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NO. 65534-5-I

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

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In re the Detention of:

MATTHEW JAGGER,

Respondent.

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**OPENING BRIEF OF APPELLANT**

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## I. DECISION BELOW

On March 9, 2010, the Hon. Gerald R. Knight of the Snohomish County Superior Court entered an order granting Mr. Jagger's motion for a new trial pursuant to CR 60(b)(11). CP at 168-170. This Court has since granted Appellant's motion to stay the trial court proceedings pending this appeal.

## II. ASSIGNMENTS OF ERROR

- A. The trial court erred in its conclusion that there was an apparent contradiction between the testimony of Dr. Shoba Sreenivasan, who testified at Mr. Jagger's 2006 jury trial, and the views express in a 2008 editorial she co-authored in 2008.
- B. The trial court erred in concluding that the perceived contradiction between Dr. Sreenivasan's 2006 trial testimony and 2008 editorial amounted to an "extraordinary circumstance" justifying a new trial pursuant to CR 60(b)(11).
- C. The trial court erred in concluding that Mr. Jagger's motion for new trial was timely made.

## III. ISSUE PRESENTED FOR REVIEW

**Where there has been no factual or legal change in circumstance since Mr. Jagger was civilly committed as an SVP in 2006 by a unanimous jury, did the trial court abuse its discretion by ordering a new trial pursuant to CR 60(b)(11)?**

#### IV. STATEMENT OF THE CASE

##### A. Mr. Jagger's criminal sexual history

The State filed this case on October 21, 2004 seeking Mr. Jagger's involuntary civil commitment as a sexually violent predator (SVP) pursuant to RCW 71.09 *et seq.* CP at 538. Mr. Jagger has a lengthy criminal history of sex offenses that begins in 1995 when he was found guilty of two counts of fourth degree assault with sexual motivation. CP at 542. These offenses involved Mr. Jagger forcing himself sexually upon a 10 year old and an 11 year old girl. *Id.* The sexual contact persisted despite the struggling of the victims, and included Mr. Jagger putting his hand down one girl's pants to touch her vagina. *Id.*; CP at 184.

In 1997, Mr. Jagger was later convicted of unlawful sexual contact in South Dakota. CP at 184. Two years later, Mr. Jagger was convicted in Snohomish County Juvenile Court of first degree child molestation, a sexually violent offense. *Id.*; CP at 541; RCW 71.09.020(15). This offense involved Mr. Jagger stalking and sexually assaulting a 10 year old girl who suffered from cerebral palsy. CP at 184-5.

In February 2002, Mr. Jagger met three young girls on a city bus in Seattle. CP 556. One of these girls was 14 year old R.P., a cancer victim who had recently completed chemotherapy. *Id.* Despite learning from R.P. that she was only 14 years old, Mr. Jagger had vaginal intercourse

with her. CP at 557. Mr. Jagger was sentenced to 32 months in prison for the offense against R.P. CP at 544. He was imprisoned for this offense when the State filed the SVP action against him. Despite this lengthy history of convictions for sexually assaulting young girls, and status as a civilly committed SVP, Mr. Jagger consistently denies ever having sexually assaulted anyone. CP at 180.

**B. Expert testimony of Dr. Shoba Sreenivasan, PhD**

At the 2006 trial, Shoba Sreenivasan, Ph.D. provided expert testimony that Mr. Jagger suffered from a sexual disorder called Paraphilia Not Otherwise Specified (Nonconsenting persons), which is a sexual disorder that involves persistent sexual fantasies, urges or behaviors involving forced or nonconsensual sex. CP at 124. According to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (DSM-IV), a person diagnosed with paraphilia has recurrent and intense sexually arousing fantasies, sexual urges, or behaviors involving nonconsenting persons. CP at 125-128. Dr. Sreenivasan testified that Jagger's paraphilia centered around repeatedly approaching, coercing, and forcing women to engage in nonconsensual sex. Dr. Sreenivasan also based her opinion that Mr. Jagger met SVP criteria, in part, on the Paraphilia diagnosis. CP at 128-144.

Mr. Jagger was also diagnosed with a personality disorder called Personality Disorder Not Otherwise Specified with antisocial and borderline traits. CP 244-256. When asked how the diagnoses of paraphilia and personality disorder interact to contribute to Jagger's likelihood to reoffend, Dr. Sreenivasan testified:

Well, I think the paraphilia NOS, the sexual deviancy disorder is the one that most explains his repetitive pattern of sexually coercive behaviors. That's kind of the core sexual deviancy disorder that he has.

But then it gets aggravated and amped up by the fact that his mood is so unstable, he doesn't really have good controls over his mood. And his behavior is so unstable, he's aggressive and assaultive and given to temper and crying and suicide gestures. So each of these things kind of act and interact with one another.

CP at 262-263.

Dr. Sreenivasan further opined that these disorders cause Mr. Jagger to have serious difficulty controlling his sexually violent behavior and make him likely to engage in predatory acts of sexual violence unless he is confined in a secure facility for treatment. CP 599.

After hearing several days of testimony, the jury returned a unanimous verdict finding Mr. Jagger to meet the statutory definition of an SVP. CP at 537. The trial court subsequently entered an order indefinitely committing Mr. Jagger to the care and custody of the Department of Social and Health Services (DSHS). CP at 538-539.

Jagger's commitment was affirmed by the Court of Appeals in an unpublished opinion. *In re Jagger*, 2007 WL 2175687 (2005), *review denied*, *In re Detention of Jagger*, 163 Wn.2d 1034, 187 P.3d 268 (2008), *cert. denied*, *Jagger v. Washington*, 129 S. Ct. 900, 173 L. Ed.2d 118, (2009).

**C. Developments since Mr. Jagger's civil commitment**

Since his 2006 civil commitment, Mr. Jagger has received regularly scheduled annual review hearings pursuant to RCW 71.09.090. CP at 171-190; 240-247; 310-370. In each of the four evaluations since Mr. Jagger's SVP commitment, the Department of Social and Health Services (DSHS) psychologist who evaluated Mr. Jagger determined that he continues to meet SVP criteria.<sup>1</sup> In response to Mr. Jagger's 2009 annual review evaluation, he filed a Motion for Order on Show Cause. CP at 298-444. In his motion, Mr. Jagger argued that he was entitled to a new trial pursuant to CR 60(b)(11) "because he was committed indefinitely on the basis of expert testimony that is now acknowledged to be wrong, unscientific and inadvertent." CP at 306-307.

In support of his argument, Mr. Jagger relied on a 2008 published commentary entitled Defining Mental Disorder When It Really Counts:

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<sup>1</sup> Copies the 2007 and 2008 DSHS annual review evaluations can be found as Exhibits A and B to Mr. Jagger's Motion for Order on Show Cause. CP at 310-370. A copy of the 2009 DSHS annual review evaluation is found at CP 240-247, and a copy of the 2009 DSHS annual review evaluation is found at CP 86-103.

DSM-IV-TR and SVP/SDP Statutes (here after “Article”) that was co-authored by Dr. Sreenivasan. CP at 383-392. In that article, the authors discuss some of the diagnoses that are frequently referenced in SVP proceedings, and suggest procedures to be followed before rendering those diagnoses. One of the diagnoses discussed in the article is Paraphilia Not Otherwise Specified (Nonconsenting persons). CP at 388. Mr. Jagger argued to the trial court that the suggested procedure in the 2008 article contradicted Dr. Sreenivasan’s 2006 testimony. Therefore, he argued, exceptional circumstances were presented that justified a new trial pursuant to CR 60(b)(11).

The trial court agreed, holding, the “apparent contradiction between Dr. Sreenivasan’s methodology in 2006 and the methodology discussed in her 2008 article call the basis through which [Mr. Jagger] was involuntarily civilly committed into question. Thus, an ‘extraordinary circumstance’ has been presented which [Mr. Jagger] was unable to address at his 2006 trial.” CP at 170.

The State subsequently asked the trial court to reconsider that decision, and within the motion for reconsideration, included a declaration from Dr. Sreenivasan. CP at 76-78. In the declaration, Dr. Sreenivasan **advised that Mr. Jagger’s characterization of her 2008 article was incorrect, and “the content of the article does not conflict with the**

**testimony [she] gave at Mr. Jagger's trial."** CP at 77 (emphasis added).

Nonetheless, the trial court declined to reconsider its order granting a new trial. CP at 6. This appeal followed. CP at 1.

## V. ARGUMENT

The trial court's decision to give Mr. Jagger a new SVP civil commitment trial pursuant to CR 60(b)(11) should be reversed. There are no "extraordinary circumstances" present in this case to justify a new trial at this time. Nonetheless, Mr. Jagger was granted a new trial after arguing that an editorial regarding diagnostic practice, which was published more than two years after his trial, justified vacating the unanimous jury verdict that he is an SVP.

Reversal is required for several reasons. First, Mr. Jagger's claim is time-barred, having been brought approximately three years after his civil commitment. In addition, the co-author of the editorial, who was also the State's expert at trial, has expressly stated that the content of the editorial does *not* contradict the methods she used during her evaluation of Mr. Jagger. Third, Mr. Jagger's motion for a new trial included numerous misstatements of fact regarding both Dr. Sreenivasan's testimony, and the rest of the evidence received by the jury during trial. Finally, the trial court abused its discretion in granting a motion for a new trial where the arguments presented were simply Mr. Jagger's speculation concerning

Dr. Sreenivasan's current opinion of his case (i.e. his opinion that, today, she would conclude that Mr. Jagger did not suffer from Paraphilia NOS in 2006). Given that the trial court heard from Dr. Sreenivasan that Mr. Jagger's opinion was false, it was an abuse of discretion to order a new trial.

**A. Legal Standard Under CR 60(b)(11)**

Mr. Jagger was granted a new trial pursuant to CR 60(b)(11), which requires the presence of "extraordinary circumstances." "CR 60(b)(11) grants the court discretion to vacate an order for '[a]ny other reason justifying relief from the operation of the judgment.' Despite its broad language, the use of CR 60(b)(11) should be reserved for situations involving extraordinary circumstances not covered by any other section of CR 60(b)." *In re Marriage of Furrow*, 115 Wn. App. 661, 673 (2003) (quoting *In re Marriage of Yearout*, 41 Wn. App. 897, 902 (1985)). Those circumstances must relate to "irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." *Id.*; *See also Barr v. MacGugan*, 119 Wn. App. 43, 78 P.3d 660 (2003) (severe clinical depression of attorney that resulted in dismissal of case through neglect of attorney's practice constitutes "extraordinary ground" pursuant to CR 60(b)(11)).

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 be overturned on appeal only if it plainly appears that it has abused that discretion. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302, 1305 (1978). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court also abuses its discretion when it applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). Moreover, a court “would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

**B. Respondent’s Motion was time barred and, as such, was not properly considered**

Respondent’s motion is time-barred by CR 60(b), which specifically states that “the motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.” While there is no explicit time limitation on motions filed under CR 60(b)(11), this rule may not be used to circumvent the one-year limit applicable to a motion to vacate judgment. *Friebe v. Supancheck*, 98 Wn. App 260, 267, 992 P.2d 1014 (1999).

A party can only move to vacate judgment under CR 60(b)(11) when his circumstances do not permit moving under another subsection of CR 60(b). *State v. Ward*, 125 Wn. App 374, 104 P.3d 751 (2005). When the circumstances alleged are covered by CR 60(b)(3), CR 60(b)(11) does not provide a basis for relief. Although Jagger framed his argument to the trial court as a request for relief pursuant to CR 60(b)(11), it is actually the functional equivalent of a CR 60(b)(3) claim, in that he is claiming that there is “new evidence” justifying relief from judgment (that is, “new evidence” if the form or a published editorial which, he claims, rendered the underlying basis for his civil commitment improper).<sup>2</sup>

However, even under the “reasonable time” limitation applicable to CR 60(b)(11) claims, Mr. Jagger failed to comply when he brought his motion more than three years after his commitment, and where there has been no change in his condition. What constitutes a “reasonable time” depends on the facts and circumstances of each case. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999), *review denied*, 140 Wn. App. 1026 (2000). Restatement of the Law 2d, Judgments 2d, § 74 states that relief from judgment should be denied if barred by lapse of time

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<sup>2</sup> In his motion, Jagger referred repeatedly to “new evidence.” He asserted, for example, that “due process not only permits, but also requires a new trial when *new evidence* demonstrates the person may no longer be a sexually violent predator even when this *new evidence* suggests that the person was wrongfully committed in the first place.” CP at 306.

or inequitable disturbance of an interest of reliance on the judgment. *In re Marriage of Himes*, 136 Wn.2d 707, 724, 965 P.2d 1087, 1096 (1998). Here, by considering Mr. Jagger's CR 60(b)(11) claim as timely, the trial court implicitly endorsed the bringing of any such future claim based on any article or commentary that may one day be published. Jury verdicts should be afforded more weight, and the "reasonable time" provision of CR 60(b) is designed to provide it. Given the flimsy evidentiary basis for Mr. Jagger's motion, the trial court erred in deeming his claim to be timely made.

**C. Mr. Jagger failed to make the requisite showing under CR 60(b)(11), thus, his jury's unanimous verdict that he is an SVP should not have been vacated**

Even if Mr. Jagger's motion was not time-barred, it still should not have been granted. There has been no change in circumstance, let alone "extraordinary circumstance," that warrants a new trial in this case. The trial court's finding regarding Dr. Sreenivasan's alleged change in methodology was directly contradicted by Dr. Sreenivasan herself.

**1. Dr. Sreenivasan's 2008 commentary was plainly misinterpreted by both Mr. Jagger and the trial court**

Mr. Jagger was granted a new trial based on the supposition that Dr. Sreenivasan misinterpreted the DSM-IV-TR during her 2005 evaluation of Mr. Jagger and resulting 2006 trial testimony. However, the plain language of the DSM, Dr. Sreenivasan's trial testimony,

Dr. Sreenivasan's 2008 article, and Dr. Sreenivasan's declaration are all consistent with one another. All of those documents and/or statements endorse the use of behavioral evidence as a means to diagnose paraphilia NOS.

At the hearing on Mr. Jagger's Motion for New Trial, a question was raised regarding whether Dr. Sreenivasan, the State's expert at trial, had changed her diagnostic philosophy since testifying in this case due to a realization that her methodology was flawed or incorrect. The Court was asked to consider an article Dr. Sreenivasan co-authored in 2008, and it was argued that the conclusions reached in the article directly contradicted the methodology used, and conclusions reached by Dr. Sreenivasan when she testified in 2006. It was further argued that the diagnostic procedures outlined in the 2008 article, if applied to Mr. Jagger's case in 2006, would have precluded Dr. Sreenivasan from concluding that Mr. Jagger suffers from Paraphilia Not Otherwise Specified (Nonconsent).

Now, having heard from Dr. Sreenivasan, we know that this alleged contradiction simply does not exist. Dr. Sreenivasan plainly advised the trial court that "the content of the article does not conflict with the testimony [she] gave at Mr. Jagger's trial." CP at 77. That statement is verified by closely comparing Dr. Sreenivasan's article to her trial

testimony in this case. In the article, Dr. Sreenivasan (and her co-authors)

wrote:

The use of paraphilia NOS to describe repetitive rape cannot be justified on the basis of the term “or behaviors” alone.

**This distinction does not mean that paraphilia NOS cannot or should not be used to describe some individuals who commit coercive sexual acts.** However, such diagnosis would require considerable evidence documenting that the rapes reflected paraphilic urges and fantasies linking the coercion to arousal. One acceptable standard for using it may be to demonstrate clear substantiation of urges and fantasies, either **as inferred by the acts perpetrated on the victim** or by the interview information, so as to distinguish it from criminal behavior that is not rooted in sexual psychopathology.

CP at 388.

In her declaration filed in support of the State’s motion for reconsideration of the order granting a new trial, Dr. Sreenivasan noted the article’s purpose was not to contradict past practices, but rather, to discuss the various ways in which DSM mental disorders are understood by the psychological community, and to urge the psychological community to provide greater clarity and consensus in the way these disorders are defined and applied. CP at 76. Paraphilia NOS was one of the disorders that was discussed. With regard to that disorder, Dr. Sreenivasan explained the purpose of the statement that use of “the Paraphilia NOS diagnosis to describe repetitive rape cannot be justified on the basis of the term “or behaviors” alone.” CP at 388. “This statement is intended to

reflect the reality that a psychologist may not properly diagnose someone with a mental disorder by simply looking at the person's 'rap sheet.'" CP at 77. In other words, it would be professionally inappropriate to assign a mental disorder to a person simply because their criminal history includes multiple instances of a particular type of crime. More investigation is required in order to determine whether the behavior is attributable to a disorder, rather than simply opportunistic or otherwise motivated.

That investigation was conducted by Dr. Sreenivasan in this case.

As she explains,

"[I]n some cases, the behaviors demonstrated by the person can be articulated to reflect sexual urges and fantasies that involve forced or coerced sexual activity. This statement embodies the notion that evidence of the urges and fantasies can come from a variety of sources such as the facts of the assaults themselves, or information about the assaults that is gained through discussion of the assaults during treatment. This is the type of case I concluded that Mr. Jagger presented when I evaluated him, and testified at his trial."

*Id.*

With substantial clarity, Dr. Sreenivasan informed the trial court that Mr. Jagger's reading of the article was simply wrong:

**[T]he characterization of the article as precluding a Paraphilia NOS diagnosis based upon the persons behaviors is incorrect.** It is also my belief that the content of the article does not conflict with the testimony I gave at Mr. Jagger's trial.

*Id.*

Not only does the above directly refute the sole basis for ordering a new trial, it is consistent with the only other source of psychological literature submitted by Mr. Jagger in support of his motion for new trial. Specifically, the article by Drs. First and Halon that was attached to Mr. Jagger's original motion states,

Sources of information that are potentially useful, although never definitive, in the attempt to determine the presence of a paraphilia include the diagnostic interview, self-report questionnaires, **and history of specific types of sexual behavior.** ...

A history of sexual offenses thematically related to a paraphilia (e.g., arrests for indecent exposure in someone with a possible exhibitionistic paraphilia or arrests for child molestation in someone with possible pedophilia) is certainly relevant as a potential indicator of an underlying paraphilic arousal pattern. However, as emphasized in this article, the fact that the person has a history of sexual offenses cannot by itself be considered sufficient evidence that the offenses were the product of paraphilic sexual fantasies and urges. **The evaluator must delve deeper and examine the specific details of the sexual offenses to establish that the behaviors are being driven by paraphilic urges.**

CP at 375 (First & Halon, *Use of DSM Paraphilia Diagnoses in SVP Commitment Cases*, (2008), Journal of the American Academy of Psychiatry and the Law, Vol. 36, No. 4 at 447) (emphasis added).

Most importantly, Dr. Sreenivasan's 2006 trial testimony went far beyond mere reporting of Mr. Jagger's criminal history. Rather there was extensive discussion of the facts and circumstances of the offending that came to Dr. Sreenivasan from a variety of different sources. *See* CP at

124-145; CP 155-158. Because Dr. Sreenivasan's trial testimony and her 2008 article are not inconsistent, there was no legitimate factual or legal reason to re-open the issue of whether Mr. Jagger meets SVP criteria some four years after his jury determined that to be the case. Therefore, the trial court abused its discretion in entering that order. For this reason, the order should be reversed.

**2. To order a new trial required acceptance of several mischaracterizations of Dr. Sreenivasan's trial testimony**

Mr. Jagger's motion for new trial was founded upon his erroneous belief that she diagnosed him with Paraphilia NOS based solely on evidence of his past behaviors, rather than evidence of his sexual thinking or urges. He boldly claimed without citation to the record that Dr. Sreenivasan "did not testify that there were any urges and fantasies compelling Mr. Jagger to commit acts of forced sex." CP at 303. Those assertions, which ultimately persuaded the trial court to vacate Mr. Jagger's civil commitment, were simply not true.

For example, those assertions failed to recognize the stated diagnostic methodology used by Dr. Sreenivasan when she testified at Mr. Jagger's trial:

Q: I'm going to ask you to tell me what information you considered in making this diagnosis. So, Dr. Sreenivasan, how did you come to the conclusion that Mr. Jagger suffers from paraphilia not otherwise specified Nonconsent?

A: Okay. Well, it goes back to that part of the criteria which says that he has recurrent sexual fantasies, urges or behaviors. **In this case there was some evidence for the fantasies and urges. Generally speaking, you need a person to kind of talk to you about that, and frequently that doesn't happen in these types of evaluations. So you look at their behaviors and you look to see, is there a pattern of coercive sexual act across time.**

CP at 128 (emphasis added).

That testimony provides an example of Mr. Jagger's repeated mischaracterization of Dr. Sreenivasan's trial testimony in his motion for new trial. In fact, the motion contained numerous incorrect assertions regarding the record in this case. In addition to her discussion of Paraphilia NOS, there was extensive testimony at trial regarding the presence of a personality disorder and the relationship of Mr. Jagger's personality disorder to his sexual offending and his likelihood to re-offend. CP 249-266.

Mr. Jagger also wrongly asserted to the trial court that Dr. Sreenivasan's trial testimony was that she diagnosed Jagger with Paraphilia NOS: Nonconsent "based entirely on a history of committing repeated rapes within a circumscribed period of time." CP at 301. This statement is specifically belied by Dr. Sreenivasan's trial testimony regarding Jagger's offense against a 10-year old developmentally disabled

girl. There, Dr. Sreenivasan made clear reference to evidence of fantasies and urges on Jagger's part:

While—he was placed [at] maple Lane School, and while he was there he—and this goes to the issue of fantasies—he admitted to sexual arousal towards [the 10-year-old girl], and he also indicated that he had been fantasizing about her for about four or six minutes before he approached her.

CP at 135.

She later testified, in explaining the relationship between his paraphilia and his predisposition “to the commission of criminal sexual acts,” that “there’s a link between this [paraphilic] disorder, and this core deviancy disorder is kind of a driving force, that’s what gets him to act out sexually.” CP at 144. Paraphilias, she testified, are “chronic and lifelong conditions, and so they tend to persist through a person’s lifespan.” *Id.*

Dr. Sreenivasan was not the only one to offer testimony regarding Jagger's fantasies and urges at trial. Meredith Byars, Jagger's treatment provider while at Maple Lane, testified regarding Jagger's disclosures during treatment in more detail: He admitted to Byars that he was sexually aroused to Gabby and that he was “thinking that he wouldn't get caught, that he wanted to have sex, he did not care how old the victim was, and that he was convinced that he wouldn't get caught because no one was around.” CP at 268-271. Mr. Jagger told Byars that the victim “looked like she was about to cry” and told him to stop but that he ignored her

requests and “pinned her down on the ground and held her down.” CP at 271. He told Byars that he felt “sexually aroused and sexually aggressive” during this incident. *Id.*

Jagger made similar disclosures to Richard Peregrin, a polygrapher who testified regarding interviews with Jagger, conducted while Jagger was in Maple Lane in 2000. Mr. Peregrin testified that Jagger, having initially denied both all physical contact with any of his alleged victims later admitted to having sexually assaulted three children, as well as having had sexual urges and fantasies toward not only Gabriella but two other victims as well:

Q: Did you ask him about any deviant fantasies?

A: Yes, I did.

Q: And what did he report this time?

A: This time he reported having sexual thoughts of his victim prior to his offenses. He reports the sexual thoughts consisted of having vaginal intercourse and oral sex with his victims. The client was previously---had previously denied any sexual thoughts of his victims.<sup>3</sup>

CP at 282.

Jagger told Peregrin that he had followed one of his victims, Gabriella, making “sexual comments” to her. CP at 273-291.

This period of self-disclosure was short-lived. Dr. Sreenivasan testified that Jagger, after treatment at Maple Lane, returned to denying his

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<sup>3</sup> This disclosure came within the context of Jagger’s admission to having had sexual contact with three girls, including Gabriella (CP at 286-288) and refers to all three children (CP at 293)

offenses and the existence of fantasies, a position he has maintained consistently since that time:

Q: Now I want to go ask for a moment to this issue of fantasies. You indicated that while he was at Maple Lane, he disclosed some information about his sexual fantasies. What additional information do you have about what he has told people about his arousals, his urges? Has he overall talked much about this over the years?

A: He's talked very little about it. So the Maple Lane disclosures were really different than what Mr. Jagger has done after, when he was in outpatient treatment, he did a—he went back to denial, and he had been---denied all the offenses, in essence, in his period of time in custody.

CP at 296.

Mr. Jagger may disagree with the diagnostic conclusions provided at his trial, but the procedure used by Dr. Sreenivasan to arrive at those conclusions was in accord with professional standards. The record is replete with evidence of his repeated sexual fantasies and urges concerning forcing sex with persons he desires. Mr. Jagger had a full and fair opportunity to contest Dr. Sreenivasan's diagnosis at trial, and he did so. None of the psychological commentary he presented in support of his motion for new trial contradicted Dr. Sreenivasan's trial testimony, nor provided any justification for the extreme remedy of vacating a unanimous jury verdict. For these reasons, it was an abuse of discretion for the trial court to order a new trial, and this Court should reverse.

**3. The “Evidence” Offered By Jagger was Not Of A Type Contemplated By CR 60(b)(11)**

Jagger seeks a new trial based on psychological commentary published since his trial. There has been no change in circumstance, let alone “extraordinary circumstance,” that warrants a new trial in this case. Discussion and/or debate among psychologists (or members of any science-based profession) is far from extraordinary; it is instead quite ordinary. However, in this case, far more important than the methodology of the individual is the uniformity of result. That is, all of the recent evaluators agree that Mr. Jagger meets the SVP definition.

The 2008 development of the “evidence” Mr. Jagger provided to the trial court caused it to most closely resemble a type contemplated by CR 60(b)(3). Even then, its transitory, evolving nature most closely resembles the sort of “evidence” rejected by Division III in *In re Knutson*, 114 Wn. App. 866, 60 P.3d 681(2003). 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.” *Id.* The court went 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 Jagger’s (implied) logic, he would be entitled to a new trial with every new development in this field. The information presented in Jagger’s motion is not final, nor was it expected to have everlasting significance. The appellate courts of this State have long been aware of the debate within the scientific community as to how best to assess risk and, more broadly, whether such assessments are sufficiently reliable to satisfy due process. While acknowledging “the inherent uncertainties of psychiatric predictions,” (*In re Young*, 122 Wn.2d 1, 56, 857 P.2d 989 (1993)), our supreme court has repeatedly upheld such assessments, approving the use of both clinical judgment (*Young*, 122 Wn.2d at 56; *In re Campbell*, 139 Wn.2d 341, 355, 986 P.2d 771 (1999)) and actuarial tools (*In re Thorell*, 149 Wn.2d 724, 752-5, 72 P.3d 708 (2005)).

The debate, however, continues, as evidenced by Jagger's submissions both in the trial court and here. Mr. Jagger's argument to the trial court that the diagnosis of certain mental disorders had been "clarified" by "researchers" since his 2006 trial is much too broad. Compare, e.g., Blanchard et al. *Pedophilia, Hebephilia, and the DSM-V*, Archives of Sexual Behavior (2008); Franklin, K. *Hebephilia: Quintessence of Diagnostic Pretextuality*, Behavioral Sciences and the Law (2010). Mr. Jagger's argument to the trial court was simply a variation on an argument that has repeatedly been soundly rejected by our courts, that is, expert testimony in SVP cases is simply too unreliable to be presented in court. While there will inevitably be disputes relating to such testimony, such disputes are within the province of the jury to resolve. *Barefoot v. Estelle*, 463 U.S. 880, 902, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). The fact that the jury resolved these disputes in the State's favor in this case does not entitle Jagger to a new trial.

**4. Four consecutive annual review evaluations have concluded that Mr. Jagger continues to meet the SVP definition**

As is required by RCW 71.09.090, Mr. Jagger has now been evaluated four more times since the jury verdict that he met SVP criteria. Each time, the evaluator concluded that Mr. Jagger continues to meet SVP criteria. Although, the evaluators' paths toward that conclusion may differ

in some ways, they have been unanimous in their ultimate conclusion. Thus, due process continues to be satisfied. *In re the Detention of Petersen*, 145 Wn.2d 789, 42 P.3d 952 (2002). At the time, there was no evidence or opinion before the Court that Mr. Jagger did not meet SVP criteria. Thus, further proceedings on that issue are simply unwarranted

Since Mr. Jagger's motion was originally filed, the 2010 DSHS annual review was completed. CP at 171-196. For the fourth time in as many years, a forensic psychologist has determined that Mr. Jagger continues to meet SVP criteria. This discussion is important given the procedural posture of this case. Should there be any evidence of a change in Mr. Jagger's mental condition, he is free to bring that evidence to the trial court at any time. RCW 71.09.090(2)(a). As it stands today, there is no evidence before this Court that in any way undermines or calls into question that by the jury at Mr. Jagger's trial. Thus, to order relitigation that issue is an abuse of discretion. For these reasons, the State respectfully requests that the new trial be stricken.

**D. Extraordinary circumstances are not present in this case**

“[A] party who seeks recourse under Rule 60(b) must persuade the trial court, at a bare minimum, that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or

defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted. *Karak v. Bursaw Oil Corp.* 288 F.3d 15, 19 (1<sup>st</sup> Cir. 2002) (citing *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 20-21 (1st Cir.1992)).

Here, Mr. Jagger was granted a new trial because the trial court erroneously believed Dr. Sreenivasan's psychological opinions about him may have changed. Dr. Sreenivasan has explicitly refuted that supposition. CP at 77. The only psychological evaluations of Mr. Jagger that have occurred since his trial have all concluded that he continues to meet the SVP definition. Thus, it is inconceivable that Mr. Jagger "has the right stuff to mount a potentially meritorious claim" at this time.

Washington law shows a strong preference for deciding cases on the merits, and balances that interest against the need for a structured, orderly judicial system. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 313-314, 989 P.2d 1144, 1147 (1999); *Griggs*, 92 Wn.2d 576, 581, 599 P.2d 12891291 (1979). Here, both interests are served by reversal of the trial court's decision to vacate the jury verdict in this case. There has been no change in circumstance, let alone "extraordinary circumstance," that warrants a new trial. Discussion and/or debate among psychologists (or members of any science-based profession) is far from extraordinary; it is

instead quite ordinary. However, in this case, far more important than the methodology of the individual is the uniformity of result. That is, all of the recent evaluators agree that Mr. Jagger continues to meet the SVP definition.

If all that were needed in order to justify a new trial were a newly published psychological opinion, a committed SVP would be entitled to a new trial with every newly published article or theory.<sup>4</sup> Regardless, Mr. Jagger's assertion to the trial court that "new" diagnostic procedures rendered Dr. Sreenivasan's trial testimony "wrong, unscientific and inadvertent" was the trial court's sole justification for its order granting a new trial, and that assertion has been proven wrong. Because that proof was available for consideration by the trial court, and the new trial was ordered nonetheless, the trial court has abused its discretion. The order granting Mr. Jagger a new trial should be reversed.

## VI. CONCLUSION

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<sup>4</sup> The fallacy of such an approach is underscored by a recent case, *In re the Detention of Gordon Strauss*, King County Superior Court Cause No. 02-2-08003-1, which illustrates the costs typical of a recommitment trial. Strauss successfully sought unconditional release and was tried before a King County jury in 2009. Because he was indigent, Strauss's legal expenses were covered by Washington tax payers. In his case, total pre- and post-trial defense costs were \$249,710.45, including \$132, 209.84 for defense attorneys and their paralegals, \$86,879.42 for defense expert witnesses, and \$9,168.40 for miscellaneous expenses. These figures do not include costs incurred by the King County Superior Court or the King County Prosecutor's Office for Strauss's three-week jury trial. Overall, Strauss's recommitment trial cost taxpayers close to \$400,000.

Because the trial court abused its discretion in granting Jagger a new trial pursuant to CR 60(b)(11), the order granting the new trial should be reversed.

RESPECTFULLY SUBMITTED this 1st day of October, 2010.

ROBERT MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "J. Choate", written over a horizontal line.

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**ORIGINAL**

NO. 65534-5-I

**WASHINGTON STATE COURT OF APPEALS, DIVISION I**

In re the Detention of:

MATTHEW JAGGER,

Respondent.

DECLARATION OF  
SERVICE

I, Allison Martin, declare as follows:

On October 1, 2010, I deposited in the United States mail true and correct cop(ies) of Appellant's Brief, postage affixed, addressed as follows:

Lila Silverstein  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

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

DATED this 5<sup>TH</sup> day of October, 2010, at Seattle, Washington.

  
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ALLISON MARTIN

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STATE OF WASHINGTON  
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