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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 40096-1

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

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In re the Detention of:

GARY CHERRY,

Petitioner.

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**RESPONDENT'S OPENING BRIEF**

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## I. IDENTITY OF RESPONDENT

Respondent is the State of Washington, by and through the Office of the Attorney General, represented in this matter by Brooke Burbank, Assistant Attorney General.

## II. ISSUES PRESENTED FOR REVIEW

1. **Did the trial court err in denying the parties' Agreed Motion to Dismiss this civil commitment proceeding when dismissal of a civil action is mandatory pursuant to CR 41(a)(1) when all parties so stipulate in writing?**
2. **Did the trial court err in denying appellant's right to a new trial when the state failed to produce any evidence that would meet its burden of showing that Mr. Cherry continued to meet the statutory definition of a Sexually Violent Predator pursuant to RCW 71.09.090 and *In re the Detention of Petersen*<sup>1</sup>?**

## III. STATEMENT OF THE CASE

Gary Cherry was civilly committed as a Sexually Violent Predator ("SVP") on September 27, 1999, in Mason County Superior Court. (MDR App. E. at 5).<sup>2</sup> On January 9, 2003, Mr. Cherry was conditionally released to a less restrictive alternative placement ("LRA") at the Secure Community Transition Facility ("SCTF").<sup>3</sup> (*Id.*) On December 11, 2003, Mr. Cherry was conditionally released from the SCTF to an LRA in his home

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<sup>1</sup> *In re the Detention of Ronald Petersen*, 145 Wn.2d 789, 42 P.3d 952 (2002).

<sup>2</sup> There have not been Clerk's Papers designated in this case, but the parties are in substantial agreement about the facts in this case. So not to delay the matter any further, the State is citing to the attachments to the Motion for Discretionary Review for all factual references.

<sup>3</sup> The SCTF is the DSHS-operated facility on McNeil Island for individuals who qualify for less restrictive placement.

in Shelton, Washington. (*Id.* at 6). Mr. Cherry has continued to live at home with his wife since that time under court-ordered conditions, and has had no law violations since his conditional release. (*Id.*)

On September 12, 2007, Dr. James Manley, a licensed psychologist employed by the Department of Health and Human Services ("DSHS") at the Special Commitment Center, completed Mr. Cherry's 2007 annual review, and concluded that Mr. Cherry no longer meets the definition of a sexually violent predator and thus should be unconditionally released into the community. (*Id.*) The State subsequently retained Dr. Harry Hoberman, Ph.D., to evaluate Mr. Cherry. Dr. Hoberman, in a report dated July 9, 2008, raised several concerns regarding Mr. Cherry, but deferred to "the opinions of and recommendations of those most familiar with Mr. Cherry, his management and his behavior in the community to date." (*Id.* at 7). However, Dr. Hoberman recommended that Mr. Cherry remain on conditional release, with further reductions in his monitoring conditions. (*Id.* at 8). On September 25, 2008, after a stipulated bench trial, the Court found that the State had proved that Mr. Cherry's condition remained such that he continued to meet the definition of an SVP, based on the report authored by Dr. Hoberman. (*Id.*)

On November 11, 2008, Dr. Manley completed Mr. Cherry's 2008 SCC annual review. For the second year in a row, Dr. Manley concluded that Mr. Cherry did not meet SVP criteria and again recommended his

unconditional release. In that evaluation, Dr. Manley responded to some of the concerns Dr. Hoberman raised in his report, and opined that Mr. Cherry had:

[S]uccessfully learned to manage these areas of risk across a period of several years, first at the SCC institution and later in the community, with decreasing levels of supervision. Mr. Cherry has developed a workable and consistently accountable method of keeping himself and the community safe.

(*Id.* at 8-14).

On May 7, 2009, Dr. Manley completed Mr. Cherry's 2009 annual review, again concluding that Mr. Cherry does not meet SVP criteria and recommending his unconditional release. (*Id.* at 14.) The psychological staff at the SCC tasked with overseeing treatment progress at the SCC, (the Senior Clinical Group), as well as the Superintendent of the SCC, Dr. Henry Richards, and Mr. Cherry's Sex Offender Treatment Provider, Dr. Brian Judd, all concurred and recommended unconditional release for Mr. Cherry based on his longstanding progress in sex offender treatment and his successful self-management in the community for six consecutive years. (*Id.* at 6-16).

On September 1, 2009, the State stipulated that, based upon the SCC's 2007, 2008, and 2009 annual review evaluations, and Dr. Judd's opinions concerning Mr. Cherry's continued successful participation in sex offender treatment, the Petitioner could not prove beyond a reasonable doubt that Mr. Cherry continues to meet the criteria for commitment as a sexually violent

predator.<sup>4</sup> The parties submitted a signed agreed order dismissing the petition and unconditionally releasing Mr. Cherry. The court refused to sign the order. The court also denied Mr. Cherry a new *jury* trial on the issue, and instead entered a finding that he continued to meet the SVP criteria.

#### IV. ARGUMENT

The trial court first erred by failing to dismiss the State's petition pursuant to CR 41(a)(1)(A), when both parties had signed a stipulation agreeing to dismissal. Once the court indicated it would not sign the order of dismissal, Mr. Cherry raised the issue of a new trial pursuant to RCW 71.09.090. The State agrees with Mr. Cherry that the trial court also erred in failing to order a new trial pursuant to RCW 71.09.090, and *In re Petersen (supra)*; however, the CR 41 issue should be dispositive and alleviate the need for remand to the trial court for the entry of an order granting a new trial. The State has no evidence that Mr. Cherry continues to meet the criteria of an SVP, and therefore would not be able to proceed to trial if one were ordered. (*Id.* at 18).<sup>5</sup> This court should dismiss the petition pursuant to RAP 12.2 and in the interest of justice.

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<sup>4</sup> The State attached Dr. Hoberman's 2008 report as an attachment to the Agreed Motion to Dismiss, but was not relying on the opinion expressed therein, as it had been superseded by the 2009 Annual Review.

<sup>5</sup> CR 41(a)(1)(B) Voluntary Dismissal provides mandatory dismissal when the plaintiff moves for dismissal "before the plaintiff rests at the conclusion of his opening case." Because proceedings pursuant to RCW 71.09 have no pending trial after the initial commitment until a new trial is ordered under 71.09.090, this subsection would not apply unless the trial court ordered a new trial. If a new trial had been ordered, the lack of dismissal would be appealable under this section as well.

**A. Commitment is Constitutional As Long As the Individual Is Mentally Ill and Dangerous**

The Washington Sexually Violent Predator civil commitment scheme has withstood numerous constitutional challenges in both State and Federal Courts. As with other mental health and involuntary treatment statutes, due process is not violated by continued commitment *provided* the State can show that the individual is currently mentally ill and dangerous. *In re Young*, 122 Wn.2d 27-33, *citing Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979); and *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780 (1992). In Mr. Cherry's case, the State did not have the requisite evidence to meet this burden, and therefore moved to dismiss the petition holding Mr. Cherry as an SVP.

**1. Voluntary Dismissal is Mandatory When Both Parties Agree in Writing**

Commitment proceedings pursuant to RCW 71.09 are civil in nature. *In re Detention of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). The civil rules govern 71.09 proceedings except, as expressed in CR 81, where inconsistent with the relevant statute. *In re Detention of Williams*, 147 Wn.2d 476, 488-89, 55 P.3d 597 (2002). RCW 71.09 is silent with regards to dismissal of actions, thus CR 41 is applicable. CR 41 differentiates between mandatory and permissive dismissals, and eliminates judicial discretion under certain circumstances. Dismissal of an action is mandatory and *shall* be

dismissed by the court "when all parties who have appeared so stipulate in writing." CR 41(a)(1)(A).<sup>6</sup>

Here, the parties appeared jointly before the court requesting that the SVP petition holding Mr. Cherry be dismissed and that he be unconditionally released. (RP 9/1/09 at 1-14; MDR App. E.). Both parties signed the agreement, and both orally represented that they were jointly seeking a dismissal. (RP 9/1/09 at 3). The State represented that it had insufficient evidence to meet its burden of showing Mr. Cherry continued to be mentally ill and dangerous. (RP 9/1/09 at 4; 11). The court erred by refusing to sign the agreed order, and ordering that the state continue to hold Mr. Cherry as an SVP.<sup>7</sup> (RP 9/1/09 at 12-14).

The Commissioner's Ruling Granting Review of this matter questions the applicability of CR 41(a)(1)(A), citing a potential conflict with RCW 71.09.090. (See Ruling Granting Review at 3-4). SVP proceedings are governed by the civil rules, except where the rules conflict with statutory provisions governing SVP proceedings. *In re Detention of Young*, 163 Wn.2d 684, 693, 185 P.3d 1180 (2008). Where the statutory provisions are consistent with the civil rules, *or are silent*, the civil rules will apply. *Id.*; see also *In re Estate of Kordon*,

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<sup>6</sup> CR 41 excepts certain actions involving Class Actions and Shareholder Derivatives from mandatory dismissal, but neither exemption is applicable here.

<sup>7</sup> Although Mr. Cherry was living in the community on Less Restrictive Placement, he was still classified as a sexually violent predator, subject to the "care and control" of DSHS, in a secure facility as defined by RCW 71.09.020(15) and living under court-ordered conditions that limited his freedom to act.

157 Wn.2d 206, 213, 137 P.3d 16 (2006). There is nothing inconsistent about this statutory procedure for ordering a new trial, and a separate process by which the prosecuting agency can dismiss an action when there is insufficient evidence to proceed. RCW 71.09.090 is silent regarding the process of dismissing a petition, which is therefore governed by the civil rules. In this matter, the parties agreed to a dismissal, signed the stipulation and presented it to the court. CR 41(a)(1) is mandatory dismissal, and the court did not have the discretion to deny the agreed motion. To force the State to proceed with a sexually violent predator commitment trial when it does not have current evidence that the individual meets the statutory criteria would be counter to the constitutional underpinnings of the statute. The State joined in Mr. Cherry's motion to dismiss the petition because it did not have the requisite evidence to meet its burden at the show cause hearing pursuant to RCW 71.90.090. (See Section 2, below). Correspondingly, it did not have the evidence to pursue any trial to which Mr. Cherry was entitled as a result. In light of the stipulation signed and presented by both parties, refusal to dismiss the petition was an abuse of discretion that has resulted in the continued confinement of Mr. Cherry. This court should reverse and dismiss the SVP action against Mr. Cherry.

**2. The Court Exceeded Its Role at the Show Cause Hearing, Acted as Fact Finder and Improperly Relied on Stale Evidence.**

Notwithstanding the refusal to dismiss the case, the Court also erred by ignoring the procedures of RCW 71.09.090, and relying on "evidence (sic) reports that have been used in the past by this court to find that he is a sexually violent predator" to make a finding that he continues to meet criteria. (RP 9/1/09 at 12; MDR App. F., Court's Amended Findings of Facts and Conclusions of Law, November 4, 2009).

RCW 71.09.090 has an express provision establishing procedures for petitioning for unconditional release when DSHS "determines that the person's condition has so changed that. . . he no longer meets the definition of a sexually violent predator. . . Upon receipt of the petition, the court *shall* within forty-five days order a hearing." 71.09.090(1) (emphasis added). Under the plain language of the statute, the court was required to order a trial on the issue of Mr. Cherry's status as an SVP, not issue a ruling deciding the issue.

*In re the Detention of Ronald Petersen*, 145 Wn. 2d 789, 42 P.3d 952 (2002) clarified the procedure set out in RCW 71.09.090. The Court held there are only two possible statutory ways for a court to determine there is probable cause to proceed to an evidentiary hearing under RCW 71.09.090(2): (1) *by deficiency in the proof submitted by the State*, or (2) by sufficiency of proof by the petitioner. 145 Wn.2d 789, 798. At the Show Cause hearing:

"The State must set forth evidence which if believed shows the prisoner (sic) still has a mental abnormality or personality disorder, i.e., the prisoner (sic) has not so changed, and this mental abnormality or personality disorder will likely cause the prisoner (sic) to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged." *Id.*

Even if the State carries its burden to prove a prima facie case for continued imprisonment (sic), the prisoner (sic) may present his own evidence which, if believed, would show the prisoner (sic) no longer suffers from a mental abnormality or personality disorder, i.e. the prisoner (sic) has "so changed" or (2) if the prisoner (sic) still suffers from a mental abnormality or personality disorder, the mental abnormality or personality disorder would not likely cause the prisoner (sic) to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged. *Id.*

Under either prong, the individual is entitled to new trial and to "the benefit of all the constitutional protections that were afforded to the person at the initial commitment proceeding." RCW 71.09.090(3)(a). Among the rights to which the individual is entitled is the right to a jury trial. *Id.*

Mr. Cherry rightfully petitioned for a new trial. (MDR App. D.) He was entitled to a new trial when the State failed to meet its burden that he continues to meet the statutory criteria. Here, the State presented no evidence that he met criteria and conceded that he no longer was an SVP, thus under Petersen and the plain language of the Statute he is entitled to a jury trial on the issue. However, because the State did not have sufficient evidence to proceed to trial, it entered a stipulation with Mr. Cherry agreeing to dismiss the case. The trial court abused its discretion by reaching well beyond the evidence

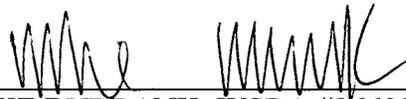
presented and concluding there was evidence to find he was a sexually violent predator. This court should dismiss Mr. Cherry's SVP matter.<sup>8</sup>

## V. CONCLUSION

The trial court abused its discretion by refusing to dismiss the petition when the parties submitted a signed stipulation to dismissal. The State asks this Court to reverse that decision, and dismiss the Petition pursuant to RAP 12.2.

RESPECTFULLY SUBMITTED this 14th day of July, 2010.

ROBERT M. MCKENNA  
Attorney General



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Assistant Attorney General  
Attorneys for the State of Washington

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<sup>8</sup> Although the State believes Mr. Cherry is entitled to a new trial, if this court were to grant the trial, the State would be in the position of moving to dismiss pursuant to CR 41(a)(1)(B).

NO. 40096-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

GARY CHERRY,

Appellant.

DECLARATION OF  
SERVICE

FILED  
COURT OF APPEALS  
10 JUL 16 PM 1:24  
STATE OF WASHINGTON  
BY: JENNY

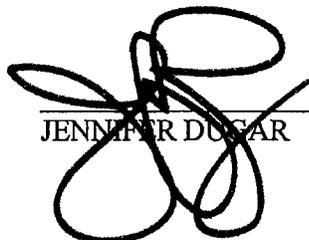
I, Jennifer Dugar, declare as follows:

On July 16, 2010, I caused to be served via email and United States mail true and correct cop(ies) of Respondent's Opening Brief, Request for Oral Argument and Notice of Unavailability, and Declaration of Service, postage affixed, addressed as follows:

Oliver Davis  
1511 3rd Ave Ste 701  
Seattle, WA 98101-3647  
oliver@washapp.org

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

DATED this 16th day of July, 2010, at Seattle, Washington.

  
\_\_\_\_\_  
JENNIFER DUGAR