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NO. 73008-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

FILED
February 5, 2016
Court of Appeals
Division I
State of Washington

Respondent,

v.

ISAAC ZAMORA,

Appellant.

---

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

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# BRIEF OF APPELLANT AND CROSS-RESPONDENT

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## A. INTRODUCTION.

Suffering from severe delusions about his chosen role in the world and hearing the voice of God directing him to kill people who were demons, Isaac Zamora killed six people. After these tragic events, the parties negotiated a plea agreement that Mr. Zamora was not guilty by reason of insanity for two counts of aggravated first degree murder and was guilty of the remaining counts. Under this agreement and based on controlling case law and statutes, the court sent Mr. Zamora to Western State Hospital for treatment. If he ever gained enough control over his mental illness that he no longer presented a danger to himself or others, he would be discharged from Western State Hospital and sent to the Department of Corrections (DOC), where he would serve prison sentences of life without the possibility of parole under the statutes in effect at the time of the plea.

Western State Hospital was not pleased with Mr. Zamora's placement in its facility. Almost immediately after his admission, it asked the court to transfer him to prison and the legislature to change the statutes that allowed for this plea agreement. The court refused to approve the transfer to prison, deriding Western State's efforts, but the legislature accommodated Western State by changing several statutes to

enable the State to transfer Mr. Zamora into DOC's custody. Based on these revised statutes, the court agreed the State could transfer Mr. Zamora to prison, but it ruled that Mr. Zamora's mental health problems required vigilant attention by prison officials and conditioned this transfer on specific treatment requirements while in DOC's custody.

The statutory changes diluting the legal threshold for Mr. Zamora's commitment at a treatment facility negate the premise of his negotiated plea and cannot fairly be applied to Mr. Zamora without violating due process and constitutional prohibitions on bills of attainder and ex post facto laws. If the revised statutes apply to Mr. Zamora and are not impermissibly vague, the State failed to meet its burden that Mr. Zamora is appropriately managed in a prison.

B. ASSIGNMENTS OF ERROR.

1. It violates due process to alter the terms of a plea agreement after the plea is entered.

2. The State breached its obligation under the plea agreement.

3. The statutes altering the basis of Mr. Zamora's plea do not apply retroactively.

4. The retroactive application of the statutory changes in RCW ch. 10.77 violate the prohibition against ex post facto laws.

5. RCW 10.77.200(3) is unconstitutionally vague.

6. RCW 10.77.200(3) constitutes a bill of attainder, which is prohibited by the state and federal constitutions.

7. The State did not meet its burden of proving Mr. Zamora can be managed within a prison under RCW 10.77. 200.

8. The court erred by finding Mr. Zamora was manageable in prison. CP 9.

9. The court lacked authority to order Mr. Zamora released into prison when it found he was manageable in prison only if it imposed conditions on DOC's control and authority.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When a person waives his right to trial and pleads guilty, due process and contractual duties require the State to abide by the terms of the negotiated agreement in good faith. The State and Mr. Zamora agreed that in exchange for pleading guilty, he would be sent to a mental hospital until no longer dangerous due to mental illness. When the legislature changed the law at the State's behest, so Mr. Zamora would not be held in the mental hospital until no longer dangerous as

dictated by the agreement, did the State violate due process and undermine the plea?

2. Statutory amendments are presumed to apply prospectively, and may not be applied retroactively unless purely curative or remedial and intended to be retroactive by express statutory language. The legislature substantially lowered the statutory standard for releasing a person from a mental hospital to serve a sentence in prison. This change in the law increases the punitive nature of Mr. Zamora's sentence. When the change in the law was not expressly retroactive, is not merely clarifying or technical, and substantively alters the terms of Mr. Zamora's plea, is it improper to retroactively apply the new law to Mr. Zamora's disposition?

3. A law prescribing punishment violates due process if it lacks standards and invites arbitrary enforcement. RCW 10.77.200(3) directs a judge to remand a criminally insane person to prison if "manageable" within prison without further definition, if the person has been sentenced to prison for a class A felony. Is whether a person may be "manageable" within a prison so vague that it invites arbitrary enforcement, lacks standards, and is incapable of judicial review?

4. In response to Mr. Zamora's plea agreement and disposition, the State changed several laws to undermine the premise of the plea. The court found these laws were written for Mr. Zamora alone, because the State wanted to undermine the agreement that placed him in a mental health hospital. Does the change in the law increasing the time Mr. Zamora will spend in prison constitute a bill of attainder, prohibited by article I, section 9 of the United States Constitution and article I, section 23 of the state constitution?

5. Under the revised RCW 10.77.200(3), the court had authority to transfer Mr. Zamora to DOC if the State proved he was "manageable" in prison. The court ruled that Mr. Zamora was manageable only contingent upon certain on-going requirements of DOC's care and treatment. Did the State fail to prove Mr. Zamora was manageable within DOC when the court ruled that additional requirements were necessary to maintain custody of him in prison?

6. In its cross-appeal, the State claims the court lacked authority to order any conditions for its treatment of any prisoner, including Mr. Zamora. RCW 10.77.200(4) permits the court to order conditional release, and RCW 10.77.200(3) lets the court define when a person would be sufficiently managed by DOC. Did the court exercise its

discretion based on the authority allocated by the legislature in defining when a person is manageable within the state prison?

7. In its cross-appeal, the State also argues that the court lacked any personal jurisdiction over DOC. The attorney general's office represents all state agencies, including DOC and the Department of Social and Health Services (DSHS), and it represented the State at the fact-finding hearing at which all but one of the State's witnesses were DOC employees. Did the court have jurisdiction to prohibit Mr. Zamora's transfer to DOC contingent on DOC providing a level of care that the court deemed necessary to safety and security of managing a mentally ill insanity acquittee?

## D. STATEMENT OF THE CASE.

### *1. Mr. Zamora and the prosecution entered a negotiated plea agreement based on controlling law that was accepted by the court.*

In 2008, Mr. Zamora's mental health spiraled out of control. He believed God chose him to fight demons. 9/9/14RP 155. Overcome by delusions and hallucinations, Mr. Zamora killed six people and injured four others. 11/17/09RP 18-19; 9/9/14RP 156-57.

Rather than proceed to trial on the multiple charges facing Mr. Zamora, including six counts of aggravated first degree murder, the

parties negotiated a plea agreement. CP 374-84. The court found, and the parties jointly agreed, that Mr. Zamora was not guilty by reason of insanity for two counts of aggravated first degree murder and guilty of the remaining counts. 11/17/09RP 26-27; CP 136-37.

The plea agreement explained it is "understood by the parties" that Mr. Zamora "will be sent to Western State Hospital" until "eligible for conditional release." CP 380. If he met the criteria for release, he would be transferred to DOC to serve the sentence imposed for the convictions. *Id*.

The written agreement said that Mr. Zamora "shall go to Western State Hospital" based on the parties' "interpretation" of the controlling law from "State v. Sommerville, 111 Wash. 2d 524 (1988) and RCW 10.77.120." CP 380.

Before entering this plea, Mr. Zamora "relied upon" his attorney's explanation of the law. CP 269 (declaration of Zamora). He "would not have accepted the plea bargain if [he] had known that the law would be changed" to alter his plea. CP 269.

The court found Mr. Zamora "legally insane" and not responsible for his acts in counts six and seven. 11/17/09RP 27. It ruled

there was a substantial danger unless he was committed and placed him in a state mental hospital for treatment. *Id*. at 27-28.

*2. The court rejected the State's efforts to discharge Mr. Zamora after a 2012 hearing*.

Based on a 2010 change in the governing statute, the State petitioned the court to release Mr. Zamora from Western State Hospital and send him to prison. 6/25/12RP 39-40. At the time Mr. Zamora pled guilty, the governing statutes let a confined person seek release from the court, but did not give this authority to the State. CP 246-47, 268-69.

The State argued that Mr. Zamora did not present a danger to the public, because he was only going to be transferred to prison, and therefore he was not substantially dangerous as required to hold him in a mental health hospital. 6/25/12RP 40.

The court rejected the State's petition after several days of testimony from treatment providers and DSHS staff, and found, "Mr. Zamora has not met any of the seven Hospital criteria for discharge from the Hospital." CP 134. He remains "currently" mentally ill, "a substantial danger to himself and others," and "continues to require

hospital level care," for recurring threatening and violent behavior that stem from his mental illness. CP 134.

The court also found that the statute governing a person's eligibility for release "does not permit release of Mr. Zamora from the Hospital merely because he can be placed at the Department of Corrections." CP 135. The court chastised Western State Hospital for being "unethical, inconsistent, and unprofessional in this particular case." 3/7/14RP 18.

*3. After further amendments of the statutes in RCW ch. 10.77, the court ruled Mr. Zamora could be "managed" by DOC if it complied with conditions governing his care.*

The State filed another petition to release Mr. Zamora to prison based on a later statutory amendment lowering the standard for releasing an insanity acquittee from the state hospital to prison. CP 30-33.

During a three-day hearing, treatment providers and evaluators agreed Mr. Zamora remained seriously mentally ill and substantially dangerous. 9/10/14RP 84-85; *see* 9/8/14RP 54, 115. He continued to have homicidal thoughts and believed he had been chosen by God and commanded to combat demons. 9/8/14RP 72, 77, 88. He talked of killing and eating a victim. 9/8/14RP 104. His delusional belief system

remained more resistant to treatment and there is an on-going risk it could increase in intensity even though he was making "slow progress." 9/9/14RP 48; 9/10/14RP 16.

Based on the newly lowered statutory threshold directing the court to release a person to prison if confined because criminally insane but "manageable" within DOC, the court found Mr. Zamora could be managed in prison, but only contingent upon DOC keeping him in the Special Offender Unit until two psychiatrists recommend changes to his treatment setting. 9/10/14RP 88; CP 9. The court also ordered that one of his current treatment providers remain his primary provider, giving him direct care and he be monitored by a psychiatrist. *Id*. DOC has appealed from these conditions and Mr. Zamora appeals from the court's order releasing him from the custody and supervision of a mental hospital and into prison.

E. ARGUMENT.

**1. By convincing the legislature to change the law after Mr. Zamora pled guilty, for the specific purpose of altering the terms of Mr. Zamora's plea, the State breached the plea agreement and violated Mr. Zamora's right to due process of law**.

*a. The State violates due process when it undermines a negotiated plea agreement.*

Mr. Zamora waived his right to be tried for 20 different offenses and entered into a plea agreement. A plea agreement is a contract between the parties, requiring the State to comply with its "contractual duty of good faith." *State v. MacDonald*, 183 Wn.2d 1, 7, 346 P.3d 748 (2015); *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971): U.S. Const. amend. 14; Const. art. I, § 3. The State may not contravene "any of the defendant's reasonable expectations that arise from the agreement." *State v. McRae*, 96 Wn.App. 298, 305, 979 P.2d 911 (1999). Because an accused person waives bedrock constitutional rights by pleading guilty, constitutional due process requires the prosecution to adhere to the terms of the plea agreement. *MacDonald*, 183 Wn.2d at 8; *Santobello*, 404 U.S. at 260.

A reviewing court construes a plea agreement based on what the defendant reasonably understood to be the terms of the agreement.

*United States v. De la Fuente*, 8 F.3d 1333, 1336 (9th Cir. 1993). If there is ambiguity, it is "construed in favor of the defendant," because the prosecution bears "responsibility for any lack of clarity." *Id*. at 1338; *United States v. Camarillo-Tello*, 236 F.3d 1024, 2017 (9th Cir. 2001). Whether the State breached its obligation under a plea agreement is objectively reviewed de novo on appeal. *MacDonald*, 183 Wn.2d at 8.

*b. Mr. Zamora's guilty plea mandated plea and waiver of constitutional rights was contingent on successful hospital treatment for his mental illness before he could be sent to prison.*

Mr. Zamora's plea rested on the agreed finding that he was not guilty by reason of insanity for two counts of aggravated first degree murder and would be sent to a state hospital for mental health treatment. A person who is not guilty by reason of insanity must be civilly detained at a certified hospital for treatment if that person is dangerous to himself or others. RCW 10.77.220 ("No person who is criminally insane confined pursuant to this chapter shall be incarcerated in a state correctional institution or facility."); RCW 10.77.110 (court "shall order" the "hospitalization" of person found not guilty by reason of insanity if substantially dangerous).

Mr. Zamora remains dangerous due to mental illness, without dispute. The State argued to send Mr. Zamora to prison but admitted, "Mr. Zamora is a dangerous person and the State doesn't dispute that." 9/10/14RP 64. The court ruled, "[a]ll of the doctors agree that Mr. Zamora suffers from a serious mental illness." *Id*. at 84. Even in 2014, Mr. Zamora was a level "1" out of seven in his behavioral control, with seven being an indication the person could be eligible for discharge. 9/8/14RP 105-06. Shortly before the 2014 release hearing, Mr. Zamora was threatening others and hearing "demonic voices trying to control me." *Id*. at 105, 108; 9/9/14RP 45. His symptoms were similar to the 2008 incident and indicated he remained at high risk of acting on his delusional belief system. 9/10/14RP 16.

*i. The law in effect at the time Mr. Zamora pled guilty required him to stay at the state's mental health hospital for treatment.*

Under the law in effect at the time Mr. Zamora pled guilty, Mr. Zamora could be released from the hospital's custody only if he petitioned for release and demonstrated he was safe to be in the community. RCW 10.77.150 (2009); RCW 10.77.200 (2009). The plea agreement provided that once Mr. Zamora gained control over his

mental illness and was no longer dangerous to himself or others, he could be transferred to DOC to serve his sentence. CP 375, 380.

A similar dual disposition arose in *State v. Sommerville*, 111 Wn.2d 524, 760 P.2d 932 (1988). Mr. Sommerville was acquitted by reason of insanity for killing his wife but he was found to be insane at the time he committed rape. The court held that RCW 10.77.220 "expressly prohibits" the defendant from serving his prison sentence before receiving treatment from DSHS for his mental illness. *Id*. at 535. A person who has been found "criminally insane" may not be incarcerated at a state correctional facility. RCW 10.77.220.

Because Mr. Sommerville was found not guilty by reason of insanity for one of his two charges, the court ruled that he must "be remanded to the custody of DSHS" for needed psychiatric care "until final discharge" and only "thereafter" could the State send him to DOC to serve his sentence. *Id*. at 536.

Before Mr. Zamora pled guilty, his lawyer unequivocally told him the State was required to place him to DSHS's custody until "eligible" for final discharge, and at that time he could be sent to prison. CP 247, 380. The plea agreement explicitly stated the parties were relying on *Sommerville* and RCW 10.77.120 as controlling Mr.

Zamora's mandatory placement in DSHS's care. CP 380. The sentencing memorandum similarly explained that based on the agreement,

> the Court is required to commit Mr. Zamora to a mental hospital operated by DSHS until such time, if any, the Court determines at a hearing that he is no longer a substantial danger to other persons or that he no longer presents a substantial likelihood of committing felonius acts jeopardizing public safety or security. Mr. Zamora may only be released to the custody of the Department of Corrections by order of the Court following such a hearing.

CP 375.

Mr. Zamora's attorney also told him to initiate final discharge from the DSHS psychiatric hospital, he would have to petition for release and prove he no longer presents a substantial danger to others due to a mental illness under RCW 10.77.200 (2009). CP 247. He relied on this understanding of the law when deciding to enter the plea agreement. CP 268-69.

Mr. Zamora had been evaluated by a well-credentialed forensic psychiatrist who determined that Mr. Zamora was not guilty by reason of insanity at the time of all offenses. CP 224. Mr. Zamora waived his right to pursue a not guilty by reason of insanity verdict for all charges. CP 223-24.

Likewise, the State recognized that if Mr. Zamora went to trial, there was a significant possibility that he could be found not guilty by reason of insanity for all charges. 6/28/12RP 175. The prosecutor told the media "he agreed to the plea deal because he was concerned a jury might acquit Zamora for insanity on all counts - meaning he could one day be freed."[1]

As the judge acknowledged, the State entered into the plea agreement because it was "trying to avoid the possibility" Mr. Zamora would be found not guilty by reason of insanity on all counts. *Id*. The judge explained the prosecution was "trying to ensure by virtue of the plea" that "Mr. Zamora would be locked up for the rest of his life at either a hospital or penitentiary." *Id*. Absent this plea, if Mr. Zamora was found not guilty of reason of insanity for all counts, he would be eligible for release into the community if he proved that he was not a danger to others or likely to commit crimes if released. RCW 10.77.200 (2009).

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[1] Associated Press, "Isaac Zamora pleads guilty in Skagit County shooting rampage," Seattle Times, Nov. 17, 2009, available at: http://www.seattletimes.com/seattle-news/isaac-zamora-pleads-guilty-in-skagit-county-shooting-rampage/.

The plea agreement benefitted the State by ensuring Mr. Zamora could not be released from the State's custody despite the undisputed role his mental illness played in precipitating the incident. It benefitted Mr. Zamora by ensuring he would receive long-term treatment for his significant mental illness in a certified hospital, and should he gain such substantial control over his mental illness so that he was not a danger to himself or others, he would be able to serve his prison sentence.

Even though the plea agreement did not guarantee a life-long hospital confinement, it guaranteed a certain legal framework would apply and procedural safeguards would protect him from being sent to prison when he remained substantially dangerous to himself or others due to his mental illness. CP 380; 3/7/14RP 16.

*ii. The law changed after Mr. Zamora's plea because state agencies did not want to comply with its terms.*

In direct response to Mr. Zamora's negotiated plea and sentence, the legislature enacted several new laws to make it far easier for the State to transfer Mr. Zamora to prison.

First, the legislature authorized the secretary of DSHS to transfer a person to prison temporarily, enacting RCW 10.77.091 in 2010. *Laws* 2010, ch. 263, § 2 (S.B. 6610). Second, the legislature

authorized the State to petition for the release of a person who was committed due to criminal insanity, a power it did not have before this 2010 change to RCW 10.77.200 (2010). *Laws* 2010, ch. 263, § 8 (S.B. 6610); CP 247. Third, it reduced the substantive threshold for when a person could be discharged from DSHS and sent to prison. RCW 10.77.200 (2013). *Laws* 2013, ch. 289, § 7 (S.S.H.B. 1114).

Under the new temporary transfer provision, DSHS may send a person found criminally insane from a DSHS treatment facility to state prison if it finds the person "presents an unreasonable safety risk which, based on behavior, clinical history, and facility security is not manageable in a state hospital setting." RCW 10.77.091(1) (enacted in 2010 and amended in 2015). Invoking this new law, the State transferred Mr. Zamora from Western State Hospital to DOC in December 2012. CP 8, 31.

This temporary transfer allowed by RCW 10.77.091(1) requires close oversight by DSHS. DSHS "shall retain legal custody" and review any placement at least every three months. RCW 10.77.091(1). Considered a "boarder" at the Monroe Correctional Center's Special Offender Unit, the director of Western State Hospital met with Mr. Zamora every few weeks as his only patient, and several DOC

psychologists and psychiatrists jointly provided Mr. Zamora with an unusual level of care and oversight. 9/8/14RP 114-15; 9/9/14RP 30, 72; 9/10/14RP 40-41.

If he was a prisoner at the Special Offender Unit, he would rarely see a psychiatrist or psychologist. 9/8/14RP 114; 9/9/14RP 30. He would instead have a mental health counselor, who may not have any professional counseling license. 9/9/14RP 36. As the only DOC "boarder," he received far more mental health care and attention than any prisoner. 9/9/14RP 30; 9/10/14RP 40-41. Even with this level of oversight, he had "decompensated badly" for a period of time and remained seriously mentally ill and dangerous. 9/8/14RP 54, 166; 9/9/14RP 28.

Not satisfied with temporarily settling Mr. Zamora in prison where it would oversee his mental health treatment, the State sought and the legislature instituted a new mechanism committing Mr. Zamora to prison permanently. In 2013, RCW 10.77.200 was further changed to allow a final discharge from DSHS to prison if the State proves the person is "manageable" within a state prison, even if the person presents a substantial danger to others or is likely to commit crimes. RCW 10.77.200(3) (2013).

For any person who "will be transferred to a state correctional institution or facility upon release to serve a sentence for any class A felony," the State:

> must show that the person's mental disease or defect is manageable within a state correctional facility, but must not be required to prove that the person does not present either a substantial danger to other persons, or a substantial likelihood of committing criminal acts jeopardizing public safety or security, if released.

RCW 10.77.200(3). The standard of proof is a preponderance of evidence. *Id*.

Under this new statute, the State sought to discharge Mr. Zamora from DSHS into prison. CP 32. The court granted this release and transfer with conditions – the propriety of this order is discussed in section 4.

*c. Changing the law that formed the basis of the plea agreement undermines the basis of the negotiated agreement, breaches the plea, and violates due process.*

The statutory changes enacted after Mr. Zamora's guilty plea gave the State authority to disregard the parties' understanding and settled expectations under the plea agreement. These changes were enacted for the specific purpose of giving the State a way to get Mr. Zamora into prison as soon as possible. 9/8/14RP 7; 9/10/14RP 81. The

court described the State's "amazing clout" in the legislature which allowed it "to jam legislation one after another in order to deal with the issue of Mr. Zamora" because DSHS "doesn't want anything to do with Mr. Zamora." 9/8/14RP 7.

Emails from Western State Hospital days after Mr. Zamora's sentence show its administrators pressed for legislative changes due to Mr. Zamora. In one email, a DSHS official wrote, "the Isaac Zamora situation continues to bother me [a lot]. Something needs to be done to expedite correct placement in a secure prison." CP 118 (brackets in original). This email is dated December 14, 2009; Mr. Zamora had been sentenced on November 30, 2009. CP 118, 120.

Another email shows Western State Hospital asked for the legislation to "assist DSHS/WSH with management of the 'Zamora' case/precedence," including obtaining "WSH ability to petition for CR [conditional release]." CP 119. The emails also acknowledged that "under the law" in existence in 2009, "patients are responsible for making the petition to court for release" from Western State Hospital, and the court might not permit DSHS to petition for Mr. Zamora's release. CP 117. This law was changed in 2010 and altered the reasons Mr. Zamora agreed to the plea. CP 268-69.

When the State enters a plea agreement, its contractual duty binds it to act in good faith. An investigating officer cannot come to court and press for a sentence different from what the State promised to recommend. *MacDonald*, 183 Wn.2d at 8, 15. The State cannot induce a plea, then "render the plea agreement meaningless" by changing the statutory scheme. *Id*. at 15. When a plea agreement rests "in any significant degree on a promise or agreement of the prosecution, such a promise must be fulfilled." *Santobello*, 404 U.S. at 262.

Mr. Zamora's plea agreement explicitly referred to the legal framework requiring Mr. Zamora be sent to DSHS for treatment and only eligible for discharge to DOC by statute and case law. CP 380. This legal framework was the basis of the plea negotiation, as the judge acknowledged and Mr. Zamora explained without dispute from the State. 6/28/12RP 173; CP 246-48.

The later change to the governing statute let the State seek Mr. Zamora's discharge under a diluted standard, where it only needed to show Mr. Zamora could be "managed" by DOC even if still substantially dangerous to others and without regard to whether any treatment would be provided. Applying this change to the legal premise

of the plea, based on new laws sought by the State, undermines the agreement and violates due process.

**2. Amending the statutes governing the State's authority to release a person acquitted by reason of insanity may not retroactively alter the terms of Mr. Zamora's plea**.

*a. The changes in the statutes governing the terms of Mr. Zamora's guilty plea were enacted after Mr. Zamora pled guilty*.

It is a "well-settled and fundamental rule of statutory construction" that "all statutes are to be construed as having only a prospective operation, and not as operating retrospectively." *In re Cascade Fixture Co.*, 8 Wn.2d 263, 271-72, 111 P.2d 991 (1941), quoting 59 C.J. 1159 § 692. The presumption that amendments are prospective is "an essential thread in the mantle of protection that the law affords the individual citizen," and is "deeply rooted." *State v. Smith*, 144 Wn.2d 665, 672, 30 P.3d 1245 (2001) (superceded by statute) (internal citations omitted).

The "antiretroactivity principle" stems from "[e]lementary considerations of fairness." *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Individuals "should have an opportunity to know what the law is" and their "settled

expectations should not be lightly disrupted." *Id*. The government may not pass vindictive legislation and give it retrospective application. *Id*. at 266-67.

The amendments to RCW ch. 10.77 alter where and how the State treats a person who has been found not guilty by reason of insanity. Mr. Zamora pled guilty with the understanding that a different substantive standard and procedural avenue applied in order for him to be sent to prison. In order to apply these recently enacted changes to him, the statutes must be retroactive, but because they are not retroactive, they may not govern his discharge and transfer to prison.

As the trial court explained, DSHS "didn't want any part of" Mr. Zamora's care and engaged in "blatant attempts" to change the law governing his plea. 9/10/14RP 81.

*b. The amendments do not apply retroactively.*

To disregard the presumption that a statutory change is prospective, the statute's language must say it is "the purpose and intention of the legislature to give [the statute] a retrospective effect" and it must be written "clearly, expressly, plainly, obviously, unequviocably, and unmistakably" in the statute. *Cascade Fixture.*, 8 Wn.2d at 271-72. Doubt must be resolved in favor of prospective

construction. *Id*. "[C]ourts disfavor retroactivity." *Smith*, 144 Wn.2d at 673.

*Smith* involved an amendment to the definition of "criminal history," to include juvenile convictions that had previously "washed out" when calculating the applicable sentencing range. 144 Wn.2d at 671. The amendment did not include "an explicit legislative command" that it apply retroactively. *Id*. at 672.

Without an explicit command of retroactive application, the amendments do not apply retroactively unless "curative" or "remedial." *Id*. To be curative, the change clarifies or technically corrects an ambiguous statute. *Id*. at 674. A substantive change is not merely curative. *Id*. at 674. The changes to RCW 10.77.091, .150, and .200 alter the substantive threshold for release and provide a new procedural mechanism for the State to seek release. These are substantive changes, not clarifying or technical corrections to ambiguities.

Similarly, to be remedial for retroactivity purposes, the change relates to practices, procedures, or remedies "and does not affect a substantial or vested right." *Id*. Imposing an affirmative disability or increasing punishment is not remedial. *Id*. By changing RCW

10.77.200 to make it easier to send Mr. Zamora to prison, the amendment increases punishment, showing the change in not remedial.

The legislature did not expressly provide that RCW 10.77.200 is retroactive; it is a substantive change that is not purely curative or remedial; it alters a prior construction of the law as construed by this Court. Accordingly, it is may not be retroactively applied.

*c. Discharging Mr. Zamora from DSHS custody and sending him to prison requires retroactive application of changes in the law, which is manifestly unfair and violates the ex post facto clause.*

Mr. Zamora waived his right to trial and agreed that he was partially criminally liable notwithstanding the serious impairment is his understanding and control of his faculties due to his mental illness. 11/17/09RP 18, 20, 27. He waived his right to appeal or collaterally attack his convictions and sentence. CP 381. But he entered into this agreement because he believed the state would act in good faith and treat his mental illness before discharging him to prison. CP 246-47, 268-69.

By diluting the threshold for transferring a person to prison to require only that Mr. Zamora is “manageable” at a prison even if he remains substantially dangerous, the substantive changes in the law are

being retroactively applied to Mr. Zamora in a manifestly unjust fashion.

A law violates the ex post facto prohibition if it changes the legal consequences of acts completed before its effective date. *State v. Edwards*, 104 Wn.2d 63, 71, 701 P.2d 508 (1985). The ex post facto prohibition also ensures fair warning of the effect of legislative changes. *Weaver v. Graham*, 450 U.S. 24, 28-30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

The court's finding that Mr. Zamora was not guilty by reason of insanity required commitment in a state mental hospital and prohibited his transfer to prison, as the parties agreed. *Sommerville*, 111 Wn.2d at 526; RCW 10.77.110, .150, .200, .220. The "state of the law" changed after Mr. Zamora's offense and in response to the court's order of disposition, for the purpose of altering the terms of his sentence. It violates ex post facto prohibitions to impose more severe punishment than was permissible when the crime was committed and undermines the settled expectations governing the plea agreement.

***3. The changes in the law are impermissibly vague and constitute a bill of attainder.***

*a. The court's unbridled authority to transfer Mr. Zamora to DOC custody is unconstitutionally vague.*

A law prescribing punishment violates due process if it is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, _ U.S. _, 135 S. Ct. 2551, 2556-57, 192 L. Ed. 2d 569 (2015).A vague provision is not constitutional "merely because there is some conduct that clearly falls within the provision's grasp." *Id*. at 2561.

The court agreed that the critical question of whether Mr. Zamora is "manageable" within prison is "inartful" and the legislature should have provided what it meant in this case. 9/8/14RP 8. It agreed the term is vague. 9/8/14RP 7. But the court believed a statute is unconstitutionally vague only if "incapable of any application." *Id*. The court decided "it can be applied" and denied the defense motion to dismiss for vagueness. *Id*.

In *Johnson*, the Supreme Court explained that a sentencing statute does not need to be unconstitutional in all applications to be unconstitutionally vague. 131 S.Ct. at 2561. Here, the court denied Mr. Zamora's motion to dismiss for vagueness on the basis that the law was not vague in all applications. CP 300.

The court ruled that whether a person is "manageable" in prison, is not "incapable of definition," but never explained what the definition was and never said what standard it was applying. CP 9; CP 300. Its written findings summarily state Mr. Zamora's mental illness "is manageable" within DOC. CP 9. Without a definition or standard to apply, there is no guard against the statute's arbitrary enforcement.

RCW 10.77.200(3)'s requirement that a person is deemed "manageable" within a prison lacks any standard beyond the floor of unconstitutional confinement. Prisons manage people by confining them, and may confine them in isolation as needed, even if solitary confinement "exact[s] a terrible price." *Davis v. Ayala*, _ U.S. _, 135 S.Ct 2187, 2210, 192 L.Ed 323 (2015) (Kennedy, J., concurring). Keeping a prisoner in solitary confinement for one year, "even without cause," is not "an atypical or significant hardship" and does not violate a liberty interest. *Ballinger v. Cedar Co., Mo*., __ F.3d _, 2016 WL 158083, *4 (8th Cir. 2016).

A severely mentally ill person is at risk in a prison. He is vulnerable to abuse by others, to worsening symptoms from stress or anxiety, and to increased prison discipline due to difficulty conforming to all rules and regulations. Metzner J. and Fellner J., "Solitary

confinement and mental illness in U.S. prisons: a challenge for medical ethics," J. Am. Acad. Psychiatry Law 38:104-8 (2010); Blitz, C., Wolff, N., Shi, J., "Physical victimization in prison: The role of mental illness," Int. J. Law Psychiatry, 2008 Oct-Nov., 31(5): 385-93 ("rates of physical victimization were significantly higher for male inmates with mental disorders").

As the State argued, Mr. Zamora was "manageable" if it the prison would not be deliberately indifferent to serious medical needs. 9/8/14RP 6. A prison may not exercise "deliberate indifference" to medical and mental health care needs. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). A prison's responsibilities are merely to comply with the Eighth Amendment prohibition on cruel and unusual punishment. *Id*. at 833-34. A deprivation of the Eighth Amendment occurs when a prison holds an inmate "under conditions posing a substantial risk of serious harm." *Id*. "[O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Id*. (internal citation omitted).

RCW 10.77.200(3) does not explain whether to be "manageable," a court must find prison is an appropriate setting for treating a mentally ill and criminally insane person, or merely if it

would violate the Eighth Amendment to place a person in DOC's custody. The State insisted that the law mandated Mr. Zamora's transfer unless DOC would be deliberately indifferent. 9/8/14RP 6.

The court agreed the statute was vague, but refused to dismiss the State's petition, partly because it believed the hearing should go forward due to the presence of witnesses, and partly because it was a "close case" on whether the statute was unconstitutionally vague. 9/8/14RP 8. The court did not explain what standard it used to find Mr. Zamora "manageable."

The statute's failure to provide any standards leaves courts to arbitrarily determine whether transferring a criminal insane person to prison seems acceptable to an individual judge, which is ripe for arbitrary enforcement and incapable of meaningful review. Because a person can be managed by being locked in a cell, the standard bears no connection to the mental illness and dangerousness that required treatment in the first place. The vagueness of the statute is unconstitutional and subverts the purpose and policy of confining a person who is not guilty by reason of insanity for treatment, rather than punishment, until the person's mental illness is under control.

*b. Enacting a law for the blatant purpose of increasing Mr. Zamora's prison term constitutes a bill of attainder.*

The state and federal constitutions prohibit any "bill of attainder," which bars "legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965); *State v. Thorne*, 129 Wn.2d 736, 759, 921 P.2d 514 (1996); U.S. Const. art. I, § 10; Art. I, § 23.

A legislative enactment is a bill of attainder if it singles out a certain person or group and imposes punishment for past conduct. *Brown*, 381 U.S. at 446. The law at issue in *Brown* barred a member of the communist party from holding a union office. *Id*. at 439. The court ruled it was a bill of attainder because it signaled out a certain group of people and punished them for their affiliation. *Id*. at 461.

RCW 10.77.200(3) was crafted expressly to alter Mr. Zamora's sentence. 9/8/14RP 7. It singles out a group of people for increased punishment – those who are both criminally insane and sentenced for a class A felony—and it applied only to Mr. Zamora. The trial court minced no words when deriding its creation, explaining that this purpose of this statute is "not kidding of anybody -- the only person in

the whole world the statute applies to is Mr. Zamora." 9/8/14RP 7. The court called it a "blatant" attempt by the State to move Mr. Zamora out of a treatment facility and into prison, simply because DSHS disliked being tasked with having to care for Mr. Zamora. 9/10/14RP 81.

By creating a statute designed to remove Mr. Zamora from the treatment program that he was ordered to receive upon being found not guilty by reason of insanity and instead putting him in prison, the legislature increased the punishment imposed on Mr. Zamora. All other people who are criminally insane and also sentenced to serve a prison term, are not eligible for serving their sentences until they are proven to no longer constitute a substantial danger to others or to commit a criminal offense. RCW 10.77.200, .220.

But Mr. Zamora, and anyone else convicted of a class A felony and criminally insane, will be imprisoned even if substantially dangerous to himself or others due to mental disorder. RCW 10.77.200(3). Rather than having to serve a sentence once his severe mental illness subsided, he would be sent to prison even when actively psychotic and unable to control the voices or visions that gave him an altered perception of reality.

For Mr. Zamora, the State bears the meager burden of proving he is "manageable" within DOC. The legislature did not define "manageable" other than explain that it does not mean the person poses a danger to others and does not mean the person is likely to commit criminal offenses. RCW 10.77.200(3). This statute was blatantly designed, as the court found, to send Mr. Zamora to prison. 9/10/14RP 81. It constitutes a bill of attainder, which is constitutionally prohibited.

Although the court attempted to mitigate RCW 10.77.200(3) by ordering conditions placed on DOC's treatment of Mr. Zamora, DOC appeals and argues that the court lacks any authority to impose judicial conditions upon any person transferred to prison. The court's lack of authority to impose conditions demonstrates there is no meaningful judicial oversight of the law, which further shows the law constitutes a bill of attainder directed at punishing Mr. Zamora notwithstanding his active and serious mental illness that requires confinement in a state hospital RCW 10.77.220.

**4. The court did not find Mr. Zamora was "manageable" within DOC absent conditions governing his care and treatment, demonstrating the State did not meet its burden permitting his discharge from Western State Hospital**

*a. The State did not meet its burden of proving Mr. Zamora was safe to be sent to prison.*

RCW 10.77.200(3) prohibits DSHS from transferring a person to prison unless it proves that "the person's mental disease or defect is manageable within a state correctional facility." The court ruled that Mr. Zamora was "manageable" within a prison only if the State maintained a higher level of treatment and oversight than it would otherwise provide. 9/10/14RP 87-88.

The court did not find Mr. Zamora qualified for transfer absent these additional conditions. If Mr. Zamora's condition was manageable as necessary for his permanent discharge from DSHS, no conditions would be necessary. Because the court doubted DOC's ability to appropriately care for Mr. Zamora permanently, it ruled that Mr. Zamora should not be discharged into total control of DOC, because without the prison's "ongoing continuing treatment" in the manner he had been receiving at the Special Offender Unit, the court remained "concerned" that Mr. Zamora would not be properly managed.

The court ruled the State could discharge Mr. Zamora "contingent" on conditions it deemed essential to managing him. 9/10/14RP 88. It insisted DOC keep Mr. Zamora at the Special Offender Unit and assign one of his current treatment providers (Drs. Jewitt or Goins) as the "primary" treatment provider with "direct contact" with Mr. Zamora. It ruled DOC must be prohibited from transferring Mr. Zamora out of the Special Offender Unit unless "two or more psychiatrists" who regularly work with Mr. Zamora "jointly recommend" his transfer. 9/10/14RP 87.

The testifying professionals from DSHS, DOC, and the independent evaluator retained by Mr. Zamora supported the court's order. Psychiatrists Waiblinger and Johnson explained that Mr. Zamora substantially benefitted from consistent care by a single provider whom he trusted. 9/8/14RP 42,120; 9/10/14RP 40-44.

Because he was a boarder and his case was high profile, DOC was providing him substantially more intensive care then he would receive as a DOC inmate. 9/9/14RP 50; 9/10/14RP 28, 30, 40-41.

Once transferred to DOC's custody, he would not have that degree of care and oversight even if he remained in the Special Offender Unit. 9/9/14RP 36. Once sent into the general population,

there would be “substantially less” mental health services available and it would require Mr. Zamora to request it. 9/9/14RP 40, 81-82. It was “very possible” Mr. Zamora would be moved out of the residential treatment he was receiving. 9/9/14RP 109.

Dr. Johnson did not believe Mr. Zamora could be managed in the general population or if his current level of treatment was reduced. 9/10/14RP 37, 44. If placed in segregation, his mental health would deteriorate. 9/10/14RP 56. Due to the “chronic” and “severe” nature of his illness, and the real possibility he would act on his delusions, he presents an “extreme risk” and would be “very dangerous” if he stopped taking medications at any time. 9/10/14RP 17-19, 23.

The reasons underlying the court’s ruling were concerns that once Mr. Zamora was discharged from DSHS custody, DOC could readily alter its level of care and would not be managing Mr. Zamora in a constitutionally appropriate manner.

*b. Because the State failed to meet its burden of proof, discharge is not authorized.*

The State’s failure to prove Mr. Zamora was capable of being successfully and appropriately managed as a DOC inmate constitutes a

failure to meet its burden to release Mr. Zamora from DSHS's custody. RCW 10.77.200(3).

*c. Alternatively, when the legislature authorized the court to determine whether a mentally ill and dangerous person is "manageable" in prison, it permitted to court to set threshold conditions.*

DOC appeals from the conditions imposed by the court, claiming a court has no authority to order it to do anything with anyone in its custody. However, under RCW 10.77.200(3), if a person's manageability within DOC depends on DOC providing a certain level of treatment and oversight, the court must either prohibit the transfer or permit the transfer with mandatory conditions.

RCW 10.77.200(4) provides that when the court considers a petition to release a person, it may place a person on "conditional release" if there is a reasonable likelihood that the person's mental disease or defect may become more active and render the person dangerous to others. The court's ruling conditioned Mr. Zamora's release upon mandatory oversight and psychiatric care that the court deemed necessary to ensuring Mr. Zamora did not become more dangerous to others. It was authorized by statute to conditionally release Mr. Zamora.

DOC is an administrative agency whose authority is to implement legislative directives. *State v. Simmons*, 152 Wn.2d 450, 455, 98 P.3d 789 (2004). When delegating authority to another entity, the legislature must provide adequate standards and set procedural safeguards that control "arbitrary administrative action and abuse of discretionary power." *Id*.

The safeguards enacted by the legislature include a court hearing to determine whether the person is manageable within DOC. RCW 10.77.200. At this hearing, the judge found that even though Mr. Zamora's mental disorder and dangerousness were being managed while he was a DOC "boarder," his condition was contingent on a level of care that he would evaporate as a DOC inmate. 9/10/14RP 86-88.

As the court recognized, Mr. Zamora had received extraordinary regular psychiatric care from Dr. Waiblinger through Western State Hospital, as well as two overseeing DOC psychiatrists, and two DOC correctional officers were specifically assigned to monitor his movements every day. This intensive daily monitoring enabled DOC to notice fluctuations in Mr. Zamora's mental health, such as when he suffered an episode of serious psychosis reminiscent of his behavior close in time to the incident where he killed multiple people.

To minimize the unacceptable risk that Mr. Zamora could be arbitrarily transferred to a level of care that would greatly increase the risk of danger to Mr. Zamora or others, the court imposed conditions on DOC. These conditions are a legitimate exercise of the discretion accorded to the court under RCW 10.77.200(3).

The court's authority to determine when a person is sufficiently safe to be held in a prison was delegated by the legislature. This delegation of authority to a fact-finding tribunal was appropriate and DOC must comply or refuse to take custody of Mr. Zamora.

**5. DOC illogically claims it was not a party to the proceedings when its witnesses constituted the majority of the evidence, its law firm litigated the issues, and it was fully informed of and participated in the litigation**

The court held a three-day fact-finding hearing to determine whether Mr. Zamora could be managed by DOC. All of the State's witnesses were DOC employees, other than Dr. Waiblinger, who is the medical director of Western State Hospital and who worked closely with DOC to facilitate Mr. Zamora's temporary transfer as a "boarder." 9/8/14RP 15, 17-19.

The attorney general represented the State in the fact-finding hearing. The attorney general is constitutionally and statutorily charged

with representing the state. *Goldmark v. McKenna*, 172 Wn.2d 568, 572, 259 P.3d 1095 (2011) ("Our state constitution directs that the attorney general 'shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.' Const. art. III, § 21"); RCW 43.10.040 ("The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings.").

DOC was fully apprised of the proceedings in this case and understood it would be affected by the court's order if the court determined that Mr. Zamora will be transferred from DSHS to DOC custody. Under RCW 9.94A.585(7), when DOC disputes the legal terms of a sentence imposed, it "may petition for a review." The mechanism for this petition is to first certify that "all reasonable efforts to resolve the dispute at the superior court level have been exhausted" and then it may petition for relief in the court of appeals. RCW 9.94A.585(7).

DOC did not seek review under RCW 9.94A.585(7). It has not certified that it engaged in "all reasonable efforts to resolve the dispute"

at the superior court level. After the court entered its order, DOC filed an amicus motion for reconsideration, explaining that it was fully familiar with the court's ruling but objected to its conditions. CP 1-5.

The State cites *State v. G.A.H*., 133 Wn.App. 567, 137 P.3d 66 (2006), to claim that the court could not order DOC take any action as a matter of personal jurisdiction. But in *G.A.H*. is far afield. It involved a criminal prosecution for a juvenile where the child had a troubled home life and the court believed the child would be better served by having DSHS place the child into foster care. *Id*. at 578-79. The court's sentencing order directed DSHS to place the child in foster care.

This order had not followed the established statutory avenue for DSHS to legally place a child in foster care. *Id*. at 578-79. The *G.A.H*. court ruled that in the context of a juvenile sentencing proceeding, the judge acted outside its authority under the Juvenile Justice Act when it obligated DSHS to intervene in a parent-child relationship without abiding by the statutory procedures for DSHS intervention in the family. *Id*.

Unlike *G.A.H*., the legislature expressly tasked the court with determining whether the State proved Mr. Zamora would be manageable within DOC, or eligible for a conditional release. RCW

10.77.200. The court exercised its discretion when deciding this question as directed by the legislature.

The court ruled that Mr. Zamora would be manageable, contingent upon ongoing oversight from qualified professionals. DSHS did not meet its burden of showing Mr. Zamora could be appropriately managed and finally discharged from DSHS without these conditions. If the discharge order is not overturned on appeal, DOC must comply with the court's order or otherwise satisfy the court it will safely care for Mr. Zamora absent any conditions.

## F. CONCLUSION.

Isaac Zamora's premature discharge from the custody of the mental health treatment provider under DSHS should be reversed and the State should be ordered to continue providing necessary treatment until he is no longer substantially dangerous to others or likely to commit any offense jeopardizing public safety.

DATED this 5th day of February 2016.

Respectfully submitted,

*s/ Nancy P. Collins*
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## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
## DIVISION ONE

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| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | NO. 73008-8-I |
| v. | ) | |
| | ) | |
| ISAAC ZAMORA, | ) | |
| | ) | |
| Appellant. | ) | |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT/CROSS-RESPONDENT** 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:

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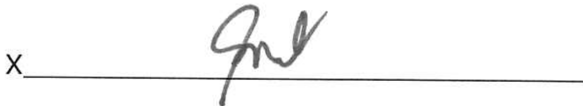
| [X] | TIMOTHY LANG<br>OFFICE OF THE ATTORNEY GENERAL<br>PO BOX 40116<br>OLYMPIA, WA 98504 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_______________ |
| [X] | ROBERT ANTANAITIS<br>OFFICE OF THE ATTORNEY GENERAL<br>PO BOX 40124<br>OLYMPIA, WA 98504 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_______________ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 5TH DAY OF FEBRUARY, 2016.

X

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