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

In re the Detention of:
WILLIAM GASTON.
Appellant.

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

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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A. ARGUMENT

Treating its appellate brief as an opportunity to continue the ghost story it spun to jurors below, the State's brief is long on facts and short on legal analysis. The State argues that Antisocial Personality Disorder, standing alone, is sufficient to indefinitely confine someone pursuant to RCW 71.09. In reaching the conclusion it does, the State does not bother to address the limitations imposed by the Due Process Clause or even the diagnostic criteria of Antisocial Personality Disorder. Despite the fear it struck in the jury, missing from the state's case at trial and its argument on appeal is any proof that Mr. Gaston's risk to reoffend is caused by the his inability to control his behavior due to a personality disorder. Because that causative link is a required element to support commitment, Mr. Gaston's indefinite commitment under RCW 71.09 must be reversed.

1. THE STATE DID NOT OFFER SUFFICIENT PROOF TO JUSTIFY COMMITMENT OF MR. GASTON.

Before the State may commit an individual under RCW 71.09, a unanimous jury must conclude the State has proved the elements RCW 71.09.020(1) beyond a reasonable doubt. In re

Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1995); RCW 71.09.050; RCW 71.09.060. Thus, the State must prove a person

has been convicted of or charged with a crime of sexual violence and . . . suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

RCW 71.09.020(18). The Supreme Court has concluded such a commitment comports with the requirements of due process only where the state can establish the person has a mental abnormality that makes it “difficult, if not impossible, for the person to control his dangerous behavior.” Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

The Court subsequently clarified this constitutional requirement saying

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.” That distinction is necessary lest “civil commitment” become a “mechanism for retribution or general deterrence”—functions properly those of criminal law, not civil commitment. cf. also Moran, The Epidemiology of Antisocial Personality Disorder, 34 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999) (noting that 40%–60% of the male prison population is diagnosable with Antisocial Personality Disorder).

Kansas v. Crane, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); see also, Foucha v. Louisiana, 504 U.S. 71, 86-87, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

a. Because it is descriptive rather than causative Antisocial Personality Disorder cannot justify commitment under RCW 71.09. Crane requires the State's proof distinguish the person who is likely to reoffend because of their mental condition from the normal recidivist who may not be constitutionally committed no matter how great the likelihood of reoffending. See e.g. In re the Detention of Thorell, 149 Wn.2d 724, 715-16, 72 P.3d 708 (2003).

The crux of the debate regarding reliance upon Antisocial Personality Disorder by itself to indefinitely confine a person under RCW 71.09, and similar statutes in another states, is that that Disorder by definition does not "cause" behavior. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p. xxiii, 4th ed. (1994) (Hereafter DSM-IV). The American Psychiatric Association (APA), the publisher of the DSM-IV, has condemned the use of Antisocial Personality Disorder as a basis for commitment under laws such as RCW 71.09. APA Final Action Paper, Eliminating the Use of Antisocial Personality Disorder

as a Basis for Civil Commitment (APA Assembly, May 19-21, 2006). The APA rejected Antisocial Personality Disorder as a basis for involuntary commitment because 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.

Nowhere, in its response does the State address how a disorder which applies to a significant majority of the male prison population narrows the class of recidivists subject to RCW 71.09 as required by Foucha and Crane. Instead the State simply cites the use of the term “personality disorder” in RCW 71.09.020(18) and concludes the Legislature intended to permit such an outcome. Brief of Respondent at 11-12. But legislative intent cannot bend the requirements of due process.

Crane makes clear that commitment is only permissible if the person’s mental condition causes them difficulty controlling their behavior. Antisocial personality disorder does not cause behavior. Because person diagnosed with Antisocial Personality Disorder retains the ability to control behavior - they simply chose not to - the diagnosis does not result in a limitation of volitional control and it

does not provide the causal link required by due process and RCW 71.09.020.

b. Even assuming Antisocial Personality Disorder can support commitment under RCW 71.09, the State did not offer sufficient proof that it does so here. Setting aside the constitutional inadequacy of Antisocial Personality Disorder as a basis for commitment, even Dr. North could not say that Mr. Gaston's personality disorder made him likely to reoffend in this case. Instead, Dr. North qualified his conclusion, saying the disorder coupled with what he termed Mr. Gaston's hypersexuality made him likely to again commit crimes of sexual violence. RP 576-604; see also, Brief of Respondent at 14. Hypersexuality, as Dr. North acknowledged, is not a recognized diagnosis either. RP 710. Thus, the best evidence the State can put forward is Dr. North's opinion that Mr. Gaston's personality disorder makes him likely to reoffend **only** if coupled with a characteristic that is neither a mental abnormality nor personality disorder. That evidence does not even meet the criteria of RCW 71.09.020(18) much less due process.

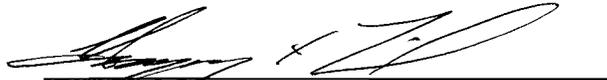
2. THE LACK OF A UNANIMITY INSTRUCTION
DEPRIVED MR. GASTON OF HIS
CONSTITUTIONAL RIGHT TO A
UNANIMOUS VERDICT

The State objected to the defense proposed “to commit” instruction which would have required the jury to find a causative effect of a single diagnosis on Mr. Gaston’s risk of reoffense. RP 983-84; CP 57. The State claims no such limitation as necessary because it offered a lone disorder as a basis for commitment. Brief of respondent at 19-20. Yet in defending the sufficiency of its proof the State says “[Mr. Gaston’s hypersexuality] **in combination with** his psychopathy **or** antisocial personality disorder ‘puts him at particular risk for committing new sex crimes.’” Brief of Respondent at 14. Thus, despite its claim the State is not now, nor did it at trial, relying on a single diagnosis. It was precisely this effort by the state to hedge its bets that led Mr. Gaston to propose an instruction to ensure juror unanimity. In fact if the State truly wished the jury to base its decision on the lone diagnosis there is no defensible argument for opposing the proposed instruction.

B. CONCLUSION

For the reasons above, and those addressed in Mr. Gaston's prior brief, the Court must reverse Mr. Gaston's commitment.

Respectfully submitted this 10th day of March, 2011.



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

IN RE THE DETENTION OF)

William Gaston,)

APPELLANT.)

NO. 64606-1-I)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10th DAY OF March, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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