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Court of Appeals
Division I
State of Washington

NO. 72796-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF:

LANCE KLEINMAN

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

On its face, a 2001 “Stipulation and Order of Commitment” bars Lance Kleinman from seeking unconditional discharge from RCW 71.09 involuntary commitment until he first has a conditional release trial. For the prosecution, that Stipulation has been quite the bargain. Not only did it relieve the State of its obligation to present evidence that Mr. Kleinman met commitment criteria in the first place, it has shielded the State from having to respond to any of his subsequent assertions that he deserves to be set free because his condition has changed.

Since 2009, the trial judges monitoring his involuntary commitment have known that forensic psychologist Dr. Luis Rosell holds the opinion that Mr. Kleinman no longer meets the statutory definition of a sexually violent predator, in part because of a positive response to continuing participation in treatment. CP 1244-1288; 1644. Under RCW 71.09.090(2), a similarly situated person would be entitled to an unconditional discharge trial.

The record shows that Mr. Kleinman never knowingly, voluntarily, or intelligently, waived his right to seek unconditional discharge until he first petitions for conditional release. This Court should vacate the Stipulation neither he, nor his lawyers, understood.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the State's "Motion to Terminate 2014 Annual Review."

2. The trial court erred in denying Mr. Kleinman's 2014 CR 60(b)(11) motion, styled as a motion to dismiss.

3. The trial court erred in denying Mr. Kleinman's request for an alternative remedy: that an unconditional discharge trial be set.

4. The trial court erred in ruling that the 2001 "Stipulation," which prevents Mr. Kleinman from seeking a show cause hearing for unconditional discharge until he first pursues conditional release, is still binding.

5. Where the record shows that Mr. Kleinman's lawyers misadvised him as to the rights he was waiving, the trial court erred in not vacating the 2001 "Stipulation and Order of Commitment."

6. The trial court erred in concluding that the question of the validity of Mr. Kleinman's 2001 waiver has been previously considered in this ongoing litigation and "confirmed on appeal."

7. The trial court erred in refusing to find that Mr. Kleinman never made a knowing, intelligent, and voluntary waiver of his rights in 2001.

8. The trial court erred in not recognizing that Mr. Kleinman received ineffective assistance of counsel when the record shows that his lawyers neither understood, nor explained, material terms of the “Stipulation” to their client.

9. The trial court erred in finding that, on these facts, barring Mr. Kleinman from seeking unconditional discharge, and limiting him to only pursuing conditional release, does not violate constitutional due process.

10. The trial court erred in ruling that no show cause hearing for unconditional discharge will be set until Mr. Kleinman has complied with the terms of the 2001 “Stipulation.”

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Fundamental constitutional rights, including the right to petition for release from involuntary civil commitment, can be given up. Such waivers survive scrutiny if – and only if – they are made knowingly, intelligently, and voluntarily. The record shows that Mr. Kleinman and his lawyers did not know that the 2001 “Stipulation” would prevent Mr. Kleinman from petitioning for unconditional discharge unless he first sought conditional release. But, since 2009, the trial judges supervising Mr. Kleinman’s involuntary commitment have ignored evidence that he no longer meets the statutory definition of a “sexually violent predator” and

have refused to grant an unconditional discharge trial under RCW 71.09.090(2).

If the record shows that Mr. Kleinman did not make a knowing, intelligent, or voluntary waiver of his right to seek unconditional discharge, should he remain bound by the State's interpretation of the "Stipulation"? If Mr. Kleinman's lawyers did not explain that the "Stipulation" was an indefinite waiver of his rights under RCW 71.09.090, did Mr. Kleinman receive effective assistance of counsel? Does the prolonged indefinite detention of an individual who has made an affirmative showing that he no longer meets involuntary commitment criteria violate constitutional due process?

D. STATEMENT OF FACTS

1. The 2001 Stipulation and 2009 Motion for Unconditional Discharge

In 2001, Lance Mr. Kleinman stipulated that he met the commitment criteria under RCW 71.09. CP 139-49. In the "Stipulation," he waived all constitutional and statutory rights to contest the State's evidence against him, and the trial court declared him to be a "sexually violent predator." CP 146. Eight years later, Mr. Kleinman moved for an unconditional discharge trial under RCW

71.09.090(2). CP 649-755. His motion for an unconditional discharge trial was supported by a proper expert opinion.

A forensic psychologist qualified to perform sex offender evaluations and risk assessments, Dr. Luis Rosell, Psy.D., concluded that Mr. Kleinman no longer met the definition of an SVP:

Based on a review of the records and interview, I am able to form the opinion, established to a reasonable degree of psychological certainty, that Mr. Mr. Kleinman's *condition has so changed that he no longer meets the definition of a sexually violent predator*. This opinion is largely based on Mr. Kleinman's change through his positive response to treatment, age, and a current static and dynamic analysis.

CP 1278. Dr. Rosell explained that Mr. Kleinman's active participation in treatment, his honesty in regard to his sexual offense history, the length of time since his last sexual offense, and his evident ability to control his sexual behavior, together "[made] him a different person than he has been in the past," meaning, no longer meeting the statutory definition of a "sexually violent predator." CP 1247-48.

At first, the State responded that Dr. Rosell's report was insufficient, but then changed course and argued Mr. Kleinman was altogether precluded by his 2001 Stipulation from seeking unconditional discharge before he petitions for unconditional discharge. CP 1099-1102.

Paragraph 8 of the Stipulation states, “The Respondent understands that he has the following additional rights upon commitment,” and lists: a) right to a show cause hearing, b) right to annual examination by DSHS, c) right to petition for release, d) right to appeal from the “Stipulation and Order of Commitment.” CP 1107. The last sentence of paragraph 8 indicates: “The respondent understands that by entering this Stipulation, he is knowingly, voluntarily and intelligently waiving these rights until the trial noted in paragraph six is held.” CP 1108. Paragraph 6 references a conditional release trial. CP 1106. The State argued this was a fair and bargained-for exchange: “Mr. Kleinman made his deal on January 5, 2001 and should be required to fulfill it.” CP 1102.

When Mr. Kleinman asked for an unconditional discharge trial in 2009, he was represented by “The Defender Association,” or “TDA,” and the same law firm that represented him in 2001. Apparently astonished at the State’s interpretation of the Stipulation, his lawyers fought back the State’s motion to dismiss the petition for unconditional discharge. CP 1211-1221.

Relying only on contractual analysis, Mr. Kleinman’s lawyers argued the language of the 2001 stipulation, and the circumstances surrounding its drafting, showed that he had waived his right to petition

for unconditional discharge for 18 months, not forever. CP 1213-21. Alternatively, they argued that any stipulation that would limit Mr. Kleinman, who had presented evidence that he no longer met commitment criteria, to petitioning for conditional release – rather than outright unconditional discharge – would be unconstitutional and unenforceable.

In support of a contractual argument that there had been no “meeting of the minds,” the 2009 lawyers showed that 2001 counsel misunderstood material terms of the stipulation. (“Declaration of Douglass McCrae.”) CP 1222-1226. Prior counsel McCrae swore, in part, that:

I did not understand the stipulation to waive Mr. Mr. Kleinman’s right to unconditional release trials for all time absent completion of an LRA trial. As far as we were concerned Lance kept all the rights anyone else committed under the law would have except that he waived his right to the initial commitment trial... We told him he kept all the post trial rights that anybody else had (including appeal) but that he got one extra post trial right.

“Declaration of Doug McCrae,” paragraphs 8 and 9. (Emphasis added.)¹

¹ The State moved to strike McCrae’s declaration. CP 1289-1293. The State argued, in part, that the declaration was irrelevant because “[t]here is no motion before This Court for Relief from Judgment or Order.” CP 1292.

Mr. Kleinman's 2009 counsel did not compare all that Mr. Kleinman allegedly waived in the 2001 Stipulation to a guilty plea in a criminal case. They did not argue that their law firm colleague's wrong advice constituted ineffective assistance of counsel. Instead, successor counsel accepted the State's position that the 2001 document was subject to contractual analysis while disagreeing with the State's reading of the written agreement. *See e.g.* CP 1215-1219. *See also* ("Respondent's Response to State's Motion to Strike Declaration of McCrae.") (Discussing parole evidence rule.) CP 1294-1299.

On the briefs filed, the trial court granted the State's motion to dismiss Mr. Kleinman's petition for an unconditional discharge trial and the State's motion to strike Mr. Kleinman's lawyer's admission that Mr. Kleinman was never advised as to the consequence of his waiver of his rights. CP 1316-19. ("Order," dated April 30, 2009.) (Discussing stipulation in contract terms and excluding attorney McCrae's declaration as "parole evidence.").

Mr. Kleinman sought discretionary review of the 2009 order, but review was denied. *See* CP 1609-13. ("Commissioner's Ruling Denying Discretionary Review," dated October 9, 2009, under Court of Appeals case number 63576-0-I.) This Court denied a motion to modify. CP 1616.

See also CP 1618-22. (Supreme Court Commissioner’s “Ruling Denying Review,” under Supreme Court Cause case number 84304-0.); CP 1608. (“Certificate of Finality.”)²

New counsel – Society of Counsel Representing Accused Persons (SCRAP) – was appointed and continues to serve Mr. Kleinman at the trial court level. CP 1323-27.

2. The 2014 Motion to Dismiss

On September 29, 2014, Mr. Kleinman filed a “Motion to Dismiss.” CP 1633-42. He argued that his civil commitment must come to an end because the 2001 stipulation was a void contract because it lacked consideration. He also argued that the stipulation was voidable because TDA did not provide effective assistance of counsel. Finally, he argued that thirteen years of ongoing commitment with no judicial scrutiny constituted a constitutional due process violation that called for dismissal of the involuntary commitment proceedings on the whole. In the alternative, Mr. Kleinman petitioned for unconditional discharge under RCW 71.09.090. CP 1642.

² The Court of Appeals file in that unsuccessful motion for discretionary review (Case number 63576-0-I) includes a transcript of the March 18, 2009 hearing where the State first argued: “[W]e’re not supposed to be here. He is supposed to first petition the Court for a less restrictive alternative.” The State said this bar could last indefinitely. 3/18/09 RP 4, 8.

Similarly to how it responded in 2009, the State took the position that Mr. Kleinman was not entitled to any annual review show cause hearing because he was still bound by the interpretation of the 2001 stipulation – approved of by the 2009 trial court order – that he first seek conditional release. (“State’s Memorandum In Support of Terminating 2014 Annual Review Without Further Proceedings.”) CP 1522-44. Mr. Kleinman’s lawyers responded by reiterating arguments for why the civil commitment against Mr. Kleinman should be dismissed, e.g. “holding Mr. Mr. Kleinman for thirteen years without court review of his mental status” violates due process. CP 1666-73.

On October 3, 2014, The Hon. J. Bill Bowman of the King County Superior Court presided over a hearing on the motion to dismiss. On November 13, 2014, the trial court denied the motion to dismiss on all grounds. CP 1837-45. (“Order on Respondent’s Motion to Dismiss and State’s Motion to Terminate Annual Review.”) The Order declared that “no show cause hearing for unconditional release will be set until [Mr. Mr. Kleinman] has complied with the terms of the [2001] stipulation.” CP 1844. On November 25, 2014, Mr. Kleinman’s counsel filed a “Notice of Discretionary Review” from the November 13, 2014 order denying his motion to dismiss. CP 1847.

On review, Mr. Kleinman filed a motion to re-designate, and Commissioner M. Kanazawa agreed that this matter should be reviewed as an appeal of right, much as a denial of a CR 60(b) motion to vacate judgment would. “Notation Ruling,” dated May 4, 2015.

E. ARGUMENT

Mr. Kleinman Did Not Make A Knowing, Intelligent, or Voluntary Waiver of His Rights Under RCW 71.09

1. Involuntary civil commitment must comport with constitutional due process

It is a settled principle of constitutional due process that a person's continued involuntary confinement under RCW 71.09 is justified only so long as the person is currently mentally ill and dangerous. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992); *In re Pers. Restraint of Young*, 122 Wn.2d 1, 38, 857 P.2d 989 (1993); U.S. Const. amend. XIV; Const. art. I, § 3. “Periodic review of the patient’s suitability for release” is required to render commitment constitutional. *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 3043 (1984). U.S. Const. amend. XIV; Const. art. I, § 3.

RCW 71.09 complies with this constitutional requirement by providing the right to annual review. *State v. McCuiston*, 174 Wn. 2d 369, 387, 275 P.3d 1092 (2012) (Holding that RCW 71.09 satisfies due process

in part because the .090 avenues for respondent-initiated release serve as “extensive procedural safeguards.”) Commitment under RCW 71.09 is indefinite in nature, but committed persons such as Mr. Kleinman can petition for conditional release to a less restrictive alternative or an outright unconditional discharge under RCW 71.09.090. *In re Det. of Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002)

2. The knowing, intelligent, and voluntary standard applies to waivers of rights that affect RCW 71.09 involuntary commitment

Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and cannot presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). The State bears the burden of showing that Mr. Kleinman knowingly, intelligently and voluntarily waived his right to demonstrate that he no longer meets the definition of an SVP. *Zerbst*. at 465; *In re det. of Brock*, 183 Wn.App. 319, 333 P.3d 494 (2014).

In *Brock*, this Court concluded that an individual civilly committed under RCW 71.09 could waive his “right to annually petition for unconditional release by written agreement with the State... so long as the waiver is shown to be knowing, intelligent and voluntary.” *Id.*, at 320. Brock explicitly agreed – for a period of four years – not to seek

unconditional discharge. *Id.*, at 321. In exchange, the State agreed to work with him to create an agreed conditional release. *Id.*

Less than two years into this agreed-to four year moratorium on his .090 right to seek unconditional discharge, Brock sought to undo the agreement. In the intervening time, the Special Commitment Center (SCC) annual evaluator had concluded that Brock no longer met statutory civil commitment criteria under RCW 71.09. Brock argued that his agreement was unenforceable and unconscionable and the trial court agreed that it was against public policy to confine an individual who no longer met the definition of a “sexually violent predator.” *Id.* at 323.

On appeal, this Court reversed. Comparing Brock’s waiver of rights to criminal plea bargains, the Court noted that “generally a defendant can waive any right that exists for his or her benefit if he or she so chooses.” *Id.* at 324, *citing to State v. Peltier*, 181 Wn.2d 290, 332 P.3d 457 (2014). On the record before it, the Court deciding Brock’s appeal was convinced that he had made his choice voluntarily, knowingly, and intelligently.

The wording of the whole agreement – including the four-year provision – was clear. *Id.* at 321. The bar on Brock seeking unconditional discharge “extended to any... that might be recommended by the SCC.” *Id.*

On the record, Brock’s lawyer specified “that she had read the Agreement to Brock word for word with particular emphasis on [the paragraph that included the waiver of the right to seek unconditional discharge for four years.]” *Id.* at 321-22. On appeal, this Court emphasized that the trial judge personally engaged in a detailed colloquy with Brock about the meaning of this very waiver:

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, [] 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?”

Id. at n. 3.

On those facts, the State had shown that Brock truly made a knowing, intelligent, and voluntary waiver of his rights. But Mr. Kleinman’s experience was far different.

3. Unlike the *Brock* matter, Mr. Kleinman did not understand what he waived

When Mr. Kleinman entered his Stipulation in 2001 he did not understand that he was waiving his right to seek unconditional discharge forever and until he first sought conditional release. In 2009, his own lawyer declared that Mr. Kleinman was not told he was waiving his right to petition for unconditional discharge. To the contrary, Mr. Kleinman was

told that he was *not waiving* any post-commitment rights: “We told him he kept all the post trial rights that anybody else had.” CP 1222-26.

(“Declaration of Douglass McCrae.”) *See also* CP 1211-12, 1218. (2009 successor counsel documenting that neither Mr. Kleinman nor his 2001 counsel understood the Stipulation to be an indefinite bar to an unconditional discharge petition.)

Responding to Mr. Kleinman’s 2014 motion to dismiss, the State argued that “the Court of Appeals and Washington State Supreme Court have already determined that [Mr. Kleinman] knowingly, intelligently and voluntarily entered the stipulation.” CP 1522. RP 27 10/3/14.

Unfortunately, the trial court accepted this misstatement of the case history. CP 1827. But, the question of the wrong advice given to Mr. Kleinman has not been considered, by any trial judge or appellate court.

First of all, the trial judge presiding over Mr. Kleinman’s 2009 motion for unconditional discharge did not consider the contents of attorney McCrae’s declaration about advice given to Mr. Kleinman at the time of the Stipulation. CP 1318-19. When the 2009 TDA counsel made only contract-based arguments, the trial judge granted the State’s request

to strike the McCrae declaration from consideration. CP 1319.³ The State did not put forward evidence contradicting McCrae's declaration. To the extent the written "Stipulation" contains standard language that Mr. Kleinman is making a knowing, intelligent, and voluntary waiver, that language does not foreclose his current argument because a trial court's acceptance of a waiver of rights does not foreclose a subsequent attack on its validity based on misadvice. *Accord State v. Sandoval*, 171 Wn. 2d 163, 249 P.3d 1015 (2011).⁴

Furthermore, contrary to what the trial court found in 2014, this issue has not been addressed on the merits by an appellate court. Mr. Kleinman failed to obtain review of the 2009 trial court rulings. CP 1613, 1622. The "denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision." RAP 2.3(c); *Accord*

³ Even though a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, the same law firm that mishandled the 2001 stipulation handled Mr. Kleinman's 2009 hearing. RPC 1.7(a)(2); RPC 1.10(a); *State v. Harell*, 80 Wn.App. 802, 911 P.2d 1034 (1996) (Reversing denial of a motion to withdraw a guilty plea that alleged ineffective assistance of counsel because original counsel had a direct conflict and should not have handled such a motion.)

⁴ The 2009 Order describes Mr. Kleinman's 2001 waiver as "entered into *knowingly, intelligently* and voluntarily, *with the assistance of counsel*." CP 1319 (emphasis added.) But the trial court, in 2009, could not have put those words to paper had it chosen to deal with the substance of McCrae's declaration to the contrary. In 2014, the trial court was wrong to yet again ignore the circumstances of the 2001 waiver. CP 1842.

State v. Schenck, 169 Wn.App. 633, 644, 281 P.3d 321 (2012) (Dismissal of personal restraint petition on ripeness grounds not a review on the merits.). Similarly, the fact that Kleinman had earlier challenged the legal sufficiency of the Stipulation, on completely different grounds, is also not informative, let alone dispositive.⁵ In its 2014 finding that the validity of Mr. Kleinman’s 2001 “Stipulation” was settled, the trial court erred as a matter of law.⁶

The McCrae declaration shows that Mr. Kleinman was not told that attempting to obtain a less restrictive alternative to total confinement was a condition precedent to him petitioning for unconditional discharge. CP 1222-26. The fact that Mr. Kleinman’s 2009 lawyers filed for unconditional discharge – without having first sought conditional release for their client – corroborates the fact that neither he nor his counsel ever understood the Stipulation to mean what the State said in 2009 it did. As such, this case stands in stark contrast to the record in *Brock*. 183 Wn.App. at 321-22. Here, the State cannot meet the burden of establishing that Mr.

⁵ Due to post-2001 developments in constitutional civil commitment law, Kleinman argued “his stipulation was legally insufficient because it did not include a finding that he has serious difficulty controlling his behavior,” but that argument was rejected in an unpublished decision of this Court. See Court of Appeals Case No. 50811-3-I. *In re Kleinman*, 121 Wn.App. 1059 (2004) (unpublished opinion).

Kleinman made a knowing, intelligent, or voluntary waiver of his rights, where his 2001 lawyer has declared the opposite to be true. The two ideas are simply irreconcilable.

4. In the alternative, the 2014 motion should have been granted because Mr. Kleinman did not receive effective assistance of counsel at the time of his 2001 stipulation

Mr. Kleinman's 2014 CR 60(b)(11) motion – styled as a motion to dismiss – should have been granted. Even in traditional civil disputes, this Court recognizes that a person may challenge a judgment under CR 60(b)(11) based on his attorney's unauthorized surrender of substantial rights, and that such a violation creates the kind of extraordinary circumstances that warrant vacation of the judgment pursuant to CR 60(b)(11). *Graves v. P.J. Taggares Co.*, 25 Wn.App. 118, 126, 605 P.2d 348 (1980); *Lane v. Brown & Haley*, 81 Wn.App. 102, 107, 912 P.2d 1040 (1996).

More importantly, this civil commitment case requires constitutional due process protections because it involves a significant deprivation of Mr. Kleinman's liberty. *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Detainees in sexually violent

⁶ The 2014 Order states, "This Court has previously found on numerous occasions that the Respondent has knowingly, intelligently and voluntarily waived his statutory right to annually petition for unconditional release and those findings have been confirmed on appeal." CP 1842.

predator proceedings have both a due process and statutory right to the assistance of counsel. *Specht v. Patterson*, 386 U.S. 605, 609-10, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); RCW 71.09.050(1).

To show ineffective assistance of counsel in a sexually violent predator case, the claimant must show counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the detainee, "i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *In re Det. of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); *Strickland v. Washington*, 466 U.S. 668, 688-89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In applying this test, courts presume counsel was effective. *Id.* A claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The right to effective assistance of counsel encompasses the criminal plea process. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *State v. Sandoval*, 171 Wn. 2d 163, 169, 249 P.3d 1015 (2011). Counsel's faulty advice can render a defendant's guilty plea involuntary or unintelligent. *McMann* at 770–71, 90 S.Ct. 1441.

A criminal defendant “challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993).

A “reasonable probability” exists if the defendant “convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances”... This standard of proof is “somewhat lower” than the common “preponderance of the evidence” standard...

State v. Sandoval, at 174-75. (internal citations omitted.)

It was objectively unreasonable for Mr. Kleinman’s counsel to not understand that the “Stipulation” delayed their client’s ability to seek unconditional discharge until he first pursued conditional discharge. Likewise, it was objectively unreasonable for Mr. Kleinman’s counsel to inaccurately explain the material terms of the document wherein their client gave up his right to contest the State’s allegation that he met commitment criteria and also waived his statutory rights under RCW 71.09.090. CP 1633-34, 1636-38, 1641-42.

The ensuing prejudice has been significant. Mr. Kleinman has endured six years of involuntary commitment without the benefit of an unconditional discharge trial that he would have otherwise been entitled to under RCW 71.09.090. *See* CP 1278-79 (Dr. Rosell holding the opinion,

to within a reasonable degree of psychological certainty, that Mr. Kleinman does not meet the RCW 71.09 definition of a sexually violent predator.). CP 1644. (September 26, 2014 declaration of respondent's counsel indicating that she has "consulted Dr. Rosell as recently as this summer and he continues to meet that opinion.").

Mr. Kleinman has established far more than a "reasonable probability that, but for counsel's [misinformation as to the meaning of the Stipulation], the result of [his 2001 civil commitment] proceeding would have been different." *Strickland*, 466 U.S. at 694. Mr. Kleinman's 2001 counsel, in his 2009 declaration, indicated that he did not believe it was possible to enter into a contract that would prolong a civil commitment for an individual who no longer met criteria. CP 1222-26.

5. Mr. Kleinman is due a remedy

The 2014 CR 60(b) motion should have been granted. Contrary to what the State argued and what the trial court accepted as true, prior litigation, both at the trial level and in the appellate courts, has not decided the question of whether Mr. Kleinman's waiver of his right to seek unconditional discharge – made after mis-advice from his 2001 lawyers – was knowing, intelligent, and voluntary. The issue of the waiver was not part of the 2001 challenge to the Stipulation. The trial court ignored the

McCrae declaration in 2009 and review was denied without any appellate decision on the merits.

In the words of Dr. Martin Luther King Jr., “the time is always right to do what is right.” Now that the instant case has been properly redesignated as an appeal of right, this Court should fix that which should have been fixed earlier and hold that the 2001 Stipulation was invalid. At the very least, this Court should remand the case back to the trial court, with specific instructions that a full evidentiary hearing on the question of the validity of Mr. Kleinman’s 2001 waiver be held. If that is the remedy ordered, the Court should instruct the trial court to consider the McCrae declaration and any other evidence either side wishes to present.

One cannot pass over the fact that there is a constitutional problem with leaving Mr. Kleinman in total confinement, when he has presented evidence that he no longer meets criteria, and did not knowingly make such a devil’s bargain. *C.f. Brock*. The trial court erred in concluding that because Mr. Kleinman may petition for conditional release there is no due process problem. CP 1842-43. As his lawyers argued, arranging for a conditional release is difficult, if not impossible. Whatever greater freedoms that Mr. Kleinman could win if he obtained conditional release from total confinement at the Special Commitment Center on McNeil

Island are no substitute for complete freedom he is entitled to ask for at an unconditional discharge trial. On conditional release from total confinement, Mr. Kleinman would remain branded a “sexually violent predator.” He would remain subject to remand to total confinement on suspicion that he has violated the terms of his conditional release. By statute, those terms are onerous.⁷

Mr. Kleinman properly requested that the stipulation be vacated and that he be returned to a pre-commitment posture where the State would be required to prove their case against him. RP 55 10/3/14. The alternative remedy, the setting an unconditional discharge trial, would also assuage the constitutional due process problem currently present. *C.f. State v. Maynard*, ___ Wn.2d. ___, 351 P.3d 159, 164 (2015) (State Supreme Court structuring a remedy that put the appellant whose right to effective assistance of counsel had been violated in the same position he was in prior to the error.)

⁷ Mandatory terms of conditional release include: “Specification of residence, prohibition of contact with potential or past victims, prohibition of alcohol and other drug use, participation in a specific course of inpatient or outpatient treatment that may include monitoring by the use of polygraph and plethysmograph, monitoring through the use of global positioning satellite technology, supervision by a department of corrections community corrections officer, a requirement that the person remain within the state unless the person receives prior authorization by the court, and any other conditions that the court determines are in the best interest of the person or others.” RCW 71.09.096(4).

F. CONCLUSION

For the reasons stated above, appellant requests that the 2001 “Stipulation and Order of Commitment” be vacated with his case returning to a pre-commitment posture, or that he be awarded an unconditional discharge trial under RCW 71.09.090, or that the Court provide any other remedy that it sees as just, including a potential remand to the trial court for a full consideration of the validity of the original waiver.

DATED this 30th day of July 2015.

Respectfully submitted,

s/ Mick Woynarowski

MICK WOYNAROWSKI (WSBA 32801)
Washington Appellate Project (91052)
Attorneys for Appellant

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

IN RE THE DETENTION OF)	
)	
LANCE KLEINMAN,)	NO. 72796-6-I
)	
APPELLANT.)	
)	

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