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COA NO. 71606-9-I

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

REC'D
SEP 22 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ALFONZIA ALLEN,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The failure to grant appellant credit for the period spent in jail toward his term of civil commitment violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and article I, section 12 of the Washington Constitution.

2. The failure to grant appellant credit for the period spent in jail toward his term of civil commitment violates the due process clause of the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution.

3. The court erred in entering an order denying credit for time served for the period appellant spent in jail before his civil commitment. CP 372-77.

4. The court erred in entering conclusions of law 2.3, 2.4, 2.5, 2.8, 2.11, 2.12, 2.14 and 2.15. CP 375-76.

Issue Pertaining to Assignments of Error

Whether the failure to grant credit for pre-trial jail time to a person unable to post bail violates the constitutional right to due process and equal protection, where that person is subsequently adjudicated not guilty by reason of insanity and subject to the statutory maximum term of commitment commensurate with the underlying criminal charge?

B. STATEMENT OF THE CASE

On August 27, 2003, Alfonzia Allen was arrested for attacking a bus passenger with a screwdriver after Allen hit the man with a beer bottle and the two struggled. CP 2, 372 (FF 1). The State charged Allen with second degree assault. CP 1-3. Bail was set at \$75,000. CP 379-81. The Defender Association appeared as Allen's counsel. CP 461-63. Allen was sent to Western State Hospital (WSH) for competency and insanity evaluations, where he remained for a total of 85 days. CP 383, 410, 414. He was ultimately found to be competent. CP 62.

On June 1, 2005, the court found Allen not guilty by reason of insanity (NGRI) under chapter 10.77 RCW. CP 75-77. Allen was committed to the custody of the Department of Social and Health Services. CP 77, 373 (FF 4). Allen has remained at Western State Hospital since being found not guilty by reason of insanity. CP 62, 384.¹

Allen was held in custody from August 27, 2003, when he was arrested, to June 1, 2005, when he was found not guilty by reason of insanity. CP 62. Other than the 85 days spent at WSH, he was confined to the Regional Justice Center/King County Jail during that period. CP 62.

¹ Allen has twice been conditionally released to the Western State Hospital Community Program. CP 384.

In 2013, defense counsel filed a motion in which he argued Allen should receive credit for pretrial confinement toward his maximum term of commitment, relying on RCW 10.77.025(1) and the equal protection clause of the federal and state constitutions. CP 61-77, 78-81. The State agreed that Allen was entitled to credit against his commitment term for the pre-NGRI period in which he was evaluated and treated at WSH. CP 388. The State disagreed that Allen was entitled to credit for pre-NGRI time spent in jail. CP 386-91. The court granted pretrial credit for the time spent being evaluated or treated at Western State Hospital, but denied without prejudice Allen's constitutional argument that he should receive credit for pre-NGRI jail time. CP 82, 114-15.

Counsel subsequently filed another motion, pressing the argument that Allen was entitled to credit for pre-NGRI jail time. CP 83-99, 362-68, 456-60. Counsel presented evidence that Jail Health Services provided medical and mental health treatment to Allen while he was in jail prior to his NGRI adjudication. CP 117-322. The State continued to oppose the defense motion. CP 413-55.

The court determined the jail health records did not provide a basis for credit for time served in jail under RCW 10.77.025(1) because Allen did not receive the mental health treatment recommended by expert evaluators to treat his mental illness and dangerousness during that time,

medication compliance was not court-ordered, and Allen was not under a "commitment" order once he returned from WSH for competency and insanity evaluations prior to June 1, 2005. CP 374 (FF 8-10). The court rejected Allen's statutory and constitutional arguments that his jail time must be credited to his term of commitment, concluding the right to equal protection and due process did not compel credit be given. CP 374-77. The court encouraged Allen to appeal. 1RP 24. He did. CP 378.

C. ARGUMENT

AS A MATTER OF DUE PROCESS AND EQUAL PROTECTION, TIME SPENT IN JAIL MUST BE CREDITED TOWARD ALLEN'S TERM OF COMMITMENT IN CALCULATING HIS MAXIMUM RELEASE DATE.

Due process and the right to equal protection dictate that a person, unable to post bail or otherwise procure his release from confinement prior to trial should, upon commitment as an insanity acquittee, be credited against a maximum commitment term with all jail time served prior to trial and commitment. A contrary decision would result in two separate sets of confinement ranges for NGRI acquittees—one for those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release. This is why Allen is constitutionally entitled to credit for time served for the time he spent in jail prior to his commitment.

a. Standard Of Review

Allen challenges the trial court's order denying him credit for pre-trial detention time on constitutional grounds. This Court reviews constitutional challenges de novo. State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010). Whether to award credit for time served is also a question of law subject to de novo review. State v. Swiqr, 159 Wn.2d 224, 227, 149 P.3d 372 (2006). The trial court's conclusions of law in Allen's case therefore receive no deference. Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

b. Insanity Acquittees Are Subject To An Absolute Limit On The Amount Of Time Spent In Commitment, Regardless Whether They Remain Dangerous As A Result Of Mental Illness

Allen, as an insanity acquittee, is not subject to indefinite commitment under chapter 10.77 RCW. The legislature has placed an absolute limit on the term of an insanity acquittee's commitment. RCW 10.77.025(1). That limit makes the credit for time served question important and constitutionally relevant. Credit for time served would be meaningless if a person could be committed indefinitely so long as he is both mentally ill and dangerous. But that is not how it works. The legislature has provided for a maximum release date commensurate with

the statutory maximum for the charged criminal offense. When that maximum release date has been reached depends on whether the insanity acquittee is entitled to credit for time served in jail prior to trial.²

RCW 10.77.025(1) thus provides: "Whenever any person has been: (a) Committed to a correctional facility or inpatient treatment under any provision of this chapter; 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."

The legislature intended to tie the commitment period to the maximum penal sentence. State v. Harris, 39 Wn App. 460, 464, 693 P.2d 750, review denied, 103 Wn.2d 1030 (1985). The "maximum possible penal sentence" refers to the statutory maximum of the charged criminal offense. State v. Reanier, 157 Wn. App. 194, 204, 237 P.3d 299 (2010), review denied, 170 Wn.2d 1018, 245 P.3d 773 (2011). "The maximum

² Allen's argument on appeal applies to those NGRI acquittees charged with a class B or C felony offense, not those charged with a class A felony, because the maximum possible penal sentence for class B and C felonies is 10 and 5 years respectively. RCW 9A.20.021(1)(b), (c). Because the maximum possible penal sentence for class A felonies is life (RCW 9A.20.021(1)(a)), NGRI acquittees charged with a class A felony are subject to indefinite commitment and are subject to final discharge only when they are no longer dangerous due to mental illness.

penal term is not simply a predictive tool as to dangerousness, but a legislative recognition of the constitutional problems inherent in any other rule." In re Pers. Restraint of Kolocotronis, 99 Wn.2d 147, 152, 660 P.2d 731 (1983). The legislature's primary purpose in tying confinement to the maximum penal term is to give recognition to the constitutional problems associated with indefinite commitment. Kolocotronis, 99 Wn.2d at 152; Reanier, 157 Wn. App. at 204. A person who serves the maximum sentence for the underlying criminal offense for which he was acquitted by reason of insanity is entitled to final discharge. Id. at 214.

Yet in rejecting Allen's constitutional claims, the trial court concluded "The need for treatment determines the length of commitment. The legislature did not intend to release an NGRI insanity acquittee committed under RCW 10.77 before treatment is successfully completed" — "if the State seeks a civil commitment near the end of the commitment term, it could be more." CP 375 (CL 2.8). The court similarly pronounced insanity acquittees "are not to be released from commitment until they have remedied the reason for their commitment." CP 376 (CL 2.12).

Special attention must be given to these conclusions, which are wrong when applied to those charged with class B and C felonies, and are misleading when applied to the issue here. The trial court envisioned the

maximum length of an NGRI commitment under chapter 10.77 RCW as the point at which treatment is successfully completed. And if treatment is never successfully completed, then commitment is indefinite. RCW 10.77.025(1) flatly contradicts the trial court's position. Again, the legislature tied civil confinement to the maximum penal term to avoid indefinite commitment. Kolocotronis, 99 Wn.2d at 152.

If the legislature intended insanity acquittees to remain committed until they were cured, then it would not have tied the maximum length of commitment to the maximum penal sentence for the crime charged. Common sense tells us that some insanity acquittees will not be cured by the time they reach the maximum penal sentence. "[I]t is impossible to predict how long it will take for any given individual to recover or indeed whether he ever will recover." Jones v. United States, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983). "There simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment." Jones, 463 U.S. at 369 (holding civil commitment for NGRI acquittees may constitutionally exceed the maximum sentence for the crime).

But the legislature, instead of authorizing an indefinite scheme of commitment tied to successful treatment, instead opted to set an absolute

release date regardless of whether successful treatment had occurred. And that legislative decision has constitutional consequences when it comes to credit for time served. With an indefinite term of confinement, credit for time served is a meaningless concept. With a definite term of confinement, constitutional considerations come into play, as will be addressed below.

The trial court's conclusions of law 2.8 and 2.12, which parrot the State's argument below, are misleading because they make it sound like the NGRI acquittee is not finished with his term of commitment under chapter 10.77 RCW unless and until he is treated to the point where he is no longer dangerous by reason of mental illness. That is untrue for those charged with a class B or C felony. When an NGRI acquittee reaches the maximum statutory term, he is entitled to final discharge. Period.

At that point, the State could seek to involuntarily commit that person again. But to do so, the State needs to use the separate procedure specified in chapter 71.05 RCW, where the State must prove commitment is justified for periods of 14, 90 or 180 days. RCW 71.05.240; RCW 71.05.320.³ Chapter 71.05 RCW is a separate civil commitment scheme.

³ See State v. Derenoff, __ Wn. App. __, __P.3d __, 2014 WL 4212733 at *5, n.1 (slip op. filed July 15, 2014) ("the State may not hold an insanity acquittee in a state mental health facility for longer than the maximum possible penal sentence for the crime charged"; "At the conclusion of this period, the State may seek to have an insanity acquittee involuntarily committed to a state mental health facility under chapter 71.05 RCW.

There is nothing uncertain about the maximum term of confinement for an NGRI acquittee under chapter 10.77 RCW — the maximum term of commitment is equal to the maximum penal sentence for the crime charged.

Allen was charged with second degree assault — a class B felony that carries a 10 year statutory maximum sentence. CP 372; RCW 9A.20.021(1)(b); RCW 9A.36.021(2). His maximum term of commitment is therefore 10 years — "the maximum possible penal sentence" for the offense charged. RCW 10.77.025(1). Allen is entitled to final discharge upon reaching that maximum term regardless of whether he remains dangerous as a result of mental illness. The question here is whether insanity acquittees are constitutionally entitled to have pre-trial jail time credited towards their maximum statutory term of commitment.

- c. Due Process And Equal Protection Required Insanity Acquittes Unable To Obtain Release Prior To Trial Receive Credit For Time Spent In Jail Towards Their Term Of Confinement.

Due process guarantees "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Wash. Const. art. I, § 3. "Due process requires the government to

This procedure, in turn, involves further due process protections.").

treat its citizens in a fundamentally fair manner." In re Detention of Ross, 114 Wn. App. 113, 121, 56 P.3d 602 (2002).

The right to equal protection guarantees "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 12. "A valid law, administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection." State v. Gaines, 121 Wn. App. 687, 705, 90 P.3d 1095 (2004).

Upon arrest, Allen's bail was set at \$75,000. CP 379-81. He was unable to make bail, as shown by the fact that he remained in jail following his arrest. If Allen does not receive credit for the days of detention spent in jail, he is being treated differently than those insanity acquittees who are able to obtain release pending their NGRI trial. His length of confinement is longer than it would be had he not been confined pending trial. Due process and equal protection do not allow this outcome.

It is instructive to consider the analogous plight of a defendant who spends time in jail before being convicted of a crime and sentenced to confinement. In Reanier v. Smith, several defendants had been denied credit for time spent in jail prior to their conviction and sentencing. Reanier v. Smith, 83 Wn.2d 342, 343-44, 517 P.2d 949 (1974). One

defendant had also spent some time in detention at Western State Hospital. Reanier, 83 Wn.2d at 343. The Supreme Court held "an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial" was entitled to credit for time served upon sentencing. Id. at 346. The Court based its decision on "principles of due process and equal protection." Id. at 347, 352-53. It reasoned that a contrary decision would result in two separate sets of sentencing ranges—one for "those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release" — and concluded that such a sentencing regime would not even survive rational basis review. Id. at 346-47. "Fundamental fairness and the avoidance of discrimination" dictate that an accused person unable to procure his release from confinement prior to trial should receive jail credit against his sentence. Id. at 346. "Otherwise, such a person's total time in custody would exceed that of a defendant likewise sentenced but who had been able to obtain pretrial release." Id.

The same reasoning applies to Allen's case, except that the class of people at issue is not defendants convicted of a crime but insanity acquittees. One class of insanity acquittees — those unable to make bail — remain confined in jail before trial and eventual commitment. Another class of insanity acquittees — those able to make bail — enjoy freedom

before trial and eventual commitment. In measuring their term of civil commitment under chapter 10.77 RCW, both classes are subject to "the maximum possible penal sentence for any offense charged." RCW 10.77.025(1). But the insanity acquittee unable to make bail spends more time in confinement than the insanity acquittee who is able to make bail.

The trial court, in denying Allen credit for his pre-trial jail time, has created two separate sets of confinement ranges—one for those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release. Under the due process and equal protection principles enunciated in Reanier, insanity acquittees too poor to make bail must be treated the same as those rich enough to make bail in terms of the overall length of confinement to which each is subject. See also State v. Cook, 37 Wn. App. 269, 274, 679 P.2d 413 (1984) ("If she does not receive credit for the 12 days of detention, she is being treated differently than those who are able to obtain release pending trial. Her disposition is different than it would be had she not been confined pending trial.").

The trial court concluded "The court's refusal to grant Mr. Allen credit for time held in King County Jail against the maximum term of commitment does not cause Mr. Allen to be confined for a longer period of time than acquittees who were not confined prior to trial. Mr. Allen had

a bail of \$75,000 and could have bailed out." CP 376 (CL 2.15). That conclusion is wrong. Allen is confined for a longer period of time than acquittees who were not confined prior to trial because he could not make bail. The fact that bail was set does not mean he was able to post it. It's obvious he could not make bail because he remained in jail. For the trial court to maintain there is no constitutional problem here because Allen could have bailed out is like saying there is no constitutional problem in denying indigent criminal defendants pre-trial credit for time served because they could have bailed out. The Supreme Court in Reardon did not see it that way. Due process and equal protection would be violated if the rich man were able to avoid presentence confinement by posting bail while the poor man has no choice but to endure presentence confinement without receiving credit for time served. Reanier, 83 Wn.2d at 349-50. The same rationale applies to the disparate treatment of poor and rich insanity acquittees.

The trial court also concluded there was no equal protection violation because Allen, as an insanity acquittee subject to commitment under chapter 10.77 RCW, was not similarly situated to criminal defendants subject to a sentence under the Sentencing Reform Act (SRA). CP 376 (CL 2.11, 2.12, 2.14).

The threshold determination for any equal protection claim is whether the person challenging the law is similarly situated to others affected by the law. State v. Handley, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990). The important thing is to identify the class of people with whom Allen is similarly situated. See In re Pers. Restraint of Knapp, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984) ("The respondents argue that the petitioners are not similarly situated to persons confined in jail because 'jail time' serves all four purposes of punishment, i.e., rehabilitation, retribution, incapacitation and deterrence, while the petitioners' 'treatment time' serves the principal purpose of rehabilitation. Assuming arguendo that the petitioners are not similarly situated to individuals who serve probationary jail time, *they are similarly situated to each other.*").

Allen might not be similarly situated to those convicted and sentenced under the SRA, but he is similarly situated to other insanity acquittees. The trial court recognized this, but did not grasp its constitutional implications. 1RP 19-20.

Insanity acquittees who are able to make bail pending entry of an NGRI order and insanity acquittees who are unable to make bail during that same period of time are both subject to the same maximum term of commitment under RCW 10.77.025(1). Those two groups are similarly situated for that reason. The only difference is one group is able to obtain

pre-trial release while the other is not. That distinction does not justify different treatment in terms of the total length of time each must serve in order to gain final discharge from commitment.

While the legislature remains free to draw many distinctions, "[t]he Reanier decision absolutely bars the legislature from distinguishing between rich defendants and poor defendants for the purpose of credit for time served." State v. Medina, 180 Wn.2d 282, 292-93, 324 P.3d 682 (2014). The touchstone is deprivation of liberty due to total confinement. Thus, credit for time spent in incarceration includes mandatory time spent in a state mental hospital. Knapp, 102 Wn.2d at 475. "[L]ike confinement in a prison or jail, a person committed to a mental hospital pursuant to a valid criminal conviction is subject to a massive curtailment of liberty." Id.

Allen was likewise subject to a massive curtailment of liberty while he was in jail pending trial. Due process and equal protection demand that he not be subject to a greater deprivation of liberty than those insanity acquittees who were able to obtain release pending their trials.

d. Allen Need Not Prove The Statute Is Unconstitutional In Order For His Constitutional Claim To Succeed.

Although there is no statutory authority for credit for time served in this circumstance, Allen is entitled to receive such credit as a matter of constitutional law. See State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d

1096 (1992) ("Even without statutory authority for the allowance of such credit, it is constitutionally mandated."). Statutory authorization is not a prerequisite to getting credit for time served. If constitutional considerations dictate credit be given, it makes no difference whether a relevant statute authorizes it. Swiger, 159 Wn.2d at 227-28.

The trial court believed Allen had the burden of proving "RCW 10.77" was unconstitutional and entered a number of conclusions of law addressing why Allen supposedly could not meet that burden. CP 375 (CL 2.3, 2.4, 2.11, 21,12, 2.14). The trial court saddled Allen with an unnecessary burden. This case is capable of being resolved without any challenge to the constitutionality of RCW 10.77.025(1).

The statute has been interpreted as authorizing credit for time served for the period in which a person is committed to a correctional facility or inpatient treatment under chapter 10.77 RCW. Lee v. Hamilton, 56 Wn. App. 880, 881, 884-85, 785 P.2d 1156 (1990). The issue of whether an insanity acquittee is entitled to credit for pretrial jail time did not arise in Lee, and so that case does not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue).

RCW 10.77.025(1) does not purport to set forth an exhaustive set for circumstances under which an insanity acquittee is entitled to credit for time served. It certainly does not specify that an insanity acquittee is precluded from receiving credit for pre-trial jail time towards an NGRI term of commitment. There is no need to challenge the constitutionality of the statute in order for Allen to prevail on his constitutional claims.

In a line of cases, the Supreme Court held credit for time served was constitutionally required without striking down a statute as unconstitutional. In State v. Anderson, the issue was whether a defendant was entitled to credit for post-trial electronic home detention. State v. Anderson, 132 Wn.2d 203, 205, 937 P.2d 581 (1997). RCW 9.94A.505(6) (former RCW 9.94A.120(16)) mandated that defendants receive credit against their sentence for time served under *pretrial* electronic home detention but did not mandate credit for *post-trial* electronic home detention. Id. at 207. The Supreme Court held the equal protection clause requires defendants under post-trial electronic home monitoring to likewise receive credit for time served, and it did so without striking down the statute as unconstitutional. Id. at 208-13.

Anderson is not the first case in which the Supreme Court held credit for time served was constitutionally required without declaring a statute unconstitutional. Reanier considered RCW 9.95.062, which

requires credit to be given for the time a defendant is imprisoned after sentencing but pending appeal. Reanier, 83 Wn.2d at 351. Since the legislature allowed credit for postconviction imprisonment pending an appeal, Reanier held the legislature should also allow credit for similar presentence confinement. Id. In so holding, the court did not strike down RCW 9.95.062 as unconstitutional. It simply held credit for time served for presentence confinement was a constitutional requirement. Id. at 352-53.

The Supreme Court took the same approach in Knapp. The Court considered the credit for time served authorized by RCW 71.06.120 and RCW 72.68.031, determined credit for time served for those similarly situated but not falling within the statutory purview was constitutionally required, and it did so without condemning those statutes as unconstitutional. Knapp, 102 Wn.2d at 473-74.

Following Reanier, Knapp, and Anderson, RCW 10.77.025(1) need not be struck down as unconstitutional. Rather, this Court need only hold that Allen is entitled to credit for time served as a matter of due process and equal protection.

The State below attempted to frame the issue as whether the statute is unconstitutional in an attempt to make it harder for Allen's claim to succeed. CP 388-89. The trial court took the same tack. CP 375 (CL 2.3).

But the question itself is misplaced. The constitutionality of RCW 10.77.025(1) need not be addressed. It is enough that the constitution requires credit for time served.

- e. In The Alternative, The Statute Is Unconstitutional Because It Does Not Survive Intermediate Scrutiny.

Even if Allen's argument is pressed into service as an attack on the statute, he prevails. The trial court applied a rational basis test. CP 375 (CL 2.5). Rational basis is not the correct level of scrutiny. Intermediate scrutiny is appropriate because the credit for time served question involves both a deprivation of liberty and a classification based on wealth. "A higher level of scrutiny is applied to cases involving a deprivation of a liberty interest due to indigency." In re Pers. Restraint of Mota, 114 Wn.2d 465, 474, 788 P.2d 538 (1990). In State v. Phelan, the Supreme Court reasoned with respect to credit for time served that presentence detention "involves both a deprivation of liberty in addition to that which would otherwise exist, and a classification based solely on wealth" and therefore applied an intermediate level of scrutiny in the equal protection analysis. State v. Phelan, 100 Wn.2d 508, 514, 671 P.2d 1212 (1983).⁴

⁴ See also Mota, 114 Wn.2d at 473-74 (denial of good-time credit under the SRA to indigent defendants for time served in county jail prior to trial and sentencing due to inability to make bail violates equal protection clause of Fourteenth Amendment under intermediate level of scrutiny; good-time credit provisions permit those who serve entire sentence either

Here, we have a classification based on wealth because Allen remained detained for inability to post bail. Cook, 37 Wn. App. at 271. "The denial of a liberty interest due to a classification based on wealth is subject to intermediate scrutiny." Mota, 114 Wn.2d at 474. "Under intermediate scrutiny, the state must prove the law furthers a substantial interest of the state." Id.

Denying credit for pretrial jail time to the insanity acquittee does not further a substantial state interest. The State will argue it has a substantial interest in confining and providing treatment to the criminally insane who pose a danger to the community. And it does. But requiring the insanity acquittee who cannot make bail to serve more time in confinement than the insanity acquittee who does make bail does not serve that substantial interest. The maximum length of civil commitment under chapter 10.77 RCW is not tied to the length of time it takes to successfully treat a criminally insane person. It is not tied to when an insanity acquittee no longer suffers from a mental illness or is no longer a danger to society. When the statutory maximum period is up, then discharge automatically follows, regardless of whether the insanity acquittee has

in county jail or state institution to receive credit for one third of total sentence, while those unable to obtain pretrial release receive credit for only one third of sentence as reduced by number of days spent in pretrial detention).

been successfully treated and regardless of whether that person still poses a danger to society due to a mental illness. An insanity acquittee who is unable to make bail pending trial and is not unconditionally released until the statutory maximum is up serves more time in confinement than the bailed-out insanity acquittee who is charged with the same class of crime and is not released until the statutory maximum is up. No substantial interest is being served in that circumstance. One class of insanity acquittees is being held in confinement longer because of poverty, nothing more.

Indeed, the Court in Reanier concluded the creation of two separate sets of sentencing ranges — one for "those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release" — would breach the principles of due process and equal protection of the law "without rational reason." Reanier, 83 Wn.2d at 346-47. The creation of two separate sets of confinement ranges — one for insanity acquittees unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release — likewise defies rational reason. The State does not have a substantial interest in treating insanity acquittees differently based on wealth.

If granted credit for jail time prior to entry of the NGRI order, Allen's 10-year term of commitment expired in August 2013. He is being

illegally detained against his will and has been for some time. Allen asks this Court to right that wrong.

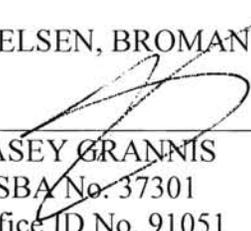
D. CONCLUSION

For the reasons set forth, Allen requests that this Court reverse the trial court's order denying immediate release and remand for entry of an order directing final discharge.

DATED this 27th day of September 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71606-9-1
)	
ALFONZIA ALLEN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALFONZIA ALLEN
WESTERN STATE HOSPITAL
CENTER FOR FORENSIC SERVICES
9601 STEILACOOM BOULEVARD SW
TACOMA, WA 98498

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF SEPTEMBER 2014.

X Patrick Mayovsky

Handwritten: N
2014 SEP 22 11:22
STP 2014 SEP 22 11:22
COURT OF APPEALS DIVISION ONE
CLERK OF COURT