

COURT OF APPEALS
DIVISION II

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NO. 38257-1-II

STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

DARNELL McGARY

Petitioner.

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED FOR REVIEW

Where McGary presented no evidence of a relevant change in condition, did the trial court properly deny McGary's request for a new trial under RCW 71.09.090?

II. STATEMENT OF THE CASE

Darnell McGary is a convicted sex offender with a history of violent offenses against women dating back to 1987. In addition, he has a lengthy history of psychiatric disorders. In 1987 and 1988, McGary committed sexual offenses against three different women. *In re Detention of McGary*, 128 Wn. App. 467, 469, 116 P.3d 415 (2005). CP at 152-53. Each offense involved forcible entry into the victim's home. In 1988, McGary pleaded guilty to two counts of first degree rape, one count of indecent liberties by forcible compulsion, two counts of first degree burglary, and one count of second degree burglary based on the offenses against the three women. *McGary*, 128 Wn. App. at 469; CP at 154. McGary served approximately nine years in prison. While in prison, McGary committed over 40 major infractions, including numerous threats to staff, and suffered from paranoia and delusions that prison officers were trying to kill him. *McGary* at 469; CP at 154.

Approximately one week before his scheduled release from prison in April 1998, the State filed a sexually violent predator (SVP) petition for

McGary's civil commitment under chapter 71.09 RCW. *McGary* at 469; CP at 139. Probable cause was established and McGary was detained on McNeil Island pending trial. Because he refused to take psychiatric medication to control his paranoid and schizophrenic behavior, his condition deteriorated, and, eventually, he was involuntarily committed to Western State Hospital under RCW 71.05 as presenting "a likelihood of serious harm to others" and "gravely disabled," requiring "intensive, supervised, 24 hour restrictive care." *McGary* at 469. The SVP petition was dismissed and then re-filed once McGary's condition had stabilized. *McGary* at 469.; CP at 139

McGary stipulated to probable cause and then to civil commitment under Washington's Sexually Violent Predator Act, RCW 71.09. *McGary* at 469; CP at 39, 88-93. He stipulated that he suffers from schizophrenia and an antisocial personality disorder, and that his personality disorder "causes him serious difficulty controlling his sexually violent behavior, "making him "more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility." CP at 91-93. The stipulation allowed McGary to be placed into a less restrictive alternative (LRA) on McNeil Island. *McGary* at 470. That LRA was unsuccessful when he stopped taking his medications. CP at 144, 149.

Since his commitment, McGary's case has been reviewed annually pursuant to RCW 71.09.070. In January of 2008, Dr. Jonathan Allison, Psy.D., evaluated McGary and determined that he suffered from schizophrenia, paranoid type, paraphilia, not otherwise specified [NOS] (rape), and antisocial personality disorder. CP at 144-45. The report indicates that McGary's medication compliance and participation in sex offender treatment over the years have been "inconsistent," that such inconsistencies contributed to a failed placement in a less restrictive alternative and return to the SCC, and that he was "not participating in any kind of sex offender treatment," at the time of the assessment. CP at 148. Dr. Allison notes that McGary's thinking "seems to be reflective of a delusional network in which he works to undermine his own interest. For example, since he believes he does not have a mental illness, he sets himself up to stop taking his medication." CP at 145. This behavior in turn results in his decompensation "manifesting in a paranoid state. It appears that his delusional network is centered on one coherent theme: If he does not have a mental illness, a personality disorder and a paraphilia, he does not need to be at the Special Commitment Center. This thereby demonstrates his inability to accurately evaluate his own risk to the community at large and provides additional evidence that the above

diagnoses” are accurate at this time. CP at 145. McGary declined to be interviewed for the evaluation. *Id.*

Following submission of Dr. Allison’s report, McGary requested a hearing pursuant to RCW 71.09.090¹. CP at 165. The State noted the matter for a hearing. In response, McGary filed a Motion to Set Aside Judgment. CP at 171-457. Although framed as a motion to vacate pursuant to CR 60(b)(11), McGary also sought relief pursuant to *In re Elmore*, 162 Wn.2d 27, 168 P.3d 1285 (2007), a case addressing annual reviews pursuant to RCW 71.09.090. CP at 172.

A hearing on the State’s Motion to Show Cause pursuant to RCW 71.09.090 and McGary’s CR 60(b) motion was held on August 19, 2008. The State relied upon the report by Dr. Allison. McGary submitted, *inter alia*, two reports by Dr. Theodore Donaldson (CP at 432-41), portions of a deposition of Dr. Michael First in the case of *In re Davenport*, Franklin County Cause No. 99-2-50349-2 (CP at 334-430) and various legal authorities. CP at 171-457. Dr. Donaldson’s reports, as well as Dr. First’s deposition, focused primarily on an attack on the diagnosis of paraphilia NOS: nonconsent/rape. In addition, Dr. Donaldson criticized various risk assessment instruments.

¹ RCW 71.09.090 was amended in 2009 by SSB 5718, but those amendments do not affect the analysis in this case.

The trial court denied McGary's request for a new trial. The court found that the State had produced evidence that McGary continued to meet the definition of an SVP, and that McGary had not provided prima facie evidence that his condition had changed since his commitment. CP at 496-98; RP at 32. The trial court also denied McGary's CR 60(b) motion. CP at 499; RP at 32. McGary timely filed a "Notice of Appeal to the Court of Appeals and Notice of Discretionary Review."²

The Commissioner affirmed the trial court's orders. McGary then filed a Motion to Modify, which this Court granted, thereby granting review.

III. ARGUMENT

McGary currently³ argues that he is entitled to a new trial pursuant to RCW 71.09.090 because 1) The trial court improperly weighed evidence at the show cause hearing; 2) since commitment, his mental health has improved with medication and treatment; 3) he does not meet commitment criteria because his paraphilia diagnosis is in error; 4) he

² Although it initially appeared that he sought review of both the Order on Show Cause and the CR 60(b) Order (*see* CP at 500-04), a request for review of CR 60(b) Order appears to have been abandoned, in that it was not referenced in McGary's Motion for Discretionary Review and Supporting Brief nor his Brief of Appellant, submitted to this Court.

³ McGary's arguments have changed somewhat with each stage of these proceedings. The arguments summarized here and addressed in this brief are those presented in his most recent submission.

does not meet the commitment criteria based on a diagnosis of antisocial personality disorder; and 5) the 2005 amendments to RCW 71.09.090 are unconstitutional to the extent that they authorize continued confinement without proof beyond a reasonable doubt that he suffers from a paraphilia.

His arguments should be rejected because they ignore established law allowing an indefinite commitment provided there is an annual review. In denying his request for a new trial, the trial court simply recognized that McGary had not provided it with any evidence of relevant change in his condition as required by statute. This Court should affirm the trial court's Orders denying McGary's request for a new trial.⁴

A. Because McGary Presented No Evidence Of A Relevant Change In Mental Condition, The Trial Court's Denial Of A New Trial Was Proper

McGary argues that the trial court erred in denying his request for a new trial pursuant to RCW 71.09.090. There was no error, however, where the State presented a prima facie case and where McGary failed to present any relevant evidence of change as required by RCW 71.09.090.

⁴ As noted, McGary appears to have abandoned his request for review of the CR 60(b) Order as such, the State, having addressed that issue in its Response to McGary's Motion for Discretionary Review, will not provide additional briefing on that issue unless requested to do so by this Court.

1. Legal Framework

a. Purpose And Procedure Of The RCW 71.09.090 Show Cause Hearing

The purpose of the annual review show cause hearing is to determine:

whether probable cause exists to warrant a hearing on whether: (i) The person's condition has so changed that he or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.090(2)(a).

The purpose of the show cause hearing is not to “re-commit” the Respondent, but to ensure that there is a continuing basis for the commitment. RCW 71.09.090(2)(a). Commitments are indefinite, persisting “until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092.” *In re Petersen*, 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (*Petersen I*). As a result, the scope of the hearing is limited, and is “in the nature of a summary proceeding wherein the trial court makes a threshold determination of whether there is evidence amounting to probable cause to hold a full hearing. *Id. at 86*. The proceeding is limited

to the submission of affidavits or declarations. RCW 71.09.090(2)(b).

At the show cause hearing, the State must present prima facie evidence that respondent continues to meet the criteria for civil commitment, and that there is no feasible less restrictive alternative (LRA). RCW 71.09.090(2)(c)(i). “If the State cannot or does not prove this prima facie case, there is probable cause to believe continued confinement is not warranted and the matter must be set for a full evidentiary hearing.” *In re Detention of Petersen v. State*, 145 Wn.2d 789, 798-799, 42 P.3d 952 (2002) (*Petersen II*). Once the State satisfies its prima facie burden, a new trial may be ordered only if respondent’s proof establishes probable cause:

to believe that the *person’s condition has so changed* that:
(A) The person no longer meets the definition of a sexually violent predator; or (B) release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.090(2)(c)(ii) (emphasis added).

There is no dispute that the State made the prima facie showing necessary to preserve McGary’s indefinite commitment. This case primarily concerns evaluation of McGary’s claim that he never met statutory criteria in the first place. To the extent that he now alleges that he presented evidence that he has “so changed” as to no longer meet

commitment criteria, that argument should be rejected, in that the “evidence” he presented of this assertion was wholly inadequate.

b. The 2005 Amendments To RCW 71.09.090

In 2005, through SB 5582, the Legislature amended the statute providing for annual review of persons committed as SVPs, RCW 71.09.090, in order to correct the statutory interpretations set forth in *In re Young*, 120 Wn. App. 753, 86 P.3d 810, *review denied*, 152 Wn.2d 1035, 103 P.3d 201 (2004) and *In re Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005). *See* Laws of 2005, ch. 344, § 1 (“The Legislature finds that the decisions in [*Young* and *Ward*] illustrate an unintended consequence of language in chapter 71.09, RCW”)⁵.

The “unintended consequence” was a proliferation of new commitment trials based solely upon a defense expert’s disagreement with the annual review report or the original commitment. *Young* and *Ward* were, therefore, contrary to the “very long term” needs of the sexually violent predator population for treatment and the equally long term needs of the community for protection from these offenders.” *Id.* “[A] new trial ordered under the circumstances set forth in *Young* and *Ward* subverts the statutory focus on treatment and reduces community safety. . . .” *Id.*

⁵ These legislative findings can be found in the “Findings-Intent” section following RCW 71.09.090.

SB 5582 preserved the State's constitutional requirement to present prima facie proof of a continuing basis for the commitment while clarifying the level of proof necessary to obtain a new trial revisiting Respondent's *indefinite* civil commitment. In a clear statement of its intent, the Legislature noted that "the mental abnormalities and personality disorders that make a person subject to commitment under RCW 71.09, are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors." Laws of 2005, ch. 344, § 1. The Legislature further recognized that although "a committed person may appropriately challenge whether he or she continues to meet the criteria for commitment," the focus of any such review was to consider "*evidence of a relevant change in condition from the time of the last commitment trial proceeding:*"

These provisions are intended only to provide a method of revisiting the indefinite commitment due to a relevant change in the person's condition, *not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition.* Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials. Therefore, the legislature intends to clarify the "so changed" standard.

Id. (emphasis added).

To maintain focus on these interests, SB 5582 clarified the specific

showing necessary to revisit an indefinite commitment:

(4)(a) Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial proceeding, *of a substantial change in the person's physical or mental condition* such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.

(b) A new trial proceeding under subsection (3) of this section *may be ordered, or held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition* since the person's last commitment trial proceeding:

(i) *An identified physiological change* to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or

(ii) *A change in the person's mental condition brought about through positive response to continuing participation in treatment* which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

RCW 71.09.090(4) (emphasis added). In this way, the Legislature restored the focus on a *change* in the person's *mental condition* and the centrality of sex offender treatment before a new commitment trial is warranted.

McGary's request for a new commitment trial fails under these standards because the State presented a prima facie case for continued confinement, and his evidence failed to address any change since his initial commitment. Instead, he alternately cites to "change" that occurred since his original incarceration, irrelevant to the questions properly before the Court, and impermissibly attempts to use the annual review for a collateral attack on his underlying commitment. The court should affirm the trial court's Order.

2. The Trial Court Did Not Improperly "Weigh" The Evidence Before It

McGary first argues that the trial court improperly "weighed" the evidence before it. App. Br. at 4-7. In support of this view, he points to the trial court's comment in the Order that it was "not persuaded" by Dr. Donaldson's reports (CP at 497) and its comment during that hearing that it did not find the deposition of Dr. First very persuasive. RP 26-27. Because the "evidence" presented by McGary was not of a type relevant to a grant of a new trial pursuant to RCW 71.09.090, the court's comments were entirely appropriate and did not suggest that the court improperly weighed the evidence. Moreover, it is important to note that all of the "evidence" presented by McGary—including the report by Dr. Donaldson—was attached to and presented within the context of his

Motion to Set Aside Judgment pursuant to CR 60(b). Because it is the duty of the trial court to weigh the evidence presented in a CR 60(b) motion, any comments by the trial court within that context were entirely proper.

The relevant inquiry at the show cause hearing is whether the person has changed since commitment. Specifically, there must be evidence of “*substantial change in the person’s physical or mental condition*” due either to “*an identified physiological change*” or “*a change in the person’s mental condition brought about through positive response to continuing participation in treatment. . .*” RCW 71.09.090(4). Rather than presenting evidence of a relevant change in physical or mental condition, however, McGary chose to wage a collateral attack on his underlying commitment by arguing that his current diagnosis of paraphilia NOS: nonconsent was incorrect, an approach that is given the facts of McGary’s case, legally of no consequence, and one specifically prohibited by the Legislature.

The trial court, in its function as gatekeeper, must determine whether probable cause is supported by sufficient facts. As noted by Division I, “Conclusory statements cannot establish probable cause, so a court must look beyond an expert’s stated conclusions to determine if they are supported by sufficient facts. *Ward*, 125 Wn. App. at 387 (emphasis

added) (internal citations omitted).⁶ Such an inquiry into the factual basis for any conclusions should not, however, be confused with a “weighing” of the evidence.

Here, rather than improperly “weighing” the evidence, the trial court merely performed its function as gatekeeper. As correctly noted by the Commissioner, the trial court’s statements “show that it was not weighing evidence but was expressing skepticism over whether Dr. Donaldson’s conclusions were supported by the facts.” Ruling at 9.

Dr. Donaldson concluded that McGary’s Paraphilia was in remission, but did not know why. He could not point to any specific factors that brought about the change and stated that McGary “has apparently changed as a result of something.” Dr. Donaldson hypothesized that “this change *could* be due to any number of conditions,” including treatment prior to McGary’s commitment as an SVP and “*perhaps* self reflection.”

Ruling at 9 (emphasis in original). The Commissioner correctly noted that the trial court’s comments were simply an expression of doubt “about the veracity of his conclusion and whether that conclusion amounted to probable cause.” Ruling at 9.

Moreover, it should be noted that the trial court’s interlineation regarding Dr. Donaldson’s report came only after defense counsel had

⁶ The *Ward* court’s determination that a new evidentiary hearing could be based on a single demographic factor has been effectively overturned by the 2005 amendments to RCW 71.09.090. The portion of the case dealing with the court’s function as gatekeeper and the quantum (as opposed to the nature) of proof necessary to justify a new trial was unaffected by those amendments.

specifically asked the trial to make such a finding. In its oral ruling, the trial court initially noted simply that Dr. Donaldson “didn’t really address change. The statute says there has to be some showing of change. I don’t see that that’s been shown.” RP at 27. McGary’s counsel then asked the trial court to include some language in the final order specifically addressing Dr. Donaldson’s report, suggesting that McGary needed to know whether he needed to be considering hiring a different expert in the future.⁷ RP at 34. Only after noting that he was “not sure what [he] could add” to the State’s proposed order (tracking the statutory language) did the court, in response to defense counsel’s urging, add the language indicating that it was “not persuaded” by Dr. Donaldson’s reports. CP at 497; RP at 35. As such, if indeed the trial court’s comment was error at all, a contention the State disputes, it was an error invited by McGary. *State v. Henderson*, 114 Wn. 2d 867, 868, 792 P.2d 514 (1990).

Because McGary presented no evidence of relevant change, there was simply nothing for the trial court to weigh. Indeed, McGary’s counsel argued at the show cause hearing that “[i]t’s our position that there’s no need for Mr. McGary to present evidence” because the

⁷ Defense counsel argued that “[i]f the Court indicates that it’s either not relying on or it’s suspect of [Dr. Donaldson’s report], I want a specific finding so Mr. McGary can see whether or not we need to be looking at different experts in the future or whether the Court has determined that there will never be a report on [sic] Dr. Donaldson that it would give merit to.” RP at 34-35.

threshold issue was whether, under *Elmore*, application of the 2005 amendments to McGary were impermissibly retroactive.⁸ RP at 16. McGary's submissions are consistent with this position: Of the roughly 286 pages submitted by McGary, only one brief paragraph in Dr. Donaldson's second report even mentions the issue of change through treatment:

In conclusion, it is my opinion that Mr. McGary no longer suffers from a paraphilic disorder (if he ever did) and that *this change could be due to any number of conditions, including his early participation in treatment, including working on sexual autobiographies and relapse prevention plans. While the research does not indicate that these activities have any known relationship to recidivism, he has participated in treatment and he has apparently changed as a result of something, whether it was the treatment or perhaps self reflection.* At the current time, he does not suffer a paraphilic disorder.

CP at 446 (emphasis added). Quite aside from the uncertainty of Dr. Donaldson's conclusions, the fact that the "treatment" to which he tentatively refers appears to have occurred entirely prior to McGary's stipulation to commitment means that it cannot form the basis for a new trial, in that any change must have come since the time of commitment. RCW 71.09.090(4)(a).⁹

⁸ McGary appears to have abandoned this argument as well, now citing *Elmore* only for the propositions that the court cannot weigh evidence and that, under *Elmore*, he has demonstrated probable cause for a new trial.

⁹ The precise parameters of McGary's participation in treatment are not entirely clear. It appears that McGary participated in treatment prior to his stipulation to

3. McGary Presented No Evidence Of A Relevant Change in Condition To Support An Order For A New Trial

McGary presents several arguments in support of his contention that he had established probable cause to believe he no longer meets commitment criteria. First, he argues that he no longer meets commitment criteria because his mental health has improved with medication and treatment. App. Br. at 8. He then argues that his diagnosis of paraphilia was incorrect, or, in the alternative, has changed due to some unidentified factor. App. Br. at 9-10. Finally, he argues that he does not meet commitment criteria based on the diagnosis of antisocial personality disorder. App. Br. at 11.

These arguments are without merit. While a change due to treatment would, if demonstrated, for the basis for a finding of probable cause, the actual “evidence” presented does not in fact establish any relevant change as a result of either medication or treatment. Secondly, McGary’s attack on his paraphilia diagnosis is irrelevant, in that he was committed not on the basis of a diagnosis of a paraphilia but on the basis

commitment in 2004, but has not participated since that time. CP at 140,156. It also appears that he has a history of contesting his diagnoses and his need for any form of treatment or medication. CP at 156. When he met with SCC staff in March of 2007, he argued “that he should not have been diagnosed with paraphilia and stated that he was taking his psychotropic medication ‘not that I agree with it that the thoughts are disordered. I disagree with any form of deviance treatment.’” He apparently told SCC staff that he had participated in sex offender treatment prior to his commitment, thereby suggesting that he should not be required to participate in any more treatment. CP at 144, 156.

of a diagnosis of an antisocial personality disorder. Even if it were relevant, it would constitute an impermissible collateral attack on his underlying commitment. Finally, McGary's attack on his diagnosis of antisocial personality disorder was not raised below and cannot be raised here for the first time. Even if this Court considers this issue, his attack on his diagnosis of antisocial personality disorder as a basis for commitment is both legally without basis and constitutes a collateral attack on his commitment. McGary has made no showing of relevant change pursuant to RCW 71.09.090.

a. McGary's Diagnosis of Schizophrenia

McGary argues that his schizophrenia is currently controlled by medication, and cites *Petersen II* for the proposition that this fact entitles him to a new trial on whether he continues to meet commitment criteria. App. Br. at 8. This argument fails for several reasons. First, although McGary stipulated that he suffered from schizophrenia, it was not the basis for his commitment, and is not identified in the Stipulation as a mental abnormality or personality disorder under the statute. CP at 88-93. Secondly, his schizophrenia was controlled by medication at the time of his commitment, and as such, the fact that it is currently controlled as a result of medication would not constitute a change of any kind, even if

relevant. Finally, his citation to *Petersen II* does not support his argument.

First, McGary's argument is factually incorrect. While the Stipulation noted the presence of schizophrenia (CP at 92), the underlying basis for McGary's commitment was the presence of an antisocial personality disorder. CP at 92. The Stipulation does not indicate that his schizophrenia formed the basis of his commitment, nor does it indicate how or to what extent that condition was believed to contribute to his likelihood to reoffend.

Second, there has never really been any question that McGary's schizophrenia can be controlled with medication. When the State's first SVP petition was dismissed and McGary sent to Western State Hospital, he remained there only until his schizophrenia had been controlled by medication. *McGary* at 471. The Stipulation committing McGary indicates that, at the time of his commitment, McGary was medication compliant, noting that he "has, since this matter was filed in December 2000, continued to engage in treatment at the Special Commitment Center" (CP at 89) and that, because of his "continued commitment to the SCC treatment program, including his *compliance with his medication order*, the parties have...agreed that in return for his stipulation to commitment...[McGary] should be released to a less restrictive

alternative....” CP at 89-90 (emphasis added). While in this LRA, McGary stopped taking his medication (CP at 144, 149, 156) and his condition worsened to the point that he began accusing staff of attempting to poison his food and water. CP at 144, 156. He appears to have begun taking his medications again during the review period covered by Dr. Allison’s report. CP at 144. McGary’s on-again/off-again relationship with medication, however, and the resulting dramatic variance in his schizophrenia, does not constitute a relevant change in his mental condition and is not the basis for a new trial.

Finally, McGary’s citation to *Petersen II* is inapposite. *Petersen II* actually involved two litigants, Petersen and Thorell. At issue in Thorell’s case was whether he had demonstrated probable cause for a new trial on the question of placement in a less restrictive alternative. Thorell offered a report from a psychologist, Dr. Gratzner, who had personally evaluated and interviewed Thorell in 1997 and had determined at that time that certain medications would suppress his pedophilic urges.¹⁰ 145 Wn. 2d at 802. Two years later, after Thorell had participated in treatment at the SCC including administration of Depo-Luperon, Dr. Gratzner confirmed through blood, polygraph, and plethysmograph tests that the treatment had had a

¹⁰ Pedophilia, a form of paraphilia, seems to have been the primary basis for Thorell’s initial commitment. *In re Thorell*, 149 Wn. 2d 724, 759, 72 P.3d 708 (2003).

positive effect on Thorell, persuading the Court that “[t]hese tests showed the Depo-Luperon treatment significantly reduced Thorell’s ‘mental abnormality.’ *Id.* Dr. Gratzner had then gone on to “specifically detail[] why he concluded Thorell’s alleged mental abnormality would not likely cause him to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative.” *Id.*

The showing in *Petersen II* is a far cry from the “evidence” presented by McGary. Unlike Thorell, the mental condition for which McGary is being chemically treated does not form the basis of his commitment, and it is unclear what effect, if any, that condition has on his likelihood to reoffend, as opposed to simply his ability to function in the world. *See CP* at 156.

b. McGary’s Diagnosis of Paraphilia

McGary also argues that his paraphilia has also changed such that he no longer meets commitment criteria. Specifically, McGary’s expert, Dr. Donaldson, states that “McGary no longer suffers from a paraphilia disorder (if he ever did) and that this change could be due to any number of conditions, including his early participation in treatment, including working on sexual autobiographies¹¹ and relapse prevention plans.” *App.*

¹¹ McGary work on his sexual autobiography appears to have occurred in 2002. *CP* at 149.

Br at 9; CP at 447. McGary argues that his is a sufficient showing of probable cause under *Elmore*.

Again, this argument fails for several reasons. First, McGary's paraphilia was not the basis for McGary's commitment, and as such any change in that condition will not affect the underlying basis for commitment. CP at 91-93. Moreover, Dr. Donaldson's report does not indicate that McGary's paraphilia has changed "as a result of "positive response to continuing participation in treatment..." RCW 71.09.090(4)(b)(ii); rather, he suggests that it never existed at all, and if it did, it has disappeared for reasons unclear to him, but which might include early treatment. CP at 446. Even if Dr. Donaldson did accept the premise that McGary had ever suffered from paraphilia, it would not be possible to demonstrate that that condition had changed since commitment in that McGary has refused to participate in treatment since at least early 2007, and, as previously noted, there is some suggestion in the most recent annual review that he has not participated in treatment for several years. *See* FN 8.

McGary also attacks the validity of the underlying diagnosis of paraphilia, and, citing the deposition of Dr. First taken in the Franklin County case, argues that he has been diagnosed "merely on the basis of

behavior.” App. Br. at 10. This assertion, in addition to being legally irrelevant,¹² is simply factually incorrect. Dr. Allison, in his report, devotes considerable time to discussing this issue, noting that a 2004 polygraph indicated deception when McGary was asked about sexual fantasies, masturbation, use of pornography, sexual activity with others, telephone sex, exhibitionism, and voyeurism. CP at 146. He notes, as well, that a review of McGary’s overt behavior “strongly suggests a covert thinking prior to and during his sexual assaults.” CP at 146. Dr. Allison goes on to note that “the combination of burglary and sexual assaults as given in the description of his crimes suggests that burglary and the ensuing verbal behavior... were the preferred stimulus that may have triggered his sexual arousal.” CP at 146.

Dr. Donaldson’s report, rather than addressing change through treatment, is simply a collateral attack on the diagnosis of paraphilia. Similar “evidence” was rejected by this Court in *In re Reimer*, 146 Wn. App. 179, 198-99, 190 P.3d 74 (2008). There, the appellant submitted a declaration by Dr. Lee Coleman not unlike that submitted in McGary’s case. In concluding that Dr. Coleman’s declaration failed to address the

¹² McGary himself seemed to originally understand that this assertion was irrelevant to the issues before the court as part of the annual review under RCW 71.09.090, presenting the deposition of Dr. First as part of his CR 60(b) motion. CP at 189-332.

statutory requirement of a change since commitment in Reimer's condition, this Court stated:

Dr. Coleman's reports reveal that he disagrees with Reimer's initial diagnoses and with the legislature's focus on treatment as a reliable predictive factor in determining whether an SVP should be released into the community. As the State argues, Dr. Coleman's reports are rooted in his fundamental disagreement with the statutory criteria that form the basis of Reimer's *initial* commitment. As we have explained in *Fox*, "[T]he legislature documented that RCW 71.09.090 provides a mechanism for an SVP to demonstrate a change in his condition ... rather than an opportunity to attack his original SVP commitment collaterally." Dr. Coleman's reports offer little to establish that Reimer's condition has *changed* Thus, because Reimer has failed to demonstrate a change in his mental condition "*brought about through positive response to continuing participation in treatment*," he is not entitled to an evidentiary hearing on these issues. RCW 71.09.090(4)(b)(ii).

Id. at 198-99 (emphasis in original)(citations omitted). The Court went on to note that, even under the pre-2005 statute, such "evidence" did not support a request for a new trial:

Former RCW 71.09.090 required Reimer to show that his condition had changed so that he no longer met the definition of an SVP. Ultimately, Dr. Coleman's reports do not provide sufficient evidence that Reimer's condition has changed as required. Rather, they constitute a collateral attack on Reimer's initial diagnoses and focus almost exclusively on the diagnostic procedures followed by the mental health community and on the premise that one's participation in treatment is directly correlated to one's risk for recidivism. This, in itself, is insufficient.

Id. Likewise, the evidence presented by McGary, even if analyzed under the pre-2005 version of RCW 71.09.090, is insufficient to support a finding of probable cause, failing, as it does, to address any change in his mental condition.

c. McGary’s Antisocial Personality Disorder

Finally, McGary argues that there is no continuing basis for his commitment, asserting that “McGary stipulated that his schizophrenia and antisocial personality disorder made him likely to reoffend sexually” and that, “once his schizophrenia is controlled through medication, there is no evidence that the personality disorder alone would make him likely to reoffend sexually.” App. Br. at 12.

McGary did not raise this issue before the trial court, nor did he raise it in his initial Motion for Discretionary Review. As such, this Court should refuse to consider this argument at this time. RAP 2.5(a) Even if this Court considers this argument, it is without merit, in that it is again, both factually and legally incorrect. While the Stipulation noted the presence of schizophrenia (and that McGary was at that time taking medication for that condition (CP at 90, 92)), the Stipulation does not indicate that his schizophrenia formed the basis of his commitment, and does not indicate how or to what extent that condition was believed to

contribute to his likelihood to reoffend. Rather, the underlying basis for McGary's commitment was the presence of an antisocial personality disorder "as that term is defined in the Diagnostic and Statistical Manual (4th ed. text revision) (hereinafter DSM-IV-TR)" CP at 91. He stipulated that his personality disorder¹³ "causes him serious difficulty controlling his sexually violent behavior" and "makes him more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility" CP at 91. McGary also stipulated that his antisocial personality disorder constituted a mental abnormality as that term is defined in RCW 71.09.020(8),¹⁴ as well as a "serious mental disorder that causes him serious difficulty controlling his behavior," and that it "makes him more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility." CP at 92.

Nor is his argument that continuing commitment cannot be based on his antisocial personality well founded. Our supreme court has rejected the idea that an antisocial personality disorder cannot legitimately form the basis of commitment under the SVP law (*see e.g.*

¹³ Schizophrenia is considered a psychotic disorder (*See* DSM 297-313), rather than a personality disorder (*see* DSM 685-729).

¹⁴ A "mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

In re Young, 122 Wn.2d 1, 38, fn. 12, 857 P.2d 989 (1993)) and has upheld commitments based on the presence of an antisocial personality disorder and in the absence of a paraphilia. *See e.g. In re Thorell*, 149 Wn.2d at 728 (upholding commitments of Casper Ross and Ken Gordon, both of whom suffered from antisocial personality disorders and neither of whom were diagnosed with a paraphilia) and in *In re Sease*, 149 Wn. App. 66, 201 P.3d 1078 (2009) (upholding commitment of Michael Sease, who was diagnosed with ASPD and Borderline Personality Disorder, but not a paraphilia).¹⁵ As noted by the *Thorell* Court, “there is no talismanic significance to a particular diagnosis of mental illness. No technical diagnosis of a particular “mental abnormality” definitively renders an individual either an SVP or not...[I]t is a diagnosis of a mental abnormality, coupled with a history of sexual violence, which gives rise to a serious lack of control and creates the risk a person will likely

¹⁵ Other states with similar laws have reached the same conclusion. *See In re Murrell*, 215 S.W.3d 96 (2007) (Missouri case upholding SVP civil commitment with no paraphilia diagnosis, ruling ASPD is not too “imprecise” to serve as the basis for commitment); *In re Barnes*, 689 N.W.2d 455 (2004) (Iowa case upholding SVP civil commitment based on ASPD, finding that statute does not require the diagnosed condition to affect the emotional or volitional capacity of every person who is afflicted with the disorder); *In re Adams*, 223 Wis.2d 60, 588 N.W.2d 336 (1998) (Diagnosis of ASPD, uncoupled with any other mental disorders, may satisfy the “mental disorder” requirement of SVP statute); *In re G.R.H.*, 711 N.W.2d 587 (2006) (North Dakota case upholding SVP civil commitment based on ASPD); and *Hubbart v. Superior Court*, 19 Cal.4th 1138, 969 P.2d 584, 81 Cal.Rptr.2d 492 (1999) (*Foucha* does not limit the range of mental impairments that may lead to the permissible confinement of dangerous and disturbed individuals).

commit acts of predatory sexual violence in the future.” 149 Wn. 2d at 762.

Finally, McGary has waived objection to his commitment on the basis his antisocial personality disorder, and cannot now wage a collateral attack against that diagnosis. Had the parties gone to trial, the State would have presented the testimony of its expert, Dr. Robert Wheeler, who had diagnosed McGary as suffering, *inter alia*, from paraphilia not otherwise specified; non-consenting persons, schizophrenia, and an antisocial personality disorder. CP at 155. The State, however, allowed McGary to stipulate to commitment and, in return for that Stipulation, to be immediately placed in a less restrictive alternative to secure confinement. Having chosen to accept the benefits of stipulation to waive his right to appeal from that order (CP at 90)¹⁶ McGary cannot now argue that an antisocial personality disorder, standing alone, cannot legitimately form the basis of a constitutional commitment.

B. The 2005 Amendments To RCW 71.09.090 Are Constitutional

McGary argues that RCW 71.09.090 is unconstitutional as applied to McGary if it does not allow him to challenge his “incorrect paraphilia

¹⁶ As part of the Stipulation, the parties agreed that McGary retained the right to appeal the trial court’s denial of McGary’s motion requiring the State to prove a recent overt act. CP at 90. He waived his right to appeal “all other rulings of the court and all other issues.” CP at 90.

diagnosis.” App. Br. at 13. To the extent that the 2005 amendments prevent re-litigation of original basis for commitment, he argues, they violate due process because the State, having originally committed McGary on the basis of one condition (schizophrenia and antisocial personality disorder) and now holding him on the basis of another (paraphilia NOS), is allowed to confine him indefinitely on basis of paraphilia without clear, cogent and convincing evidence that he suffers from that condition. App. Br. at 16. This, he argues, deprives him of a meaningful opportunity to be heard because he can never challenge this “unproven” diagnosis for an illness he has never been shown to have and where there has never been any proof on the impact of that condition on his likelihood to reoffend. App. Br. at 13-19. Finally, he compares his case to that of the appellant in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992), urging that, where original basis for commitment no longer exists, the State must prove new basis for commitment. App. Br. at 18.

This analysis is possible only if one completely ignores the facts of McGary’s case and is likewise unfamiliar with the record before the Supreme Court in *Foucha*. As noted above, the diagnostic basis for McGary’s commitment has not changed: he was committed on the basis of

his antisocial personality disorder, and continues to suffer from that condition. The State, through Dr. Allison's report, presented prima facie evidence of the continued existence of this condition, and he presented no evidence to the contrary. Indeed, Dr. Donaldson, in his 2007 and 2008 reports (CP at 431-42, 443-47) makes no reference to that diagnosis at all, restricting himself instead to discussions of McGary's schizophrenia and paraphilia diagnoses. Thus McGary presented no evidence to rebut the state's prima facie case or to suggest that the underlying condition upon which his commitment was based had "so changed" that he no longer qualified for commitment as an SVP.

Secondly, McGary's assertion that he is now being held on the basis of the diagnosis of a paraphilia is likewise incorrect.¹⁷ Dr. Allison's report repeatedly references his diagnosis of antisocial personality disorder (CP at 147, 148) noting that various risk factors "intermingle with aspects of [the diagnoses of antisocial personality disorder and schizophrenia] leading to Mr. McGary's elevated risk of sexual offending." CP at 147, 148,155. McGary points to nothing in the report that states or even

¹⁷ McGary alternately suggests that he is being held exclusively on the basis of the erroneous paraphilia diagnosis ("Evidence that McGary's continued commitment is based on an incorrect diagnosis requires a new trial on whether he meets the commitment criteria" App. Br. at 11) and that he is being held *in part* based on that diagnosis ("...when continued commitment is based, in whole or in part, on a new diagnosis that was not litigated in the original commitment proceeding." App. Br. at 18).

suggests that the treatment he has been offered (and has refused) is relevant only to the presence of a paraphilia. Dr. Allison refers only to the need for McGary to participate in “sex offender treatment,” (CP at 148) tying such treatment to McGary’s need to “understand some of the stimulus in the environment that lead him” to offend, (CP at 149) not specifically to the presence of a paraphilia. While Dr. Donaldson, in his 2008 report, opines that “[o]nly a Paraphilia specifically predisposes an individual to sexual behavior,” (CP at 140) he cites no authority for this view. Finally, as noted above, McGary cites no authority for the proposition that an antisocial personality disorder, standing alone, cannot form the basis for commitment, and numerous courts around the nation have rejected that argument.

Nor do the facts of McGary’s case bear any resemblance to those before the Court in *Foucha*. *Foucha* appears at the time of his commitment to have suffered from what was “probably” a “drug induced psychosis.” 504 U.S. at 74. Several years after commitment, a panel reported to the court that “there had been no evidence of mental illness since admission,” that *Foucha* was now in “good shape” mentally, but suffered from an “antisocial personality,” and remained dangerous. *Id. at* 75. The problem in *Foucha*, then, was not that the state of Louisiana had

substituted a new, un-litigated diagnosis for one that had been proven; it was that Louisiana, “attempted to continue Foucha’s confinement without claiming that he suffered from a mental illness...” at all. *Young* at 38.¹⁸

Unlike Foucha, McGary continues to suffer from a mental illness, or mental abnormality, in the form of an antisocial personality disorder. He stipulated both that he suffered from that condition and that this condition constituted a mental abnormality. That condition persists. McGary also asserts that the State, by diagnosing him as currently suffering from a paraphilia, has substituted a new mental condition. This is simply incorrect. With what appears to be one exception,¹⁹ the record indicates that McGary has consistently been found to suffer from a paraphilic disorder as far back as 1998. CP at 155. The fact that the 2004 Stipulation did not include that diagnosis as one of the bases for commitment does not mean that the State agreed that he did not suffer from that condition. It simply meant that the State did not believe that its

¹⁸ The *Young* court discussed Foucha’s diagnosis at length, distinguishing Foucha’s diagnosis of “antisocial personality” from an antisocial personality disorder, such as that suffered by Young and McGary. See *Young* at 38, fn 12.

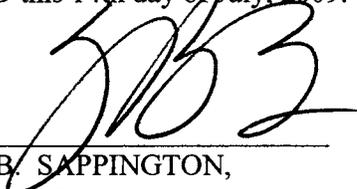
¹⁹ Dr. Allison’s report indicates that, in 2002, Dr. Robert Saari submitted a report indicating that he did not believe McGary suffered from a paraphilic disorder. CP at 145. Dr. Donaldson’s 2007 report (CP at 431-42) makes the erroneous assertion that McGary “does not currently carry a diagnosis of Paraphilia.” Dr. Donaldson was apparently unfamiliar with the 2004 report of Dr. Yanisch from the SCC, who, disagreeing with Dr. Saari, concluded that McGary did in fact suffer from a Paraphilia, as well as Dr. Allison’s report.

inclusion was essential for purposes of a lawful commitment. McGary's arguments are without merit and should be rejected.

IV. CONCLUSION

McGary fails to demonstrate that trial court improperly weighed evidence at the show cause hearing, or that he presented evidence of relevant change since commitment such that he would be entitled to a new trial. Nor does he demonstrate that the 2005 amendments to RCW 71.09.090 are unconstitutional. In denying his request for a new trial, the trial court simply recognized that McGary had not provided it with any evidence of relevant change in McGary's condition, as required by statute. This Court should affirm the trial court's Orders denying McGary's request for a new trial.

RESPECTFULLY SUBMITTED this 14th day of July, 2009.



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WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

DARNELL MCGARY,

Respondent.

**DECLARATION OF
SERVICE**

I, Jennifer Dugar, declare as follows:

On this 14th day of July, 2009, I sent via e-mail and deposited in the United States mail true and correct cop(ies) of Brief Of Respondent and Declaration Of Service, postage affixed, addressed as follows:

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

DATED this 14th day of July, 2009, at Seattle, Washington.



JENNIFER DUGAR
Legal Assistant