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NO. 68664-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re Detention of

LOUIS W. BROCK,

Respondent.

BRIEF OF APPELLANT

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I. SUMMARY

In the middle of an unconditional release trial, a sexually violent predator decided that he would be better off seeking a less restrictive placement rather than unconditional release. 4 Trial RP 297-98. He therefore entered into an agreement to abandon the trial. Both he and the prosecutor agreed to use their best efforts to obtain a less restrictive placement alternative. The prosecutor agreed that he would not challenge any recommendation from the Special Commitment Center for less restrictive placement. Mr. Brock agreed not to seek **un**conditional release for four years. This included any unconditional release that might be recommended by the SCC. 2 CP 232-35; 4 Trial RP 306-07, 311-12. After carefully questioning Mr. Brock about his understanding of this agreement, the court approved it as in the interest of justice. 2 CP 232-36 (Appendix A); 4 Trial RP 306-07, 309-13.

Nine months later, the SCC did recommend unconditional release. 2 CP 202-31. Mr. Brock then reneged on his agreement and sought such release. 1 CP 127-75. A new trial judge allowed him to do this. He determined that Mr. Brock's agreement not to seek unconditional release violated public policy. He concluded that

this warranted vacating the agreed judgment under CR 60(b)(11). 1 CP 37-47 (Appendix B).

This decision was erroneous, for three reasons. First, a judgment cannot be vacated based on a mere error of law. In re Marriage of Moody, 137 Wn.2d 979, 991, 976 P.2d 124 (1999). To vacate a judgment by stipulation requires a showing of fraud or mutual mistake, which did not exist in this case. Haller v. Wallis, 89 Wn.2d 539, 545, 573 P.2d 1302 (1978).

Second, even when a settlement has not been judicially approved, the parties are allowed to balance conflicting considerations of public policy. If provisions of the agreement are causally related to the events that gave rise to the controversy, they are permissible – even if those provisions would otherwise violate public policy. Chadwick v. Northwest Airlines, Inc., 33 Wn. App. 297, 302, 654 P.2d 1215 (1982), aff'd, 100 Wn.2d 221, 667 P.2d 1104 (1983).

Third, even if the court were authorized to reconsider the public policy of this settlement, it is entirely consistent with that policy. The legislature has established a policy that sexually violent predators should seek release through treatment, not merely through increased age. Under the governing statute, release should

result from "change ... brought about through positive response to continuing participation in treatment." RCW 71.09.090(4)(b)(ii). The statute specifically precludes release based on age alone. RCW 71.09.090(4)(c). The agreement required Mr. Brock to seek release through treatment, thereby implementing the legislature's policy.

II. ASSIGNMENTS OF ERROR

(1) The trial court erred in entering an order vacating judgment.

(2) The court erred in striking a portion of a judicially-approved settlement agreement.

III. ISSUES

(1) During a trial on the release of a sexually violent predator, the parties entered into a settlement that provided for a minimum period of treatment. The court approved this settlement. Can a later judge strike a key portion of this agreement as contrary to public policy?

(2) If the later judge was entitled to consider public policy, did he correctly determine that public policy allows this sexually violent predator to seek unconditional release, where there is no evidence to satisfy the statutory requirements of either a significant

change in physiological condition or a positive response to participation in treatment?

IV. STATEMENT OF THE CASE

A. INITIAL COMMITMENT AND DENIALS OF RELEASE.

In March, 1991, the State filed a petition to declare the respondent, Louis Brock, a sexually violent predator (SVP). 3 CP 365-66. The case was assigned to Hon. Gerald L. Knight. He presided over it for more than 19 years. See 2 CP 235.

In December, 1991, Mr. Brock was determined to be an SVP and committed for treatment. 3 CP 540. This court remanded the case for consideration of less restrictive alternatives. 3 CP 509-34. On remand, the trial court ruled that Mr. Brock's proposed treatment plan did not satisfy statutory requirements. It again entered an order of commitment, and this court affirmed. 3 CP 489, 470-82; In re Brock, 99 Wn. App. 722, 995 P.2d 111, review denied, 141 Wn.2d 1025 (2000).

On five subsequent occasions, the court reviewed the case and refused to order a release hearing. 3 CP 356-60 (denying 2004 petition for unconditional release), 452-54 (2004 annual review); 448-51 (2005 annual review), 434-37 (2006 annual review); 426-28 (2007 annual review). Two of these orders were appealed, and this

court affirmed them. 3 CP 438-47; In re Brock, 126 Wn. App. 957, 110 P.3d 791 (2005) (affirming 2004 order denying release); 2 CP 292-300 (affirming order on 2006 annual review).

B. 2010 TRIAL AND SETTLEMENT AGREEMENT.

In November, 2007, Mr. Brock obtained an evaluation from Dr. Richard Wollert. This evaluation concluded that Mr. Brock was no longer likely to engage in sexually violent predatory acts if released. 3 CP 417-25. Based on this evaluation, the court ordered a trial. 2 CP 305-06.

After lengthy pre-trial proceedings, the trial began on March 1, 2010. A jury was selected and heard a day of testimony. The State's primary witness was Dr. Paul Spizman of the Special Commitment Center (SCC). He testified to Mr. Brock's offense history, which included four rapes or attempted rapes. 3 Trial RP 189-94.[1] He pointed out that, in his 18 years at SCC, Mr. Brock had never engaged in treatment to any significant extent. 3 Trial RP 188. When Dr. Spizman interviewed Mr. Brock in 2009, Mr. Brock denied ever committing a sexual offense. 3 Trial RP 289-90. Dr. Spizman concluded that Mr. Brock had a mental abnormality and

[1] "Trial RP" refers to the report of proceedings covering the trial on March 1-4, 2010.

personality disorder that made him likely to commit further sexually violent acts if released. 3 Trial RP 236-37.

The next morning, March 4, the parties advised the court that they were negotiating a settlement. Mr. Brock's attorney explained that the testimony had been an "eye-opening experience" for Mr. Brock. He had never heard his history reviewed in such compact detail and with Dr. Spizman's interpretation. As a result, Mr. Brock realized that he needed to "get his life together" and "make some changes." "[R]ather than throwing the dice with this jury and having an order entered potentially denying him unconditional release, he would like to put his energies and have me focus my energies towards getting him into an LRA [less restrictive alternative]." 4 Trial RP 297-98. Another attorney for Mr. Brock later said that at this point in the trial, "everybody" told Mr. Brock that it was going very badly and that he was going to lose. 3/16/12 RP 17.

Following further negotiations, the parties announced a settlement agreement. 2 CP 232-35 (appendix A). Under this agreement, Mr. Brock agreed to abandon the trial and not have the jury decide the issues. He stipulated that he continued to meet the definition of an SVP. He said that he wanted to "pursue best efforts

to be placed in a less restrictive placement alternative." The prosecutor agreed to use best efforts to help Mr. Brock and his attorney "explore, develop and craft an appropriate less restrictive placement alternative, which satisfies the requirements of the law and is acceptable to the SCC and the Department of Corrections." The prosecutor informed the court that, if the SCC recommended an LRA, he was agreeing not to challenge that recommendation. 4 RP 306.

The agreement included the following provision (paragraph 6):

> Mr. Brock, having fully consulted with his attorney, does intelligently, knowingly and voluntarily further agree to waive his statutory and any constitutional right to seek, petition or accept an unconditional release or removal of his designation as a Sexually Violent Predator for a period of four (4) years from the date of this Order.

2 CP 234.

The prosecutor informed the court that this was a "key provision." He explained its purpose:

> The clear implication is we don't want to litigate all this each year. If we're going to do it, let's do it now.

4 Trial RP 304-05. The prosecutor pointed out that even if the SCC recommended Mr. Brock's release, Mr. Brock was agreeing not to accept that recommendation. 4 Trial RP 306-07.

In open court, the prosecutor explained the agreement paragraph by paragraph. 4 Trial RP 301-07. The judge then questioned Mr. Brock about his understanding and acceptance of the agreement. 4 Trial RP 309-12. This included a specific review of paragraph 6. The judge again pointed out that this provision precluded Mr. Brock from seeking unconditional release, even if it was recommended by the SCC. Mr. Brock said that he understood and agreed to that. 4 Trial RP 311-12.

The judge told Mr. Brock that he had sometimes been "his own worst enemy" because of his inability to communicate and exchange information with people at the SCC. He reminded Mr. Brock of his agreement to exercise his own best efforts towards release into an LRA "It's nice to enter into this agreement, but if nobody is going to exercise their best efforts, then it's really a waste of time." 4 Trial RP 312-13.

The judge approved the agreement. He specifically found that the agreement was in the interest of justice. 4 Trial RP 313. The judge then discharged the jurors, informing them that the matter had been settled by agreement. 4 Trial RP 316-18.

C. VACATION OF SETTLEMENT AGREEMENT.

Nine months later, in November, 2010, the SCC submitted a new evaluation signed by Dr. Spizman. 2 CP 202-31. Between the time of the settlement and this report, Mr. Brock had not engaged in any sex offender specific treatment. 2 CP 207. Nor had there been any substantial change in his physiological condition. 2 CP 205. Dr. Spizman nevertheless concluded that Mr. Brock was no longer an SVP. This was based solely on his increased age:

> Overall, Mr. Brock presents as a man who once posed a considerable risk of reoffense. However, with increasing age, he appears to no longer warrant a paraphilia diagnosis. Furthermore, while still active in antisocial behaviors, as would be expected with age these have also diminished when compared with his younger years. Thus I am unable to clearly identify an underlying mental abnormality/personality disorder that would meet the criteria necessary for Mr. Brock to be civilly committed as a Sexually Violent Predator. Furthermore, I question the degree of risk he poses, and I cannot state he continues to be more likely than not to reoffend sexually if released unconditionally from confinement.
>
> ...
>
> [W]hat is missing is compelling evidence to offset the strong data that indicates as a man ages they decline in risk of sexual recidivism. Without that compelling evidence, I have little to indicate that Mr. Brock will not follow this typical pattern.

2 CP 224.

Based on this report, Mr. Brock sought an unconditional release trial. 1 CP 127-75. In response, the State pointed out that Mr. Brock had waived his right to do this. 1 CP 113-26. The case was assigned to a new judge, Hon. Richard Okrent. Mr. Brock moved to strike or withdraw that portion of his agreement. 1 CP 90-95.

In responding to this motion, the prosecutor provided some further background about the purposes of the 2010 agreement. From Mr. Brock's point of view, conditional release to an LRA appeared more advantageous than unconditional release. "An unconditional release would have placed Mr. Brock back in the community, without resources or treatment, after decades of incarceration and confinement." The State was likewise concerned about "Mr. Brock's ability to function and not reoffend if given an immediate, outright, unconditional release." Maintaining supervision required retaining the SVP designation. "The four year term recognized the time it might take for the [LRA] program to be created and for Mr. Brock to receive sufficient benefits." 1 CP 63.

Notwithstanding this explanation, the court determined that Mr. Brock's promise not to seek unconditional release for four years violated public policy. This was because it "allowed continued

confinement of Mr. Brock when he no longer meets the definition of a SVP." 1 CP 42. The court believed that this constituted an "extraordinary circumstance" that justified modifying the agreed judgment under CR 60(b)(11). 1 CP 45. The court therefore granted the motion to strike. 1 CP 37-47, 25-36. (The court's memorandum opinion is set out in Appendix B.) The State is appealing from that order. 1 CP 1.

V. ARGUMENT

A. AFTER A SETTLEMENT AGREEMENT HAS BEEN APPROVED BY THE COURT AND IMPLEMENTED BY THE PARTIES, IT IS NOT SUBJECT TO RECONSIDERATION ON PUBLIC POLICY GROUNDS.

1. A Judgment Entered By Stipulation Cannot Be Vacated Absent A Showing Of Fraud Or Mutual Mistake.

The trial court approved a settlement agreement, finding that it was in the interest of justice. 4 Trial RP 313. Two years later, a different judge invalidated a key portion of the agreement, because he considered it to be contrary to public policy. This was error. A judge's disagreement with his predecessor's actions is not a proper basis for setting aside a stipulated judgment.

"[T]he law favors amicable settlement of disputes and is inclined to clothe them with finality." Haller v. Wallis, 89 Wn.2d 539, 545, 573 P.2d 1302 (1978).

> If the judgment conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing.

Id. at 544; see Handley v. Mortland, 54 Wn.2d 489, 493-94, 342 P.2d 612 (1959); Snyder v. Tompkins, 20 Wn. App. 167, 173, 579 P.2d 994, review denied, 91 Wn.2d 1001 (1978).

Here, the agreement was negotiated by attorneys who had been working on the case for two years. 1 Trial RP 6. The negotiations specifically addressed the possibility that the SCC might recommend release. 4 Trial RP 306. Before accepting the agreement, the judge questioned Mr. Brock to ensure that he understood it and agreed to it. 4 Trial RP 309-12. The judge specifically called Mr. Brock's attention to the provision delaying his ability to seek or accept unconditional release. 4 Trial RP 311. There is no showing of fraud, mutual mistake, or lack of consent. Consequently, there is no valid legal basis for modifying the stipulated judgment.

The later judge believed that his action was justified by CR 60(b)(11). That rule allows a court to grant relief from a final judgment based on "[a]ny other reason justifying relief from the

operation of the judgment." A court's decision under this rule is reviewed for abuse of discretion. A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. If a ruling is based on an erroneous view of the law, it is necessarily an abuse of discretion. Questions of law are reviewed de novo. In re Marriage of Herridge, 169 Wn. App. 290, 296-97 ¶14, 279 P.3d 956 (2012) (citation omitted). When there is no showing of fraud or mutual mistake, vacating a stipulated judgment is an abuse of discretion. In re Marriage of Burkey, 36 Wn. App. 487, 675 P.2d 619 (1984).

CR 60(b)(11) does not authorize courts to vacate judgments based on disagreements with their policy. "CR 60(b)(11) applies only in extraordinary circumstances relating to irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." Barr v. MacGugan, 119 Wn. App, 43, 48, 78 P.3d 660 (2003); see Haller, 89 Wn.2d at 543 (defining "irregularity" under CR 60(b)(1)). An error of law is not an "irregularity" and does not justify vacating a judgment. State v. Keller, 32 Wn. App. 135, 140, 647 P2d 35 (1982). (Although Keller was a criminal case, it was decided under CR 60(b)(11). Keller, 32

Wn. App. at 139; see State v. Scott, 92 Wn.2d 209, 595 P.2d 549 (1979).)

"Whether the terms of a [settlement] agreement are unfair is a legal issue which must be raised on appeal – not a motion to vacate the decree." In re Marriage of Moody, 137 Wn.2d 979, 991, 976 P.2d 124 (1999). The original trial judge was entitled to disapprove the agreement if he considered it to be contrary to public policy or improper for any other reason. Had he done so, the parties could have attempted to negotiate a different agreement, or they could have simply proceeded with the trial that was in progress. When the agreement is set aside years later, the parties are deprived of these options. The propriety of a settlement should be determined before it is consummated, not years later.

Parties are entitled to rely on the judicial approval of a settlement. Here, the State abandoned its right to a jury trial in reliance on promises by Mr. Brock. The court then allowed him to repudiate the promises that the State relied on in taking this action. This is unfair. If the original judge's action truly violated public policy, it constituted an error of law. Such an error can only be corrected via appeal. It cannot support vacation of a judgment.

2. Even When Settlement Agreements Have Not Been Judicially Approved, They Can Include Provisions That Would Otherwise Be Contrary To Public Policy.

Even if this case involved a mere contract rather than a judgment, the result would be the same – the contract could not be invalidated as contrary to public policy. A settlement contract may include provisions that would otherwise violate public policy, so long as they relate to matters arising out of the dispute. Two cases illustrate this point: Helgeson v. Marysville, 75 Wn. App. 174, 881 P.2d 1042 (1994), and Chadwick v. Northwest Airlines, Inc., 33 Wn. App. 297, 654 P.2d 1215 (1982), aff'd, 100 Wn.2d 221, 667 P.2d 1104 (1983).

In Helgeson, a city employee sought disability retirement. The city claimed that he was not disabled. The parties agreed to a settlement under which the city withdrew its challenge to the employee's retirement. In return, the employee agreed to waive his statutory right to future medical benefits from the city. Several years later, the employee developed severe medical problems caused by his work for the city. He sought medical benefits under the public employee retirement statute.

This court upheld the employee's waiver of statutory benefits. The court recognized an express legislative policy against

waiver of retirement benefits. Nonetheless, because the right to receive the benefits was not vested, the employee could waive them as part of a settlement agreement. Under these circumstances, this waiver was not contrary to public policy. Helgeson, 75 Wn. App. at 182-84.

In Chadwick, a company fired an employee after denying his request for extended sick leave. The employee claimed that his firing constituted discrimination based on handicap. Following a grievance procedure, the company agreed to reinstate him. The employee agreed that he would limit his amount of sick leave. When he took excessive sick leave, the company fired him again. He sued, claiming that the agreement itself constituted an unlawful act of handicap discrimination.

This court upheld the agreement:

> A release generally extends to all matters within the parties' contemplation at the time it is executed.
>
> An employee may release claims arising from antecedent discriminatory events, acts, patterns, or practices, or the "continuing" or "future" effects thereof, so long as such effects are causally rooted – in origin, logic, and factual experience – in discriminatory acts or practices which antedate the execution of the release.

Chadwick, 33 Wn. App. at 302 (citations omitted). In affirming this decision, the Supreme Court said that the agreement was proper

because it "did not waive claims for future discriminatory acts." Id., 100 Wn.2d at 223.

Under the analysis of Chadwick, a settlement agreement does not provide *carte blanche* for any future acts that might violate public policy. It does, however, give the parties broad authority to address the future consequences of the disputed issue. In doing so, it can authorize acts that could otherwise be viewed as violating public policy.

Here, the disputed issue at the 2010 trial was whether Mr. Brock continued to meet the requirements for detention as an SVP. If he did, he was subject to detention until such time as his condition changed. RCW 71.09.090(1), (2). Change takes time. The negotiated four-year period provided the minimum time necessary for a community treatment program to be created and for Mr. Brock to receive sufficient benefits from it. 1 CP 63.

The defendant's expert believed that Mr. Brock's age put him outside the statutory definition of an SVP. 2 Trial RP 110. There was every reason to anticipate that he would continue to hold the same views. If the trial had simply been abandoned, the probable result would have been another trial on the same issues within a short time. The prosecutor was not willing to accept a "settlement"

that would result in the rapid renewal of the same litigation. 4 Trial RP 304-05. Because of these considerations, the provision delaying unconditional release was "causally rooted," as a matter of logic and experience, in the events that gave rise to the dispute. Consequently, this provision was a proper part of the settlement agreement.

Ultimately, every settlement agreement resolves conflicting issues of public policy. In a case involving money damages, for example, there is a public policy that persons who have been the victims of a legal wrong should receive full compensation. See Jones v. Firemen's Relief & Pension Bd., 48 Wn. App, 262, 268, 738 P.2d 1068 (1987). On the other hand, there is a public policy encouraging settlement. City of Seattle v. Blum, 134 Wn.2d 243, 258, 947 P.2d 223 (1997). If a later court is permitted to re-weigh these policies, no settlement would be secure.

In the present case, the purpose of the 2010 trial was to resolve conflicting public policies: the policy of detaining and treating sexually violent predators, and the policy of releasing people who are not sexually violent predators. Instead of accepting a jury's resolution of this conflict, the parties reached their own accommodation. Their agreement provided a specified minimum

period of treatment. That treatment could be in either the SCC or a less restrictive alternative, depending on future circumstances. This compromise cannot properly be set aside based on the assumption that Mr. Brock is *not* a sexually violent predator. The court was not entitled to re-weigh the conflicting public policy considerations that were implicit in the agreement.

B. EVEN IF THE COURT WERE ENTITLED TO RE-WEIGH PUBLIC POLICY, THERE IS NO PUBLIC POLICY OF RELEASING SEXUALLY VIOLENT PREDATORS WITHOUT TREATMENT.

Even if the second judge was empowered to re-examine issues of public policy, he did so incorrectly. The judge perceived a public policy in granting unconditional release whenever there is no "ongoing showing of mental illness and dangerousness." 1 CP 45. The only factor mitigating Mr. Brock's dangerousness is his age. 2 CP 224. The Legislature has made it clear that increased age is not a sufficient reason for release. Rather, release should depend on the predator's positive response to treatment.

The standards for releasing a sexual violent predator are provided by RCW 71.09.090. The full text of that section is set out in Appendix C.[2] The statute consists of five subsections.

[2] Appendix C is the version of the statute that was in effect at the time of the settlement. Laws of 2009, ch. 409, § 8. Since then,

Subsection (1) provides for petitions for release that are supported by the Department of Social and Health Services (DSHS) (the agency in charge of the SCC). Subsection (2) covers petitions that are opposed by DSHS. Subsection (3) covers procedural requirements at a hearing on either kind of petition. Subdivision (4) contains general provisions. Subsection (5) gives the court continuing jurisdiction until the predator is unconditionally discharged.

The present case involves a petition for discharge that was supported by DSHS. Such a petition should be filed under the following circumstances:

> If the secretary [of DSHS] determines that the person's condition has so changed that either: (a) The person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge.

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the statute has been amended three times. Laws of 2010, 2nd sp. sess, ch. 28, § 2; Laws of 2011, 2nd sp. sess., ch. 7, § 2; Laws of 2012, ch. 257, § 7. These amendments changed some aspects of pre-trial procedures, but they did not alter the factual showing necessary for release. None of the provisions quoted in the body of this brief have been amended.

RCW 71.09.090(1). Under this subsection, a petition for release depends on a finding that the predator's condition has changed. Depending on the circumstances, the petition may be for either conditional or unconditional release. In either case, release depends on a court order.

Subsection (4) sets out restrictions that are applicable to all hearings:

> (b) A new trial proceeding under subsection (3) of this section may be ordered, or a trial proceeding may be held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding:
>
> (i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or
>
> (ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.
>
> (c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.

RCW 71.09.090(4)(b), (c). The legislative findings reflected in this statute are entitled to substantial deference from the court. State v. McCuistion, 174 Wn.2d 369, 391-92 ¶¶ 37-38, 275 P.3d 1092 (2012).

Subdivisions (4)(b) and (4)(c) apply to any "new trial proceeding under subsection (3)." Subsection (3) applies to any "hearing resulting from subsection (1) or (2) of this section." Thus, the provisions of subdivisions (4)(b) and (4)(c) apply to hearings on both petitions that are supported by DSHS (subsection (1)) and those that are not (subsection (2)).

Under subdivisions (4)(b), a release trial requires a showing of one of two kinds of change. Subdivision (4)(b)(i) sets out one possibility: a physiological change that renders the person permanently incapable of committing a sexually violent act. Subdivision (4)(b)(ii)) sets out the other possibility: a "change in the person's mental condition brought about through positive response to continuing participation in treatment." These two subdivisions make it clear that increased age is not a basis for release, absent one of these two kinds of change.

If there were any doubt on this point, it would be eliminated by subdivision (4)(c). According to that subdivision, "a change in a

single demographic factor, without more, does not establish probable cause for a new trial proceeding." A "single demographic factor" includes "a change in the chronological age ... of the committed person." There is thus no doubt that, under the policies declared in this statute, a sexually violent predator should not be released simply because he is older.

The settlement negotiated in this case was designed to serve exactly these policies. It was intended to ensure that Mr. Brock could be released through change resulting from participation in treatment. 4 Trial RP 308. Such change takes time. The settlement defined four years as the minimum period of treatment that would be needed for Mr. Brock to be safely released with *no* supervision.

This did not mean that Mr. Brock would remain at the SCC for four years. To the contrary, the settlement placed no restrictions on his ability to petition for *conditional* release. Moreover, the prosecutor agreed not to oppose any petition for *conditional* release that is supported by the SCC. 4 Trial RP 306. If Mr. Brock is no longer a danger to the community, there should be little difficulty in devising "conditions ... that adequately protect the community," so as to justify conditional release under RCW 71.09.090(1).

The settlement thus serves the precise policies established by the legislature in this statute. It encourages Mr. Brock to seek release through participation in treatment. Whenever his condition improves to a degree that allows adequate public safety, he can seek *conditional* release. After four years, he can seek *unconditional* release. What he cannot do is what he is now attempting -- seeking unconditional release without an adequate period of treatment. That attempt violates the settlement agreement, but it likewise violates the public policy set out by the legislature in RCW 71.090(4)(b) and (c).

Ultimately, what Mr. Brock did in the settlement was to waive unconditional release hearings for a period of four years. Although RCW 71.09.090 grants SVPs the right to an annual review hearing, it expressly authorizes the SVP to waive that right. Such a waiver is therefore not contrary to public policy.

In short, even if the second judge was entitled to re-examine the policy set out in this agreement, his resolution of that issue was erroneous. The settlement agreement in this case violates no public policy. The court therefore erred in relieving Mr. Brock from a key provision of his voluntary settlement agreement.

VI. CONCLUSION

The order modifying the settlement agreement should be reversed. In accordance with that agreement, Mr. Brock's petition for unconditional release should be dismissed.

Respectfully submitted on January 14, 2013.

MARK K. ROE
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By: 

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Filed in Open Court
3-4, 2010
SONYA KRASKI
COUNTY CLERK
By [signature]
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

In re the detention of

Louis Brock

Respondent.

No. 91-2-01736-9

AGREEMENT TO ABANDON TRIAL

This matter has come on in open court, on March 4, 2010, before the Honorable Gerald L. Knight and the State having been represented by Paul Stern, Deputy Prosecuting Attorney for Snohomish County, and the respondent having been present, in the custody of the Department of Social and Health Services, and being represented by Paula T. Olsen, and the parties having representing they have come to the following agreement.

This document is intended to set forth the understanding of all parties in entering an Order in which Mr. Brock abandons his demand for a trial on the issue of whether he remains a Sexually Violent Predator.

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APPENDIX A

1. Mr. Brock has been previously adjudicated as a sexually violent predator. He was found to be a SVP at a trial in 1991. A recommitment trial on this issue has been commenced (on March 1, 2010), and the State has presented its entire case and is prepared to rest. The respondent has his expert witness, Dr. Wollert, present in the courtroom prepared to testify on his behalf.

2. The testimony presented so far in this trial includes testimony from Dr. Spizman of the Special Commitment Center (SCC) that Mr. Brock continues to suffer from a mental abnormality and personality disorder, specifically to include Paraphilia Not Otherwise Specified (nonconsent) and that his mental abnormality and personality disorder causes him serious difficulty in controlling his sexually violent behavior. Dr. Spizman has also testified that his mental abnormality and personality disorder makes Mr. Brock likely to engage in predatory acts of sexual violence if not confined to a secure facility. The respondent has stipulated that he has the requisite prior convictions for crimes of sexual violence. Thus by this Agreement, the respondent agrees that he currently continues to meet the criteria for and the definition of a Sexually Violent Predator (hereafter SVP) .

3. Having fully and fairly considered this case and the consequences of this litigation, Mr. Brock with the advice of counsel, does hereby knowingly, intelligently and voluntarily elect to abandon this trial, not present any evidence, nor testify on his own behalf and not to have the jury decide the issues.

4. Instead Mr. Brock has decided that he wants to pursue best efforts to be placed in a less restrictive placement alternative. Mr. Brock understands that there is no express or implied promise by the State or the SCC that such placement will occur.

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5. The State of Washington, through the Snohomish County Prosecutor's Office, does agree to use their best efforts to work with Mr. Brock and his counsel to help them explore, develop and craft an appropriate less restrictive placement alternative, which satisfies the requirements of the law and is acceptable to the SCC and the Department of Corrections. Mr. Brock understands that there is no express or implied promise by the State or the SCC that such placement will occur.

6. Mr. Brock, having fully consulted with his attorney, does intelligently, knowingly and voluntarily further agree to waive his statutory and any constitutional right to seek, petition or accept an unconditional release or removal of his designation as a Sexually Violent Predator for a period of four (4) years from the date of this Order.

7. Mr. Brock having fully consulted with his counsel, does hereby intelligently, voluntarily and knowingly further agree to waive his statutory and any constitutional right to use public funds to hire an expert to challenge his status as a SVP for 45 months from the date of this Order.

8. Nothing in this Agreement precludes the SCC from recommending, or the parties from agreeing, to approving a less restrictive placement (LRA) for Mr. Brock, or if one is in place, from modifying the conditions or terms of such placement of the conditions of the LRA during the period. The Court shall have the authority to enter into changes in the conditions of the LRA.

9. Nothing in this Agreement limits or precludes the remedies of RCW 71.09.098, involving the revocation, modification and arrest authority for any violations of the Conditions on

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201-4046
(425) 388-3333 Fax: (425) 388-3572

Less Restrictive Release as might in time be entered, or may otherwise be permitted under RCW 71.09.

ENTERED THIS 4th DAY OF March, 2010

Louis W. Brock
Louis Brock, Respondent

Paula T Olson
Paula T. Olson, #11584
Counsel for Mr. Brock

Paul Stern, #14199
on behalf of Snohomish County
Prosecutors Office

APPROVED BY THE COURT: Gerald L. Knight
Honorable Gerald L. Knight
Snohomish County Superior Court
March 4, 2010

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SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

In Re the Detention of: vs. LOUIS W. BROCK Respondent.	Case No.: 91-2-01736-9 ORDER STRIKING PARAGRAPH 6 OF THE AGREEMENT TO ABANDON TRIAL

THIS MATTER comes before the Court on Respondent Louis Brock's Motion to Strike, Withdraw, or Otherwise not Enforce. Mr. Brock seeks to have the portion of his prior Agreement to Abandon Trial in which he agreed not to petition for or accept unconditional release for a period of four years stricken, withdrawn, or otherwise declared unenforceable.

BACKGROUND

Respondent Louis Brock was found to be a sexually violent predator by a jury and was committed to the Washington Special Commitment Center in 1991. In 2010, Judge Gerald Knight granted Mr. Brock an unconditional release trial. During the trial, the State called one expert, Dr. Paul Spizman, who opined that Mr. Brock met the definition of a Sexually Violent Predator. After the State rested, Brock announced that he wanted to abandon the trial. The State and Mr. Brock's attorney negotiated an agreement in which

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APPENDIX B

Mr. Brock agreed to "waive his statutory and any constitutional right to seek, petition, or accept an unconditional release or removal of his designation as a Sexually Violent Predator for a period of four (4) from the date of [the] Order." Agreement to Abandon Trial ("the Agreement"), docket no. 444, at ¶ 6. In return, the State "agree[d] to use their best efforts to work with Mr. Brock and his counsel to help them to explore, develop, and craft an appropriate less restrictive placement alternative, which satisfies the requirements of the law and is acceptable to the SCC and the Department of Corrections. Mr. Brock understands that there is no express or implied promise by the State or the SCC that such placement will occur." Agreement, docket no. 444, at ¶ 5. The Agreement was signed by the State, Mr. Brock, and Mr. Brock's attorney at the time. Additionally, Judge Knight reviewed the entire order with Mr. Brock in open court. The Court minutes from that hearing, docket no. 438, reflect that "[t]he Respondent read the agreed order and understands the agreed order in its entirety. . . . The Respondent also gives up his right for four years from today to seek a petition for or accept an unconditional release from the SCC."

Prior to 2010, every annual review of Mr. Brock conducted pursuant to RCW 71.09.090 concluded that he met the definition of a Sexually Violent Predator ("SVP"). In October 2010, Dr. Spizman released Mr. Brock's annual review in which changed his opinion to conclude that Brock no longer meets the definition of a SVP. Dr. Spizman's 2011 annual review again concluded that Brock no longer meets the definition of a sexually violent predator.

In November, 2011, Brock petitioned this Court under RCW 71.09.090 for an unconditional release trial. The State objected on the basis that the Agreement prevented Brock from seeking unconditional release until 2014. At a hearing on December 28th, 2011, this Court requested additional briefing with regards to the applicability of CR 60 and CR 2(a) to the Agreement. Brock subsequently filed a Motion to Strike, Withdraw, or Otherwise Not Enforce Stipulation. Oral argument on the matter was heard on March 16, 2012.

DISCUSSION

Any time the State seeks to deprive an individual of liberty through commitment, due process protections apply. Foucha v. Louisiana, 504 U.S. 71, 118 L.Ed. 437, 112 S. Ct. 1780 (1992). "When a state's laws impinge on fundamental rights, such as liberty, they are constitutional only if they further compelling state interests, and are narrowly drawn to serve those interests." In re Pers. Restraint of Young, 122 Wn.2d 1, 23 (1993) (citing State v. Farmer, 116 Wn.2d 414, 429 (1991); In re Schuoler, 106 Wn.2d 500, 508 (1986).

The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, the State may only commit persons who are both *currently* dangerous and have a mental abnormality. Foucha, 504 U.S. at 77 (emphasis added). Current mental illness is a constitutional requirement of continued detention. O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S. Ct. 2486, 45 L.Ed.2d 396 (1975). Periodic review of a person's suitability for release "is essential for the constitutionality of civil commitment," and cannot be divorced from whether the person is

currently mentally ill and dangerous due to that mental illness. Jones v. United States, 463 U.S. 354, 368, 103 S.Ct. 3043 (1984).

Proceedings under the sexually violent predator statute, RCW chapter 71.09, are civil in nature. In re Young, 122 Wn.2d at 23. The civil rules therefore apply to proceedings under the sexually violent predator statute, except when inconsistent with provisions for special proceedings set forth in RCW chapter 71.09. In re the Detention of Williams, 147 Wn.2d 476, 488-89 (2002).

I. CR(2)(A)

The first question in considering the validity and enforceability of the Agreement to Abandon Trial is whether it falls under CR 2A. The rule provides:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court, on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys.

CR 2A does not apply unless (1) the agreement is made by parties or attorneys in respect to the proceeding in a cause and (2) either the existence of the agreement or material term thereof is genuinely disputed. In re the Marriage of Ferree, 71 Wn.App. 35, 38 (1993).

Here, there is no dispute that the State and Mr. Brock made the agreement and that the first prong of CR 2A's applicability applies. While the parties do not dispute the actual terms of the agreement, there is a genuine dispute about the validity and enforceability of Paragraph 6 of the Agreement. Thus the second prong also applies and the Agreement can be analyzed under CR 2A.

II. Enforceability of the Contract

Mr. Brock acknowledges that he signed the Agreement in open court and understood its contents, but he argues that the court should set aside the stipulation both because it is contrary to Washington law regarding Sexually Violent Predators and because it is an unconscionable contract.

A. Contrary to Law

Generally, a written stipulation signed by counsel on both sides of a case is binding on the parties and the court. Riordan v. Commercial Travelers Mut. Ins. Co., 11 Wn. App. 707 (1974). However, litigants cannot stipulate to the power of courts to decide matters of law. Gallagher v. Sidhu, 126 Wn. App. 913 (2005).

Brock argues that the agreement is invalid because it usurps the role of the court to decide Brock's status as a SVP. Under RCW 71.09.070, the SCC is required to conduct a yearly evaluation of all persons civilly committed under RCW 71.09. This requirement exists to prevent a person from being continually committed as a SVP if he or she no longer meets the statutory definition of being currently dangerous and mentally ill. Indeed, the statute has withstood constitutional challenges in part because of this annual review process. See, e.g. In re Young, 121 Wn.2d at 39.

Here, there have been two consecutive annual review reports of Brock stating Dr. Spizman's opinion that Brock is no longer dangerous and no longer meets the definition of a SVP. Thus, Brock argues, the Agreement attempts to usurp the Court's authority and duty to ensure that Brock currently meets the dangerousness and mental illness SVP requirements.

The State's response is that, because a party may waive a constitutional or statutory right, the Court should accept Mr. Brock's waiver of his right to seek unconditional release because it was made knowingly, intentionally, and voluntarily. See State v. Forza, 70 Wn.2d 49, 71 (1966) ("Constitutional guarantees are subject to waiver by an accused if he knowingly, intentionally, and voluntarily waives them.") (quotation and citation omitted).

At oral argument, the State also observed that the RCW 71.09.090(2)(a) provides a procedure through which a person from waiving his right to petition for a period of one year after he receives his annual review from the secretary. Thus, the State argues, because the statute allows for a one-year waiver of the right to petition for unconditional release, a longer four-year waiver, as occurred here, should also be deemed valid and enforceable.

While the acknowledging that Mr. Brock entered into the Agreement voluntarily and with full knowledge of its terms, the Court finds that the Paragraph 6 of the Agreement should be stricken because it violates public policy by allowing continued confinement of Mr. Brock when he no longer meets the definition of a SVP. The one-year waivers are valid because they are connected to the required annual review. If a person receives an unfavorable review, it is quite possible that he may choose to waive the right to petition because of the strong possibility that it would prove futile. However, the waiver of a right to accept unconditional release after future annual reviews with unknown results is contrary to law because those future annual reviews may not support continued confinement in the SCC. If Mr. Brock were allowed to waive future rights to petition for unconditional release, there would be no purpose in conducting the annual reviews.

B. Unconscionability of the Agreement

"A stipulation agreement signed and subscribed by the attorneys representing the parties is a contract and its construction is governed by the legal principles applicable to contracts." Allstot v. Edwards, 114 Wn. App. 625, 636 (2002). Unconscionability is a doctrine under which courts may deny enforcement of all or part of an unfair or oppressive contract based on abuses during the process of forming a contract, or abuses within the actual terms of the contract itself. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 814 (2009). "The existence of an unconscionable bargain is a question of law for the courts." Nelson v. McGoldrick, 127 Wn.2d 124, 131 (1995). Substantive unconscionability involves those cases "where a clause or term in the contract is alleged to be one-sided or overly harsh," Schroeder v. Fageol Motors, 86 Wn.2d 256, 260 (1975), and it can exist even when the surrounding circumstances of the agreement do not support procedural unconscionability. Adler v. Fred Lind Motor, 153 Wn.2d 331, 346 (3004). The burden of proving that a contract or a contract clause is unconscionable lies upon the party attacking the contract. Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 898 (Div. 1 2001).

The Court is not convinced that Mr. Brock has met his burden of showing that the contact was either substantively or procedurally unconscionable. Mr. Brock certainly had a meaningful choice as to whether he wanted to enter into the agreement; indeed, he even initiated the agreement himself. Accordingly, the fact that the Agreement is now proving to be disadvantageous to Mr. Brock is not sufficient for the Court to find that enforcement is unconscionable.

III. Applicability of CR 60

The State argues that Brock's the Motion to Set Aside the agreement is properly analyzed as an effort to obtain relief for judgment under CR 60. That rule provides relief from judgment as follows:

> (a) Clerical Mistakes;
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
>
> (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
>
> (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . .
>
> (11) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1), (2), or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

As a general rule, judgments and orders may be vacated on grounds other than a clerical error only on motion of a party. See CR 60(b). Here, while Mr. Brock does not specifically ask for vacation of the Agreement under CR 60(b), the Court interprets Brock's motion to be a request for vacation under CR 60(b).

While the State is correct that none of the specific reasons outlined in CR 60(b)(1)-(10) apply in this case[1], the Court also has power to grant relief from judgment under CR 60(b)(11), which applies when there is "any other reason justifying relief from the operation of the judgment." This provision is "confined to situations involving extraordinary circumstances not covered by any other section of the rule." Barr v. MacGuan, 119 Wn. App. 43, 48 (2003).

The Court finds that the present situation presents the type of extraordinary circumstances justifying relief that are contemplated by CR 60(11). Unlike the typical civil judgment or order contemplated by the civil court rules, the Agreement involves the confinement of Mr. Brock and the deprivation of his freedom. As such, it is appropriate for the Court to view the term "extraordinary circumstances" with a more liberal interpretation than it would with an order involving, for example, a probate dispute or the division of assets in a dissolution.

Here, those extraordinary circumstances justifying relief are present. While Mr. Brock was certainly very familiar with the legal proceedings taking place at the time he signed the Agreement and the implications of his waiver of rights, the nature of the SVP statute justifies relief, as the statute requires an ongoing showing of mental illness and dangerousness. If these criteria are no longer met, as Dr. Spizman's annual reviews suggest, then keeping Mr. Brock confined is an extraordinary circumstance justifying relief from judgment under CR 60(b)(11). Thus, the Court finds that Paragraph 6 of the

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[1] Specifically, the Court notes that the present situation does not fall under CR 60(b)(3) and its one-year time limitation because Dr. Spizman's 2010 and 2011 annual reports were

Agreement should not be enforced, and it will allow Mr. Brock to petition for unconditional release.

CONCLUSION

Mr. Brock's Motion to Strike, Withdraw, or Otherwise Not Enforce Stipulation is GRANTED as to Paragraph six (6) of the Agreement to Abandon Trial. Accordingly, Mr. Brock will be allowed to petition for and accept an unconditional release from the Washington Special Commitment Center.

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not "new evidence," but were, rather, a change in circumstances.

APPENDIX C

RCW 71.09.090
(as amended by Laws of 2009, ch. 409, § 8)

(1) If the secretary determines that the person's condition has so changed that either: (a) The person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing.

(2)(a) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall file the notice and waiver form and the annual report with the court. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed that: (i) He or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

(b) The committed person shall have a right to have an attorney represent him or her at the show cause hearing, which may be conducted solely on the basis of affidavits or declarations, but the person is not entitled to be present at the show cause hearing. At the show cause hearing, the prosecuting attorney or attorney general shall present prima facie evidence establishing that the committed person continues to meet the definition of a

sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community. In making this showing, the state may rely exclusively upon the annual report prepared pursuant to RCW 71.09.070. The committed person may present responsive affidavits or declarations to which the state may reply.

(c) If the court at the show cause hearing determines that either: (i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator and that no proposed less restrictive alternative is in the best interest of the person and conditions cannot be imposed that would adequately protect the community; or (ii) probable cause exists to believe that the person's condition has so changed that: (A) The person no longer meets the definition of a sexually violent predator; or (B) release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community, then the court shall set a hearing on either or both issues.

(d) If the court has not previously considered the issue of release to a less restrictive alternative, either through a trial on the merits or through the procedures set forth in RCW 71.09.094(1), the court shall consider whether release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community, without considering whether the person's condition has changed. The court may not find probable cause for a trial addressing less restrictive alternatives unless a proposed less restrictive alternative placement meeting the conditions of RCW 71.09.092 is presented to the court at the show cause hearing.

(3)(a) At the hearing resulting from subsection (1) or (2) of this section, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The prosecuting agency shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to a jury trial and the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment.

(b) If the issue at the hearing is whether the person should be unconditionally discharged, the burden of proof shall be upon

the state to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator. Evidence of the prior commitment trial and disposition is admissible. The recommitment proceeding shall otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

(c) If the issue at the hearing is whether the person should be conditionally released to a less restrictive alternative, the burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. Evidence of the prior commitment trial and disposition is admissible.

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

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

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

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

(c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor

includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.

(5) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time as the person is unconditionally discharged.