NO. 94443-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISAAC ZAMORA,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

After a violent crime spree which took place over the course of one afternoon in September 2008, Isaac Zamora was charged with 20 felonies, including six counts of first degree aggravated murder. In a plea bargain reached with the Skagit County Prosecuting Attorney, Mr. Zamora pleaded guilty to 18 of the 20 charges, including four of the murder charges, and pleaded not guilty by reason of insanity (NGRI) to the remaining two murder charges. He was placed in the custody of the Department of Social and Health Services (DSHS) as a result of the insanity plea.

In 2013, the Washington State Legislature amended the statute governing the final release of insanity acquittees from state custody. The amendment modified the criteria for a final release from the custody of DSHS and allowed insanity acquittees who face transfer to a Department of Corrections (DOC) institution or facility to serve a sentence for a class A felony to be released when the acquittee's mental disease or defect is manageable within a state correctional institution or facility.

Based on this new law, DSHS successfully petitioned in September 2014 to have Mr. Zamora released from its custody and remanded to DOC custody. On appeal, Mr. Zamora challenged the court's order, arguing that implementing the new law violated his plea agreement, that the statutory

changes violated the ex post facto and bill of attainder clauses of the Washington State and U.S. Constitutions, and that the term "manageable" used in the statute was unconstitutionally vague. The Court of Appeals rejected all three arguments.

Because the Court of Appeals decision does not raise a significant question of constitutional law, does not conflict with existing case law, and does not raise an issue of substantial public interest, Mr. Zamora's Petition for Review should be denied.

II. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, Department of Social and Health Services.

III. COUNTERSTATEMENT OF THE ISSUES

This case is not appropriate for review by this Court under the considerations governing acceptance of review. RAP 13.4(b). If review were granted, the issues presented would be:

1. Did the amendment to the release provisions of RCW 10.77.200 violate Mr. Zamora's plea agreement when the only reference in the plea agreement to Mr. Zamora's release from DSHS custody explicitly states that there is no guarantee how long he will spend in DSHS custody?

2. Does the amendment violate the ex post facto and bill of attainder clauses of the Constitution, where change to the release standard has no retroactive effect or punitive effect on Mr. Zamora?

3. Did the Court of Appeals correctly find that the amendment to RCW 10.77.200 was not impermissibly vague when it determined that the term "manageable" in DOC custody is capable of being applied in this case?

IV. STATEMENT OF THE CASE

Mr. Zamora was charged with 20 felonies for his actions on September 2, 2008, including multiple counts of burglary, theft, and aggravated murder. CP 376. On November 17, 2009, the trial court approved a plea agreement Mr. Zamora entered into with the Skagit County Prosecuting Attorney in which he agreed to plead guilty to all but two of the counts of aggravated murder. CP 378. In exchange for his plea, Skagit County agreed to not seek the death penalty for the aggravated murder charges. CP 378-79. The parties also stipulated that Mr. Zamora would enter a plea of Not Guilty by Reason of Insanity to the remaining two counts of aggravated murder, and that the trial court should find him NGRI and commit him to Western State Hospital because he meets the commitment criteria under RCW 10.77.110(1). CP 379. As part of the agreement, Skagit County also agreed to not file further charges or

sentencing enhancements against Mr. Zamora, and agreed to seek a standard range sentence for the counts he pled guilty to. CP 379-80. Skagit County also agreed to recommend that the trial court follow the agreement by finding Mr. Zamora NGRI of the remaining two counts, and committing him to Western State Hospital pursuant to RCW 10.77.120. CP 379-80.

The plea agreement next contained a provision stating that it was the understanding of the parties, based on *State v. Sommerville*, 111 Wn.2d 524, 760 P.2d 932 (1988) and RCW 10.77.120, that Mr. Zamora would be first sent to Western State Hospital, and that it was only after he was eligible for release that he would be transferred to DOC for the serving of his sentence. CP 380. The plea agreement stated, in pertinent part:

> It is further understood by the parties, that based on case law the defendant and the State anticipate that the defendant will be sent to Western State Hospital until such time if any he is eligible for a conditional release and at that time he will be transferred to the Department of Corrections for the serving of his sentence in this case. The interpretation of the law that the defendant shall go to Western State Hospital is based on *State v. Sommerville*, 111 Wash. 2d 524, (1988) and RCW 10.77.120.

CP 380.

The agreement went on to state that the parties understood that there was no guarantee how long Mr. Zamora might remain at Western

State Hospital, and that the length of time he spent there was not a basis for withdrawing, voiding, or collaterally attacking the plea and sentence. CP 380.

The same day the plea agreement was approved, the trial court made findings of fact that Mr. Zamora committed all 20 of the acts he was accused of, but that he was legally insane at the time of the commission of two of the aggravated murders. CP 137. The trial court also found that Mr. Zamora should be placed in treatment at Western State Hospital. CP 137. Based on these findings, the trial court concluded

> That pursuant to the agreement of the parties and *State v. Sommerville*, 111 Wn.2d 524 (1988), the Defendant should be committed to Western State Hospital, and that upon any conditional release that may subsequently be ordered by the Court, he should be remanded to the custody of the Washington Department of Corrections to serve any prison term imposed under this cause.

CP 138.

On November 30, 2009, a Felony Judgment and Sentence was entered ordering that Mr. Zamora be committed to DOC custody to serve four consecutive life sentences without the possibility of parole upon his discharge from DSHS custody. CP 130-31. The trial court also entered an Order of Commitment stating

> The defendant shall remain committed with the Department of Social and Health Services as criminally insane subject only to further proceedings of this Court for conditional

> release and/or final discharge or release. Upon any conditional release and/or final discharge or release subsequently ordered by the Court, the Defendant shall be remanded to the custody of the Washington Department of Corrections to serve the prison term imposed separately in this cause.

CP 308.

In December 2012, Mr. Zamora was moved from Western State Hospital to the Special Offender Unit (SOU), a mental health treatment facility at the Monroe Correctional Complex. CP 31. Although now placed in a DOC facility, Mr. Zamora remained in the custody of DSHS. *Id.* In 2013, the Legislature amended RCW 10.77.200 to allow for the release of an insanity acquittee who will be transferred to a state correctional institution or facility upon release from DSHS custody to serve a sentence for any class A felony, if it is shown that the acquittee's "mental disease or defect is manageable within a state correctional institution or facility." Laws of 2013, ch. 289, § 7.

In December 2013, DSHS filed a petition pursuant to RCW 10.77.200 seeking Mr. Zamora's release from DSHS custody and transfer to DOC custody. CP 30-36. DSHS alleged in its petition that Mr. Zamora had progressed in treatment to the point that his condition was manageable in a DOC correctional facility. CP 32.

In September 2014, the trial court held an evidentiary hearing on the petition. The court heard testimony from Brian Waiblinger, M.D., a psychiatrist and the Medical Director at Western State Hospital; Cynthia Goins, Ph.D., a clinical psychologist at the SOU; Paul Jewitt, M.D., a psychiatrist at SOU; Bruce Gage, M.D., DOC's Chief of Psychiatry; and Sally Johnson, M.D., a psychiatrist retained by Mr. Zamora. CP 8. At the conclusion of the hearing, the trial court made the following findings concerning Mr. Zamora's condition and care:

> These experts agree, and their testimony establishes the following: (1) Mr. Zamora continues to suffer from a serious mental illness; (2) Mr. Zamora has not been a management problem during his 20 months at SOU; (3) DOC has cared for Mr. Zamora's (sic) appropriately during his 20 months at SOU; and (4) Mr. Zamora has responded better to treatment at the SOU than he did while at Western State Hospital.

CP 8-9. Based on these findings the trial court concluded Mr. Zamora's mental illness was manageable within a state correctional institution, ordered him released from DSHS custody, and remanded him to DOC custody to serve his criminal sentence. CP 9. The trial court also imposed two conditions on DOC with regard to its care and custody of Mr. Zamora.

Both Mr. Zamora and DOC timely appealed the decision. The Court of Appeals upheld the trial court's order granting the release of Mr. Zamora from DSHS custody and transferring him to DOC custody. It

also overturned the conditions placed on DOC and remanded the case back to the trial court for a redetermination of whether the court would still consider Mr. Zamora's mental illness manageable within a correctional institution. Mr. Zamora moved for reconsideration, which the Court of Appeals denied.

Mr. Zamora then timely petitioned this Court for discretionary review.

V. REASONS WHY REVIEW SHOULD BE DENIED

A petition for discretionary review by this Court must show that the Court of Appeals decision meets the factors in RAP 13.4(b), which provides:

> **(b) Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The issues raised by Mr. Zamora do not meet the requirements of RAP 13.4(b). The plea agreement claim is unique to the facts, and presents no significant question of law under the Constitution of the State of Washington or the United States, or conflict that warrants this Court's

review. Similarly, the ex post facto, bill of attainder, and vagueness arguments are tied to RCW 10.77.200 and the facts of this case, and involve the well-settled application of those principles. Thus, there is no conflict or issue of substantial public interest that justifies this Court's review of those issues. In short, the Court of Appeals decision did not alter any of the legal protections currently enjoyed by defendants who enter into plea agreements, nor other legal protections, because the rulings rely on court precedent.

A. The Court of Appeals Correctly Found That There Was No Due Process Violation Because the Plea Agreement Was Not Violated

Mr. Zamora asks this Court to review whether the trial court violated his due process rights by ordering his release from DSHS custody. He claims the plea agreement guaranteed him a specific legal framework that would control all future determinations of when he would be eligible for discharge from DSHS custody under RCW 10.77.200. In particular, Mr. Zamora cites to the references in the plea agreement to RCW 10.77.120 and the *Sommerville* case as the basis for his position that the plea agreement guaranteed that he would only be released from DSHS custody when he was no longer dangerous to himself or others. Petition for Review at 9-10.

The Court of Appeals conclusion that there was no violation of the plea agreement does not warrant review under RAP 13.4(b). The court examined the terms of Mr. Zamora's plea agreement by utilizing contract law principals per this Court's decisions in *State v. Chambers*, 176 Wn.2d 573, 293 P.3d 1185 (2013), and *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003). Looking only at objective manifestations of intent within the plea agreement, and not unexpressed subjective intent, the Court of Appeals found Mr. Zamora's argument was unsupported by the text of the plea agreement. *State v. Zamora,* No. 73008-8-I, slip op. at 17 (Mar. 6, 2017). The Court of Appeals found that the plea agreement stated that the parties understood that Mr. Zamora would be sent to Western State Hospital "until such time if any he is eligible for a conditional release and at that time he will be transferred [to] the Department of Corrections for the serving of his sentence." *Id.* at 18. It also found that the plea agreement did not address the length of time Mr. Zamora would remain at Western State Hospital or the specific criteria for discharge from DSHS custody and remand to DOC to serve his sentence. *Id.* at 19. Thus, the court applied this Court's governing principles. Mr. Zamora's argument merely claims that the Court of Appeals misapplied those principles, which is not an issue that warrants review.

Mr. Zamora claims that the references to *Sommerville* and RCW 10.77.120 within the plea agreement are themselves sufficient to show that the plea agreement was predicated on guaranteeing that he would remain in DSHS custody until he was no longer dangerous to himself or others. Petition for Review at 9. Again, applying existing law, the Court of Appeals correctly found that there was no support for interpreting these citations to create this additional obligation, one that would have tied the hands of future legislators to direct the responsibilities of DSHS and DOC.

The *Sommerville* reference concerns this Court's interpretation of RCW 10.77.220, which prohibits the incarceration of an individual committed under RCW 10.77 in a state correctional institution or facility. In *Sommerville*, the defendant had been found guilty of first degree rape, but NGRI of first degree murder. The trial court ordered the defendant to serve his sentence on the rape conviction before being placed with DSHS, but the Court overturned the order, ruling that RCW 10.77.220 first required placement in DSHS custody until final discharge to DOC to serve his sentence. *Sommerville*, 111 Wn.2d at 534-36.

The Court of Appeals determined that the references to *Sommerville* in Mr. Zamora's plea agreement only ensured that he would be committed to Western State Hospital before remand to DOC to serve

his sentence, not that he would remain in DSHS custody until he was no longer dangerous to himself or others. *Zamora,* slip op. at 18. As this is exactly what occurred in Mr. Zamora's case, not only has the plea agreement not been violated, but Mr. Zamora's claim that this case conflicts with the *Sommerville* decision fails as well.

Similarly, the references to RCW 10.77.120 in the plea agreement were not a basis to find that there had been a breach. RCW 10.77.120 describes the legal obligation that DSHS has to care for insanity acquittees, and states that a person committed to DSHS as criminally insane shall not be released from the control of DSHS until after a hearing and court order of release. After noting that the plea agreement not only contained references to RCW 10.77.120, but that it also specifically required that Mr. Zamora have notice and an opportunity for a hearing prior to entry of an order of release from DSHS and remand to DOC, the Court of Appeals determined that the plea agreement had not been breached because there was no dispute that Mr. Zamora was provided notice and the opportunity to participate in the hearing on the DSHS petition for release. *Zamora,* slip op. at 19.

Mr. Zamora also asks this Court to consider whether the plea agreement was breached because he claims to have signed it with the expectation that the law would not change. Petition for Review at 5.

Again, the Court of Appeals rejection of this argument presents no issue that warrants review. The court simply followed its prior decision in *State v. McRae*, 96 Wn. App. 298, 305, 979 P.2d 911 (1999), along with *State v. Hennings*, 129 Wn.2d 512, 528, 919 P.2d 580 (1996), which held that a defendant is not entitled to rely on the expectation that the law in effect at the time of a plea agreement will not change, and that a vested right entitled to due process protection cannot be based merely upon an expectation that the existing law will continue. *Zamora,* slip op. at 18. Because Mr. Zamora's expectation that future changes in the law would not apply to him did not come from the language of the plea agreement, but instead came from his expectation that the law would not change, there was no breach of the plea agreement. *Id.*

Last, Mr. Zamora argues that this case raises an issue of substantial public interest because it "endorses post-plea changes to the governing law that fundamentally alter the expected punishment resulting from the negotiated settlement." Petition for Review at 3. However, this is a mischaracterization of the Court of Appeals decision because it does not overturn any prior precedent on construing a plea agreement, or limit any other defendant from relying on this prior precedent to challenge the actions of the State. Instead, the decision simply utilized prior precedent to determine that Mr. Zamora had failed to establish that his plea agreement

guaranteed that he would not be released from DSHS custody and remanded to DOC custody until he was no longer a danger to himself or others. And, to the extent that this Court would need to determine whether or not the terms of this particular plea agreement support Mr. Zamora's position, any further review would be limited to the specific facts of this case. As a result, the precedential value of the Court's decision would be extremely limited.

In short, the court order releasing Mr. Zamora did not breach the plea agreement, and his challenge on that basis does not warrant further appellate review by this Court.

B. The Amendment to RCW 10.77.200(3) Does Not Violate the Ex Post Facto and Bill of Attainder Clauses Because It Is Not Retroactive and Has No Punitive Effect on Mr. Zamora

Next, Mr. Zamora asks this Court to address his claim that the change to RCW 10.77.200(3) violates the ex post facto clause and the prohibition against bills of attainder. He argues that the "state of the law" changed after his criminal case was decided in a way that imposed a more severe punishment on him than was permissible when the crimes were committed and undermined the settled expectations of his plea agreement. Petition for Review at 16. The Court of Appeals disagreed with this interpretation of the change in RCW 10.77.200(3), and held that there was no constitutional violation because the statute is procedural in nature, did

not inflict punishment, and did not apply retroactively. *Zamora,* slip op. at 22. This ruling reflects a straightforward application of existing law and does not present a conflict or significant question requiring this Court's review.

In order to bring a successful ex post facto claim, Mr. Zamora needed to show that the law operates retroactively, and that it increases the penalty over what it was at the time of the conduct. *In re Pers. Restraint of Flint*, 174 Wn.2d 539, 545, 277 P.3d 657 (2012). But, as the Court of Appeals noted in its decision, under the *Flint* case a statute does not operate retroactively merely because the triggering event originates in a situation that existed before the statute was enacted, and a statute does not operate retrospectively just because it upsets expectations based on prior law. *Zamora,* slip op. at 21-22.

The Court of Appeals found that the amendment to the release criteria in RCW 10.77.200(3) operates prospectively, because the triggering event for its operation was the filing of the petition for release from DSHS custody and remand to DOC custody, not the entry of Mr. Zamora's underlying NGRI commitment order. *Zamora,* slip op. at 22. Since the petition for release in this case was filed by DSHS after the effective date of the statute, the amendment was not retroactively applied.

This ruling is consistent with the plain language of the statute and the ruling in *Flint* providing guidance on how to detect a retroactive law.

To claim that RCW 10.77.200(3) was retroactively applied to him, Mr. Zamora claimed a right to have the old version of the statute apply to him under the plea agreement. Petition for Review at 15. However, the Court of Appeals found that the settlement agreement contained no such guarantee. *Zamora,* slip op. at 18-19. Thus, this is a straightforward application of the rule that a statute does not operate retroactively just because it upsets expectations based on prior law. *Flint,* 174 Wn.2d at 547.

This Court may also decline review because Mr. Zamora cannot show that the amendment to RCW 10.77.200(3) increased his criminal punishment. Citing *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 351 (1987), the Court of Appeals explained that an ex post facto violation cannot occur if the change in the law is merely procedural and does not increase a punishment or change the ingredients of the offence or the ultimate facts necessary to establish guilt. *Zamora,* slip op. at 20. The change to RCW 10.77.200(3) is civil in nature, and did not create a punishment for an act that was not already punishable at the time it was committed. In 2008, the act of premeditated murder was already a crime subject to punishment, and the change to RCW 10.77.200(3) did not increase the punishment for it–it was and still is life in prison.

RCW 9A.32.030, 040. As a result, the Court of Appeals found that RCW 10.77.200(3) is procedural and does not inflict punishment. *Zamora,* slip op. at 22.

The finding that RCW 10.77.200(3) does not inflict punishment is also the reason why it cannot be a bill of attainder. Citing to this Court's decision in *Hennings*, the Court of Appeals stated that a legislative act violates the prohibition against bills of attainder if it inflicts punishment on an individual or group without judicial trial. *Zamora,* slip op. at 21. But RCW 10.77.200(3) does not inflict punishment, so it cannot be a bill of attainder. However, even if the Court of Appeals had found that RCW 10.77.200(3) inflicted punishment, it still could not be a bill of attainder because Mr. Zamora continued to have the right to a judicial proceeding to determine whether or not he should be released from DSHS custody. Providing for a judicial proceeding prevents RCW 10.77.200(3) from violating the prohibition on bills of attainder.

C. RCW 10.77.200(3) Is Not Impermissibly Vague Because the Ordinary Meaning of "Manageable" Is Capable of Being Applied To the Phrase "Person's Mental Disease or Defect Is Manageable Within a State Correctional Institution or Facility"

Last, Mr. Zamora asks this Court to address whether the term "manageable" in RCW 10.77.200(3) is unconstitutionally vague. Petition for Review at 17-20. The specific language at issue states that insanity

acquittees who will be transferred to a state correctional institution or facility because they will be serving a sentence for a class A felony following their release from DSHS custody are to be released if it is shown that "the person's mental disease or defect is manageable within a state correctional institution or facility." RCW 10.77.200(3).

The Court of Appeals properly placed the burden of showing that the statute is unconstitutionally vague beyond a reasonable doubt on Mr. Zamora, citing this Court's decisions in *In re Detention of M.W.*, 185 Wn.2d 633, 374 P.3d. 1123 (2016), *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008), and *State v. Watson*, 160 Wn.2d 1, 154 P.3d 909 (2007). Next, the Court of Appeals clarified that RCW 10.77.200(3) had to be examined as applied to the particular facts of the case, as opposed to being reviewed on its face. *Zamora,* slip op. at 23 (citing *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988) and *City of Spokane v. Douglass*, 115 Wn.2d 171, 795 P.2d 693 (1990)).

Given this criteria, the Court of Appeals found that Mr. Zamora had failed to meet his burden of proving that RCW 10.77.200(3) was unconstitutional beyond a reasonable doubt. *Zamora,* slip op. at 23. It determined that the term "manageable" was not incapable of definition, and that a court could rely on the ordinary meaning of the word as stated in a dictionary, citing *State v. Klein*, 156 Wn.2d 102, 124 P.3d 644 (2005).

Zamora, slip op. at 23. Finally, the Court of Appeals upheld the trial court's use of the definition of "manageable" from Webster's Third New International Dictionary ("capable of being managed: submitting to control") as sufficient for being able to determine the question of fact in this case (whether Mr. Zamora's mental disease or defect is manageable under RCW 10.77.200(3)). *Zamora,* slip op. at 23.

This decision is supported by how the definition was applied in this particular case. In order to establish DOC's ability to control Mr. Zamora's mental illness, DSHS presented the testimony of several mental health professionals familiar with Mr. Zamora and the level of treatment available at DOC, treatment that he had been receiving for the last 20 months. They all testified that "the Department of Corrections can handle Mr. Zamora, and that they handle other people even worse than Mr. Zamora, for lack of a better term." Report of Proceedings (RP) (Sept. 10, 2014) at 85. They also testified that "DOC is currently treating and managing many persons such as Mr. Zamora," and that while Mr. Zamora has been at DOC, "he's not been a management problem." *Id.* at 85-86 (see also RP (Sept. 8, 2014) at 41, 53-55; RP (Sept. 9, 2014) at 56-57, 100-01).

Rather than attempting to demonstrate how the statute was inappropriately applied in this particular case, Mr. Zamora argues that the

statute fails to provide standards to reduce the potential risk of arbitrary enforcement. Petition for Review at 19. He then relies on unreasonable interpretations of the statute to manufacture vagueness where none exists. For instance, an ordinary person would not understand "manageable" to mean locking a mentally ill prisoner in solitary confinement for one year without cause. Petition for Review at 18. These attempts to manufacture an issue based on hypotheticals is completely contrary to the Court's duty to presume constitutionality and avoid hypothesizing unconstitutional applications. *Weden v. San Juan Cty.*, 135 Wn.2d 678, 708, 958 P.2d 273 (1998); *Douglass*, 115 Wn.2d at 182-83.

The Court of Appeals correctly concluded that Mr. Zamora had failed to meet his burden of proving the statute is unconstitutionally vague beyond a reasonable doubt, and that whether Mr. Zamora's mental disease or defect is manageable within a correctional facility is a question that could be resolved through the use of the ordinary definition of "manageable." As a result, there is no significant constitutional issue for this Court to address.

VI. CONCLUSION

Mr. Zamora has failed to meet the criteria in RAP 13.4(b) for granting a petition for review. Accordingly, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 31st day of May 2017.

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CERTIFICATE OF SERVICE

I, *Holly McClure*, state and declare as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

I certify that on May 31, 2017, I served a true and correct copy of this **ANSWER TO PETITION FOR REVIEW** and this **CERTIFICATE OF SERVICE** by e-mailing an electronic copy and a copy was also sent via U.S. Mail as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 31st day of May 2017, at Tumwater, Washington.

HOLLY MCCLURE
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