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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
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**IN THE COURT OF APPEALS, DIVISION II
IN AND FOR THE STATE OF WASHINGTON**

In re the application of:

: Appeal No. 42552-1-II

DARNELL McGARY,

: **REPLY TO THE STATE'S RESPONSE
TO THE PERSONAL RESTRAINT
PETITION**

Petitioner,

v.

MR. KELLY CUNNINGHAM,

Respondent.

I. Introduction

Petitioner Darnell McGary, by and through pro-se, hereby enters his reply in the following matter, and request this court grant his application for writ of habeas corpus. This motion is based on the fact that there is no material issues of dispute as to the basis of his confinement up to 2004, or that the constitution forbids further confinement under the circumstances surrounding this matter. See Motion Titled As Summary Judgment (1 thru 11)

The State outlines several issues in it's response, namely, 1) that his 2004 commitment is invalid because since his initial commitment, staff at SCC have burdened him with the diagnosis of

1 Paraphilia NOS: Non-Consent that he did not stipulate to in his stipulation to commitment nor
2 was there a change in condition since the stipulation indicating sexual deviancy; this argument is
3 still valid as this court suggested that Paraphilia NOS was invalid, also due to changed
4 circumstances this disorder is currently in full remission as Drs. Carter and Marquez suggested in
5 2010 & 2011, (Pet. at 3, Motion For Sum. Judgment at 8); 2) that according to Micheal First
6 Paraphilia has been found to not exist, and hence cannot form a basis for civil commitment (Pet. at
7 3-4, Motion For Sum. Judgment at 4); 3) that he no longer suffers from a anti-social personality
8 disorder, the condition that formed the basis of commitment the basis of this commitment as
9 acknowledged by the State in it's brief was unlawful, Motion For Sum. Judgment at 4,5,6); and
10 4) that he is entitled to release based on the 2010 report of the SCC stating he no longer meets
11 the criteria for commitment. (Pet. at 6, Motion For Sum. Judgment at 5).

12 13 **II. History**

14 The facts of this case are very complex and far reaching, in May of 1998, the petitioner was
15 transferred to the Special Commitment center after the court found that there was probable cause
16 that he was a sexually violent predator. This probable cause satisfied RCW 71.09.040. Petitioner
17 was then evaluated by Dr. Vince Gollogly Ph.D who confirmed that there was cause for the court
18 to initiate a civil commitment trial in this matter. However, after being confined for almost
19 seventeen months in the Special Commitment center, the State's attorney general dismissed the
20 proceedings, and had petitioner transferred to Western State Hospital under chapter RCW 71.05.
21 In re Detention of McGary(I), 128 Wn. App. 470 (2005). Petitioner has proven to be a low risk
22 offender. RCW 71.09.060(3)(unauthorizing the housing of detainees under RCW 71.09 in any
23 mental health facility due to there unsecure nature), RCW 10.77.220 (limiting confinement of
24 SVP's to correctional facilities) In re Detention of Gordon, 102 Wn.2d (2000)(defining WSH as

1 a unsecure facility) In re Detention of Young, 122 Wn.2d (1993)(defining RCW 71.09 as a
2 facility that houses only SVP's and authorizing there confinement only in a "total confinement
3 facility"). Petitioner was returned to the sexually violent predator statute, no recent overt act
4 was alleged. McGary(I) at 472. Petition was treated under RCW 71.05 for both schizophrenia
5 and anti-social personality disorders. Id.

6 Before trial petitioner stipulated to being a sexually violent predator in exchange for a less
7 restrictive alternative with housing in the secure community transition facility. Also, petitioner
8 agreed to other terms of the agreement such as waiving all rights to trial by jury, and to his
9 commitment diagnosis as stated:

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

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

19 During petitioners treatment there has been a lot of controversy surrounding whether or not he
20 suffered from the diagnosis of Paraphilia NOS (non-consent). In 2002, Dr. Robert Saari Ph.D
21 found that Petitioner did not suffer from Paraphilia NOS. However, later evaluations indicated
22 that Petitioner did suffer from Paraphilia NOS. Id. McGary(II), 155 Wn. App. 775 (2010). Dr.
23 Micheal First the editor of the (DSM) diagnostic & statistical manual of mental disorders
24 disputed that the diagnosis of Paraphilia NOS (non-consent) was indeed a valid opinion when

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 given to an individual for the purpose of a diagnostic impression. He pointed to the notion that
2 there was an error in the DSM that provided for his explanation an conclusion that the diagnosis
3 was not valid in reference. Id. McGary(II), 155 Wn. App. 775 (2010). However, the State in this
4 case points to the fact that petitioner is not confined for the purpose an treatment of a Paraphilia,
5 but that his diagnosis of Anti-Social Personality disorder is the basis of his commitment, an that
6 it remains unchanged. Therefore, there was no cause to believe that the petitioner was unchanged
7 at the time of the court of appeals analysis. Therefore, the State agrees that Paraphilia NOS (non-
8 consent) is not the commitment diagnosis basing the foundation for petitioner's commitment.
9 Therefore, any argument to this court would be baseless an unfounded except to state there has
10 never been any signs or symptoms evident since the sexual assaults that form a basis of this
11 disorder.

12 Petitioner did carry the diagnosis of schizophrenia, an argued to the court of appeals that the
13 disorder was well controlled, an that would also form a basis to show that he was no longer
14 meeting the criteria for commitment as a sexually violent predator. However, as the petitioner
15 points out, an the State argued this does not show that petitioner has changed due to the fact that
16 his diagnosis of schizophrenia is not the basis of his commitment, an cannot be used to show
17 change as to his no longer meeting the criteria under the sexually violent predator statute. This
18 argument makes great sense due to the fact petitioner was not diagnosed with this disorder until
19 after 1994, for the petitioner to argue his release based on this changed diagnosis would be
20 unfounded, an make very little sense. The State did not rely on this diagnosis to form the basis of
21 commitment under the statute. Id. McGary(II), 155 Wn. App. 775 (2010)...

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

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

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

23 Although, Petitioner stipulated that he suffers from schizophrenia, the stipulation indicates that
24 his anti-social personality disorder was the mental abnormality forming the basis of his
commitment. Id. For Department of Correction behavior (DOC) reference, McGary(I), 128 Wn.
App. 470 (2005). The State acknowledges it's contract with Petitioner but states now it is invalid
due to the new commitment order of 2011, however, the commitment is founded based on a

1 personality disorder and as the law suggests concludes the stipulation unlawful since you cannot
2 form the basis of commitment on Anti-Social Personality disorder. Also, there is no case analogy
3 indicating that solely Anti-Social Personality disorder is a committable disorder standing alone.
4 See In re Detention of Thorell, 149 Wn.2d (2003).

5
6 As stated, the Supreme Court held for a Louisiana patient Terry Foucha that the statute allowing
7 continued confinement of insanity acquittees on basis of his antisocial personality, after hospital
8 review committee had reported no evidence of mental illness and recommended conditional
9 discharge, violated Due Process. Foucha v. Louisiana, 504 U.S. 71, 118 L.Ed.2d 437 (1992). This
10 is the same instance here the Forensic Department of the SCC has stated in its 2010 evaluation
11 by Dr. Carter that Petitioner no longer meets the criteria for commitment. This is based on,
12 decrease in anti-social personality due to good behavior and age. Chapter 71.09 RCW would be
13 unconstitutional if it allowed petitioner to be confined absent proving he was not dangerous to
14 self or others even though he was no longer suffering from the ailment that caused his
15 confinement. Petitioner is entitled to release when he has recovered his mental abnormality
16 sufficiently that he is no longer mentally ill in that form. Foucha v. Louisiana, 504 U.S. 71, 118
17 L.Ed.2d 437 (1992). Petitioner declares he can be held as long as he is both mentally ill and
18 dangerous to others, no longer. Also, this standard can no longer be met through competent
19 testimony. All evaluators since 2010 have concurred with Dr. Megan Carter and therefore
20 petitioner should no longer be detained against his will absent his mental abnormality. In 2011,
21 the evaluator was Dr. Steven Marquez Ph.D, who concurred with Dr. Megan Carter that the
22 criteria for Anti-Social Personality disorder was no longer being met. *Id.* On the basis of this,
23 petitioner can no longer be held under the statute as committable for a personality disorder. The
24

1 court must release petitioner based on the testimony given in the evaluations. In sum, the
2 standard test for mental abnormality is no longer being met.

3 4 **III. Should The State Be Allowed To Break It's Contract**

5 Although this is a civil commitment law, the State is bound by it's contract. Stipulation
6 agreement's are contractual in nature an must be adhered to entirely. Stipulations resemble plea
7 bargains that are contracts between the State and the Defendant. State v. Sledge, 133 Wn.2d
8 828, 947 P.2d 1199 (1997), because a Defendant gives up important constitutional rights by
9 agreeing to a plea bargain, the State must adhere to the terms of the agreement. State v. Hagar,
10 126 Wn. App. 320 (2005)(where a stipulation to facts is an integral part of a plea agreement and
11 the two are not shown to be divisible, the stipulation and resulting sentence may not be
12 challenged apart from the agreement itself). The fact that petitioner carries a diagnosis of
13 schizophrenia is not relevant in the determination of whether or not he actually continues to meet
14 the sexually violent predator criteria under the statute RCW 71.09, based on the contract between
15 the State and Petitioner. Nevertheless, schizophrenia was never a factor in any of the sexual
16 assaults he was involved in, in the past. Petitioner was committed an treated for both (APD &
17 Schizophrenia) at Western State Hospital. [C]hapter 71.05 RCW is intended to be a short-term
18 civil commitment system that is primarily designed to provide short-term treatment to
19 individuals with serious mental disorders and then return them to the community. In contrast to
20 persons appropriate for civil commitment under RCW 71.05, sexually violent predators generally
21 have personality disorders and/or mental abnormalities which are unamendable to existing
22 mental illness treatment modalities and those conditions render them likely to engage in sexually
23 violent behavior. McGary(I), 128 Wn. App.471 (2005). Petitioners diagnosis of schizophrenia
24 was treated an released from RCW 71.05 under a short-term standard, an can no longer be

1 detained constitutionally. Again, the States argument is that it does not matter if the petitioner
2 changed in regard to this diagnosis because it does not form the basis of his commitment. *Id.*
3 McGary, 155 Wn. App. 775 (2010). For the court to evaluate this commitment on the basis of
4 Anti-Social Personality alone interprets the contract correctly in this matter, an the State should
5 be bound by it's terms.

6 7 **IV. Would The State Be Issue Precluded In Regard To Breaking It's Contract**

8 The State would be precluded from arguing that Paraphilia NOS (non-consent) formed a basis of
9 commitment under the statute in this particular case, due to the fact that it is not part of any
10 contract and/or conclusion based consideration in the evaluation perspective. Although petitioner
11 has been evaluated in the past with paraphilia NOS (non-consent), he has also had evaluations
12 that did not conclude he suffered from such diagnosis after review of his criminal history and
13 disclosure. In 2010, Dr. Megan Carter Ph.D, found that there was no evidence of current
14 symptoms, an stated it was in remission. In 2011, Dr. Steven Marquez Ph.D, found that there was
15 no evidence also, and put that it was in probable remission. In Levine v. Torvik, the experts
16 testified Levine's mental illness was in remission and gave a definition of "no signs of mental
17 illness or dangerousness". The trial court found that because Levine suffered from "psychosis"
18 for which there is no cure, he was still mentally ill and therefore dangerous. *Id.* On Appeal, the
19 trial courts determination that Levine suffered from mental illness and was dangerous was
20 overturned. *Id.* 986 F.2d 1506 (6th Cir. 1993). However, as stated earlier in the brief, petitioner
21 has never shown paraphiliac behavior at the Special Commitment Center in over twelve years.
22 The State would be issue precluded from wasting the courts time with whether or not it is a valid
23 diagnosis to begin with, and whether petitioner currently suffers for the disease. There is no
24

1 current symptoms. The Respondent would be estopped from arguing it formed a basis of
2 commitment. The State is bound by collateral estoppel and/or issue precluded from bringing any
3 argument regarding Paraphilia NOS and/or Schizophrenia in determining the likelihood of re-
4 offense based on a acquired disease not present during my offending behavior. Seattle First
5 National Bank v. Cannon, Wn. App. 922 (1998).(applying collateral estoppel to civil
6 proceedings). Collateral estoppel promotes judicial economy and prevents inconvenience, and
7 even harassment of parties. Reninger v. Dept. of Corr., 134 Wn.2d 437 (1998). Here allowing the
8 State to look past the stipulated findings of fact in this matter amounts to harassment, and allows
9 the State time to create deception surrounding the issues it wishes to pursue at this time. Further,
10 this is not a successive petition under RCW 10.73.140 as the sole challenge here is whether or
11 not it is legal to confine someone based on a personality disorder specifically (Anti-Social
12 Personality disorder) when the law indicates otherwise, this petition is based on the 2010
13 declaration of Dr. Megan Carter Ph.d stating the status of sexually violent predator had changed.

14 15 **V. Conclusion**

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

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

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

22 This court should reach the same inevitable conclusion as in State v. Sommerville: Because Mr.
23 McGary once exhibited symptoms of a mental disorder, he will always be deemed "mentally ill"
24 regardless of his lack of symptoms because the disease may be in "periodic remission." An
insanity acquittal will support an inference of continuing mental illness, but that inference does
not last indefinitely. United States v. Bilyk, 29 F.3d 459, 462 (8th Cir. 1994). Otherwise, the

1 periodic reports and subsequent hearings mandated by RCW 71.09.070 would be purposeless, as
2 would the directive that the State must release the insanity acquittee when the basis for holding
3 him or her in the psychiatric facility disappears. The evidence indicates Mr. McGary has not
4 shown symptoms of any mental disorder since admission to the Special Commitment Center in
5 2000. Id. 86 Wn. App. 700, 937 P.2d 1317 (1997).

6 That Mr. McGary is currently suffering from a mental disorder is not supported by substantial
7 evidence even in the trial court at his 2011 re-commitment hearing.

8 For the reasons stated in this argument the court should conclude that the mental illness coupled
9 with dangerousness standard to be applied in this case can no longer be met. This court should
10 issue a habeas corpus releasing the petitioner from further confinement due to the fact he no
11 longer meets the requirements for commitment under RCW 71.09 as a sexually violent predator.

12 Dated this 27th day of May 2012

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14 
15 Darnell McGary Pro Se

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18 **I, Darnell McGary swear pursuant to and in accordance with 28 U.S.C 1746, I placed in the mail**
19 **first class a copy of thi sreply to Court of Appeals, and to: Ms. Sarah Sappington, address of 800 Fifth**
20 **Avenue # 2000, Seattle Wa, 98104-3188; also to counsel Ms. Rebecca Wold Bouchey**

21
22 **DATED This 27th day of May 2012**

23
24 
Darnell McGary Pro Se

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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

May 27, 2012

Mr. David Ponzoha, Clerk

The Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma Wa, 98402

Re: In re the Personal Restraint of McGary, No. 42552-1-II

Dear Mr. Ponzoha,

Please find enclosed a copy of the reply brief in this matter. I have circulated copies to all parties interested in this case.

Sincerely,

Darnell McGary