litigating Hebephilia in Sexually Violent Predator Civil Commitment Proceedings, supra, at 504.

In sum, absent a diagnosis that "the psychiatric profession itself classifies as a serious mental disorder," Hendricks, 521 U.S. at 360,

involuntary civil commitment violates the Due Process Clause. Dr. Doren's diagnosis of paraphilia NOS (hebephilia) lacks such medical recognition. It is not in the DSM-IV-TR nor recognized by the APA. There is no consensus among psychiatrists of its validity as a diagnosis or its appropriateness in civil commitment proceedings. Accordingly, due process prohibits its use as a predicate for involuntary civil commitment.

- d. The State's reliance on antisocial personality disorder as a basis for civil commitment violates due process, as it is too imprecise a diagnosis.

Mr. Ayers's involuntary commitment also violates due process insofar as it is based on a diagnosis of antisocial personality disorder. To begin with, the Supreme Court's decision in Foucha strongly implies that due process prohibits involuntary commitment on the basis of such a diagnosis. See 504 U.S. at 78, 82-83 (State may not commit person indefinitely merely because he is determined to have "a personality disorder that may lead to criminal conduct").

Antisocial personality disorder is simply "too imprecise a category to offer a solid basis for concluding that civil detention is justified." Hendricks, 521 U.S. at 373 (Kennedy, J., concurring). For this reason, the diagnosis is fatally "[*in*]sufficient to distinguish the dangerous sexual offender whose serious mental illness, 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. For example, in Crane, the Court cited a study that found that 40 to 60 percent of the male prison population is diagnosable with antisocial personality disorder. Id. at 412. In reality, this number is probably 75 to 80 percent. See, e.g., Eric S. Janus, Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation, 92 N.W. U. L. Rev. 1279, 1291 & n.59 (1998) (collecting studies indicating that 75 to 80 percent of all prisoners are diagnosable with antisocial personality disorder). Indeed, an estimated seven million Americans—including more than six million men—are diagnosable with antisocial personality disorder. Harriet Barovick, Bad to the Bone, Time, Dec. 27, 1999.

That millions of Americans and a substantial majority of the male prison population are diagnosable with antisocial personality disorder is not surprising. The core of an antisocial personality disorder diagnosis is the existence of any three of the following seven behaviors:

- (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 the 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-IV-TR at 706.³

Far from "distinguish[ing] . . . the dangerous but typical recidivist convicted in an ordinary criminal case," Crane, 534 U.S. at 413, these criteria essentially *describe* a typical recidivist (as well as millions of non-criminals).

The APA also has taken the position that antisocial personality disorder is an over-inclusive and inappropriate basis for civil commitment. For instance, in 2006, the APA approved an action paper supporting the elimination of antisocial personality disorder as a basis for the civil commitment of sex offenders. APA Final Action Paper, Eliminating the Use of Antisocial Personality Disorder as a Basis for Civil Commitment (APA Assembly, May 19-21, 2006), available at <http://www.psych.org> (last visited Jan. 23, 2012). The action paper explained that antisocial

³ The remaining "diagnostic criteria" of APD are that the individual must be at least 18 years of age, there must be some "evidence" of a "Conduct Disorder" before age 15, and the antisocial conduct underlying the diagnosis must not relate exclusively to schizophrenia or a manic episode. DSM-IV-TR at 706. A "Conduct Disorder" is, more or less, a juvenile version of APD. See id. at 98-99, 702; Zander, Civil Commitment Without Psychosis, *supra*, at 55. APD does not require an actual diagnosis of conduct disorder; rather, "a history of some symptoms of Conduct Disorder before age 15" will suffice. DSM-IV-TR at 702; Zander, Civil Commitment Without Psychosis, *supra*, at 55.

personality disorder should not serve as a predicate for involuntary civil commitment because, *inter alia*, it "is a disorder largely defined on the basis of the behavior exhibited by the individual; *it is not premised on any underlying disturbance of thought, mood, cognition or aberrant sexual urge.*" Id. at 1-2 (emphasis added).⁴

In addition to the APA's opposition to the use of antisocial personality disorder as a predicate for involuntary commitment, numerous individual mental health professionals and commentators have leveled similar criticisms. See, e.g., Daniel F. Montaldi, *The Logic of Sexually Violent Predator Status in the United States of America*, 2(1) *Sexual Offender Treatment* (2007), available at <http://www.sexual-offender-treatment.org/57.0.html> (last visited Jan. 23, 2012); Bruce Winick et al., *Should Psychopathy Qualify for Preventive Outpatient Commitment?*, in *International Handbook on Psychopathic Disorders and the Law* 8 (Alan Felthous and Henning Sass, eds., 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984938 (last visited Jan. 23, 2012) (antisocial personality disorder does not justify involuntary civil commitment because it "does not impair cognitive processes or

⁴ The APA opposes the use of an antisocial personality disorder diagnosis as a basis for civil commitment despite the disorder's inclusion in the APA-published DSM-IV-TR. As the DSM explains (at xxxvii): "It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category . . . does not imply that the condition meets legal . . . criteria for what constitutes a mental disease, mental disorder, or mental disability." Thus, while consensus professional recognition, as reflected by the

otherwise interfere with rational decision making" and "does not make it difficult for [the individual] to control [his] conduct"); Zander, Civil Commitment Without Psychosis, *supra*, at 52-62 (summarizing studies and scholarly opinion).

Even a prominent article espousing the minority view in the profession that involuntary commitment based on antisocial personality disorder may be appropriate in some cases concedes that "[t]he use of [antisocial personality disorder] to justify civil commitment is unlikely to find general acceptance among mental health professional groups." Shoba Sreenivasan et al., Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of "Mental Disorder" and "Likely to Reoffend", 31 J. Am. Acad. Psychiatry & L. 471, 477 (2003).

In sum, as the Supreme Court has twice suggested (and perhaps once concluded), and consistent with the APA's official position, antisocial personality disorder is simply too imprecise and overbroad a diagnosis to survive constitutional scrutiny. See Foucha, 504 U.S. at 82-83; Crane, 534 U.S. at 412-13. The diagnosis does not satisfy the State's constitutional obligation to differentiate "the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an

DSM, should be seen as a *necessary* condition for civil commitment under the Due Process Clause, it should not be viewed as a *sufficient* condition.

ordinary criminal case." Crane, 534 U.S. at 413. To the contrary, as numerous studies indicate, it comes perilously close to justifying the civil commitment of "any convicted criminal." Foucha, 504 U.S. at 82-83. Under Foucha and its progeny, antisocial personality disorder is not a valid basis for civil commitment, and Mr. Ayers's continued detention on that ground violates due process.

- e. Mr. Ayers is entitled to relief if either diagnosis is held invalid.

Where a verdict in a criminal case is based upon a statutory alternative means that is later held to be improper, the judgment must be reversed if it is impossible to say under which means the verdict was obtained. Stromberg v. California, 283 U.S. 359, 368, 51 S. Ct. 532, 75 L. Ed 1117 (1931); Street v. New York, 394 U.S. 576, 585-86, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969). If the verdict is the result of a bench trial, the question is whether the basis for the judge's decision can be ascertained from the record. Street, 394 U.S. at 586. Moreover, even if the record precludes the inference that the conviction was based *solely* on the improper means, the reviewing court must still reverse if the conviction could have been based upon *both* the proper and the improper means. Id. at 587-88; cf. State v. Bourgeois, 72 Wn. App. 650, 664, 866 P.2d 43 (1994) (exceptional sentence must be reversed where record

shows trial court placed "significant weight" on inappropriate aggravating factor in imposing sentence).

Here, the record shows the trial judge relied upon *both* of Dr. Doren's diagnoses in finding Mr. Ayers met the criteria for commitment under RCW 71.09. In its written findings, the court stated: "The Court finds that *both* the Respondent's Paraphilia NOS, involving sexual attraction to adolescents (Hebephilia), *and* his Antisocial Personality Disorder are congenital or acquired conditions, that they affect the Respondent's emotional or volitional capacity, and that they predispose him to the commission of criminal sexual acts to the degree constituting him a menace to the health and safety of others." CP 68-69 (emphasis added). The court further stated, "*both* the Respondent's Paraphilia NOS, involving sexual attraction to adolescents (Hebephilia), *and* Antisocial Personality Disorder, *independently and in combination with each other*, cause him serious difficulty controlling his sexually violent behavior." CP 69 (emphasis added). Finally, the court stated, "[t]he Respondent's mental abnormality and personality disorder, *both independently and in combination*, make(s) him likely to engage in predatory acts of sexual violence if not confined in a secure facility." CP 75 (emphasis added).

Thus, the record is plain that the court relied upon *both* diagnoses in finding Mr. Ayers met the sexually violent predator criteria, and that it

placed significant weight on each one. Thus, even if only one of the means is held unconstitutional, this Court must reverse and remand for a new trial. Street, 394 U.S. at 587-88; Bourgeois, 72 Wn. App. at 664.

3. MR. AYERS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

Detainees in RCW 71.09 civil commitment proceedings have both a due process and statutory right to the assistance of counsel. As noted, civil commitment for any purpose is a significant deprivation of liberty that requires due process protections. Addington v. Texas, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). The constitutional right to procedural due process includes the right to counsel. Specht v. Patterson, 386 U.S. 605, 609-10, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967).

Moreover, the statute provides a right to the assistance of counsel at the commitment trial. RCW 71.09.050(1).

To show ineffective assistance of counsel in a civil detention context, the claimant must show counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the detainee, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); see also Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

- a. Counsel was ineffective for failing to request a Frye hearing.

Frye directs courts to apply particular criteria in assessing the reliability and admissibility of expert testimony. Under the Frye standard, novel scientific evidence is admissible only if (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). The Frye standard recognizes that because judges do not have the expertise to assess the reliability of scientific evidence, the courts must turn to experts in the particular field to help them determine the admissibility of the proffered testimony. Id. The inquiry turns on the level of recognition accorded to the scientific principle involved; the court "look[s] for *general acceptance* in the appropriate scientific community." Id. (quoting State v. Janes, 121 Wn.2d 220, 232-33, 850 P.2d 495 (1993)). "If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted." Id. (quoting State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)).

The Frye standard applies in determining the reliability and admissibility of expert testimony about whether an individual suffers from

a particular novel psychiatric diagnosis. Greene, 139 Wn.2d at 70-71. The question in such a case is whether the diagnosis is generally accepted within the psychiatric community as a recognized mental condition that is regularly diagnosed and treated. Id. at 71. In Greene, the court concluded dissociative identity disorder was generally accepted in the psychiatric community, because it was included in the DSM-IV. Id. The court explained, "The DSM-IV's diagnostic criteria and classification of mental disorders reflect a *consensus* of current formulations of evolving knowledge in the mental health field." Id. (quoting DSM-IV at xxvii). Further, the disorder was regularly diagnosed and treated by mental health professionals in this state. Id. at 72. For these reasons, the expert testimony regarding the disorder met the Frye standard in Greene.⁵

At the time of Mr. Ayers's 2005 trial, Dr. Doren's diagnosis of paraphilia NOS (hebephilia) was not included in the DSM-IV-TR and was not generally accepted by the psychiatric community as a valid diagnosis. It was certainly not a mental condition that was regularly diagnosed and

⁵ In In re Detention of Berry, Division One held Frye does not apply to the use of a particular novel psychiatric diagnosis at a civil commitment trial but rather to "the science upon which the expert's opinion is founded." 160 Wn. App. 374, 379, 248 P.3d 592 (2011), review denied, 172 Wn.2d 1005, 257 P.3d 665 (2011). The court reasoned, "the science at issue is standard psychological analysis," which is well-established and therefore not subject to Frye. Id.

But as discussed, Greene held the Frye standard does apply in determining the reliability and admissibility of expert testimony regarding whether an individual suffers from a particular novel psychiatric diagnosis. Greene, 139 Wn.2d at 70. Because Berry conflicts with Greene, it was wrongly decided and this Court should not follow it.

treated by psychiatrists, and even today the diagnosis has not been recognized outside of the civil commitment context. Zander, Civil Commitment Without Psychosis, *supra*, at 49. Finally, there are no peer-reviewed studies reporting inter-rater reliability of the diagnosis in clinical practice or research settings. *Id.* In sum, the psychiatric community is far from recognizing the validity or reliability of the diagnosis. Trial counsel should have requested the diagnosis be subjected to a Frye hearing.

b. Counsel was ineffective for failing to object to the expert's testimony under ER 702.

Expert testimony is admissible under ER 702⁶ only if it is helpful to the trier of fact under the particular facts of the case. Greene, 139 Wn.2d at 73. Under ER 702, expert testimony will be deemed helpful to the trier of fact only if its relevance can be established. *Id.* at 73. Scientific evidence that does not help the trier of fact resolve any issue of fact is irrelevant and does not meet the requirements of ER 702. *Id.* Unlike the Frye standard, this inquiry turns on the forensic application of the particular scientific principle or theory. *Id.*

⁶ ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Here, the relevant question to be resolved by the trier of fact was whether Mr. Ayers had a serious mental disorder that caused him difficulty controlling his sexually violent behavior. Thorell, 149 Wn.2d at 736, 740-41; Crane, 534 U.S. at 413. As discussed, the expert testimony regarding the diagnosis of antisocial personality disorder did help to satisfy the State's constitutional obligation to differentiate "the dangerous sexual offender whose serious mental illness, 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. To the contrary, the disorder merely describes a majority of convicted criminals and therefore is not a valid basis for civil commitment. Also, the use of the diagnosis of antisocial personality disorder in civil commitment proceedings has not found general acceptance among the relevant community. While antisocial personality disorder is recognized by mental health professionals, as well as the DSM-IV-TR, as a potentially useful diagnosis for clinical or research purposes, it is not considered a valid basis for civil commitment.

Thus, even though the diagnosis of antisocial personality disorder may have gained general acceptance in the psychiatric community as a potentially useful diagnosis for clinical or research purposes, it is not

helpful to the trier of fact in sexually violent predator proceedings and was therefore inadmissible under ER 702.

In sum, counsel was ineffective for failing to challenge Dr. Doren's testimony regarding antisocial personality disorder under ER 702.

Antisocial personality disorder is insufficient to distinguish the dangerous sexual offender whose serious mental disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. Counsel should have objected to the testimony under ER 702 as unhelpful to the trier of fact.

c. Reversal is required.

Counsel's failure to request the paraphilia NOS (hebephilia) diagnosis be subject to a Frye hearing, and his failure to object to the expert's testimony about antisocial personality disorder under ER 702, resulted in prejudice. As discussed, had counsel requested a Frye hearing, the trial court would have concluded there was a lack of consensus among experts in the mental health field about the validity of the "paraphilia NOS (hebephilia)" diagnosis. The court would have determined the alleged disorder is not regularly diagnosed or treated by psychiatrists and is not recognized outside of the civil commitment context. Thus, the court would have concluded the expert's testimony about the diagnosis was not admissible.

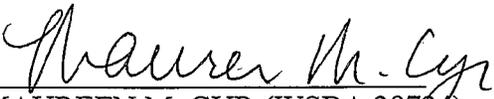
Similarly, as discussed, had counsel objected to the expert's testimony about antisocial personality disorder under ER 702, the trial court would have concluded the testimony was not helpful to the trier of fact and was therefore inadmissible.

Thus, Mr. Ayers has established a "reasonable probability that, but for counsel's [failure to raise his due process claim], the result of [his civil commitment] proceeding would have been different." Strickland, 466 U.S. at 694. Reversal is required.

F. CONCLUSION

Because Mr. Ayers's civil commitment rests on diagnoses that are either not generally accepted within the psychiatric community or are too broad and imprecise, his commitment violates due process. Further, trial counsel was ineffective for failing to request the diagnoses be subject to a Frye hearing or to argue they were objectionable under ER 702. For these reasons, the trial court's order denying the motion to vacate judgment must be reversed and the matter remanded for a new trial.

Respectfully submitted this 24th day of January 2012.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

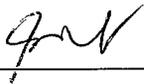
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)	
LENIER AYERS,)	NO. 42335-9-II
)	
)	
APPELLANT.)	

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