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STATE OF WASHINGTON
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NO. 81201-2

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

PAUL MOORE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW

- A. Does due process require an advisement and waiver of rights before a person subject to civil commitment stipulates to certain facts and exhibits during the commitment trial?
- B. Was Mr. Moore's trial counsel ineffective for entering into a stipulation to certain facts and exhibits during his commitment trial?
- C. Does due process require that assessments of future dangerousness in civil commitment cases be limited to the near future?

II. STATEMENT OF THE CASE

Paul Moore was civilly committed as a sexually violent predator (SVP) on March 9, 2006, following a bench trial. CP 5-16. The evidence adduced at trial illustrates Mr. Moore's extensive history of sexually assaulting and raping women.

A. Mr. Moore's Extensive History of Predatory Sexual Offending

Mr. Moore committed his first known sexual offense in Seattle on September 14, 1985 when he entered a beauty salon armed with an 8-inch knife and ordered a hairdresser and her customer to the back of the salon. CP 6, 35. There, Mr. Moore forced the hairdresser to disrobe and perform oral sex on him. CP 6, 36. When the victim began to choke and gag, Mr. Moore attempted to anally rape her and, when he was unsuccessful, he vaginally raped the victim. *Id.* Before leaving, Mr. Moore told the two women not to come out of the room or he would "burn the place down." *Id.*

When he was later arrested, the police discovered that Mr. Moore was carrying a green bottle filled with gasoline. *Id.*

Mr. Moore pled guilty to Rape in the First Degree with a Deadly Weapon in King County Superior Court on October 13, 1987, for this offense. *Id.* This is a sexually violent offense as defined in RCW 71.09.020(15). CP 12, 36. He was sentenced to 75 months confinement. CP 6, 36.

While he was serving this sentence, Mr. Moore committed his second sexually violent offense. CP 7, 37. On the morning of February 23, 1990, Mr. Moore sexually assaulted his female prison counselor by forcing her into an isolated corner of her office, bending her over while holding a homemade shank to her ribcage, and simulating intercourse by rubbing his erect penis against her buttocks. *Id.* During a subsequent prison infraction hearing regarding the incident, Mr. Moore acknowledged that he intended to have sex with the counselor when he assaulted her. *Id.*

Mr. Moore pled guilty to Attempted Rape in the Second Degree by Forcible Compulsion in the Snohomish County Superior Court for this crime. *Id.* This is a sexually violent offense as defined in RCW 71.09.020(15). CP 12, 38. He was sentenced to 50 ½ months confinement. CP 7, 37.

Mr. Moore committed his third sex offense approximately a year later when he assaulted another female prison staffer. CP 8, 38. While the corrections officer was assisting Mr. Moore with cleaning his cell, he struck her on the head with a broom handle, lunged at her, and shoved her into his cell. *Id.* The victim sprayed Mr. Moore with the disinfectant she was carrying and ran out of the cell. *Id.* When questioned about this offense by a psychological evaluator, Mr. Moore admitted that he attacked the officer in an effort to “try to do something sexual to her.” *Id.*

Mr. Moore was charged with Custodial Assault in the First Degree in Snohomish County Superior Court. *Id.* However, the matter was subsequently dismissed by the State “in the interests of justice” since Mr. Moore was already in prison. CP 8, 230.

Mr. Moore committed his fourth sex offense on February 19, 1995. CP 8, 38. Again, the victim was a female corrections officer. *Id.* As he was returning to his cell after breakfast, Mr. Moore grabbed the officer from behind, held her around the chest, and pinned her arms in front of her. *Id.* Mr. Moore then simulated intercourse with the officer by thrusting his pelvis into her buttocks. *Id.* Another officer witnessed the assault and assisted in gaining control of Mr. Moore. *Id.* The victim suffered physical injury as a result of this assault and could not work for approximately eight months. CP 8, 39.

Mr. Moore was charged with Indecent Liberties by Forcible Compulsion for his offenses against Cheryl S. CP 9, 39. On February 3, 1997, he pled guilty to Custodial Assault with Sexual Motivation in Mason County Superior Court, and was sentenced to 60 months confinement. *Id.*

B. Mr. Moore's History of Competency in His Prior Criminal Cases

Mr. Moore's history of engaging in bizarre behavior led to competency evaluations in each of his prior criminal cases, all of which ultimately concluded he was competent. For example, after Mr. Moore was charged with sexually assaulting the female hairdresser in 1985, he was sent to Western State Hospital (WSH) for an evaluation to assess his competency. CP 36. After approximately 13 months of extended observation, Mr. Moore was determined to be competent to stand trial and pled guilty to the offense. *Id.*

Mr. Moore's competency was again challenged after he was charged with sexually assaulting his prison counselor in June 1990. CP 37. An evaluation by Dr. Greg Gagliardi at WSH indicated that Mr. Moore had the capacity to fake symptoms of mental illness, and was extremely dangerous and violent. CP 239. Mr. Moore was found competent to stand trial and pled guilty to sexually assaulting his counselor. CP 27, 37.

Mr. Moore was again sent to WSH after being charged with his third sex offense occurring in 1991. CP 38. He was again found to be competent by Hospital staff. CP 230.

After committing his most recent sex offense in prison in 1995, Mr. Moore was transported to WSH for a competency evaluation. CP 38-39. This evaluation found Mr. Moore competent as he subsequently pled guilty to the offense. *Id.*

C. Competency Finding in SVP Action

Shortly before Mr. Moore was due to be released from prison in May 2002, the State petitioned for Mr. Moore's commitment as an SVP. CP 35. Prior to trial, Mr. Moore's counsel moved for a hearing to determine Mr. Moore's competency and to consider whether the court should appoint a Guardian ad Litem (GAL) on his behalf. CP 217.

At the competency hearing, Dr. Gustafson submitted a report to the court and testified to Mr. Moore's competency. 9/20/02 RP at 2-20. Dr. Gustafson had been retained by Mr. Moore's defense counsel to conduct competency evaluations of Mr. Moore on approximately four occasions. *Id.* at 4-5. Dr. Gustafson testified that on "one or two" of those occasions, he had found Mr. Moore incompetent. *Id.* On those occasions, Dr. Gustafson testified, Mr. Moore had not been on anti-psychotic medication. *Id.*

Dr. Gustafson had attempted to interview Mr. Moore at the Special Commitment Center (SCC), where persons detained as potential SVPs are housed, but Mr. Moore had refused to speak to him. *Id.* He had, however, reviewed a report from Mr. Moore's therapist at the SCC, who indicated that, although there were times that Mr. Moore had refused to talk, at other times he "communicated clearly what he wanted and seemed to clearly understand what was said to him." *Id.* at 6.

Dr. Gustafson testified that he personally had observed Mr. Moore immediately before the SVP competency hearing. *Id.* Mr. Moore appeared cooperative and was talking to his attorney. *Id.* He stated that Mr. Moore "clearly understood what his attorney was saying, and he responded appropriately and cooperatively in his conversations with her." *Id.* Asked whether a GAL would be in Mr. Moore's best interests, Dr. Gustafson stated that, when Mr. Moore was cooperating and talking with his attorney, a GAL would not be necessary. *Id.* at 8.

At the conclusion of the hearing, the trial court found Mr. Moore competent. *Id.* at 15. The trial court appointed a "standby" GAL, ruling that, if a situation arose where defense counsel or the GAL felt that

Mr. Moore was not able to make his own decision, there would be another hearing to reevaluate Mr. Moore's status. *Id.* at 14-15¹.

D. SVP Trial

A bench trial began on March 7, 2006, after Mr. Moore withdrew his jury demand. CP 207; 3/7/06 RP at 51. Mr. Moore was present during the first day of trial. 3/7/06 RP at 2-3. The parties began by arguing the numerous evidentiary issues raised by Mr. Moore's trial counsel in her 15 motions in limine filed prior to trial. CP 165-183; 3/7/06 RP at 2-51.

The State called as its only live witness Dr. Richard Packard, a psychologist and certified sex offender treatment provider who conducted the SVP evaluation for the State. RP 3/7/06 at 53-54. Following the first portion of the direct examination of Dr. Packard, and a brief pause during which Mr. Moore conferred with counsel, the parties presented to the court a document entitled "Stipulated Facts and Exhibits," which was subsequently entered. 3/7/06 RP at 71-75; CP 35-42. Pursuant to that document, the parties stipulated to certain facts surrounding Mr. Moore's prior convictions, including a brief description of each offense and the subsequent court disposition of each crime. CP 35-39. In addition, the parties stipulated to the admissibility of 15 exhibits, including various court documents relating to Mr. Moore's prior convictions, sworn

¹ Beyond the initial (oral) appointment, there is no further mention of the Standby GAL, and he does not appear to have ever been asked to participate or intervene.

testimony of witnesses in one prior offense, and the curriculum vitas and evaluations of Mr. Moore conducted by Drs. Packard and Donaldson, the experts for the State and Mr. Moore, respectively. CP 40-41.

Defense counsel orally affirmed on the record that both she and Mr. Moore agreed with the stipulation, but wanted the record to reflect her continuing objections to certain portions of the evidence identified in Mr. Moore's motions in limine. 3/7/06 RP at 72-73. The court acknowledged the continuing objection. 3/7/06 RP at 73.

Following the first day of trial, Mr. Moore, at his own insistence, did not return for the remainder of the trial. 3/7/06 RP at 143-144. The bench trial proceeded through the cross-examination of Dr. Packard by Mr. Moore's counsel, as well as the parties' closing arguments. RP 3/8/06 at 20-42; RP 3/9/06 at 28-34.

In her closing, Mr. Moore's counsel argued the State had not met its burden of proof because the Dr. Packard's diagnoses were internally inconsistent and because Mr. Moore's expert, Dr. Donaldson, concluded Mr. Moore is more appropriate for commitment pursuant to RCW 71.05. RP 3/9/07 at 28-34. After considering the evidence, the trial court committed Mr. Moore as an SVP. *Id.* at 51-51; CP at 5-14.

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E. Court of Appeals Affirms Mr. Moore's Commitment

Mr. Moore appealed the commitment order. In an unpublished decision, the court affirmed Mr. Moore's commitment. *In re Detention of Moore*, 58087-6-I, slip op. at 1. The court rejected Mr. Moore's argument that due process required the trial court to advise Mr. Moore of the rights he was waiving by entering into the stipulation to facts and exhibits. *Id.* at 6. The Court of Appeals cited to a long line of analogous criminal cases holding that due process does not require that a defendant understand the rights waived by entering a factual stipulation, so long as the stipulation is not the equivalent of a guilty plea. *Id.* The stipulation to facts and exhibits entered by Mr. Moore "in no way conceded that the State had met its burden of proof," and, indeed, Mr. Moore's counsel vigorously advocated for him by drafting and arguing numerous pretrial motions, presenting evidence at trial, cross-examining the State's expert, and contesting the sufficiency of the State's evidence in closing argument. *Id.* at 7. The court also rejected Mr. Moore's ineffective assistance of counsel claim and his claim that assessments of dangerousness must be limited to the near future. *Id.* at 9-12.

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III. ARGUMENT

A. The Trial Court Did Not Violate Mr. Moore's Right To Due Process By Accepting His Stipulation To Facts And Exhibits Without Advising Him Of Any Rights He Was Waiving By Entering Into The Stipulation.

Mr. Moore's primary argument in his petition for review is again his allegation that his due process rights were violated when the trial court accepted Mr. Moore's stipulation to facts and exhibits during his trial without providing an advisement of rights to Mr. Moore and ensuring Mr. Moore's waiver of those rights was knowing, intelligent and voluntary. Pet. for Review at 7-13. However, as recognized by the Court of Appeals, the trial court was not required to provide an advisement and obtain a waiver from Mr. Moore because the stipulation was not tantamount to a stipulation to commitment. Therefore, review pursuant to RAP 13.4(b)(3) and (4) is not appropriate.

At the outset, it is important to note, and correct, two misstatements of fact made by Mr. Moore relating to his due process argument. First, Mr. Moore implies throughout his argument that what occurred was not a trial, but either a stipulated facts proceeding or a stipulation to commitment. *See e.g.*, Pet. for Review at 11 ("Mr. Moore essentially stipulated to the case against him."). However, the record clearly demonstrates that a bench trial was held in this matter. Mr. Moore's counsel filed and argued motions in limine, she cross-examined

the State's expert witness, Dr. Packard, transcripts of testimony from other witnesses – including cross-examination – were provided to the court, Mr. Moore's counsel presented closing argument in which she contended the evidence was not sufficient to find Mr. Moore meets the criteria of an SVP, and, most importantly, the trial court retained the ultimate authority to determine whether the State had met its burden of proving beyond a reasonable doubt that Mr. Moore is an SVP.

In addition, Mr. Moore also alleges that he had previously been found incompetent to stand trial. Pet. for Review at 9. This is simply not true. In all his previous criminal cases, he was never found by the courts to be incompetent, and in the SVP proceeding, the trial court found him competent.

Although there is no controlling appellate authority on point, analogous caselaw from the criminal arena demonstrates that Mr. Moore's due process claim is without merit. In criminal cases, procedural due process requires that a court must inform a defendant of certain constitutional rights that the defendant is waiving before accepting his or her guilty plea. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Due process demands this because of the drastic consequences that automatically flow from a guilty plea – a conviction and potential loss of liberty – as well as the danger that the defendant will

be erroneously deprived of his or her liberty without such an advisement and waiver. *Id.* at 242-43 (“a plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment”); *Mathews v Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (one factor in the procedural due process balancing test is the risk that the procedure used will result in the erroneous deprivation of the private party’s constitutional interest at issue).

Some courts have extended the rule of *Boykin* to hold that the *Boykin* rights must also be given in cases where a factual stipulation by a criminal defendant is the functional equivalent of a guilty plea. *See e.g.*, *Adams v. Peterson*, 968 F.2d 835 (1992). This is essentially the argument advanced by Mr. Moore in this matter. He argues that the factual stipulation he entered into in this case was the functional equivalent of stipulating to commitment, thereby triggering the due process requirement of an advisement and waiver of rights. Pet. for Review at 11 (“Mr. Moore essentially stipulated to the case against him.”). His argument is without merit because this Court has made clear that a stipulated facts trial such as was held in this case is very different than a guilty plea - or its civil equivalent.

In *State v. Johnson*, 104 Wn.2d 338, 340, 705 P.2d 773 (1985), this Court addressed the issue of “when, if at all, will a stipulated facts trial be found to be tantamount to a guilty plea.” A guilty plea includes a waiver of the right to appeal and, as noted in *Boykin*, is in itself a conviction, leaving nothing to be determined except punishment. *Id.* at 341. In a stipulated facts trial, however:

The judge or jury still determines the defendant’s guilt or innocence; the State must prove beyond a reasonable doubt the defendant’s guilt; and the defendant is not precluded from offering evidence or cross-examining witnesses but in essence, by stipulation, agrees that what the State presents is what the witnesses would say. Furthermore, in a stipulated facts trial the defendant maintains his right to appeal, which is lost when a guilty plea is entered.

Id. at 342-43.

The stipulated facts trial procedure used in this case was not the functional equivalent of a stipulation to commitment, as illustrated by *Johnson*. The trial court retained the right to determine whether Mr. Moore met the criteria of an SVP. Mr. Moore’s attorney presented evidence on his behalf, cross-examined Dr. Packard, and argued in closing that the State had not met its burden because Dr. Packard’s diagnoses were inconsistent. Finally, Mr. Moore retained the right to appeal the trial court’s decision, which he has done. The procedure used was not tantamount to the civil equivalent of a guilty plea. As a result, due process

did not require any advisements and waiver since the risk of an erroneous deprivation of Mr. Moore's liberty interest was low.

B. Mr. Moore Received Effective Assistance of Counsel.

Mr. Moore argues that his counsel was ineffective because she did "not act as an advocate" by stipulating to certain facts and exhibits. Pet. for Review at 13-19. This argument is without merit and should be rejected as Mr. Moore cannot prove that his counsel's performance was unreasonable or that had she acted otherwise the result of the trial would have been different.

As with Mr. Moore's previous argument, it is important at the outset to correct factual misstatements and misrepresentations made by Mr. Moore relating to this claim. For example, Mr. Moore alleges that charges in one of his prior sex offenses were dismissed after he was found incompetent. Pet. for Review at 16-17. As noted, above, this simply is not true. The trial court in that case had concerns about his competency, but he was found by Western State Hospital staff to be competent. CP 8, 230. The charges were dismissed by the State without any finding of incompetency as Mr. Moore was already incarcerated at the time for other crimes. *Id.*

Mr. Moore also claims that when the trial court rejected certain of his motions in limine relating to evidentiary matters, his counsel "ceased

mounting any challenge to these allegations.” Pet. for Review at 17. Again, this is simply untrue. Even after the trial court rejected Mr. Moore’s evidentiary motions, his counsel later reiterated to the court Mr. Moore’s continuing objection to the evidence at issue. RP 3/7/06 at 72-73.

In order to prevail on an ineffective assistance of counsel claim, the claimant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant, “i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). The proper measure of attorney performance is whether the actions by counsel were reasonable under prevailing professional norms. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The court will “strongly presume effective representation” and will not consider strategic or tactical decisions ineffective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

Mr. Moore argues that his counsel acted unreasonably because she did not “act as an advocate.” Pet. for Review at 14. This is simply not borne out by the undisputed factual record in the case. As noted, above, Mr. Moore’s attorney filed and argued motions in limine, cross-examined

the State's expert witness, Dr. Packard, and presented closing argument in which she pointed out inconsistencies in Dr. Packard's diagnoses of Mr. Moore and relied on the opinion of Mr. Moore's expert, Dr. Donaldson, in arguing that the State had not sustained its burden of proving Mr. Moore meets commitment criteria.

Although Mr. Moore's counsel did stipulate to the admissibility of certain facts and exhibits, such a decision was a tactical determination on her part; one that was very reasonable under the circumstances. First, many of the exhibits stipulated to were court documents such as guilty plea statements signed by Mr. Moore and judgments and sentences. Mr. Moore lost nothing by stipulating to the admissibility of these documents, which would clearly have been admitted even over his objection. The same is true of the transcripts of prior sworn testimony of the witnesses to one of his prior offenses.

In addition, his counsel's decision to enter the stipulation to facts and exhibits provided Mr. Moore with certain advantages. For example, Mr. Moore was able to cross-examine the State's expert, Dr. Packard, but because of the stipulation was able to prevent the State from doing the same with Mr. Moore's expert, Dr. Donaldson (while still providing the court with Dr. Donaldson's report). In addition, by presenting an abbreviated version of Mr. Moore's prior offenses, Mr. Moore's counsel

prevented live, in-court testimony from the victims in those crimes; testimony that is typically emotional, compelling and benefits only the State. See e.g., *In re Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993).

“Exceptional deference” should be given to tactical decisions made by trial counsel in determining whether counsel’s assistance was unreasonable within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984), *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). The decisions of Mr. Moore’s counsel were sound and reasonable and, as a result, do not meet the first prong of the *Strickland* standard of ineffective assistance. *In re Detention of Strand*, 139 Wn.App. 904, 913, 162 P.3d 1195 (2007).²

Mr. Moore also fails to satisfy the second prong of the *Strickland* test: That but for the alleged unreasonable conduct of counsel, he would not have been found to meet commitment criteria. For example, Mr. Moore argues that trial counsel should have cross-examined the various witnesses who established his prior acts of sexual violence to test their veracity or challenge their version of events, and by stipulating to the testimony, he was unable to cross-examine them. Pet. for Review at 16. It

² Mr. Moore cites two cases in support of his ineffective assistance claim: *In re the Dependency of G.A.R.*, 137 Wn. App. 1, 150 P.3d 643 (2007) and *In re the Welfare of J.M.*, 130 Wn. App. 912, 125 P.3d 245 (2005). Pet. for Review at 15-16. However, as noted in the State’s brief in the Court of Appeals, those cases are clearly distinguishable. Respondent’s Opening Brief at 24-27.

is difficult to see how this could or would have made any difference in the outcome of the proceedings. In SVP cases, the State is not required to prove the facts underlying a conviction of a sexually violent offense; the State is only required to prove the fact of a conviction. *In re Stout*, 159 Wn.2d at 367; *In re Young*, 122 Wn.2d at 54-55. Thus, even if Mr. Moore had vigorously challenged the testimony of the victims of his offenses - unlikely in light of the fact that he essentially admitted committing each assault in his interview with Dr. Packard - it is unclear what difference this would or could have made in the final outcome of the case.

The evidence that Mr. Moore was a sexually violent predator was overwhelming. Indeed, his own expert, although he did not believe that Mr. Moore suffered from the requisite mental condition, believed that "Mr. Moore appears likely to commit a sex offense in the future. Given his history and his current mental status, it seems impossible to reach any other conclusion." Ex. 14 at 11.

C. The State's Failure to Specify a Time Period Within the Foreseeable Future When Predicting Future Dangerousness Did Not Violate Moore's Rights to Due Process.

Mr. Moore argues that to satisfy due process when the individual is incarcerated, the State has to prove that sexual re-offense is likely within the reasonably foreseeable future. Pet. for Review at 19-20. This argument has been considered and rejected by both this Court and the

Court of Appeals. *In re Young*, 122 Wn.2d at 59; *In re Detention of Wright*, 138 Wn.App. 582, 155 P.3d 945 (2007). As such, his argument is without merit and should be rejected.

IV. CONCLUSION

As clearly demonstrated, none of the issues raised by Mr. Moore in his petition for review involve a significant and unsettled question of constitutional law or substantial public interest within the meaning of RAP 13.4(b)(3) and (4). Therefore, the State respectfully requests that the Court deny review in this matter and affirm the decision of the trial court committing Mr. Moore as a Sexually Violent Predator.

RESPECTFULLY SUBMITTED this 28th day of February, 2008.

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