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NO. 63717-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY CHARLES REANIER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	10
1. WHERE A DEFENDANT PLEADS NOT GUILTY BY REASON OF INSANITY TO MULTIPLE COUNTS, THE MAXIMUM TERM OF COMMITMENT OR TREATMENT UNDER RCW 10.77.025 MAY PROPERLY BE BASED ON CONSECUTIVE TERMS OF UP TO THE STATUTORY MAXIMUM FOR EACH COUNT.....	10
a. This Appeal Is Untimely	10
b. The Trial Court Properly Imposed A Ten-Year Term Of Commitment.....	12
2. BECAUSE REANIER'S AGREEMENT TO THE CONSECUTIVE TERMS OF COMMITMENT AND HIS AGREEMENT NOT TO APPEAL HIS COMMITMENT WERE INDIVISIBLE PARTS OF THE AGREEMENT, HE CANNOT CHALLENGE HIS TERM OF COMMITMENT WITHOUT CHALLENGING THE ENTIRE PLEA	18
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Jackson v. Indiana, 406 U.S. 715,
92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972)..... 17

Washington State:

Cockle v. Dep't of Labor & Indus.,
142 Wn.2d 801, 16 P.3d 583 (2001)..... 16

In re Personal Restraint of Breedlove,
138 Wn.2d 298, 979 P.2d 417 (1999)..... 13, 16

In re Personal Restraint of Goodwin,
146 Wn.2d 861, 50 P.3d 618 (2002)..... 11, 12, 19

State v. Bisson, 156 Wn.2d 507,
130 P.3d 820 (2006)..... 20

State v. Ermels, 156 Wn.2d 528,
131 P.3d 299 (2006)..... 19, 20

State v. Harris, 39 Wn. App. 460,
693 P.2d 750, review denied,
103 Wn.2d 1030 (1985)..... 14, 15, 16, 17, 18

State v. Miller, 110 Wn.2d 528,
756 P.2d 122 (1988)..... 19

State v. Sunich, 76 Wn. App. 202,
884 P.2d 1 (1994)..... 16

State v. Turley, 149 Wn.2d 395,
69 P.3d 338 (2003)..... 20

State v. Walsh, 143 Wn.2d 1,
17 P.3d 591 (2001)..... 19

Statutes

Washington State:

Laws 1987, ch. 456, § 5 16
Laws 2005, ch. 68, § 3 16
RCW 9.94A.535 13, 16
RCW 9.94A.589 13
RCW 9A.20.021 13
RCW 9A.36.031 13
RCW 10.73.090..... 12
RCW 10.77.020..... 15
RCW 10.77.025..... 1, 10, 12, 15
RCW 10.77.080..... 3, 12

Rules and Regulations

Washington State:

CrR 7.4..... 11
RAP 5.2..... 11

Other Authorities

Sentencing Reform Act 1, 5, 13, 14, 16

A. ISSUES

1. The primary goal of statutory construction is to carry out the intent of the legislature. RCW 10.77.025 provides for a term of commitment up to "the maximum possible penal sentence for any offense charged for which the person was committed." The legislature has made it clear that a trial court may impose an exceptional sentence consisting of consecutive sentences where the parties stipulate to such a sentence, and the court finds that the sentence furthers the interests of justice and the purposes of the Sentencing Reform Act. As part of his plea of not guilty by reason of insanity, Reanier stipulated to consecutive five-year terms of commitment for two counts of Assault in the Third Degree, and the trial court made the requisite findings. Did the trial court properly order a ten-year term of commitment?

2. Where a plea agreement contains no objective manifestation of intent to treat separate portions as divisible, the defendant will not be allowed to challenge one portion without challenging the entire agreement. Reanier pled not guilty by reason of insanity to two counts of Assault in the Third Degree and stipulated to consecutive terms as an exceptional sentence, in order to avoid facing a mandatory term of life imprisonment without

possibility of parole as a persistent offender under the original charge of Assault in the Second Degree. Where Reanier now challenges the agreed exceptional sentence, is his only remedy withdrawal of his plea?

B. STATEMENT OF THE CASE

Timothy Reanier was charged by Information with Assault in the Second Degree. The State alleged that, on July 3, 2004, Reanier assaulted two King County Sheriff's deputies with a knife. The State added a deadly weapon allegation to the charge. CP 1. In its Request for Bail, the State noted that "it appears as though this charge represents the defendant's third strike." CP 3.

According to the Certification for Determination of Probable Cause, police responded to a call reporting a man with a knife. When they arrived, they found Reanier sitting on the median; they blocked traffic and contacted him. Reanier screamed at the police to shoot him, and yelled that he had a gun. At one point, Reanier reached behind his back and aggressively thrust out his hand, holding an eight-inch kitchen knife. When police confronted Reanier, he raised the knife head-high and rushed at them. When Reanier was within 30 feet, police brought him under control with a

taser. Reanier later told the police that he wanted to die, and that they were supposed to shoot him. CP 2.

Reanier was sent to Western State Hospital for a mental evaluation. CP 4-6. Reanier told mental health professionals that he had been using methamphetamine for approximately two weeks leading up to the incident that ended in his arrest. CP 14. He described hearing voices telling him that there was a bomb inside him, and deciding that he needed to kill himself to save others. CP 15. The two psychiatrists evaluating Reanier diagnosed a methamphetamine-induced psychotic disorder. CP 13. While the evaluators ruled out diminished capacity, their findings were equivocal with respect to insanity. CP 16-17. They found "no current barriers to a finding of competence." CP 14.

On May 16, 2005, the trial court found Reanier competent to stand trial or enter a plea to the charges. CP 7-8. The parties quickly reached a resolution. The State amended the information to charge two counts of Assault in the Third Degree. CP 23-24. Reanier signed a "Motion for Acquittal and Statement of Defendant on RCW 10.77.080 Motion for Acquittal on the Grounds of Insanity." CP 25-29. In this document, he acknowledged that the maximum sentence for Assault in the Third Degree was five years "on each

count," and that the State would recommend "5 years consecutive on each count (agreed)." CP 26.

The parties also entered into a detailed "Agreement of the Parties." CP 33-34. The State agreed to amend the information to two counts of Assault in the Third Degree. CP 33. The parties recommended that an exceptional term of commitment be imposed: "Specifically, the parties recommend that the terms in Counts I and II run consecutively for a total term of 10 years. Defendant agrees that a term of 10 years is [a] legal term of commitment under these facts." Id. Reanier further acknowledged that, because he had two prior "strikes," a conviction for Assault in the Second Degree would expose him to a sentence of life imprisonment without possibility of parole. Id. Reanier agreed that he was receiving a "substantial benefit by agreeing to recommend an exceptional term of commitment" because, under the agreement, he would no longer face mandatory life imprisonment. Id. Reanier also waived his right to have a jury decide whether there were facts to support an exceptional term of commitment. CP 34.

Finally, as part of the agreement, Reanier explicitly waived his right to appeal the exceptional term of commitment: "Defendant

understands that he can challenge the imposition of an exceptional term of commitment by direct appeal or by collateral attack.

Defendant waives his right to challenge the imposition of an exceptional term of commitment in this case either by direct appeal or collateral attack." CP 34.

The trial court entered "Findings of Fact and Conclusions of Law for Exceptional Term of Commitment." CP 20-22. The court found that Reanier "understands and agrees that a term of commitment of 10 years is a legal term under these facts." CP 20. The court found that Reanier "has received a great benefit by agreeing to an exceptional term of commitment in this case because [he] no longer faces a mandatory sentence of life imprisonment without the possibility of parole if convicted as originally charged." CP 21. The court found that Reanier "knowingly, intelligently and voluntarily waived his right to challenge the imposition of an exceptional term of commitment in this case either by direct appeal or by collateral attack." CP 22.

The court also found substantial and compelling reasons for the exceptional term of commitment. CP 22. The court concluded that the agreement generally served the purposes of the Sentencing Reform Act, and that the agreement was consistent

with the interests of justice and was in conformance with state prosecuting standards. Id.

On May 27, 2005, the court entered "Findings of Fact, Conclusions of Law, Judgment, Order of Acquittal by Reason of Insanity, and Order Committing Defendant for Treatment." CP 30-32. The court found that Reanier was legally insane at the time of the assaults, and that he presented a danger to public safety such that he should be detained in a state mental hospital. CP 31. The court accordingly acquitted Reanier by reason of insanity, and committed him to the Secretary of the Department of Social and Health Services for hospitalization. CP 32. The court noted that "[t]he maximum term of commitment or treatment in this case is 10 years." CP 31. Reanier did not appeal the order of commitment. RP¹ 5.

On September 6, 2006, Western State Hospital ("WSH") recommended Reanier's conditional release to a long-term (3-6 month) inpatient substance abuse rehabilitation facility. CP 46-51. On April 16, 2007, the trial court signed "Findings of Fact, Conclusions of Law, and Order Releasing Defendant from

¹ "RP" refers to the verbatim report of proceedings held in the trial court on May 29, 2009.

Hospitalization to Community on Conditions." CP 64-69. The court ordered Reanier to enter an inpatient chemical dependency program and, upon completion, enter into and follow treatment recommendations of an outpatient chemical dependency program. CP 66. He was specifically ordered not to use alcoholic beverages, controlled substances, or nonprescribed drugs or drug paraphernalia. Id. Reanier was also ordered to obtain a mental health evaluation and follow any treatment recommendations, and to submit to random urinalysis, blood or breath testing as requested by a Community Corrections Officer ("CCO"). Id.

On April 22, 2009, the State sought revocation of Reanier's conditional release due to violation of his conditions. CP 70-88. The State's request was based on a Notice of Violation from Reanier's CCO, detailing Reanier's continuing use of marijuana, alcohol, cocaine and methamphetamine, as well as his failure to complete chemical dependency treatment. CP 84-85, 87. The specific violations alleged in the notice were: 1) "Failing to report to the Department of Corrections as directed on 2/13/09"; and 2) "Ingesting cocaine on or about 2/4/09." CP 86.

Reanier opposed revocation, arguing that the court should "continue him on release conditions until the expiration of the period

of supervision." CP 95. Reanier contended that, despite his agreement to a ten-year term of commitment, the trial court's jurisdiction expired after five years, the statutory maximum for Assault in the Third Degree. CP 90-91, 95.

The trial court held a hearing on the allegations, and on the question of revocation, on May 29, 2009. The State informed the court that the most recent recommendation from WSH was that Reanier be placed in an inpatient drug therapy program, and then be returned to WSH for risk assessment with the hope that he would be able to continue on a less restrictive alternative. RP 2. The State joined in this recommendation. RP 3.

The court first addressed Reanier's argument that the court no longer had jurisdiction to supervise him. RP 3. Reanier argued that, because his term of commitment was imposed under RCW 10.77, there was no authority to run the terms for the two counts consecutively – one five-year term was all that was available. RP 4-6. The State disagreed, but argued that, even if Reanier was correct, his remedy was withdrawal of his plea of not guilty by reason of insanity ("NGRI"):

My point on the estoppel argument is that if they wish to bring this type of thing, it needs to come in the context of a motion to withdraw the [NGRI] order and

the underlying plea. Otherwise, the State is severely prejudiced. Because going forth in good faith we allowed this individual to plead guilty to two counts of consecutive counts of [assault] three with the 10-year maximum. That's what the parties clearly sought and what they clearly foresaw.

If you are allowed to come in after you received the benefit of the bargain and say, by the way, I didn't get the strike from the assault two and I only get five years, that is clearly unfair. And that's why estoppel is a very important point in this.

RP 8-9.

Each party argued that the statutory language supported his position. RP 12-15. While lamenting the lack of authority on the issue, the trial court concluded that it had jurisdiction to act.

RP 15-16, 17.

The court then turned to the alleged violations, and Reanier admitted both. RP 16. Nor did Reanier object to further counseling or treatment, either inpatient or outpatient. RP 17. While Reanier asked to be released pending placement in a program, the trial court ordered him held for 45 days pending placement. RP 18-32; CP 96-97.

Reanier has now appealed, challenging the trial court's statutory authority to impose a term of commitment based on consecutive sentences.

C. ARGUMENT

1. WHERE A DEFENDANT PLEADS NOT GUILTY BY REASON OF INSANITY TO MULTIPLE COUNTS, THE MAXIMUM TERM OF COMMITMENT OR TREATMENT UNDER RCW 10.77.025 MAY PROPERLY BE BASED ON CONSECUTIVE TERMS OF UP TO THE STATUTORY MAXIMUM FOR EACH COUNT.

Reanier contends that the relevant statute, RCW 10.77.025, does not permit the trial court to base his total term of commitment on consecutive terms of up to the statutory maximum for each count to which he pled not guilty by reason of insanity. This is incorrect. The legislature has explicitly authorized consecutive terms as an exceptional sentence based on the stipulation of the parties; thus, the "maximum possible penal sentence" encompasses the two consecutive five-year terms imposed in this case.

- a. This Appeal Is Untimely.

As a preliminary matter, this appeal is untimely. The trial court's order imposing Reanier's ten-year term of commitment was filed in the superior court on May 27, 2005. CP 30-32. Reanier filed this Notice of Appeal on June 25, 2009. CP 98. This is well

beyond the 30-day period allowed for filing a notice of appeal. See RAP 5.2(a).

Reanier, however, purports to appeal the "Order denying defense motion to limit jurisdiction to supervise compliance with not guilty by reason of insanity order entered herein on the 29th day of May, 2009." CP 98; see CP 97 (trial court's ruling "[t]hat the motion to limit jurisdiction of this Court to supervise compliance with release conditions to 5 years total for both charges is DENIED."). RAP 5.2(e) allows a party 30 days to appeal a timely motion for arrest of judgment under CrR 7.4. The criminal rule, in turn, provides that judgment may be arrested for lack of jurisdiction. CrR 7.4(a)(1). Such a motion must be brought within ten days after the decision or, in the discretion of the trial court, up to entry of judgment. CrR 7.4(b). Reanier never mentioned CrR 7.4 at his revocation hearing, nor would a motion under that rule have been timely.

Reanier nevertheless relies on In re Personal Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002), for the proposition that "the trial court has the power and duty to correct the erroneous sentence, whenever the error is discovered." Appellant's Opening Brief at 13. But In re Goodwin was a personal

restraint petition. While Goodwin brought his petition more than one year after his judgment was final, his judgment was invalid on its face, and thus exempt from the time bar. In re Goodwin, 146 Wn.2d at 865-67; see RCW 10.73.090. Reanier, too, may argue that his judgment and sentence is invalid on its face, but he must do so in a personal restraint petition.

b. The Trial Court Properly Imposed A Ten-Year Term Of Commitment.

Even if this Court reaches the merits of Reanier's appeal, he cannot prevail. The statute that governs the term of commitment following a finding of not guilty by reason of insanity reads in relevant part:

(1) Whenever any person has been: (a) Committed to a correctional facility or inpatient treatment under any provision of this chapter;² or (b) ordered to undergo alternative treatment following his or her acquittal by reason of insanity of a crime charged, such commitment or treatment cannot exceed the maximum possible penal sentence for any offense charged for which the person was committed, or was acquitted by reason of insanity.

RCW 10.77.025(1).

² Reanier's motion for acquittal on the grounds of insanity was made under RCW 10.77.080. CP 25.

The "maximum possible penal sentence" for a given crime is the statutory maximum set by the legislature. RCW 9A.20.021. Assault in the Third Degree is a class C felony; thus, the maximum possible penal sentence for that crime is five years. RCW 9A.20.021(1)(c); 9A.36.031(2).

Reanier's commitment, however, is based on *two* counts of Assault in the Third Degree. CP 31. While the legislature has made it clear that sentences for current offenses will ordinarily be served concurrently, it is equally clear that consecutive sentences may be imposed as an exceptional sentence. RCW 9.94A.589(1)(a). The legislature has explicitly authorized the court to impose an aggravated exceptional sentence where the parties stipulate that justice is best served by such a sentence, and the court finds that the sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act ("SRA"). RCW 9.94A.535(2)(a); see also In re Personal Restraint of Breedlove, 138 Wn.2d 298, 310, 979 P.2d 417 (1999) (where trial court has approved plea agreement as consistent with interests of justice and in conformance with state prosecuting standards, court may approve stipulation to exceptional sentence if court finds sentence is consistent with purposes of SRA).

Reanier's sentence meets these criteria. The parties jointly recommended two consecutive five-year terms, for a total term of commitment of ten years. CP 33. Reanier expressly stipulated that, by virtue of this joint recommendation, he received a "substantial benefit," in that he no longer faced a mandatory sentence of life imprisonment. Id. The trial court found that the agreed exceptional term of commitment was consistent with and in furtherance of the interests of justice and the purposes of the SRA. CP 22. The term of commitment was thus statutorily authorized.

To support his argument that his ten-year term of commitment is not authorized by statute, Reanier relies primarily on State v. Harris, 39 Wn. App. 460, 693 P.2d 750, review denied, 103 Wn.2d 1030 (1985). Like Reanier, Harris was charged with two class C felonies, each carrying a maximum five-year term, and he was committed pursuant to an order of acquittal by reason of insanity. Id. at 461-63, 463 n.1. After more than five years had passed, during which time Harris was several times released on conditions and re-committed after violating terms of release, Harris filed a petition for final discharge. Id. at 462. The trial court denied the petition, and Harris appealed. Id.

The State, arguing for a ten-year term of commitment, contended that the relevant statute³ permitted commitment for a period equal to "that which *would have been served had consecutive sentences been imposed*" – ten years. Id. at 463 (italics added). Harris took the position that, since the maximum term for *either* of his underlying offenses was five years, his maximum term of commitment was also five years. Id. at 462-63. Finding no clear answer in the language of the statute or in legislative intent, the court applied the rule of lenity and resolved the case in favor of Harris's interpretation of the statute.

The decision in Harris should not bind this Court. First of all, the court in Harris devoted little time and no significant analysis to the plain meaning of the statutory language. The court simply noted that Washington courts had repeatedly construed "any" (as in "maximum possible penal sentence for any offense") to mean "every" and "all," and summarily concluded that the word rendered the statute ambiguous. Harris, 39 Wn. App. at 463, 465. But if the word "every" were inserted in place of "any" in the statute, the

³ The statute governing commitment following acquittal by reason of insanity at the time of the Harris decision was former RCW 10.77.020(3). Although the statute governing such committal is now found at RCW 10.77.025(1), the relevant language remains unchanged.

logical conclusion would be that the term of commitment could include the maximum term for "every offense charged" – in Reanier's case, two five-year terms. The same result would obtain if the statutory language were "all offenses charged."

Even if the language were deemed ambiguous, the intent of the legislature is clearer now than it was under the sentencing scheme in effect in Harris's time.⁴ Harris committed his crimes on or before July 11, 1977; the order of acquittal by reason of insanity was entered on June 12, 1978. Harris, 39 Wn. App. at 461-62. Harris was decided in January 1985. It was not until 1987 that the legislature explicitly provided for consecutive sentences as an exceptional sentence. Laws 1987, ch. 456, § 5. It was not until 1999 that the Washington Supreme Court held that a stipulation in a plea agreement could be a statutorily valid basis for an exceptional sentence. In re Breedlove, 138 Wn.2d at 304-10.⁵

⁴ "The primary goal of statutory construction is to carry out legislative intent." Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

⁵ In 2005, the legislature codified the Breedlove holding in RCW 9.94A.535(2)(a). Laws 2005, ch. 68, § 3. While Division 2 of this Court has concluded that the SRA does not come into play in an NGR1 plea, that holding was made in the context of answering a different question, and with little analysis. State v. Sunich, 76 Wn. App. 202, 206, 884 P.2d 1 (1994). In any event, the holding does not preclude this Court from taking into account certain legislative actions under the SRA in assessing the legislature's intent in the present context.

The court in Harris examined some of the legislative discussion surrounding passage of the language limiting the period of commitment to the "maximum possible penal sentence for any offense charged." The court determined that the language was enacted in response to Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), in which the Supreme Court held that a criminal defendant found incompetent to stand trial could not be committed indefinitely absent a finding of dangerousness. Harris, 39 Wn. App. at 464. The Harris court quoted a legislator as to the purpose of the enactment: "I think in order to meet Jackson v. Indiana this should be tied into the length of time he *would have served* if convicted of a felony."⁶ Id. (quoting from February 6, 1974 minutes of the House Judiciary Committee) (italics added).

Despite the similarities, Reanier's situation is different from Harris's in one important respect. It appears that the court in Harris was dealing with a *hypothetical* term of commitment – the State argued that commitment should be for a period "equal to that which would have been served *had consecutive sentences been*

⁶ Note that the legislator said "would have served," not "could have served."

imposed." Harris, 39 Wn. App. at 463 (italics added). While the "would have served" language from the legislative discussion did not bear directly on Harris's situation, where consecutive maximum terms had not actually been imposed, the language is directly relevant to Reanier's situation.⁷ Because he agreed to, and received, consecutive terms for his two crimes, there is little question here about what sentence he "would have served if convicted of a felony" – ten years. The legislative intent is clear.

2. BECAUSE REANIER'S AGREEMENT TO THE CONSECUTIVE TERMS OF COMMITMENT AND HIS AGREEMENT NOT TO APPEAL HIS COMMITMENT WERE INDIVISIBLE PARTS OF THE AGREEMENT, HE CANNOT CHALLENGE HIS TERM OF COMMITMENT WITHOUT CHALLENGING THE ENTIRE PLEA.

Reanier argues that his ten-year term of commitment should be vacated, and the case remanded for imposition of a five-year term. This remedy is not available under these facts. Given the

⁷ Further evidence of the hypothetical nature of the question in Harris is found in fn 2, wherein the court contrasts the Washington statute with one from California that seems to include such hypothetical possibilities (maximum term of commitment is "the largest sentence that *could have been* imposed upon conviction, including any additional terms for enhancements and consecutive sentences"). Harris, 39 Wn. App. at 465 n.2 (italics added).

agreement of the parties, Reanier's only remedy would be withdrawal of his NGRI plea.

The Washington courts have long held that, where a plea agreement is based on a mutual misunderstanding of the applicable law, the defendant may choose either specific performance or withdrawal of the plea. State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988); State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001). Specific performance of the agreement in this case is not likely a remedy that Reanier would choose, given his challenge to the term of commitment to which he agreed. That leaves him with withdrawal of his plea.

Reanier relies on In re Goodwin, supra, in claiming that this case should simply be remanded for imposition of a single five-year term of commitment. But Goodwin did not involve a plea bargain with the type of explicit waivers found in Reanier's agreement.

More directly on point is State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006). Like Reanier, Ermels stipulated to the basis for an exceptional sentence as part of a plea agreement. Id. at 533. Like Reanier, Ermels, as part of his agreement, explicitly

waived his right to appeal the exceptional sentence.⁸ Id. at 534.

Like Reanier, Ermels asked the appellate court to simply remand for resentencing within the standard range. Id. at 537.

The court found that the requested remedy was not available to Ermels under these circumstances – Ermels could not challenge his stipulation that there was a basis for an exceptional sentence without challenging the entire agreement. Id. at 541. The court relied on its prior decisions in State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003), and State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006), in concluding that the plea agreement was, under these circumstances, a "package deal." Ermels, 156 Wn.2d at 541.

Addressing Ermels's waiver of his right to appeal the exceptional sentence, the court found that this waiver was also an indivisible part of the plea agreement. Id. at 542. "As a result [of the waiver], the State was assured that it would not have to expend resources defending the propriety of and basis for the exceptional sentence on appeal." Id. Based on the indivisible nature of the plea agreement, the court concluded that Ermels was not entitled to be resentenced within the standard range. Id. at 531. The court

⁸ Ermels reserved the right to appeal the *length* of the sentence, but waived his right to appeal "the basis for and propriety of the imposition of an exceptional sentence upward." Ermels, 156 Wn.2d 534.

held that Ermels's only remedy was to challenge his entire plea. Id.
at 542-43.

Similarly, this Court should hold that Reanier is not entitled to a remand for imposition of a single five-year term of commitment. Under the circumstances of this case, his remedy, if any, is to withdraw his plea and return the parties to their original positions.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to dismiss this appeal as untimely. Should this Court reach the merits, the State asks the Court to affirm Reanier's ten-year term of commitment or, in the alternative, hold that the only remedy available to him is withdrawal of his NGR1 plea.

DATED this 23rd day of December, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Maureen M. Cyr**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. TIMOTHY REANIER**, Cause No. **63717-7-I**, in the Court of Appeals for the State of Washington, Division I.

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

U Brame
Name
Done in Seattle, Washington

12/23/09
Date