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NO. 68664-0-I

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

In re Detention of Louis Brock,

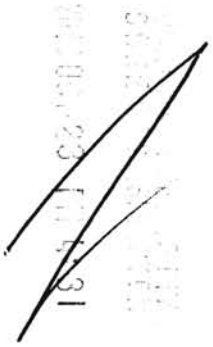
STATE OF WASHINGTON,

Appellant,

v.

LOUIS BROCK,

Respondent.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Richard T. Okrent, Judge

BRIEF OF RESPONDENT

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A. ISSUES IN RESPONSE

1. Where RCW 71.09 is an involuntary commitment scheme, did the trial court correctly conclude the parties could not agree to Respondent Louis Brock's continued commitment where the state's annual reports concluded he did not meet the commitment criteria?

2. Does the state's reading of RCW 71.09.090 conflict with constitutional principles and rules of statutory construction?

3. Did the trial court properly set aside the stipulation where the parties lacked authority to agree to Brock's continued commitment?

B. STATEMENT OF THE CASE

Respondent Brock was committed under RCW 71.09 in 1991. On March 4, 2010, he was in the middle of a trial to determine the propriety of a less restrictive alternative to complete incarceration. The state relied on the testimony of Dr. Paul Spizman as the state's expert. Spizman is an evaluator who works at the Special Commitment Center (SCC). CP 233.

Before the defense presented its case, the parties entered an agreement that ended the trial. The agreement required the state to use its "best efforts" to work with Brock 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 [sic]." CP 234.

In exchange, 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[1] for a period of four (4) years from the date of this order." CP 234, ¶ 6. Brock also agreed to waive his 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." CP 235.

The state's "best efforts" – whatever they might have been – bore no fruit.[2] But Brock did not expend public funds to challenge his continued commitment status under RCW 71.09. Instead, the state's own expert, Dr. Spizman, did that for him.

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[1] State's capitalization.

[2] Brock's response to the state's brief supports the conclusion that the state did little, if anything, to support its end of this one-sided "bargain." CP 90-95, 96-112.

In the statutorily required annual review[3] conducted in October 2010, Dr. Spizman as the state's evaluator determined Brock no longer met the criteria for continued involuntary commitment. CP 148. For reasons not clearly stated in the current record, no trial was requested or held at that time.[4]

In the October 2011 annual review, Dr. Spizman again opined that Brock no longer met criteria for continued commitment under RCW 71.09. CP 127-201.

On November 9, 2011, Brock filed a memorandum in support of an unconditional release trial. With Spizman's undisputed evaluation providing probable cause, Brock asserted a trial was required by RCW 71.09.090(2)(c)(ii)(A) and In re Detention of Petersen, 145 Wn.2d 789, 42 P.3d 952 (2002). CP 127-30.

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[3] RCW 71.09.070. The annual review also is an important procedure necessary to allow this allegedly "civil" preventive detention scheme to survive constitutional scrutiny. See argument 1.d., infra.

[4] The state's brief in the trial court asserts prior defense counsel "felt compelled" not to seek a trial because of the agreement to abandon the previous trial. CP 116.

The state opposed Brock's request, citing the agreement to abandon the 2010 trial. Under the state's view, Brock should not be allowed to "accept" the annual review's conclusion, request a trial, or "accept an unconditional release from the SCC." CP 234.

In response, Brock raised two main claims. First, the agreement lacked consideration and was unenforceable. The state's "best efforts" promise was illusory at its inception, and in its ultimate failure. CP 99-101. Second, any waiver of the right to release was not constitutionally valid. The trial court was bound to uphold the constitution, not any agreement. CP 101-04.

In response, trial counsel for the state offered his own affidavit setting forth the facts that he believed might be shown, if the state's counsel were allowed to testify. Based on those alleged facts, the state argued the agreement was a stipulated "settlement." Citing civil cases far afield from RCW 71.09, the state argued such settlements are encouraged for their "finality." CP 53-54.

The state then argued this "settlement" could only be set aside under the terms of CR 60(b). According to the state's theory, this "settlement" had thus become a "final judgment." CP 55-56.

In reply, Brock argued a stipulation to keep someone "civilly" committed beyond statutory and constitutional limits is not

enforceable where there is no evidence to support Brock's continued detention. CP 49-50.

The trial court heard oral arguments on March 16, 2012. On April 5, the court entered two written orders. One, drafted by defense counsel, struck paragraph 6 of the agreement to abandon trial. CP 25-36.

That order recognized the constitutional limitations of indefinite "civil" commitment. The state may only commit a person who is currently mentally ill and who is currently dangerous. CP 29-31.

The court then analyzed the stipulation under CR 2A and determined the agreement was contrary to law and not enforceable. The agreement unconstitutionally usurped the court's authority to determine the validity of Brock's continued commitment. It violates public policy by allowing continued confinement even though Brock no longer met criteria for confinement. The court did not find the agreement unconscionable. At the state's suggestion, the court determined that CR 60(b)(11) provided the procedural vehicle to set aside the agreement and grant relief. CP 30-36.

In its conclusion, the order stated Brock "will be allowed to petition for and accept an unconditional release from the Washington Special Commitment Center." CP 36.

After preliminary pleadings in this Court, Commissioner Neel determined the state could appeal the order as a matter of right.

C. ARGUMENT

1. NO AUTHORITY ALLOWS A PERSON TO AGREE TO VOLUNTARY COMMITMENT WHEN THE STATE FAILS TO MAKE A PRIMA FACIE SHOWING THAT THE PERSON CONTINUES TO MEET COMMITMENT CRITERIA.

The trial court correctly resolved the statutory, constitutional, and policy issues. Its order should be affirmed.

The state asserts the trial court erred for three reasons. BOA at 2-3. Two foundational problems plague the state's claims. The first is substantive, the second procedural.

First, RCW 71.09 is an involuntary commitment scheme. No statutory authority allows a person to voluntarily commit himself when the state cannot show the person still meets statutory and constitutional requirements for continued commitment. Second, the stipulation was not a "judgment" and a trial court has the power to set aside stipulations that exceed the state's statutory authority.

Finally, the state asserts the trial court could not vacate a settlement agreement based on public policy concerns. BOA at 19-24. But more than public policy is at issue here.

A reviewing court will normally avoid deciding constitutional questions if a decision may be entered on statutory grounds. Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 752, 49 P.3d 867 (2002). The construction of statutes is a question of law. In re Detention of Brock, 99 Wn. App. 722, 724, 995 P.2d 111 (2000). Brock therefore first discusses why the trial court's order correctly interprets Washington statutes. The order also ensures that the state complies with well-settled constitutional obligations. This Court may reject the state's appeal and affirm the trial court's order on any grounds apparent in the record. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

a. The State's 71.09 Commitment Scheme Does Not Allow Voluntary Commitment by Stipulation.

The state's substantive position fails because it assumes a person may volunteer for continued commitment when the state fails to justify involuntary commitment. With one inapplicable and limited exception, Chapter 71.09 does not authorize agreements for voluntary commitment when the state fails to meet its burden of production to show the person meets commitment criteria.

Chapter 71.09 is a detailed statutory scheme that allows open-ended involuntary commitment of people who meet narrowly defined

statutory criteria. Because the scheme results in a "massive curtailment of liberty," the statute is strictly construed. In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

Courts have upheld the continuing scheme because at least once per year the state must establish the person still meets commitment criteria. RCW 71.09.070; WAC 388-880-031; State v. McCuistion, 174 Wn.2d 369, 385, 275 P.3d 1092 (2012), cert. denied, 133 S. Ct. 1460 (2013); In re Detention of Moore, 167 Wn.2d 113, 125 n.3, 216 P.3d 1015 (2009); In re Detention of Ambers, 160 Wn.2d 543, 548, 158 P.3d 1144 (2007); In re Detention of Cherry, 166 Wn. App. 70, 75, 271 P.3d 259 (2011); In re Detention of Mitchell, 160 Wn. App. 669, 677, 249 P.3d 662 (2011). The annual review process serves to identify those detainees who are no longer mentally ill and dangerous, and who may be released unconditionally or to a less restrictive alternative. McCuistion, 174 Wn.2d at 388-89.

The state's argument begins with the unstated assumption that a person can voluntarily choose to remain at the SCC even when the state's annual report concludes the person does not meet commitment criteria. When this flawed foundation is exposed, the state's argument topples.

The sole authority for voluntary commitment is in RCW 71.09.080(7). Normally, when a "petition is dismissed, or a trier of fact determines that [the] person does not meet civil commitment criteria," the person must be released within 24 hours. RCW 71.09.080(7). A narrow exception allows a later release "by agreement of the person who is the subject of the petition." Id. In other words, when the state cannot prove the person meets commitment criteria, the statute allows a person to voluntarily remain at the SCC for a short time so the person can make arrangements for another place to stay.

Nothing in the statute envisions a four-year period of voluntary commitment like the state proposes here. No other language in Chapter 71.09 allows the state or a committed person to agree to ongoing commitment beyond an annual review that concludes the person does not meet commitment criteria.

The legislature knows how to write laws authorizing voluntary commitments for mental health reasons.[5] Its use of different language to construct its different 71.09 scheme shows a different legislative intent. "[I]t is an 'elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.'" State v. Jackson, 137 Wn.2d 712, 724, 976 P.2d 1229 (1999) (quoting United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). In addition, by expressing a limited exception in .080(7), the legislature excluded others. In re Detention of Martin, 163 Wn.2d 501, 510, 182 P.3d 951 (2008) (applying the settled rule of construction, "expressio unius est exclusio alterius).

In short, the state has cited no authority in the trial court or this Court that would permit the parties to stipulate to a person's continued commitment at the SCC without the state's ongoing obligation to show the person continues to meet commitment criteria. The SCC is not a

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[5] See e.g., RCW 71.05.050 (authorizing voluntary inpatient treatment); RCW 71.05.210 (authorizing referral "for further care on a voluntary basis"); RCW 71.05.260(1)(d) (allowing continued intensive treatment on voluntary basis); RCW 71.05.380 (affording voluntarily detained persons the same statutory rights as involuntarily detained persons); RCW 71.12.560 (allowing voluntary patients in private institutions).

voluntary hotel with three squares a day; its rooms and board instead are intended for people the state proves belong there.[6]

b. Annual Review Cannot be Waived

Another flawed assumption undermines the state's argument. The state broadly asserts Brock could waive his right to petition for release under "71.09.090." BOA at 24. While this may be true under subsection .090(2), it is not true under subsection .090(1).

To explain, subsection .090 provides two paths leading to a petition for release. The first path under .090(1) is simple. "If the secretary determines that the person's condition has so changed" that the person no longer meets the criteria for continued commitment, "the secretary shall authorize" a petition to the court for unconditional discharge. "The petition shall be filed with the court" and served on the relevant prosecuting agency. RCW 71.09.090(1) (emphasis added). "Upon receipt of the petition" the court "shall within forty-five days order a hearing." RCW 71.09.090(1).

This hearing, i.e. a trial, is not discretionary. As a general rule, the word "shall" in a statute imposes a mandatory duty. Goldmark v.

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[6] As the state often complains to the media, taxpayers pay significant amounts to run the state's 71.09 scheme. See e.g., CP 69-89.

McKenna, 172 Wn.2d 568, 259 P.3d 1095 (2011). It is no surprise that the Supreme Court summarized subsection (1) like this:

> If, in the course of its annual review, DSHS finds that the individual's condition has changed such that he no longer meets the definition of a SVP or conditional release to a less restrictive alternative would be appropriate, DSHS must authorize the individual to petition for unconditional discharge or conditional release to a less restrictive alternative. RCW 71.09.090 1). The court must order an evidentiary hearing upon receipt of the petition. Id.

McCuistion, 174 Wn.2d at 379 (emphasis added).

The second path to petition for release, under .090(2), is more difficult for the committed person. When the secretary's annual report concludes the person still meets commitment criteria, the person may nonetheless petition the court to determine whether a trial is warranted. But a trial need not occur unless (i) the report fails to present a prima facie case, or (ii) the person clears the hurdle of a show cause hearing by showing "probable cause" that "the person's condition has so changed that he or she no longer meets the definition of a sexually violent predator[.]" RCW 71.09.090(2)(a), (c).[7]

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[7] McCuistion, 174 Wn.2d at 380 ("The court must order an evidentiary hearing if the State fails to meet its burden or, alternatively, the individual establishes probable cause to believe his 'condition has so changed' that he no longer meets the definition of a SVP or that conditional release to a less restrictive alternative would be appropriate.") (citing, inter alia, RCW 71.09.090(2)(a)).

The right to petition under .090(2) may be affirmatively waived, as may the show cause hearing. But no similar language in .090(1) allows the petition to be waived when the secretary's annual report concludes the person no longer meets commitment criteria. Again, the different language shows a different legislative intent. In short, where the annual report does not justify continued commitment, the Legislature requires a trial on the petition.

The statute is as simple as it looks. When the annual report meets the state's burden of production to justify continued commitment, the burden then shifts to the defense to show "probable cause" to justify a trial. But when the annual report does not meet the state's burden, a trial is required.

Stated another way, subsection .090(1) grants the secretary authority to determine whether a committed person has so changed that he no longer meets the definition of a sexually violent predator, and provides no procedure for judicial inquiry into that determination. In contrast, subsection .090(2) grants show cause authority to the trial court and sets out a specific procedure the court must follow to make that determination.

The simplicity is not surprising, because the state bears the burden to justify continued commitment when it confines a person

involuntarily. Our constitution demands this.[8] The constitution is not just persuasive policy, it is the supreme law of the land.

c. A Person Need not Show A Physiological or Treatment-Based Change When the State's Annual Review Concludes the Person No Longer Meets Commitment Criteria.

The state's argument also incorrectly assumes that no trial may ever be held absent evidence of a physiological or treatment-based change. BOA at 20-22. This claim overlooks the legislature's use of the term "probable cause" and how that term operates in the context of 71.09.090(1), (2), and (4).

As discussed in McCuistion, the 2005 amendments to subsection 090(4)(b) limit the type of "change" that can justify a new trial under subsection .090(2). The two general categories are: (1) a physiological change that permanently renders the person unable to commit a sexually violent act, or (2) a change brought about through positive response to continuing participation in treatment. The statute further states that a change in a single demographic factor, such as age, "does not establish probable cause for a new trial under subsection (3) of this section." RCW 71.09.090(4)(c).

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[8] See argument 1.d., infra.

The state's brief concludes with the claim that the 2005 amendments preclude a new trial even when the state's own annual report concludes the person does not meet commitment criteria. BOA at 19-22. The state is wrong. Its argument misreads when and how the statute allocates the burden of production to show "probable cause" that a person has changed.

As discussed supra, subsection .090(1) provides that a petition for a new trial "shall be filed" and the court "shall . . . order a hearing" if the secretary determines that the person's condition has so changed that the person no longer meets commitment criteria. RCW 71.09.090(1)(a). Section .090(1) does not include the term "probable cause," nor does it require the defense to show "probable cause." This makes sense; when the state's annual report does not meet the state's burden of production to justify the continued commitment, the defense need not show "probable cause" to rebut the state's showing.

Subsection .090(2) applies to the different situation where the state meets its burden of production, i.e. the annual report concludes the person continues to meet commitment criteria. After the state has met that initial burden, subsection .090(2) requires the court "to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed that" he no longer

meets commitment criteria or conditional release is appropriate. RCW 71.09.090(2)(a) (emphasis added).

Subsection .090(4)(a) begins with the words "[p]robable cause" and tells us when those words apply. "Probable cause exists to believe that a person's condition has 'so changed' under subsection (2) of this section" only when evidence exists "of a substantial change in the person's physical or mental condition such that the person no longer" meets commitment criteria. (Emphasis added). Subsection .090(4)(b) and (c) therefore do not limit the type of change until after the state clears the initial hurdle with its own showing that the person continues to meet commitment criteria. Subsection (4)(a) does not limit the type of change that may justify a new hearing when the state's own annual report concludes the person no longer meets commitment criteria.

As stated above the statute does not require or allow the court to make a determination of probable cause where the secretary has authorized the petition. Subsection .090(4) only applies to petitions under .090(2), filed without the secretary's authorization. If .090(4) were interpreted to apply to petitions authorized by the secretary, .090(1) would be rendered meaningless; there would be no distinction between unauthorized .090(2) petitions and authorized .090(1)

petitions. Furthermore, if the legislature had intended the court to inquire into the determination made by the secretary it would have set out a show cause procedure for the court to follow, similar to that laid out in .090(2). Again, the different language shows a different legislative intent.

The legislative findings show that the 2005 amendments to .090(4) were intended to address petitions made by committed persons without the secretary's authorization, e.g. the Young[9] and Ward[10] decisions. Those decisions dealt with .090(2) petitions, not authorized petitions under .090(1). The legislature meant to stem the tide of trials hearings resulting from reports by defense experts, not from the state's own annual reviews.

There is no question the statute envisions that change may be shown solely through the annual report. Subsection .070 requires DSHS to conduct an annual review of a committed person's status. The annual report must consider whether the person currently meets the definition of a sexually violent predator. Subsection .070 does not direct DSHS to limit its examination to specific factors or certain types

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[9] In re Young, 120 Wn. App. 753, 86 P.3d 810 (2004).

[10] In re Ward, 125 Wn. App. 381, 104 P.3d 747 (2005).

of change, but rather to render an opinion on the broader question of whether the person continues to meet commitment criteria. The annual report is then considered internally by Senior Clinical at the SCC and by the superintendent of the SCC and forms the basis for the secretary's determination to authorize a petition for a new trial. This is what occurred in Brock's case.

In other words, when the DSHS annual review determines a person's status has changed such that he no longer meets criteria, then .090(1) grants the secretary the power to authorize a petition for a new trial. If the annual review does not show the person's status has changed and that he thus continues to meet criteria, .090(2) allows the person to establish "probable cause" that he has "so changed," as defined under .090(4). The state, at the show cause hearing under .090(2), may rely exclusively on the annual report prepared by DSHS under .070.

The legislature clearly anticipated that a committed person would be entitled to a new trial where the annual report did not provide the state with a prima facie case. Subsection .090(1) was enacted for this exact eventuality, and was unmodified by the 2005 amendments.

The state's proposed statutory interpretation also would defy logic. The state contends Brock must seek change through treatment

from a treatment facility that opined he no longer has a mental abnormality. According to the state's report he does not need the treatment the state allegedly may provide, but he still may not petition for release until he shows a change through positive response to a continuing course of treatment.[11] Courts should construe statutes to avoid such absurd results. Lowy v. PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012).

Nonetheless, the state claims that subsection .090(4)(b) broadly states that a new trial under subsection (3) may not be ordered if the only change in factual circumstances is a change in a single demographic factor, such as age. BOA at 21-23. This is at best a strained reading and it creates substantial problems. As discussed supra it overlooks the difference between petitions filed under .090(1) and .090(2), as well as decades of state and federal law requiring the state to justify continued involuntary commitment.

At most, the statute may be internally ambiguous on this point. But where chapter 71.09 must be strictly construed, ambiguity does not aid the state's claim. Hawkins, 169 Wn.2d at 801 (71.09 is strictly

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[11] "That's some catch, that Catch-22." State v. Frederick, 100 Wn.2d 550, 558, 674 P.2d 136 (1983) (quoting J. Heller, Catch-22 45-46 (1961)), overruled on other grounds, Thompson v. State, Dept. of Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999).

construed); In re Detention of Ambers, 160 Wn.2d 543, 552-53, 158 P.3d 1144 (2007) (statutory ambiguity construed against the state). Courts also will construe statutes to avoid serious constitutional doubts. State v. Strong, 167 Wn. App. 206, 212, 272 P.3d 281 (2012).

The state's brief therefore fails to recognize the state's initial burden of production, and fails to discuss how and when "probable cause" must be shown by the defense. Under the state's view, an aging person would never have a new trial even when the state's own expert concludes the person no longer meets criteria. While the state may find this a sound "policy," the legislature does not. Nor do our state and federal constitutions.

In short, to adopt the state's position, this Court must conclude: (1) the state may continue to involuntarily confine a person when the state's own annual report concludes the person does not meet commitment criteria, and (2) the person has no right to a trial unless he shows probable cause of the narrow type of physiological or treatment-based change discussed set forth in the 2005 amendments to .090(4)(b). Not surprisingly, the state cites no authority for its position.

The badly-fractured McCuistion court did not adopt the state's view. Instead, the state's annual report in McCuistion met the state's prima facie burden of production. McCuistion, at 174 Wn.2d at 375, 386 ("Because the State concluded from its annual review that McCuistion continued to meet this definition, we hold that the trial court's order denying Mr. McCuistion's request for an evidentiary hearing comported with substantive due process requirements"). Even so, the court barely upheld the .090(4)(b) amendments.[12] The state now advocates a view of the statute far beyond that upheld by the McCuistion majority.

d. The Constitution Also Requires the State to Justify Continued Involuntary Commitment.

Brock's liberty has been substantially deprived via the 71.09 commitment. Nonetheless, as the trial court properly recognized, he retains the right to due process of law. CP 29; U.S. Const. amend. 14; Const. art. 1, § 3; Foucha v. Louisiana, 504 U.S. 71, 77–78, 112

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[12] McCuistion was initially a 5-4 decision that struck the 2005 amendments as violating substantive due process. After a motion to reconsider, withdrawal of the opinion, and reargument, the five-member majority favored the state, with three justices dissenting. The newest member of the court would have declined to reach the constitutional issues, reasoning that McCuistion lacked standing, since he had shown no change even under the pre-2005 amendments. McCuistion, at 398-99 (Wiggins, J, concurring and dissenting in part).

S.Ct. 1780, 118 L.Ed.2d 437 (1992); In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002); In re Detention of Anderson, 134 Wn. App. 309, 319, 139 P.3d 396 (2006). Ongoing confinement is unconstitutional for an individual who is no longer both mentally ill and dangerous. Kansas v. Hendricks, 521 U.S. 346, 358, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); Foucha, 504 U.S. at 77.

The trial court properly recognized that the state may continue to commit a person under RCW 71.09 only where the person currently has a mental abnormality and is currently dangerous. CP 29-30 (citing, inter alia, Foucha). The court properly concluded that Chapter 71.09 requires annual reviews to determine whether a person in Brock's position continues to meet commitment criteria. CP 31 (citing RCW 71.09.070 and In re Detention of Young, 122 Wn.2d 1, 39, 857 P.2d 989 (1993)). The court properly ruled that "litigants cannot stipulate to the power of courts to decide matters of law." CP 31 (citing Gallagher v. Sidhu, 126 Wn. App. 913, 920 & n.29, 109 P.3d 840 (2005)).

The court determined that the main problem with paragraph 6 of the agreement was that it rendered null the statutorily and constitutionally required annual review process. In so doing, the agreement attempted to usurp the court's authority and duty to ensure

that Brock's commitment could only continue if the state showed he was currently mentally ill and dangerous. CP 31-32. The trial court reached the correct constitutional conclusion.

2. THE COURT PROPERLY VACATED THE INVALID STIPULATION.

As shown above, no authority allowed these parties to continue Brock's commitment where the state could not meet its prima facie burden to show he continued to meet commitment criteria. The trial court properly recognized the above principles and declined to skate further out on thin statutory and constitutional ice. The court did not err when it struck a statutorily and constitutionally indefensible stipulation.

a. The Stipulation Is Properly Vacated as Ultra Vires.

The practical effect of the stipulation was to allow the Snohomish County prosecutor to bind the DSHS, the SCC, and the Washington Office of Public Defense (OPD)[13] to pay for Brock's continued commitment even though the state could not establish he

[13] The obligation to pay for indigent defense services was recently transferred from DSHS to OPD. RCW 2.70.900, enacted by Laws of 2012, ch. 257, § 3.

continued to meet commitment criteria. Because the prosecutor lacked this authority, the stipulation should be vacated as ultra vires.

> An administrative agency created by statute has only those powers expressly granted or necessarily implied by that statute. Properties Four, Inc. v. State, 125 Wn. App. 108, 105 P.3d 416 (2005); Barendregt v. Walla Walla Sch. Dist. No. 140, 26 Wn. App. 246, 249, 611 P.2d 1385 (1980). This is especially true "where the public treasury will be directly affected." State ex rel. Bain v. Clallam County Bd. of County Comm'rs, 77 Wn.2d 542, 548, 463 P.2d 617 (1970) (citing State ex rel. Thurston County v. Dept. of Labor & Indus., 167 Wash. 629, 9 P.2d 1085 (1932)). The doctrine applies to governmental action to "protect the citizens and taxpayers ... from unjust, ill-considered, or extortionate contracts, or those showing favoritism." Noel v. Cole, 98 Wn.2d 375, 378, 655 P.2d 245 (1982). If a state agent lacks legal authority, "no void act of theirs can be cured by aid of the doctrine of estoppel." Barendregt, 26 Wn. App. at 250, 611 P.2d 1385.

Paopao v. State, Dept. of Social and Health Services, 145 Wn. App. 40, 185 P.3d 640 (2008); see also, Chemical Bank v. Wash. Public Power Supply Sys., 102 Wash.2d 874, 910-11, 691 P.2d 524 (1984) (Chemical Bank II) (government agreements outside statutory authority are ultra vires); Noel v. Cole, 98 Wn.2d 375, 379-81, 655 P.2d 245 (1982) (same), superseded by statute on other grounds as stated in Dioxin Ctr. v. Pollution Bd., 131 Wn.2d 345, 360, 932 P.2d 158 (1997).

As shown above, when an annual review does not meet the state's burden to show a prima facie case that the person continues to meet commitment criteria, a petition for a new trial must be filed. Continued voluntary commitment is not statutorily allowed, nor is it allowed by agreement. The state lacks the authority to contractually avoid its annual review obligations, or to render any annual review a nullity.

Courts have reached the same conclusion in similar contexts. For example, the state and defense cannot expand a trial court's sentencing authority by agreement. State v. Barber, 170 Wn.2d 854, 872-74, 248 P.3d 494 (2011). Nor is a Washington court bound by a party's erroneous agreement on questions of law. See e.g., In re Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (appellate court not bound by erroneous concession of legal error); State v. Knighten, 109 Wn.2d 896, 901–02, 748 P.2d 1118 (1988) (same).

The trial court relied on a corollary to this rule. CP 41. As this Court concluded in Gallagher v. Sidhu, 126 Wn. App. 913, 920 & n.29, 109 P.3d 840 (2005), parties cannot stipulate to limit a trial court's power to decide questions of law. In other words, parties may stipulate to a variety of matters, but courts still retain the power to

determine whether parties have the statutory authority to enter the stipulation. As shown here, neither party had the authority to bind DSHS, the SCC, and OPD to underwrite Brock's continued commitment absent the state's prima facie proof that he continued to meet commitment criteria.

The state largely relies on two cases that discuss limitations on when a trial court may invalidate agreements based on public policy: 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 91982), aff'd, 100 Wn.2d 221, 667 P.2d 1104 (1983). BOA at 15-19. Neither case is on point, because neither case involves a stipulation that exceeds the state's authority. The stipulation in Brock's case does not merely involve questions of "public policy."

b. The Stipulation Is Properly Vacated for Mutual Mistake.

The state properly concedes a stipulation may be vacated when it results from a mutual mistake. BOA at 12-13. "A party seeking to rescind an agreement on the basis of mutual mistake must show by clear, cogent and convincing evidence that the mistake was independently made by both parties." Paopao, 145 Wn. App. at 50 (quoting Chemical Bank v. Wash. Public Power Supply Sys., 102

Wash.2d 874, 898–99, 691 P.2d 524 (1984) (Chemical Bank II). "Mutual mistake occurs when the belief is not in accord with the facts." Paopao, at 50.

In Chemical Bank II the parties to a municipal bond issue believed the municipalities had statutory authority to enter various bond agreements. Because the parties were mutually mistaken, and the local governments lacked authority to enter into the contracts at issue, the Supreme Court ruled the agreements were void. Chemical Bank II, at 898-99.

As shown in argument 1, there is no authority for the parties to agree to Brock's continued commitment without the state's prima facie annual showing that he meets commitment criteria. The parties were both mistaken in their belief that the state had authority to enter into such an agreement. The trial court did not err in striking paragraph 6 of the stipulation.

3. THE STIPULATION WAS NOT A JUDGMENT.

The state contends the trial court's order set aside a "final judgment." BOA at 11-14. The state further contends a trial court cannot set aside judgments under CR 60(b)(11) "based on disagreements with their policy." BOA at 13. As shown supra, the

trial court's order was not based on a mere policy disagreement. In addition, the stipulation was not a final judgment.

Commitment under RCW 71.09 is ongoing. As shown supra, the state must annually prove the committed person is both mentally ill and dangerous Moore, 167 Wn.2d at 125 n.3; Ambers, 160 Wn.2d at 548; Cherry, 166 Wn. App. at 75; Mitchell, 160 Wn. App. at 677. "Final disposition does not occur until the [person] is unconditionally released." Cherry, 166 Wn. App. at 75 (citing Mitchell, at 677).

If the annual review provides probable cause to believe the person no longer meets criteria for continued commitment, the trial court must hold a trial. The ongoing nature of "civil" commitment under RCW 71.09 renders few orders "final."

The state's request for review resembles a trial court's denial of a party's motion for summary judgment. Such orders allow a trial – and are subject only to discretionary review.

Citing RAP 2.2(a)(10), the state asserts there is a right to appeal because the trial court's order cites CR 60(b)(11) as the procedural vehicle for striking paragraph 6 of the agreement to abandon trial. Response, at 5. The problem is that the agreement was not a "judgment," and Mitchell and Cherry show it was certainly

not final. It was, at best, an interlocutory order. Setting it aside did not vacate a judgment.

Another way to illustrate the state's error would be to put the shoe on the other foot. The state's argument depends on the assumption that the March 2010 agreement to abandon the trial was both "final" and a "judgment." Otherwise CR 60(b) would be irrelevant. But if Brock had tried to appeal from that allegedly final judgment, the state would argue it was not final and it was not a judgment that could be appealed. See e.g., In re Detention of Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999) The state cannot have it both ways.

D. CONCLUSION

The trial court properly struck the unlawful stipulation. This Court should remand to hold the trial that has been ordered. CP 46-47.

DATED this 23d day of October, 2013.

Respectfully Submitted,

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.
Snohomish Cty Self Fire
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.
10/23/13
Name Done in Seattle, WA Date