SUPREME COURT NO. 91052-9

No. 68664-0-I

IN THE SUPREME COURT OF WASHINGTON

In re Detention of Louis Brock,

STATE OF WASHINGTON,

Respondent,
v.

LOUIS BROCK,

Petitioner.

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

The Honorable Richard T. Okrent, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Louis Brock asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Brock seeks review of Division One's published decision in In re Detention of Brock, __ Wn. App. __, 333 P.3d 494 (2014), attached as appendix A. The court of appeals denied Brock's motion to reconsider by order dated October 21, 2014, attached as appendix B.

C. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

1. Where RCW 71.09 is an involuntary commitment scheme, did the trial court correctly conclude the parties could not agree to Louis Brock's continued voluntary commitment where the state's annual reports concluded he no longer met commitment criteria?

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

3. Does Division One's reading of RCW 71.09.090 conflict with constitutional principles and rules of statutory construction?

4. Although the issue is now moot, should this Court grant review of a published Court of Appeals decision that allows RCW

71.09 to become a voluntary, rather than involuntary, commitment scheme?

D. STATEMENT OF THE CASE[1]

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[2] for a

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[1] See also, Brock, 333 P.3d at 494-96.

[2] State's capitalization.

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.[3] 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.

In the statutorily required annual review[4] 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.[5]

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[3] 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.

[4] 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 BOR at 21-23.

[5] 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.

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 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.

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.

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. The state appealed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. NO AUTHORITY ALLOWS A PERSON TO AGREE TO VOLUNTARY COMMITMENT WHEN THE STATE DOES NOT SHOW 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. BOR at 7-23. Second, the stipulation was not a "judgment" and a trial court had the

power to set aside stipulations that exceed the state's statutory authority. BOR at 23-29.

Finally, the state asserted 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. The State's 71.09 Commitment Scheme Does Not Allow Voluntary Commitment by Stipulation.

Brock's first argument showed that RCW Chapter 71.09 is an involuntary commitment scheme. No statutory authority allows a person to agree to continued commitment when the state's proof shows the person no longer meets commitment criteria. BOR at 7-14. This is unlike Washington's other civil commitment scheme in RCW Chapter 71.05, in which the Legislature specifically authorized voluntary commitment. BOR at 10 (citing statutes and cases).

Brock's brief discussed the 71.09 scheme's statutory language in detail. Because the scheme results in a "massive curtailment of liberty," it is strictly construed. In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). The scheme has been upheld because at least once per year the state must establish the person still meets commitment criteria. BOR at 11-23 (citing, inter alia, 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)). 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.

As shown in Brock's brief, the state cited no authority 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 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

Brock's brief also showed why a person in Brock's position cannot waive the right to annual review or to petition for release under RCW 71.09.090(1). BOR at 11-14.

He explained that 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,

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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.

"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. McKenna, 172 Wn.2d 568, 259 P.3d 1095 (2011). It is no surprise that this 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]

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

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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)).

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. BOR at 21-23.[8]

c. The Court of Appeals Erred in Reaching its Contrary Conclusion.

The Court of Appeals rejected Brock's argument, noting that Brock did not waive the right to unconditional release based on a

[8] Brock's brief also showed why the state wrongly argued that Brock needed to show a physiological or treatment-based change even when the state's annual review concluded he no longer met commitment criteria. BOR at 14-21. The state claimed its burden to show a person continues to meet the commitment criteria does not arise until the person shows a physiological or treatment based change. This is nonsense. According to the state's expert's report, Brock does not need the treatment the state allegedly may provide. But the state claims he still may not petition for release until he shows a treatment-based change. As Brock's brief noted, "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). Courts construe statutes to avoid such absurd results. Lowy v. PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). The Court of Appeals did not address the state's or Brock's argument on this point.

favorable annual review. The opinion reasoned that Brock only waived the right "to a trial to determine whether or not the State can prove that he continues to meet" commitment criteria. Brock, 333 P.3d at 497 (emphasis added). The opinion concludes that because the outcome of a trial is "unknown," Brock had not waived his "release." Id.

In the context of RCW 71.09.090, however, the Court of Appeals created a distinction with no difference. The only statutory mechanism by which Brock may be released requires a trial. This is true whether the SCC agrees he should be released, or whether defense expert opinion provides the prima facie showing that Brock no longer meets criteria. RCW 71.09.090(3)(a)-(d).

The Court of Appeals was technically correct that two potential outcomes might follow a trial, and thus the outcome is "uncertain." But what remains certain is that waiving the trial results in continued confinement that is not supported by prima facie proof that Brock still meets the criteria for commitment.

In short, the published opinion holds that a person in Brock's position may voluntarily waive the only means by which the person may be released. This results in the certainty of continued voluntary commitment. The problem remains that no statute authorizes it.

In reaching its contrary conclusion, the Court of Appeals analogized to the waiver of rights that occurs when pleas are negotiated and entered in criminal cases. Brock, 333 P.3d at 497 ("criminal defendants can waive rights that exist for their benefit", citing, inter alia, State v. Peltier, __ Wn.2d __, 332 P.3d 457 (2014)). The plea analogy also fails, because trial courts cannot accept guilty pleas absent a factual basis. In Washington, we do not let people voluntarily stay in our prisons unless the state establishes a factual basis for the admission of guilt. CrR 4.2(d); In re Restraint of Keene, 95 Wn.2d 203, 206, 622 P.2d 360 (1980); State v. S.M., 100 Wn. App. 401, 414, 996 P.2d 1111 (2000).

The issue in Peltier did not involve the factual basis supporting Peltier's plea agreement. Instead, the state charged Peltier with serious offenses that were not barred by the statute of limitations. Following pretrial negotiations, Peltier and the state agreed to a stipulated trial on lesser offenses that would result in shorter sentences. Peltier, 332 P.3d at 458-59. The problem was that the statute of limitations had run as related to the lesser offenses. Years later, after Peltier challenged the trial court's authority to accept the stipulation and sentence him, this Court held this is not a jurisdictional problem. Instead, the superior court still had "authority to adjudicate

the type of controversy" and to sentence Peltier at the time of the stipulated agreement. Id., at 460-61. Peltier therefore could waive the protections provided by the statute of limitations. Id., at 461.

In short, the parties in Peltier stipulated to the factual basis for Peltier's conviction and confinement. The only legal question was whether Peltier could agree to resolve higher charges against him by agreeing to waive a statute of limitations defense to lesser charges.

The Peltier court's answer to that legal question has no bearing on the unrelated factual question presented in Brock's case. Here the state secured from Brock a waiver to the state's foundational factual obligation to justify Brock's continued involuntary commitment. This is more akin to accepting a guilty plea without establishing a factual basis. Without that factual basis, Brock's waiver of a trial rendered his continued commitment voluntary. This result is not authorized by statute, and therefore the parties could not contractually agree to it.[9]

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[9] BOR at 7-27; see also Brock, 333 P.3d at 496 "[A] contract that is in conflict with statutory requirements is illegal and unenforceable as a matter of law. Failor's Pharmacy v. Dep't of Soc. & Health Servs., 125 Wn.2d 488, 499, 886 P.2d 147 (1994) (citing Hederman v. George, 35 Wn. 2d 357, 362, 212 P.2d 841 (1949)); Hammack v. Hammack, 114 Wn. App. 805, 810–11, 60 P.3d 663 (2003)."

d. This Court Should Grant Review.

As noted previously, the RCW 71.09 scheme involves a "massive curtailment of liberty." The state continues to confine hundreds of people at the SCC, and the population continues to age. The proper scope of the 71.09 scheme, and whether it allows continued voluntary commitment, are significant constitutional questions of substantial public interest.

In response, the state may point out that the issue is moot in Brock's case, because the terms of the stipulation no longer prohibit him from seeking his release. But the published decision will be relied on by future litigants and courts, and will encourage the state's attorneys to offer illusory deals that dodge the state's constitutional and statutory burdens of production and proof. For all these reasons, this Court should grant review. RAP 13.4(b)(3), (4).

D. CONCLUSION

For the reasons stated herein, this Court should grant review. RAP 13.6.

DATED this 21st day of November, 2014.

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.

Seth Fine, Snohomish

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name 18487 Done in Seattle, WA 11/21/14 Date

333 P.3d 494
Court of Appeals of Washington,
Division 1.

In re DETENTION OF Louis W. BROCK,
Respondent.

No. 68664–0–I. | Sept. 2, 2014.

Synopsis
Background: Sex offender, who was designated a sexually violent predator (SVP), moved to strike stipulation in settlement agreement in which he agreed to waive his statutory and any constitutional right to seek, petition for or accept an unconditional release or removal of his designation as a SVP for a period of four years. The Snohomish Superior Court, Richard T. Okrent, J., found stipulation violated public policy by allowing continued confinement of offender when he no longer met the definition of a SVP. State appealed.

[Holding:] The Court of Appeals, Spearman, C.J., held that sex offender, who was designated a SVP, was free to enter into settlement agreement with State and waive his right to petition for unconditional release.

Reversed.

West Headnotes (5)

[1] **Mental Health**
⇦Discharge or continued commitment

So long as the waiver is shown to be knowing, intelligent and voluntary, a sexually violent predator (SVP) may agree to waive the right to petition for unconditional release. West's RCWA 71.09.090(1).

Cases that cite this headnote

[2] **Mental Health**
⇦Discharge or continued commitment

Sex offender, who was designated a sexually violent predator (SVP), was free to enter into settlement agreement with State and waive his right to petition for unconditional release for a period of four years. West's RCWA 71.09.090(1).

Cases that cite this headnote

[3] **Contracts**
⇦Freedom of contract

In general, parties may contract as they wish, and courts will enforce their agreements without passing on the substance.

Cases that cite this headnote

[4] **Contracts**
⇦Violation of Statute
Contracts
⇦Enforcement of contract in general

A contract that is in conflict with statutory requirements is illegal and unenforceable as a matter of law.

Cases that cite this headnote

[5] **Criminal Law**
⇦Waiver of Defenses and Objections
Sentencing and Punishment
⇦Plea bargain or other agreement

In the context of a plea agreement in a criminal case, generally a defendant can waive any right that exists for his or her benefit if he or she so chooses, but a plea agreement cannot bind a court to impose a sentence that is contrary to

APPENDIX A

law.

Cases that cite this headnote

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Opinion

SPEARMAN, C.J.

[1] ¶ 1 In this case we consider whether a sexually violent predator (SVP) under Chapter 71.09 RCW may waive his or her right to annually petition for unconditional release by written agreement with the State. We conclude that so long as the waiver is shown to be knowing, intelligent and voluntary, a SVP may agree to waive the right to petition for unconditional release. Accordingly, the agreement at issue in this case is lawful and enforceable. We reverse.

FACTS

¶ 2 In 1991 Louis Brock was committed to the Special Commitment Center (SCC) following a jury determination that he met the definition of a SVP[1] under chapter 71.09 RCW.[2] In November 2007, Brock filed a *495 motion for a new trial on whether he should be unconditionally released from the confinement. The trial court granted the motion on February 28, 2008. At Brock's new trial, which began in March 2010, the State offered testimony from Dr. Paul Spizman, an evaluator at the SCC. He testified that because Brock suffered from a mental abnormality and personality disorder which made him likely to engage in predatory acts of sexual violence, he met the definition of a SVP. After hearing Dr. Spizman's testimony and based on the advice of his attorneys, Brock concluded that it was unlikely he would win unconditional release at trial. He also decided a conditional release from confinement would more likely result from negotiating with the State than by a jury trial. Before the second day of testimony resumed, the parties notified the court they were attempting to settle the case. Later that same day, Brock and the State entered into a settlement agreement ("the Agreement").

¶ 3 The Agreement required Brock and the State to each use their "best efforts" to explore, develop, and craft an appropriate less restrictive placement alternative (LRA) that would be acceptable to the SCC. Clerk's Papers (CP) at 234. In exchange, Brock agreed that "he currently continues to meet the criteria for and the definition of a[SVP]." CP at 233. He also agreed to waive his "statutory and any constitutional right to seek, petition [for] or accept an unconditional release or removal of his designation as a[SVP] for a period of four (4) years from the date of [the] Order." CP at 234, ¶ 6 ("Paragraph Six"). This promise extended to any unconditional release that might be recommended by the SCC. Brock's counsel told the court that she had read the Agreement to Brock word for word with particular emphasis on Paragraph Six. She stated that Brock indicated he understood the agreement and "he specifically agreed to that provision [Paragraph Six] as well." Verbatim Report of Proceedings (3/4/10) at 307. The court questioned Brock about his understanding of the Agreement and whether he was entering into it knowingly, intelligently and voluntarily. Brock answered "Yes." to both questions.[3] VRP (3/4/10) at 310–11. The court approved the Agreement as in the interest of justice. The parties filed the Agreement, signed by Brock, counsel for both sides, and the court. The jury was dismissed and the trial ended.

¶ 4 Seven months later, Dr. Spizman conducted an annual review of Brock, as required by statute. Based on this evaluation, Dr. Spizman "ha[d] significant uncertainty whether [Brock continued to have] a mental abnormality." CP at 147. He thus concluded Brock no longer met the criteria for continued involuntary commitment. Brock did not petition for unconditional release at that time.

¶ 5 A year later, after the October 2011 annual review, Dr. Spizman was again "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." CP at 191. He also questioned the degree of risk Brock posed if he was released from confinement, opining "I cannot state [Brock] continues to be more likely than not to reoffend sexually if released unconditionally from confinement." *Id.*

¶ 6 On November 10, 2011, less than two years after signing the Agreement, Brock filed a memorandum, citing Dr. Spizman's report, in support of his request for a trial on whether he should be unconditionally released. The State objected to the request. It argued that,

regardless of Dr. Spizman's opinion, the Agreement precluded Brock from seeking unconditional release until 2014.

¶ 7 In March 2012, Brock filed a motion to strike, withdraw or otherwise not enforce the stipulation, contending the agreement was unenforceable because it usurped the authority of the court and because the agreement was unconscionable. The State opposed the *496 motion. It contended that because Brock was seeking relief from a judgment or order, the motion was properly analyzed under CR 60. The State pointed out that Brock had not shown that any of the bases listed in CR 60(b)(1)-(10) applied. Accordingly, it argued, the motion should be denied. In reply, Brock clarified that his request for relief was not based on CR 60(b).

¶ 8 The court granted Brock's motion and entered an order striking Paragraph Six of the Agreement.[4] The court concluded Brock was entitled to relief because Paragraph Six violated "public policy by allowing continued confinement of Mr. Brock when he no longer meets the definition of a SVP." CP at 42. The court further found that "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." CP at 42. Although Brock expressly denied that he sought to vacate the Agreement under CR 60(b), the court also granted relief under CR 60(b)(11) concluding that under the circumstances, Brock's continued confinement without a right to seek unconditional release was an extraordinary circumstance justifying relief.[5] The judge rejected Brock's claim that the Agreement was unconscionable and reserved ruling on the issue of whether the Agreement failed for lack of consideration.[6]

¶ 9 The State appeals.

DISCUSSION

[2] ¶ 10 Brock first contends that the Agreement is illegal because, in light of the results of his most recent annual reviews, it subjects him to confinement without requiring the State to show that he meets the necessary statutory and constitutional commitment criteria, i.e., that he is currently both mentally ill and dangerous. He also contends the Agreement is unlawful because it assumes a person may volunteer for continued commitment when the State fails to justify involuntary commitment, which he argues is contrary to the SVP statute. Thus, he contends the Agreement is void and unenforceable. We disagree.

[3] [4] [5] ¶ 11 In general, parties may contract as they wish, and courts will enforce their agreements without passing on the substance. *Redford v. Seattle,* 94 Wash.2d 198, 206, 615 P.2d 1285 (1980). But a contract that is in conflict with statutory requirements is illegal and unenforceable as a matter of law. *Failor's Pharmacy v. Dep't of Soc. & Health Servs.,* 125 Wash.2d 488, 499, 886 P.2d 147 (1994) (citing *Hederman v. George,* 35 Wash.2d 357, 362, 212 P.2d 841 (1949)); *Hammack v. Hammack,* 114 Wash.App. 805, 810–11, 60 P.3d 663 (2003). In the context of a plea agreement in a criminal case, generally a defendant can waive any right that exists for his or her benefit if he or she so chooses. *State v. Peltier,* No. 89502–3, —— Wash.2d ——, 332 P.3d 457, 2014 WL 4108675 (August 21, 2014). But a plea agreement cannot bind a court to impose a sentence that is contrary to law. *State v. Barber,* 170 Wash.2d 854, 870, 248 P.3d 494 (2011).

¶ 12 Brock argues that the Agreement is void as a matter of law because it attempts to bind the court to detain him under circumstances that are contrary to statutory and constitutional law. But Brock misconstrues the Agreement and its effect on his detention. Even absent the Agreement, Brock is not entitled to unconditional release based on the results of his 2011 annual review.[7] Under *497 RCW 71.09.090(1), he is only entitled to a trial to determine whether or not the State can prove that he continues to meet the definition of a SVP. Obviously, the outcome of such a proceeding is unknown. Thus, what Brock has waived in his Agreement is not his release from confinement, but rather his right to petition for a trial on the issue. The issue before us is whether a SVP may knowingly, intelligently and voluntarily waive the right to petition for such a trial or whether such an agreement is, as Brock contends, contrary to law.

¶ 13 In *Peltier,* our Supreme Court noted that generally criminal defendants can waive rights that exist for their benefit. We see no reason why the same general rule should not apply in this context. A SVP, like a criminal defendant, may determine for any number of reasons that it is to his or her benefit to waive the right to a trial. And if it appears advantageous to waive the right to a trial, he or she should be able to do so. We are not persuaded that we should constrain a person's ability to make such a decision regarding the conduct of their own case.

¶ 14 Nor are we persuaded that permitting a SVP to make such a choice is contrary to the SVP statute. RCW 71.09.090(1) provides:

> 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.

According to this subsection, the Department of Social and Health Services (DSHS) must authorize a SVP to file a petition, if the annual review concludes the committed person no longer meets the definition of a SVP. Brock urges us to find that because the authorization by DSHS to file a petition is mandatory under these circumstances, so too is the filing of the petition for unconditional release. But, in the absence of any ambiguity on this point, there is no occasion for us to interpret or read into the statute words that are not there. *C.J.C. v. Corp. of Catholic Bishop of Yakima,* 138 Wash.2d 699, 708, 985 P.2d 262 (1999). Here, under the plain language of the statute, the filing of the petition is not mandatory. Nor does the statute place the discretion whether to file a petition in DSHS. Rather, the choice appears to lie with the SVP. We discern no inconsistency with the statute in permitting a committed person to waive the right to petition for a trial if he or she so chooses.

¶ 15 Brock points out that under RCW 71.09.090(2)(a), if the annual review concludes the person still meets the commitment criteria, DSHS "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 [DSHS's] objection. The notice shall contain a waiver of rights," in the event the SVP chooses not to exercise this right. Based on this provision, he argues, and the trial court so concluded, that a waiver of the right to petition for unconditional release in excess of one year, i.e., concurrent with the annual review, violated public policy and was contrary to law. We disagree that the provisions for notice of the right to petition and waiver of that right in subsection (2)(a) are applicable to subsection (1).

¶ 16 Subsection (2)(a) specifically addresses notice of and waiver of the right to file a petition *over DSHS's objection.* Notice of the right to file a petition under this circumstance is necessary because otherwise a committed person might reasonably believe that ***498** an unfavorable annual review precluded a petition for any type of release even though it does not. The subsection also recognizes that because the likelihood of release in light of an unfavorable review is substantially less, a committed person may decide to waive filing a petition. Neither of these circumstances are present in a case such as this which arises under subsection (1). That subsection makes no mention of notice of the right to file a petition or of waiver because the favorable annual review and the mandatory authorization to file a petition is sufficient notice. And the question of whether to file a petition in light of a favorable annual review is not one of waiver, but one of choice that lies with the committed person.

¶ 17 We conclude the trial court erred in vacating Paragraph Six of the Agreement between Brock and the State.[8]

¶ 18 *Reverse.*

WE CONCUR: LAU and BECKER, JJ.

Footnotes

1 "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(18).

2 For a brief summary of Brock's criminal history, *see Taggart v. State,* 118 Wash.2d 195, 199–201, 822 P.2d 243 (1992).

3 The court stated, "[SCC] might submit a report saying that they don't believe that you're a sexually violent predator within those four years, and that you should be released unconditionally, that you by this paragraph, if that happened, are agreeing that you would not seek an unconditional release or attempt to have you designated as not being a sexually violent predator. Do you understand that?" Brock answered, "Yes, I do." VRP (3/4/10) at 311–12.

4 Because the judge who presided over the aborted trial had retired, the motion was heard by a different judge.

5 Both parties agree, albeit for different reasons, that the trial court improperly granted Brock relief under CR 60(b). The State contends that the Agreement is a stipulated judgment to which CR 60(b) applies and relief should have been denied because the necessary showing under the rule (i.e. fraud or mutual mistake) was not made. Brock contends that the rule is inapplicable because the Agreement was not a final judgment. In light of our disposition of this case, we need not resolve this dispute.

6 Because neither party briefs these two issues on appeal, we do not address them.

7 We also reject Brock's contention that the Agreement converts his detention from involuntary to voluntary. The basis for Brock's current detention is not the Agreement, but instead, the jury finding in 1991 that he met the criteria for commitment as a SVP beyond a reasonable doubt. That judgment has never been set aside and remains in effect unless and until it is determined otherwise in a new proceeding.

8 Brock also argues that the Agreement is unlawful as *ultra vires,* because through it, the Snohomish County prosecutor has bound "DSHS, the SCC and the Washington Office of Public Defense (OPD) to pay for Brock's continued commitment even though the [S]tate could not establish he continued to meet commitment criteria." Brief of Respondent at 23–24. We disagree. As discussed above, because the basis for Brock's detention is the 1991 jury verdict, each of the noted agencies remain statutorily obliged to fund Brock's commitment.

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

IN RE DETENTION OF STATE OF WASHINGTON, Appellant, LOUIS W. BROCK, Respondent.	))))))))	No. 68664-0-I ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

A motion for reconsideration was filed by respondent Louis Brock and the court called for an answer. The State filed an answer to the motion for reconsideration.

A majority of the panel has determined this motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 21st day of October 2014.

FOR THE COURT:

Spearman, C.J.

Presiding Judge

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APPENDIX B