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COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON

In re the Personal Restraint Petition of:

Case No.: 32702-3-II

BY DONALD T. MCCARTHY,
SECURITY

PETITIONER'S REPLY TO RESPONSE OF
THE INDETERMINATE SENTENCE
REVIEW BOARD

Petitioner.

Petitioner, by and through his attorney, CRAIG P. BARNES, of Linn-Barnes Law Offices, PLLC, respectfully submits his Reply to Response of the Indeterminate Sentence Review Board.

ARGUMENT

A. BASED ON THE RECENT RULINGS BY THIS COURT IN *STATE V. BORBOA* AND *STATE V. MONROE*, THIS COURT SHOULD FIND THAT MR. MCCARTHY'S RIGHT TO TRIAL BY JURY WAS VIOLATED UNDER *BLAKELY V. WASHINGTON* BY THE BOARD'S DECISION TO EXTEND HIS MINIMUM TERM BY 24 MONTHS.

In the Response of the Indeterminate Sentence Review Board (hereinafter, ISRB or Board), the Board argues that because Blakely does not apply to an indeterminate sentence such as Mr. McCarthy's, his request for relief under Blakely must fail. Response of the Indeterminate Sentence Review Board, at 18. The Board's argument is contradicted by recent decisions of this Court. See State v. Borboa, 124 Wn.App. 779, 102 P.3d 183 (2004); State v. Monroe, WL 590287 (3/15/2005). In Borboa, this Court found that, "The main question in this appeal is whether a sentence imposed under RCW 9.94A.712 is subject to the Sixth Amendment right to jury trial as interpreted in Apprendi v. New Jersey, and Blakely v. Washington. Answering yes, we affirm in part and reverse in part." Borboa, 124 Wn.App. at 782.

Like in the present case, the State in Borboa argued that the Sixth Amendment right to jury trial as interpreted in Apprendi and Blakely could not have been violated because it does not

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apply to (indeterminate) sentences imposed under RCW 9.94A.712. Borboa, 124 Wn.App. at 784. This Court found that:

“In clarifying the Sixth Amendment’s right to jury trial, however, Apprendi and Blakely significantly change the trial judge’s ability to impose an exceptional minimum term under RCW 9.94A.712. RCW 9.94A.712 provides that an exceptional minimum term must meet the requirements of RCW 9.94A.535. RCW 9.94A.535 provides that the facts needed to support an exceptional term are not just the elements of the crime, but must include one or more aggravating facts that are not elements of the crime. Necessarily then, the jury does not find each fact needed to support an exceptional minimum term simply because it returns a general verdict of guilty and without jury findings, an exceptional minimum term violates the Sixth Amendment’s right to jury trial.”

Borboa, 124Wn.App. at 787.

This Court confirmed its position on this issue in Monroe, finding again that a defendant is entitled to have a jury find disputed facts beyond a reasonable doubt before the sentencing court can use such facts to impose a minimum term above his standard range under RCW 9.94A.712 (3). Monroe, WL 590287. In making this finding, this Court reasoned that a distinction could be drawn between facts increasing the defendant’s *minimum* sentence and facts extending the sentence beyond the statutory *maximum*. Id. In Monroe, this Court found that the petitioner’s rights were not violated when the sentencing court gave him a maximum term (of life) that exceeded the term allowed by the jury’s verdict, but that his jury right under Blakely was violated when the sentencing court imposed a minimum term in excess of his standard range. Id.

The reasoning of this Court in Monroe is particularly relevant in Mr. McCarthy’s case because the Court addresses the role of the Independent Sentencing Review Board (ISRB). In Monroe, this Court noted that the Washington Supreme has held that any inmate serving a pre-Sentencing Reform Act (SRA) life sentence can never establish that he or she is receiving more punishment under the SRA because the ISRB has discretion to impose a minimum sentence of

life. Monroe, WL 590287; *citing In re Personal Restraint of Stanphill*, 134 Wn.2d 165, 949 P.2d 365 (1998). This Court found, "... [p]recisely because the statutes governing imposition of Monroe's sentence do not grant the sentencing court (RCW 9.94A.712(3)) or the ISRB (RCW 9.95.420), unfettered discretion to impose a minimum term of life that Stanphill does not control the decision here." Id.

Mr. McCarthy, like the petitioners in both Barboa and Monroe, was sentenced pursuant to RCW 9.94A.712, and also fell under the jurisdiction of the ISRB pursuant to RCW 9.95.420. RCW 9.94A.712 is an indeterminate sentencing scheme, but contrary to the Board's contention in its Response, this Court has found that Blakely does apply to a petitioner under RCW 9.94A.712's indeterminate sentencing scheme. Response of the Indeterminate Sentence Review Board, at 17; Monroe, WL 590287, Barboa, 124Wn.App. at 787 . Because Blakely does apply to defendants sentenced pursuant to RCW 9.94A.712, and RCW 9.95.420 does not grant the ISRB unfettered discretion to extend Mr. McCarthy's minimum term to his maximum sentence, this Court should find that the State's indeterminate sentencing procedure has deprived Mr. McCarthy of his Sixth Amendment right to a trial by jury, and invalidate the ISRB's decision to extend his minimum sentence by twenty four months.

B. BECAUSE THE BOARD'S DECISION NOT TO APPOINT COUNSEL TO REPRESENT MR. MCCARTHY VIOLATED HIS DUE PROCESS RIGHTS, THE BOARD'S DECISION TO EXTEND HIS MINIMUM TERM BY TWENTY-FOUR MONTHS SHOULD BE VACATED.

In its Response, the Board cites to Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 2104-05, 60 L.Ed. 2d 668 (1979) for the sole proposition that a .420 hearing and a parole revocation hearing are like "apples and oranges" because a .420 hearing involves an offender who is still in prison, and a parole revocation involves an offender who is already at liberty. Response of the Indeterminate Sentence Review

Board, at 19-21. The Board’s reliance on Greenholtz for that proposition is narrow and misplaced.

1. A .420 hearing is more like a parole revocation hearing than a parole “.100” hearing, and the critical difference is the burden of proof.

First, the Court in Greenholtz compares “parole release” (not a .420 hearing) to “parole revocation”. Greenholtz, 442 U.S. at 9. A prisoner facing “parole release” is in a significantly different position than a prisoner facing a .420 hearing. The decision in Greenholtz pre-dated the Sentencing Reform Act (1984) in Washington, as well as the enactment of RCW 9.95.420. The only “parole release” that a prisoner could have faced at that time is the type now governed by RCW 9.95.100. Under this statute:

“Any person convicted in a state correctional institution, not sooner released under the provisions of this chapter, shall, in accordance with the provisions of law, be discharged from custody on serving the maximum punishment provided by law for the offense of which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term. The board shall not, however, until his or her maximum term expires, release a prisoner, *unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release.*”

RCW 9.95.100 (emphasis added).

In a parole hearing under RCW 9.95.100, the Board has virtually unfettered power to determine whether or not a prisoner is released. Id.

In contrast, in a .420 hearing:

“*The board shall order the offender released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such condition, it is more likely than not that the offender will commit sex offenses if released.*”

RCW 9.95.420(3)(a)(emphasis added).

In a .420 hearing, there is a *presumption* that the prisoner will be released, unless the Board finds by a preponderance of evidence that it is more likely than not that the offender will

commit another crime. *Id.* Even though prisoners facing both “parole release” and a .420 hearing are incarcerated at the time of their hearings, there is arguably a significant difference in the “expectancy of release” between the two. *See generally Greenholtz*, 442 U.S. at 12. In the case of a prisoner facing a RCW 9.95.100 hearing, based on the language of the statute, there is no presumption of release- the prisoner’s potential liberty is subject entirely to the “opinion” of the Board. RCW 9.95.100. Conversely, in the case of a prisoner facing a .420 hearing, there is a presumption of release- the prisoner’s opportunity to obtain liberty is much better because the Board must find against the prisoner’s presumption of release by a preponderance of evidence. Therefore, a prisoner facing a .420 hearing would have a higher “expectancy of release”, and a more tangible liberty interest than a prisoner facing a RCW 9.95.100 hearing.

Because of the higher “expectancy of release” of a prisoner facing a .420 hearing, the .420 is much more like a parole revocation hearing, than a RCW 9.95.100 hearing. In a parole revocation hearing, like in a .420 hearing, the Board must find by a “preponderance of evidence” that there is evidence sufficient to challenge a presumption in favor of the parolee. RCW 9.95.125. In its Response, the Board attempts to downplay the importance of this comparison, arguing that the difference between a parole revocation hearing (where offender is outside prison) and a .420 hearing (where an offender is inside a prison) is more significant than the “identical nature of the burden of proof”. Response of the Indeterminate Sentencing Review Board, at 21. As the Court finds in *Greenholtz*, there is a significant difference in the liberty interest between a prisoner facing “parole release”, and one facing “parole revocation”. *See generally Greenholtz*, 442 U.S. at 12. But it is the language of the controlling statute that distinguishes a .420 hearing from RCW 9.95.100 hearing, and makes it much more like a parole revocation hearing, where one is entitled to legal representation.

2. A .420 Hearing is not at all like a community custody revocation hearing.

Next, in its Response, the Board essentially argues that a .420 hearing should be treated the same as a community custody revocation hearing, where the Washington Court of Appeals, Division I, has found that counsel is not required. Response of the Indeterminate Sentence Review Board, at 22; *citing In re McNeal*, 99 Wn. App. 617, 636, 994 P.2d 890 (2000).

A .420 hearing has almost nothing in common with a community custody revocation. First, a community custody revocation is considered as inmate disciplinary proceedings. RCW 9.94A.205(3). This gives the Department of Corrections (DOC) the sole authority to conduct community custody revocation hearings. *Id.* A .420 hearing, like a parole revocation hearing, is conducted by the ISRB. The DOC's primary function is to oversee internal institutional matters, while the ISRB is a separate agency whose function is to determine whether or not an offender is fit for release in the community. RCW 9.95.100.

Second, community placement is not analogous to probation or parole- it is a sentence enhancement. *State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996). There is a fundamental distinction between community placement and the related effects of probation and parole: Community placement occurs in addition to the period of confinement, while probation and parole occur in lieu of confinement. *Ross*, 129 Wn.2d at 286. Community custody is purely punitive. "The decision to revoke community custody is based primarily on factual determinations about whether the individual violated the conditions of community custody. The success or failure of the rehabilitative process *is not even a factor.*" *In re McNeal*, 99 Wn.2d at 635(emphasis added). Even in its Response, the Board does not go so far as to argue that rehabilitation is "not even a factor" in .420 hearings. Response of the Indeterminate Sentence

Review Board, at 24-25. After citing to a portion of legislative history for RCW 9.95.420, the Board only contends that, “Thus, the purpose of the .420 hearing is arguably oriented more toward public safety rather than rehabilitation...” Id.

If .420 hearings were not rehabilitative, then the ISRB would not recommend that an offender enter into and complete rehabilitative treatment. However, in Mr. McCarthy’s case, the ISRB did just that. Personal Restraint Petition of Donald McCarthy, Ex.3 at 3 (“...[i]t’s the Board’s conclusion that unless he has some sex offender treatment in order to learn about his deviant desires and behaviors he would constitute an ongoing danger to the community, especially young, vulnerable, or mentally disabled people.”).

Third, an offender who is subject to a .420 hearing maybe released into community custody, but that does not mean that community custody is the primary focus of a .420 hearing. The only decision the ISRB makes in a .420 hearing is whether or not to *release* an offender from confinement onto community custody. The Board essentially makes a judicial decision (as a fact finder and jury). If the ISRB releases the offender, the DOC becomes solely responsible for enforcing the terms of community custody as set out in the offender’s judgment and sentence. See Petitioner’s Ex. 1, at 6 (“The defendant shall be on community supervision/community custody under the charge of the Department of Corrections and shall follow and comply with the instructions, rules and regulations promulgated by said Department...”).

The Board’s conclusion that a .420 hearing should be treated like a community custody revocation hearing simply defies logic. In its summary of this issue, the Board argues that, as pointed out in Ross, the purpose of community placement is primarily punitive. Response of the Indeterminate Sentence Review Board, at 25. The Board then states that, “Because it is primarily

punitive, it is unlike a parole revocation hearing.” Id. Then the Board argues that, “Therefore, Mr. McCarthy’s attempt to demonstrate that a .420 hearing is rehabilitative in the same manner as parole revocation hearing fails.” Id.

Just because community custody is primarily punitive, and parole revocation is not primarily punitive, does not mean that a .420 hearing is not like a parole revocation hearing. If community custody is primarily punitive, and parole revocation is not, then community custody is not like parole revocation. It is the Petitioner’s argument that .420 hearings are much more like a parole revocation hearing (in part because they have rehabilitative qualities) and not like community custody revocation hearings (which are entirely punitive in nature). See McNeal, 99 Wn.App. at 899. Thus, Mr. McCarthy should be entitled to the same due process protections as those afforded to offenders in parole revocation hearings.

3. A review of Mr. McCarthy’s mental health history, as well as a complete review of the text of his transcript of his .420 hearing demonstrate Mr. McCarthy’s need for counsel at his hearing.

The Board argues that under the case-by-case analyses dictated by Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L.Ed. 2d 656 (1973), Mr. McCarthy should not be entitled to an attorney at his .420 hearing, despite his mental disabilities, because of his performance at that one hearing. Response of the Indeterminate Sentence Review Board, at 25-26. In support of this position, the Board argues that, “Although Mr. McCarthy portrays himself as a person who is incapable of speaking effectively on his own behalf during a .420 hearing, his cogent, well articulated comments made during his first .420 belie that contention.” Response of the Indeterminate Sentence Review Board, at 26. The Board refers to Mr. McCarthy’s mental health

history as “apparent”, and describes Mr. McCarthy as portraying himself in a “self-serving fashion” in his initial petition. Response of the Indeterminate Sentence Review Board, at 26, 28.

File records show that Mr. McCarthy is over 60 years of age, and has an I.Q. of 72, which in the range of mild retardation. Petition, at 15. He was unable to finish his high school education, and last worked as a painter. Id. Mr. McCarthy has been receiving mental health treatment since 1980, and has been diagnosed with paranoid schizophrenia. Id.

Although Mr. McCarthy may appear to give “cogent” answers to some of the ISRB’s questions during his hearing, many of the comments made by his counselors, as well as his interactions during the hearing are quite consistent with his long documented history of mental disability. For example, during the ISRB’s questioning of his counselor:

Merkner: Ah, he just came in March I believe, March 21, ah, and I ah, makes it clear that anxiety and nervousness has been the major mental health symptom and ah, he did seek help and got into my relaxation training group when that became available in the spring of '03. He successfully completed that and participated ah, ah, wholeheartedly in that and appears to have gotten some benefit from that and...

Austin: Why specifically was he sent over here?

McCarthy: Paranoid schizophrenia

Austin: We’ll ask you in just a minute, Mr. McCarthy. We’ll take it step by step if you can listen, please.

Merkner: Reason for referral, offender is extremely fearful, anxious and paranoid. History of paranoid schizophrenia.

Austin: And that’s manifest by his condition today, that’s the way he normally presents himself when he’s talking to you, or is he a little less nervous?

Petitioner’s Exhibit 4, at 5.

Mr. McCarthy’s mental health counselor testified:

Slusser: Mr. McCarthy arrived here at SOU on March 21, 2003 as Jim said he was sent here to (inaudible). Since he's been here he's not been a management problem. I did his end of sentence review and BMI referral and so I've known and had good contact with Mr. McCarthy since he's been here at SOU. Um, he is a lot more right now kind of, how do you describe it, what you're feeling right now, kind of anxiety, more than he usually is. Ever since he was informed that this board hearing was coming up in the last month or so he's been a lot more kind of paranoid, but his anxiety has been at a lot higher level, so on a normal basis it's not this high. Like I say I got to meet with him when he first came in here and interviewed (inaudible) twice as much as it usually is....

Petitioner's Exhibit 4, at 6.

His mental health counselor further testified:

Slusser: Um, I think um, we have described Mr. McCarthy as a very fragile person. Um, he's making progress. I do not know if he would be able to participate in SOTP at this time, complete it just due to his mental health conditions right now. So, um, like I say his anxiety is twice as much right now as it usually is. He's doing well at SOU, and um, that would be something I would prefer the mental health staff to evaluate and see if he can go there or participate.

Petitioner's Exhibit 4, at 6.

Then Austin (Chairman of the ISRB) asked Mr. McCarthy if he had any questions for Mr. Slusser. He responded:

McCarthy: Yeah. One thing. There were two bad cell mates that I had and I was also frightened at the arguments when people were told something and were talking about me. Not really threatening but talking.

Austin: What'd they say about ya?

McCarthy: Intimidation and pointing at me and talking, whispering and stuff.

Garrett: Do you know what they were saying about you?

Garrett: (inaudible)

McCarthy: Not really, but the way I heard it was that ah, that (inaudible) said he heard it from a guard.

Garrett: So you didn't, this isn't something you saw but just something you heard that other people were talking about?

McCarthy: Yeah, at some point that whispering and stuff.

Garrett: Okay.

Petitioner's Exhibit 4, at 7.

Clearly, the counselors' testimony supports Mr. McCarthy's history of mental illness, as well as the effect of his mental illness on his ability to effectively participate in the .420 hearing. Id. Further, there is no suggestion by his counselors or the ISRB that Mr. McCarthy's anxiety during the hearing is fabricated. In fact, Mr. Slusser testified that Mr. McCarthy was a "very fragile person" and that Mr. McCarthy's anxiety level was about twice as high as usual at that time. Petitioner's Exhibit 4, at 6

When Mr. Austin gave Mr. McCarthy an opportunity to question Mr. Slusser, he didn't really appear to understand what to do. He didn't ask a question, but rather brought up an incident regarding two "bad cell mates" that had frightened him. Petitioner's Exhibit 4, at 6. Mr. Austin and Ms. Garrett attempted to draw out his point, but ultimately gave up with a resigned "Okay". Id. This is certainly not an example of a "cogent, well articulated" comment.

The point is that this Court should review Mr. McCarthy's .420 hearing transcript in its entirety before making any judgment's about his ability to represent himself. The Board's argument, based on a few portions of the transcript, that Mr. McCarthy is presenting himself in a self-serving manner in his petition, and that he is quite articulate and capable, is belied by Mr. McCarthy's lengthy mental disability history and several other portions of that same transcript.

Finally, although Mr. McCarthy may have been able to answer some of the ISRB's questions in a with salient information, that does not mean that he was able to adequately represent himself. The effectiveness of the due process rights guaranteed by Morrissey v. Brewer, 408 U.S. 471, 480 (1972) may depend on the use of skills that a probationer or parolee is

unlikely to possess. Scarpelli, 411 U.S. at 786. Despite the informal nature of the proceeding and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examination or cross-examination of witnesses or the offering or dissecting of complex documentary evidence. Scarpelli, 411 U.S. at 786-787.

Mr. McCarthy's inability to formulate questions to cross-examine his mental health counselor is an excellent example of why Mr. McCarthy needs appointed counsel to protect his due process rights under Morrissey and Scarpelli.

C. BECAUSE MR. MCCARTHY'S JUDGMENT AND SENTENCE WAS NOT "VALID ON ITS FACE", THE ONE YEAR STATUTE OF LIMITATIONS DOES NOT APPLY TO HIS THIRD CLAIM FOR RELIEF.

In its Response, the Board argues that Mr. McCarthy's third ground for relief is time-barred based on RCW 10.73.090(1), and should be summarily dismissed. Response of the Indeterminate Sentence Review Board, at 14. RCW 10.73.090 states, in part, that:

"(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment and becomes final if the judgment and sentence is *valid on its face* and was rendered by a court of competent jurisdiction."

RCW 10.73.090(1)(emphasis added).

If a judgment and sentence is not "valid on its face", then the one year time bar does not apply. In re Personal Restraint Petition of Goodwin, 146 Wn.2d 861, 865-7, 50 P.3d 618 (2002).¹

¹ "We have never held, however, that RCW 10.73.090 requires, merely by use of the words 'valid on its face,' that the only type of invalidity that will prevent operation of the one-year bar to filing a personal restraint petition is constitutional infirmity. By its plain language, the statute does not state that 'valid' means 'constitutionally valid.' As we reasoned in Stoudmire

The one year limit imposed by this statute on collateral attack on a judgment does not apply to Mr. McCarthy's third ground for relief because his judgment and sentence was not valid on its face. See Petitioner's Exhibit 1, at 2. For the court to sentence Mr. McCarthy under RCW 9.94A.712, it had to find that he had a prior conviction, listed in RCW 9.94A.030(32)(b), in addition to his current sex offense. The only conviction the court lists in his criminal history is Sex Abuse First Degree (Multnomah, OR). Id. "Sex Abuse First Degree" was not listed under statute as crime in Washington in 2002. The closest comparable crimes in Washington in 2002 were Child Molestation in the First or Second Degree. However, the court clearly did not engage in a comparative analyses because there is no language on the face of the judgment and sentence to indicate such an analyses. See Petitioner's Exhibit 1. It is only clear, without further elaboration, that the court relied on an out-of-state conviction to support its sentence under RCW 9.94A.712.

Thus, Mr. McCarthy's third claim should not be dismissed as time barred under RCW 10.73.090 because his judgment and sentence was not "valid on its face". In re Goodwin, 146 Wn.2d at 865-866.

CONCLUSION

For the above stated reasons, the Petitioner respectfully requests that this court vacate Mr. McCarthy's conviction under 9.94A.712 and release him on time served. Alternatively, Petitioner asks this court to vacate the results of his .420 hearing, and order the state to provide him with an attorney for another hearing.

and Thompson, under RCW 10.73.090(1), *'invalid on its face' means the judgment and sentence evidences the invalidity without further elaboration.*" Id. (emphasis added).

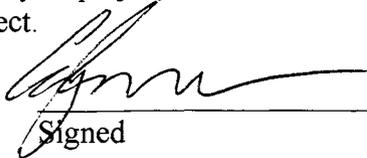
Dated this 5th day of April, 2005.



Craig P. Barnes
WSBA # 30657
Linn-Barnes Law Offices, PLLC
1370 Stewart St., Ste. 101
Seattle, WA 98109
Phone: (206) 545-6871
Fax: (206) 260-7570

CERTIFICATE OF SERVICE

On this day, the undersigned sent to the Attorney of Record for the Indeterminate Sentence Review Board a copy of this document via Mail, 1st class prepaid. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

 4/5/05 Seattle, WA
Signed Date Place

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