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
	)	
	)	

REPLY BRIEF FOR PETITIONER-APPELLANT BRUCE N. BROWN

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SUMMARY OF THE ARGUMENT

The State does not deny that both the American Psychiatric Association ("APA") and the drafters of the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, IV-TEXT REVISION (4th ed.-text rev. 2000) ("DSM" or "DSM-IV-TR") have rejected Dr. Doren's self-created diagnosis of "Paraphilia NOS-Nonconsent." The State articulates its position bluntly: "Due process does not require that a mental disorder be accepted by the medical profession to serve as a basis for a sexually violent person commitment." Resp. Br. 15. This argument conflicts with the Supreme Court's decisions in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Kansas v. Crane*, 534 U.S. 407 (2002), and therefore must be rejected. The State also defends Dr. Doren's diagnosis on the ground that a number of other state evaluators have embraced it with great enthusiasm in sexually-violent-persons cases. *See* Resp. Br. 18-20. But the fact that a practice is rampant does not insulate it from constitutional scrutiny; to the contrary it requires a sharpened constitutional inquiry. *See* Part I, *infra*.

The State also does not deny that up to 80% of the male prison population and more than 7,000,000 Americans are diagnosable with Antisocial Personality Disorder ("APD") or that the APA has denounced APD as a basis for civil commitment. Rather, the State principally argues that *Adams v. Bartow*, 330 F.3d 957 (7th Cir. 2003), has already resolved this constitutional issue. However, *Adams*

was decided under AEDPA's narrow and deferential standard of review and held only that the state court's decision was not unreasonable under then-clearly established federal law. Addressing the issue *de novo* under *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Hendricks*, and *Crane*, the State's arguments fail because APD is too imprecise and overbroad to justify civil commitment under the Due Process Clause. *See* Part II, *infra*.

Thus, ***both*** diagnoses asserted as a basis for Brown's commitment are constitutionally invalid. Moreover, Brown's petition must be granted if ***either*** diagnosis is invalid. First, a general verdict must be set aside if the case was submitted to the jury on both constitutional and unconstitutional grounds. *See* Part V, *infra*. Second, the negation of either diagnosis satisfies the miscarriage-of-justice test. *See id.* Third, the ineffectiveness of Brown's state appellate counsel constitutes "cause" for his procedural default so that Brown need not establish a miscarriage of justice. *See* Part VI. Brown has not procedurally defaulted the ineffective assistance issue because the procedural rule on which the State relies is not firmly establishing and regularly followed. *See id.*

ARGUMENT

I. Because Dr. Doren's Self-Created Diagnosis Of "Paraphilia NOS-Nonconsent" Has Been Rejected By The Psychiatric Profession, It Is Not A Valid Basis For Commitment Under The Due Process Clause.

Both the APA and the drafters of the DSM have specifically and deliberately rejected the diagnosis "Paraphilia NOS-Nonconsent." *See* Pet. Br. 20-25. Nonetheless, the diagnosis is defended by Dr. Dennis Doren, an employee of the State and the State's expert witness in this case, for the purpose of civilly committing persons, such as Bruce Brown, who do not have any disorder recognized by the profession.[1] Indeed, at Brown's trial, "[Dr.] Doren acknowledged that the psychiatric community did not recognize the [diagnosis] and that he had created it himself because he perceived a gap in the [DSM-IV-TR]." SA60.

The State does not deny any of this. *See* Resp. Br. 4-5, 15-20.[2] Rather, the State takes the position that it is free to "craft" its own diagnoses without regard

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1 *See generally* Dennis M. Doren, EVALUATING SEX OFFENDERS: A MANUAL FOR CIVIL COMMITMENTS AND BEYOND 63-85 (2002); Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT 17, 41-47 (2005); *see also* Doren, *supra*, at 54 (advising that a diagnosis is necessary in commitment proceedings because, "[i]n effect, these laws all specifically *require* that the examiners determine each offender's mental condition related to his sexual offending").

2 Brown's opening brief also explains that Dr. Doren's diagnosis of "Paraphilia NOS-Nonconsent" is inconsistent with the variants of Paraphilia NOS that the DSM does recognize, all of which are relatively rare and inherently nonviolent, and with the treatment of rape in other sections of the DSM. *See* Pet. Br. 20-21. The State does not appear to take issue with either point. *See* Resp. Br. 4-5, 15-20.

to the opinions of the psychiatric community and that a "jury, not the consensus of mental health professionals," is the only judge of the validity of such state-created "disorders." *Id.* at 17-18; *see also id.* at 15 ("Due process does not require that a mental disorder be accepted by the medical profession to serve as a basis for a sexually violent person civil commitment."). The State's argument rests entirely on the Supreme Court's unexceptional statement that "legal definitions" of "mental health concepts" need "not fit precisely with the definitions employed by the mental health community" or "mirror those advanced by the medical profession." *Hendricks*, 521 U.S. at 359; *see* Resp. Br. 16-17. This modest proposition is too slender a reed to support the State's far-reaching argument. It is one thing to say that legal definitions need not "fit precisely" or perfectly "mirror" those of the psychiatric profession, but quite another to assert that the profession's views are altogether ***irrelevant***. *Hendricks* and the Court's subsequent decision in *Crane* do not support such a monumental leap. To the contrary, they show that involuntary commitment based on a diagnosis rejected by the psychiatric profession does not comport with due process.

In *Hendricks*, the Court stated that "Hendricks' diagnosis as a pedophile"—"a condition that the psychiatric profession itself classifies as a serious mental disorder"—"plainly suffices for due process purposes." 521 U.S. at 360 (citing the DSM-IV). Likewise, in his concurring opinion, Justice Kennedy—who pro-

vided the fifth vote in support of the majority opinion—emphasized that Hendricks' "diagnosis is at least described in the DSM-IV." *Id.* at 372 (Kennedy, J., concurring). Finally, Justice Breyer's dissent also cited the fact that "the psychiatric profession itself classifies [pedophilia] as a serious mental disorder" as the first of "three * * * circumstances that, taken together, convince[d] [him] that [the state] ha[d] acted within the limits that the Due Process Clause substantively sets." *Id.* at 374-75 (Breyer, J., joined by Stevens & Souter, JJ., dissenting) (citing the DSM-IV).

And in *Crane*, in an opinion by Justice Breyer, the Court again made clear that a diagnosis that "'the psychiatric profession itself classifies' * * * 'as a serious mental disorder'" was an important, if not a necessary, foundation for its decision in *Hendricks*. *Crane*, 534 U.S. at 410 (quoting *Hendricks*, 521 U.S. at 360). The Court further explained that *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). Critically, the Court stated that "[t]he presence of what the 'psychiatric profession itself classified as a serious mental disorder' helped to make that distinction in *Hendricks*." *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 360) (internal alterations omitted); *see also Foucha*, 504 U.S. at 88 (O'Connor, J.,

concurring) ("I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so * * *.").

In light of the Supreme Court's consistent reliance on recognition by the "psychiatric profession itself" and the DSM, the State's contention that it can confine individuals based on diagnoses that the profession and DSM have rejected is not persuasive. The State's further contention that "it [is] up to the jury, not the consensus of mental health professionals," to sort out the validity of such state-created diagnoses on a case-by-case basis (Resp. Br. 17-18) also fails. As Justice Souter explained during oral argument in *Hendricks*, "there has got to be a medically recognized category within which the particular individual falls"—*i.e.*, the Constitution requires "a categorical approach"—because "a purely individual approach" would be more "likely to be abused." *See* Pet. Br. 19-20. Put simply, the fact that Dr. Doren and the State were able to persuade lay jurors to commit Brown based on a "diagnosis" that both the DSM and the APA reject does not confer on the diagnosis the legitimacy that the psychiatric profession has deliberately withheld. Rather, it confirms that a "purely individual approach" that permits commitment proceedings premised on such state-created diagnoses is subject to abuse.[3]

[3] The State's reliance on the DSM's cautionary statement "that a diagnosis of one of its listed disorders '[i]n most situations' is not sufficient to establish the legal exis-
(cont'd)

Finally, the State suggests that Paraphilia NOS-Nonconsent has gained some acceptance in the professional community. *See* Resp. Br. 18-20. The State relies primarily on Professor Zander's reference to "widespread acceptance" of Dr. Doren's diagnosis. *Id.* at 19. In context, however, Professor Zander's reference to "widespread acceptance" is considerably less impressive than the State makes it seem:

> Of 242 men committed to the [sexually violent persons] facility in Doren's home state of Wisconsin on June 10, 2005, 98 (40.5%) had a firm or provisional diagnosis of paraphilia-NOS; of this number, * * * 50 men had the "nonconsent" specifier, while the remaining 48 had an "other" specifier. Given the apparent ***widespread acceptance*** of Doren's diagnosis * * * by forensic experts in the field * * *, it is apparent that Doren's position as to the legitimacy of this diagnosis has been influential.

Zander, *supra*, at 42-43 (emphasis added; citations omitted). Professor Zander went on to explain, however, that "scholarly opinion" on the issue is a different story altogether, as Dr. Doren "appears to ***stand alone*** among published experts in defending [his] use of the diagnosis." *Id.* at 44-45 (emphasis added).

Thus, Professor Zander's point was that, despite its scholarly and professional rejection, many examiners who testify for states and against individuals in

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(… cont'd)

tence of a "mental disorder,' 'mental disability,' 'mental disease,' or 'mental defect''" (Resp. Br. 18 (quoting DSM-IV-TR at xxxiii)) is also misplaced. Although the State is correct that a DSM-recognized diagnosis may not be a "sufficient" basis for civil commitment, it is a ***necessary*** condition. *See* Pet. Br. at 30-31 n.14.

civil commitment proceedings have bought into Dr. Doren's diagnosis with great enthusiasm.[4] This enthusiasm is unsurprising given the ease with which the diagnosis—which is not cabined by any clear, tested criteria[5]—can be asserted.[6] However, the fact that this practice is already rampant and apparently increasing does not insulate it from constitutional scrutiny. *E.g.*, *INS v. Chadha*, 462 U.S. 919, 944 (1983). Indeed, the constitutional "inquiry is ***sharpened***, rather than blunted, by the * * * increasing frequency" of civil commitment proceedings premised on illegitimate, state-created diagnoses that have been rejected by the mainstream psychiatric profession. *Id.* (emphasis added).

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[4] *See also* Zander, *supra*, at 41 ("Between 1994 and May 2005, [Doren] conducted 74 training sessions regarding 'sex offender civil commitment assessments' in 17 U.S. States, the District of Columbia, and three Canadian provinces. * * * [T]he high prevalence of the diagnosis [by state evaluators] * * * is consistent with Doren's argument favoring it * * * and may be a consequence of his widely-espoused position * * *."); Holly A. Miller *et al.*, *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29 L. & HUM. BEHAV. 29, 39 (2005) ("Numerous evaluators have utilized the diagnosis 'paraphilia not otherwise specified' to apply to rapists. However, the definition of this appellation is so amorphous that no research has ever been conducted to establish its validity."); Robert A. Prentky *et al.*, *Sexually Violent Predators in the Courtroom*, 12 PSYCHOL. PUB. POL'Y & L. 357, 366-67 (2006) ("it has become a common practice among some examiners to apply a newly coined diagnosis, paraphilia NOS-nonconsent").

[5] *See, e.g.*, 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 are stated or implied in the DSM-IV, it is not surprising that, in practice, the diagnosis of Paraphilia NOS, nonconsent, is widely variable.").

[6] *See, e.g.*, Prentky *et al.*, *supra*, at 367 ("[B]ecause by definition all victims of sexual crimes are nonconsenting, all sexual offenders with multiple offenses (spanning at least 6 months) could be diagnosed with paraphilia NOS-nonconsent.")

In short, the State does not deny that both the DSM and the APA have deliberately rejected Dr. Doren's diagnosis. And in its brief attempt to clothe the diagnosis with a semblance of credibility, the State does little more than show that, despite "stand[ing] alone among published experts" (Zander, *supra*, at 45), Dr. Doren has influenced a number of other state evaluators to follow his lead. This leaves the State with its original argument: "Due process does not require that mental disorder be accepted by the medical profession to serve as a basis for civil commitment." Resp. Br. at 15. As shown above, that proposition is rejected by the reasoning and decisional bases of *Hendricks* and *Crane*.

II. Because APD Is Too Imprecise To Narrow The Class Of Persons Eligible For Commitment—Or Distinguish The Typical Recidivist Not Subject To Commitment—Brown's Involuntary Civil Commitment On That Basis Violates Due Process.

As discussed in Brown's opening brief, more than 7,000,000 Americans and up to 80% of the male prison population are diagnosable with APD. *See* Pet. Br. 27. These numbers are hardly surprising given that, as Justices Ginsburg and Souter highlighted during oral argument in *Crane*, the disorder can be diagnosed on the basis of rather common, non-criminal characteristics—*e.g.*, habitual lying, inability to hold a job, recklessness, and financial irresponsibility. *See* Pet. Br. 28-29. Further, the APA has denounced the use of APD as a basis for civil commitment, explaining that the "disorder [is] largely defined on the basis of the behavior exhibited by the individual" and "is ***not*** premised on any underlying distur-

bance of thought, mood, cognition or aberrant sexual urge."[7] The APA's view is generally accepted within the profession. *See* Pet. Br. 30-32. As one commentator put it, "it is almost unimaginable that a person whose sole diagnosis was '[APD]' and who was potentially dangerous would be committed involuntarily." Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 126 (1996).

The State does not deny these facts. *See* Resp. Br. 20-25. Rather, in attempting to justify the "almost unimaginable," it argues principally that this Court's decision in *Adams* has already resolved the constitutional issue. *See* Resp. Br. 20-23. The State acknowledges, as it must, that *Adams* was decided under the AEDPA's narrow and deferential standard of review (*see* 28 U.S.C. § 2254(d)(1)), which does not apply to Brown's claim. *See* Resp. Br. 22. But the State ultimately asserts that "[t]his Court should not rule contrary to *Adams* here simply because a different standard of review applies." Resp. Br. 22-23.

The State's attempt to minimize the import of Section 2254(d)(1)'s inapplicability is unpersuasive. Under AEDPA, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that

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[7] APA Final Action Paper, *Eliminating the Use of Antisocial Personality Disorder as a Basis for Civil Commitment*, at 1-2 (APA Assembly, May 19-21, 2006) (emphasis added), *available at* http://tinyurl.com/6ykpxu.

the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Burgess v. Watters*, 467 F.3d 676, 681 (7th Cir. 2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)). Rather, the federal court must deny the petition unless the state court's decision "[lies] ***well outside*** the boundaries of permissible differences of opinion." *Burgess*, 467 F.3d at 681 (emphasis added) (quoting *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir.2002)). For this reason, AEDPA deference is often outcome-determinative,[8] and it is hard to imagine that the State would ever minimize its significance in a case in which it did apply.

Because Section 2254(d)(1) does not apply here, the question is simply whether, in the Court's independent judgment, APD is too imprecise and over-inclusive to justify civil commitment under the Due Process Clause. In *Foucha*, the Supreme Court did determine that involuntary civil commitment based on a diagnosis of APD and a finding of dangerousness violated due process. *See* 504 U.S. at 73-83; *see also State v. Foucha*, 563 So. 2d 1138, 1141 (La. 1990) (Foucha's "main diagnosis is [APD]"), *rev'd*, 504 U.S. 71. The State contends that *Foucha* is inapposite because Louisiana had conceded that Foucha's APD was not a "mental illness." Resp. Br. 21. This argument fails, however, because—as the State it-

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[8] *See, e.g.*, *Sellan v. Kuhlman*, 261 F.3d 303, 310 (2d Cir. 2001); *United States ex rel. Bartlett v. Briley*, 2005 WL 217029, at *6 (N.D. Ill. Jan. 25, 2005), *aff'd sub nom*, *Bartlett v. Battaglia*, 453 F.3d 796 (7th Cir. 2006).

self emphasizes (Resp. Br. 16)—"the term 'mental illness' is devoid of any talismanic significance." *Hendricks*, 521 U.S. at 359. Thus, the precise characterization of Foucha's APD is not important. What is significant is that APD was deemed a constitutionally inadequate basis for involuntary commitment. And while *Adams* concluded that there was too much ambiguity in the *Foucha* opinion to qualify as "clearly established Federal law" (*see Adams*, 330 F.3d at 961), that standard does not apply here, and the better interpretation of *Foucha* is that it rejected APD as a constitutional basis for civil commitment.

Further, the Court's post-*Foucha* pronouncements have continued to cast considerable doubt on APD as a basis for involuntary commitment. In *Hendricks*, Justice Kennedy (who provided the fifth vote in favor of the majority opinion), cautioned that, "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." 521 U.S. at 373 (Kennedy, J., concurring). And in dissent, Justice Breyer emphasized that Hendricks' was committable under the Due Process Clause because, *inter alia*, he suffered from a "specific, serious, and ***highly unusual*** inability to control his actions." *Id.* at 375 (Breyer, J., joined by Souter & Stevens, JJ., dissenting) (emphasis added).

Finally, in *Crane* Justice Breyer explained for the Court that "*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual of-

fender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.' That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment." *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 360; *id.* at 372-73 (Kennedy, J., concurring). At the end of this passage, the Court cited a study finding that "40%-60% of the male prison population is diagnosable with [APD]." *Crane*, 534 U.S. at 412 (citing Paul Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999)).[9] Taken together with *Foucha*, Justice Kennedy's cautionary statement against disorders that are "too imprecise," and Justice Breyer's prior reference in *Hendricks* to "highly unusual" disorders, the reasonable implication of this citation is that APD is fatally over-inclusive and cannot serve to distinguish the narrow class of offenders subject to civil commitment from run-of-the-mill recidivists who are not.

The State further argues that although a diagnosis of APD does little if anything to narrow the class of persons eligible for commitment, the jury's finding that Brown was dangerous and likely to engage in future acts of sexual vio-

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[9] As noted in Brown's opening brief, this figure is a conservative estimate. Many studies put the figure at 75%-80%. *See* Pet. Br. 27 & n.10.

lence adequately served that function. *See* Resp. Br. 23-25.[10] But this argument also fails because the Supreme Court has held that the threshold finding of a disorder, not just the additional finding of dangerousness, must serve to "narrow[] the class of persons eligible for confinement." *Hendricks*, 521 U.S. at 358; *Crane*, 534 U.S. at 410. For all the reasons discussed in Brown's opening brief (at 27-32) and above, APD cannot serve that function. Indeed, a substantial majority of the male prison population is diagnosable with the disorder based on little more than the very conduct that landed them in prison in the first place. *See* APA Final Action Paper, *supra*, at 1 (APD is "largely defined on the basis of the behavior exhibited by the individual"). Moreover, the State's theory would authorize precisely the sort of "purely individual approach" that Justice Souter rightly criticized as inviting abuse. *See* Pet. Br. 19-20.

In sum, the best interpretation of *Foucha* is as a rejection of APD as a basis for involuntary civil commitment. To the extent that *Foucha* leaves any doubt, APD is too imprecise and fails to accomplish the narrowing function that the

[10] The State notes that *Adams* upheld a ruling of the Wisconsin Court of Appeals that accepted a similar argument. *See* Resp. Br. 23-24. However, *Adams* merely concluded: "we cannot say that" the state court's ruling "was *unreasonable*." 330 F.3d at 963 (emphasis by the Court). The Court did not hold that the state court's ruling was ***correct*** or approve of its reasoning. Further, the Court emphasized that *Crane* was not "clearly established Federal law" for purposes of its decision because *Crane* post-dated the state court's ruling in Adams's case. *See Adams*, 330 F.3d at 962.

Court's subsequent decisions require. Accordingly, Doren's APD diagnosis also fails to justify Brown's civil commitment under the Due Process Clause.

III. The State Is Judicially Estopped From Pursuing Civil Commitment On The Basis Of APD.

Brown argued in his opening brief that because the test of legal insanity in criminal cases and the standard for establishing eligibility for civil commitment are substantively indistinguishable, the State's position that APD cannot support an insanity defense estops them from relying on APD to justify civil commitment. *See* Pet. Br. 33-34. The State responds, first, by arguing that Brown "forfeited" this argument by not raising it in the district court. *See* Resp. Br. 25. But Brown did raise the argument below. While Brown may not have used the phrase "judicial estoppel," he did highlight the State's inconsistent positions as one aspect of his due process claim. Specifically, he cited a passage from Professor Zander's article emphasizing the "logical inconsistency" inherent in opposing APD as a basis for an insanity defense while at the same time relying on it as a basis for civil commitment.[11] As Professor Zander explains, "[a] further irony of

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[11] *See* Petitioner's Brief in Support of Petition for Habeas Corpus, Doc. 20, at 9 ("[T]he scientific community has never recognised [APD] as condition that can cause an inability to control behavior, but rather, just the opposite claims are made * * * during all other court proceedings wherein [APD] has been diagnosed. Specifically, in all criminal cases, * * * the experts * * * make it very clear to the jury that the scientific community has never recognised [APD] as a condition other than one consisting of a clinical term for a criminal. i.e., it is not any type of condition that can cause any crimi-
(cont'd)

this logical inconsistency is that, though many states specifically exclude [APD] as a basis for an insanity defense, they allow it as the sole diagnostic basis for an SVP commitment. Wisconsin is one such state." Zander, *supra*, at 64 (citation omitted; citing, *inter alia*, *Simpson v. State*, 215 N.W.2d 435 (Wis. 1974)).

In the district court, Brown quite reasonably attacked this logical inconsistency under the general rubric of due process. "Due process centrally concerns the fundamental fairness of governmental activity." *Quill Corp. v. N. Dakota*, 504 U.S. 298, 312 (1992); *see also, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) ("fundamental fairness" is "the touchstone of due process"). The State's inconsistent positions—that APD ***can*** cause a person "serious difficulty in controlling behavior" (*Crane*, 534 U.S. at 413) but ***cannot*** result in a "lack[] [of] substantial capacity * * * to * * * conform his or her conduct to the requirements of law" (Wis. Stat. § 971.15(1))—implicate fundamental fairness.[12]

(… cont'd)

nal an inability to control their behavior[.]") (paragraph break and citation omitted) (citing Zander, *supra*, at 64, ¶ 3); *id.* at 10 ("[I]t is outrageous … and just down right evil to claim for the purpose of indefinite civil commitment that [APD] causes only certain sex offenders to commit crimes (i.e., sexual assault) due to lack of control but does not cause any other criminal to commit other crimes due to lack of control which is just down right crazy for any one to make such inconsistent claims.") (alterations and emphasis omitted) (citing Zander, *supra*, at 64, ¶ 3); *see also* Doc. 22, at 2, 3 (same).

[12] *Cf. Bradshaw v. Stumpf*, 545 U.S. 175, 188-90 (2005) (Souter, J., concurring) (discussing petitioner's due-process claim that "a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant");
(cont'd)

Thus, although Brown did not use the legal phrase "judicial estoppel," he did raise the basic argument in the district court. And because he was proceeding *pro se*, that was sufficient. This Court has long held that "liberal construction is to be accorded material drawn *pro se*, including petitions for habeas corpus and other forms of post-conviction relief." *Wilson v. Phend*, 417 F.2d 1197, 1199 (7th Cir. 1969). Accordingly, the Court does not penalize a *pro se* petitioner simply because he "confuse[s] legal theories or draw[s] the wrong legal implications from a set of facts." *Osagiede v. United States*, --- F.3d ----, 2008 WL 4140630, at *4 (7th Cir. Sept. 9, 2008) (citing *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999)). Rather, "the mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so." *Barnett*, 174 F.3d at 1133 (internal quotation marks and alterations omitted; italics added).

On the merits of the judicial estoppel issue, the State asserts that "Wisconsin's definition of 'mental disease or defect' in the insanity context is not the same standard for commitments from *Crane*." Resp. Br. 26. This argument is an exercise in semantics. Under *Crane*, the State must prove that the individual suf-

(… cont'd)

Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000) (the State's "use of inherently factually contradictory theories violates the principles of due process"); *accord In re Sakarias*, 106 P.3d 931, 942-44 (Cal. 2005).

fers from a disorder that causes "serious difficulty in controlling behavior." *Crane*, 534 U.S. at 413. Under Wisconsin law, a criminal defendant who pleads not-guilty-by-reason-of-insanity must prove that "as a result of a mental disease or defect," he "lacked substantial capacity * * * to * * * conform his * * * conduct to the requirements of law." Wis. Stat. § 971.15(1). The State fails to explain how a "serious difficulty" differs from a "lack[] [of] substantial capacity" or how "controlling [one's] behavior" (by which is meant criminal, sexual behavior) differs from "conform[ing] [one's] * * * conduct to the requirements of the law." Because there is no difference, the State should be estopped from relying on APD as a basis for civil commitment.

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

As discussed in Brown's opening brief, while the Due Process Clause imposes limits "on the use of unreliable evidence,"[13] Wisconsin's courts permit the use of expert testimony such as Dr. Doren's whether it is reliable or not.[14] The

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13 *Ferrier v. Duckworth*, 902 U.S. 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); *see also* Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 598 (1978) ("The due process clause prohibits the state * * * from using any single item of evidence against a defendant which is inherently too unreliable for rational evaluation by the jury.").

14 *City of W. Bend v. Wilkens*, 693 N.W.2d 324, 329 (Wis. Ct. App. 2005) ("Wisconsin, unlike the federal courts, considers the reliability of scientific evidence a question of weight and credibility for the trier of fact to decide.").

State does not take issue with either proposition. *See* Resp. Br. 27-28. Rather, it asserts that "Doren's diagnoses were not unreliable, and in any event, in Wisconsin, their reliability was for the jury to decide." *Id.* at 28.

As shown above and in Brown's opening brief, however, Dr. Doren's diagnoses are not reliable; indeed, their unreliability has been criticized consistently.[15] Further, the DSM's rejection of Dr. Doren's "Nonconsent" diagnosis is especially revealing because a—if not the—primary purpose of the DSM was "to improve reliability": "Since discretion was viewed as the breeding ground for diagnostic ***unreliability***, the developers of [the] DSM sought to control discretion by using checklists, structured interview schedules, and formal decision rules." Zander, *supra*, at 33 (italics omitted; emphasis added) (quoting Herb Kutchins & Stuart A. Kirk, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS 252 (1997)). "[I]t is not surprising that" the absence

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15 *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) (diagnoses of Paraphilia NOS-Nonconsent are "so unreliable * * * that it is impossible to attain a reasonable degree of certainty as to [its] presence"); Miller *et al.*, *supra*, at 39 ("[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."); Zander, *supra*, at 49-50, 52-57 (discussing reliability problems with the diagnoses of Paraphilia NOS-Nonconsent and APD); Howard V. Zonana et al., DANGEROUS SEX OFFENDERS: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION 170 (1999) ("The ability to make the diagnosis [of a rape-related paraphilia] with a sufficient degree of validity and reliability remains problematic.").

of clear criteria and formal decision rules renders Dr. Doren's self-created diagnosis "widely variable" and unreliable "in practice." Levenson, *supra*, at 365.[16]

Moreover, the State's fallback argument—that, "in any event, * * * reliability was for the jury to decide" (Resp. Br. 28)—is even less persuasive. As this Court has explained, the Due Process Clause imposes limits "on the ***use*** of unreliable evidence." *Ferrier*, 902 F.2d at 547 (emphasis added); *cf. Hensley v. Carey*, 818 F.2d 646, 648 (7th Cir. 1987) (the due-process prohibition on suggestive lineups "protect[s] an *evidentiary* interest" "against the admission of unreliable evidence at trial"). Indeed, the State's argument perfectly parallels the contention rejected in *Jackson v. Denno*, 378 U.S. 368 (1964), that, although the Due Process Clause prohibits the use of involuntary confessions, the question whether a confession was voluntary may be left for the jury to decide at trial. *Id.* at 376-78. Just as such a procedure did "not adequately protect [the defendant's] right to be free of a conviction based upon a coerced confession" (*id.* at 377), so leaving the question of reliability to the jury cannot adequately protect the right against indefinite confinement based on unreliable evidence.

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16 The State criticizes Brown's reliance on the principles articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as nonsensical. Resp. Br. at 27-28. The analogy makes perfect sense, however, given that *Daubert*'s purpose is "ensure that any and all scientific testimony or evidence admitted is not only relevant, but ***reliable***" (*id.* at 589 (emphasis added)) and due process forbids the use of unreliable evidence.

V. Brown's Petition Must Be Granted If Either Of Dr. Doren's Diagnoses Was Constitutionally Invalid.

The State agrees with Brown that the "miscarriage of justice" exception to the procedural default rule applies in civil commitment cases. *See* Resp. Br. 4, 13-15; Pet. Br. 44-45; *accord Levine v. Torvik*, 986 F.2d 1506, 1517 n.9 (6th Cir. 1993). The State also agrees, or at least does not take issue with, Brown's (and the district court's) position that Brown is not required to present "new evidence" to support his claim or Brown's alternative position that he has presented new evidence. *See* Resp. Br. 13-15; Pet. Br. 45-48; A4; A13. Finally, the State agrees that Brown's petition must be granted if the Court determines that neither of Dr. Doren's diagnoses is a valid basis for civil commitment under the Due Process Clause. *See* Resp. Br. 4, 14-15.

Thus, the parties' only apparent point of disagreement regarding the miscarriage-of-justice exception is whether Brown is entitled to relief if only one of Dr. Doren's diagnoses is held invalid. *Compare* Pet. Br. 39-43, *with* Resp. Br. 28-29. Initially, it is important to note that the State's argument that Brown must discredit both diagnoses is based ***exclusively*** on the premise that Brown must satisfy the miscarriage-of-justice test. *See* Resp. Br. 28-29. The State never contests, and thus effectively concedes, that Brown's petition must be granted if one of Dr. Doren's diagnoses is invalid ***and*** Brown's procedural default is excused based on state appellate counsel's ineffectiveness (*see* Part VI, *infra*).

But even assuming for the sake of argument that Brown must establish a miscarriage of justice, the State's argument fails for two reasons. First, as discussed in Brown's opening brief (at 39-41), under *Stromberg v. California*, 283 U.S. 359 (1931), and its progeny, "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." *United States v. Cappas*, 29 F.3d 1187, 1193 (7th Cir. 1994) (alteration omitted) (quoting *Griffin v. United States*, 502 U.S. 46, 53 (1991)). Accordingly, "a verdict must be set aside" if it was submitted to the jury on both a valid and an invalid theory and "'it is impossible to tell which ground the jury selected.'" *Cappas*, 29 F.3d at 1193 (quoting *Yates v. United States*, 354 U.S. 298, 312 (1957)); *accord, e.g.*, *Zant v. Stephens*, 462 U.S. 862, 880-82 (1983). In *Cappas*, this Court held that this principle supersedes the normal operation of the harmless error rule because, "unlike the harmless error rule," the *Stromberg* rule "*is* a direct interpretation of the underlying constitutional guarantee." 29 F.3d at 1193. The same is true here: Because the remedy that *Stromberg* mandates is inseparable from Brown's constitutional right to due process, that right cannot be frustrated by a common-law, prudential prejudice analysis—*i.e.*, the miscarriage-of-justice standard—that is not grounded in the Constitution.

Second, even apart from *Stromberg*, a finding that either of Dr. Doren's diagnoses is constitutionally invalid would entitle Brown to relief under the miscarriage-of-justice test. *See* Pet. Br. 49-50. Under that test, a petitioner is entitled to relief if, but for the relevant constitutional error, "***it is more likely than not*** that no reasonable juror would have found" against him. *House v. Bell*, 547 U.S. 518, 537 (2006) (emphasis added) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). In this case, Brown's commitment rests on three possible grounds: (1) Paraphilia NOS-Nonconsent, (2) APD, or (3) a combination of the two. The State concedes that a verdict based solely on an invalid diagnosis would satisfy the "no reasonable juror" standard. *See* Resp. Br. 4, 14-15. In addition, the invalidity of either diagnosis would negate any verdict that rested jointly on both because "there is an unacceptable danger that the trier of fact will have regarded the two * * * as 'intertwined' and have rested the conviction on both together." *Zant*, 462 U.S. at 882 (quoting *Street v. New York*, 394 U.S. 576, 588 (1969)).

Accordingly, a ruling that Paraphilia NOS-Nonconsent is a constitutionally invalid diagnosis would negate two of three possible bases for the verdict—*i.e.*, (1) and (3). Likewise, a ruling that APD is a constitutionally invalid ground for civil commitment would negate (2) and (3). In either case, therefore, "it is more likely than not that no reasonable juror would have" committed Brown but for the constitutional error. *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 327).

VI. Counsel's Failure To Assert Brown's "Significant And Obvious" Due Process Claim In State Court Excuses Brown's Procedural Default.

In his opening brief, Brown explained that his state appellate counsel's failure to raise his "significant and obvious" due process claim constituted ineffective assistance of counsel and, hence, "cause" and "prejudice" excusing his procedural default. *See* Pet. Br. 50-53. The State does not dispute that Brown's claim was "significant and obvious" or that counsel's failure to raise the issue was constitutionally ineffective. *See* Resp. Br. 9-12. Nor does it dispute that counsel's failure was prejudicial under both *Strickland v. Washington*, 466 U.S. 668, 694 (1984), and the cause-and-prejudice test. *See* Pet. Br. 53 & n.20. Rather, the State's ***only*** counterargument is that Brown defaulted his ineffective assistance claim. *See* Resp. Br. 9-12. Specifically, it argues that, following his direct appeal, Brown should have known to file a *pro se* petition alleging ineffective assistance in the Wisconsin Court of Appeals pursuant to *State v. Knight*, 484 N.W.2d 540 (Wis. 1992).

However, as discussed in Brown's opening brief (at 54-55), by its clear terms *Knight* applies only to criminal defendants, not civil committees such as Brown. Indeed, *Knight* went so far as to stress that "[t]he sole issue before the court [was] 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 541. In Brown's opening brief (at 55 n.21), he acknowledged that he is now

aware that the appellant in *McGee v. Bartow*, No. 07-3278 (7th Cir.), did file a *Knight* petition, which was denied in an unpublished opinion. The State seizes on Brown's acknowledgment and points to one other case in which a civil committee filed a *Knight* petition. *See* Resp. Br. 10 (citing *State ex rel. Seibert v. Macht*, 627 N.W.2d 881 (Wis. 2001)). Despite searching all cases in Westlaw or Lexis that cite *Knight*, Brown has identified no other case, published or unpublished, in which a civil committee filed a *Knight* petition.

In order to give rise to a procedural default, "the state's procedural rule must be both 'firmly established and regularly followed.'" *Braun v. Powell*, 227 F.3d 908, 912 (7th Cir. 2000) (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)). A state procedural rule is not an adequate ground for finding procedural default if it is "employed * * * infrequently" (*Braun*, 227 F.3d at 912 (internal quotation marks omitted)) or "if the prisoner 'could not fairly be deemed to have been apprised of its existence' at the time she acted" (*id.* (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958))). In addition, "the state procedural rule [must] speak[] in unmistakable terms." *Abu-Jamal v. Horn*, 520 F.3d 272, 286 (3d Cir. 2008) (quoting *Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir. 1996)). Thus, in *Braun*, this Court held that Wisconsin's rule that a fugitive prisoner waived pending claims for post-conviction relief was not an adequate ground for finding procedural default because the holding of "[t]he critical" Wisconsin precedent

addressing the issue did not clearly apply to the facts of the petitioner's case. *See* 227 F.3d at 915-16. Accordingly, the petitioner was not on "notice, as required by [this Court's] case law, that her escape would preclude her later later filing a * * * motion" for post-conviction relief. *Id.* at 916.

Similarly, Brown was not "on notice" that he needed to—or, indeed, could—file a *Knight* petition because the procedure has been "employed * * * infrequently" in civil commitment cases. *Braun*, 227 F.3d at 912, 916. Indeed, as noted above, Brown has identified only two such petitions—only one of which resulted in a published decision. Nor does *Knight* speak in anything approaching "unmistakable terms" (*Abu-Jamal*, 520 F.3d at 286) given that it explicitly limited the "sole issue" it addressed to the appropriate procedure in "criminal" cases. 484 N.W.2d at 540-41.[17] If, as in *Braun*, a case on all fours was necessary to put a fugitive prisoner "on notice" that escape might waive her right to pursue post-conviction relief, then it follows that *Knight* has been applied too infrequently in civil commitment cases and does not speak in sufficiently clear terms to have put Brown on notice of any obligation to file a *Knight* petition.

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[17] The Wisconsin Court of Appeals recently acknowledged that even in criminal cases, Wisconsin's *Knight* jurisprudence has "create[d] much confusion." *State ex rel. Panama v. Hepp*, 2008 WL 3089957, at *7 (Wis. Ct. App. Aug. 7, 2008) (recommended for publication); *see also* David Ziemer, *Wisconsin Court of Appeals Is Forum for Ineffective Claim*, WIS. L.J., Aug. 18, 2008, *available at* 2008 WLNR 15655571 (discussing "the confusing realm of ineffective assistance of appellate counsel claims" in Wisconsin).

CONCLUSION

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

October 14, 2008

Respectfully submitted,

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____
Jack L. Wilson

Dated: October 14, 2008

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I certify that on the 14th day of October 2008 I filed an original and fifteen hard copies and one digital copy of the foregoing REPLY BRIEF FOR PETITIONER-APPELLANT BRUCE N. BROWN by sending them by UPS overnight delivery to:

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