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70022-7

COA NO. 70022-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICKEY BEAVER,

Appellant.

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

The Honorable Brian D. Gain, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in revoking appellant's conditional release and ordering involuntary confinement at a state mental hospital. CP 143-44.

2. The court violated due process when it revoked appellant's conditional release and ordered appellant into involuntary confinement at a state mental hospital in the absence of finding that he suffered from a current mental illness that caused him to be dangerous.

3. RCW 10.77.190(4) violates due process.

Issues Pertaining to Assignments of Error

1. Whether involuntary commitment in a state mental health facility violates due process in the absence of a supported finding that the person whose conditional release is revoked currently suffers from a mental illness that endangers public safety?

2. Whether RCW 10.77.190(4) violates due process in failing to require a finding of current mental illness that causes dangerousness as a prerequisite to revocation of conditional release and involuntary commitment at a state mental hospital?

B. STATEMENT OF THE CASE

In 2005, the Honorable Brian Gain found Rickey Beaver not guilty by reason of insanity to the charge of residential burglary. CP 8-10. The

court found "At the time of the act(s) charged, the defendant was suffering from a mental disease or defect affecting the defendant's mind to the extent that either the defendant was unable to perceive the nature and quality of the act(s) with which he/she is charged; or the defendant was unable to tell right from wrong with reference to the particular act(s) charged." CP 9 (FF 3). The court also found "The defendant is a substantial danger to other persons and presents a substantial likelihood of committing criminal acts jeopardizing the public safety or security unless kept under further control by the court." CP 9 (FF 4). According to the court, it was in the best interest of Beaver and the public to commit him to a state mental hospital. CP 9-10 (FF 5, CL 4).

In January 2007, Judge Gain ordered Beaver's conditional release from Western State Hospital (WSH). CP 11-16. In January 2010, Judge Gain granted the State's petition to revoke Beaver's conditional release on the basis that Beaver violated release conditions and posed a threat to public safety. CP 41-43.

On August 19, 2010, Judge Gain entered an agreed order granting temporary release to an inpatient chemical dependency treatment program at Pioneer Counseling Center for six months. CP 197-205. The WSH Center for Forensic Services recommended this course of treatment because it could not provide the level of service needed for chemical

dependency treatment. CP 203. Upon completion of the inpatient program, Beaver was returned to Western State Hospital. CP 200.

In 2011, Beaver moved for his unconditional release. CP 49-66. He ultimately withdrew his petition for final discharge in exchange for conditional release. CP 104-09. On July 27, 2011, Judge Gain entered an agreed order on conditional release. CP 104-09. As part of that order, Beaver agreed that he continued to meet criteria as not guilty by reason of insanity pursuant to chapter 10.77 RCW. CP 104.

In 2012, the State again petitioned for revocation of Beaver's conditional release. CP 206-69. The State attached a report dated July 14, 2011 from psychologist Dr. Judd. CP 251-60. Dr. Judd diagnosed Beaver with polysubstance abuse with physiological dependence in a controlled environment on Axis I and antisocial personality disorder on Axis II. CP 258. Dr. Judd opined Beaver was a moderate to high risk to reoffend if released to the community and was in need of continued treatment. CP 260.

Psychologist Dr. Scholtz diagnosed Beaver with polysubstance abuse with physiological dependence in a controlled environment and cannabis abuse under Axis I and antisocial personality disorder under Axis II. CP 267-68. Dr. Scholtz believed Beaver was a moderate but not high risk to the community. CP 268-69. Dr. Scholtz concluded Beaver was not

in need of continued psychiatric hospitalization, that he was not currently suffering from a major disorder of thought or mood, and that his psychiatric symptoms appeared to be the direct result of intoxication, prolonged use and withdrawal from drugs and alcohol. CP 269.

By order dated April 6, 2012, Judge Gain modified Beaver's conditions of release rather than revoke release. CP 118-21. The court found Beaver had violated the conditions of a previous release order by using cocaine and failing to attend chemical dependency treatment and appointments with the Department of Corrections. CP 118 (FF 1).

In reports dated January 22, 2012, February 28, 2012 and March 23, 2012, Western State Hospital evaluators concluded Beaver's psychiatric symptoms were in remission, Beaver was not in need of WSH services and he had "reached his maximum benefit from psychiatric inpatient services." CP 119 (FF 4). Western State Hospital did not recommend that Beaver remain at its facility but noted his need of the recovery skills that community based chemical dependency treatment would provide. CP 119 (FF 4). Sound Mental Health was able to provide increased community-based services and Beaver was amenable to them. CP 118 (FF 3). The Public Safety Review Board (PSRP) recommended revocation and commitment at Western State Hospital because it believed

Beaver remained a threat to public safety. CP 119 (FF 5); see CP 113-16 (PSRP letter).

The court ordered Beaver to remain in the community for several reasons, one of which was "[t]he decision to commit Mr. Beaver to Western State Hospital would serve to protect the community in the short term by keeping Mr. Beaver in a secure location, but revocation and commitment would only serve as preventative detention, which is inappropriate at this time." CP 119 (CL 3.c.).

The March 23, 2012 WSH report prepared by the Risk Review Board (RRB) restated its position from the year before: "*Given that Western State Hospital is a locked inpatient psychiatric facility with specialization in treatment regarding symptoms of mental illness as opposed to substance abuse, the question arose as to what benefit Mr. Beaver could derive from further inpatient hospitalization.* Mr. Beaver's progress through hospitalization at that time was reviewed and summarized as follows: *He has shown no signs or symptoms of mental illness that cannot be explained by other means such as inducement by substance abuse or characterological factors.*" CP 111. The RRB concluded, as it did the year before, "*Mr. Beaver has shown no signs or symptoms of mental illness. His presentation does not alter significantly whether or not he is taking psychiatric medication. There has been a*

pattern of his being sent to WSH without accompanying symptoms warranting psychiatric care." CP 112. According to the RRB, Beaver had experienced "maximal benefit from being at WSH." CP 112. The RRB recognized Beaver potentially remained at risk of re-offense based on his Axis II diagnosis alone, but adhered to its previous opinion that Beaver could be adequately treated in a non-psychiatric inpatient facility. CP 112.

In December 2012, a hearing was scheduled to determine whether Beaver's conditional release should be modified or revoked due to violation of release conditions. CP 138-39. In its memorandum of law, the State argued it had the burden of proof to demonstrate grounds for revocation by a preponderance of the evidence. CP 149. It further argued any violation of the conditional release order was sufficient to return Beaver to total confinement at Western State Hospital. CP 150. Drawing a purported distinction between commitment "placement" and commitment "status," the State claimed due process did not require both a mental health condition and dangerousness before revocation could take place. CP 151-52.

A revocation hearing took place on January 11, 2013. RP[1] 4-33. The State presented testimony of a police officer that arrested Beaver for driving while intoxicated. RP 6-15. Beaver's community corrections officer testified that Beaver had violated conditions of his release, including a cocaine relapse. RP 17-19. The State argued Beaver's conditional release should be revoked because he violated release conditions and posed a threat to public safety. RP 26.

Defense counsel argued Beaver should be allowed to remain on conditional release, noting his concern that Western State Hospital does not provide substance abuse treatment and "if the Court were to return him there indefinitely, it would be sort of a warehouse situation." RP 28. The defense contended "in order to provide him with the counseling that he needs in order to be able to function, really he needs to not be at Western State Hospital." RP 29.

The judge signed off on a written order revoking conditional release and recommitting Beaver to Western State Hospital. RP 33; CP 142-44. As part of that written order, the court found Beaver was conditionally released subject to the terms of the April 6, 2012 release order. CP 143. Beaver violated these conditions of release: (1) maintain

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[1] The verbatim report of proceedings is referenced as follows: RP – 1/11/13.

good conduct and not violate laws or ordinances; (2) do not use drugs, alcohol or controlled substances; and (3) remain in a state of remission from drug abuse and not exhibit significant signs of drug abuse relapse. CP 143-44 (FF 1, 7). Beaver used cocaine on October 22, 2012. CP 143 (FF 3). On December 4, 2012, Beaver drank alcohol and drove a motor vehicle and was charged with the offense of driving under the influence. CP 143 (FF 4, 5). Beaver had a history of noncompliance with release conditions and was warned on April 6, 2012 that any future violations would result in revocation. CP 143-44 (FF 6). The court found Beaver posed an extreme threat to public safety on December 5, 2012 when he drove his vehicle under the influence of alcohol. CP 144 (FF 8). The court determined it was appropriate to revoke Beaver's conditional release "[d]ue to the violations of the conditional release and the threat to the public presented by Mr. Beaver." CP 144 (FF 9).

Before signing off on the written order, Judge Gain told defense counsel that he wanted to go over "the complications" of Beaver's case so that counsel could adequately represent Beaver. RP 30. The judge noted his concern that Western State Hospital, in its last evaluation, "was of the opinion that there was no mental health disease," although the PSRB believed Beaver was a risk to public safety. RP 30. The judge continued: "I'll express the same concerns I had and continued to have. One is the

adequacy of . . . mental health treatment and resources available. As everyone knows, the criminal justice system is used in too many instances to address mental health issues . . . the legislature needs to certainly address the adequacy of mental health treatment in the State of Washington." RP 31.

The judge continued: "The other concern I have is the public safety concern. I expressed this before. I'm concerned with using public safety as a reason to keep somebody in the mental health system basically at Western State, which is basically preventative detention when there is no longer mental health issues that raise concern. And in this case it is other issues that raise the public safety concerns rather than mental illness unless we broaden the scope to consider alcohol and substance abuse as mental illness, which they probably to some extent are. However, with those concerns about preventing [sic] detention, I am satisfied at this point I don't have any authority to do anything other than grant the State's motion. But I am concerned about using not guilty by reason of insanity as a preventative detention for persons who are otherwise risky to the public." RP 31-32.

Those concerns being expressed, the judge revoked conditional release because Beaver violated the conditions of release and he was a risk to the public. RP 32. The judge noted he was "cognizant of the abuse of

alcohol and substance abuse treatment at Western State, but again I don't have any control over that." RP 32.

Defense counsel requested a conditional release hearing be scheduled, given that there was no treatment at Western State Hospital and "there appears to be an absence of mental health issue [sic] to be addressed at Western State." RP 32. The judge declined: "We've been here too many times. But I'm bringing that issue to your attention because I am concerned about the possibility of -- and it would not be as egregious as other countries have used it but using mental health facilities as preventative detention, but basically that's what's happening. That was the disagreement between the treatment evaluators and the board in this particular case. So I'm satisfied, other than bringing that to your attention, I don't have any other options at this point but to revoke." RP 33. This appeal follows. CP 169-76.

C. ARGUMENT

1. AS A MATTER OF DUE PROCESS, BEAVER CANNOT BE INVOLUNTARILY COMMITTED WITHOUT A FINDING OF CURRENT MENTAL ILLNESS.

The trial court revoked Beaver's conditional release and ordered him back into total confinement at Western State Hospital. The court found Beaver was a danger to the public. CP 144 (FF 8, FF 9). The court, however, did not find Beaver suffered from a mental illness that caused

him to endanger public safety. In the absence of that finding, Beaver's commitment to Western State Hospital violates due process. U.S. Const. amend XIV; Wash. Const. art. I, § 3. If the revocation provision found at RCW 10.77.190(4) is interpreted to not require such a finding, then it is unconstitutional.

a. Standard of Review

Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Whether a constitutional right has been violated is a question of law reviewed de novo. State v. Bao Dinh Dang, __Wn.2d__, 312 P.3d 30, 34 (2013); State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). Questions of statutory interpretation are also reviewed de novo. Bao Dinh Dang, 312 P.3d at 34.

b. In The Absence Of A Mental Illness That Causes Dangerousness, Revocation Of Conditional Release And Involuntary Commitment To A State Mental Hospital Is Unconstitutional.

"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." Jones v. United States, 463 U.S. 354, 361, 103 S. Ct. 3043, 77 L. Ed. 2d 694

(1983) (quoting Addington v. Texas, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)).

In light of due process requirements, the United States Supreme Court has repeatedly affirmed that "mental illness and dangerousness must both underpin an involuntary commitment." Bao Dinh Dang, 312 P.3d at 35 (citing Foucha, 504 U.S. at 77 (holding as a matter of due process that an insanity acquittee "may be held as long as he is both mentally ill and dangerous, but no longer"); Jones, 463 U.S. at 368 ("The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous."); O'Connor v. Donaldson, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement."); see also Kansas v. Hendricks, 521 U.S. 346, 363, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (involuntary civil confinement is permissible only of the "dangerous mentally ill.").

The Washington Supreme Court likewise recognizes an insanity acquittee may be committed to a mental institution "so long as he is both mentally ill and dangerous as a result of that mental illness, but no longer." State v. Reid, 144 Wn.2d 621, 631, 30 P.3d 465 (2001). "In short, in order to confine an insanity acquittee to institutionalization against his or her

will, the trial court must make two determinations: first, that the acquittee suffers from a mental illness and second, that the acquittee is a danger to others." Bao Dinh Dang, 312 P.3d at 35. This requirement applies to the revocation of conditional release and resulting involuntary commitment just as much as it does to an initial involuntary commitment following an insanity acquittal. See id. at 35-36 (applying due process requirement to revocation of conditional release).

In Beaver's case, the court revoked conditional release and involuntarily committed Beaver to Western State Hospital based on findings that Beaver had violated the conditions of his release and was a danger to public safety. CP 144 (FF 9). The court, however, did not find Beaver had a current mental illness. Nor did the court find that Beaver's dangerousness was a result of a mental illness. The revocation of Beaver's conditional release and involuntary commitment to Western State Hospital therefore violated due process.

There is conflicting information in the record on whether Beaver suffered from a current mental illness. Recent evaluations reached different conclusions. CP 111-12 (Western State Hospital); CP 258 (Dr. Judd); CP 267-68 (Dr. Scholtz). The determination of whether Beaver continues to suffer from a mental disease or defect is a question of fact. State v. Klein, 156 Wn.2d 103, 115, 124 P.3d 644 (2005) (upholding trial

court's finding that diagnosis of polysubstance dependence and a personality disorder not otherwise specified constituted a mental disease or defect); cf. Foucha, 504 U.S. at 74-75, 82-83 (state could not indefinitely confine person in mental hospital based on "antisocial personality" that makes him dangerous).

The trial judge strongly suggested he did not view Beaver as currently laboring under a mental illness. RP 30-32. The judge noted his concern that Western State Hospital, in its last evaluation, "was of the opinion that there was no mental health disease." RP 30. The judge expressed further concern "with using public safety as a reason to keep somebody in the mental health system basically at Western State, which is basically preventative detention when there is no longer mental health issues that raise concern. And in this case it is other issues that raise the public safety concerns rather than mental illness unless we broaden the scope to consider alcohol and substance abuse as mental illness, which they probably to some extent are." RP 31. In response to defense counsel's complaint that there was no mental health issue to be addressed at Western State Hospital, the judge stated "I am concerned about the possibility of -- and it would not be as egregious as other countries have used it but using mental health facilities as preventative detention, but

basically that's what's happening. That was the disagreement between the treatment evaluators and the board in this particular case." RP 33.

The trial court did not find Beaver had a mental illness that made him dangerous. Due process requires such a finding before a court can involuntarily commit an insanity acquittee to a state mental hospital in a setting of total confinement. Bao Dinh Dang, 312 P.3d at 35.

A preponderance of the evidence is the proper standard of proof in revoking an insanity acquittee's conditional release. Id. at 38. The Supreme Court, however, has also stated "Washington law since 1905 has presumed the mental condition of a person acquitted by reason of insanity continues and the burden rests with that individual to prove otherwise." Klein, 156 Wn.2d at 114 (addressing petition for total discharge) (quoting State v. Platt, 143 Wn.2d 242, 251 n. 4, 19 P.3d 412 (2001) (Talmadge, J, lead opinion) (addressing petition for conditional release)). Even assuming Beaver had the burden of proof on the issue of whether he no longer suffered from a mental illness, due process still requires a finding that he had a mental illness before confinement in a mental hospital is constitutionally authorized.

"A trial court is not required to make findings of fact regarding every item of evidence introduced in the case, but it must make findings as to all ultimate facts and material issues." In re Pers. Restraint of Davis,

152 Wn.2d 647, 680, 101 P.3d 1 (2004). A material fact is "one which is important, carries influence or effect, is necessary, must be found, is essential to the conclusions, and upon which the outcome of litigation depends." Wold v. Wold, 7 Wn. App. 872, 875, 503 P.2d 118 (1972). "An ultimate fact is one that is essential and determinative, without which a judgment would lack support in an essential particular." Davis, 152 Wn.2d at 680. Ultimate facts "are the necessary and controlling facts which must be found in order for the court to apply the law to reach a decision." Wold, 7 Wn. App. at 875.

The existence of a current mental illness is essential to support involuntary commitment in a state mental hospital. It is an ultimate fact that must be found to support a revocation of conditional release.

While an insanity acquittal supports an inference of continuing mental illness, "that inference does not last indefinitely." State v. Sommerville, 86 Wn. App. 700, 710, 937 P.2d 1317 (1997) (citing United States v. Bilyk, 29 F.3d 459, 462 (8th Cir. 1994)), review denied, 133 Wn.2d 1023, 950 P.2d 477 (1997). "Otherwise, the periodic reports and subsequent hearings mandated by RCW 10.77 would be purposeless, as would the directive that the State must release the insanity acquittee when the basis for holding him or her in the psychiatric facility disappears." Sommerville, 86 Wn. App. at 710; see Bao Dinh Dang, 312 P.3d at 41

(reports of mental health providers at Western State Hospital supported trial court's conclusion that Dang's mental health issues rendered him too dangerous for conditional release).

Here, there is sufficient evidence in the record to undermine the presumption that Beaver continues to labor under a mental illness. The trial judge recognized the problem but mistakenly felt he had no choice but to order Beaver back into Western State Hospital because he was dangerous.

"[U]nless an acquittee has an identifiable mental condition, he cannot be held by the state merely because he is dangerous." Parrish v. Colorado, 78 F.3d 1473, 1477 (10th Cir. 1996) (addressing significance of holding in Foucha), cert. denied, 518 U.S. 1011, 116 S. Ct. 2536, 135 L. Ed. 2d 1058 (1996). In the absence of a supported finding by the trial court that Beaver had a current mental illness that made him dangerous to others, the court could not constitutionally revoke conditional release and order Beaver into total confinement at Western State Hospital. The court therefore erred in revoking Beaver's conditional release. CP 143-44.

c. RCW 10.77.190(4) Is Capable Of Being Interpreted Consistent With Due Process Requirements, But If This Court Determines Otherwise, Then It Is Unconstitutional.

In the context of a hearing on whether a person's conditional release should be modified or revoked, RCW 10.77.190(4) provides "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."

RCW 10.77.190(4) does not explicitly require a finding of current mental illness that causes dangerousness in order to revoke conditional release. But courts are obligated to interpret a statute to uphold its constitutionality whenever possible. Bao Dinh Dang, 312 P.3d at 36 (interpreting RCW 10.77.190(4) to require a dangerousness finding for revocation).

Courts will read a requirement into a statute even where it is not explicitly present in order to save a statute from constitutional infirmity.

See In re Detention of Harris, 98 Wn.2d 276, 284-85, 654 P.2d 109 (1982) (while involuntary commitment under RCW 71.05.020 does not explicitly require that evidence of dangerous behavior be recent, RCW 71.05.020 interpreted as requiring a showing of a substantial risk of physical harm as evidenced by a recent overt act to comport with substantive due process); In re Dependency of K.R., 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995) (although Washington's termination statute, RCW 13.34.180(1), does not explicitly require evidence of current parental unfitness, statute interpreted to implicitly contain the requirement and thus "comports with the constitutional due process requirement that unfitness be established by clear, cogent, and convincing evidence."); In re Welfare of A.B., 168 Wn.2d 908, 920, 232 P.3d 1104 (2010) (holding a parent has constitutional due process right not to have his or her relationship with a natural child terminated in the absence of a trial court finding of fact that the parent is currently unfit to parent the child).

The meaning of a statute is construed by reading it in relation with other statutes. Bao Dinh Dang, 312 P.3d at 36. Reading RCW 10.77.190(4) in relation to the statutory scheme governing insanity acquittees as a whole shows the legislature intended a current finding of mental illness as a prerequisite to revocation and confinement in a state mental hospital.

Treatment of mentally ill individuals is the statutory scheme's reason for being. The underlying purpose of the insanity acquittal scheme is reflected in RCW 10.77.120(1), which provides "The secretary shall provide adequate care and individualized treatment to persons found criminally insane at one or several of the state institutions or facilities under the direction and control of the secretary. In order that the secretary may adequately determine the nature of the mental illness or developmental disability of the person committed as criminally insane, all persons who are committed to the secretary as criminally insane shall be promptly examined by qualified personnel in order to provide a proper evaluation and diagnosis of such individual."

One institution devoted to the confinement of the mentally ill is Western State, which is a "state-owned psychiatric hospital that 'handl[es] the most complicated long-term care needs of patients with a primary diagnosis of mental disorder.'" Klein, 156 Wn.2d at 107 n.1 (quoting RCW 72.23.025(1)). RCW 10.77.210 commands that "[a]ny person involuntarily detained, hospitalized, or committed pursuant to the provisions this chapter shall have the right to adequate care and individualized treatment."

The statutory mandate to treat the mental illness of those involuntarily confined in state mental hospitals reflects a due process

requirement. Wyatt v. Aderholt, 503 F.2d 1305, 1312, 1315 (5th Cir. 1974) (citing Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)); Burnham v. Dep't of Public Welfare, 503 F.2d 1319 (5th Cir. 1974), cert. denied, 422 U.S. 1057, 95 S. Ct. 2680, 45 L. Ed. 2d 709 (1975); D.W. by M.J. on Behalf of D.W. v. Rogers, 113 F.3d 1214, 1219 (11th Cir. 1997) ("The constitutional right to psychiatric care and treatment is triggered by the state's physical confinement of a mentally ill individual."); Goodman v. Parwatikar, 570 F.2d 801, 804 (8th Cir. 1978) ("The due process clause compels minimally adequate treatment be provided for involuntary patients in state institutions."). Insanity acquittees cannot "be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent." Foucha, 504 U.S. at 88 (O'Connor, J., concurring).

The factual determination that an insanity acquittee does not currently suffer from a mental disease or defect altogether vitiates the basis for confinement at a psychiatric facility pursuant to RCW 10.77.110. Reid, 144 Wn.2d at 631. A statutory scheme of confinement must be "carefully limited" so the State does not confine people based upon dangerousness alone. Foucha, 504 U.S. at 81-82. "[C]ivil commitment

statutes are constitutional only when both initial *and continued confinement* are predicated on the individual's mental abnormality and dangerousness." State v. McCuistion, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012), cert. denied, 133 S. Ct. 1460, 185 L. Ed. 2d 368 (2013) (emphasis added). For example, the annual review statute in sexually violent predator proceedings satisfies due process because the statutory basis for continued commitment requires current mental abnormality and dangerousness, which the State must reevaluate annually. McCuistion, 174 Wn.2d at 388, 392.

Chapter 10.77 RCW likewise provides for a periodic review process for insanity acquittees. And what is reviewed is not only whether the acquittee is still dangerous. Review encompasses whether the acquittee is still mentally ill. RCW 10.77.140 thus mandates "Each person committed to a hospital or other facility or conditionally released pursuant to this chapter shall have a current examination of his or her mental condition made by one or more experts or professional persons at least once every six months."

Reading the statutory scheme for civil commitment under chapter 10.77 RCW as a whole makes it possible to interpret RCW 10.77.190(4) as requiring a finding of mental illness before revocation of conditional release is authorized. A contrary interpretation of RCW 10.77.190(4)

undermines why the involuntary commitment scheme exists in the first place: to treat those that are mentally ill.

Without a mental illness to be treated, involuntary civil commitment constitutes nothing but punishment, which is anathema to any statutory scheme for civil commitment. See In re Pers. Restraint of Young, 122 Wn.2d 1, 21-22, 857 P.2d 989 (1993) ("the civil commitment goals of incapacitation and treatment are distinct from punishment, and have been so regarded historically."). A constitutional civil commitment scheme does not function as "preventative detention" precisely because a person must be both mentally ill and dangerous to be civilly committed. Young, 122 Wn.2d at 39.

It would make no sense for the legislature to authorize involuntary confinement in a state mental hospital to treat a mental illness where the person does not in fact suffer from mental illness. Statutes must be construed to avoid unlikely, absurd, or strained consequences. City of Seattle v. Fuller, 177 Wn.2d 263, 270, 300 P.3d 340 (2013).

If, however, RCW 10.77.190(4) cannot be interpreted to require a finding of mental illness as a prerequisite to revocation and total confinement in a mental hospital, then that provision violates due process. The ultimate power to interpret, construe, and enforce the constitution belongs to the judiciary. Seattle School District No. 1 of King County v.

State, 90 Wn.2d 476, 496, 585 P.2d 71 (1978). "[I]t is emphatically the province and duty of the judicial department to say what the law is . . . even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch." Seattle School District No. 1, 90 Wn.2d at 496. Because the court is the ultimate interpreter of constitutional law, the legislature cannot abridge constitutional rights by its enactments. Id. at 503 n.7 (citing Marbury v. Madison, 5 U.S. 137, 163, 2 L. Ed. 60, 69 (1803)).

Confinement in a mental hospital based upon dangerousness alone violates due process. To justify commitment, there must also be a mental illness that causes the dangerousness. If RCW 10.77.190(4) cannot be interpreted in a manner that renders it constitutional, then this Court must fulfill its duty and declare it to be unconstitutional. See State v. Thorne, 129 Wn.2d 736, 769, 921 P.2d 514 (1996) ("If a statute does not contain all of the process which is due, this court will impose the requirements necessary to satisfy due process.").

c. The Present Appeal Should Be Reviewed On Its Merits Despite Beaver's Subsequent Release Into The Community.

On October 21, 2013, the trial court entered an order granting Beaver conditional release. CP 270-78. The State may argue this recent order renders the present appeal moot. A case is moot when it involves

only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief. Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994).

Beaver's appeal should still be reviewed because the error is "'capable of repetition, yet evading review.'" In re Marriage of Irwin, 64 Wn. App. 38, 60, 822 P.2d 797 (1992) (quoting Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 713, 35 L. Ed. 2d 147 (1973) (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 283, 55 L. Ed. 310 (1911)). Over the course of the past nine years, Beaver has bounced back and forth between total confinement at Western State Hospital and conditional release in the community.[2] Taking history as a guide, it is apparent the State does not hesitate to seek revocation of Beaver's conditional release status and has succeeded in revoking that status in the past. Beaver gains conditional release and then loses it again. The Sword of Damocles hangs perpetually over Beaver's head every time he is put back on conditional release. The erroneous revocation of Beaver's conditional release status is capable of repetition yet easily evades review.

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[2] RCW 10.77.025(1) provides "Commitment or treatment cannot exceed the maximum possible penal sentence for any offense charged for which the person was acquitted by reason of insanity." The maximum penal offense for residential burglary is 10 years. RCW 9A.52.025(2); RCW 9A.20.021(b).

Moreover, this Court has the power to decide a technically moot case to resolve issues of continuing and substantial public interest. State v. Slattum, 173 Wn. App. 640, 647, 295 P.3d 788 (2013). Courts consider three criteria in determining whether the requisite degree of public interest exists: (1) the public or private nature of the question presented; (2) the need for a judicial determination for future guidance of public officers; and (3) the likelihood of future recurrences of the issue. State v. G.A.H., 133 Wn. App. 567, 573, 137 P.3d 66 (2006).

Most cases in which appellate courts utilize the exception to the mootness doctrine involve issues of constitutional or statutory interpretation. In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002). These types of issues tend to be more public in nature, more likely to arise again, and the decisions helpful to guide public officials. Mines, 146 Wn.2d at 285.

Beaver's case raises constitutional and statutory interpretation questions regarding the revocation of conditional release for an entire class of insanity acquittees. These questions are public in nature because they extend beyond Beaver's own personal circumstances. Furthermore, the likelihood of recurrence factor is not limited to the questions of whether the appellant himself would be subjected to the same violation. Likelihood of recurrence includes whether the issue would recur for *others* in the future. In

re Pers. Restraint of Myers, 105 Wn.2d 257, 261, 714 P.2d 303 (1986); State v. Sansone, 127 Wn. App. 630, 637, 111 P.3d 1251 (2005).

The courts have repeatedly recognized "[w]here a technically moot issue implicates due process rights, it is one in which there is sufficient public interest to warrant deciding it." Sansone, 127 Wn. App. at 637 (quoting In re Dependency of H., 71 Wn. App. 524, 528, 859 P.2d 1258 (1993); accord In re Marriage of T., 68 Wn. App. 329, 336, 842 P.2d 1010 (1993). Beaver's challenge should be reviewed on its merits because it involves issues of constitutional magnitude and statutory interpretation that carry legal implications beyond his own case.

D. CONCLUSION

For the reasons set forth, Beaver respectfully requests reversal of the commitment order.

DATED this 6th day of December 2013

Respectfully Submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 70022-7-I
	)	
RICKEY BEAVER,	)	
	)	
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 6TH DAY OF DECEMBER, 2013, 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] RICKEY BEAVER
630 MOSES LANE SOUTH APT. B
RENTON, WA 98057

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF DECEMBER, 2013.

X Patrick Mayovsky