

No. 08-1171

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRUCE N. BROWN,	)	Appeal from the United States
	)	District Court for the Eastern
Petitioner-Appellant	)	District of Wisconsin, Milwaukee
	)	Division
v.)	
	)	Case Number 2:06-C-753
STEVE WATTERS,)	
)	
Respondent-Appellee.)	Hon. Lynn Adelman
)	
)	

BRIEF FOR PETITIONER-APPELLANT BRUCE N. BROWN

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BRIEF FOR PETITIONER-APPELLANT BRUCE N. BROWN

JURISDICTIONAL STATEMENT

Petitioner-Appellant Bruce N. Brown (“Brown”) filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court for the Eastern District of Wisconsin. The district court had jurisdiction under 28 U.S.C. §§ 1331, 2241, and 2254.

On December 17, 2007, the district court denied Brown’s petition and dismissed the case. On December 26, 2007, Brown filed a notice of appeal and a motion for a certificate of appealability. On January 7, 2008, the district court issued a certificate of appealability, and this appeal was docketed on January 22, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

ISSUES PRESENTED FOR REVIEW

Brown was civilly committed under Wisconsin’s Sexually Violent Persons Law on the basis of two alleged mental disorders. The first has been rejected by the American Psychiatric Association (“APA”) and the DIAGNOSTIC AND STATISTICAL MANUAL, IV-TEXT REVISION (4th ed.-text rev. 2000), the definitive reference for mental health professionals, which reflects the consensus of the profession. The second describes up to eighty percent of the U.S. prison population and more than seven million Americans, and the APA’s position is that it is an over-

broad and inappropriate basis for involuntary civil commitment. The issues presented for review are:

1. Whether Brown's civil commitment violates due process because the first diagnosis is not medically recognized and the second diagnosis is overbroad and too imprecise.

2. Whether procedural default is excused because Brown's continued, unconstitutional detention would constitute a miscarriage of justice or because Brown's counsel was ineffective in failing to raise his due process claim.

STATEMENT OF THE CASE

In June 2003, Brown was civilly committed pursuant to Wisconsin's Sexually Violent Persons Law, chapter 980 of the Wisconsin Statutes. Doc. 11, Ex. A.¹ Brown's commitment was affirmed by the Wisconsin Court of Appeals in December 2005 (SA50), and the Wisconsin Supreme Court denied review in April 2006 (SA58).

In July 2006, Brown petitioned the district court for a writ of habeas corpus on the ground that his civil commitment violates the Due Process Clause of the United States Constitution. Doc. 1. In July 2007, the district court ruled that

¹ Citations to the required short appendix are denoted "A__" Citations to the separate appendix are denoted "SA__." All other record citations are denoted "Doc. __," based on the district court docket number.

Brown had not exhausted his due process claim and stayed proceedings to allow him to exhaust the claim in state court. SA59-SA64.

Pursuant to the district court's order, Brown filed a petition for a writ of habeas corpus in state court. SA65. The state court dismissed Brown's petition. *Id.* The district court then lifted its stay. SA66.

In December 2007, the district court denied Brown's petition. A1. However, the court subsequently issued a certificate of appealability. A11. This appeal followed.

STATEMENT OF FACTS

Brown's Criminal Conviction, Parole, and Civil Commitment Trial

In 1984, Brown was convicted of first-degree sexual assault and recklessly endangering safety in the Circuit Court of Milwaukee County, Wisconsin. SA12. He was sentenced to twenty years' imprisonment on the sexual assault count and to three consecutive years on the reckless endangerment count. *Id.* Brown was paroled in 1996. *Id.* At that time, the State elected not to petition for Brown's commitment under its Sexually Violent Persons Law. *Id.*; see Wis. Stat. ch. 980. The State revoked Brown's parole in 1997. SA12. Brown's parole revocation summary indicates that he violated the terms of his parole by using alcohol and illegal drugs and staying overnight at an unapproved residence; however, none of the violations involved any sexually violent act. *Id.*

When Brown approached his next release date in 1998, the State filed a petition to commit him as a sexually violent person. *Id.* At Brown's civil commitment trial, the State relied on the diagnosis of Dr. Dennis Doren, a psychologist employed by the State. SA16-SA17. "Doren diagnosed Brown as suffering from 'Paraphilia Not Otherwise Specified – Nonconsent.' He admitted that he created the 'nonconsent' portion of the diagnosis himself, because he believed there to be a gap in the DSM-IV-TR."² SA54; *accord* A2; SA60. Doren also diagnosed Brown with "Antisocial Personality Disorder" ("APD"). Doren testified that his diagnosis relied on a review of Brown's criminal history, including pre-sentence investigation and police reports, and prison discipline record.⁴ SA17.

² The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, IV-TEXT REVISION (4th ed.-text rev. 2000) ("DSM-IV-TR") is published by the American Psychiatric Association. As the Wisconsin Court of Appeals has recognized, "[t]he DSM-IV is the definitive reference for mental health professionals, and is the product of numerous professional experts in the field who have come together to draft and revise diagnostic criteria to reflect the consensus of the profession." *In re Commitment of Pletz*, 619 N.W.2d 97, 105 (Wis. Ct. App. 2000), *rev. denied*, 629 N.W.2d 783 (Wis. 2001). Unless otherwise noted, all references to the "DSM" are to the DSM-IV-TR.

³ Brown's discipline record included eleven conduct reports classified as relating to sexual conduct. SA16. One involved the inappropriate touching of a visitor, a second involved an inappropriate comment to a nurse, and nine refer to "excessive" kissing or embracing. *Id.*

⁴ Brown's criminal history also includes an "attempted sexual perversion" in 1974, *see* Wis. Stat. § 944.17 (1973-74), and first-degree sexual assaults in 1977 and 1978. The latter offenses were committed during residential burglaries. *See* SA15-SA16. Brown's discipline record included eleven conduct reports classified as relating to sexual conduct. SA16. One involved inappropriate touching of a visitor, a second involved an inappropriate comment to a nurse, and nine refer to "excessive" kissing or embracing. *Id.*

At trial, Doren described “Paraphilia Not Otherwise Specified (‘NOS’)–Nonconsent” as involving “recurrent, intense sexual fantasies, sexual urges, and/or behaviors involving” nonconsenting persons. *Id.* When asked whether Paraphilia NOS-Nonconsent was recognized by the DSM, in an apparent attempt to bolster his diagnosis, Doren told the jury – over Brown’s sustained objection – that he “checked with the American Psychiatric Association” (“APA”) and that he was “quite clear that it’s not a lesser category” of diagnosis. *Id.*; SA54. Doren further claimed that Paraphilia NOS-Nonconsent “impairs [Brown’s] decision-making process and makes it more difficult for him to control his behavior.” SA17.

Doren characterized his second diagnosis – APD – as involving a pattern of conduct demonstrating disregard for the rights of others. *Id.* Doren claimed that Brown’s criminal record indicated that “either he can’t control himself, or he doesn’t care about what he’s doing to the victims.” SA17-SA18. He also claimed that APD predisposed Brown to commit acts of sexual violence. SA18.

Over Brown’s objection, Doren also testified about his use of “actuarial risk assessment instruments” to predict the risk that Brown would reoffend if released. *Id.* After computing Brown’s “risk score” under these instruments, Doren increased the score by approximately twenty percent because he believed that the instruments underestimated Brown’s risk. SA19. Doren claimed that an

upward adjustment was appropriate because of the high score that he had assigned Brown under the "Hare Psychopathy Checklist-Revised" ("PCL-R")⁵ and because he believes that the actuarial instruments systemically underestimate the risk of recidivism. SA19.

At trial, Brown denied that he had a mental disorder that predisposed him to acts of sexual violence or that he had any serious difficulty controlling his behavior, as demonstrated by the fact that, while on parole, he had lived in the community for sixteen months without reoffending. SA19-SA20. He also contended that the State's evidence was unreliable and did not support a nexus between his alleged disorder and sexual dangerousness. SA20.

As noted above, on cross-examination, Doren "admitted that he created the 'nonconsent' portion of the [Paraphilia NOS-Nonconsent] diagnosis himself, because he believed there to be a gap in the DSM-IV-TR." SA54; *accord* A2; SA60. He also admitted that no professional organization recognized the factors he used to make the diagnosis. SA20. Indeed, these factors were found only in Doren's own book. *Id.* Doren also acknowledged that the actuarial instruments

⁵ Robert D. Hare's PCL-R (1991) is a "checklist" of twenty characteristics, such as "glibness/superficial charm," "grandiose sense of self-worth," "shallow affect," "need for stimulation/proneness to boredom," "lack of realistic, long-term goals," and "promiscuous sexual behavior." Robert D. Hare, *Psychopathy, Affect and Behavior*, in *PSYCHOPATHY: THEORY, RESEARCH AND IMPLICATIONS FOR SOCIETY* 105, 106 (David J. Cooke *et al.* eds., 1998). "The rater * * * score[s] each item on a 3-point scale (0, 1, 2)" to arrive at the subject's overall score. *Id.*

on which he relied could not quantify Brown's individual risk of reoffending but could provide only an average for a population group with a given set of characteristics. *Id.* And of that group, on average, only forty-nine percent would be convicted of a violent sex offense following release. *Id.*

Brown's expert in the field of forensic psychiatry, Dr. Lynn Maskel, testified that a psychiatrist or psychologist should rely on the DSM for *all* possible diagnoses. SA22. She explained that Paraphilia NOS-Nonconsent "isn't in the DSM-IV-TR" and quite simply "does not exist." SA22-SA23. Indeed, the DSM rejected such a diagnosis. SA23.

Maskel also testified that while APD is a "legitimate * * * diagnosis," it is not a valid basis for civil commitment. SA22-SA23. She explained that up to eighty percent of the prison population could be diagnosed with APD and that persons diagnosed with APD are typically ordinary criminals who "could control their behavior if they wanted to." SA23. Further, APD does *not* predispose individuals to acts of sexual violence or indicate that the individual suffers from difficult-to-control sexual urges. *Id.* Finally, Maskel testified that antisocial conduct decreases as individuals reach their 40s and that Doren had not identified any recent, "strong evidence of antisocial features" in Brown. *Id.*

Brown also called Dr. Marc Goulet, a mathematics professor at the University of Wisconsin-Eau Claire, and Dr. Stephen Hart, a forensic psychologist and

professor at Simon Fraser University in British Columbia, to address the underlying flaws in the actuarial instruments used by Doren and Doren's misapplication of them. SA21-SA22. Goulet explained that the instruments were unreliable because they were based on dissimilar populations; failed to take account of variables such as culture, age at release, aging, treatment, and supervisory conditions; and/or were based on inadequate samples. *Id.* Goulet also testified that Doren's "ratcheting" up of Brown's risk score based on his own intuition and subjective opinion of the actuarial instruments was arbitrary and statistically unsound. SA22. Hart testified that the actuarial instruments were unreliable and not generally accepted within the field of clinical-forensic psychology. Doc. 11, Ex. C, at 2-3; *see also* SA13, SA18.

During deliberations, the jury sent out a note requesting "access to a copy of the DSM-IV-TR," but the court denied the request. SA25. The jury ultimately returned a general verdict finding that Brown was a sexually violent person. *Id.*

Brown's Direct Appeal

On appeal to the Wisconsin Court of Appeals, Brown challenged his commitment on four grounds: (1) the admission of actuarial evidence violated due process and state law (SA26-SA31, SA34-SA35, SA51-SA53); (2) Doren's testimony that he "checked with the [APA]" about his unrecognized diagnosis was prejudicial hearsay (SA32-SA35, SA54-SA55); (3) the use of a general verdict

form, rather than a special verdict form, was an abuse of discretion and violated due process (SA23-SA25, SA35-SA39, SA55-SA56); and (4) because he had not committed any sexually violent offense following his 1996 parole, “due process require[d] proof that he [was] presently dangerous as evidenced by a recent overt act of sexual violence” (SA39-SA47, SA56). *See also* A2-A3. The appellate court rejected all four claims and affirmed in an unpublished opinion. SA50. Brown then petitioned the Wisconsin Supreme Court for review on the first and third issues. Doc. 11, Ex. F. However, the court denied the petition. SA58; A3.

Proceedings in the District Court

On July 12, 2006, Brown filed a petition for a writ of habeas corpus in the district court, alleging that his detention violated due process. A3; Doc. 1. Specifically, Brown argued that Doren’s “bogus,” self-created diagnosis of Paraphilia NOS-Nonconsent lacked any scientific foundation and that Doren’s diagnosis of APD failed to distinguish Brown from the “typical recidivist” convicted in an ordinary criminal case. *See, e.g.*, Docs. 1, 16-17, 20, 22-23. Accordingly, he contended that his civil commitment violated due process under the Supreme Court’s decisions in, *inter alia*, *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Kansas v. Hendricks*, 521 U.S. 346 (1997); and *Kansas v. Crane*, 534 U.S. 407 (2002).

After the district court lifted the stay that it had entered to allow Brown to exhaust his due process claim in state court (*see* SA59-SA67), it denied Brown’s

petition on the grounds that his due process claim was procedurally defaulted and failed on the merits (*see* A1-A9). The court first ruled that Brown's claim was procedurally defaulted, that ineffective assistance of appellate counsel could not establish "cause" for the default because Brown had not exhausted that claim, and, finally, that Brown could not overcome his procedural default by establishing a "miscarriage of justice" because his due process claim failed on the merits. *See* A3-A5.

Addressing the merits of Brown's due process claim, the district court reasoned that, as a matter of federal constitutional law, "the 'legal' definition of mental illness[] in a commitment case * * * is a predisposition to commit violent acts and difficulty controlling such predisposition." A6. The court then held that "the fact that the DSM-IV-TR does not refer to a specific disorder called 'Paraphilia-NOS-Nonconsent' and the fact that other experts do not recognize the disorder" does not necessarily render civil commitment on that basis unconstitutional. *Id.* According to the district court, the only issue is whether Brown "can control himself," and "[t]hat was an issue for the jury to resolve." *Id.* The court therefore held that "[b]ecause the jury resolved [that] issue in favor of the state, [Brown's] confinement does not violate the Due Process Clause." A6-A7.

The court did state that its ruling should not be taken to imply that "anything goes." A7. The court recognized that "a psychologist could render an

opinion * * * that is so irrational or unpersuasive that it would not support indefinite civil commitment consistent with the Due Process Clause.” *Id.* But it nonetheless held that a diagnosis of Paraphilia-NOS-Nonconsent, while “novel,” did not violate due process. *Id.* The court also rejected Brown’s challenge to Doren’s APD diagnosis, relying primarily on this Court’s decision in *Adams v. Bartow*, 330 F.3d 957 (7th Cir. 2003). *See* A8.

The district court subsequently issued a certificate of appealability specifying two issues: whether Brown’s commitment violates due process and whether that claim is barred by procedural default. A12-A15. In its order, the court acknowledged that “jurists of reason would find [the] analysis” in its prior order dismissing the petition to be “debatable.” A14. Specifically, the court recognized that it had “interpreted Supreme Court and Seventh Circuit precedent as giving states a tremendous amount of freedom in creating categories of mental disorders[.]” *Id.* The court reiterated, however, that “there must be some line to be drawn even among diagnoses that refer to an inability to avoid criminal behavior,” and noted that Brown had “cited a scholarly article supporting his theory that Paraphilia-NOS-Nonconsent is a bogus disorder.” *Id.* (citing Thomas K. Zander, *Civil Commitment Without Psychosis: The Law’s Reliance on the Weakest Links in Psychodiagnosis*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT 17 (2005)). The court therefore certified Brown’s substantive claim for appeal. A14.

The court also certified for appeal the issue of procedural default, holding that “if [Brown] could succeed on the merits of his [due process] claim, * * * such success would establish that a fundamental miscarriage of justice [has] occurred, entitling [Brown] to relief notwithstanding his procedural default.” A13.

SUMMARY OF THE ARGUMENT

I.

Brown’s involuntary civil commitment is unconstitutional because neither of the diagnoses on which it is based satisfies the Due Process Clause. The first diagnosis (Paraphilia-NOS-Nonconsent) is contrary to Supreme Court precedent because it is not medically recognized and has been rejected by the profession. *See* Section I.A, *infra*. The second (APD) is overbroad and too imprecise to meet constitutional standards and has been rejected by the profession as a basis for involuntary commitment. In addition, the Supreme Court’s decision in *Foucha* strongly implied that APD did not satisfy due process. Finally, the State is judicially estopped from relying on APD because in criminal proceedings it has taken the inconsistent position that APD cannot provide the basis for an insanity defense. *See* Section I.B, *infra*.

Brown’s civil commitment also violates the Due Process Clause because it is based wholly on unreliable evidence—namely, Doren’s diagnoses. *See* Section I.C, *infra*.

If the Court determines that either of the diagnoses at issue in this case violates due process, then the petition must be granted under *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), and progeny. Such an error cannot be deemed harmless. *See* Section I.D, *infra*.

II.

Procedural default does not bar Brown's claims, first, because it would be a miscarriage of justice to permit his continued detention in violation of due process and, second, because the default is attributable to the fact that his state-court counsel was constitutionally ineffective in failing to raise his significant and obvious due process claim.

STANDARD OF REVIEW

This Court reviews the district court's findings of fact for clear error and its legal conclusions, as well as mixed questions of law and fact, *de novo*. *Carlson v. Jess*, 526 F.3d 1018, 1023 (7th Cir. 2008). Because Brown's due process claim was not "adjudicated on the merits in State court proceedings" (28 U.S.C. § 2254(d)), it is not subject to the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Dye v. Frank*, 355 F.3d 1102, 1107 (7th Cir. 2004). Under applicable pre-AEDPA standards, any factual determinations by the state court are presumed to be correct, but all questions of law and mixed questions of law and fact are decided *de novo*. *Id.* In particular, the Court "must

exercise its independent judgment when deciding * * * questions of constitutional law.” *Williams v. Taylor*, 529 U.S. 362, 400 (2000) (O’Connor, J., concurring in part and concurring in the judgment).

ARGUMENT

I. **Brown’s Involuntary Commitment Violates Due Process Because It Is Premised On Diagnoses That Have Been Rejected By The Profession And Are Overbroad And Too Imprecise.**

The Supreme Court “repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979) (collecting cases); *see also, e.g., Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (involuntary civil commitment is a “massive curtailment of liberty”). “Moreover, it is indisputable that involuntary commitment * * * can engender adverse social consequences” and a “stigma” “that * * * can have a very significant impact on the individual.” *Addington*, 441 U.S. at 425-26. Accordingly, the Court has held that an individual “may be held as long as he is both mentally ill and dangerous, but no longer.” *Foucha*, 504 U.S. at 77.

Three Supreme Court precedents are directly applicable to this case: *Foucha*, 504 U.S. 71; *Hendricks*, 521 U.S. 346; and *Crane*, 534 U.S. 407. Taken together, these cases establish that involuntary civil commitment may not be based on a diagnosis that is either medically unrecognized or too imprecise to distin-

guish the truly mentally ill from typical recidivists who must be dealt with by criminal prosecution alone.

In *Foucha*, the Court held that 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 the 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 that 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 that if a supposedly dangerous person with APD “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 her concurring opinion, Justice O’Connor added that it was “clear that acquittees could not be confined as mental patients absent some medical justification for doing so.” *Id.* at 88 (O’Connor, J., concurring in part and concurring in the judgment).

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 then upheld Hendricks’ commitment under the Kansas Sexually Violent Predator Act [“KSVPA”], noting that “[t]he mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder.” *Id.* at 360 (citing DSM-IV). Thus, “Hendricks’ diagnosis as a pedophile * * * suffice[d] for due process purposes” and, further, his admitted inability to control his pedophilic urges “adequately distinguish[e] [him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.” *Id.*

In his concurrence, Justice Kennedy, who provided the fifth vote in support of the majority opinion, also emphasized that Hendricks’ “mental abnormal-

ity—pedophilia—is at least described in the DSM-IV.” *Id.* at 372 (Kennedy, J., concurring). He therefore concluded that, “[o]n the record before [the Court], [Hendricks’ commitment] conform[ed] to [the Court’s] precedents.” *Id.* at 373. He was quick to add, “however, * * * [that] if it were shown that mental abnormality,” as defined by state law, “is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.” *Id.*

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, agreed that Hendricks’ commitment comported with due process but did not agree with all of the majority’s analysis. *Id.* at 374 (Breyer, J., dissenting). Justice Breyer’s opinion thus “set forth three sets of circumstances that, taken together, convince[d]” him that Hendricks’ commitment did not violate due process:

First, *the psychiatric profession itself classifies the kind of problem from which Hendricks suffers as a serious mental disorder.* [Citing the DSM-IV.] * * * The Constitution permits a State to follow one reasonable professional view, while rejecting another. The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable. * * *

Second, *Hendricks’ abnormality does not consist simply of a long course of antisocial behavior,* but rather it includes a specific, serious, and *highly unusual* inability to control his actions. * * *

Third, Hendricks’ mental abnormality also makes him dangerous. * * *

Id. at 374-76 (emphasis added; citations omitted).

Most recently, the Court revisited the KSVPA and held that due process requires that “there must be proof of serious difficulty in controlling behavior” in order to support involuntary civil commitment. *Crane*, 534 U.S. at 413. The Court reemphasized that 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 to a study finding that forty to sixty percent of the male prison population is diagnosable with APD. *Id.* at 412 (citing Paul Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOCIAL PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999)).

A. Doren’s Diagnosis Of Paraphilia NOS-Nonconsent Violates Due Process Because It Is A Bogus Diagnosis That Has Been Rejected By The Profession, Including The APA And The DSM.

Doren’s diagnosis of “Paraphilia NOS-Nonconsent” is, as Brown has put it on several occasions, bogus, and its use as predicate for Brown’s involuntary civil

commitment therefore violates due process. The 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 375 (Breyer, J., dissenting); *Crane*, 534 U.S. at 410, 412) and was “at least described in the DSM-IV” (*Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring)). 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”). During oral argument in *Hendricks*, Justice Souter drove home precisely why the Due Process Clause requires consensus “medical recognition” before it can justify involuntary civil commitment:

SOUTER: You don’t take the position * * * that [a] State could say, we recognize a category of mental abnormality or mental illness. It hasn’t been recognized in any medical or psychiatric literature, but we’re recognizing it now, and that satisfies [due process?] * * *

[KANSAS]: That would not be the argument the State would make * * *.

SOUTER: What is the function of this medical recognition * * * under *Foucha*? * * * Why do we * * * say that in order to satisfy the mental illness element under *Foucha* there has got to be a medically recognized category within which the particular individual falls?

[KANSAS]: * * * [S]o that the Court doesn’t worry that we confine merely for dangerousness or merely for a class of people that we don’t want to be around * * *. * * * [T]o be able to civilly commit * * * them it has to be a medically recognized condition * * *.

SOUTER: It's less likely to be abused if there's a categorical approach rather than a purely individual approach.

Transcript of Oral Argument, *Hendricks*, 521 U.S. 346 (Nos. 95-1649, 95-9075), at http://www.oyez.org/cases/1990-1999/1996/1996_95_1649/argument/.

“Paraphilia NOS-Nonconsent” fails the Court’s “medical recognition” or “medical justification” test because it has been rejected by both the psychiatric profession in general and the APA and the DSM in particular. Put simply, it is a wholly unreliable and invalid diagnosis that fails to distinguish Brown from any “dangerous but typical recidivist” who cannot be civilly committed under the Due Process Clause. *Crane*, 534 U.S. at 413.

The DSM does recognize a general diagnosis of “Paraphilia NOS.” DSM at 576. “This category is included for coding Paraphilias that do not meet the criteria for any of the specific categories” (*id.*)—the “specific categories,” including, for example, pedophilia, exhibitionism, and sexual sadism (*see id.* at 566-75). The DSM explains that 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, it would be hard to imagine that the DSM would list such “relatively

rare” and “inherently nonviolent” disorders while omitting a *valid* diagnosis of Paraphilia NOS-Nonconsent, which would be “more common and certainly more socially problematic” than the disorders specifically identified. Zander, *supra*, at 43; 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”). Rather, the logical inference is that the modifier “Nonconsent” was intentionally omitted.

This inference is supported by the treatment of nonconsensual sexual conduct in other sections of the DSM. For example, rape is mentioned in the section of the DSM that covers “other conditions or problems” that may merit “clinical attention” but are *not* independently diagnosable mental disorders. See DSM at 731, 738-39; Zander, *supra*, at 43-44. In addition, the DSM recognizes another sexual disorder—Sexual Sadism—that “involves acts * * * in which the individual derives sexual excitement from the psychological or physical suffering (including humiliation) of the victim.” DSM at 573. While Sexual Sadism often involves acts of rape, it is not a valid diagnosis absent the additional element of suffering and humiliation. *Id.*; see also Zander, *supra*, at 43.

Finally, lest there be any doubt that the Paraphilia NOS category was not intended to include a “Nonconsent” diagnosis, such a disorder was specifically considered and rejected during the drafting of a prior version of the DSM. There was a proposal to include the diagnosis—then known as “Paraphilic Coercive Disorder”—in a revision to the DSM-III, but the APA’s Board of Trustees voted it down. Zander, *supra*, at 45-46. After this defeat, no such proposal was even advanced during the drafting of the DSM-IV or the DSM-IV-TR. *Id.* at 46.

Doren is, of course, aware that the DSM does not recognize Paraphilia NOS-Nonconsent. As the Wisconsin Court of Appeals put it, “[h]e admitted that he created the ‘nonconsent’ portion of the diagnosis himself, because he believed there to be a gap in the DSM-IV-TR.” SA54; *accord* A2; SA60. In his book, Doren tries to dismiss the profession’s rejection of his self-created diagnosis by attributing it to “strong opposition by those espousing a ‘feminist theory’ concerning rape, such that the idea was unacceptable that rape might be associated with a pathological condition (vs. seen as an outgrowth of differential power relationships),” as well as fears that rapists would seek to use the diagnosis as an insanity defense. Dennis M. Doren, *EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND* 64 (2002). Then, citing only unpublished testimony and private correspondence, he asserts that there was no real debate among the DSM’s authors as to the appropriateness of the diagnosis. *Id.*

Doren's account of the APA's rejection of his diagnosis is incomplete and misleading. "The APA trustees rejected the diagnosis [then known as] paraphilic coercive disorder, in part, because of the preliminary nature of the data and the difficulty physicians have in differentiating paraphilic coercive disorder from other disorders." Zander, *supra*, at 46 (internal quotation marks omitted). A subsequent APA task force similarly concluded that "[t]he ability to make [such a] diagnosis with a sufficient degree of validity and reliability remains problematic." Howard V. Zonana *et al.*, DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 170 (1999). And even more recently, the APA flatly stated that "there is no recognized mental illness of 'rapism'" ("rapism" being an alias of Paraphilia NOS-Nonconsent). Brief for the American Psychiatric Ass'n and American Academy of Psychiatry & the Law as *Amici Curiae* in Support of Respondents at 23, *Crane*, 534 U.S. 407 (No. 00-957) [hereinafter, "APA/AAPL *Crane* Brief"].⁶

In addition to the APA's consistent rejection of Paraphilia NOS-Nonconsent or "rapism," numerous professionals and commentators continue to

⁶ APA *amicus* "briefs are approved by the [APA's] Board of Trustees and present to the court the views of the [APA] on matters of mental illness, patient care, psychiatric practice, and other forensic issues." APA Website, at http://www.psych.org/MainMenu/EducationCareerDevelopment/Library/AmicusCuriae_1.aspx (last visited July 22, 2008).

conclude that it is invalid and diagnostically unreliable.⁷ Indeed, prior to the emergence of Doren's "newly coined diagnosis" (Prentky *et al.*, *supra*, at 366), the profession seems to have believed that the whole "concept of 'paraphilic rapism' [had fallen] on its figurative face" so that "'ordinary' * * * rape by [itself was not a] 'sexual predator' issue[]" (William H. Reid, *Myths About Violent Sexual Predators and All That Pesky Legislation*, 4 J. PRAC. PSYCHIATRY & BEHAV. HEALTH 246, 246 (1998)).

⁷ See, e.g., Richard Wollert, *Poor Diagnostic Reliability, the Null-Bayes Logic Model, and their Implications for Sexually Violent Predator Evaluations*, 13 PSYCHOL. PUB. POL'Y & L. 167, 185 (2007) (concluding, based on analysis of results of independent evaluations in 295 "sexually violent predator" cases, that "psychologists who undertake [such] evaluations should no longer diagnose any [individual] as suffering from [Paraphilia NOS-Nonconsent]" because the diagnosis is "so unreliable * * * that it is impossible to attain a reasonable degree of certainty as to [its] presence" and, therefore, its "only function" is to provide a "pretext" for "preventive detention"); Robert A. Prentky *et al.*, *Sexually Violent Predators in the Courtroom*, 12 PSYCHOL. PUB. POL'Y & L. 357, 367, 370 (2006) ("because by definition all victims of sexual crimes are nonconsenting, all sexual offenders with multiple offenses * * * could be diagnosed with paraphilia NOS-nonconsent"; thus, the "category becomes a wastebasket for sex offenders" and "is taxonomically useless"); Holly A. Miller *et al.*, *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 L. & HUM. BEHAV. 29, 39 (2005) ("[T]he definition of [Paraphilia NOS-Nonconsent] is so amorphous that no research has ever been conducted to establish its validity * * *. How such a diagnosis would differentiate a class of rapists who suffer from a mental abnormality is very unclear."); Stephen D. Hart & P. Randall Kropp, *Sexual Deviance and the Law*, in SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 557, 568 (Richard Laws & William T. O'Donohue eds., 2d ed. 2008) (Paraphilia NOS-Nonconsent "is an idiosyncratic diagnosis * * * that is not generally accepted or recognized in the field"); Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 L. & HUM. BEHAV. 357, 365 (2004) ("Since none of [Doren's] criteria [for diagnosing Paraphilia NOS-Nonconsent] are stated or implied in the DSM-IV, it is not surprising that, in practice, the diagnosis * * * is widely variable."); Zander, *supra*, at 44-45, 49-50 (summarizing research studies and academic and professional opinion).

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. As Justice Souter put it, “medical recognition” is necessary to prevent “abuse[.]” of civil commitment procedures. Transcript of Oral Argument, *Hendricks*, 521 U.S. 346 (Nos. 95-1649, 95-9075). Doren’s self-created diagnosis of “Paraphilia NOS-Nonconsent” lacks such medical recognition. It has been rejected by the DSM—“*the* definitive reference for mental health professionals,” which “reflect[s] the *consensus* of the profession,” *Pletz*, 619 N.W.2d at 105 (emphasis added)—as well as the APA and numerous practitioners and academics. Accordingly, due process prohibits its use as a predicate for involuntary civil commitment.

B. The State’s Reliance On APD As A Basis For Civil Commitment Violates Due Process And Principles Of Judicial Estoppel.

1. APD Is Too Imprecise A Diagnosis To Satisfy Due Process.

Brown’s involuntary commitment also violates due process insofar as it is based on a diagnosis of APD. 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, 82-83.⁸ In *Adams*, this Court dis-

⁸ *See also, e.g.*, APA/AAPL Crane Brief at 9-10, 19 (*Foucha* “effectively rejected” civil commitment on the basis of dangerousness and an APD diagnosis); Brief for the American Psychiatric Ass’n as *Amicus Curiae* in Support of Leroy Hendricks at 23, *Hendricks*, (cont’d)

counted *Foucha*'s discussion of APD as "dicta," not a holding, and therefore not "'clearly established Federal law' for purposes of [28 U.S.C.] § 2254(d)(1)." *Adams*, 330 F.3d at 961. But the *Adams* Court did *not* make an independent determination whether APD satisfies constitutional requirements. Rather, the limited "question before [the Court], which [it] consider[ed] under the highly deferential standard applicable [under AEDPA], [was] whether the [state] court unreasonably applied either *Hendricks* or *Foucha*." *Id.* at 963.⁹

Here, in contrast, because the pre-AEDPA standard of review applies, the question before the Court is whether, in the Court's "independent judgment," involuntarily commitment on the basis of an APD diagnosis violates due process. *Williams*, 529 U.S. at 400 (O'Connor, J., concurring in part and concurring in the judgment) (under the pre-AEDPA standard, "a federal court entertaining [an] application for habeas relief must exercise its independent judgment when decid-

(... cont'd)

521 U.S. 346 (Nos. 95-1649, 95-9075) ("this Court held in *Foucha* that [APD] * * * is not the sort of 'mental illness' that permits a parens patriae civil commitment"); *Prentky et al.*, *supra*, at 368 ("*Foucha* * * * hinted broadly that APD is not, even when combined with dangerousness, a sufficient predicate for civil commitment."); *Zander*, *supra*, at 20 ("*Foucha* * * * appeared to stand for the legal principle that, although mental illness coupled with dangerousness * * * could constitutionally justify civil commitment, [APD] * * * could not").

⁹ Indeed, because the Supreme Court decided *Crane* after the state court's ruling in *Adams*, the *Adams* Court also stressed that it was not even "deciding whether the [state court's] decision was an unreasonable application of *Crane*." *Adams*, 330 F.3d at 963.

ing * * * questions of constitutional law”). Under the best reading of *Foucha*, *Hendricks*, and *Crane*, that question must be answered in the affirmative.

APD 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 forty to sixty percent of the male prison population is diagnosable with APD. *Id.* at 412. In reality, this number is probably seventy-five to eighty percent.¹⁰ Indeed, an estimated *seven million Americans*—including more than six million men—are diagnosable with APD.¹¹ Harriet Barovick, *Bad to the Bone*, TIME, Dec. 27, 1999. Thus, APD certainly is not the sort of “highly unusual” disorder that at least four Justices in *Hendricks* agreed was a constitutional prerequisite to involuntary civil commitment. *See* 521 U.S. at 375 (Breyer, J., dissenting).

¹⁰ *See* APA/AAPL *Crane* Brief at 18 (noting that the state’s expert in *Crane* estimated that seventy-five percent of prisoners have APD); *see also, e.g.*, Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota’s Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1291 & n. 59 (1998) (collecting studies indicating that seventy-five to eighty percent of all prisoners are diagnosable with APD).

¹¹ Given that APD cannot be diagnosed before the age of 18 (DSM at 706), more than 1 in 20 adult American men are diagnosable with the “disorder.”

That millions of Americans and a substantial majority of the male prison population are diagnosable with APD is not surprising. The core of an APD 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 at 706.¹²

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). During

¹² 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 at 706. A “Conduct Disorder” is, more or less, a juvenile version of APD. *See id.* at 98-99, 702; Zander, *supra*, at 55. APD does not require an actual diagnosis of a Conduct Disorder; rather, “a history of some symptoms of Conduct Disorder before age 15” will suffice. DSM at 702; Zander, *supra*, at 55.

oral argument in *Crane*, Justice Ginsburg recognized precisely this problem and expressed significant concerns over the use of APD as a predicate for involuntary civil commitment:

[I]f you look at the definition of [APD] and they say pick three out of a list of seven, you could pick out habitually doesn't work, doesn't pay debts, is reckless, irritable. That's * * * considerably less than what is defined as an abnormality like pedophilia. There are a lot of ordinary people who would fit that description.

Transcript of Oral Argument, *Crane*, 534 U.S. 407 (No. 00-957), at http://www.oyez.org/cases/2000-2009/2001/2001_00_957/argument/. Justice Ginsburg also noted that anyone who was “a liar” and “a malingerer” and did “not pay [his] debts” would satisfy the criteria. *Id.* And when Kansas’s counsel took the position that a person exhibiting such unexceptional criminal and non-criminal behaviors “could be committed,” Justice Souter’s only response was, “Wow.” *Id.*; see also, e.g., *Zander, supra*, at 54-56 (explaining how an unexceptional “parking ticket scofflaw” could be diagnosed with APD). Such concerns likely explain why, in remanding the case for further proceedings, the *Crane* Court specifically noted that Crane suffered from “both exhibitionism and [APD]”¹³ (534 U.S. at

¹³ Exhibitionism is a paraphilia that is specifically recognized by the DSM (at 569). It involves a serious difficulty controlling urges to “expos[e] one’s genitals to an unsuspecting stranger.” *Id.*

411), and then suggested, albeit obliquely, that a diagnosis of APD alone might be too imprecise and overbroad to survive constitutional scrutiny (*id.* at 412).

The APA has also taken the position that APD is an over-inclusive and inappropriate basis for civil commitment. In its *amicus* brief in *Crane*, the APA advised the Court that “permitting confinement of all dangerous individuals with [APD] * * * would * * * not meaningfully circumscribe the reach of preventive detention.” APA/AAPL *Crane* Br. at 8-9. In addition, in 2006, the APA approved an Action Paper supporting the elimination of APD 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://tinyurl.com/6ykpxu>; see Ken Hausman, *Assembly, Board Pass Statement on Detainee Interrogations*, 41 PSYCHIATRIC NEWS, June 16, 2006, at 1, 10 (reporting the Assembly’s approval of the Action Paper). The Action Paper explained that APD 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.*” APA Final Action Paper, *supra*, at 1-2 (emphasis added).¹⁴

¹⁴ The APA opposes the use of an APD diagnosis as a basis for civil commitment despite the disorder’s inclusion in the APA-published DSM. As the DSM explains (at (cont’d)

In addition to the APA's opposition to the use of APD as a predicate for involuntary commitment, numerous individual mental health professionals and commentators have leveled similar criticisms.¹⁵ Indeed, this Court has also commented that "'antisocial personality disorder' * * * strikes us as fancy language for being a murderer." *Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000). Even a prominent article espousing the minority view in the profession that involuntary commitment based on APD may be appropriate in some cases concedes that "[t]he use of [APD] to justify civil commitment is unlikely to find general accep-

(... cont'd)

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 DSM, should be seen as a *necessary* condition for civil commitment under the Due Process Clause (*see* Section I.A, *supra*), it should not be viewed as a *sufficient* condition.

¹⁵ See, e.g., Jack Vognsen & Amy Phenix, *Antisocial Personality Disorder Is Not Enough: A Reply to Sreenivasan, Weinberger, and Garrick*, 32 J. AM. ACAD. PSYCHIATRY & L. 440, 441 (2004) (APD "alone is not a sufficient diagnostic condition for * * * civil commitment without an attendant diagnosis of paraphilia that indicates an established deviant sexual preference"); Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 126 (1996) ("[I]t is almost unimaginable that a person whose sole diagnosis was '[APD]' and who was potentially dangerous would be committed involuntarily."); Daniel F. Montaldi, *The Logic of Sexually Violent Predator Status in the United States of America*, SEXUAL OFFENDER TREATMENT, Vol. 2, Issue 1 (2007), available at <http://www.sexual-offender-treatment.org/57.0.html> (last visited July 22, 2008); Bruce Winick *et al.*, *Should Psychopathy Qualify for Preventive Outpatient Commitment?*, at 8, available at <http://papers.ssrn.com/abstract=984938> (APD does not justify involuntary civil commitment because it "does not impair cognitive processes or otherwise interfere with rational decision making" and "does not make it difficult for [the individual] to control [his] conduct."); Zander, *supra*, at 52-62 (summarizing studies and scholarly opinion).

tance 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) (emphasis added).

In sum, as the Supreme Court has twice suggested (and perhaps once concluded), and consistent with the APA’s official position, APD 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 absolutely nothing 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, as numerous studies now indicate, it comes perilously close to justifying the civil commitment of “any convicted criminal.” *Foucha*, 504 U.S. at 82-83. Thus, while the Wisconsin courts have several times proclaimed that the Sexually Violent Person Law is “narrowly tailored” to serve the State’s interests, (*e.g.*, *In re Commitment of Bush*, 699 N.W.2d 80, 86 (Wis. 2005)), this brand of “narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker.” *Hill v. Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting). Under *Foucha* and progeny, APD

is not a valid basis for civil commitment, and Brown's continued detention on that ground violates due process.

2. The State Is Judicially Estopped From Relying On APD As A Basis For Civil Commitment.

The State is also judicially estopped from pursuing civil commitment on the basis of an APD diagnosis. In criminal prosecutions, the State takes the position that APD is *not* a valid basis for the defense of not guilty by reason of insanity. *See, e.g., State v. Lindh*, 457 N.W.2d 564, 568 (Wis. Ct. App. 1990) (“[The State’s expert] opined that Lindh was not suffering from a mental disease at the time of the shooting. He had an antisocial personality disorder *but that is not a mental disease.*”) (emphasis added), *rev’d on other grounds*, 468 N.W.2d 168 (Wis. 2001), *habeas corpus granted sub nom., Lindh v. Murphy*, 124 F.3d 899 (7th Cir. 1997); *Simpson v. State*, 215 N.W.2d 435, 438-39 (Wis. 1974); *see also, e.g., William H. Reid, Antisocial Personality, Psychopathy, and Forensic Psychiatry*, 7 J. PSYCHIATRIC PRAC. 55, 57 (2001) (stating that APD alone “does not support an insanity defense” because “[n]o U.S. jurisdiction accepts antisocial personality alone as a limiting factor in a defendant’s ability to form intent or take responsibility for his or her actions”). The State takes this position despite the fact that, under Wisconsin law, “[a] person is not responsible for criminal conduct if * * * as a result of mental disease or defect the person lacked substantial capacity * * * to * * * conform his or her conduct to the requirements of law.” Wis. Stat. § 971.15.

For all practical purposes, this standard is the same as the constitutional standard under *Crane*: To establish an insanity defense, a criminal defendant must prove that he suffers from a “mental disease or defect” that results in a “lack[] [of] substantial capacity” to control his behavior, while in civil commitment cases, the State must prove that the individual suffers from a mental disorder that causes “serious difficulty in controlling [his] behavior.” *Crane*, 534 U.S. at 413. Any distinction is purely semantic, yet the State takes diametrically opposed positions. Having pursued criminal convictions on the theory that APD does not satisfy this common standard, the State is judicially estopped from contradicting itself in civil commitment cases by taking the “clearly inconsistent” position that APD is a qualifying mental disorder. *See generally New Hampshire v. Maine*, 532 U.S. 742, 749-56 (2001); *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 659-60 (7th Cir. 2004); *Lowery v. Stovall*, 92 F.3d 219, 223 n.3 (4th Cir. 1996) (“judicial estoppel does not require * * * that the parties meet the requirement of mutuality”); 18B Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 4477, at 601 (2d ed. 2002) (“even a government may be precluded from blatant inconsistency, particularly when the matter does not involve broad formulation and reformulation of public policy”). At minimum, the State’s unprincipled willingness to recharacterize APD to serve different purposes further undermines the diagnosis’s scientific validity.

C. Brown's Commitment Violates Due Process Because It Is Based On Unreliable Evidence.

The Wisconsin courts have not adopted the federal *Daubert* standard governing the reliability and admissibility of evidence. "Wisconsin, unlike the federal courts, considers the reliability of scientific evidence a question of weight and credibility for the trier of fact to decide." *City of W. Bend v. Wilkens*, 693 N.W.2d 324, 329 (Wis. Ct. App. 2005). "One result of the fact that *Daubert* is not applied in Wisconsin courts is that an expert's methodology and foundation can be self-justified. * * * In short, unlike federal court practice, an expert in [Wisconsin] state court may testify that 'it is so because I am an expert and I say it is so.'" Robert M. Whitney, *Guarding the Gates: Admissibility of Expert Evidence in Federal and Wisconsin Courts: The Fate of Daubert in Wisconsin*, 73 WIS. LAW (Mar. 2000), available at <http://tinyurl.com/5sc26t>.¹⁶ In this case, the result of Wisconsin's explicitly lenient standard for the admission of expert testimony is that Brown was committed based solely on unreliable diagnoses that would not even be *admissible* in federal court.

¹⁶ See also, e.g., *Martindale v. Ripp*, 629 N.W.2d 698, 715 (Wis. 2001) ("The standard in this state for the admission of expert testimony is not stringent."); *State v. Van Buren*, 746 N.W.2d 545, 551 (Wis. Ct. App. 2008) (the *Daubert* standard is "much more restrictive" than Wisconsin's); *Anderson v. Combustion Eng'g, Inc.*, 647 N.W.2d 460, 463 (Wis. Ct. App. 2002) (Wisconsin law "sets a fairly low threshold for the admissibility of opinion evidence that is beyond the presumed ken of ordinary jurors.").

Daubert and Federal Rule of Evidence 702 direct courts to use a number of guideposts to assess the reliability of expert testimony. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993); *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 534-35 (7th Cir. 2005), *vacated in part on other grounds*, 448 F.3d 936 (7th Cir. 2006); Fed. R. Evid. 702 advisory committee note (2000 Amendments). These guideposts include: whether a theory has been generally accepted in the scientific community, whether the witness's research was developed expressly for purposes of litigation, whether a theory can be and has been tested and its known or potential rate of error when applied, and whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See *Fuesting*, 421 F.3d at 534-35. Doren's testimony runs afoul of these guideposts.

First, as discussed at length above in Section I.A, Doren's diagnosis of Paraphilia NOS-Nonconsent is not generally accepted in the psychiatric community. Likewise, even proponents of "[t]he use of [APD] to justify civil commitment" specifically admit that it "is unlikely to find general acceptance among mental health professional groups." Sreenivasan *et al.*, *supra*, at 477. Under *Daubert*, "a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism." 509 U.S. at 594 (citation and internal quotation marks omitted); *see also, e.g., Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 603 (10th Cir. 1997) (holding that "a controversial

diagnosis * * * unsupported by sound scientific reasoning or methodology” should be excluded under *Daubert*) (citing *Bradley v. Brown*, 42 F.3d 434, 438-39 (7th Cir. 1994)).

Second, Doren’s theories were developed for purposes of testifying in civil commitment litigation. The book in which Doren, a state-employed evaluator, articulates and attempts to defend his self-created diagnosis is essentially a how-to manual for state witnesses in civil commitment proceedings. See, e.g., Doren, *supra*, at 184-88 (advice on courtroom testimony); see also, e.g., Prentky *et al.*, *supra*, at 366-67 (noting that the “newly coined” diagnosis was developed by evaluators in sexually violent persons cases).

Third, “the definition of [Paraphilia NOS-Nonconsent] is so amorphous that no research has ever been conducted to establish its validity.” Miller *et al.*, *supra*, at 39. In addition, in a study of sex offender civil commitment cases, the lack of consistent agreement among independent evaluators as to the practical application of the diagnosis caused another researcher to conclude that “psychologists who undertake [such] evaluations should no longer diagnose any [individual] as suffering from [Paraphilia NOS-Nonconsent]” because the diagnosis is “so unreliable * * * that it is impossible to attain a reasonable degree of certainty as to [its] presence.” Wollert, *supra*, at 185; accord Zander, *supra*, at 49-50. Because Doren’s theory has not been subjected to research or testing and, further,

evaluators are unable to agree consistently as to its practical application, its “potential rate of error when applied” (*Fuesting*, 421 F.3d at 534) is simply unknowable. These factors further undermine its reliability under *Daubert*. See, e.g., *Bradley*, 42 F.3d at 438.

Finally, Doren’s reliance on APD as a basis for commitment “unjustifiably extrapolate[s] from an accepted premise to an unfounded conclusion.” *Fuesting*, 421 F.3d at 534 (internal quotation marks omitted). While APD is recognized by mental health professionals, as well as the DSM, as a potentially useful diagnosis for clinical or research purposes (*see note 14, supra*), it is not considered a valid basis for civil commitment (*see generally Part I.B, supra*). Doren’s use of this legitimate diagnosis to reach improper and unfounded conclusions also undermines the reliability of his opinion. See *Fuesting*, 421 F.3d at 537.

While *Daubert* is not, of course, binding on the states, the Due Process Clause does impose limits on the use of unreliable evidence. *Ferrier v. Duckworth*, 902 F.2d 545, 547 (7th Cir. 1990); accord *White v. Illinois*, 502 U.S. 346, 363-64 (1992) (Thomas, J., concurring in part and concurring in the judgment). In the context of involuntary civil commitment proceedings, where the State seeks to impose a “significant deprivation of liberty” (*Addington*, 441 U.S. at 425) solely on the basis of psychiatric testimony, the *Daubert* standard – which is designed specifically to ensure the reliability of such expert testimony (509 U.S. at 589) – is a practical and

appropriate proxy for the reliability that due process requires. For the reasons discussed here and in Sections I.A-B, *supra*, Doren's diagnoses would be inadmissible under *Daubert* and progeny, rendering Brown's commitment invalid under the Due Process Clause.

D. The Petition Must Be Granted If Either Of Doren's Diagnoses Is Held Invalid.

In its order dismissing Brown's petition, the district court noted that it "previously found that if [Brown] prevailed on his first claim" — *i.e.*, his challenge to Doren's Paraphilia NOS-Nonconsent diagnosis — "he might also prevail on his second claim" — *i.e.*, his challenge to the use of APD — "because it was not clear whether the jury made its finding of future dangerousness with respect to the first or second diagnosis." A8. But the court then reversed that earlier determination and stated that because it had rejected Brown's "first claim, regardless of whether the jury believed that Paraphilia-NOS-Nonconsent or APD or some combination of the two disorders made [Brown] dangerous, its finding was sufficient to render [Brown's] subsequent commitment constitutional." *Id.* The district erred by reversing itself, as its prior reasoning was correct. If *either* of Brown's diagnoses is found to be constitutionally insufficient, then his commitment is necessarily invalid, and he is entitled to a writ of habeas corpus.

This case is controlled by *Stromberg v. California*, 283 U.S. 359 (1931). In *Stromberg*, "[t]he verdict against the [defendant] was a general one" that "did not

specify the ground upon which it rested”; “the jury were instructed that their verdict might be given with respect to any [of three grounds], independently considered”; and on appeal one of those three grounds was held to violate the First Amendment. *Id.* at 367-68. Under these circumstances, the Court held that because “it [was] impossible to say under which clause of the statute the conviction was obtained,” “the necessary conclusion” was “that, if *any* of the clauses in question [was] invalid under the Federal Constitution, the conviction [could not] be upheld.” *Id.* at 368 (emphasis added); accord, e.g., *Zant v. Stephens*, 462 U.S. 862, 881 (1983).

More recently, the Supreme Court has held that the *Stromberg* rule “do[es] not necessarily stand for anything more than the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.” *Griffin v. United States*, 502 U.S. 46, 53 (1991). Even as clarified by *Griffin*, however, the rule is plenty broad enough to cover this case. Further, this Court has held that the *Stromberg* rule is “unlike the harmless error rule” because it “is a direct interpretation of the underlying constitutional guarantee.” *United States v. Cappas*, 29 F.3d 1187, 1193 (7th Cir. 1994). Thus, a verdict “cannot stand

where it ‘may have rested’ on an impermissible ground.” *Id.* (quoting *Griffin*, 502 U.S. at 53).¹⁷

Thus, because the jury in Brown’s case returned a general verdict and was permitted to find Brown to be a sexually violent person based on either of Doren’s diagnoses, it is simply “impossible to say under which [diagnosis] the [verdict] was obtained.” *Stromberg*, 283 U.S. at 368. This principle applies with particular force here because under Wisconsin law, “[a]s long as all of the jurors agreed that [Brown] suffered from [a] mental disease, unanimity requirements are satisfied, even if jurors disagree[d] as to which mental disease predisposes [him] to recidivism.” *Pletz*, 619 N.W.2d at 102. Therefore, if either diagnosis is invalid, “the necessary conclusion * * * is that * * * the [verdict] cannot be upheld.” *Stromberg*, 283 U.S. at 368. And this necessary conclusion “is a direct interpretation of the underlying constitutional guarantee” –the Due Process Clause. *Cappas*, 29 F.3d at 1193.

But even if *Stromberg*, *Griffin*, and this Court’s decision in *Cappas* did not require automatic reversal upon a determination that either diagnosis is constitu-

¹⁷ *Stromberg*’s rule of automatic reversal is essentially another way of saying that a *Stromberg* error is structural and therefore is not subject to harmless error analysis. See *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993); *Pulido v. Chrones*, 487 F.3d 669, 675-76 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 1444 (2008); *Lara v. Ryan*, 455 F.3d 1080, 1085-86 (9th Cir. 2006).

tionally invalid, it is clear that the harmless-error rule of *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), is also satisfied in that situation. Under *Brecht*, “habeas relief must be granted [if] the * * * error had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* (internal quotation marks omitted). The State bears the burden of establishing harmlessness. *Fry v. Pliler*, 127 S. Ct. 2321, 2327 n.3 (2007). “When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had ‘substantial and injurious effect or influence in determining the jury’s verdict,’ that error is not harmless. And, the petitioner must win.” *O’Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Here, if either diagnostic basis for Brown’s commitment is removed from the equation, there is at least “grave doubt” that the result would have been the same. As discussed above, Brown and his experts vigorously challenged both of Doren’s diagnoses at trial. *See* SA19-SA23. Brown’s expert testified that Paraphilia NOS-Nonconsent is not recognized by the professional community, was rejected by the DSM, and quite simply “does not exist.” SA22-SA23. She also challenged Doren’s diagnosis of APD, testified that the diagnosis describes eighty percent of the prison population, and maintained that APD does not predispose him to acts of sexual violence. SA23. Brown also presented expert testimony that Doren’s use of actuarial instruments was flawed and unreliable. SA21-SA22. And, to counter the State’s contention that he could not control his

behavior, he emphasized that while on parole he lived in the community without re-offending. SA20. The jury was allowed to return a verdict based on either diagnosis, and unanimity as to the diagnosis was not required. SA23-SA25, SA35-SA39.

Tellingly, the jury sent the trial court a note during its deliberations asking “to have access to a copy of the DSM-IV-TR.” SA25. The jury’s request, which the trial court denied, clearly indicates that it harbored doubts as to the validity of Doren’s diagnoses. Under these circumstances, the State cannot carry its burden of persuasion that the unconstitutionality of either diagnosis is harmless. Because such an error, at minimum, creates “grave doubt,” Brown “must win.” *O’Neal*, 513 U.S. at 436.

To be clear, *both* diagnoses are in fact unconstitutional. Accordingly, there should be no argument of harmless error because there is simply no constitutional basis for Brown’s detention. Further, under the rule of *Stromberg*, *Griffin*, and *Cappas*, the unconstitutionality of either diagnosis requires automatic reversal. But even if the *Brecht* standard is applicable, Brown prevails because the State cannot establish harmlessness.

II. Procedural Default Does Not Bar Brown's Claim Because The Default Was Caused By His Lawyer's Ineffectiveness And/Or Because Failure To Entertain His Claim Would Result In A Miscarriage Of Justice.

A habeas petitioner whose claim for relief is procedurally defaulted may avoid the consequences of the default by showing either cause for the default and prejudice attributable thereto or that failure to entertain his claim would result in a "miscarriage of justice." See *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Schlup v. Delo*, 513 U.S. 298, 314-15 (1993). Brown is able to establish both of these grounds.

A. The Miscarriage-Of-Justice Exception.

1. The Miscarriage-Of-Justice Exception Is Applicable In Civil Commitment Cases And Available To Brown.

The Supreme Court has held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the [petitioner's] procedural default." *Murray*, 477 U.S. at 496. Thus, when the petitioner is imprisoned "for an act that the law does not make criminal," "[t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice." *Bousley v. United States*, 523 U.S. 614, 626 (1998) (quoting *Davis v. United States*, 417 U.S. 333, 346-47 (1974)) (internal quotation marks omitted). In its ruling issuing a certificate of appealability, the district court concluded that the miscarriage-of-justice doctrine applies in civil commit-

ment cases and that “if [Brown] could prevail [on his due process claim], then it would be clear that this constitutional deprivation worked a fundamental miscarriage of justice and his petition should be granted notwithstanding his procedural default.” A13. This reasoning was correct and consistent with the only two federal court opinions of which Brown is aware. *See Levine v. Torvik*, 986 F.2d 1506, 1517 n.9 (6th Cir. 1993) (the miscarriage-of-justice exception “applie[s] * * * where [a] constitutional violation * * * has resulted in the confinement of one who is actually not mentally ill”); *Beaulieu v. Minnesota*, 2007 WL 2915077, at *4 n.4 (D. Minn. Oct. 4, 2007).

In its ruling, the district court noted that, in criminal post-conviction proceedings, petitioners relying on the miscarriage-of-justice exception generally have been required to present some “new evidence.” A13. The court concluded, however, that it would be “inappropriate” to apply this requirement in civil commitment cases when the question is the existence or nonexistence of a constitutionally valid mental disorder, not guilt or innocence. *Id.*; *accord* A4. This reasoning is sound. As the district court noted, the Supreme Court and this Court have referred to “new evidence of innocence.” *See, e.g., Schlup*, 513 U.S. at 316; *United States ex rel. Bell v. Pierson*, 267 F.3d 544, 551 (7th Cir. 2001). However, Brown’s claim is not that he is “actually innocent” of any crime but rather that he is actually ineligible for civil commitment under the Due Process Clause. “In this

context, it is hard to imagine that anything could constitute ‘new evidence of innocence.’” A 4.

In any event, the “new evidence” language in *Schlup* and other decisions is not a bar to Brown’s claim for two additional reasons. First, new evidence is *not* an absolute prerequisite to establishing a miscarriage of justice. For example, in *Bousley*, the Supreme Court held that the exception was available without any discussion of new evidence. *See* 523 U.S. at 623-24. There, the petitioner’s claim of actual innocence rested on a Supreme Court decision, issued after his conviction was affirmed on appeal, holding that the statute under which he was convicted did not reach the conduct on which his conviction was based. *See id.* at 616-17, 623-24. Building on *Bousley*, the Third Circuit has “held that, in certain circumstances, the lack of new evidence is not necessarily fatal to an argument that a petitioner is actually innocent.” *Cristin v. Brennan*, 281 F.3d 404, 420 (3d Cir. 2002) (discussing *United States v. Garth*, 188 F.3d 99 (3d Cir.1999)). “In those circumstances, it [is] not a question of what new evidence of innocence the petitioner [can] present, but whether the evidence currently in the record [is] sufficient to convict.” *Cristin*, 281 F.3d at 421. And in a recent *Bousley*-type case, this Court also suggested that a petitioner could establish a miscarriage of justice without new evidence. *See Morales v. Bezy*, 499 F.3d 668, 672-73 (7th Cir. 2007),

cert. dismissed sub nom., Morales v. Jett, 2008 WL 1730116 (U.S. July 2, 2008); *id.* at 673-74 (Rovner, J., dissenting).

Much like a defendant who is “actually innocent” because the statute under which he was convicted does not proscribe the conduct for which he was convicted, Brown is “actually ineligible” for involuntary commitment because Doren’s diagnosis is not a valid basis for commitment under the Constitution. Therefore, “it [is] not a question of what new evidence * * * [Brown can] present, but whether the [diagnosis] currently in the record [is] sufficient to [justify involuntary civil commitment].” *Cristin*, 281 F.3d at 421.¹⁸

The second reason that *Schlup*’s reference to new evidence does not bar Brown’s claim is that his claim does involve some “new evidence.” Doren’s book describing his newly coined, self-created diagnosis was not published until 2002,

¹⁸ Brown’s claim presents a particularly compelling case for distinguishing *Schlup*’s reference to “new evidence.” This is because “[n]ew substantive due process’ rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, [are] placed on a different footing.” *Mackey v. United States*, 401 U.S. 667 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). “[T]he writ has historically been available for attacking convictions on such grounds” “because [they] represent[] the clearest instance where finality interests should yield.” *Id.* at 692-93. “There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose,” but there is an “obvious interest in freeing individuals from punishment for conduct that is constitutionally protected.” *Id.* at 693; see *Teague v. Lane*, 489 U.S. 288, 305-10 (1989) (adopting Justice Harlan’s views). Brown’s substantive due process claim is on the same “footing” as such rules because it implicates a liberty interest of the same order.

and, as a result, much of the professional criticism of his theory was not published until after Brown's trial in June 2003. *See generally* Sections I.A-B, *supra*. Of particular note, Dr. Thomas K. Zander's article, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, *supra*, which discusses the relevant academic and professional literature and critiques Doren's diagnosis, was not published until 2005. The district court specifically cited Zander's article as a substantial factor in its ruling issuing a certificate of appealability. A14. Accordingly, to the extent that it is necessary for Brown to point to any new evidence, Dr. Zander's article and the substantial, recent academic and professional literature discussed in Part I, should suffice.

2. Failure To Consider Brown's Claim Would Result In A Miscarriage Of Justice.

Failure to entertain a procedurally defaulted claim would result in a "miscarriage of justice" if "it is more likely than not that no reasonable juror would have found" against the petitioner. *House v. Bell*, 547 U.S. 518, 537 (2006) (quoting *Schlup*, 513 U.S. at 327). As the Court recently explained, "[t]his formulation * * * 'ensures that [the] petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice.'" *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 327). The district court correctly concluded that if Brown's due process claim is meritorious, "then it would be clear that this constitutional deprivation worked a fundamental miscarriage of

justice and his petition should be granted notwithstanding his procedural default.” A13.

To begin with, because both of Doren’s diagnoses are constitutionally insufficient, the question what a “reasonable juror” might have done is inapt. As a matter of constitutional law, the case never could have gone to a jury. Thus, a miscarriage of justice is evident.

Moreover, even if the Court concludes that one of Doren’s two diagnoses manages to crawl across the threshold of constitutional permissibility, such a ruling would still indicate a miscarriage of justice. Doren’s first diagnosis is an unreliable self-creation that has been consistently rejected by his peers, the APA, and the DSM, a treatise that the Wisconsin courts recognize as “the definitive reference for mental health professionals” and as “reflect[ing] the consensus of the profession.” *Pletz*, 619 N.W.2d at 105. And while his second diagnosis is recognized by the DSM for clinical and research purposes, it is useless as a tool for distinguishing the truly mentally ill and dangerous from typical recidivists, as evidenced by the fact that it can be applied to up to eighty percent of the prison population, an estimated seven million Americans, and 1 in 20 American men. For these and other reasons, it too has been rejected by the APA as a basis for involuntary civil commitment.

Brown vigorously attacked both of these diagnoses at trial, and, as evidenced by the jury's request during deliberations for a copy of the DSM, the jurors plainly had doubts as to Doren's diagnoses. Unfortunately, it seems likely that, in the end, jurors were swayed by the presence of two alleged disorders (perhaps wrongly believing that, even if one of the alleged disorders was suspect, a licensed professional such as Doren would never base his opinion solely on bogus or unhelpful diagnoses) or that different jurors relied on different diagnoses in reaching a verdict. Given the enormity of the liberty interest at stake (*Addington*, 441 U.S. at 425; *Humphrey*, 405 U.S. at 509), involving not just a term-of-years sentence but an *indefinite* detention, it would constitute a miscarriage of justice to permit Brown's continued confinement on the basis of such a verdict.

B. Ineffective Assistance of Counsel.

1. Brown Can Establish Ineffective Assistance And Resulting Prejudice.

An independent reason why procedural default can be excused is that the failure of Brown's attorney to raise the claim in state court constitutes ineffective assistance and, hence, cause for his procedural default. *See, e.g., Franklin v. Gilmore*, 188 F.3d 877, 883 (7th Cir. 1999) ("Attorney error that constitutes ineffective assistance of counsel is cause to set aside a procedural default."). Ineffectiveness is established if "counsel's representation fell below an objective standard of reasonableness," as measured by "prevailing professional norms." *Strickland v.*

Washington, 466 U.S. 668, 688-89 (1984). In particular, “when ‘appellate counsel fails to present significant and obvious issues on appeal,’ his conduct falls below the standard of objective reasonableness.” *Hollenback v. United States*, 987 F.2d 1272, 1275 (7th Cir. 1993) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

Brown’s substantive due process claim was a “significant and obvious issue” and should have been raised in state court. As discussed above, at the time of Brown’s civil commitment trial, *Hendricks* had already stressed the importance of a disorder’s recognition by the DSM and that some disorders might be too imprecise to satisfy due process. *Hendricks*, 521 U.S. at 360; *id.* at 372-73 (Kennedy, J., concurring); *id.* at 375 (Breyer, J., dissenting). The Court again emphasized these points in *Crane* and, in fact, seemed to imply that the diagnosis of APD in particular might be too imprecise. *Crane*, 534 U.S. at 410, 412-13. Moreover, *Hendricks* and *Crane* both relied on the Court’s earlier decision in *Foucha*; as noted above, some believed that *Foucha* had already placed APD off limits as a basis for involuntary commitment. See note 8, *supra*. Lastly, just before Brown’s civil commitment trial, this Court decided *Adams*. Although *Adams* denied a claim similar to Brown’s, the Court emphasized that it was doing so under the “highly deferential” AEDPA standard, which required the Court to disregard *Foucha*’s “dicta” and the Supreme Court’s recent decision in *Crane* and review the state court’s ruling for reasonableness only. *Adams*, 330 F.3d at 961, 963. Moreover,

given that the petitioner in *Adams* was able to obtain a certificate of appealability even under that highly deferential standard (*id.* at 960), competent counsel should have recognized Brown's due process claim as a viable issue for appeal.

In light of the substantial Supreme Court precedent suggesting and implicitly supporting Brown's due process claim, that claim must be regarded as a "significant and obvious" one. *See, e.g., Mason v. Hanks*, 97 F.3d 887, 902 (7th Cir. 1996) (holding that appellate counsel failed to present a "significant and obvious issue" because petitioner "might well have won" had counsel challenged testimony that arguably constituted inadmissible hearsay under state law).¹⁹

Brown's due process claim is also "clearly stronger" than some, if not all, of the claims that his appointed counsel raised on appeal. *See Suggs v. United States*, 513 F.3d 675, 678, 680 (7th Cir. 2008). For example, the challenge to Doren's ambiguous reference to having "checked with the [APA]" about his diagnosis (*see* SA32-SA35, SA54-SA55) must be regarded as less compelling than Brown's claim that the diagnosis itself is fundamentally unconstitutional. In addition, although the actuarial instruments relied on by Doren and challenged by Brown's appellate counsel certainly have "engendered skepticism," their admis-

¹⁹ The obviousness of Brown's due process claim is confirmed by the fact that the petitioner-appellant in *McGee v. Bartow*, No. 07-3278 (7th Cir.), found it sufficiently obvious to raise the argument *pro se* during his appeal in the Wisconsin state courts. *McGee v. Bartow*, 2007 WL 1062175, at *3-*4 (E.D. Wis. Apr. 3, 2007).

sion “to predict the probability of recidivism has been accepted in a number of cases.” *United States v. McIlrath*, 512 F.3d 421, 425 (7th Cir. 2008). Indeed, such instruments appear to have been universally accepted in numerous jurisdictions. *See generally In re Commitment of Simons*, 821 N.E.2d 1184, 1190-96 (Ill. 2004).

Finally, counsel’s failure to raise Brown’s significant and obvious due process claim resulted in “prejudice,” as defined by *Strickland* and the cause-and-prejudice test. That is, as discussed Section I.D and Subsection II.A.2, *supra*, Brown has established far more than “a reasonable probability that, but for counsel’s [failure to raise his due process claim], the result of [his civil commitment] proceeding [and/or his appeal] would have been different.” *Strickland*, 466 U.S. at 694.²⁰

2. Brown’s Ineffective Assistance Claim Is Not Defaulted.

In its stay order, the district court recognized that the argument that Brown’s “appellate counsel was ineffective” “is plausible because [Brown’s due process] claim is obvious and * * * appears potentially meritorious.” SA61. But in its order dismissing Brown’s petition, the district court reversed itself and ruled that Brown’s ineffective assistance could not constitute cause for his default

²⁰ *See Belford v. United States*, 975 F.2d 310, 314 (7th Cir. 1992) (observing that prejudice under *Strickland* and under the cause-and-prejudice test at least “overlap” and may be “identical”), *overruled on other grounds by Castellanos v. United States*, 26 F.3d 717, 719-20 (7th Cir. 1994); *Lynch v. Ficco*, 438 F.3d 35, 49-50 (1st Cir. 2006) (holding that the two standards are identical).

because Brown “ha[d] not exhausted a claim that his appellate counsel was ineffective and * * * ha[d] not argued that he can show good cause for this default.”

A4. For the reasons that follow, the district court should have adhered to its original analysis.

In concluding that Brown’s ineffective assistance claim was defaulted, the district court apparently accepted the State’s position that, following his direct appeal, Brown was obligated to pursue that claim by filing a pro se petition for a writ of habeas corpus in the Wisconsin Court of Appeals pursuant to *State v. Knight*, 484 N.W.2d 540 (Wis. 1992). See Doc. 34, at 5. In *Knight*, the Wisconsin Supreme Court described the issue before the court as follows:

The parties agree that a *criminal defendant* who believes he or she has been denied effective assistance of appellate counsel is entitled to a procedure and forum for asserting this claim. * * *

The sole issue before the court is the appropriate vehicle of relief for a criminal defendant who asserts that his or her appellate counsel provided ineffective assistance.

484 N.W.2d at 540-41 (emphasis added). The court ultimately held “that to bring a claim of ineffective assistance of appellate counsel, a *defendant* must petition the appellate court that heard the appeal for a writ of habeas corpus.” *Id.* at 545 (emphasis added). *Knight* also specifically held that, for the limited purpose of challenging the effectiveness of appellate counsel, this procedure supplanted

Wis. Stat. § 974.06 – the statutory procedure by which *criminal defendants* may collaterally attack their *convictions*. 484 N.W.2d at 544. Thus, based on reported Wisconsin decisions, it would not have appeared to Brown that a “*Knight* petition” was an “available procedure” (28 U.S.C. § 2254(c)) for a civil litigant such as himself. Instead, by its clear terms, *Knight* applies only to criminal cases.²¹

Moreover, after the district court entered a stay to allow Brown to exhaust his due process claim in state court, the state court denied Brown’s petition for relief, apparently because, *inter alia*, it ruled that a petition for discharge under Wis. Stat. § 980.09 was an adequate remedy and habeas corpus was therefore unavailable. *See* Doc. 34, at 6-7. The State then used this ruling to argue that Brown was obligated to petition for discharge under section 980.09 in order to exhaust his claim. *See* SA65. The district court, however, correctly rejected the State’s argument because section 980.09 “provides a procedure only for committees whose mental condition has improved since their initial commitment” and does not authorize a challenge to the constitutionality of that commitment. SA66; *see* Wis.

²¹ Brown is now aware that the appellant in No. 07-3278 did pursue a *Knight* petition in state court, which the Wisconsin Court of Appeals thoroughly misconstrued and then dismissed in an unpublished opinion. *McGee*, 2007 WL 1062175, at *3-*4. Even if, contrary to the explicit limitation of *Knight*’s holding to “criminal” cases, *McGee*’s case is taken as an indication that a *Knight* petition can be filed in the context of an appeal from a civil commitment proceeding, this obscure procedure certainly “is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights.” *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

Stat. § 980.09 (“The court shall deny the petition * * * unless * * * the person’s condition has changed since the date of his or her initial commitment * * *”). Therefore, a proceeding under section 980.09 also does not provide Brown with a means of bringing an ineffective assistance claim.

In addition, for the same reasons discussed in Part II.B.1, *supra*, Brown’s trial counsel was ineffective for failing to raise his due process claim at the outset of his commitment proceeding. The State may contend that this issue is defaulted under the rule of *State v. Escalona-Naranjo*, 517 N.W.2d 157 (Wis. 1994), which interpreted Wisconsin’s “*postconviction relief*” statutes (which are inapplicable to Brown’s case) as generally requiring “*criminal defendants*” to raise such ineffective assistance claims on direct appeal. *Id.* at 163-64 (emphasis added). The Wisconsin Supreme Court, however, has specifically reserved the question whether *Escalona-Naranjo* applies to civil commitment cases. *Bush*, 699 N.W.2d at 87 n.8. In the absence of an on-point Wisconsin decision, the Court should predict that Wisconsin would adopt the “better-reasoned approach” “that failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim.” *Massaro v. United States*, 538 U.S. 500, 504, 509 (2003); *cf. Gomez v. Jaimet*, 350 F.3d 673, 678 (7th Cir. 2003) (observing that *Massaro* is based on jurisprudential policies that “logically * * * may extend to ineffective assistance claims arising out of state court,” although its “holding * * * is not legally binding

on states"). Under that approach, the issue of trial counsel's effectiveness also has not been defaulted.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and Brown's petition for a writ of habeas corpus should be granted.

July 24, 2008

Respectfully submitted,

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No. 08-1171

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRUCE N. BROWN,)	Appeal from the United States
	)	District Court for the Eastern
Petitioner-Appellant	)	District of Wisconsin, Milwaukee
	)	Division
v.)	
	)	Case Number 2:06-C-753
STEVE WATTERS,)	
)	
Respondent-Appellee.)	Hon. Lynn Adelman
)	
)	

APPENDIX OF PETITIONER-APPELLANT BRUCE N. BROWN

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

BRUCE N. BROWN,
Petitioner,

v.

Case No. 06C0753

STEVE WATTERS,
Respondent.

DECISION AND ORDER

Pro se petitioner Bruce N. Brown, who is civilly committed as a violent sexual offender under Wis. Stat. Ch. 980, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner alleges that his confinement violates his right to substantive due process of law because it is based on “mental disorders” – Paraphilia-Not Otherwise Stated (“NOS”)-Nonconsent and Antisocial Personality Disorder (“APD”) – that are insufficient to justify his loss of liberty. This is so, petitioner asserts, because Paraphilia-NOS-Nonconsent is not recognized by the medical community and APD is over inclusive.

I. BACKGROUND

In 1984, a Wisconsin court convicted petitioner of first-degree sexual assault and endangering safety and sentenced him to twenty years in prison. In 1996, petitioner was paroled, but later his parole was revoked. In 1998, as petitioner was approaching his release date, Wisconsin petitioned to civilly commit him under Ch. 980. At petitioner’s commitment trial, the state called psychologist Dennis Doren as an expert witness. Doren testified that he diagnosed petitioner with Paraphilia-NOS-Nonconsent and APD. He testified that Paraphilia-NOS-Nonconsent led petitioner to experience “recurrent, intense

sexual fantasies, sexual urges, and/or behaviors involving” nonconsenting persons and that it affected petitioner’s ability to make decisions and made it difficult for him to control his behavior. (Answer Ex. B at 8.) As to APD, Doren defined the disorder as a pattern of behavior showing disregard for the rights of others and involving impulsive actions. He testified that petitioner had shown that, due to the APD, “either he can’t control himself, or he doesn’t care about what he’s doing to the victims.” (Id. at 8-9.) On cross-examination, Doren stated that he had coined the Paraphilia-NOS-Nonconsent diagnosis. He testified that neither the diagnostic manual of mental disorders (the DSM-IV-TR) nor any professional associations for psychologists recognized a diagnosis by that name. A defense witness testified that Paraphilia-NOS-Nonconsent was not a proper diagnosis.

The trial court instructed the jury that before declaring petitioner to be a sexually violent person, it would have to find that petitioner had been convicted of a sexually violent offense, that he had a mental disorder and that his disorder made him dangerous to others. It stated that a mental disorder is:

a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards. . . . You are not bound by medical opinions, labels, or definitions.

(Id. at 16.) The jury found petitioner to be a sexually violent person and the Milwaukee County Circuit Court committed him.

Petitioner appealed to the state court of appeals, arguing that the admission of hearsay evidence and actuarial evidence violated his right to due process, the trial court erred in not providing a special verdict form, and his commitment violated due process

because the state failed to prove any overt act indicating dangerousness. The state court of appeals affirmed and the state supreme court denied review.

On July 12, 2006, petitioner filed the present action. On July 23, 2007, I found that petitioner had failed to exhaust his state remedies and stayed the case so that petitioner could present his claims to the state courts. Petitioner filed a motion in state court, and that court promptly dismissed it after noting that state habeas relief was unavailable to Ch. 980 committees and that, even if habeas relief were available, petitioner had shown no good reason for failing to raise his constitutional claims on direct appeal. After the parties notified me of the state court's order, I reopened the case and ordered them to submit additional materials relevant to the issue of procedural default.

II. DISCUSSION

It is clear that petitioner procedurally defaulted his constitutional claims and petitioner offers no reasonable argument to the contrary. "When a petitioner has procedurally defaulted a claim, a federal court cannot reach the merits of that claim unless the petitioner demonstrates: (1) cause for and actual prejudice arising from failing to raise the claim as required, or (2) that enforcing the default would lead to a fundamental miscarriage of justice." Gomez v. Jaime, 350 F.3d 673, 679 (7th Cir. 2003) (internal quotation marks omitted). Petitioner asserts that he did not default his claims, rather his public defender defaulted his claims. I interpret this as an attempt on the part of petitioner to establish "cause" for his default, given that a petitioner may do so by demonstrating that his appellate counsel was ineffective. Edwards v. Carpenter, 529 U.S. 446, 451 (2000). However, "a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas

petitioner can satisfy the ‘cause and prejudice’ standard with respect to the ineffective-assistance claim itself.” Id.; Lewis v. Sternes, 390 F.3d 1019, 1026 (7th Cir. 2004). Petitioner has not exhausted a claim that his appellate counsel was ineffective and he has not argued that he can show good cause for this default.

Petitioner also argues that he has suffered a fundamental miscarriage of justice. The fundamental miscarriage of justice exception applies when a petitioner can prove that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Murray v. Carrier, 477 U.S. 478, 496 (1986). The Supreme Court has suggested that a petitioner must make such a showing with reference to new evidence that was either not available at the time of trial or not presented at trial. Schlup v. Delo, 513 U.S. 298, 329 (1995). Thus, the Seventh Circuit has stated that, “without new evidence of innocence, even a meritorious constitutional claim is not sufficient to allow a habeas court to reach the merits of a procedurally defaulted claim.” United States ex rel. Bell v. Pierson, 267 F.3d 544, 551-52 (7th Cir. 2001); see also Gomez, 350 F.3d at 679-80 (discussing the kind of evidence that qualifies as “new evidence”). The requirement of new evidence, developed in criminal cases, seems inappropriate as applied to a civil committee. In a civil commitment trial, the question is whether the defendant has a mental disorder that renders him dangerous. In this context, it is hard to imagine that anything could constitute “new evidence of innocence.” Thus, it would make sense to modify the standard for civil committees challenging their commitments.

In the present case, though, I need not resolve this issue. Although in staying this case, I found that it was not absolutely clear that petitioner could not show entitlement to relief, upon further reflection on the applicable law, I am satisfied that petitioner’s claims

fail on the merits. The Due Process Clause has a substantive component that bars “arbitrary, wrongful government actions.” Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

The Supreme Court has found involuntary civil commitment of a particular class of violent offenders to be consistent with due process only when:

- (1) the confinement takes place pursuant to proper procedures and evidentiary standards,
- (2) there is a finding of dangerousness either to one's self or to others, and
- (3) proof of dangerousness is coupled with the proof of some additional factor, such as a mental illness or mental abnormality.

Kansas v. Crane, 534 U.S. 407, 409-10 (2002) (internal quotation marks omitted).

A state has wide latitude in defining a term like “mental illness” or “mental abnormality.” Id. at 410. However, the definition must “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.” Id. at 413. In order to do so, the state must minimally show that an offender experiences difficulty controlling his violent behavior. Id. at 412-13; see also Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (stating that requiring states to prove not only dangerousness but also mental illness “serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control”); State v. Post, 197 Wis. 2d 279, 306 (1995) (stating that

[t]he key to the constitutionality of the definition of mental disorder in chapter 980 is that it requires a nexus – persons will not fall within chapter 980's reach unless they are diagnosed with a disorder that has the specific effect of predisposing them to engage in acts of sexual violence. Not all persons who commit sexually violent crimes can be diagnosed as suffering from mental disorders, nor are all persons with a mental disorder predisposed to commit sexually violent offenses.)

It need not be “impossible” for the committee to control his behavior, but it must be “difficult.” Crane, 534 U.S. at 411.

Thus, one could say that the “legal” definition of mental illness, in a commitment case such as petitioner’s, is a predisposition to commit violent acts and difficulty controlling such predisposition. This may or may not coincide with any particular psychological or medical diagnosis. See Hendricks, 521 U.S. at 359 (stating that “legal definitions” regarding mental illness “need not mirror those advanced by the medical profession”); Post, 197 Wis. 2d at 306 (discussing the “imperfect fit” between the law and clinical labels in the DSM-IV-TR in the context of a Ch. 980 challenge). Thus, a diagnosis that is not generally recognized in the medical community may be sufficient to satisfy due process concerns and, conversely, a diagnosis that is widely recognized may be insufficient. See State v. Klein, 124 P.3d 644, 656-57 (Wash. 2005) (Sanders, J., dissenting) (arguing that drug addiction should not be considered a mental disease for commitment purposes even though it is included in the DSM-IV-TR).

As stated, petitioner claims that Wisconsin violated his right to substantive due process by committing him based on a diagnosis of Paraphilia-NOS-Nonconsent because it is not a medically recognized disorder. Doren testified that Paraphilia-NOS-Nonconsent caused petitioner to experience difficulty controlling his pathological impulses to have sex with non-consenting individuals and rendered him dangerous. I presume that petitioner believes otherwise; he thinks that he can control himself. However, the fact that the DSM-IV-TR does not refer to a specific disorder called “Paraphilia-NOS-Nonconsent” and the fact that other experts do not recognize the disorder do not necessarily indicate that petitioner can control himself. That was the issue for the jury to resolve. Because the jury

resolved the issue in favor of the state, petitioner's confinement does not violate the Due Process Clause.

This is not to say that anything goes. I presume that a psychologist could render an opinion that an individual has a disorder characterized by an inability to avoid criminal behavior that is so irrational or unpersuasive that it would not support indefinite civil commitment consistent with the Due Process Clause. However, this case does not present such a diagnosis. While the name "Paraphilia-NOS-Nonconsent" may be novel, the diagnosis appears to be consistent with recognized diagnostic principles. The DSM-IV-TR includes a disorder called "Paraphilia Not Otherwise Specified," which includes "Paraphilias that do not meet the criteria for any of the specific categories." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Text Revision (DSM-IV-TR) 576 (4th ed. 2000). And it states that "[t]he essential features of a Paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects; 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months. Id. at 566 (emphasis added). Courts have upheld other Wisconsin commitments based on a diagnosis of non-specified paraphilia involving a predisposition to commit rape, McGee v. Bartow, Case No. 06-C-1151, 2007 U.S. Dist. LEXIS 62470, at *6-8 (E.D. Wis. Aug. 23, 2007); Johnson v. Hunter, No. C 05-02064 SI, 2006 U.S. Dist. LEXIS 66455, at *5-6 (N.D. Cal. Aug. 31, 2006); Post, 197 Wis. 2d at 119, and other states have committed individuals on the basis of such a diagnosis, see, e.g., Seling v. Young, 531 U.S. 250, 255 (2001); Neely v. Hayman, Civil Action No. 06-5190 (PGS), 2007 U.S. Dist. LEXIS 67283, at *4-5 (D.N.J. Sept. 12, 2007).

Because petitioner's first claim fails, his second claim – that the diagnosis of APD is insufficient to support his commitment because it is over inclusive – also fails. The Seventh Circuit has stated that a diagnosis of APD can justify commitment where there is a finding that his mental disorder would likely cause him to be dangerous in the future. Adams v. Bartow, 330 F.3d 957, 962-63 (7th Cir. 2003); see also McGee, 2007 U.S. Dist. LEXIS 62470, at *6-8 (finding that Adams precluded a claim very similar to petitioner's, involving a diagnosis of Paraphilia-NOS and APD). In the present case, I previously found that if petitioner prevailed on his first claim, he might also prevail on his second claim because it was not clear whether the jury made its finding of future dangerousness with respect to the first or second diagnosis. However, given my resolution of petitioner's first claim, regardless of whether the jury believed that Paraphilia-NOS-Nonconsent or APD or some combination of the two disorders made petitioner dangerous, its finding was sufficient to render petitioner's subsequent commitment constitutional.

As such, petitioner has procedurally defaulted his claims and, in any case, they fail on the merits.

III. CONCLUSION

For the reasons stated,

IT IS ORDERED that Bruce N. Brown's petition for a writ of habeas corpus is **DENIED**.

IT IS FURTHER ORDERED that the present action is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that the clerk of court enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 17 day of December, 2007.

/s _____
LYNN ADELMAN
District Judge

United States District Court

EASTERN DISTRICT OF WISCONSIN

JUDGMENT IN A CIVIL CASE

BRUCE N. BROWN,
Plaintiff

v.

CASE NUMBER: 06-C-753

STEVE WATTERS,
Defendant

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Bruce N. Brown's petition for a writ of habeas corpus is DENIED and this case is DISMISSED.

December 17, 2007

Date

JON W. SANFILIPPO

Clerk

/s

(By) Deputy Clerk

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

BRUCE N. BROWN,
Petitioner,

v.

Case No. 06C0753

STEVE WATTERS,
Respondent.

ORDER

On December 17, 2007, I denied Bruce Brown's petition for a writ of habeas corpus. On December 26, 2007, petitioner filed a notice of appeal of such denial along with a request to proceed in forma pauperis on appeal and a motion for a certificate of appealability.

I. REQUEST TO PROCEED IN FORMA PAUPERIS

At the district level, petitioner paid the \$5 filing fee. At the appellate level, the filing fee is \$455; the difference in cost makes petitioner's current request understandable.

Title 28 U.S.C. § 1915(a)(1) authorizes the commencement of an appeal without prepayment of fees by a person who submits an affidavit that includes a statement of all assets he possesses and states that he is unable to pay such fees. Section 1915(a)(3) adds that an appeal may not be taken in forma pauperis if the district court certifies in writing that the appeal is not taken in good faith. "Good faith" is an objective standard. Coppedge v. United States, 369 U.S. 438, 446 (1962); Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000). An appeal is taken in "good faith" if it seeks review of any issue that is not clearly frivolous, Coppedge, 369 U.S. at 446; Lee, 209 F.3d at 1026, meaning that a reasonable person could suppose it to have at least some legal merit, Lee, 209 F.3d at 1026; Howard v. King, 707 F.2d 215, 219-20 (5th Cir. 1983). The existence of any non-frivolous issue on appeal is sufficient to require the court to grant the petition for leave to proceed in forma pauperis. Dixon v.

Pitchford, 843 F.2d 268, 270 (7th Cir. 1988). District courts must not apply an inappropriately high standard when making good faith determinations, and the denial of a certificate of appealability does not necessarily warrant denial of in forma pauperis status. Pate v. Stevens, 163 F.3d 437, 439 (7th Cir. 1998).

I will grant petitioner permission to appeal in forma pauperis. Petitioner has filed an affidavit of indigence, which shows that he lacks the funds necessary to pay the \$455 appellate filing fee. And although I denied his petition, petitioner's claims are not frivolous.

II. MOTION FOR A CERTIFICATE OF APPEALABILITY

Before a habeas petitioner may take an appeal to the Seventh Circuit, I must consider whether to grant him a certificate of appealability pursuant to 28 U.S.C. § 2253(c). Fed. R. App. P. 22(b). The certificate of appealability may issue only if the applicant makes a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). The standard for making a "substantial showing" is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted) (citing Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983)). If the court issues a certificate of appealability it must indicate on which specific issue or issues the petitioner has satisfied the "substantial showing" requirement. See 28 U.S.C. § 2253(c)(3).

In denying the present petition, I found that the petitioner had procedurally defaulted his claim and that petitioner's substantive due process claim failed on the merits. Given the nature of petitioner's confinement and his claim, this is a case where my rulings on the procedural issue and the merits are intertwined.

It is clear that petitioner procedurally defaulted his substantive due process claim in state court. However, if petitioner could succeed on the merits of his claim, I believe that such success would establish that a fundamental miscarriage of justice had occurred, entitling petitioner to relief notwithstanding his procedural default. The miscarriage of justice exception to the procedural default doctrine applies when a petitioner can prove that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Murray v. Carrier, 477 U.S. 478, 496 (1986). A petitioner must make such a showing with reference to new evidence that was either not available at the time of trial or not presented at trial. Schlup v. Delo, 513 U.S. 298, 329 (1995); United States ex rel. Bell v. Pierson, 267 F.3d 544, 551-52 (7th Cir. 2001). As I noted in my December 17 decision, this standard seems inappropriate as applied to petitioner. In a civil commitment trial, the question is not whether the defendant is guilty or innocent, but whether he does or does not have a mental disorder that renders him violent. Thus, it does not make sense to apply the Carrier/Schlup standard, with its references to innocence and new evidence, to a civil committee challenging the legitimacy of the mental disorder with which he was diagnosed. In my view, if petitioner could prevail in showing that his diagnosis is constitutionally insufficient to justify custody, then it would be clear that this constitutional deprivation worked a fundamental miscarriage of justice and his petition should be granted notwithstanding his procedural default.

Given my understanding of the default issue, if reasonable jurists would find my assessment of petitioner’s constitutional claims debatable or wrong, they would also find that he had overcome his procedural default. Thus, I turn to the merits of petitioner’s claim. Petitioner asserts that his confinement violates his right to substantive due process of law because it is based on “mental disorders” – Paraphilia-Not Otherwise Stated (“NOS”)- Nonconsent and Antisocial Personality Disorder (“APD”) – that are insufficient to justify his

loss of liberty. In my December 17 decision, I noted that a jury found that petitioner had a mental disorder that made it difficult for him to control his violent tendency to have sex with nonconsenting individuals and concluded that his confinement was thus constitutionally permissible. I found that the precise labeling of Paraphilia-NOS-Nonconsent and its relationship to the DSM-IV did not render petitioner's confinement unlawful. Further, I found that because petitioner's claim regarding the antisocial personality disorder diagnosis was tied to his first claim, it failed too.

I believe that jurists of reason would find my analysis debatable. I interpreted Supreme Court and Seventh Circuit precedent as giving states a tremendous amount of freedom in creating categories of mental disorders so long as states define disorders with reference to difficulty controlling behavior. However, as I stated in my December 17 decision, there must be some line to be drawn even among diagnoses that refer to an inability to avoid criminal behavior. I decided that petitioner's diagnosis was acceptable. However, petitioner cited a scholarly article supporting his theory that Paraphilia-NOS-Nonconsent is a bogus disorder. Zander, Thomas, "Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis," Journal of Sexual Offender Civil Commitment: Science and the Law, 1 (2005). I also note that my colleague District Judge Griesbach recently issued a certificate of appealability to one of petitioner's fellow committees on a very similar issue. McGee v. Bartow, Case No. 06-C-1151(E.D. Wis. Sept. 17, 2007) (order granting COA). That appeal is currently pending before the Seventh Circuit Court of Appeals and may even be appropriate for consolidation with petitioner's appeal. McGee v. Bartow, Appeal No. 07-3278.

Thus, I will certify for appeal both the procedural and the substantive questions presented by this case.

For the reasons stated,

IT IS ORDERED that petitioner's motion to proceed in forma pauperis is **GRANTED**.

IT IS FURTHER ORDERED that petitioner's motion for a certificate of appealability is **GRANTED**.

Dated at Milwaukee, Wisconsin, this 7 day of January, 2008.

/s _____
LYNN ADELMAN
District Judge

**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)
AND SEVENTH CIRCUIT RULE 32**

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7) and Seventh Circuit Rule 32 for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2002 in Book Antigua 13 point font (except for the footnotes, which are in 12 point font). The length of this brief is 13,897 words.

Jack L. Wilson

Dated: July 24, 2008

CERTIFICATE OF COMPLIANCE WITH SEVENTH CIRCUIT RULE 30

I hereby certify that the required short appendix and separate appendix contain all material that is required pursuant to Seventh Circuit Rule 30(a) and Rule 30(b).

Jack L. Wilson

Dated: July 24, 2008

CERTIFICATE OF COMPLIANCE WITH SEVENTH CIRCUIT RULE 31(e)

I hereby certify that the compact disc containing the digital version of the brief, required short appendix, and separate appendix, includes all materials that are available electronically in searchable PDF format.

Jack L. Wilson

Dated: July 24, 2008

CERTIFICATE OF SERVICE

I certify that on the 24th day of July 2008 I filed an original and fifteen copies of the foregoing BRIEF FOR PETITIONER-APPELLANT BRUCE N. BROWN, an original and ten copies of the SEPARATE APPENDIX OF PETITIONER-APPELLANT BRUCE N. BROWN, and one digital copy of those materials, by sending them by UPS overnight delivery to:

Clerk of the Court
United States Court of Appeals for the Seventh Circuit
Room 2722
219 South Dearborn Street
Chicago, IL 60604

I further certify that on the 24th day of July 2008, I served two copies of the foregoing BRIEF FOR PETITIONER-APPELLANT BRUCE N. BROWN, one copy of the SEPARATE APPENDIX OF PETITIONER-APPELLANT BRUCE N. BROWN, and one digital copy of those materials, by UPS overnight delivery to:

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Attorney for Respondent-Appellee

Jack L. Wilson

No. 08-1171

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRUCE N. BROWN,	)	Appeal from the United States
	)	District Court for the Eastern
Petitioner-Appellant	)	District of Wisconsin, Milwaukee
	)	Division
v.)	
	)	Case Number 2:06-C-753
STEVE WATTERS,)	
)	
Respondent-Appellee.)	Hon. Lynn Adelman
)	
)	

SEPARATE APPENDIX OF PETITIONER-APPELLANT BRUCE N. BROWN

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**COURT OF APPEALS
DECISION
DATED AND FILED**

December 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2003AP3252

Cir. Ct. No. 1998CI14

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE COMMITMENT OF BRUCE N. BROWN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRUCE N. BROWN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Bruce Brown appeals from a judgment finding him to be a sexually violent person under Chapter 980 of the Wisconsin Statutes and

ordering him committed to the custody of the Department of Health and Family Services. He challenges evidentiary rulings relating to the testimony of an expert witness, the denial of a requested special verdict and jury instructions, and the lack of evidence showing that he was presently dangerous as evidenced by a recent overt act. We reject each of Brown's arguments and affirm. For convenience, we will discuss the facts necessary to decide each issue along with that issue.

Testimony About Actuarial Instruments

¶2 The State's expert psychologist, Dennis Doren, employed a series of actuarial instruments to assist him in assessing the probability that Brown would commit future acts of sexual violence. These included the Rapid Risk Assessment For Sex Offender's Recidivism (RRASOR), the Static-99, and the Minnesota Sex Offender Screening Tool Revised (MnSOST-R). Brown contends that Doren should not have been allowed to testify about the results of the actuarial instruments because: (1) the instruments were not the type of data reasonably relied upon by experts diagnosing mental disorders causing a substantial probability of sexual violence under WIS. STAT. § 907.03 (2003-04)¹; (2) the actuarial evidence was insufficiently probative; (3) the instruments were insufficiently reliable to satisfy due process; and (4) the actuarial evidence unduly prejudiced Brown.

¶3 We first note that Brown's argument regarding WIS. STAT. § 907.03 is misplaced. That statute provides:

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Actuarial instruments are not themselves “facts or data.” Rather, they are a method for evaluating data. While some of the historical information about Brown to which the actuarial instruments were applied might fall within this statute, Brown has not identified any specific fact used in the administration of the instruments to which he objected as otherwise inadmissible.

¶4 Brown’s challenge to the reliability of the actuarial instruments also misses the point. Brown contends that he has a due process right to have his commitment based upon reliable evidence, even though Wisconsin has elected not to follow the federal rule set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which gives trial courts a broad gatekeeper role over the admission of scientific evidence. However, “Wisconsin, unlike the federal courts, considers the reliability of scientific evidence a question of weight and credibility for the trier of fact to decide.” *City of West Bend v. Wilkens*, 2005 WI App 36, ¶23, 278 Wis. 2d 643, 693 N.W.2d 324. In other words, the Wisconsin rule is *not* that individuals may be committed based upon unreliable evidence, but that in this state it is the jury’s function to determine what evidence is reliable. If the jury determines that evidence offered by an expert is reliable, there is no due process violation. The test for admissibility remains simply whether: the evidence is relevant; the witness offering it is qualified as an expert; and the evidence will

assist the jury in determining an issue of fact. *State v. Peters*, 192 Wis. 2d 674, 687, 534 N.W.2d 867 (Ct. App 1995).²

¶5 Finally, we also reject Brown's second and fourth contentions that the trial court should have barred Doren's testimony on the results of the actuarial instruments because it was not probative and was unduly prejudicial. The crux of both these arguments appears to be that, because the instruments only measure *general* recidivism rates, they are not probative as to the probability that an individual will commit a future *sexually violent offense because of mental illness*, and were thus likely to mislead the jury. We agree that, to be admissible, evidence must be relevant under WIS. STAT. §§ 904.01 and 904.02, in that it relates to a fact or proposition of consequence to the determination of the action, and its probative value must not be substantially outweighed by the danger of unfair prejudice or confusion of issues under WIS. STAT. § 904.03. We are satisfied, however, that the trial court reasonably exercised its discretion here in determining that the probative value of the actuarial testimony was not substantially outweighed by its prejudicial effect. While the specific measure of recidivism used in the instruments is not precisely the same as the future risk which needs to be determined, the instruments could nonetheless help a jury draw a conclusion as to that future risk. *See State v. Tainter*, 2002 WI App 296, ¶20, 259 Wis. 2d 387, 655 N.W.2d 538 (holding that the trial court properly found actuarial instruments relevant because they assist in assessing an offender's future risk).

² We note that, in affirming the admission of Doren's testimony regarding the results of the actuarial instruments he employed, we do not thereby affirm the validity of his testimony or his methods. Under Wisconsin law governing the admissibility of expert testimony, that determination is to be made by the jury, not by this court or the circuit court.

Reference to American Psychiatric Association

¶6 Doren diagnosed Brown as suffering from “Paraphilia Not Otherwise Specified—Nonconsent.” He admitted that he created the “nonconsent” portion of the diagnosis himself, because he believed there to be a gap in the DSM-IV-TR. When asked whether the “not otherwise specified category is a lesser category of diagnosis,” Doren responded, over a sustained objection, “I’m quite sure it’s not a lesser category. I checked with the American Psychiatric Association.” Brown claims this reference to the American Psychiatric Association was hearsay which improperly buttressed the validity of Doren’s diagnosis and therefore entitles him to a new trial.

¶7 An evidentiary error does not require a new trial unless it “has affected the substantial rights of the party seeking to reverse or set aside the judgment.” WIS. STAT. RULE 805.18(2). The test for whether an error was prejudicial, as opposed to harmless error, is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Hannemann v. Boyson*, 2005 WI 94, ¶57, 282 Wis. 2d 664, 698 N.W.2d 714 (citations omitted). An error cannot be said to have contributed to the verdict if it is clear that a rational jury would have reached the same result absent the error. *Id.*

¶8 Brown has not convinced us that Doren’s reference to the American Psychiatric Association was prejudicial. First of all, his testimony that he “checked” with the association does not reveal the substance of what the association told him. Moreover, even inferring that someone at the association agreed with Doren that the “not otherwise specified” designation is not a lesser category of a paraphilia diagnosis, that does not mean that the association agreed

that “nonconsent” was a proper designation. In short, it is clear from the transcripts that the issue of whether Doren’s diagnosis was valid was fully tried, and the absence of Doren’s isolated reference to having checked with the association would not have led the jury to reach a different result.

Special Verdict

¶9 Brown requested that the trial court give the jury a special verdict form “to reflect the four different elements ... because of the sort of difficult nature of the testimony, because of the discrete nature of the inquiries, and because [counsel] thought it would prevent any problem in depriving the ... respondent of a unanimous jury verdict.”³ The trial court denied the motion, analogizing the case to criminal matters and reasoning that since a single verdict is sufficient for a first-degree murder charge, it is adequate for a Chapter 980 case.

¶10 Brown contends that the trial court erroneously exercised its discretion in denying his special verdict request because the general verdict form used in a first-degree homicide trial was an improper factor to consider. We disagree. Brown himself had argued that the “difficult nature of the testimony” warranted a special verdict form. We see no reason why the trial court could not then compare the difficulty or complexity of the issues in a Chapter 980 case to those in a homicide case in deciding whether a special verdict form was necessary.

³ The State claims that one of the four questions Brown asked the court to include on the special verdict misstated the law. We cannot evaluate that claim because the jury instruction conference was not recorded, and counsel’s subsequent offer of proof only asked that each element be listed individually on the verdict, without restating what those elements were. *See Air Wisconsin, Inc. v. North Central Airlines, Inc.*, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980).

Nor, for that matter, do we see what prejudice Brown would have suffered, since the verdict actually given to the jury was itself proper.

Absence of a Recent Overt Act

¶11 This case arose in a somewhat different posture than the usual Chapter 980 case in that the State did not petition to commit Brown until he was approaching his second release from prison on the underlying sexually violent offense, following the revocation of his earlier parole. Brown contends that, once an offender has been released from custody for a sexually violent act, substantive due process requires a showing that he or she has committed a recent overt act before proceeding on a commitment. In *State v. Carpenter*, 197 Wis. 2d 252, 275, 541 N.W.2d 105 (1995), however, the Wisconsin Supreme Court explicitly rejected a contention “that the State must establish an overt act in order to establish probable cause of dangerousness because he had been released from custody prior to the filing of the petition.”

¶12 Brown attempts to distinguish the holding in *Carpenter* from the present case on the grounds that the court there did not mention substantive due process in its analysis. That argument ignores the fact that the *Carpenter* court did expressly distinguish the facts before it from those in a substantive due process case from Washington—specifically *In re Young*, 857 P.2d 989 (Wash. 1993). Indeed, *Young* is one of the cases which Brown now cites in support of his position. We are therefore persuaded that *Carpenter* did implicitly reject the same substantive due process argument presented here, and we are bound by that decision. See *State v. Clark*, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

BRUCE N. BROWN,
Petitioner,

v.

Case No. 06C0753

STEVE WATTERS,
Respondent.

DECISION AND ORDER

Pro se petitioner Bruce N. Brown, who is civilly committed as a violent sexual offender under Wis. Stat. Ch. 980, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner alleges that his confinement violates his right to substantive due process of law because neither of the “mental disorders” that he was diagnosed with, Paraphilia-Not Otherwise Stated (“NOS”)-Nonconsent and Antisocial Personality Disorder (“APD”), render him a sexually violent person. This is so, according to petitioner, because Paraphilia-NOS-Nonconsent is not a medically recognized disorder and because APD is over-inclusive. Respondent now moves to dismiss for failure to exhaust state remedies.

I. BACKGROUND

In 1984, a Wisconsin court convicted petitioner of first-degree sexual assault and endangering safety and sentenced him to twenty years in prison. In 1996, petitioner was paroled, but fourteen months later his parole was revoked for non-violent rule violations. In 1998, as petitioner was approaching his release date, the State petitioned to civilly commit him under Ch. 980. A jury trial was held, and the State called Dr. Dennis Doren as an expert witness. Doren testified that petitioner was a sexually violent person because

he had Paraphilia-NOS-Nonconsent and APD. Doren acknowledged that the psychiatric community did not recognize the former disorder and that he had created it himself because he perceived a gap in the American Psychiatric Association's Diagnostic and Statistical Manual. The jury found petitioner to be a sexually violent person and the Milwaukee County Circuit Court committed him.

Petitioner appealed to the state court of appeals, arguing that the admission of hearsay evidence and actuarial evidence violated his right to due process, the trial court erred in not providing a special verdict form, and his commitment violated due process because the state failed to prove any overt act indicating dangerousness. The state court of appeals affirmed and the state supreme court denied review.

III. DISCUSSION

I may not consider the merits of petitioner's substantive due process claim unless he exhausted it in the state courts. And contrary to petitioner's statements, he has not done so. He argued due process claims to the state courts but on different grounds. As such, I turn to whether any state avenues for relief remain open. Petitioner claims that he has no available remedy in state court. However, the basis for this argument is that all state courts will follow the decision of the state court of appeals, to which he objected. Simply because petitioner thinks that he will lose in state court does not relieve him of the duty to provide the state courts a full and fair opportunity to decide his claims. As respondent points out, a state court remedy likely is available under Wis. Stat. § 782.01, which allows civilly committed people to bring a writ of habeas corpus action in state court. Therefore, the issue is properly one of exhaustion rather than procedural default. See Burgin v. Broglin, 900 F.2d 990, 995 (7th Cir. 1990).

Generally an unexhausted claim is dismissed without prejudice. However, the Supreme Court has authorized district courts to stay federal habeas petitions to enable petitioners to exhaust unexhausted claims in state courts without having the statute of limitations on federal habeas claims expire. See Rhines v. Weber, 544 U.S. 269 (2005). To grant a stay, a federal court must conclude that a petitioner may have good cause for failing to exhaust, that his unexhausted claim may have merit and that he has not been dilatory. Id. at 278. Although Rhines was decided in the context of “mixed” habeas petitions, that fact is immaterial. See Dolis v. Chambers, 454 F.3d 721, 725 (7th Cir. 2006). Further, I may grant a stay sua sponte. See Akins v. Kenney, 410 F.3d 451, 455-56 (8th Cir. 2005).

In the present case, petitioner contends that he has good cause for failing to exhaust because his appellate counsel was ineffective. This contention is plausible because plaintiff’s claim is obvious and, as discussed below, appears potentially meritorious. See Fetterly v. Paskett, 997 F.2d 1295, 1301 (9th Cir. 1993) (stating that district court should grant a stay where failure to exhaust may have been attributable to counsel’s ineffective assistance).

I now turn to the potential merit of petitioner’s claim. As for Doren’s diagnosis of Paraphilia-NOS-Nonconsent, petitioner argues that it is a violation of due process to confine him based on a diagnosis that the medical community does not recognize. Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for commitment as a sexually violent person, see Kansas v. Crane, 534 U.S. 407, 413 (2002), I have some doubt whether such an idiosyncratic “diagnosis” is sufficient. Id. (stating that the nature of the psychiatric

diagnosis is an important factor in determining whether an individual may be committed).

The Supreme Court has not abandoned the idea that a diagnosis must be medically justified. See Foucha v. Louisiana, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring); Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (stating that

A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.' These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.)

(internal citations omitted). Thus, assuming that Paraphilia-NOS-Nonconsent lacks a medical foundation, petitioner's claim is potentially meritorious.

Furthermore, I cannot say that petitioner will be unable to establish that the diagnosis of Paraphilia-NOS-Nonconsent is indistinguishable from the "dangerous but typical recidivist convicted in an ordinary criminal case." Crane, 534 U.S. at 413; see also Thomas K. Zander, Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis, 1 J. of Sexual Offender Civil Commitment: Science & The Law 17 (2005). The main diagnostic characteristic of Paraphilia-NOS-Nonconsent is having "recurrent, intense sexual fantasies, sexual urges, and/or behaviors involving" nonconsenting persons. (Answer Ex. B at 8.) This criterion raises questions about the disorder's ability to satisfy substantive due process, because it may be that every criminal convicted of a sexual crime could be diagnosed with the disorder. See Hendricks, 521 U.S. at 373 (Kennedy, J., concurring) ("If it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.").

Petitioner's argument concerning Doren's second diagnosis, APD, may also have merit. In order to commit an individual consistent with due process, the State must show that the person has a mental disorder and that the mental disorder makes it difficult for the person to control their behavior. See Crane, 534 U.S. at 412. Petitioner argues that his diagnosis of APD is over-inclusive and does not address his capacity to control his behavior. The Supreme Court has suggested caution in connection with APD. In Crane, the Court stated that Hendricks established an important distinction between "a dangerous sexual offender subject to civil commitment" and "other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." Crane, 534 U.S. at 412 (internal citations omitted). Subsequently, the Court noted that forty to sixty percent of the male prison population is diagnosable with APD. Id.; see also Foucha, 504 U.S. at 85.

The Seventh Circuit rejected an argument regarding APD similar to that of petitioner, but in a case in which there was also a finding that the APD would likely cause the prisoner to commit another sexually violent offense. Adams v. Bartow, 330 F.3d 957 (7th Cir. 2003). See also Linehan v. Milczark, 315 F.3d 920, 926-27 (8th Cir. 2003). In the present case, is not clear that the jury made any determination that APD contributed to petitioner's future dangerousness, because the verdict did not distinguish between petitioner's multiple diagnosed disorders. Further, there is less evidence of petitioner's dangerousness and than there was in Adams and Linehan. Petitioner has completed treatment programs. Although his parole was revoked subsequent to those treatment programs, the revocation resulted from non-violent rule violations. And petitioner lived among the public for fourteen months without any sexual violence. Petitioner has committed multiple offenses in the

past; however, respondent must still “explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct.” Foucha, 504 U.S. at 82.

Because petitioner may have good cause for failing to exhaust, may have a meritorious claim and has not been dilatory, I will stay the current action to allow petitioner to exhaust his claim in state court and avoid closing off federal relief.

Therefore,

IT IS ORDERED that the present proceeding be **STAYED** while petitioner pursues his substantive due process claim in state court. Petitioner has thirty days from the date of this order to file his claim in state court, and has thirty days after the exhaustion of his claim in state court to return here.

In view of my decision as to exhaustion,

IT IS FURTHER ORDERED that all pending motions are **DENIED**.

Dated at Milwaukee, Wisconsin this 23 day of July, 2007.

/s _____
LYNN ADELMAN
District Judge

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

BRUCE N. BROWN,
Petitioner,

v.

Case No. 06C0753

STEVE WATTERS,
Respondent.

ORDER

On July 16, 2006, Bruce N. Brown, who is civilly committed as a violent sexual offender under Wis. Stat. Ch. 980, filed a pro se petition for a writ of habeas corpus. Respondent moved to dismiss the petition for failure to exhaust or, in the alternative, based on procedural default. On July 23, 2007, I found that petitioner had failed to exhaust his claim and stayed the action so that he could return to state court and exhaust such claim. Petitioner then filed a state habeas petition in state court and such court dismissed his case on procedural grounds. Petitioner now brings a motion under Fed. R. Civ. P. 60(b), asking for relief from my July 23 order. Petitioner is somewhat confused about the nature of my order, as such order has already been effectuated; this case has been stayed. Presumably, petitioner hopes that I will lift the stay, which is not contrary to the July 23 order but was rather contemplated by the order.

Respondent has responded to petitioner's motion by noting that while the state habeas procedure was unavailable, petitioner may yet exhaust his claim through Wis. Stat. § 980.09, which allows civil committees to petition the state for release at any time. Thus, respondent asks me to maintain the stay until petitioner attempts this route. I disagree that

petitioner could bring the constitutional claim raised in the present action under § 980.09. Such section provides a procedure only for committees whose mental condition has improved since their initial commitment. It directs state courts to

deny the petition under this section without a hearing unless the petition alleges facts from which the court or jury may conclude the persons condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person.

Id.; see also In re Kruse, 296 Wis. 2d 130, 150 (Ct. App. 2006). The section does not provide a way for a committee to challenge the constitutionality of his initial commitment based on an argument that could have been raised at the time of initial commitment.

As such, I will deny petitioner's improper motion but will lift the stay on this case. The initial question that I must decide is whether I must dismiss the petition based on procedural default or whether petitioner can show the applicability of any exception to the procedural default rule. Both parties have already submitted some information relevant to this issue, but I will give each party an opportunity to file one additional brief solely on the issue of procedural default before I decide the issue.

Therefore,

IT IS ORDERED that petitioner's motion for relief is **DENIED**.

IT IS FURTHER ORDERED that the stay is lifted and this case is **REOPENED**.

IT IS FURTHER ORDERED that if petitioner wishes to provide the court with additional information relevant to the issue of procedural default, he must do so by **November 5, 2007**.

IT IS FURTHER ORDERED that if respondent wishes to provide the court with additional information relevant to the issue of procedural default, he must do so by **December 3, 2007**.

Dated at Milwaukee, Wisconsin this 15 day of October, 2007.

/s _____
LYNN ADELMAN
District Judge