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STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

In re the Detention of:

DARNELL MCGARY,

Respondent.

NO. 11-2-06280-1

ORDER GRANTING STATE'S
MOTION TO TRANSFER AND
STRIKING HEARING ON
PETITIONER'S SUMMARY
JUDGMENT MOTION

THIS MATTER came before the Court on the

- Petitioner McGary's Motion for Summary Judgment;
- the State's Motions to
 - transfer this habeas action to the Court of Appeals as a Personal Restraint Petition;
 - strike the hearing for Petitioner McGary's summary judgment motion on December 2, 2011, and
 - strike the mandatory review hearing, scheduled for December 9, 2011 before this Court.

The State appeared through Senior Counsel Sarah Sappington, who appeared telephonically. Mr McGary appeared pro se. also telephonically. The Court considered the pleadings filed in this action, as well as the arguments of counsel and Mr. McGary Based upon all matters considered:

1. The State's motion to transfer this habeas action to the Court of Appeals as a Personal Restraint Petition is hereby GRANTED.

ORDER GRANTING STATE'S MOTION
TO TRANSFER AND STRIKING
HEARING ON PETITIONER'S
SUMMARY JUDGMENT MOTION

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ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle WA 98104

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2. The December 2, 2011 hearing on Mr. McGary's Motion for Summary Judgment is STRICKEN.

3. The December 9, 2011 Mandatory Review Hearing is hereby STRICKEN.

DATED this 2nd day of December, 2011

[Handwritten Signature]

THE HONORABLE RONALD CULPEPPER

Presented by.

ROBERT M. MCKENNA
Attorney General

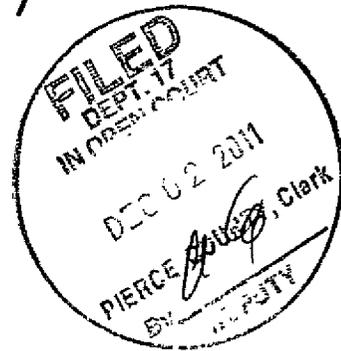
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SARAH B. SAPPINGTON, WSBA #14514
Senior Counsel

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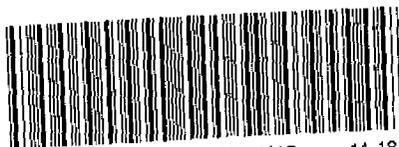
DARNELL MCGARY
Pro Se *agreed as to form telephonically*



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TACOMA WA 98402



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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF PIERCE**
9

10 In re the application of.

Case No. 11-2-06280-1

11 DARNELL McGARY,

: **MOTION FOR SUMMARY JUDGMENT**
: **UNDER CIVIL RULE 56(c)**

12 Petitioner,

13 v.

14 MR KELLY CUNNINGHAM,

15 Respondent
16

17
18 **I. Introduction**

19 Petitioner Darnell McGary, by and through pro-se, hereby enters his appearance in the following
20 matter, and request this court grant his application for writ of habeas corpus This motion is
21 based on the fact that there is no material issues of dispute as to the basis of his confinement, or
22 that the constitution forbids further confinement under the circumstances surrounding this matter.
23 Summary judgment is appropriate when there is no material issues of fact in dispute, and the
24 moving party is entitled to judgment as a matter of law. Gossett v Farmers Ins. Co., 133 Wn.2d
25 954, 948 P 2d 1264 (1997).
26

27 //

28 //

1 A proceeding for writ of habeas corpus cannot be used to review alleged trial errors. It is limited
 2 by law to those cases in which it appears that the judgment and sentence under which petitioner
 3 is confined is void on its face. Thompson v. Smith, 33 Wn. 2d 142, 143, 204 P.2d 525 (1949).
 4 The purpose of a writ of habeas corpus is to inquire into the legality of the petitioners restraint
 5 and to determine whether his constitutional right to due process has been violated. In the matter
 6 of the Application for Writ of Habeas Corpus of Robert Montague v. William Conte, 3 Wn. App.
 7 687 (1970))

8

9 II. Basis

10

11 The facts of this case are very complex and far reaching, in May of 1998, the petitioner was
 12 transferred to the Special Commitment center after the court found that there was probable cause
 13 that he was a sexually violent predator. This probable cause satisfied RCW 71.09.040. Petitioner
 14 was then evaluated by Dr. Vince Gollogly Ph.D who confirmed that there was cause for the court
 15 to initiate a civil commitment trial in this matter. However, after being confined for almost
 16 seventeen months in the Special Commitment center, the State's attorney general dismissed the
 17 proceedings, and had petitioner transferred to Western State Hospital under chapter RCW 71.05.
 18 In re Detention of McGary(I), 128 Wn. App. 470 (2005). Petitioner has proven to be a low risk
 19 offender. RCW 71.09.060(3)(unauthorizing the housing of detainees under RCW 71.09 in any
 20 mental health facility due to their unsecure nature), RCW 10.77.220 (limiting confinement of
 21 SVP's to correctional facilities) In re Detention of Gordon, 102 Wn.2d (2000)(defining WSH as
 22 a unsecure facility) In re Detention of Young, 122 Wn.2d (1993)(defining RCW 71.09 as a
 23 facility that houses only SVP's and authorizing their confinement only in a "total confinement
 24 facility"). Petitioner programmed at the hospital under RCW 71.05 for a full nine months at
 25 which time the (Drs.) at the hospital decided that there was no longer a reason to detain petitioner
 26 any longer since he was in their view stabilized. Therefore, two of the doctors at the hospital
 27 filed a letter to the attorney general's office recommending that the sexually violent predator
 28 proceedings be adjudicated, and after some time there was no response from the State, so again

1 the doctors filed yet another letter requesting re-instatement of the 71.09 proceedings, no recent
 2 overt act was alleged in the matter. McGary(I) at 472 Petitioner was treated under RCW 71.05
 3 for both schizophrenia and anti-social personality disorders. Id.

4
 5 The State on December 15, 2000 re-instated a petition under RCW 71.09 the sexually violent
 6 predator act, and petitioner was transferred back to the Special Commitment Center Petitioner
 7 engaged in treatment (cognitive behavior therapy) specific for sex offenders for several years. or
 8 up until 2004, after completion of the inpatient treatment program trial was commencing, before
 9 the jury was seated petitioner stipulated to being a sexually violent predator in exchange for a
 10 less restrictive alternative with housing in the secure community transition facility. Also,
 11 petitioner agreed to other terms of the agreement such as waiving all rights to trial by jury, and to
 12 his commitment diagnosis as stated:

13
 14 Specifically, petitioner stipulated that he suffers
 15 from schizophrenia and an anti-social personality
 16 disorder. Petitioner also stipulated that his anti-
 17 social personality disorder "causes him serious
 18 difficulty controlling his sexually violent
 19 behavior," making him more likely than not to
 20 engage in predatory acts of sexual violence if he
 21 is not confined in a secure facility ¹

22 In re Detention of McGary(II), 155 Wn. App. 775 (2010)

23 Petitioner continued to participate in the treatment program and was transferred out to the secure
 24 community transition facility (LRA) on September 7, 2004, after approximately ten months in
 25 the LRA petitioner elected to return to the total confinement facility, the special commitment

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 27
 28 ¹ The American Psychiatric Associations diagnostic and Statistical Manual of Mental disorder (4th Ed 2000) (DSM-
 IV-TR) at 297-98, 685 lists schizophrenia as a psychotic disorder rather than a personality disorder Thus, McGary
 did not stipulate that his psychotic disorder made him unable to control his sexually violent behavior or increase his
 likelihood of engaging in predatory acts of sexual violence

1 center on McNeil Island This court then re-voked it's LRA order concluding petitioners return to
2 the Special Commitment center.

3 During petitioners treatment there has been a lot of controversy surrounding whether or not he
4 suffered from the diagnosis of Paraphilia NOS (non-consent). In 2002, Dr Robert Saari Ph.D
5 found that Petitioner did not suffer from Paraphilia NOS. However, later evaluations indicated
6 that Petitioner did suffer from Paraphilia NOS. Id. McGary(II), 155 Wn. App. 775 (2010). Dr.
7 Micheal First the editor of the (DSM) diagnostic & statistical manual of mental disorders
8 disputed that the diagnosis of Paraphilia NOS (non-consent) was indeed a valid opinion when
9 given to an individual for the purpose of a diagnostic impression. He pointed to the notion that
10 there was an error in the DSM that provided for his explanation an conclusion that the diagnosis
11 was not valid in reference Id. McGary(II), 155 Wn. App. 775 (2010). However, the State in this
12 case points to the fact that petitioner is not confined for the purpose an treatment of a Paraphilia,
13 but that his diagnosis of Anti-Social Personality disorder is the basis of his commitment, an that
14 it remains unchanged. Therefore, there was no cause to believe that the petitioner was unchanged
15 at the time of the court of appeals analysis. Therefore, the State agrees that Paraphilia NOS (non-
16 consent) is not the commitment diagnosis basing the foundation for petitioners commitment.
17 Therefore, any argument to this court would be baseless an unfounded.

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23 Petitioner did carry the diagnosis of schizophrenia, an argued to the court of appeals that the
24 disorder was well controlled, an that would also form a basis to show that he was no longer
25 meeting the criteria for commitment as a sexually violent predator However, as the petitioner
26 points out, an the State argued this does not show that petitioner has changed due to the fact that
27 his diagnosis of schizophrenia is not the basis of his commitment, an cannot be used to show
28

1 change as to his no longer meeting the criteria under the sexually violent predator statute. This
2 argument makes great sense due to the fact petitioner was not diagnosed with this disorder until
3 after 1994, for the petitioner to argue his release based on this changed diagnosis would be
4 unfounded, and make very little sense. The State did not rely on this diagnosis to form the basis of
5 commitment under the statute. Id. McGary(II), 155 Wn. App. 775 (2010)...

7
8
9 The State has fashioned its belief that petitioner is a sexually violent predator on the basis of his
10 unchanged Anti-Social Personality disorder. However, some authority exist that indicates that it
11 is unconstitutional to restrain a person for this disorder altogether, and that this violates the
12 constitution under the due process clause. Most courts have interpreted the decision in Foucha v.
13 Louisiana, 504 U.S at 75-83, to be specifically referring to this condition as the only personality
14 disorder that is not committable under its precedent. See State v. Reid, in this case the court
15 interpreted Foucha to say that holding him based on dangerousness and antisocial personality
16 disorder violated due process. Id. 102 Wn App. 513 (2000) affirmed 144 Wn. 2d (2001). The
17 court even further concluded that antisocial personality was an untreatable disorder. Id.
18 However, here we have a different situation altogether, the Special Commitment center's
19 forensic department has taken the time to evaluate the petitioner for the last two years, and has
20 come to the same conclusion amongst its evaluators, that due to good behavior and age the
21 petitioner's personality disorder is no longer satisfying the criteria for commitment under the
22 statute stating.

23
24 While he received numerous infractions in the DOC, it has been
25 several years since he has received any behavioral problems
26 reports at the SCC. He continues to demonstrate more subtle
27 characteristics of being antisocial. However, other behaviors
28 indicate his attempts to be compliant. As is commonly seen in
those diagnosed with Anti-Social Personality Disorder, the
severity of the disorder appears to be decreasing as McGary ages.

1 (Annual Review by Dr. Megan Carter Ph.D at 14 (2010)

2
3 Although. Petitioner stipulated that he suffers from schizophrenia, the stipulation indicates that
4 his anti-social personality disorder was the mental abnormality forming the basis of his
5 commitment. Id. For Department of Correction behavior (DOC) reference, McGary(I), 128 Wn
6 App. 470 (2005)...

7
8 As stated, the Supreme Court held for a Louisiana patient Terry Foucha that the statute allowing
9 continued confinement of insanity acquittee on basis of his antisocial personality, after hospital
10 review committee had reported no evidence of mental illness and recommended conditional
11 discharge, violated Due Process. Foucha v Louisiana, 504 U.S 71, 118 L.Ed 2d 437 (1992) This
12 is the same instance here the Forensic Department of the SCC has stated in it's 2010 evaluation
13 by Dr. Carter that Petitioner no longer meets the criteria for commitment. This is based on
14 decrease in anti-social personality due to good behavior and age. Chapter 71.09 RCW would be
15 unconstitutional if it allowed petitioner to be confined absent proving he was not dangerous to
16 self or others even though he was no longer suffering from the ailment that caused his
17 confinement. Petitioner is entitled to release when he has recovered his mental abnormality
18 sufficiently that he is no longer mentally ill in that form Foucha v. Louisiana, 504 U.S 71, 118
19 L.Ed 2d 437 (1992). Petitioner declares he can be held as long as he is both mentally ill and
20 dangerous to others, no longer. Also, this standard can no longer be met through competent
21 testimony. All evaluators since 2010 have concurred with Dr. Megan Carter and therefore
22 petitioner should no longer be detained against his will absent his mental abnormality. In 2011,
23 the evaluator was Dr. Steven Marquez Ph D, who concurred with Dr. Megan Carter that the
24 criteria for Anti-Social Personality disorder was no longer being met. Id. On the basis of this,
25 petitioner can no longer be held under the statute as committable for a personality disorder. The
26 court must release petitioner based on the testimony given in the evaluations. In sum, the
27 standard test for mental abnormality is no longer being met.
28

III. Should The State Be Allowed To Break It's Contract

Although this is a civil commitment law, the State is bound by it's contract. Stipulation agreement's are contractual in nature an must be adhered to entirely. Stipulations resemble plea bargains that are contracts between the State and the Defendant. State v Sledge, 133 Wn 2d 828, 947 P.2d 1199 (1997), because a Defendant gives up important constitutional rights by agreeing to a plea bargain, the State must adhere to the terms of the agreement. State v Hagar, 126 Wn. App. 320 (2005)(where a stipulation to facts is an integral part of a plea agreement and the two are not shown to be divisible, the stipulation and resulting sentence may not be challenged apart from the agreement itself). The fact that petitioner carries a diagnosis of schizophrenia is not relevant in the determination of whether or not he actually continues to meet the sexually violent predator criteria under the statute RCW 71.09, based on the contract between the State and Petitioner Nevertheless, schizophrenia was never a factor in any of the sexual assaults he was involved in, in the past. Petitioner was committed an treated for both (APD & Schizophrenia) at Western State Hospital. [C]hapter 71.05 RCW is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under RCW 71.05, sexually violent predators generally have personality disorders and/or mental abnormalities which are unamendable to existing mental illness treatment modalities and those conditions render them likely to engage in sexually violent behavior McGary(I), 128 Wn. App.471 (2005) Petitioners diagnosis of schizophrenia was treated an released from RCW 71.05 under a short-term standard, an can no longer be detained constitutionally Again, the States argument is that it does not matter if the petitioner changed in regard to this diagnosis because it does not form the basis of his commitment. Id. McGary, 155 Wn App. 775 (2010) For the court to evaluate this commitment on the basis of

1 Anti-Social Personality alone interprets the contract correctly in this matter, an the State should
2 be bound by it's terms.

3
4 **IV. Would The State Be Issue Precluded In Regard To Breaking It's Contract**

5
6 The State would be precluded from arguing that Paraphilia NOS (non-consent) formed a basis of
7 commitment under the statute in this particular case, due to the fact that it is not part of any
8 contract and/or conclusion based consideration in the evaluation perspective. Although petitioner
9 has been evaluated in the past with paraphilia NOS (non-consent), he has also had evaluations
10 that did not conclude he suffered from such diagnosis after review of his criminal history and
11 disclosure. In 2010, Dr. Megan Carter Ph.D, found that there was no evidence of current
12 symptoms, an stated it was in remission In 2011, Dr. Steven Marquez Ph.D, found that there was
13 no evidence also. and put that it was in probable remission In Levine v Torvik, the experts
14 testified Levine's mental illness was in remission and gave a definition of "no signs of mental
15 illness or dangerousness". The trial court found that because Levine suffered from "psychosis"
16 for which there is no cure, he was still mentally ill and therefore dangerous. Id. On Appeal, the
17 trial courts determination that Levine suffered from mental illness and was dangerous was
18 overturned Id. 986 F.2d 1506 (6th Cir 1993) However, as stated earlier in the brief, petitioner
19 has never shown paraphiliac behavior at the Special Commitment Center in over twelve years
20
21 The State would be issue precluded from wasting the courts time with whether or not it is a valid
22 diagnosis to begin with, and whether petitioner currently suffers for the disease. There is no
23 current symptoms The Respondent would be estopped from arguing it formed a basis of
24 commitment. The State is bound by collateral estoppel and/or issue precluded from bringing any
25 argument regarding Paraphilia NOS and/or Schizophrenia in determining the likelihood of re-
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1 offense based on a acquired disease not present during my offending behavior. Seattle First
 2 National Bank v. Cannon, Wn. App. 922 (1998).(applying collateral estoppel to civil
 3 proceedings). Collateral estoppel promotes judicial economy and prevents inconvenience. and
 4 even harassment of parties. Reninger v. Dept. of Corr., 134 Wn.2d 437 (1998). Here allowing the
 5 State to look past the stipulated findings of fact in this matter amounts to harassment. and allows
 6 the State time to create deception surrounding the issues it wishes to pursue at this time.
 7

8 V. Conclusion

10 This court should issue a habeas corpus concluding that the State is issue precluded from raising
 11 anything not in the contract regarding criteria for commitment under chapter RCW 71.09. The
 12 court should also allow the petitioner to release due to the fact his Anti-Social Personality
 13 disorder is no longer applicable to concluding he is a menace to the health and safety of others
 14 Persons facing civil commitment as SVP's must have serious difficulty controlling behavior. In
 15 re detention of Thorell, 149 Wn. 2d 731, 732, 735, 759 (2003) For examples of current mental
 16 illness see history of Bernard Thorell. Id. The committed acquittee is entitled to release when he
 17 has recovered his "sanity" or is no longer dangerous, he may be held as long as he is mentally ill
 18 and dangerous. Jones v. United States, 463 US 354, 103 S. Ct 3043, 77 L.Ed 2d 694 (1983).
 19

20 Here the petitioner has not had any behavior problems at the (SCC) Special Commitment Center
 21 for over five years. He has not been accused on any strong-arm behavior true or false since 1992,
 22 an has never been infracted for any women related behavior during his incarceration. The State
 23 may say that this is not evidence of lack of dangerousness. However, to establish dangerousness
 24 there must be proof of serious difficulty controlling behavior, this standard would lead one to
 25 believe that perfection in a institutional environment is impossible The U.S Supreme court has
 26 consistently held involuntary commitment statutes are permissible when (1) the confinement
 27 takes place pursuant to proper procedures and evidentiary standards (2) there is a finding of
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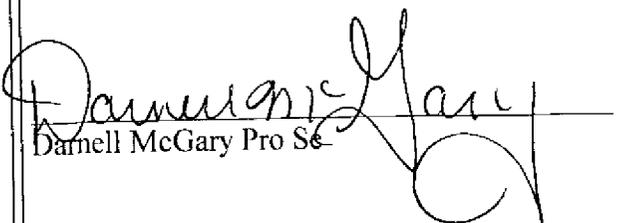
1 dangerousness either to ones self or to others and (3) proof of dangerousness is coupled with
2 mental illness. Kansas v. Crane, 534 US ____ (2002).

3
4 Next, the State has not proven mental illness by clear and convincing evidence. For the last two
5 years the evaluators under RCW 71.09.070, (annual review on file, 2010, 2011), have found that
6 the basis for commitment, (Anti-Social Personality disorder) no longer presents an area of
7 concern Dr. Megan Carter indicates due to good behavior and age this disorder has decreased,
8 she also concluded she could not state to a reasonable degree of psychological certainty that
9 petitioner still meet commitment criteria. In Dr Steven Marquez's evaluation he concurred with
10 Dr. Carter in determining that the criteria for (APD) were no longer satisfied. Both of these
11 individuals agreed also that the diagnosis of Paraphilia NOS (non-consent) was in remission
12 and/or probable remission, troubling is the fact that this disorder is not part of the commitment
13 diagnosis, an is a catch all diagnosis. Mental health statutes must adhere to strict due process
14 standards In re Labellix, 107 Wn 2d 196, 728 P.2d (1985).

15
16 For the reasons stated in this argument the court should conclude that the mental illness coupled
17 with dangerousness standard to be applied in this case can no longer be met. This court should
18 issue a habeas corpus releasing the petitioner from further confinement due to the fact he no
19 longer meets the requirements for commitment under RCW 71 09 as a sexually violent predator

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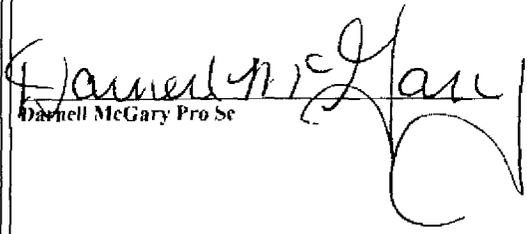
24 Dated this 3rd day of November, 2011

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28 Darnell McGary Pro Se

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I, Darnell McGary swear pursuant to and in accordance with 28 U.S.C. 1746, I placed in the mail first class a copy of this motion to Pierce County Superior Court, and to: Ms. Sarah Sappington, address of 800 Fifth Avenue # 2000, Seattle Wa. 98104-3188

DATED This 3rd Day of November, 2011


Darnell McGary Pro Se

November 21 2011 2:59 PM

KEVIN STOCK
COUNTY CLERK
NO: 11-2-06280-1

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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

8 In re the matter of:

NO. 11-2-06280-1

9 DARNELL MCGARY,

10 Petitioner,

STATE'S RESPONSE TO
PETITIONER MCGARY'S MOTION
FOR SUMMARY JUDGMENT AND
MOTION TO TRANSFER CASE TO
COURT OF APPEALS

11 v.

12 KELLY CUNNINGHAM,

13 Respondent.

14 The State of Washington, through its attorneys, ROBERT M. MCKENNA, Attorney
15 General, and SARAH SAPPINGTON, Senior Counsel, responds to Petitioner's Motion for
16 Summary Judgment filed by Mr. McGary under the above cause.

17 **I. STATEMENT OF THE CASE**

18 The facts of Mr. McGary's case were set forth by the Court of Appeals:

19 McGary is a convicted sex offender. In 1988, he pleaded guilty to two
20 counts of first degree rape, one count of indecent liberties by forcible
21 compulsion, two counts of first degree burglary, and one count of
22 second degree burglary. He served approximately nine years'
23 incarceration. While incarcerated, he committed more than 40 major
24 infractions, including numerous threats to staff, and he suffered from
25 paranoia and delusions that prison officers were trying to kill him. In
26 April 1998, before McGary's scheduled prison release, the State filed a
petition for his civil commitment under chapter 71.09 RCW as an SVP.
The State established probable cause, resulting in McGary's commitment
at the Special Commitment Center (SCC) pending trial. Because he
refused to take psychiatric medication to control his paranoid and
schizophrenic behavior, his condition deteriorated, and the Department
of Social and Health Services (DSHS) transferred him to Western State
Hospital under chapter 71.05 RCW, the civil commitment provision.

STATE'S RESPONSE TO PETITIONER
MCGARY'S MOTION FOR SUMMARY
JUDGMENT AND MOTION TO
TRANSFER CASE TO COURT OF
APPEALS

1

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
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(206) 464-6430

1 As a result, in April 2000, the State dismissed its SVP petition without
2 prejudice. After his condition stabilized in December 2000, the State
3 refiled the SVP petition. McGary then stipulated to probable cause and
4 civil commitment under chapter 71.09 RCW.

5 Specifically, he stipulated that he suffers from schizophrenia and an
6 antisocial personality disorder. He also stipulated that his antisocial
7 personality disorder "causes him serious difficulty controlling his
8 sexually violent behavior," making him "more likely than not to engage
9 in predatory acts of sexual violence if he is not confined in a secure
10 facility.,, The trial court concluded that his antisocial personality
11 disorder is a "mental abnormality" under RCW 71.09.020(8). The
12 stipulation allowed his placement into a less restrictive alternative in the
13 SCC. That less restrictive alternative proved unsuccessful when he
14 stopped taking his medications. Since his civil commitment, DSHS has
15 reviewed McGary's case annually following RCW 71.09.070.

16 *In re Det. of McGary*, 155 Wn. App. 771, 775-777, 231 P.3d 205 (2010) (internal citations
17 omitted).

18 In February of this year, Mr. McGary filed a habeas corpus petition challenging his
19 commitment under this cause. He successfully served Kelly Cunningham in September of 2011,
20 and has now filed a Motion for Summary Judgment on the habeas petition. The State files this
21 response, asking that, for the reasons identified below, this Court 1) transfer the petition to the
22 Court of Appeals for consideration as a personal restraint petition; 2) strike the Motion for
23 Summary Judgment; and 3) strike the mandatory review hearing now set for December 9. If the
24 Court elects to hear Mr. McGary's motion for summary judgment, the State asks that it be denied.

25 II. ARGUMENT

26 A. This Court Should Transfer The Petition To The Court Of Appeals For Consideration As A Personal Restraint Petition.

While the personal restraint petition procedure does not override the habeas jurisdiction
of the superior court, the interests of judicial comity, judicial economy and the ends of justice
may require a superior court to transfer habeas petitions to the jurisdiction of the Court of
Appeals. *Tolliver v. Olsen*, 109 Wn.2d 607, 746 P.2d 809 (1987). The *Tolliver* court made it
clear that a superior court's habeas jurisdiction stems from Article IV, section 6 of the
Washington Constitution. *Id.* at 610. The personal restraint petition provisions of RAP 16.3-

1 16.5 do not affect the habeas jurisdiction of the superior court. *Id.* at 611. However, the ends
2 of justice may often require a superior court to forego its habeas jurisdiction in favor of the
3 personal restraint petition jurisdiction of the Washington appellate courts. *Id.* at 612-13. As
4 discussed below, the ends of justice favor transfer of the petition to the Court of Appeals for
5 consideration as a personal restraint petition.

6 There are two reasons that this matter should be transferred to the Court of Appeals as a
7 personal restraint petition. First, the issues raised in Mr. McGary's habeas petition may be
8 substantially similar to the issues raised in a matter already before the Court of Appeals.
9 Following the 2010 Annual Review, Mr. McGary was granted a new trial on the question of
10 whether he continued to meet commitment criteria. *See* Agreed Order Granting Evidentiary
11 Hearing On Unconditional Release, attached as Attachment A. The matter went to trial, and a
12 unanimous jury re-committed him in August of 2011 (*see* Order of Commitment, attached as
13 Attachment B). He is currently appealing that verdict. *See* Notice of Appeal, *In re McGary*,
14 COA No. 42552-1-II, attached as Attachment C. Mr. McGary has not yet filed his opening
15 brief in that matter and the State does not know what issues he will raise. Depending on the
16 issues raised, however, it may well be appropriate to ask, in the interests of both justice and
17 judicial efficiency, that the two matters be consolidated. This will only be possible if the two
18 matters are both before the Court of Appeals.

19 Secondly, one of the issues raised in his habeas petition and his summary judgment
20 motion has to do with the validity of the diagnosis of Paraphilia NOS: Nonconsent.¹ The Court
21 of Appeals has already stated that Mr. McGary "may raise this challenge [related to the
22 invalidity of the diagnosis of Paraphilia NOS: Nonconsent] to his commitment in the context of
23 a CR 60 motion, a personal restraint petition, or a writ of habeas corpus in federal court. *See*

24 _____
25 ¹ It is the State's position that this issue, as framed in his habeas petition, cannot form a challenge to his
26 current commitment because the habeas petition challenges his prior, pre-August 2011 commitment. The State
makes this argument with regard to the propriety of the Court of Appeals hearing any argument on this issue
without waiving this objection.

1 CR 60(b).” 155 Wn. App. at 785.² Given the Court of Appeals’ familiarity with Mr. McGary’s
2 various legal challenges to his commitment³ and with this argument in particular, it is
3 appropriate to transfer this matter to the Court of Appeals as a Personal Restraint Petition.

4 **B. This Court Should Strike Mr. McGary’s Motion For Summary Judgment**

5 Mr. McGary has noted a motion for summary judgment before this Court. A hearing is
6 set for December 2, 2011. Rather than first hearing Mr. McGary’s summary judgment motion
7 and then transferring the case to the Court of Appeals, this Court should, in the interests of
8 judicial efficiency, simply transfer the case directly to the Court of Appeals and strike the
9 hearing on the motion for summary judgment. Any summary proceeding Mr. McGary wishes
10 to pursue can be noted before and considered by that court to the extent permitted by the Rules
11 of Appellate Procedure.

12 **C. If This Court Does Not Transfer The Case To The Court Of Appeals And Strike**
13 **Mr. McGary’s Motion, The Court Should Deny His Motion For Summary**
14 **Judgment.**

15 Under CR 56(c), summary judgment will be ordered “if the pleadings, depositions,
16 answers to interrogatories, and admissions on file, together with the affidavits, if any, show
17 that there is no genuine issue as to any material fact and that the moving party is entitled to a
18 judgment as a matter of law.” As the moving party, the petitioner must produce evidence
19 demonstrating there are “no genuine issues as to any material fact and that the moving party is
20 entitled to summary judgment as a matter of law.” CR 56(c).

21 Once the petitioner has satisfied this burden, the respondent must bring forward
22 evidence setting forth “specific facts showing that there is a genuine issue for trial,” or
23 summary judgment “shall be entered against him.” CR 56(e).

24 ² This matter concerned McGary’s appeal from this Court’s denial of his request for a new trial following
25 an earlier Annual Review.

26 ³ In addition to his 2010 appeal from this Court’s denial of his request for a new trial, Mr. McGary has
previously appealed from his stipulation to commitment on the limited issue of the sufficiency of the State’s proof
of a recent overt act. *In re Detention of McGary*, 128 Wn. App. 467, 116 P.3d 415 (2005).

1 A nonmoving party in a summary judgment may not rely on speculation,
2 argumentative assertions that unresolved factual issues remain, or in having its
3 affidavits considered at face value; for after the moving party submits adequate
4 affidavits, the nonmoving party must set forth specific facts that sufficiently rebut
the moving party's contentions and disclose that a genuine issue as to a material
fact exists.

5 *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

6 Mr. McGary makes three arguments in his Motion: First, he argues that, because the
7 Department's annual review in 2010 concluded that he no longer meets criteria for commitment, he
8 must be released. Motion at 5-6.⁴ Second, he appears to argue that the State should be prohibited
9 by virtue of its "contract" with him (that is, his stipulation to commitment) from referencing the
10 diagnosis of schizophrenia. Motion at 7-8. Finally, he urges that the State should be collaterally
11 estopped from arguing that Paraphilia NOS; Nonconsent is relevant to his likelihood to reoffend in
12 that that diagnosis did not form the basis of his initial commitment. Motion at 8.

13 Mr. McGary's motion, although labeled as a motion for summary judgment, is
14 essentially indistinguishable from his habeas petition and contains no analysis that goes to the
15 core of a summary judgment analysis (that is, "that there is no genuine issue as to any material
16 fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c)). More
17 importantly, it is fatally flawed because it does not relate to his current confinement: The
18 central underlying factual premise of both his habeas petition and his summary judgment
19 motion is that he is being held on the basis of his initial Stipulation to Commitment. While this
20 might have been accurate at the time of his Petition's filing in February of 2011, it is no longer
21 the case. As noted above, Mr. McGary received a new trial pursuant to RCW 71.09.090(2) in
22 August of 2011 based on his 2010 Annual Review. Following trial, a unanimous jury
23 determined that he continued to meet commitment criteria. *See* Attachment B. The basis for
24 the initial (2004) commitment is no longer relevant and arguments related to the propriety of

25 ⁴ In an apparent aside to this argument, he also argues that his commitment on the basis of an Antisocial
26 Personality Disorder violates due process under *Foucha v. Louisiana*, 504 U.S. 71, 118 L.Ed.2d 437 (1992).

1 that commitment are moot. Likewise, his argument that he is entitled to release on the basis of
2 the 2010 annual review is also moot, in that he has already received a new trial on the basis of
3 that report. Finally, to the extent that Mr. McGary might seek to use this habeas action to
4 challenge the jury's verdict, he cannot. As he correctly points out in his Motion, a proceeding
5 for writ of habeas corpus cannot be used to review alleged trial errors. Motion at 2, citing
6 *Thompson v. Smith*, 33 Wn. 2d 142, 143, 204 P.2d 525 (1949). Such arguments would
7 properly be made within the context of his appeal from his most recent commitment, not within
8 the context of a habeas action in superior court.

9 Even if these matters were not moot, Mr. McGary has not demonstrated that there is no
10 genuine issue as to any material fact related to either his underlying diagnoses or commitment
11 on that basis. If anything, his motion demonstrates that there has been dispute related both to
12 his diagnoses and their relationship to his likelihood to reoffend. Moreover, the presence of all
13 of these diagnoses and their relationship to his likelihood to reoffend were all hotly debated at
14 his August, 2011 re-commitment trial, making clear that genuine issues of material fact
15 continue to exist in this case. As such, he has failed to carry his burden and his Motion for
16 Summary Judgment must be denied.

17 **D. This Court Should Strike the Mandatory Court Review Hearing**

18 In addition to the Motion for Summary Judgment scheduled for December 2, this
19 matter has also been scheduled for a "mandatory court review hearing" on December 9, 2011
20 at 9 AM. Because any matters that would be addressed at that hearing can simply be addressed
21 at the hearing on Motion for Summary Judgment/Motion to Transfer, any additional hearing is
22 superfluous and should be stricken.

23 **III. CONCLUSION**

24 For the reasons stated above, the Respondent respectfully requests that the Court
25 1) transfer the petition to the Court of Appeals for consideration as a personal restraint petition;
26 2) strike the Motion for Summary Judgment; and 3) strike the mandatory review hearing now

1 set for December 9. If the Court elects to hear Mr. McGary's motion for summary judgment,
2 the State asks that it be denied.

3 RESPECTFULLY SUBMITTED this 21st day of November, 2011.

4 ROBERT M. MCKENNA
5 Attorney General

6 
7 SARAH SAPPINGTON, WSBA #14514
8 Senior Counsel
9 Attorneys for State of Washington

ATTACHMENT A



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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

In re the Detention of:

DARNELL MCGARY,

Respondent.

NO. 00-2-14060-1

AGREED ORDER GRANTING
EVIDENTIARY HEARING ON
UNCONDITIONAL RELEASE

This matter came before this Court on April 6, 2010, for a Show Cause hearing pursuant to RCW 71.09.090. The Respondent was present via telephone and was represented by his attorney, F. McNamara Jardine. The Petitioner, State of Washington, was also present and was represented by Sarah Sappington, Senior Counsel, who appeared telephonically.

The parties agree that, based on the February 10, 2010, report of Megan N. Carter, Psy.D, the State is unable to make a prima facie case that Respondent currently suffers from a mental abnormality or personality disorder which makes him likely to commit predatory acts of sexual violence if not confined to a secure facility. Accordingly, the parties agree that this matter should be set for a trial on the issue of unconditional release.

The Court, having considered the files and records of this matter, now, hereby

ORDERS:

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AGREED ORDER GRANTING
EVIDENTIARY HEARING ON
UNCONDITIONAL RELEASE

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

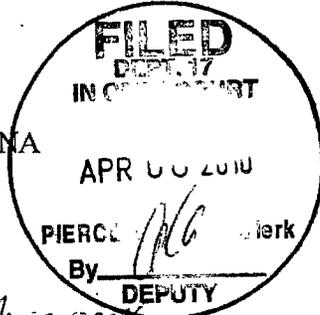
1 This matter is set for an evidentiary trial on the issue of Respondent's unconditional
2 release to the community on the 22 day of Sept, 2010

3 DATED this 6th day of April, 2010.

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6 THE HONORABLE RONALD T. CULPEPPER
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9 Presented by:

10 ROBERT M. MCKENNA
11 Attorney General

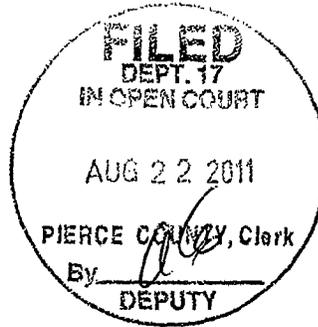


Copy Received; Approved as to form and content:

12
13 Present telephonically
14 SARAH B. SAPPINGTON
15 WSBA No. 14514
16 Senior Counsel
Attorneys for Petitioner

Present telephonically
F. McNAMARAJARDINE
WSBA No. 21677
Attorney for Respondent

ATTACHMENT B



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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

In re the Detention of:

NO. 00-2-14060-1

DARNELL MCGARY,

ORDER OF COMMITMENT

Respondent.

Upon the finding of the Court on August 22, 2011, that Respondent, Darnell McGary, is a sexually violent predator pursuant to RCW 71.09.060, the Court hereby enters the following:

ORDER OF COMMITMENT

Respondent, Darnell McGary, shall be committed to the Special Commitment Center in Steilacoom, Washington, to the custody of the Department of Social and Health Services, for control, care, and treatment until such time as his mental abnormality and/or personality disorder has so changed that the Respondent is safe to be conditionally released to a less restrictive alternative or unconditionally discharged.

DATED this 22 day of August, 2011.

[Signature]
THE HONORABLE RONALD CULPEPPER
Judge of the Superior Court

Presented by:

ROBERT M. MCKENNA
Attorney General

Copy received; Approved as to Form:

[Signature]
JAMES BUDER, WSBA #36659
Assistant Attorney General
Attorney for Petitioner

[Signature]
F. MCNAMARA JARDINE, WSBA #21677
D. MICHAEL SHIPLEY, WSBA #
Attorneys for Respondent

ORDER OF COMMITMENT

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6430

ATTACHMENT C

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RECEIVED
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CRIMINAL JUSTICE DIVISION
ATTORNEY GENERAL'S OFFICE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

IN RE THE DETENTION OF: DARNELL McGARY, <p style="text-align: right;">Respondent.</p>	No. 00-2-14060-1 NOTICE OF APPEAL TO COURT OF APPEALS Commitment Trial 08/08/11
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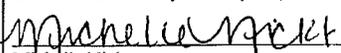
TO: THE STATE OF WASHINGTON and JAMES BUDER, Assistant Attorney General.

YOU, AND EACH OF YOU, will please take notice that the above Respondent seeks review by Division II of the Court of Appeals of the Order(s) affirming respondent's commitment pursuant to RCW 71.09 as a Sexually Violent Predator, entered on the 22nd of August 2011. A copy of the Order is attached hereto.

DATED this 16th day of September 2011.


 F. McNAMARA JARDINE, WSBA# 21677
 Attorney for Respondent

I, Michelle Nicks, a person over 18 years of age, served The Attorney General's Office, a true copy of the document to which this certification is affixed, on: 9/16, 2011. Service was made by delivery to (ABC Legal Messenger Inc.);


 Michelle Nicks

NOTICE OF APPEAL TO COURT OF APPEALS - 1

Department of Assigned Counsel
 DRAWER M
 9601 Steilacoom Blvd. SW
 Tacoma, Washington 98498-7213
 Telephone:(253) 756-2310

November 21 2011 3:40 PM

KEVIN STOCK
COUNTY CLERK
NO: 11-2-06280-1

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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

In re the Detention of:

NO. 11-2-06280-1

DARNELL MCGARY,

DECLARATION OF SERVICE

Respondent.

On the 21st day of November, 2011, I sent via e-mail to Becky Denny at the SCC, true and correct cop(ies) of Note for Motion, State's Response to Petitioner McGary's Motion for Summary Judgment and Motion to Transfer Case to Court of Appeals and Declaration of Service. Becky Denny subsequently confirmed by staff that the documents had been served to Mr. McGary via the Staff at the SCC. See attached for details.

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

DATED this 21st day of November, 2011, at Seattle, Washington.


ALLISON MARTIN

Martin, Allison (ATG)

From: Martin, Allison (ATG)
Sent: Monday, November 21, 2011 3:07 PM
To: Martin, Allison (ATG)
Subject: FW: Darnell McGary

From: Denny, Becky (DSHS/SCC)
Sent: Monday, November 21, 2011 3:05 PM
To: Sappington, Sarah (ATG); Martin, Allison (ATG)
Subject: FW: Darnell McGary

Here you go, Ladies!

Becky Denny
SCC Legal/Discovery Coordinator
(253) 589-6203
(253) 589-6228 (fax)
dennybe@dshs.wa.gov

From: Nerio, Al (DSHS/SCC)
Sent: Monday, November 21, 2011 3:03 PM
To: Denny, Becky (DSHS/SCC)
Subject: RE: Darnell McGary

Mr. McGary received his papers at 3:00pm on 11/21/11.

From: Denny, Becky (DSHS/SCC)
Sent: Monday, November 21, 2011 2:58 PM
To: Nerio, Al (DSHS/SCC)
Subject: FW: Darnell McGary

Al, please print the attached and give it to Darnell McGary. Please send me an e-mail confirming what time he received the attached. Thanks Al.

Becky Denny
SCC Legal/Discovery Coordinator
(253) 589-6203
(253) 589-6228 (fax)
dennybe@dshs.wa.gov

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3 **SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

4 DARNELL MCGARY

Plaintiff

December 6, 2011

5 vs.

6 KELLY CUNNINGHAM

Defendant

No.: 11-2-06280-1

Court of Appeals No.:

7
8 CLERK'S PAPERS PER
9 REQUEST OF APPELLANT
10 TO THE
11 COURT OF APPEALS,
DIVISION II

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8 **SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

9 DARNELL MCGARY

Plaintiff

December 6, 2011

10 vs.

No.: 11-2-06280-1

11 KELLY CUNNINGHAM

Court of Appeals No.:

12 Defendant

13 CLERK'S PAPERS PER
14 REQUEST OF APPELLANT
15 TO THE
16 COURT OF APPEALS,
17 DIVISION II

18 HONORABLE RONALD E. CULPEPPER

19 Trial Judge
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PIERCE COUNTY SUPERIOR COURT

December 06, 2011 - 9:39 AM

Transmittal Letter

Document Uploaded: prp-MCGARYPRP.pdf

Case Name: IN RE THE DETENTION OF DARNELL McGARY

County Cause Number: 11-2-06280-1

Court of Appeals Case Number:

Personal Restraint Petition (PRP) Transfer Order

Notice of Appeal/Notice of Discretionary Review

(Check All Included Documents)

Judgment & Sentence/Order/Judgment
Signing Judge: _____

Motion To Seek Review at Public Expense

Order of Indigency

Filing Fee Paid - Invoice No: _____

Affidavit of Service

Clerk's Papers - Confidential Sealed

Supplemental Clerk's Papers

Exhibits - Confidential Sealed

Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____

Administrative Record - Pages: _____ Volumes: _____

Other: _____

Co-Defendant Information:

No Co-Defendant information was entered.

Sender Name: Emma J Gaddis