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

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STATE OF WASHINGTON,

Respondent,

v.

BAO DANG,

Appellant.

---

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

The Honorable Michael J. Fox

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BRIEF OF APPELLANT

---

Susan F. Wilk  
Elaine L. Winters  
Attorneys for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## A. SUMMARY OF ARGUMENT

Due process requires that in order for an individual to be involuntarily committed to a mental institution, he must be mentally ill and dangerous. In accordance with this principle, the Washington Legislature has expressly stipulated that when a motion for acquittal by reason of insanity has been granted, the fact-finder must affirmatively conclude that the individual is dangerous before he may be confined in a mental institution. If the fact-finder determines that the person is not dangerous but is in need of further control by the court or other institutions, he must be conditionally released.

Bao Dang was conditionally released following his acquittal by reason of insanity but his conditional release was revoked, despite his compliance with all affirmative terms of his release, because his mental condition deteriorated. In revoking his conditional release, the court did not find that he was dangerous. Dang's confinement solely on the basis of his mental illness violated due process. To the extent this result could be construed to have been authorized by statute, either the statute is ambiguous and must be given a construction that ensures a constitutional result, or it violates due process. Further, insufficient evidence was

adduced to prove Dang was dangerous. Dang should be released from confinement.

B. ASSIGNMENTS OF ERROR

1. The trial court denied Dang his Fourteenth Amendment right to substantive due process when it failed to find that Dang posed a substantial danger to other persons or a substantial likelihood of committing criminal acts jeopardizing public safety or security before revoking his conditional release.

2. To the extent that RCW 10.77.190 permits an individual who has been conditionally released to be civilly committed without first requiring a finding that the individual is dangerous, the statute is unconstitutional.

3. Insufficient evidence was presented to prove that Dang was dangerous and should have his conditional release revoked.

4. In violation of due process, the trial court erred in considering unreliable hearsay at the hearing on the State's motion to revoke Dang's conditional release.

5. The trial court erred in applying a preponderance of the evidence standard of proof to the State's motion to revoke Dang's conditional release.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment requires that in order for an individual to be confined against his will in a mental institution, he must be proven to be mentally ill and dangerous. Chap. 10.77 RCW, pertaining to criminally insane individuals, requires a finding of dangerousness be expressly made by the fact-finder as a predicate for confinement; otherwise, the person must be released. Bao Dang was determined to be mentally ill but not dangerous and was conditionally released. The court subsequently revoked Dang's conditional release because his mental status deteriorated, but the court never made a finding that he was dangerous before ordering his commitment. Did the commitment order violate due process? (Assignment of Error 1)

2. The Washington Legislature has stipulated that the fact-finder must affirmatively determine an insanity acquittee is dangerous before he may be committed to a mental institution. Despite this, RCW 10.77.190, pertaining to modification or revocation of conditional release, may be construed to permit revocation and confinement based solely upon proof of a violation of a term of release, and without any predicate finding of dangerousness. If the statute is ambiguous, must it be construed

to conform with what the constitution demands? If it is unambiguous, is it unconstitutional? (Assignment of Error 2)

3. Despite some evidence of deterioration in Dang's mental condition, two mental health professionals declined to civilly commit Dang because there was insufficient evidence of any constitutionally sound predicate to do so. Where Dang was otherwise wholly compliant with all of the terms of his conditional release, did the State fail to present sufficient evidence to prove that Dang was dangerous so as to warrant his commitment to Western State Hospital? (Assignment of Error 3)

4. Although there is no Sixth Amendment right to confrontation at a probation modification hearing, absent a showing of good cause, confrontation may be required under the due process clause to ensure that the evidence presented is reliable. Did the trial court err in considering unreliable hearsay at the hearing on the motion to revoke his conditional release without requiring the State to establish good cause for its admission? (Assignment of Error 4)

5. Should this Court conclude that in light of the liberty interest an insanity acquittee has in his conditional release the

standard of proof at a revocation hearing should be clear and convincing evidence? (Assignment of Error 5)

D. STATEMENT OF THE CASE

Bao Dang is a Vietnamese native who suffers from a severe major depressive disorder with psychosis. CP 45, 48. On November 7, 2006, not long after he was released from a civil commitment to Western State Hospital (“WSH”), Dang attempted to set fire to a gas station in south King County. CP 2. Based on this event, he was charged by the King County Prosecuting Attorney with one count of Attempted Arson in the First Degree. CP 1.

Dang filed an unopposed motion for acquittal by reason of insanity, pursuant to RCW 10.77.080. CP 12-16. On April 17, 2007, the court entered an order finding Dang not guilty by reason of insanity and directing his conditional release. CP 6-11. The court made the following pertinent findings:

- That Dang committed the act charged;
- That at the time of the act charged, Dang was suffering from a mental disease or defect affecting his mind to the extent that he was unable to appreciate the nature and quality of the act or tell right from wrong with reference to the act charged;
- That Dang “is not a substantial danger to other persons and does not now present a substantial likelihood of committing

felonious acts jeopardizing public safety or security but . . . is in need of further control by the court or other persons or institutions”; and

- That it was in Dang’s best interest and in the best interest of others that Dang be placed in treatment that is less restrictive than detention in a state mental hospital.

CP 7-8.

The court ordered Dang’s release, subject to multiple conditions, including that he “shall be in a state of remission from the effects of mental disease or defect and have no significant deterioration of mental condition or other significant sign of decompensation.” CP 10.

In a subsequent order modifying the conditions of Dang’s conditional release, the court authorized Dang’s Department of Corrections (“DOC”) Community Corrections Officer (“CCO”) to detain Dang and take him into custody for hospitalization and evaluation if the CCO reasonably believed that Dang was failing to adhere to the conditions of his supervised release, and that as a result might become a substantial danger to other persons or present a substantial likelihood of committing criminal acts. CP 18-19. The order also provided for semiannual reports to the court, as required by statute. Id.

For the next 15 months, Dang did very well on conditional release. He complied with his treatment plan and medication regimen. RP 16. He showed up for all of his doctor appointments and appointments with his case manager at Harborview Mental Health Services ("HMHS"), Eric King. RP 24; CP 31. Although he initially was required by King to come in person to Harborview to pick up his medications five times per week, Dang did so well on conditional release that this requirement was reduced to three times per week. RP 25.

By June 2008, Dang was permitted without any objection from the State or DOC to travel to Vietnam for one month. CP 29-30. Dang's psychiatrist at HMHS, Anna Holen, concurred in Dang's travel request. CP 31. Holen noted that Dang had been attending regular appointments with her and his case manager and had reported stable symptoms. Id. Dang had informed Holen of his plans for coping with any increase in symptoms and to take his prescribed medications as required, and Holen indicated that she would be willing to provide Dang with one month's supply of medications to accommodate Dang's proposed travel. Id.

When Dang returned from Vietnam, however, he was very depressed. RP 16, 40, 50. He asked his mother to buy him a ticket

to return to Vietnam, and when she said she would not he became upset. RP 95-96, 104-05, 108.

Both King and Dang's CCO, Randall Vanzandt, were concerned by Dang's emotional condition. RP 17, 40. Dang told them that he believed his mother controlled his legal proceedings and influenced whether the court would allow him off supervision. RP 17-19, 40. He said that he wanted to move out of her house. RP 19, 45. Vanzandt telephoned King to confirm that Dang was taking his prescribed medications as required. RP 40. King told Vanzandt that Dang appeared to him to be depressed, but that Dang was showing up to pick up his medications. Id.

At one point, shortly after Dang's return, Dang went to the Harborview Emergency Room allegedly to report that he was going to blow up a gas station.<sup>1</sup> RP 44. He asked the County Designated Mental Health Professional ("CDMHP") for help finding a new apartment. RP 44-45. When the CDMHP explained that he could admit Dang to the hospital, but could not help him find a new place to live, Dang assured him that he would not do anything dangerous. RP 45. Dang was released from Harborview and was not civilly committed.

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<sup>1</sup> Dang objected to this testimony and similar testimony from King as hearsay. RP 32, 44.

When he learned of this incident, Vanzandt went to Dang's home with another CCO to conduct a search. RP 45. Dang had just picked up his medications and had a two-day supply there. Id. Although they conducted a thorough search, the CCOs could not find any indication that Dang was not taking his medications as prescribed. Id. They also could not find any evidence that Dang had been abusing illegal drugs or alcohol. Id. In short, they could not find anything to explain Dang's transformation in mood. Id.

On August 19, 2008, Dang came to Vanzandt's office for a meeting. RP 48. His affect was flat and blunted. Id. Dang told Vanzandt that he was going to do "something big" and that he wanted to go to WSH. Id. Upon further discussion, Dang retracted this statement, and indicated that he simply wished to find a new place to live. RP 55, 59-60. Vanzandt decided to take Dang to Harborview. RP 49. He brought Dang to the hospital and arranged for Dang to get a bed in the psychiatric ward. Id.

The CDMHP who evaluated Dang at Harborview, however, found no grounds to detain Dang. RP 51. When Harborview informed Vanzandt of their intention to release him, Vanzandt decided to detain Dang himself. Id. Dang was cooperative when

Vanzandt took him into custody. RP 60-61. He did not struggle or offer any verbal objection to his arrest. Id.

Dang remained at WSH for the next 21 months.

Based upon these events, the State filed a motion to revoke Dang's conditional release. CP 36-71. Hearings on the motion were held on May 24, 25, and 26, 2010 before the Honorable Michael J. Fox. Both King and Vanzandt testified on the State's behalf. The State also called as a witness Dr. Norma Martin, a clinical psychologist in the forensic unit at WSH. RP 60-63. Martin pointed to an episode before Christmas 2009, when Dang was depressed and expressed a desire to harm himself. RP 67-68. Martin believed that Dang should not be rereleased, as he needed to show more mood stability over time. RP 78.

Martin admitted that Dang's condition was greatly improved since Dang's admission to WSH in August 2008. RP 79-85. Dang exhibited diminished signs of anxiety, in particular about court dates, which previously had been a trigger for him. RP 79. Dang not only took his prescribed medications faithfully, he had insight into when he needed his medications and their purpose. RP 81. He knew to ask staff for a "PRN" – anxiety medication that he was

not regularly prescribed – whenever anxiety might be an issue for him. RP 85.

According to the leader of Dang’s medical education class, Dang participated in class, met group goals, and offered self-disclosure. RP 83. He attended 23 out of 23 sessions with his therapist. RP 88. His therapist reported that Dang was being more assertive than in the past and contributing during his sessions. Id. In a letter to his support team, Dang said that he felt he had been “sick,” and that in the future he would bring his symptoms to the attention of staff. RP 85. In fact, it was because of a self-report and request to be placed into seclusion that staff became aware of Dang’s suicidal ideation in December. RP 67-68.

Although Dang submitted to Martin a relapse prevention plan which he did not seem to fully understand, Martin worked with him on preparing a new plan. RP 87. Together, they conducted a master file review, and after that was completed they created a new relapse prevention plan. Id. In the plan, Dang identified strategies for dealing with stressful situations. For example, when asked what the best way to deal was with aggressive people, Dang responded, “walk away and let them cool down.” RP 89. When asked about

dealing with his own anger, Dang said that he would talk to his family, or take a walk. RP 90.

A source of concern for the State's witnesses was the fact that Dang proposed as part of his release plan that he would live with his mother. RP 79. However Dang's family was an important support for him during his confinement at WSH. RP 94-95. His mother and brother visited him weekly and he spoke with his mother on the telephone nearly every day. Id. In fact, although initially Dang would not accept visits from his mother, as his condition improved he visited with her regularly. RP 84.

Dang's mother testified at the hearing. She said that when Dang returned from Vietnam in 2008, he appeared very depressed, but that in the past several months Dang had returned to normal. RP 95. She asked the court to allow Dang to come home so that she could take care of him. RP 97-98. She said that Dang had told her he would not stop taking his medication, as he recognized that it was very important for him. RP 97.

Dang's mother lived a five-minute walk from Harborview. Apart from the times that Dang would be at Harborview or in appointments with his therapist or CCO, Dang's mother said that he would be with her and her other son, Wu. RP 98. She said that

she herself would remind Dang to take his medication morning and evening, and that if he ever started acting strange, her other son would notify Dang's CCO or case manager. RP 99.

Dang also testified at the hearing. He said that if he was released, he would ask his friends and his mother to help him, because he did not want to do anything wrong anymore. RP 100. He promised to attend all of his medical appointments and take his medications, as he understood that the medications were necessary to stabilize his mood. RP 100-01. He said he understood that the warning signs of decompensation included being confused, starting to think too much, and having feelings of anxiety. RP 103.

He explained that when he came back from Vietnam in 2008, he felt strongly that he wanted to return. RP 104. He asked his mother to buy a ticket so that he could go back, and she said no, explaining that he had just come home and should wait a little while before returning. RP 104-05. This made Dang feel "sad inside." RP 105, 108. He was homesick for Vietnam. RP 108.

Dang said that he did not want to leave his mother's home. RP 106. He told the court, "I want to be home. I want to be surrounded with family members." RP 108.

At the conclusion of the hearing, the court acknowledged that Chap. 10.77 RCW is silent on the question of the burden of proof on a motion to revoke conditional release. The court concluded that the standard of proof should be a preponderance of the evidence, on the basis that preliminary issues in criminal cases are generally decided under a preponderance of the evidence standard. RP 142. The court commented, however, that the question of what was the correct standard of proof was “academic” because the “proof [was] strong” that Dang’s conditional release should be revoked. RP 143. The court noted that Dang’s mental condition had deteriorated and a lot of his problems involved his mother, and concluded there was no placement that would satisfy the court that he could maintain himself without further deterioration. RP 144.

The court entered a written order following its ruling. CP 79-80. Neither the court’s oral ruling nor the written order made any finding of dangerousness. Indeed, the written order contained no factual findings whatsoever, but simply ordered, “[t]hat the conditional release previously ordered herein is revoked[.]” CP 80. Dang appeals. CP 81-84.

## E. ARGUMENT

1. THE TRIAL COURT FAILED TO FIND THAT DANG PRESENTED A SUBSTANTIAL DANGER TO OTHERS OR A THREAT TO PUBLIC SAFETY OR SECURITY IF NOT CONFINED, RENDERING THE ORDER COMMITTING HIM TO A MENTAL INSTITUTION UNCONSTITUTIONAL.

a. An individual may not be confined against his will in a mental institution except upon proof that he is both mentally ill and dangerous. “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). “[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Because of this liberty interest, an individual may not be involuntarily civilly committed except upon clear and convincing evidence that he is mentally ill and dangerous. 441 U.S. at 426-27.

The standard of proof articulated in Addington does not apply to the commitment of criminally insane persons. In Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), the Supreme Court evaluated the constitutionality of a

statutory scheme that provided for automatic commitment to a mental hospital following an acquittal by reason of insanity. The Court noted that a judgment of not guilty by reason of insanity establishes two facts: (1) that the acquittee committed the crime with which he was charged, and (2) that he engaged in the criminal acts because of insanity. Id.

The Court reasoned that the fact that a person has been found beyond a reasonable doubt to have committed a criminal offense is indicative of dangerousness. Id. at 364. The Court concluded that “a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society.” Id. at 366.

Distinguishing Addington, the Court also rejected arguments that principles of due process required the proof of insanity be by clear and convincing evidence, on the basis that the fact that a criminal offense has been committed “eliminates the risk that [the acquittee] is being committed for mere ‘idiosyncratic behavior.’” Id. at 367. The Court further noted, “since automatic commitment . . . follows only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his

mental illness, there is good reason for diminished concern as to the risk of error.” Id. (emphasis in original).

Nevertheless, both mental illness and dangerousness must be present to justify continued commitment of an insanity acquittee. Foucha, 504 U.S. at 80, 85-86; Jones, 463 U.S. at 370 (“when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society”); see also id. at 368 (“The purpose of commitment following an insanity acquittal ... is to treat the individual’s mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous”).

b. Washington requires a specific finding of dangerousness as a predicate for commitment of an insanity acquittee. Unlike the statutory scheme evaluated by the Court in Jones, in Washington, an insanity acquittee is not subject to commitment unless there is a specific finding that he or she is a “substantial danger to other persons or ... present[s] a substantial

likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions.” RCW 10.77.010(4); see also RCW 10.77.040; RCW 10.77.080; RCW 10.77.110; Born v. Thompson, 154 Wn.2d 749, 761, 117 P.3d 1098 (2005). This emphasis accords with the constitutional concerns underscoring the opinion in Foucha.

Absent a finding of dangerousness, an insanity acquittee must be released from custody:

If a defendant is acquitted of a crime by reason of insanity, and it is found that he or she is not a substantial danger to other persons, and does not present a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, the court shall direct the defendant's release. If it is found that such defendant is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, the court shall order his or her hospitalization, or any appropriate alternative treatment less restrictive than detention in a state mental hospital, pursuant to the terms of this chapter.

RCW 10.77.110(1).

In the State’s brief in support of its motion to revoke Dang’s conditional release, the State contended it did not have to prove

that Dang was dangerous to justify Dang's secure confinement. CP 41. The State acknowledged that "substantive due process requires both a mental condition and danger for civil commitment." Id. The State argued, however, that the mere fact of a not guilty by reason of insanity finding absolved it of the constitutional obligation to prove dangerousness. Id.

The State apparently believed that any argument that it should have to separately prove dangerousness would confuse civil commitment placement with civil commitment status. Id. The State alleged,

During . . . civil commitment, a person can either be placed in total confinement at an institution like Western State hospital, or placed on a conditional release. In either circumstance, the person is "committed" in the constitutional sense required for substantive due process.

CP 41.

The State's argument was based on a misreading of the statute and the record in Dang's case. In fact, in order to permit Dang's conditional release, according to the plain language of the statute, the court had to find that Dang "[was] not a substantial danger to other persons, and [did] not present a substantial likelihood of committing criminal acts jeopardizing public safety or

security.” RCW 10.77.150(3). Thus, contrary to the State’s argument, according to Washington’s statutory scheme, civil commitment placement and civil commitment status are linked. An individual only may be confined if he is dangerous, and he must be released or conditionally released if he is not. Washington’s statutory scheme in effect adds a layer of substantive due process protection that is absent from the federal scheme considered in Jones. Dangerousness is not presumed, but must be expressly proven on the record.

c. The trial court did not make a finding of dangerousness before ordering Dang’s commitment. Upon Dang’s motion for acquittal by reason of insanity, pursuant to the procedures outlined in RCW 10.77.080 and RCW 10.77.010, the trial court specifically found that Dang was not a substantial danger to other persons and did not present a substantial likelihood of committing criminal acts jeopardizing public safety or security, but that he was in further need of control by the court or other institutions. CP 7-8. Based upon this finding, the court was compelled to order Dang’s conditional release. RCW 10.77.110(3).

When Dang was alleged to have suffered deterioration of his mental condition, the court found there was probable cause to believe that:

The defendant has failed to adhere to the terms and conditions of the conditional release ordered in this criminal insanity proceeding and because of that failure the defendant presents a substantial danger to others and presents a substantial likelihood of committing criminal acts jeopardizing public safety and security.

CP 33. But the court did not ratify its probable cause finding at the hearing on the motion to revoke Dang's conditional release. Instead the court ordered his commitment based solely on the fact of his violation of the condition that he be in a state of remission and suffer no significant deterioration of his mental state. CP 79-80.

It is possible that this omission was prompted by the State's misunderstanding of the pertinent statutory requirements. Whatever the reason, Dang's commitment failed to meet the constitutional standards required under the Fourteenth Amendment's guarantee of substantive due process. Foucha, 504 U.S. at 80; Jones, 463 U.S. at 368, 370.

2. TO THE EXTENT THAT CHAP. 10.77 MAY PERMIT AN INSANITY ACQUITTEE TO BE CONFINED WITHOUT PROOF OF DANGEROUSNESS, THE STATUTE IS UNCONSTITUTIONAL.

The Legislature plainly intended to ensure that only individuals who are expressly found to be both mentally ill and dangerous be securely confined for mental health treatment. Indeed, the statutory language of RCW Chap. 10.77 is unambiguous. At the initial determination of whether a person charged with a crime should be acquitted by reason of insanity, the Legislature has explicitly provided that civil commitment is permissible only upon proof of dangerousness. RCW 10.77.040; RCW 10.77.080; RCW 10.77.150.

Yet, the statute appears to contain an anomaly: RCW 10.77.190, which addresses modification of the terms or revocation of conditional release, provides that when a person has been taken into custody, or a motion filed to modify or revoke conditional release, the court shall set a hearing. “The issue to be determined [at the hearing] is whether the conditionally released person did or did not adhere to the terms and conditions of his or her release, or whether the person presents a threat to public safety.” RCW 10.77.190(4). The statute further provides:

Pursuant to the determination of the court upon such hearing, the conditionally released person shall either continue to be conditionally released on the same or modified conditions or his or her conditional release shall be revoked and he or she shall be committed subject to release only in accordance with provisions of this chapter.

Id.

The State construed this statute to mean that the court had discretion to revoke a person's conditional release "if the State proves either that the defendant violated the terms of his conditional release or presents a threat to public safety." CP 50 (emphasis in original). In light of the Legislative mandate that commitment be based only upon an explicit finding of dangerousness, the State's construction makes no sense. Indeed, the State's construction encourages an unconstitutional result, as a person on conditional release has been expressly found to be safe to be at large, albeit subject to the court's supervision. Thus, as in Dang's case, under the State's reading of the statute, a person can be confined solely on the basis of mental illness.

a. If the statute is ambiguous, the ambiguity must be resolved in favor of a constitutional result. The court's primary duty in construing a statute is to discern and implement the Legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

“The plain meaning of a statute may be discerned ‘from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.’” Id. (quoting Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002)).

A statute that is susceptible of only one interpretation is unambiguous, and may not be construed. Id. The language of RCW 10.77.190 is confusing. The statute deals with several different circumstances: (1) the modification of the terms of conditional release upon reasonable belief that the person is failing to adhere to the terms originally imposed by the court or that the person is in need of additional care or treatment; (2) the procedural due process protections afforded a conditionally released person who has been taken into custody; (3) the facts to be determined at a hearing following a conditionally released person’s apprehension; and (4) the remedies available to the court pursuant to its determination. RCW 10.77.190.<sup>2</sup> To the extent that the statute can

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<sup>2</sup> In its entirety, RCW 10.77.190 provides:

(1) Any person submitting reports pursuant to RCW 10.77.160, the secretary, or the prosecuting attorney may petition the court to, or the court on its own motion may schedule an immediate hearing for the purpose of modifying the terms of conditional release if the petitioner or the court believes the released person is failing to adhere to the terms and conditions of his or her conditional release or is in need of additional care and treatment.

be read to permit confinement without a predicate finding of dangerousness, either the statute is ambiguous or its terms conflict with the Legislature's intent to ensure that its commitment procedures for the criminally insane comport with due process.

Compare J.P., 149 Wn.2d at 453.

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(2) If the prosecuting attorney, the secretary of social and health services, the secretary of corrections, or the court, after examining the report filed with them pursuant to RCW 10.77.160, or based on other information received by them, reasonably believes that a conditionally released person is failing to adhere to the terms and conditions of his or her conditional release the court or secretary of social and health services or the secretary of corrections may order that the conditionally released person be apprehended and taken into custody. The court shall be notified of the apprehension before the close of the next judicial day. The court shall schedule a hearing within thirty days to determine whether or not the person's conditional release should be modified or revoked. Both the prosecuting attorney and the conditionally released person shall have the right to request an immediate mental examination of the conditionally released person. If the conditionally released person is indigent, the court or secretary of social and health services or the secretary of corrections or their designees shall, upon request, assist him or her in obtaining a qualified expert or professional person to conduct the examination.

(3) If the hospital or facility designated to provide outpatient care determines that a conditionally released person presents a threat to public safety, the hospital or facility shall immediately notify the secretary of social and health services or the secretary of corrections or their designees. The secretary shall order that the conditionally released person be apprehended and taken into custody.

(4) The court, upon receiving notification of the apprehension, shall promptly schedule a hearing. The issue to be determined is whether the conditionally released person did or did not adhere to the terms and conditions of his or her release, or whether the person presents a threat to public safety. Pursuant to the determination of the court upon such hearing, the conditionally released person shall either continue to be conditionally released on the same or modified conditions or his or her conditional release shall be revoked and he or she shall be committed subject to release only in accordance with provisions of this chapter.

A court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” J.P., 149 Wn.2d at 451 (quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.2d 792 (2003)). At the same time, however, “[a] kind of stopgap principle is that, in construing a statute, ‘a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.’” Id. (citation omitted).

It would be absurd to conclude that the Legislature intentionally drafted an end run around the constitutional requirement that persons may not be confined absent proof of mental illness and dangerousness. This result is particularly illogical given the Legislature’s evident care in drafting related provisions of the same statute. Thus, if the statute is ambiguous, it should be construed to require the court to find both that the insanity acquittee failed to comply with the terms of his conditional release and that he poses a threat to public safety.

b. Alternatively the statute is unconstitutional. If the State is correct and the statute is unambiguous, CP 79, then it is unconstitutional. According to the State’s reading of the statute, an insanity acquittee can be conditionally released based on an

affirmative finding that he does not pose a substantial risk of danger or threat to public safety and security. Then, he can be confined based solely on his violation of a term of his conditional release, without the court ever finding that he is dangerous. Such a result would lead to confinement based upon mental illness alone, which violates due process. If this Court does not conclude that RCW 10.77.190 is ambiguous, requiring it be construed to conform to what the Fourteenth Amendment demands, then the statute is unconstitutional.

**3. THE EVIDENCE WAS INSUFFICIENT TO PROVE DANGEROUSNESS AND DANG MUST BE RERELEASED.**

In some circumstances, a court's failure to find that a person is dangerous and mentally ill before ordering his involuntary commitment might require remand for a hearing at which this question will be considered. Here, however, insufficient evidence was presented to prove that Dang was dangerous under any standard of proof. For this reason, the remedy should be vacation of the order committing him with direction he be rereleased.

None of the witnesses who testified was able to establish that because of his depression following his return from Vietnam, Dang posed a substantial likelihood of endangering other persons.

In fact, during the two-week period before Vanzandt decided to arrest Dang, Dang was presented to Harborview as a psychiatric emergency on two occasions. RP 30-32. On both occasions, the CDMHP declined to confine him because there was no basis to do so.

Under Chap. 71.05 RCW, in order to detain a person for evaluation and treatment, a CDMHP must find probable cause to believe that the person, “as a result of a mental disorder: (i) presents a likelihood of serious harm; or (ii) is gravely disabled.”

RCW 71.05.150. This determination must be based upon a personal interview of the person by the CDMHP. RCW

71.05.150(1). “Likelihood of serious harm” means:

(a) A substantial risk that: (i) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by a person upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by a person upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; or

(b) The person has threatened the physical safety of another and has a history of one or more violent acts[.]

RCW 71.05.020(25).

The fact that Vanzandt was concerned about Dang's alleged statements cannot substitute for the fact that on two separate occasions, following a clinical assessment of Dang, the CDMHP did not find probable cause to believe he presented a likelihood of serious harm. Further, the fact that Dang evidenced exacerbated symptoms of depression after his return from Vietnam must be weighed against his near perfect compliance with the other terms of his conditional release. Dang appeared for all of his appointments with his doctor, case manager, and CCO. RP 24. Dang took his medications as prescribed. Id. He performed so well on conditional release that he was permitted to decrease his appointments to pick up his medications from five times per week to three times per week. RP 25.

Simply put, although Dang's heightened depression was a legitimate source of concern for Vanzandt, Vanzandt had nothing more than a hunch that Dang could become dangerous as a consequence. Two mental health professionals tasked with the specific duty of evaluating mentally ill persons for signs of dangerousness did not even find probable cause to believe Dang posed a likelihood of serious harm. Under any standard of proof,

the evidence was insufficient to prove that Dang was dangerous.

The order revoking his conditional release should be vacated.

4. IF THE MATTER IS REMANDED FOR A HEARING, THE COURT SHOULD BE BARRED FROM CONSIDERING UNRELIABLE HEARSAY AS PROOF OF DANGEROUSNESS.

At the hearing on the motion to revoke Dang's conditional release, the trial court repeatedly permitted the State to introduce hearsay. In particular, in lieu of obligating the State to call the CDMHPs who examined Dang at Harborview to testify, both King and Vanzandt testified to their out-of-court statements. RP 32, 44. Dang objected that these statements were hearsay, but his objections were overruled because the court believed that hearsay was generally admissible at the proceeding. Id.

The court's rulings were incorrect. It is true that there is no Sixth Amendment right to confront witnesses at probation modification and similar hearings, but the Fourteenth Amendment supplies a due process right to confrontation. U.S. Const. amend. XIV; Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005). Although the due process rights afforded at a particular proceeding are "flexible" and depend upon what the

situation demands, Morrissey, 408 U.S. at 481, this Court should conclude that the trial court's admission of hearsay testimony at the revocation hearing violated due process.

In Morrissey, the Supreme Court considered the nature of the protections afforded a prisoner at a parole revocation hearing. The Court held that at a minimum, due process requires:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a "neutral and detached" hearing body; and
- (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 489 (emphasis added).

The Court reasoned in Morrissey that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." Id. at 482. The Washington Supreme Court has applied the holding in Morrissey to the revocation of a special sex offender sentencing alternative ("SSOSA") and to probation modification hearings. State v. Dahl,

139 Wn.2d 678, 687, 990 P.2d 396 (1999); Abd-Rahmaan, 154 Wn.2d at 289.

The liberty interest enjoyed by Dang in his conditional release is similar to the interest of a parolee considered in Morrissey. Like a parolee, Dang has been found to have committed a crime. Cf., Morrissey, 408 U.S. at 483. The State thus has an interest in returning Dang to confinement without a full-blown adversary trial if it is found that Dang has violated his conditional release and is no longer safe to be at large. Id. “Yet, the State has no interest in revoking parole without some informal procedural guarantees.” Id. “It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.” Id. at 482 n. 8 (quoting United States ex rel. Bey v. Connecticut Board of Parole, 443 F.2d 1079, 1086 (2nd Cir. 1976)).

Thus, due process necessitates that modification or revocation of conditional release be based upon “verified facts” and an “accurate knowledge” of Dang’s behavior. Morrissey, 408 U.S. at 484; Abd-Rahmaan, 154 Wn.2d at 287. Although hearsay may be admissible in such a proceeding, it should be considered “only if

there is good cause to forgo live testimony.” Dahl, 139 Wn.2d at 686. “Good cause is defined in terms of ‘difficulty and expense of procuring witnesses in combination with ‘demonstrably reliable’ or ‘clearly reliable’ evidence.” Id. (citation omitted).

In Dahl, the Court reversed the revocation of Dahl’s SSOSA where the trial court had admitted hearsay allegations that Dahl had exposed himself to two young girls. Id. at 681. The Court disagreed that some corroboration rendered the evidence sufficiently reliable to justify its admission without live testimony:

[The corroborating facts] [do] not address the issue of whether the girl's identification of Dahl in the photo montage was in some way tainted or erroneous. Without knowing any circumstances surrounding the incident and the girls' statements, the court had no information upon which to base a determination of reliability. The court was never informed of how the identification was made or the circumstances surrounding the presentation of the photo montage. The State never offered the photo montage or the police reports as exhibits. The only information the court had about the event was fourth hand: two girls reported an indecent exposure to a police officer, who informed Dahl’s CCO, who told O’Connell, who included the incident in a treatment report. This treatment report was then relied upon by the judge at the revocation proceeding.

Id. at 687.

The Court held that under the good cause standard, “the reliability of the hearsay must be considered in light of the difficulty

in procuring live witnesses.” Id. The Court noted that in addition to failing to establish the evidence’s reliability, the State had not shown that it would be difficult or expensive to procure live testimony or sworn affidavits. Id. The Court therefore concluded that the evidence did not meet either prong of the “good cause” standard: “it was neither demonstrably reliable nor necessary, due to the difficulty in procuring live witnesses.” Id. The Court reached a like result in Abd-Rahmaan. 154 Wn.2d at 290.

Here, similarly, there was no good cause to admit the hearsay evidence. Certainly, the State did not offer any explanation why it did not call the CDMHPs who examined Dang to testify at trial. Given that these witnesses were county employees who surely were accustomed to testifying in legal proceedings and readily available to testify in a court in King County, it is difficult to imagine any persuasive rationale for failing to introduce their live testimony.

Further, the hearsay testimony was not reliable evidence. The statements allegedly made by Dang to the CDMHPs wholly lacked context, and so the court lacked any means of ensuring that it had an “accurate knowledge” of Dang’s behavior. Dang’s alleged claims that he wanted to blow up a gas station, if they were made,

could legitimately arouse concern that he posed a likelihood of serious harm under Chap. 71.05 RCW. But the CDMHPs who supposedly heard Dang's statements must have determined that he did not pose a threat, or they would not have directed his release. This conclusion is compelled given that all that is required to detain a person under Chap. 71.05 RCW is probable cause. RCW 71.05.150(1).

If Dang had the opportunity to cross-examine these witnesses, these questions would have been fully addressed so as to ensure that the revocation of Dang's conditional release was based upon "verified facts." This Court should determine, therefore, that the admission of this hearsay denied Dang his due process right to confrontation. If the Court does not vacate the revocation order for insufficient evidence, the Court should direct that upon remand, the State must produce the CDMHPs who purportedly heard Dang's statements.

**5. THE STANDARD OF PROOF AT A HEARING TO  
REVOKE AN INSANITY ACQUITTEE'S  
CONDITIONAL RELEASE SHOULD BE CLEAR  
AND CONVINCING EVIDENCE.**

The court also erred in concluding that the standard of proof at the revocation hearing was a mere preponderance of the

evidence. Chap. 10.77 RCW is silent as to the standard of proof at a hearing on a motion to modify or revoke an insanity acquittee's conditional release. However, the rules adopted by the Supreme Court for mental health commitment proceedings address the question of the standard of proof on a motion to revoke a person's conditional release. The rules were promulgated to address the standard of proof when a person has been taken into custody for violating the terms and conditions of a mental health conditional release, pursuant to RCW 71.05.340. MPR 4.2.

MPR 4.5, pertaining to burden of proof, provides:

Before entering an order returning any person for involuntary treatment on an inpatient basis as a result of failure to adhere to the terms and conditions of conditional release pursuant to RCW 71.05.340 or less restrictive treatment under RCW 71.05.320, the court shall find at the hearing that there is clear, cogent, and convincing evidence that such person did not adhere to the terms and conditions of release or less restrictive treatment, that the terms of such release or treatment should not be modified, and that the person should be returned to inpatient treatment.

MPR 4.5.

The State contended that the burden of proof should be a preponderance of the evidence, but Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983), relied upon by the State below, does not address this question. The Court in Hickey simply held that Washington's

provision of different procedures for civil committees and insanity acquittees did not violate equal protection. Id. at 546-47. The Court did not address the question of what burden of proof should apply when the Legislature has not answered the question.

The trial court believed that the standard of proof should be the same as at a probation modification hearing. However there are important differences between an insanity acquittee and a person on probation. The person on probation has been convicted of a crime and thus has forfeited important liberty protections. State v. McCormick, 166 Wn.2d 689, 699-700, 213 P.3d 32 (2009). An insanity acquittee, however, has been found to have committed a crime but has not suffered a criminal conviction. His rights are thus different in substance and scope from those held by a probationer. Again, a person on conditional release also has affirmatively been found not dangerous.

The Sentencing Reform Act of 1981 (SRA) does not speak to the question of the standard of proof at a hearing on a motion to revoke an insanity acquittee's conditional release. Indeed, it is notable that the procedure for revoking the conditional release of insanity acquittees does not appear in the SRA, but rather in Chap.

10.77 RCW, which provides substantial due process protections to insanity acquittees.

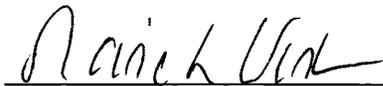
Because an insanity acquittee (1) has not suffered a criminal conviction; (2) has been found not to be dangerous; and (3) stands outside of the criminal justice system with respect to the nature of the liberty interest he enjoys in his conditional release, the standard of proof at a hearing on a motion to revoke conditional release should be that articulated in MPR 4.5: clear and convincing evidence. This Court should conclude that the trial court erred in applying a preponderance of the evidence standard at the hearing on the motion to revoke Dang's release.

F. CONCLUSION

This Court should hold that the trial court violated due process when it failed to make a finding that Dang was dangerous before revoking his conditional release and ordering his commitment. This Court should further conclude that this finding is required by statute. Finally, this Court should conclude that insufficient evidence supported this requisite requirement for commitment, and vacate the revocation order.

DATED this 29<sup>th</sup> day of November, 2010.

Respectfully submitted:



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SUSAN F. WILK (WSBA 28250)  
ELAINE L. WINTERS (WSBA 7780)

Washington Appellate Project (91052)  
Attorneys for Appellant

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

COURT OF APPEALS  
STATE OF WASHINGTON  
2010 NOV 30 PM 4:42

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. ) NO. 65337-0-I  
 )  
 BAO DINH DANG, )  
 )  
 Appellant. )

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
<input checked="" type="checkbox"/> BAO DINH DANG	(X)	U.S. MAIL
WESTERN STATE HOSPITAL	( )	HAND DELIVERY
9601 STEILACOOM BLVD SW	( )	_____
TACOMA, WA 98498		

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2010.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710