Supreme Court of the State of New York
Orange County

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In the Matter of a Retention Order Pursuant to CPL 330.20,

Index.: 24005/1998

In relation to,

John D. Ford, a patient at Mid-Hudson Forensic Psychiatric Center.

Respondent.

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RESPONDENT, JOHN FORD'S CLOSING ARGUMENT

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MR. FORD'S CLOSING ARGUMENT

RELEVANT STATEMENT OF FACTS & PROCEDURAL HISTORY

The facts of this case, insofar as pertinent to this memorandum, are contained in the accompanying affirmation of NANETTE METCALF, ESQ., duly affirmed on April 22, 2019, the exhibits appended thereto, and the Court's records of the prior proceedings held herein, and incorporated herein and made part hereof. On June 12, 1996, Respondent, John Ford (hereafter referred to as "Mr. Ford", "John", or "Respondent"), was arrested in Suffolk County for *inter alai*, the following: conspiracy, reckless endangerment, and possession of radioactive material.

After a series of CPL 730 examinations, in 1999 Mr. Ford plead guilty by reasons of insanity. Mr. Ford has been permanently housed indefinitely in Mid-Hudson Psychiatric Center (hereafter referred to as "Mid-Hudson") since February 2000. The years prior, Mr. Ford was also in the care and custody of Mid-Hudson because of the

CPL 730 examinations. In total, Mr. Ford has been in the custody and care of Mid-Hudson for approximately twenty-three (23) years.

ISSUE PRESENTED

Whether there is a legally sufficient basis pursuant to C.P.L. 330.20(1)(c) to continue to detain Mr. Ford at a secure facility where Mr. Ford in his almost twenty (23) years at Mid-Hudson has not violently acted out against himself, staff, or others. Mr. Ford also has no history of medical non-compliance while at Mid-Hudson, no history of relapse, no history of substance abuse, and was afforded "gold card" privileges because he is not physically aggressive.

Answer: No, there is no legally sufficient basis to continue to detain Mr. Ford at a secure facility since his mental illness does not constitute a danger to himself or others.

SUMMARY OF ARGUMENT

There is no legally sufficient basis to continue to detain Mr. Ford at a secure facility because he does not currently constitute a physical danger to himself or others. As Dr. Ortiz testified, in his almost twenty-three years at Mid-Hudson, Mr. Ford has made no attempts to commit suicide, no attempts to escape, there have been no outbursts of violence against any other patients or staff, and he's made zero threats to staff or other patients during that time period. In fact Dr. Ortiz conceded during her testimony that Mr. Ford has not engaged in any type of violent behavior since he's been detained and has been afforded "gold card" privileges at the facility as a result of his

remarkable behavior. Additionally, as Dr. Grief pointed out, Mr. Ford has no history of substance abuse, has remained compliant with medication, and as the medical records demonstrate Mr. Ford is an active participant who has demonstrated progress.

Furthermore, it is legally insufficient to continue to detain Mr. Ford on the basis of mere speculation that Mr. Ford may become a danger if released, especially where both Dr. Miller and Dr. Ortiz's testimony regarding Mr. Ford's progress and insight was contradictory to and inconsistent with both the medical records and the opinion of Dr. Grief. Their testimony not only failed to take into account the progress and participation of Mr. Ford as documented by medical records, their testimony also failed to give adequate recognition to the limitations that may be placed on Mr. Ford with an Order of Conditions.

As a result of the foregoing, since Mr. Ford's behavior for approximately twenty-three years at Mid-Hudson demonstrates, he did not and does not present as a danger to himself or others. Therefore, he should be transferred to a non-secure facility with an Order of Conditions in place requiring him to comply with the prescribed treatment plan, not to leave the facility without prior authorization, and any other conditions as this Court may deem as just and proper.

POINT ONE

MR. FORD DOES NOT SUFFER FROM A DANGEROUS MENTAL DISORDER BECAUSE HE DOES NOT CURRENTLY CONSTITUTE A PHYSICAL DANGER TO HIMSELF OR OTHERS.

Mr. Ford does not currently constitute a physical danger to either himself or others. In assessing whether a patient presents as a danger to either himself or others, the New York Court of Appeals has taken into account several different factors. Those factors include: (1) amount of time that has lapsed since the initial criminal act; (2) behavior at the facility including any instances of violence or refusal to take medication; (3) history of substance or alcohol abuse; (4) history of relapse; and (5) of course actual violent behavior. *See generally Matter of Torres,* 78 N.Y.2d 1085 (1st Dept. 1990, *affg. for reasons stated in* 166 A.D. 2d 228 (1991); *Matter of Francis S.,* 87 N.Y.2d 554, 561 (1995); *Matter of George L.,* 85 N.Y.2d 295 (1995).

In re David B., the New York Court of Appeals highlighted the following:

> In 1980, the Legislature passed the Insanity Defense Reform Act (L 1980, ch 548). That statute, codified as CPL 330.20, provides for confinement of an insanity acquittee at either a secure or non-secure facility, and contains a set of definitions applicable to such determinations. Under the amended CPL scheme, a person who has successfully asserted an insanity defense may be classified at an initial commitment hearing as **Track 1**, having a "dangerous mental disorder" (CPL 330.20 [1] [c]); **Track 2**, being "mentally ill" and in need of further institutional treatment (CPL 330.20 [1] [d]); or **Track 3**, neither suffering from a "dangerous mental disorder" nor being "mentally ill," in which case a release order with conditions must issue. In the context of subsequent

> retention hearings pursuant to CPL 330.20 (9), a determination that one continues to suffer from a "dangerous mental disorder" will result in continued confinement in a secure psychiatric facility while a finding that an individual does not have a dangerous disorder but is "mentally ill" results in transfer to or retention in a non-secure facility (*id.*).

In re David B., 97 N.Y.2d 267, 276–77, 766 N.E.2d 565 (2002).

CPL 330.20(1)(c) states: Dangerous mental disorder" means: (i) that a defendant currently suffers from a "mental illness" as that term is defined in subdivision twenty of section 1.03 of the mental hygiene law , and (ii) that because of such condition he currently constitutes a physical danger to himself or others.

> In *Matter of George L.*, the New York Court of Appeals stated that generally a finding of a defendant's current dangerousness for purposes of CPL 330.20 (1) (c) (ii), "must be based on more than expert speculation that he or she poses a risk of relapse or reverting to violent behavior once medical treatment and supervision are discontinued. The prosecution may meet its burden of proving that a defendant poses a current threat to himself or others warranting confinement in a secure environment, for example, by presenting proof of a history of prior relapses into violent behavior, substance abuse or dangerous activities upon release or termination of psychiatric treatment, or upon evidence establishing that continued medication is necessary to control defendant's violent tendencies and that defendant is likely not to comply with prescribed medication because of a prior history of such noncompliance or because of threats of future noncompliance.

Matter of George L., 85 N.Y.2d 295, 307-08 (1995); *In re David B.*, 97 N.Y.2d 267, 277–78 (2002).

Later that same year, in *Matter of Francis S.*, the New York Court of Appeals upheld a recommitment order, holding that "relapses into violent behavior, substance abuse and non-compliance with treatment requirements were all sufficient indicators of present dangerousness for purposes of secure confinement to a psychiatric facility." *Matter of Francis S.*, 87 N.Y.2d 554, 561 (1995).

In *Matter of George L.*, continued confinement was warranted where the underlying criminal act occurred 17 months prior, the patient had a history of relapse, and he had violated hospital rules by possessing matches and responded aggressively when confronted with contraband. *Matter of George L.*, 85 N.Y.2d at 307-08. The Court reasoned that those circumstances demonstrated that there were sufficient factors to establish current dangerousness. *Id.* at 308; *See also* LARRY CUNNINGHAM, *New York's Post-Verdict Scheme for the Treatment of Insanity Acquittees: Balancing Public Safety with Rights of the Mentally Ill*, 25 J. Civ. Rts. & Econ. Dev 81, 88 (2010)).

Similarly, in *Matter of Francis S.*, a recommitment order was affirmed where the patient relapsed into violent behavior, had a history of substance abuse and non-compliance with treatment requirements. *Matter of Francis S.*, 87 N.Y.2d 554, 561 (1995). The Court ultimately reasoned that those factors were sufficient to demonstrate present dangerousness for the purposes of continued confinement in a secure facility. *Id.*

On the other hand, a transfer with an express Order of Conditions requiring continued medication and treatment was proper where although there was an isolated violent event, it was provoked and remote in time. *Matter of Torres*, 78 N.Y.2d 1085 (1st Dept. 1990), *affirmed by* Court of Appeals 166 A.D. 2d 228 (1991). The First Department reasoned that the evidence demonstrated so long as the patient continued to take his medication he was no longer psychotic, and the patient's expert, whose testimony was not discredited, testified that because of that factor, the patient should be released to a non-secure facility. *Id.* at 230-31. It was insufficient to demonstrate that the patient *currently* posed a threat where the Government's expert testified that if the patient stopped taking his medication he would pose a danger in the future. *Id.* Additionally, the First Department specifically stated that the nature of the prior criminal act for which the detainee was acquitted is insufficient, without more, to demonstrate a current danger which would preclude his release or transfer. *Id.* at 231.

As set forth in greater detail below, in this case, all three of the expert witnesses testified that Mr. Ford has not acted out violently during his entire time at Mid-Hudson (roughly 23 years). There were never any instances where Mr. Ford has refused his prescribed medication, he had no known history of substance abuse, more than twenty-three years passed since the underlying crime was committed, and his good behavior at Mid-Hudson afforded him "gold card" privileges. As a result, because Mr. Ford does

not currently constitute a physical danger to himself or others, he should be transferred to a non-secure facility.

A. THE GOVERNMENT FAILED TO MEET THEIR BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE IN FAILING TO PRESENT ANY EVIDENCE OF A HISTORY OF PHYSICAL VIOLENCE, THREATS OF VIOLENCE, NON-COMPLIANT BEHAVIOR AT MID-HUDSON, HISTORY OF RELAPSE, OR A HISTORY OF SUBSTANCE ABUSE.

The burden at a transfer hearing is on the People to prove that the patient is still dangerous "or that the issuance of a transfer order is inconsistent with the public safety and welfare of the community." *People v Escobar*, 61 NY2d 431. If the People fail to meet their burden, the court must issue a transfer order. "The Commissioner of Mental Health has the burden of demonstrating to the satisfaction of the court, by a preponderance of the evidence, that defendant suffers from a dangerous mental disorder in order to retain him in a secure facility." *People v Escobar*, 61 NY2d 431; *Matter of Torres*, 166 A.D.2d 228, 230 (1st Dept. 1990).

In this case, the Government has failed to meet their burden of proof since the record is devoid of any proofs that Mr. Ford has a history of violence against either himself or others the entire twenty-three (23) years he's been at Mid-Hudson, his overall behavior while at Mid-Hudson has been more than compliant, and his medical records – contrary to the testimony of Dr. Ortiz and Dr. Miller, demonstrate both progress and active participation.

i) Mr. Ford's Non-Violent History.

During the hearing three expert witnesses testified. Dr. Ortiz and Dr. Miller for the Government, and Dr. Grief for Mr. Ford. All three experts agreed that Mr. Ford had no history of violence for the twenty-three years while at Mid-Hudson either against himself or others.

As to Mr. Ford's non-violent behavior and history, Dr. Ortiz testified as follows:

> Q. In the five years that you've been at Mid-Hudson, on how many occasions has he made any escape attempts?
>
> A. None.
>
> MR. ARCIDIACONO: I couldn't hear.
>
> THE COURT: What was the question?
>
> MS. METCALF: Escape attempts. The number of escape attempts since she's been at Mid-Hudson, which is five years.
>
> MR. BARRY: Wait a second. That's all the escape attempts or by Mr. Ford?
>
> MS. METCALF: By Mr. Ford specifically.
>
> A. There has been none.
>
> Q. Since your time at Mid-Hudson, how many assaults has Mr. Ford committed?
>
> A. He has not engaged in any assaultive behavior.
>
> Q. Since your time at Mid-Hudson, on how many occasions has he at any staff members, doctors or other patients?

A. Never.

Q. Since you've been at Mid-Hudson, on how many occasions has Mr. Ford made any threats to any staff, doctors or patients?

A. Never.

Q. Since your time at Mid-Hudson, on how many occasions has Mr. Ford raised his voice at any staff, doctor or patient?

A. Never that I can recall.

Q. Since your time at Mid-Hudson, has Mr. Ford engaged in any violent activity?

A. No.

Q. In reviewing the records you reviewed, I'm assuming, you testified earlier you reviewed all of his records dating back to his admission; correct?

A. Yes.

Q. Since his admission up until your time that you've been at Mid-Hudson, how many suicide attempts have there been by Mr. Ford?

MR. ARCIDIACONO: Objection. There's been no allegation that he made any suicide attempts or escape attempts.

MS. METCALF: Your Honor, that's precisely my point.

THE COURT: You may answer.

A. None that I can recall.

Q. Since that same time period and for – continuing in the series of questions until I say otherwise, we'll use the same time period.

How many outbursts have there been by Mr. John Ford against patients, doctors or staff?

MR. ARCIDIACONO: Asked and answered.

MS. METCALF: Different time period, Your Honor.

A. I can answer?

THE COURT: I think she said never before. Let's move on.

Q. Since Mr. Ford's admission up until the time period that you came to Mid-Hudson, how many escape attempts have there been by Mr. Ford?

A. There has been none.

Q. For the same time period, how many threats have there been made by Mr. John Ford to any staff, doctors or other patients?

A. There has been no threats.

Q. So essentially, since his admission, Mr. Ford has not displayed any violent behavior? Is that fair and accurate to say?

A: That is Fair and accurate.

(*See* Mental Hygiene Retention Transcript dated January 9, 2019 at p. 38, ¶ 7 - p. 40, ¶ 21 attached hereto as **Exhibit A**).

As to Mr. Ford's non-violent behavior and history, Dr. Miller testified as follows:

> Q. In the past 20 years that Mr. Ford has been there, has he been a danger to himself?
>
> A. No.
>
> Q. In the past 20 years that Mr. Ford has been there, has he been a danger to others?
>
> A. No, he hasn't.

(*See* Mental Hygiene Retention Transcript - Cross for Dr. Miller dated January 11, 2019 at p. 231, ¶ 10 - 15 attached hereto as **Exhibit B**).

Dr. Grief testified not only to the lack of violence at Mid-Hudson, but also well beyond that time period. The following answer was provided to the Court:

> A. My ultimate opinion is that he doesn't have a dangerous mental disorder. That he's not a danger to anyone. As I elaborated in my 2016 report, the factors -- the risk factors for violence, the main risk factors are a history of multiple violent offenses as an adult. History of criminal offenses as a juvenile. Substance abuse problems and psychopathy. Mr. Ford has none of the risk factors. Delusions are a risk factor but a weak one. So there's little evidence that delusions alone puts him at risk. If it did put him at risk for committing violence, he would have committed violence in my opinion before. He had delusions for approximately 25 plus years prior to the time he was committed to Mid-Hudson.

(*See* Mental Hygiene Retention Transcript -Direct for Dr. Grife dated January 9, 2019 at p. 93, ¶ 2 – 14 attached hereto as **Exhibit A**).

Mr. Ford has also demonstrated that when faced with difficult situations he's been able to exercise restraint. Dr. Miller highlighted this point when she testified as follows:

> Q. How many hearings has Mr. Ford had since he's been confined to be released to the extent that you know?
>
> A. Every two years. At least eight, I would guess.
>
> Q. Do you believe this environment in and of itself is maybe considered stressful because he's outside of the facility; correct?
>
> A. Yes.
>
> Q. Could a disfavorable ruling in this very proceeding be considered potentially a stress factor?
>
> A. Yes.
>
> Q. And he's had -- I'm sorry. How many times, to your knowledge, this very same hearing?
>
> A. I would estimate at least eight.
>
> Q. At least eight. Following each and every one of those disfavorable dispositions, has he once acted out to harm himself or others?
>
> A. No.
>
> Q. No, he has not.

(*See* Mental Hygiene Retention Transcript -Cross for Dr. Miller dated January 11, 2019 at p. 200, ¶ 15 - p. 201, ¶ 7 attached hereto as **Exhibit B**).

Dr. Grief also cited to three instances where Mr. Ford was able exercise restraint while in the community working as a court officer. Dr. Greif testified as follows:

> A. He was in the community for 25 years approximately suffering from delusions. He didn't commit violence during that time. In fact, there are instances of him exercising restraint. There are three occasions that during the time he was a court officer, where he had to take his gun out and he was able to successfully arrest or deter three different individuals without using his gun.

(*See* Testimony of Grief January 9, 2019 at p. 94, ¶ 16 - 22 attached hereto as **Exhibit A**).

Unequivocally, in the past almost 20 years at Mid-Hudson Mr. Ford has not demonstrated any violent behavior, nor has he made any threats of violence in that time period – and beyond that period as well.[1] Mr. Ford has also demonstrated an ability to exercise restraint when faced with difficult situations. As Dr. Grief pointed out in both his report of February 2016[2] and during his testimony, *"the single most robust predictor of future violence is a history of multiple prior offenses."* (*See* Testimony of Grief January 9, 2019, at p. 101, ¶ 23 - 25 attached hereto as **Exhibit A**).

Here, the record is simply devoid of any such proof of a history of violence beyond the underlying criminal act, which is substantially remote in time. Dr. Grief not

[1]The only potential instance of a threat of violence dates back to 32 years ago, and the testimony proffered was not independently corroborated. (*See* Transcript of Mr. Ford's sister).

[2] *See* Mr. Ford's Trial **Exhibit G**.

only pointed this out in reference to remoteness in time, but also in reference to Mr. Ford's age as being a factor. Dr. Grief testified as follows:

> A. Age is a factor. We know that most violent acts are committed by men in their 20s and 30s. That recidivism, violence offense recidivism decreases with age starting particularly in the 40s and goes down in the 50s, 60s, and is extremely low in men who are 70 or plus years old.

(*See* Testimony of Grief January 9, 2019 attached hereto as **Exhibit A**).

Simply put, there's been no empirical data, other than the underlying criminal act, to suggest a history of violence, and the factor of Mr. Ford's age suggests to Dr. Grief that Mr. Ford is not likely to act violently in the future.

ii) **Mr. Ford's Overall Behavior While at Mid-Hudson.**

In addition, both Dr. Ortiz and Dr. Miller acknowledged that based on Mr. Ford's outstanding behavior, Mr. Ford has "gold card" privileges. The relevant testimony of Dr. Miller was as follows:

> Q. And since his confinement at Mid-Hudson which is roughly 20 years, to some extent, he has been stable in that he's not physically harmed either himself or others; correct?
>
> A. Yes.
>
> Q. In fact, he's a model -- he has the highest privilege I was told?
>
> A. Yes, he has a gold card.
>
> Q. Why does he have the privileges there?

A. Our privilege system is based on behavioral concerns. So he has the highest privilege level because he hasn't been physically aggressive.

Q. Because he hasn't physically harmed himself or others; correct?

A. Yes.

(*See* Mental Hygiene Retention Transcript -Cross for Dr. Miller dated January 11, 2019 at p. 199, ¶ 19 - 200, ¶ 7 attached hereto as **Exhibit B**).

Dr. Ortiz also noted the privileges that Mr. Ford's superior behavior has afforded him, and she testified as follows:

Q. While Mr. Ford has been at Mid-Hudson facility, has he obtained any awards?

A. Yes.

Q. What are they?

A. He has maintained the gold card, which is the highest privilege at Mid-Hudson.

Q. What does that mean?

A. That means because of his behavior, he is able to maintain gold card, which allows him to attend monthly dinner and engage in other activities that other patients do not engage in.

Q. When you say "behavior", because of his behavior can you elaborate?

A. Because he has not been aggressive or assaultive.

Q. He's not done anything violent?

A. Exactly.

Q. Has he been medication compliant, with the exception because he had some concerns, he did not want to change medication?

A. Yes, he has.

(*See* Mental Hygiene Retention Transcript -Cross for Dr. Miller dated January 9, 2019 at p. 53, ¶ 19 - p. 54, ¶ 13 attached hereto as **Exhibit A**).

In addition to recognition of Mr. Ford's impeccable behavior, both Dr. Ortiz and Dr. Miller testified as to Mr. Ford's compliance while at Mid-Hudson. Dr. Ortiz testified as follows:

Q. Based on your review of the records and your treatment and evaluation of Mr. Ford, has he always been compliant with taking the medication he's prescribed?

A. Yes. He takes the medication that he is prescribed.

(*See* Mental Hygiene Retention Transcript dated January 9, 2019 at p. 17, ¶ 8 - 11 attached hereto as **Exhibit A**).

Dr. Miller testified as follows:

Q. Was there ever a court order that required him to take medication? Based on your review of the records, have there been any applications by your facility to court order and mandate Mr. Ford to take medication?

A. No, there haven't.

Q. And he's been compliant with the medication he's on?

A. Yes.

Q. And he's never had an issue with noncompliance; correct?

A. Correct.

(*See* Mental Hygiene Retention Transcript -Cross for Dr. Miller dated January 11, 2019 at p. 234 ¶ 15 - 24 attached hereto as **Exhibit B**).

The only instance that Mr. Ford refused medication was when he refused to change his medication based on side effects especially in light of his blood pressure issues and cancer. However, Dr. Ortiz confirmed that Mr. Ford had legitimate concerns as follows:

Q. The medication that Mr. Ford has refused, to your knowledge, has there been any conversation based on the records between Mr. Ford and his doctor regarding the side effects and his concerns about taking that medication?

A. Based on the records, yes.

Q. And what do the records state?

A. Based on my recollection, Mr. Ford has expressed concerns about negative side effects of medications; however, there are many medications that the psychiatrist can try to see which one works best for him without all of the negative side effects.

. . . .

(*See* Mental Hygiene Retention Transcript dated January 9, 2019 at p. 47 ¶ 7 - 14 attached hereto as **Exhibit A**).

. . . .

Q. What, if anything, else has he in the past ten years been diagnosed with? Any major disease or illness?

A. Hypertension, I believe. He has complained of back pain. I cannot recall any other.

Q. Do you recall if he was ever diagnosed with pancreatic cancer?

A. Yes.

Q. He was?

A. Yes.

Q. Having had such an illness, would that have any likelihood that it would increase his concerns about the risk of side effects?

A. I can understand his concerns, yes.

. . . .

(*See* Mental Hygiene Retention Dr. Ortiz cross Transcript dated January 9, 2019 p. 50 ¶ 5 - 17 attached hereto as **Exhibit A**).

. . . .

Q. Is the risk of side effects a legitimate concern?

A. Yes.

(*See* Mental Hygiene Retention Transcript dated January 9, 2019 at p. 49 ¶ 22 - 23 attached hereto as **Exhibit A**).

Notably, even while receiving the prescribed medication, Mr. Ford never acted out with any physical violence, nor did he make any threats of violence.

As to the progress that Mr. Ford has made, contrary to much of the testimony regarding Mr. Ford's progress by both Dr. Ortiz and Dr. Miller, the medical records spoke for themselves to demonstrate that Mr. Ford is an active participant and he has made

progress in his weekly groups. (*See* Mr. Ford's Trial Exhibits C, J, and K). Mr. Ford's Trial Exhibit C was a progress note from December 2018 that stated Mr. Ford is an active participant in scheduled weekly groups and group discussions. Mr. Ford's Trial **Exhibit J** was a progress note that marked progress as good, and his **Trial Exhibit J** was a progress note from January 3, 2017 that marked off Mr. Ford's participation and interaction.[3] Additionally, as Dr. Ortiz testified, Mr. Ford attends his group therapy, which is approximately 20 hours of treatment per week, in addition to remaining medically compliant. (*See* Mental Hygiene Retention Transcript dated January 9, 2019 at p. 15, ¶ 9 - 20 attached hereto as **Exhibit A**).

iii) The Government's Witnesses' Testimony Relating to Mr. Ford's Progress Was Inconsistent and Incredible.

The propriety of impeachment by inconsistent statement is clear when the witness' testimony on direct examination flatly contradicts what he said before the trial or hearing court. The Judge may discount or disbelieve that portion of the witness' testimony that is inconsistent with his prior statements, or it may judge the witness' overall credibility to have been so shaken that it disregards his entire testimony. *See* the Seventh Circuit Judicial Conference Committee on Jury Instructions, Manual on Jury Instruction in Federal Criminal Cases § 6.05 at 44 (1965) (highlighting "[I]f the jury believes that a witness has

[3]Notably, Dr. Ortiz has not actually been at any group session with Mr. Ford in the past three (3) years. (*See* Mental Hygiene Retention Transcript dated January 9, 2019 at p. 72, ¶ 21 - 22 attached hereto as **Exhibit A**).

willfully sworn falsely to a material fact in the case, the jury may disregard his testimony in whole or in part, except insofar as it may have been corroborated by other credible evidence."); *see also Brooks v United States*, 309 F2d 580 (CA10 Okla); *Jones v United States*, 113 App DC 233, 307 F2d 190, cert den 372 US 919, 9 L Ed 2d 724, 83 S Ct 733; *Mason v United States*, 95 F2d 612 (CA5 Fla).

It is a legitimate function of cross-examination to probe the reasoning process of the expert psychiatric witness and cross-examination may expose any shaky factual basis for the opinion. *People v. Stone*, 35 N.Y.2d 69, 358 N.Y.S.2d 737, 315 N.E.2d 787 (1974).

On direct Dr. Ortiz testified that Mr. Ford has not made any progress since his admission at Mid-Hudson. However, on cross-examination it became evident that the progress notes, entered by nurses or members of Mr. Ford's team, contradicted Dr. Ortiz's direct testimony. On cross, Dr. Ortiz testified as follow:

> Q. Do you know what this document is?
>
> A. Yes.
>
> Q. What is this document?
>
> A. It's a monthly nursing note.
>
> Q. And that was a note that would be created by your facility; is that correct?
>
> A. It was created by one of the nurses, yes.
>
> Q. Is that part of the record or part of the documents that you would review as part of your job?

A. Yes.

MR. METCALF: Your Honor, I ask at this time that the witness give back the document.

THE COURT: What is that document?

THE WITNESS: It's a nursing note. Monthly nursing note which details every single goal that Mr. Ford has in his treatment plan and speaks to the goals.

THE COURT: What month is it?`3aa

THE WITNESS: December, I believe.

THE COURT: Of this year?

THE WITNESS: Yes, that just past.

THE COURT: Of '18.

MR. METCALF: It's also documents that are prepared and made by her facility and part of her review for her testimony today.

THE COURT: It shall be admitted and shall be marked.

MR. METCALF: Thank you, Your Honor.

MR. BARRY: Just for the record, what's the purpose of this document?

THE COURT: To show that he's participating.

MR. BARRY: There's no evidence that that document says he's participating.

THE COURT: Then it won't show it.

(Whereupon, the item previously referred to is received and marked Defendant's Exhibit Number C in evidence.)

Q. Now, after reviewing this document, does this document actually state he attends and actively participates in scheduled weekly groups and group discussions?

A. Yes, it does.

Q. Thank you.

(*See* Mental Hygiene Retention Transcript -Recross for Dr. Ortiz dated January 9, 2019 at p. 74, ¶ 21 - p. 76, ¶ 12 attached hereto as **Exhibit A**).

Similarly, on direct Dr. Miller testified that Mr. Ford failed to demonstrate he's done anything to address his risks if he were released from Mid-Hudson. Contrary to that testimony, on cross, Dr. Miller testified as follows:

A. The date is 1/14/17. And it's a progress note from a risk reduction group.

Q. What does it say about the risk reduction group? What does it say about Mr. Ford's involvement?

A. It says that he participates with occasional prompting. That his behavior is appropriate. That his progress is good. That he's working towards meeting his clinical focus. That he uses skills.

THE COURT: Louder.

A. That he is using skills and techniques in the group. That he's socially appropriate. That he showed insight into why the group focus relates to himself. That he's demonstrated an understanding of the group topic. That he contributes to the group in a relevant matter. And that

he's sharing and contributing to the group.

(*See* Mental Hygiene Retention Transcript - Cross for Dr. Miller regarding Exhibit K dated January 11, 2019 at p. 225, ¶ 16 - p. 226, ¶ 5 attached hereto as **Exhibit B**).

> Q. So you had the chance to review this record just now; correct?
>
> A. Yes.
>
> Q. And with respect to progress in recovery group, it was reported that was good; correct, based on the record that you read?
>
> A. It said the word good. It looked like a check off section list then the progress summary was at the very bottom.
>
> Q. But the progress in recovery group was marked as good?
>
> A. Yes.
>
> Q. And it also stated that showed insight into why group focus relates to self, always. It indicated that was "always" the case; is that correct?
>
> A. Yes.

(*See* Mental Hygiene Retention Transcript -Cross for Dr. Miller dated January 11, 2019 at p. 193, ¶ 20 - p. 194, ¶ 7 attached hereto as **Exhibit B**).

On numerous occasions during her direct testimony Dr. Ortiz testified to Mr. Ford did not having a clear understanding of things, yet on cross she testified as follows:

> Q. In the past two years, has Mr. Ford been asked the question whether he understands why people were scared by what he did?

A. I know I've asked during interviews. Not sure if other people have asked.

Q. You've asked that specific question as to why people were scared by what he had done?

A. Along the lines of that theme.

Q. Okay. Could you be specific then as to what you asked?

MR. BARRY: Judge, I object.

THE COURT: She can ask what conversation.

A. Along the lines of why plotting to use radioactive material can be dangerous and people can be concerned.
Q. And what was his response?

A. I can't recall his exact response, but there was a level of understanding as to how that can be.

THE COURT: Doctor, if you can speak louder.

THE WITNESS: I cannot recall his response specifically, but there was a level of understanding how that can be dangerous.

(*See* Mental Hygiene Retention Transcript dated January 9, 2019 at p. 61, ¶ 5 – 25 attached hereto as **Exhibit A**).

Ms. Ortiz also testified on direct that Mr. Ford had a lack of a support system yet on cross it became clear that this statement was unsupported by facts that were readily available to her, making her testimony unreliable. Dr. Ortiz testified as follows:

Q. Now, in part of your assessment, you took into account social support correct?

A. Correct.

Q. Can you please describe what inquires and investigation went into what his social support system is?

A. What the patient reported himself, as well as what the treatment team have reported.

Q. To your knowledge, does the facility maintain any records with regard to a visitor log?

A. I'm sure they do, yes.

Q. And that was not reviewed as part of drafting your forensic: correct?

A. Correct.

Q. To your knowledge, was there or is there a telephone log that the facility maintains?

A. I am not sure.

Q. To your knowledge, are his phone calls monitored?

A. I am not sure.

Q. So there was no review of any records, if any existed, with respect to what telephone calls Mr. Ford has had in the past two years; correct?

A. Correct.

If Dr. Ortiz did review any of Mr. Ford's records she would have been made aware of his friends who do visit and speak with him over the phone frequently, as testified to Mr. Ford's friend as 30 years, John Magafino. Mr. Ford's friend also testified that he would support Mr. Ford in any way, shape, or form as will others if Mr. John is changed facilities.

Ultimately, the inconsistent and unreliable review of the records by Dr. Ortiz and Dr. Miller demonstrates that their testimony is not reliable.

POINT II

THE GOVERNMENT'S CONCERNS ARE LEGALLY INSUFFICIENT FOR CONTINUED COMMITMENT.

A. The Government's Concerns Are Not Current and Speculative in Nature.

As highlighted in *Matter of Francis S.*:

> [A] finding that a defendant "currently constitutes a physical danger to himself or others" must be based on more than expert speculation that he or she poses a risk of relapse or reverting to violent behavior once medical treatment and supervision are discontinued. The prosecution may meet its burden of proving that a defendant poses a current threat to himself or others warranting confinement in a secure environment, for example, by presenting proof of a history of prior relapses into violent behavior, substance abuse or dangerous activities upon release or termination of psychiatric treatment, or upon evidence establishing that continued medication is necessary to control defendant's violent tendencies and that defendant is likely not to comply with prescribed medication because of a prior history of such noncompliance or because of threats of future noncompliance.

Matter of Francis S., 206 AD2d 4, 17, *supra*.

Dependence upon factors such as these--clearly evidencing a defendant's threat to himself or society-- is warranted to justify the significant limitations on an insanity acquitee's liberty interest which accompany secure confinement." *Matter of George L.*, 85 N.Y.2d 295, 307–08, 648 N.E.2d 475 (1995).

As set forth in significant detail above, the Government concern's in this case were unsupported by proofs of history of relapse into violent behavior, proof of

dangerous activities, non-compliance with medication[4], etc. Instead, the Government's concerns were speculative and do not demonstrate that currently, Mr. Ford presents a physical danger to either himself or others.

The Government fears that if Mr. Ford were no longer under supervision then there would be nothing stopping him from committing the same crime in the future because he has the same beliefs as he did when he came to Mid-Hudson. (*See* Mental Hygiene Retention Transcript -Cross for Dr. Ortiz dated January 9, 2019 at p. 41 ¶ 7 – 15 attached hereto as Exhibit A). However, that concern is merely speculative and inconsistent with the testimony of Dr. Grief and the prior rulings of the New York Court of Appeals. *See Matter of Torres*, 78 N.Y.2d 1085 (1991) (holding that the Commissioner of Mental Health failed to meet his burden where the expert testified that Defendant was mentally ill and may attempt to escape if he failed to take his medication).

In the *Torres* case, the issue of continued medication and treatment was expressly provided for in the Order of Conditions. *Id.* at 1086.

As to the Government's speculative concerns, Dr. Grief testified as follows:

> A. He was in the community for 25 years approximately suffering from delusions. He didn't commit violence during

[4]Although the Government tried to argue that Mr. Ford refused other medication, this argument was discredited since it was conceded to by all three experts that Mr. Ford did have health concerns with changing medications. In addition, it's noteworthy that even in the event the alternate medication may prove more effective, there has been no history of violence or threats of violence or otherwise non-compliant behavior while Mr. Ford has been at Mid-Hudson.

> that time. In fact, there are instances of him exercising restraint. There are three occasions that during the time he was a court officer, where he had to take his gun out and he was able to successfully arrest or deter three different individuals without using his gun. . . So the idea that because he's had delusions or some of the same delusions the whole time he's been at Mid-Hudson and, therefore, he is likely to commit violence if he's released doesn't make logical sense because as I said, he was free for 25 years with the same delusions and he didn't commit violence . . .

(*See* Testimony of Grief January 9, 2019 attached hereto as **Exhibit A**).

Overall, the government's concerns are based on speculation and they failed to meet their burden where their entire case and expert testimony was based on unsupported conclusions of possibilities that could happen in the future if Mr. Ford changed facilities. Ultimately, the record is devoid a showing that another facility cannot deal with Mr. Ford's needs, and more importantly the record is devoid any showing of how other facilities handle safety and security. Simply put, Mr. Ford is not a risk to himself and other and therefore, an Order of Conditions should be issued in this matter.

B. An Order of Conditions Would Serve to Address Any of the Speculative <u>Concerns of the Office of Mental Health.</u>

The burden at a transfer hearing is on the People to prove that the patient is still dangerous "or that the issuance of a transfer order is inconsistent with the public safety and welfare of the community." If the People fail to meet their burden, the court must issue a transfer order. *See* LARRY CUNNINGHAM, *New York's Post-Verdict Scheme for the*

Treatment of Insanity Acquittees: Balancing Public Safety with Rights of the Mentally Ill, 25 J. Civ. Rts. & Econ. Dev 81, 88 (2010).

The definition of an Order of Conditions pursuant to CPL 330.20(o) is as follows: "Order of conditions" means an order directing a defendant to comply with this prescribed treatment plan, or any other condition which the court determines to be reasonably necessary or appropriate . . .

If a transfer order is granted, the patient is moved to a non-secure facility, of which there are several scattered throughout New York. These are known in the vernacular as "civil hospitals": state-run hospitals typically used for the civil commitment of the mentally ill. A transfer order is also the first instance in which a court must issue an "order of conditions": [The order] direct[s] a defendant to comply with this prescribed treatment plan, or any other condition which the court determines to be reasonably necessary or appropriate, and, in addition, where a defendant is in custody of the commissioner, not to leave the facility without authorization. *See* LARRY CUNNINGHAM, *New York's Post-Verdict Scheme for the Treatment of Insanity Acquittees: Balancing Public Safety with Rights of the Mentally Ill*, 25 J. Civ. Rts. & Econ. Dev 81, 88 (2010).

Once a patient is transferred to a non-secure facility, he will continue to come up for retention reviews every two years or less, since he is still in the custody of OMH.[45] At this stage, however, the burden on OMH and the People is substantially

less. Instead of having to prove that the patient is dangerous, they need only prove that he is "mentally ill." Under the statute, there are three requirements for a defendant to be found "mentally ill": (1) the patient has an illness that requires inpatient treatment; (2) treatment is necessary for the patient's welfare; and (3) the patient's "judgment is so impaired that he is unable to understand the need for such care and treatment." *See* LARRY CUNNINGHAM, *New York's Post-Verdict Scheme for the Treatment of Insanity Acquittees: Balancing Public Safety with Rights of the Mentally Ill*, 25 J. Civ. Rts. & Econ. Dev 81, 88 (2010).

In *Matter of Torres*, the Court indicated that the Government's expert opinion that the patient would pose a danger if he discontinued his medication was expressly provided for in the Court's Order of Conditions. *Torres*, 166 A.D.2d at 230-31 (1991). In this case, the recommendations of Dr. Grief could be provided for in an Order of Conditions.

Dr. Grief recommended the following based on his work experience and assessment of Mr. Ford:

> A. Well, as I said, I think he should be in a less restrictive facility, such as a state psychiatric hospital. As I said, if there is a strict order of conditions including psychiatric treatment, he would continue to have oversight, structure, support and treatment . . . and if he were not successful in a non-secured psychiatric facility or if he violated his order of conditions, he can always be sent back to a secured facility.

> Q. Would his treatment needs or request differ in the non-secured facility to your belief?
>
> A. I don't think his treatment would differ significantly. The only thing that I think would be more available based on what I know about state psychiatric hospitals is that there's more individual psychotherapy conducted in state facilities.
>
> Q: So then your history and career, did you work at any psychiatric facilities at all?
>
> A. Yes.
>
> Q: Where?
>
> A: [I] worked in the Payne Whitney Psychiatric Facility part of New York Hospital . . . I worked at Westbury Hospital, which is part of the Yale University School of Medicine . . . I worked in the New York Hospital Westchester Division . . .

(*See* Transcript dated January 9, 2019 at p 95, ¶ 16 – p. 96, ¶ 21 attached as **Exhibit A**).

An Order of Conditions that requires continued treatment and medication, and restricts Mr. Ford's ability to the leave the facility would address the Government's concerns that Mr. Ford lacks insight into his disorder. As a result, transfer to a non-secure facility with proper conditions should be granted.

CONCLUSION

As the United States Supreme Court stated in *Jones v. United States,* 463 U.S. 354, 361, 103 S. Ct. 3043, 3048, 77 L. Ed. 2d 694 (1983) "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323

(1979). Therefore, a State must have "a constitutionally adequate purpose for the confinement." *O'Connor v. Donaldson,* 422 U.S. 563, 574, 95 S.Ct. 2486, 2493, 45 L.Ed.2d 396 (1975).

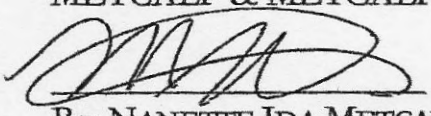
Undoubtedly in this case where Mr. Ford has been committed to a secure for facility for almost twenty-three years, has not had a single incident of violence to himself, others, or made threats of violence about either himself or others, coupled with that fact that he has no history of substance abuse or relapse, there was never a necessity to compel medication, and an Order of Conditions can require continued confinement in a non-secure facility along with the requirement of continued medical treatment, continued confinement in a secure facility would be, simply put, a constitutional deprivation of Mr. Ford's rights to due process, life, and liberty.

As a result, based on the fact that Mr. Ford does not constitute a current danger to either himself or others, Mr. Ford should be transferred a non-secure facility with an Order of Conditions in place requiring him to comply with the prescribed treatment plan, not to leave the facility without prior authorization, and any other conditions as this Court may deem as just and proper.

WHEREFORE, the undersigned requests that the foregoing motions be granted and requests such other and further relief as this Honorable Court may deem just and proper.

Dated: New York, NY
April 22, 2019

Respectfully Submitted,
METCALF & METCALF, P.C.



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