IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 08-1171

BRUCE N. BROWN,

Petitioner-Appellant,

v.

STEVEN WATTERS, Director,

Respondent-Appellee.

Appeal From A Judgment And Order Denying A Petition For A Writ Of Habeas Corpus, Entered In The United States District Court For The Eastern District Of Wisconsin, The Honorable Lynn Adelman, Presiding

BRIEF OF RESPONDENT-APPELLEE

J.B. VAN HOLLEN
Attorney General

AARON R. O'NEIL*
Assistant Attorney General
State Bar #1041818
*Counsel of Record
Attorneys for Respondent-Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740

TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 2

SUMMARY OF ARGUMENT 3

STANDARD OF REVIEW 5

ARGUMENT 6

BROWN IS NOT ENTITLED TO HABEAS RELIEF BECAUSE HE PROCEDURALLY DEFAULTED HIS CLAIMS THAT HIS COMMITMENT AS A SEXUALLY VIOLENT PERSON VIOLATES DUE PROCESS AND HE CANNOT OVERCOME HIS DEFAULT 6

A. Law governing procedural default 6

B. Brown's claims of ineffective assistance of trial and appellate counsel cannot constitute cause for his procedural default because these claims are themselves defaulted 9

C. Brown cannot excuse his default under the fundamental miscarriage of justice standard. 13

1. The appropriate fundamental miscarriage of justice standard to apply in the sexually violent person context. 13

2. Brown has not shown that no reasonable juror could have found him ineligible to be committed as a sexually violent person. 14

a. 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........... 15

Page

b. APD is not too imprecise to serve as the basis for Brown's commitment. 20

c. The State is not judicially estopped from relying on APD a basis for civil commitment. 25

d. Brown's commitment is not based on unreliable evidence. 27

e. If this Court concludes that only one of Brown's diagnoses violates due process, it must still affirm his commitment. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases Cited

Adams v. Bartow,
330 F.3d 957 (7th Cir. 2003).. 21, 22, 23, 24

Ake v. Oklahoma,
470 U.S. 68, 81 (1985)... 20

Badelle v. Correll,
452 F.3d 648 (7th Cir. 2006).. 7

Bintz v. Bertrand,
403 F.3d 859 (7th Cir. 2005)... 6, 7

Bousley v. United States,
523 U.S. 614 (1998)... 8

Braun v. Powell,
227 F.3d 908 (7th Cir. 2000).. 6

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993)... 27, 28

Page

Eckstein v. Kingston,
460 F.3d 844 (7th Cir. 2006) 6

Edwards v. Carpenter,
529 U.S. 446 (2000) 9, 12

Estelle v. McGuire,
502 U.S. 62, 67-68 (1991) 26

Foucha v. Louisiana,
504 U.S. 71 (1992) 20, 21, 22

Hadley v. Holmes,
341 F.3d 661 (7th Cir. 2003) 6

Holman v. Gilmore,
126 F.3d 876 (7th Cir. 1997) 25

In re Post,
187 P.3d 803 (Wash. Ct. App., 2008) 19

Kansas v. Crane,
534 U.S. 407 (2002) 17, 23, 26

Kansas v. Hendricks,
521 U.S. 346 (1997) 15, 16, 17

Massaro v. United States,
538 U.S. 500 (2003) 11, 12

McCleskey v. Zant,
499 U.S. 467 (1991) 7

Milone v. Camp,
22 F.3d 693 (7th Cir. 1994) 27

Murray v. Carrier,
477 U.S. 478 (1986) 7, 8, 14

Page

Muth v. Frank,
412 F.3d 808 (7th Cir. 2005) 5

O'Sullivan v. Boerckel,
526 U.S. 838 (1999) 7

People v. Williams,
74 P.3d 779 (Cal. 2003) 19

Sawyer v. Whitley,
505 U.S. 333 (1992) 14

Schlup v. Delo,
513 U.S. 298 (1995) 8, 9

Seling v. Young,
531 U.S. 250, 255 (2001) 19

Simpson v. State,
62 Wis. 2d 605,
215 N.W.2d 435 (1974) 26

Spreitzer v. Schomig,
219 F.3d 639 (7th Cir. 2000) 12

State v. Adams,
223 Wis. 2d 60,
588 N.W.2d 336, 340 (Ct. App. 1998) 23, 24, 26

State v. Bush,
2005 WI 103, 283 Wis. 2d 90,
699 N.W.2d 80 11

State v. Escalona-Naranjo,
185 Wis. 2d 168,
517 N.W.2d 157, 163-64 (1994) 11

State v. Knight,
168 Wis. 2d 509,
484 N.W.2d 540, 545 (1992) 10

Page

State v. Peters,
192 Wis. 2d 674,
534 N.W.2d 867, 872 (Ct. App. 1995) 27

State v. Pletz,
2000 WI App 221, 239 Wis. 2d 49,
619 N.W.2d 97 18

State ex rel. Seibert v. Macht,
2001 WI 67, 244 Wis. 2d 378,
627 N.W.2d 881 .... 10, 11

Strickland v. Washington,
466 U.S. 668 (1984) 9

United States v. Frady,
456 U.S. 152 (1982) 8

United States v. Hook,
195 F.3d 299 (7th Cir. 1999) 25, 26

Statutes Cited

28 U.S.C. § 2254(b)(1)(A) 6

28 U.S.C. § 2254(d) 6

28 U.S.C. § 2255 12

Kan. Stat. Annot. § 59-29a01 16

Wis. Stat. ch. 980 ....passim

Wis. Stat. § 907.02 27

Wis. Stat. § 971.15 .... 25, 26

Page

Wis. Stat. § 980.01(2) .... passim

Wis. Stat. § 980.01(7) 24

Other Authorities

Dennis M. Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond (2002) 19

Diagnostic and Statistical Manual of Mental Disorders-IV-TR (4th ed. 2000) 4, 18

Fed. R. Evid. 702 27

Gregory DeClue, *Paraphilia NOS (Nonconsenting) and Antisocial Personality Disorder*, 34 J. Psych. and Law 495, 508 (2006) 19, 24, 25

Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliances on the Weakest Links in Psychodiagnosis*, 1 J. Sexual Offender Civ. Commitment 17 (2005) 19

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 08-1171

BRUCE N. BROWN,

Petitioner-Appellant,

v.

STEVEN WATTERS, Director,

Respondent-Appellee.

Appeal From A Judgment And Order Denying A
Petition For A Writ Of Habeas Corpus, Entered In The
United States District Court For The Eastern District Of Wisconsin,
The Honorable Lynn Adelman, Presiding

BRIEF OF RESPONDENT-APPELLEE

JURISDICTIONAL STATEMENT

The jurisdictional statement in petitioner-appellant Bruce N. Brown's brief is complete and correct.

STATEMENT OF ISSUES

Brown is currently in respondent-appellee's[1] custody because he has been committed as a sexually violent person under Wis. Stat. ch. 980. He claims his commitment violates the constitution because the two mental disorders with which the State's expert witness diagnosed him, paraphilia-not otherwise specified-nonconsent (nonconsent) and antisocial personality disorder (APD) violate due process because the nonconsent diagnosis is not recognized by the mental health profession and the APD diagnosis is overbroad.

Brown, however, never presented his claims to the state courts, and they are procedurally defaulted. In order for this court to address Brown's claims on the merits, then, it must determine whether he can overcome his default by either showing cause or prejudice or that a fundamental miscarriage of justice will result if the court does not consider his claims. The State submits that the following issues are presented for this appeal.

1. Has Brown shown cause and prejudice to excuse his procedural default of his claims that his commitment as a sexually violent person under Wis. Stat. ch. 980 violates due process?

---

[1]The State of Wisconsin is the real party in interest to this appeal and subsequent references to "respondent-appellee" in this brief will be to "the State."

2. Has Brown demonstrated that a fundamental miscarriage of justice will result if this court does not address his claims on the merits?

3. Does Brown's commitment violate due process because the nonconsent diagnosis is not recognized by the mental health profession and the APD diagnosis is overbroad?

SUMMARY OF ARGUMENT

Brown has not demonstrated that he is entitled to habeas relief, and this court should affirm the district court's decision denying Brown's petition. Brown contends that his commitment as a sexually violent person under Wis. Stat. ch. 980 violates due process. Specifically, he claims the two medical disorders the State relied upon to support his commitment, paraphila-not otherwise specified-nonconsent (nonconsent) and antisocial personality disorder (APD), violate due process because the nonconsent diagnosis is not recognized as valid by the mental health profession and APD is overinclusive.

It is undisputed that Brown procedurally defaulted these claims because he never raised them in state court. As such, in order to be entitled to relief, Brown has to show cause for his default and resulting prejudice, or that a fundamental miscarriage of justice will occur if this court does not address his claims. Brown cannot demonstrate cause

and prejudice because the asserted causes for his default, the ineffectiveness of his appellate and trial counsel, have never been presented in state court, and are themselves defaulted.

Additionally, Brown cannot show that a fundamental miscarriage of justice will result if this court does not address his claims. The State substantially agrees with Brown's assertion that, in the context of a civil commitment, to show a fundamental miscarriage of justice, a habeas petitioner would have to show that no reasonable juror would have found him eligible for commitment. The State further agrees that resolving whether Brown has made this showing depends upon whether Brown can show that the State's diagnoses violate due process.

This court must ultimately affirm the district court because Brown's claims do not warrant relief. Brown is incorrect that his commitment on the basis of the nonconsent diagnosis violates due process because the diagnosis is not recognized by mental health professionals, is not found in the Diagnostic and Statistical Manual of Mental Disorders-IV-TR (4th ed. 2000) (DSM), and has been criticized by the American Psychiatric Association (APA). Due process does not require that the mental disorder necessary to civilly commit a sexually violent person meet these requirements. Further, while Brown has

shown that the nonconsent diagnosis is subject to dispute in the mental health community, it has not been uniformly rejected, as he contends.

Brown is also not entitled to relief on his claim that his commitment based on APD violates due process because it is too imprecise. Brown is not committed simply because he has APD. He is committed because he has APD and this makes it substantially probable that he will engage in acts of sexual violence. This complies with due process. Further, Brown's assertion that the United States Supreme Court has determined that a person may not be civilly committed based on an APD diagnosis is incorrect. Finally, Brown's claim that the State is judicially estopped from relying on APD to justify a civil commitment because it will not support an insanity defense in Wisconsin is also wrong. Apart from the fact that Brown forfeited this argument by not raising it in the district court, the principles of judicial estoppel do not apply to the application of different types of cases involving distinct legal standards.

STANDARD OF REVIEW

Because Brown has procedurally defaulted his claims by failing to present them to the state courts, there is no adjudication on the merits of Brown's claims for this court to review. *See Muth v. Frank*, 412 F.3d 808, 814-16 (7th Cir. 2005). As such, this court does not apply the

deferential standard of 28 U.S.C. § 2254(d) in addressing Brown's claims. Instead, it applies the pre-Antiterrorism and Effective Death Penalty Act standard, which requires this court to dispose of Brown's petition "as law and justice require." *Braun v. Powell*, 227 F.3d 908, 917 (7th Cir. 2000) (quoting 28 U.S.C. § 2243).

This Court reviews the district court's legal conclusions *de novo* and its findings of fact for clear error. *See Eckstein v. Kingston*, 460 F.3d 844, 848 (7th Cir. 2006) (citation omitted). This Court also reviews *de novo* the district court's determination that a petitioner has procedurally defaulted a claim. *Hadley v. Holmes*, 341 F.3d 661, 664 (7th Cir. 2003).

ARGUMENT

BROWN IS NOT ENTITLED TO HABEAS RELIEF BECAUSE HE PROCEDURALLY DEFAULTED HIS CLAIMS THAT HIS COMMITMENT AS A SEXUALLY VIOLENT PERSON VIOLATES DUE PROCESS AND HE CANNOT OVERCOME HIS DEFAULT.

A. Law governing procedural default.

A federal court may not grant a petition for a writ of habeas corpus unless the "applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). This requires that the petitioner have "fully and fairly presented his claims to the state appellate courts," thereby giving the courts a "meaningful opportunity

to consider the substance of the claims that he later presents in his federal challenge." *Bintz v. Bertrand*, 403 F.3d 859, 863 (7th Cir. 2005) (citation omitted). Fair presentment requires that the petitioner present the state courts with the operative facts and legal principles that govern his claims, and that the petitioner do so through one complete round of state court review. *Id.* (citation omitted); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Where a petitioner fails to properly assert his claims while exhausting his state court remedies, the claims are considered procedurally defaulted rather than unexhausted. *Bintz*, 403 F.3d at 863.

A federal court may address procedurally defaulted claims under two circumstances. The first is if the petitioner can show cause for the default and resulting prejudice. *See Badelle v. Correll*, 452 F.3d 648, 661 (7th Cir. 2006). To show cause for a default, the petitioner must show that an "'objective factor external to the defense impeded counsel's efforts'" to raise these issues in state court. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To show prejudice, a petitioner must show that the errors "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," or that he was denied fundamental

fairness in the state court proceedings. *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis omitted); *Carrier*, 477 U.S. at 494.

The second circumstance under which a court may address a defaulted claim is if the petitioner can demonstrate that a fundamental miscarriage of justice will result if the court does not address the claim. A fundamental miscarriage of justice occurs when a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier*, 477 U.S. at 496. This standard requires that the "petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citing *Carrier*, 477 U.S. at 496). In this context, "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 623 (1998) (citation omitted). In making this assessment, the district court is not bound by the rules of evidence, and the court may consider evidence that was excluded or unavailable at trial. *Schlup*, 513 U.S. at 327-28. "[T]he analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Id.* at 328. The petitioner, however, must do more than establish the existence of reasonable doubt—he must show that no reasonable juror would have found him guilty. *Id.* at 329. The district

court must "make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.*

B. Brown's claims of ineffective assistance of trial and appellate counsel cannot constitute cause for his procedural default because these claims are themselves defaulted.

Brown argues that he can establish cause for his default because his appellate and trial counsel were ineffective for not raising his due process claims in state court (Brown's brief at 50-57). He asserts that the due process claims were significant and obvious issues that his attorneys overlooked and that they should have raised them (*id.*).

This court should reject this argument because Brown never made this argument in state court. While ineffective assistance of counsel under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), if proven, can constitute cause for a procedural default, it cannot do so if the issue of counsel's ineffectiveness has not been exhausted in state court, unless cause and prejudice is shown for the default of that claim. *Edwards v. Carpenter*, 529 U.S. 446, 452-54 (2000); *Carrier*, 477 U.S. at 489. As the district court correctly concluded, Brown has never argued in state court that his attorneys were ineffective, and their alleged failures cannot provide cause for his default (Dkt. 38:4).

Brown contends that the district court erred in finding his ineffective assistance claim defaulted because it apparently agreed with the State's argument that to exhaust an ineffective assistance of appellate counsel claim, Brown needed to file a petition for a writ of habeas corpus in the Wisconsin Court of Appeals pursuant to *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540, 545 (1992). Brown argues that this conclusion was mistaken because *Knight* only applies to criminal defendants, not civil committees (Brown's brief at 53-55). He acknowledges that another committed person pursued a *Knight* petition challenging his appellate counsel's performance related to his commitment proceedings, but maintains that *Knight* petitions are obscure procedures, and he should be excused for not filing one (Brown's brief at 55 n.21).

Brown is mistaken. Persons committed under Wis. Stat. ch. 980 are entitled to counsel on their direct appeal of their commitment, and this right encompasses the right to effective assistance from that counsel. *See State ex rel. Seibert v. Macht*, 2001 WI 67, ¶12, 244 Wis. 2d 378, 627 N.W.2d 881. And when a committee asserts that he was denied the effective assistance of appellate counsel, he may file a petition for a writ of habeas corpus in the Wisconsin Court of Appeals.

Id., ¶ 3. Brown could have argued in state court that his appellate counsel was ineffective for not raising his due process claims.

Brown also argues that his trial counsel was ineffective for not raising his due process claims during his commitment proceedings (Brown's brief at 56-57). He believes that the State will argue that this claim is defaulted by Wisconsin's prohibition on successive challenges to criminal convictions, *see State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 163-64 (1994), but notes that the Wisconsin Supreme Court has reserved the issue of whether this bar applies to sexually violent person commitment cases (Brown's brief at 56). *See State v. Bush*, 2005 WI 103, ¶ 19 n.8, 283 Wis. 2d 90, 699 N.W.2d 80. The State does not assert that Brown's claim is barred because of *Escalona* because that is a state court procedural bar. What makes Brown's ineffective assistance of trial counsel claim defaulted in this Court is his complete failure to raise it in state court, let alone present it through one complete round of appellate review.

Brown also argues that, in light of the Wisconsin Supreme Court's reservation in *Bush*, the United States Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003), excuses his default (Brown's brief at 56-57). There, the United States Supreme Court determined that a federal prisoner's failure to raise an ineffective

assistance of trial counsel claim on direct appeal did not bar him from raising it in his later petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2255. *Massaro*, 538 U.S. at 509. Brown contends similar considerations should excuse his default. This argument misses the point. That Wisconsin's highest court has not decided whether a state procedural bar would prohibit raising a claim in an attack on a Chapter 980 commitment that could have been raised in a previous one does not change the fact that Brown never challenged trial counsel's effectiveness in state court.

Further, in the context of habeas petitions filed by those in state custody, the rules of exhaustion and procedural default exist to promote federalism and comity by giving the state courts the first opportunity to correct alleged constitutional errors. *Spreitzer v. Schomig*, 219 F.3d 639, 645 (7th Cir. 2000). Such concerns were not at issue in *Massaro*, which involved a federal prisoner. In that context, the default rule exists "to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro*, 538 U.S. at 504. Brown failed to give the Wisconsin courts the first opportunity to address his trial and appellate attorneys' effectiveness, and as a result, he cannot rely on these claims to excuse his procedural default. *Edwards*, 529 U.S. at 452-54.

C. Brown cannot excuse his default under the fundamental miscarriage of justice standard.

1. The appropriate fundamental miscarriage of justice standard to apply in the sexually violent person context.

In order to assess whether Brown can overcome his defaulted claims by showing a fundamental miscarriage of justice, this Court needs to resolve what this standard means in the context of a civil commitment for a sexually violent person. In his brief, Brown argues that the standard should be requiring the habeas petitioner to show that the error claimed resulted in the confinement of a person who is not actually mentally ill (Brown's brief at 45). He also asserts that he should not have to present new evidence to make this showing, but even if he was, academic criticism of the State's expert's diagnosis not published until after his trial suffices (Brown's brief at 46-48).

The State largely agrees with Brown's suggested standard, and submits that in the context of a sexually violent person commitment, proving a fundamental miscarriage of justice would require the petitioner to show that, but for the errors alleged, no reasonable juror could have found him to be a sexually violent person beyond a reasonable doubt under the applicable state statutes. Or, put another way, the petitioner has to show that he is "actually innocent" of being a sexually violent person.

The State bases its proposed standard largely on the other actual innocence standards established by the Supreme Court. In order for a criminal habeas petitioner to show a fundamental miscarriage of justice, he has to show that he is actually innocent of the crimes of which he was convicted. *Murray*, 477 U.S. at 496. For a habeas petitioner challenging the imposition of a capital sentence, actual innocence requires that the petitioner demonstrate that no reasonable juror would have found him eligible for the death penalty under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 335-36 (1992). In both these circumstances, the petitioner has to show that no reasonable juror would have found that he met certain statutory criteria, either the crime's elements, or the standards for imposing the death penalty. The State discerns no reason why the inquiry should be any different for a habeas petitioner challenging a sexual predator commitment.

2. Brown has not shown that no reasonable juror could have found him ineligible to be committed as a sexually violent person.

The State agrees with Brown and the district court that Brown's proving a fundamental miscarriage of justice depends entirely on whether he can succeed on his due process claims (Brown's brief at 48-49; Dkt. 38:4-5). If due process requires that "mental disorder" as that

term is used in Wis. Stat. § 980.01(2), excludes both nonconsent and APD, then no reasonable juror should have ever found Brown eligible for commitment. As noted, Brown challenges the two diagnoses on different grounds. These diagnoses were made and testified to at trial by Dr. Dennis Doren, the State's expert witness. Brown claims that Doren's nonconsent diagnosis violates due process because the mental health profession does not accept it as valid (Brown's brief at 18-25). Brown also argues Doren's APD diagnosis is too imprecise to justify commitment, and that the state is judicially estopped from relying on it as a basis to commit sexually violent persons (Brown's brief at 25-34). The State addressees each argument in turn.

a. 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.

Brown claims Doren's nonconsent diagnosis violates due process because it is not accepted by mental health professionals, specifically noting that the APA does not recognize it and it is not found in the current edition of the DSM (Brown's brief at 18-25). The United States Supreme Court has rejected the contention that due process requires states to define "mental disorder" or similar terms in their statutes in line with the standards of the psychiatric community. *See Kansas v.*

Hendricks, 521 U.S. 346, 358-59 (1997). There, the court faced a challenge to Kansas's Sexually Violent Predator Act, which permitted civil commitment for persons who, due to a "'mental abnormality' or a 'personality disorder' are likely to engage in 'predatory acts of sexual violence.'" *Id*. at 350 (quoting Kan. Stat. Annot. § 59-29a01 *et seq*. (1994)). The Court determined that the act complied with its earlier cases upholding civil commitment statutes because it required both a finding of dangerousness and the presence of a mental illness. *Hendricks*, 521 U.S. at 358.

In so holding, the Court specifically rejected Hendricks's claim that the act's use of the phrase "mental abnormality" did not comport with earlier cases requiring a finding of "mental illness" because it was a term coined by the Kansas legislature and not the psychiatric community. *Id*. at 358-59. The Court stated "the term 'mental illness' is devoid of any talismanic significance." *Id*. at 359. It further noted that "'psychiatrists disagree widely and frequently on what constitutes mental illness'" and that the Court itself had never used consistent terms in its cases involving civil commitments. *Id*. (quoted sources omitted). The Court observed:

> [W]e have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators

> the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. See, *e.g.,* Gerard, The Usefulness of the Medical Model to the Legal System, 39 Rutgers L.Rev. 377, 391-394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). *Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession.* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxiii, xxvii (4th ed.1994).

Id. (emphasis added). *See also Kansas v. Crane*, 534 U.S. 407, 413-14 (2002) (reaffirming that psychiatric and the legal standards do not and need not overlap).

The *Hendricks* Court flatly rejected the proposition Brown now advances – that a sexually violent person commitment must be based on a mental health diagnosis accepted by the psychiatric community. Brown asserts that Doren's nonconsent diagnosis has been "rejected" by the mental health profession, particularly the APA and the editors of the DSM (Brown's brief at 18-25). But as *Hendricks* makes clear, the Wisconsin legislature was permitted to craft its own meaning of "mental disorder," and it was up to the jury, not the consensus of

mental health professionals, to determine whether Doren's nonconsent diagnosis fits Wis. Stat. § 980.01(2)'s definition.

Indeed, as the *Hendrick's* Court noted, the DSM itself rejects Brown's proposition. *See* DSM-IV-TR at xxxiii (noting the imperfect fit between "questions of ultimate concern to the law and the information contained in a clinical diagnosis."). The DSM cautions that a diagnosis of one of its listed disorders "[i]n most situations" is not sufficient to establish the legal existence of a "'mental disorder,' 'mental disability,' 'mental disease,' or 'mental defect.'" *Id.* It further cautions that while the current DSM reflects the current consensus about classification of mental disorders, new knowledge based on research and clinical experience will undoubtedly lead to further understanding of the listed disorders, the inclusion of new ones, and removal of others. *Id.* Brown correctly notes that the DSM "'reflect[s] the *consensus* of the [mental health] profession.'" (Brown's brief at 25 (quoting *State v. Pletz*, 2000 WI App 221, ¶ 29, 239 Wis. 2d 49, 619 N.W.2d 97)). It is not, however, incorporated into the due process clause.

Further, Brown misstates the extent to which the nonconsent diagnosis has been rejected by the medical community. Admittedly, it is a controversial diagnosis, particularly in the area of sexually violent person commitments. *See* Thomas K. Zander, *Civil Commitment*

Without Psychosis: The Law's Reliances on the Weakest Links in Psychodiagnosis, 1 J. Sexual Offender Civ. Commitment 17, 41-42 (2005) (discussing Doren's acknowledgement in his book, Dennis M. Doren, Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond (2002), that the nonconsent diagnosis is controversial). In his book, Doren set out criteria to guide mental health professionals in diagnosing nonconsent, which is defined primarily by a deviant sexual arousal to nonconsensual sex. *Id*. As Zander notes, the diagnosis has found "widespread acceptance" in the forensic community. *Id*. at 42-43. *See, e.g., Seling v. Young*, 531 U.S. 250, 255 (2001); *In re Post*, 187 P.3d 803, 817-18 (Wash. Ct. App., 2008); *People v. Williams*, 74 P.3d 779, 781 (Cal. 2003). Obviously, forensic psychologists and psychiatrists are part of the mental health profession, and simply because Brown has pointed to some professional and academic criticism of Doren's diagnosis does not establish that it is completely without support in the mental health field. *See also* Gregory DeClue, *Paraphilia NOS (Nonconsenting) and Antisocial Personality Disorder*, 34 J. Psych. and Law 495, 508 (2006) ("[t]here appears to be a general acceptance among most psychiatrists, psychologists, and sexologists that a person can have a Paraphilia involving rape.").

All that Brown has proven is that Doren's nonconsent diagnosis is the subject of some controversy among mental health professionals. As Brown acknowledges, he brought this controversy to the jury's attention during his commitment trial through his cross-examination of Doren and his own expert in an attempt to show that the State's diagnosis did not justify his commitment (Brown's brief at 4-7). The jury was the appropriate group to resolve whether the nonconsent diagnosis met the definition of a mental disorder for the purposes of Wis. Stat. ch. 980. *See Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). This is all due process requires, and this court should reject Brown's argument that his commitment based on the nonconsent diagnosis violates the Constitution.

b. APD is not too imprecise to serve as the basis for Brown's commitment.

Brown next argues that the other mental disorder with which Doren diagnosed him, APD, violates due process because it is too imprecise to provide a basis for his commitment (Brown's brief at 25-33). He contends that *Foucha v. Louisiana*, 504 U.S. 71, 78, 82-83 (1992), strongly implies that a civil commitment cannot be based on APD, and that *Crane* and *Hendricks* suggest this as well (*id.*). He also,

again, relies on criticism by the mental health community of the diagnosis serving as a basis for commitment (*id*.).

This Court should reject Brown's arguments. The State does not dispute that in *Foucha*, the Court held that Foucha's antisocial personality along with a finding of dangerousness by a Louisiana court was not enough to keep him involuntarily committed as an insanity acquittee. *Foucha*, 504 U.S. at 85. The Court held that although a state may confine a person who is mentally ill and dangerous, Louisiana could not hold Foucha because his antisocial personality was not a mental illness. *Id*. at 80. From this, Brown argues, his APD is not a mental disorder under Wis. Stat. § 980.01(2).

Brown reads *Foucha* too broadly. As this Court has noted, the reason Foucha's antisocial personality did not constitute a mental illness was because, there, the State never argued that Foucha was mentally ill. *Id*. at 78-80. *See Adams v. Bartow*, 330 F.3d 957, 961 (7th Cir. 2003). As this Court recognized, *Foucha* stands for the proposition that an insanity acquittee can only be held as long as he is mentally ill; simply being dangerous is not enough. *Id*. And, as this Court specifically recognized in *Adams*, APD is a mental illness. *Id*. The reason the Court did not consider it an illness in *Foucha* was because the state conceded that it was not. *Id*.

In an attempt to get around *Adams*, Brown latches onto this Court's statement that even if *Foucha* does stand for the proposition that APD alone is insufficient to justify a commitment, it is dicta, which was inadequate to justify relief in *Adams* because dicta is not clearly established federal law under the AEDPA (Brown's brief at 25-27). *Adams*, 330 F.3d at 961. Because his case is not controlled by the AEDPA, Brown claims this Court should exercise its independent judgment and conclude APD is not enough to justify a commitment (Brown's brief at 25-27).

This Court should decline Brown's invitation. *Adams* does not clearly state that *Foucha* stands for the proposition that Brown claims it does. Instead, this Court distinguished *Foucha's* facts from those in *Adams* by noting, among other things, that Louisiana had conceded that an antisocial personality was not a mental illness, whereas no one had disputed in state court that APD was a mental illness in *Adams*. *Adams*, 330 F.3d at 961. This Court's comment that *Foucha* might support Adams's, and now Brown's, interpretation was preceded by "even if," and refuted the argument without finding its premise to be correct. *Id.* Additionally, the Court's discussion does not change its clear distinction of *Foucha* from the facts of *Adams*. This Court should

not rule contrary to *Adams* here simply because a different standard of review applies.

Brown also argues that the Supreme Court suggested in *Crane* that APD cannot serve as a basis for commitment (Brown's brief at 27-32). He relies in part, on the Court's reference to a study finding that forty to sixty percent of the male prison population has APD (Brown's brief at 27 (citing *Crane*, 534 U.S. at 412)). Brown also argues that the number might even be higher, and further notes APD's prevalence in the general population (Brown's brief at 27). Brown points to the broad behavioral definitions of APD in the DSM, noting the minimal, non-criminal actions that qualify for a diagnosis and Justices Ginsburg's and Souter's similar concerns at the oral argument in *Crane* (Brown's brief at 28-29). Additionally, Brown points to the APA's and academic opposition to using APD as a basis for commitment (Brown's brief at 30-33).

Brown misconstrues the issue, which is not whether APD in general provides a basis for commitment, but whether it does in his case. Wisconsin Stat. § 980.01(2) does not define "mental disorder" as a condition that "*generally*, predisposes 'people,' or 'persons,' or the 'prison population,' or even the 'mentally disordered population' to engage in sexual violence." *State v. Adams*, 223 Wis. 2d 60, 69,

588 N.W.2d 336, 340 (Ct. App. 1998). Instead, as the Wisconsin Court of Appeals explained in *Adams*, the relevant inquiry is whether the individual being committed has a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence. Wis. Stat. §§ 980.01(2) and (7).[2] The State does not dispute that most of the prison population has APD. But this does not mean they are all subject to commitment under Chapter 980. A person will only be subject to commitment if, along with having a conviction for a qualifying offense, they have a disorder that makes them dangerous. As this Court noted in *Adams*, it is this dangerousness, along with the disorder, that distinguishes committed persons from the "typical recidivist." *Adams*, 330 F.3d at 961-62 (quoted source omitted). *See* DeClue, *supra* at 498 ("[t]o paraphrase a popular slogan, psychiatric disorders do not engage in acts of sexual violence, people do. . . . [I]t is just as wrong to state that an antisocial personality disorder could

---

[2]At the time of Brown's trial, Wis. Stat. § 980.01(7) required a showing that the mental disorder made it "substantially probable" that the person would commit future acts of sexual violence. The Wisconsin legislature has since changed the standard to require a showing that the disorder makes it "likely" that the person will commit future acts of sexual violence. *See* Wis. Stat. § 980.01(2) (2001-02) and Wis. Stat. § 980.01(2) (2003-04).

never make a person likely to commit acts of sexual violence as it would be to say that a paraphilia always makes a person likely to engage in sexual violence."). The jury could properly conclude that Brown's APD provided a basis for his commitment.

c. The State is not judicially estopped from relying on APD a basis for civil commitment.

Brown also argues that the State is judicially estopped from relying on an APD diagnosis to commit him because it takes the position that APD is not a mental disease or defect for the purposes of the insanity defense (Brown's brief at 33-34). *See* Wis. Stat. § 971.15. This court may easily dispose of this claim. Initially, Brown never raised it in district court, and it is forfeited. *See Holman v. Gilmore*, 126 F.3d 876, 885 (7th Cir. 1997).

Further, Brown has not satisfied the prongs of a judicial estoppel claim. This doctrine prevents a party who prevails on one ground in a lawsuit from repudiating that ground in another lawsuit. *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999) (citation omitted). Three prerequisites exist for its application: "(1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must

have convinced the first court to adopt its position." *Id.* (quoted source and internal quotation marks omitted).

Brown plainly cannot prevail on his estoppel claim. That the State argues APD is not a basis for an insanity defense is not inconsistent with relying on it to support a sexually violent person commitment. Insanity and commitment under Chapter 980 are two different legal proceedings with different procedures, standards, definitions, and burdens of proof. Contrary to Brown's assertions, Wisconsin's definition of "mental disease or defect" in the insanity context is not the same standard for commitments from *Crane*, or for that matter, under Chapter 980 (Brown's brief at 34). The Wisconsin legislature has specifically excluded antisocial conduct from the definition of mental disease or defect under Wis. Stat. § 971.15. *See Simpson v. State*, 62 Wis. 2d 605, 612, 215 N.W.2d 435, 438-39 (1974). It has not done so for Wis. Stat. § 980.01(2). *Adams*, 588 N.W.2d at 340. This court is bound by Wisconsin's interpretation of its own laws. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Additionally, it is unlikely that the facts at an insanity trial and a commitment hearing, even involving the same person, would ever be similar enough to invoke judicial estoppel. Brown has not proven his judicial estoppel claim.

d. Brown's commitment is not based on unreliable evidence.

Brown also argues that his commitment violates due process because it is based on unreliable evidence (Brown's brief at 35-39). This unreliable evidence is, of course, Doren's nonconsent and APD diagnoses. Brown criticizes the standard for the admissibility of expert testimony in Wisconsin, and appears to ask this Court to impose the stricter federal standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on Wisconsin's courts, at least in Chapter 980 proceedings. Brown's brief at 35-39.

Brown is correct that Wisconsin does not follow the federal gatekeeping rule of Fed. R. Evid. 702 and *Daubert*. *See State v. Peters*, 192 Wis. 2d 674, 687, 534 N.W.2d 867, 872 (Ct. App. 1995). Instead, in Wisconsin, expert testimony is admissible if it is relevant, the person giving it is qualified as an expert, and it will assist the jury in determining an issue of fact. *Id*. Wis. Stat. § 907.02. Brown concedes that *Daubert* is not binding on the states, but nonetheless asserts that it "is a practical and appropriate proxy for the reliability that due process requires" (Brown's brief at 38-39). *See Milone v. Camp*, 22 F.3d 693, 702 (7th Cir. 1994) (*Daubert* does not set a constitutional floor for state evidentiary codes).

This Court must reject Brown's argument. As argued previously, Doren's diagnoses were not unreliable, and in any event, in Wisconsin, their reliability was for the jury to decide. The State and Brown presented their conflicting ideas about Doren's diagnoses, and the jury decided to believe the State. Further, Brown's argument contradicts itself. If, as Brown acknowledges, the constitution does not require that the States apply *Daubert*, then it makes no sense to say that it needs to apply to Chapter 980 proceedings. Brown's claim that a stricter standard is needed because commitment proceedings can deprive the person of his liberty is of no moment; so do state criminal proceedings and the constitution does not require *Daubert* apply to them. This Court should decline Brown's request to rewrite Wisconsin's laws of evidence.

e. If this Court concludes that only one of Brown's diagnoses violates due process, it must still affirm his commitment.

Brown argues in his brief that if this Court concludes that either the nonconsent or APD diagnosis violates due process, it must grant his petition because the jury returned a general verdict and thus, the Court cannot determine if his commitment is based on the improper diagnosis (Brown's brief at 39-43). This argument misconstrues the procedural posture of this case. Brown has to overcome his procedural default in

order to have this Court grant his petition. While the parties have discussed the merits of Brown's claims in assessing whether he can do this, ultimately Brown needs to show cause and prejudice or that he will suffer a fundamental miscarriage of justice if the Court does not address his claims on the merits. As argued in section B, above, Brown cannot show cause for his default.

This leaves Brown with the actual innocence exception to procedural default, but he cannot satisfy this standard unless both his diagnoses violate due process. Under the parties' proposed standard, Brown has to show no reasonable juror would have found him to be eligible for commitment but for the improper diagnoses. *See* Section C.1, above. If only one diagnosis is improper, the other is valid. As such, this Court could not conclude that no reasonable juror would ever have voted to commit Brown because a reasonable juror could rely on the valid diagnosis. Brown's argument would perhaps be stronger if this Court was directly reviewing the merits of his claims. Because they come to this Court procedurally defaulted, however, only one diagnosis need be valid for this Court to affirm the district court's decision denying Brown's habeas petition.

CONCLUSION

Upon the foregoing, the State respectfully requests that this Court affirm the district court's judgment and order denying Brown's petition for a writ of habeas corpus.

Dated at Madison, Wisconsin, this 17th day of September, 2008.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

AARON R. O'NEIL*
Assistant Attorney General
State Bar #1041818
*Counsel of Record
Attorneys for Respondent-Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740

CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief conforms to the rules contained in Federal Rule of Appellate Procedure 32(a)(7)(B) and in Circuit Rule 32. The length of this brief is 6,157 words.

Aaron R. O'Neil
Assistant Attorney General