SUPREME COURT NO. _____

NO. 75364-9-I

IN THE SUPREME COURT OF THE STATE 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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A. IDENTITY OF PETITIONER

Louis Brock asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Brock requests review of the published decision in In re the Matter of the Detention of Brock, Court of Appeals No. 75364-9-I (slip op. filed Feb. 26, 2018), attached as an appendix.[1]

C. ISSUE FOR REVIEW

Where the annual DSHS[2] evaluation does not support continued civil commitment under chapter 71.09 RCW, does the statute bar the State from relying on an outside expert's evaluation to meet its prima facie burden that a person meets the commitment criteria?

D. STATEMENT OF THE CASE

Petitioner Louis Brock was committed to the Special Commitment Center (SCC) in 1991, under chapter 71.09 RCW, as a "Sexually Violent Predator" (SVP). In re the Detention of Brock, 183 Wn. App. 319, 320-23, 333 P.3d 494, 494-96 (2014), review denied, 182 Wn.2d 1017, 345 P.3d 784 (2015). In May 2015, Brock was granted a trial on whether he should be released to a "Less Restrictive Alternative" (LRA) living

[1] Brock's case is linked with In re the Matter of the Detention of Nelson, Court of Appeals No. 75138-7-I.
[2] "DSHS" refers to "Department of Social and Health Services."

arrangement. RP[3] 24-25. In preparation for trial, the State retained the services of Dr. Henry Richards, Ph.D, to prepare and submit an evaluation of Brock, which includes the results of both polygraph and plethysmograph testing Brock was order to submit to. CP 81-113, 149-50. Dr. Richards' evaluation concludes Brock still meets the criteria for commitment at the SCC and that a LRA is not suitable. CP 111, 113.

In February 2016, DSHS filed its annual review report prepared by Dr. Kristen Carlson, Ph.D, a DSHS employee and Forensic Evaluator at the SCC. CP 114-48. The report concludes: "**At this time, in my professional opinion, I cannot say with any degree of psychological certainty that Mr. Brock is considered likely (more probably than not) to commit a sexually violent offense.**" CP 136 (emphasis in original).

In May 2016, Brock's counsel filed a response objecting to the State's reliance on the evaluation Dr. Richards prepared for the LRA trial to meet its burden at the annual review show cause hearing to show Brock still meets the commitment criteria. CP 47-53. Counsel argued the State should be precluded from relying on Dr. Richards' report, and instead

[3] "RP" refers to the single volume of verbatim report of proceedings referenced in this matter for the dates of May 29 & June 8, 2015, which was attached to Brock's motion for discretionary review as "Appendix B." A supplemental statement of arrangements has been filed designating that report of proceedings in this matter.

should have to proceed with the results of the SCC's own forensic evaluator, Dr. Carlson. Counsel noted that if the State is allowed to disregard the result of the SCC-generated evaluation and instead hire an outside evaluator for annual reviews, the constitutional safeguards the annual review process is meant to provide will be undercut such that the State could expert-shop until they found one to give them the result they want, instead of the ostensibly neutral and objective evaluation produced by the SCC evaluator. CP 50-52. Counsel argued that when the proper evaluation is considered - Dr. Carlson's - the State failed to meet its burden to prove Brock still meets the commitment criteria. CP 53. The State filed a reply disputing Brock's counsel's interpretation of the relevant statutes. CP 38-46.

A Show Cause hearing was held May 24, 2016, before the Honorable Richard T. Okrent. CP 4-34. The court held the State was unrestricted in what evidence it could present to satisfy its initial burden in the annual review process to make a prima facie showing Brock still meets the commitment criteria, including the report prepared by Dr. Richards in preparation for the LRA trial. CP 32-33. Brock sought discretionary review of this ruling, which was granted by the Court of Appeals, and a decision issued February 26, 2018 affirming the trial court. Appendix.

E. ARGUMENT

WHETHER THE PROSECUTING AGENCY MAY RELY ON OUTSIDE EXPERTS TO MEETS ITS BURDEN AT ANNUAL REVIEW HEARINGS RATHER THAN ON THE ANNUAL EVALUATION PRODUCED BY THE DEPARTMENT IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The annual review statute does not authorize the State to expert-shop for the opinion it needs to meet its prima facie burden of showing the committed person still meets the chapter 71.09 RCW commitment criteria. The trial court relied on Dr. Richards' evaluation in ruling the State established its prima facie case. Dr. Richards' evaluation, however, was unauthorized by statute and should have been excluded. The only evaluation authorized by statute was Dr. Carlson's evaluation. Dr. Carlson's evaluation did not establish a prima facie case for continued commitment. The trial court thus erred in not excluding Dr. Richards' evaluation and ruling the State met its burden of proof at the annual review stage. This Court should conclude that when strictly construed, the annual review statute precludes the State from expert shopping to meet its prima facie burden that the committed person meets the SVP definition.

Although the case is technically moot because Brock has been unconditionally released by agreement, the Court of Appeals reached the merits of the appeal because it presents a recurring issue of continuing and substantial public interest. Slip op. at 7. Brock agrees. He seeks review

in this Court under RAP 13.4(b)(4). A decision that potentially affects numerous proceedings in the lower courts warrants review as an issue of substantial public interest where review will avoid unnecessary litigation and confusion on a common issue. State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

a. At the annual review stage, the State must make a prima facie showing of current mental illness and dangerousness.

A showing of current mental abnormality and dangerousness is a due process requirement of indefinite civil detention. Kansas v. Hendricks, 521 U.S. 346, 357-58, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Due process requires the State to "conduct periodic review of the patient's suitability for release." State v. McCuistion, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012), cert. denied, 133 S. Ct. 1460, 185 L. Ed. 2d 368 (2013).

Persons committed under chapter 71.09 RCW thus have the right to an annual review of their continued confinement. RCW 71.09.070(1); RCW 71.09.090. An annual evaluation must include "consideration of whether . . . the committed person currently meets the definition of a sexually violent predator." RCW 71.09.070(2)(a). The SVP is defined as "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).

There are three statutory avenues to an unconditional release trial. The first is when the Department secretary authorizes such a trial under RCW 71.09.090(1). McCuistion, 174 Wn.2d at 379-80. If no such authorization is forthcoming, then the case proceeds to the show cause stage. Id. at 380. The court must hold a release trial if (1) the State fails to present prima facie evidence that "the committed person continues to meet the definition of a sexually violent predator" under RCW 71.09.090(2)(c)(i) or, alternatively, (2) probable cause exists to believe that the person's condition has so changed through treatment (or relevant physiological change), that he no longer meets the SVP definition under RCW 71.09.090(2)(c)(ii). Id.

b. The State is entitled to one report from a DSHS evaluator to meet its prima facie case at the annual review stage and the statute does not authorize the State to procure another evaluation to meet its burden.

To make its prima facie showing at the show cause hearing, "the state may rely exclusively upon the annual report prepared pursuant to RCW 71.09.070." RCW 71.09.090(2)(b). The Court of Appeals seized upon the word "may" in this provision to conclude the State is free to

procure another expert evaluation to make its prima facie case when the original annual review evaluation produced by the Department is not to the State's liking. Slip op. at 8-9. According to the Court of Appeals, Brock argued that "may" in this context means "shall." Slip op. at 8. That is inaccurate description of Brock's argument. Brock has always acknowledged that "may" has a permissive meaning. The dispute is over *what* the State is permitted to use beyond the written report filed by the Department. The permissive "may" does not mean "anything goes."

When RCW 71.09.090(2)(b) says "may rely exclusively upon the annual report prepared pursuant to RCW 71.09.070," it is referring to the written report. We know this because "the annual report prepared pursuant to RCW 71.09.070" is a written report as per the terms of RCW 71.09.070, which requires that report "be in the form of a declaration or certification" and filed with the court. RCW 71.09.070(5). With this frame of reference in mind, RCW 71.09.090(2)(b) means the State need not rely solely on the evaluator's written report to prove its prima facie case. The State can also present the evaluator's live testimony or deposition testimony in support of its prima facie case. That interpretation of the statute is reasonable and gives meaning to the word "may."

The provision does not mean the State may rely on more than one annual report, where the Department-produced report does not allow the

State to meet its burden of proof and a second is needed to give the State what it wants. To interpret the statute otherwise would be to condone expert-shopping and make a mockery of an annual review process that is supposed to be independent of bias and void of manipulation.

The Court of Appeals' interpretation is driven by its insistence that "[t]he annual review and the show cause hearing are separate and distinct procedures," and so RCW 71.09.070 "does not preclude the prosecuting agency from hiring another expert to contradict the annual report at the show cause hearing." Slip op. at 7. This approach conflicts with established rules of statutory construction.

The plain meaning of a statute is discerned from "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The annual review and show cause provisions are undeniably related. The annual review evaluation triggers proceedings under RCW 71.09.090. McCuistion, 174 Wn.2d at 379-80. The annual report is a central feature in show cause determinations. The Court of Appeals artificially separated RCW 71.09.070 and RCW 71.09.090 from one another, as if they operate in different universes.

Statutory provisions are not read in isolation divorced from context. Id. at 10-11. Statutes must be read as a whole and their provisions harmonized whenever possible. Tommy P. v. Board of County Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). The annual review and show cause provisions must therefore be read in relation to one another and harmonized. See In re Detention of Ambers, 160 Wn.2d 543, 552, 158 P.3d 1144 (2007) (referring to RCW 71.09.070 and RCW 71.09.090 collectively as the "annual review statute" and interpreting the provisions to avoid conflict). The general purpose of the legislation is to accurately distinguish between those who should remain committed without a trial from those who should not. The annual review evaluation prepared by the Department is a critical feature of the process. But under the Court of Appeals' interpretation, the Department evaluation can be discarded as meaningless, at least when it suits the State's purpose to treat it that way. When the State wants to rely on the Department evaluation, the evaluation matters and is used to block a release trial. When the State disagrees with the evaluation, the evaluation becomes superfluous, and another evaluation is obtained to block a release trial.

The statutory scheme envisions the production and filing of one report by one evaluator, not multiple reports by multiple evaluators. The use of definite articles and singular nouns when referring to the annual

review evaluator and evaluation shows this to be true. RCW 71.09.070(2)-(5); see Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 74-75, 316 P.3d 1119 (2014) (use of definition article signifies legislative intent to limit the object at issue to "one"); State v. Ose, 156 Wn.2d 140, 146, 124 P.3d 635 (2005) (the word "a" is "used only to precede singular nouns except when a plural modifier is interposed."). The statutory scheme limits the annual review evaluation to one produced by the Department.

The qualification requirements for the expert evaluator reinforce this argument. DSHS "is required to have the condition of each person detained under the act reviewed *by a qualified professional* at least annually and regularly report to the court whether each detainee still meets the statutory and constitutional criteria for civil commitment." In re Pers. Restraint of Meirhofer, 182 Wn.2d 632, 637, 343 P.3d 731 (2015) (citing RCW 71.09.070(1); WAC 388-880-031) (emphasis added). WAC 388-880-033 sets forth the requirements for a professionally qualified persons "employed by the department or under contract to provide evaluative services." According to the Court of Appeals, the State is free to choose its own expert, including a non-Department evaluator, to meet its burden because its method of proof is unlimited. But non-Department evaluators are not subject to the qualification requirements of the annual review

statute or any WAC provision. The evaluation requirements found in RCW 71.09.070 only apply to the Department evaluation. The qualification requirements of WAC 388-880-033 only apply to Department evaluators. Nothing in the statute or the WAC provisions addresses the requirements for evaluations performed by non-Department evaluators. The omission is a sign of legislative intent that only Department evaluators have authority to perform annual review evaluations.

Crucially, "statutes that involve a deprivation of liberty must be strictly construed." In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). "Strict construction requires that, 'given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.'" Id. (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)). When strictly construed, the statute requires the State to rely on the Department evaluation to prove its prima facie case, not a second evaluation that contradicts the first.

The legislature knows how to specify at what stage the State is entitled to more than one expert. Once it is determined that a person has the right to a trial, then the prosecuting agency has the right "to have the committed person evaluated by *experts chosen by the state*. The

prosecuting agency shall have a right to a current evaluation of the person by *experts* chosen by the state." RCW 71.09.090(3)(a) (emphasis added). There is no such comparable provision for the preceding show cause stage of the process, which addresses the procedures for determining whether the State has established a prima facie case or whether a person has changed through treatment and is thus entitled to a trial. It 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." United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wn.2d 355, 362, 687 P.2d 186 (1984). At the initial show cause stage, the State has no right to hire its own expert, nor is there a right to more than one expert.

c. The Court of Appeals' interpretation leads to the absurd consequence that the State will never fail to meet its prima facie burden, meaning a release trial based on the State's failure of proof will never occur despite being an available option in the statute.

Under the Court of Appeals' interpretation, there is no end to the number of experts the State could rely on to establish a prima facie case. Expert after expert could be brought in until one is finally found that opines the committed person currently meets the SVP definition. In interpreting statutes, "'we presume the legislature did not intend absurd results' and thus avoid them where possible." State v. Eaton, 168 Wn.2d

476, 480, 229 P.3d 704 (2010). Pursuant to RCW 71.09.090(2)(c)(i), the court must hold a release trial if the State fails to present prima facie evidence that "the committed person continues to meet the definition of a sexually violent predator." McCuistion, 174 Wn.2d at 380. The Court of Appeals' interpretation turns this statutory provision into a functional nullity. Under its interpretation, the State will *never* fail to meet its prima facie burden because it can always disregard any evaluation that does not satisfy its burden of proof and get another evaluation that will satisfy its burden. This mechanism for a release trial may as well not exist because it is never triggered. See State v. Franklin, 172 Wn.2d 831, 840, 263 P.3d 585 (2011) (condemning interpretation of statute that leads to absurd results when "carried to its logical extension").

The Court of Appeals brushed off this argument by proclaiming "[a] party's discretion to retain and rely on expert witnesses of its choosing is a regular component of civil and criminal proceedings." Slip op. at 10. The annual review scheme under chapter 71.09 RCW, however, is unique. The legislature provided for a specific means of obtaining a release trial: failure of prima facie proof. And it provided for a means to establish that proof. The Court of Appeals' interpretation renders this portion of the statute worthless.

d. The Court of Appeals' interpretation of the statute undermines legislative intent to provide timely annual review hearings.

Allowing the State to get another evaluation to prove its prima facie case frustrates the committed person's right to timely annual review. "A periodic and timely evaluation of the sexually violent person's mental health condition is critical to the constitutionality of the civil commitment scheme." In re Detention of Rushton, 190 Wn. App. 358, 371, 359 P.3d 935 (2015). Disregarding one annual review evaluation and substituting another leads to inevitable delay at the show cause stage. The Court of Appeals' interpretation of the statute, which it reads as authorizing substitute annual evaluations, creates untimely annual review. It is unreasonable to believe the legislature intended untimely review. This is another sign that the legislature intended only one annual evaluation to be used by the State at the show cause stage.

e. The doctrine of constitutional avoidance supports Brock's statutory interpretation argument.

The Court of Appeals opined "[a]llowing the prosecuting agency to present a different evaluation to make its prima facie case at the show cause hearing provided for in RCW 71.09.090(2) does not undermine the objectivity of the annual review process and is not inconsistent with substantive due process." Slip op. at 10. Brock disagrees.

Statutes are construed to avoid constitutional problems, if possible. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). The doctrine of constitutional avoidance supports Brock's interpretation that the annual review scheme authorizes only one Department evaluation at the show cause stage. The annual evaluation "is critical to the constitutionality of the civil commitment scheme." Rushton, 190 Wn. App. at 371. The annual review process satisfies due process because it can be relied on to "properly identify those who are no longer mentally ill and dangerous." McCuistion, 174 Wn.2d at 389. "Once an individual has been committed, he is entitled to a written annual review by a qualified professional *to ensure* that he continues to meet the criteria for confinement." Id. at 379 (emphasis added). For this proposition, McCuistion cites RCW 71.09.070, where the Department evaluation is described. Id. The annual evaluation produced by a Department evaluator is the first step by which proper identification is accomplished. When a Department evaluator concludes the person does not meet the commitment criteria, that is a red flag that the system has broken down and has ceased to reliably identify those who should be committed.

The State complained it had no control over the report produced by the Departments evaluator, Dr. Carlson. CP 38-46. That is the point. The evaluation process should be free from the prosecutor's influence to

protect its objectivity. The legislature intended the Department evaluation to serve as a check on commitment. The structure of the annual review scheme, in delegating responsibility for conducting the annual evaluation to a Department evaluator rather than one chosen by the prosecuting agency, reflects an attempt to insulate the evaluation from improper interference. The Department evaluation that is produced without the prosecutor's involvement can be relied on as an objective assessment untainted by prosecutorial pressure to arrive at a particular result. Allowing the prosecutor's office to obtain a second report whenever the initial evaluation does not allow the State to meet its prima facie case calls into question whether the annual review process properly identifies those who are no longer mentally ill and dangerous in a neutral manner free from distorting political influence.

Procedural due process is also implicated here. The United States Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). "[C]ivil incarceration that is noncompliant with the process due under the statute which authorizes civil incarceration affects a person's substantial rights, namely depriving basic

liberty without the process due." In re Detention of Martin, 163 Wn.2d 501, 511, 182 P.3d 951 (2008).

The statute creates a liberty interest in authorizing a release trial under certain conditions. One of those conditions is where the State fails to establish a prima facie case that the prisoner meets the SVP definition. "Once a state has granted a liberty interest by statute, 'due process protections are necessary to insure that the state-created right is not arbitrarily abrogated.'" State ex rel. T.B. v. CPC Fairfax Hosp., 129 Wn.2d 439, 453, 918 P.2d 497 (1996) (addressing a civilly committed child's statutory rights to demand release and to access counsel under chapter 71.34 RCW) (quoting Jones, 445 U.S. at 489) (internal quotation marks omitted). When courts allow the prosecution to disregard the initial evaluation in favor of another evaluation that contradicts the first, the state-created right to a release trial is arbitrarily nullified. In that circumstance, the release trial is blocked merely because the prosecution chooses to block it.

Following the Court of Appeals' interpretation, the annual process is rigged because the State will always satisfy its prima facie case through resort to another evaluator when the Department's annual evaluation does not establish a prima facie case. That due process problem is avoided by adopting Brock's interpretation of the statute. Courts "must construe

statutes so as to render them constitutional." State v. Roberts, 142 Wn.2d 471, 502, 14 P.3d 713 (2000).

F. CONCLUSION

For the reasons stated, Brock requests this Court grant review.

DATED this 28th day of March 2018.

Respectfully submitted,

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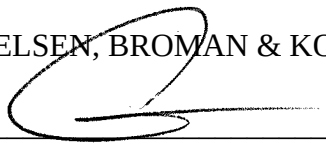

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of ZACHARY SHANE NELSON, Petitioner.	No. 75138-7-I DIVISION ONE
In the Matter of the Detention of LOUIS BROCK, Petitioner.	No. 75364-9-I PUBLISHED OPINION FILED: February 26, 2018

BECKER, J. — These linked appeals are before us on discretionary review to address a recurring issue in the procedure for determining whether a person committed as a sexually violent predator may have a trial for release. We hold that at a show cause hearing under RCW 71.09.090(2)(b), the prosecuting agency is free to rely on experts of its choosing rather than relying exclusively on annual evaluations prepared under RCW 71.09.070.

The issue involves two distinct sections of chapter 71.09 RCW. The first is the requirement for an annual evaluation. Each person committed as a sexually violent predator "shall have a current examination of his or her mental condition made by the department at least once every year." RCW 71.09.070(1).

The second is the procedure for a show cause hearing, which is set forth in RCW 71.09.090(2).

A committed person may petition the court once a year for conditional release to a less restrictive alternative or unconditional release. The court then sets a show cause hearing to determine whether probable cause exists for a trial on release. RCW 71.09.090(2)(a). The court performs "a critical gate-keeping function" at the show cause hearing; the court "must assume the truth of the evidence presented" but at the same time "must determine whether the asserted evidence, if believed, is *sufficient* to establish the proposition its proponent intends to prove." State v. McCuistion, 174 Wn.2d 369, 382, 275 P.3d 1092 (2012), cert. denied, 568 U.S. 1196 (2013).

At a show cause hearing, the prosecuting agency for the state "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." RCW 71.09.090(2)(b). If the state does not make this initial showing, the court "shall" set a release trial. RCW 71.09.090(2)(c).

If the state does make this initial showing, the committed person will still be allowed to have a release trial if 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.

RCW 71.09.090(2)(c)(ii); see In re Det. of Petersen, 145 Wn.2d 789, 798, 42 P.3d 952 (2002) (two statutory ways for a court to determine there is probable cause to proceed to an evidentiary hearing: "(1) by deficiency in the proof submitted by the State, or (2) by sufficiency of proof by the prisoner.") Proof that the prisoner has "so changed" must be shown by current evidence from a licensed professional of a physiological change or a treatment-induced change to the person's mental condition. RCW 71.09.090(4); McCuistion, 174 Wn.2d at 382.

Petitioners contend that the prosecuting agency's prima facie evidence required by RCW 71.09.090(2)(b) is limited to the annual evaluation. The objective of petitioners is to proceed to a trial. If the state fails to make its prima facie showing at the show cause hearing, the committed person will be granted a full trial even if there is no evidence that the person has "'so changed.'" McCuistion, 174 Wn.2d at 380 ("The court must order an evidentiary hearing if the State fails to meet its burden"); In re Det. of Marcum, 189 Wn.2d 1, 8, 403 P.3d 16 (2017). Thus, if the prosecuting agency's evidence at the show cause hearing were limited to an annual evaluation, and that evaluation did not meet the State's burden stated in RCW 71.09.090(2)(b), the matter would proceed to trial.

Nelson

Petitioner Zachary Nelson was committed as a sexually violent predator in 2011. Nelson's commitment was based on acts he committed as an adolescent.

Nelson's annual evaluation in 2015 was performed by Dr. Robert Saari, a psychologist employed as a forensic evaluator by the Department of Social and

Health Services. An annual evaluation must include "consideration of whether . . . the committed person currently meets the definition of a sexually violent predator." RCW 71.09.070(2)(a). According to Dr. Saari's report, he does not think Nelson currently meets the definition. He said that his opinion was based not on any clear change in Nelson's mental condition but on a fundamental disagreement with his initial commitment.

Dr. Saari's evaluation was sent to the King County Superior Court and the King County Prosecuting Attorney's Office as required by RCW 71.09.070(1). Citing Dr. Saari's acknowledged lack of expertise with adolescent sex offenders, the prosecutor's office contacted the department and requested a second evaluation. The department retained Dr. Christopher North to complete a second evaluation of Nelson. Dr. North has experience with juvenile sex offenders and had previously evaluated Nelson. According to Dr. North's evaluation, Nelson currently meets the definition of a sexually violent predator.

The court scheduled a show cause hearing to determine whether Nelson was entitled to an unconditional release trial. Nelson moved to strike Dr. North's evaluation, arguing the state was required to rely exclusively on the annual evaluation performed by Dr. Saari. The trial court denied the motion to strike. If the only professional evaluation before the court had been Dr. Saari's report stating that Nelson does not meet the definition of a sexually violent predator, the state would not have carried its initial burden of producing prima facie evidence. The court concluded that the state met its prima facie burden through Dr. North's evaluation.

Dr. Saari's report did not evaluate Nelson's condition as having changed since his commitment trial. The trial court determined that his report was "not sufficient" to allow Nelson to proceed to a trial and entered an order terminating Nelson's annual review.

Nelson's appeal does not challenge the court's ruling that Dr. Saari's report was insufficient to permit him to proceed to a trial. The sole issue he presents is whether the trial court properly allowed the state to rely on Dr. North's report as prima facie evidence of his unfitness for release instead of limiting the State to Dr. Saari's evaluation.

Brock

Petitioner Louis Brock has been committed as a sexually violent predator since 1991. While committed, Brock has largely refused treatment. Dr. Kristen Carlson, a psychologist employed as a forensic evaluator by the department, performed an annual evaluation of Brock. Her report was filed in February 2016. She stated that although Brock was not participating in treatment, she could not "say with any degree of psychological certainty that Mr. Brock is considered likely (more probably than not) to commit a sexually violent offense." Brock requested a show cause hearing to determine whether there were grounds for his unconditional release in light of Dr. Carlson's report. The show cause hearing was held in May 2016.

To meet its initial burden of producing prima facie evidence under RCW 71.09.090(2)(b), the prosecuting agency—in Brock's case, the Attorney General's Office—submitted an evaluation produced in November 2015 by

Dr. Henry Richards. Dr. Richards opined that Brock continues to meet the definition of a sexually violent predator and is not safe to be released to a less restrictive alternative. This report was not an annual evaluation produced by the department. Dr. Richards prepared it in anticipation of serving as an expert witness for the state at a trial in July 2016 on whether a less restrictive alternative was appropriate for Brock.

Brock objected to the introduction of Dr. Richards' evaluation. He made the same argument as Nelson—that the statute required the state to rely exclusively on the annual evaluation performed by Dr. Carlson.

The court ruled the state was unrestricted in the type of evidence it could present to make the prima facie showing required by RCW 71.09.090(2)(b). The court admitted Dr. Richards' report and held that it was prima facie evidence that Brock continued to meet the definition of a sexually violent predator.

The court then found that Brock did not meet his burden of establishing probable cause that his condition had "so changed" under RCW 71.09.090(2)(c)(ii). The court considered Carlson's evaluation but noted that Brock had not been participating in treatment. The court declined to grant Brock's request for a new trial. See RCW 71.09.090(4)(b).

Like Nelson, Brock does not challenge the trial court's ruling that Dr. Carlson's report was insufficient to establish probable cause. The sole issue is whether the trial court properly allowed the state to rely on the report by Dr. Richards to make its prima facie showing. Petitioners contend that only the

annual evaluation is admissible at the show cause hearing to determine whether the state has met its prima facie burden.

Since the grant of discretionary review, both Nelson and Brock have been granted jury trials regarding their request for unconditional release. Because they have already obtained the relief they are seeking, their appeals are technically moot. This court may review a moot case "if it presents issues of continuing and substantial public interest." In re Marriage of Horner, 151 Wn.2d 884, 891, 93 P.3d 124 (2004). We elect to do so in this case due to the recurring nature of the issue presented.

The issue presented is a matter of statutory construction. Statutory interpretation is reviewed de novo. In re Det. of Strand, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009). "In interpreting a statute, this court looks first to the plain language." State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Under RCW 71.09.070, the department must produce an annual report of the detainee's mental condition. Petitioners claim the statute envisions the annual report as the only evaluation the prosecuting agency may rely on to meet the state's burden at the show cause hearing. Their proposed limitation finds no support in the statutory language. The annual review and the show cause hearing are separate and distinct procedures. RCW 71.09.070 makes the production of the annual report an obligation of the department. It does not preclude the prosecuting agency from hiring another expert to contradict the annual report at the show cause hearing. It does not even mention the

prosecuting agency. The obligations of the prosecuting agency are discussed in RCW 71.09.090(2)(b) in connection with the show cause hearing.

The show cause hearing is a judicial proceeding. Its purpose is to determine whether the detainee is entitled to an evidentiary hearing. Marcum, 189 Wn.2d at 11. The initial burden of proof is placed on the prosecuting agency to demonstrate that continued commitment is appropriate. To make its prima facie showing at the show cause hearing, "the state may rely exclusively upon the annual report prepared pursuant to RCW 71.09.070." RCW 71.09.090(2)(b).

Brock and Nelson argue that "may" in this context means "shall." Their interpretation runs contrary to the statute's plain language. The word "may" is ordinarily regarded as permissive, and it is presumed to do so when used in the same statutory provision as the word "shall." Scannell v. City of Seattle, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982). Here, the word "may" is presumptively permissive. It occurs in a statutory provision that also uses the word "shall":

> 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 agency *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.

RCW 71.09.090(2)(b) (emphasis added).

Courts do not engage in statutory interpretation of a statute that is not ambiguous. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), cert. denied, 534 U.S. 1130 (2002). "If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself." Keller, 143 Wn.2d at 276. The statute quoted above unambiguously provides that the state is permitted to rely on an annual report to make its prima facie case at the show cause hearing but is not required to do so.

In an attempt to overcome the statute's plain language, Nelson and Brock call on the doctrine of constitutional avoidance. Statutes are construed to avoid constitutional problems if possible. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). The annual review scheme is "critical" to the constitutionality of chapter 71.09 RCW because it provides a means to petition the court for release. McCuistion, 174 Wn.2d at 388. "This statutory scheme comports with substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous." McCuistion, 174 Wn.2d at 388.

The annual review produced by a professional evaluator for the department is used "to properly identify those who are no longer mentally ill and dangerous." McCuistion, 174 Wn.2d at 389. Nelson and Brock argue that allowing the state to retain and rely on other experts at the show cause hearing will strip the annual review process of objectivity. They contend that unless the state is required to rely exclusively on the annual report, the commitment scheme as a whole will not provide substantive due process.

We disagree. What is critical to the constitutionality of the statute is a "periodic and timely evaluation of the sexually violent person's mental health condition." In re Det. of Rushton, 190 Wn. App. 358, 371, 359 P.3d 935 (2015). The periodic and timely evaluation is provided for in RCW 71.09.070 by making it an obligation of the department. Allowing the prosecuting agency to present a different evaluation to make its prima facie case at the show cause hearing provided for in RCW 71.09.090(2) does not undermine the objectivity of the annual review process and is not inconsistent with substantive due process. Cases cited by petitioners do not suggest otherwise. The Supreme Court has expressly stated that at a probable cause hearing, the trial court "is entitled to consider all of the evidence, including evidence submitted by the State." McCuistion, 174 Wn.2d at 382.

Contrary to the argument of petitioners, allowing the state to bring in expert witnesses other than the department's evaluator is not an absurd result. A party's discretion to retain and rely on expert witnesses of its choosing is a regular component of civil and criminal proceedings.

In short, construing "may rely exclusively" as if it meant "shall rely exclusively" is not warranted by statutory language and is not necessary to avoid a constitutional problem. The plain language of RCW 71.09.090(2)(b) allows the state to rely on an annual evaluation at a show cause hearing but does not prevent the state from presenting an expert witness of its own choosing.

Affirmed.

Becker, J.

WE CONCUR:

Mann, J.

ACJ

NIELSEN, BROMAN & KOCH P.L.L.C.

March 28, 2018 - 2:30 PM

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Appellate Court Case Title:	In re the Detention of: Louis Brock, Petitioner
Superior Court Case Number:	91-2-01736-9

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