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Supreme Court No. 87726-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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~~STATE OF WASHINGTON,~~

Respondent,

v.

BAO DINH DANG,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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## A. INTRODUCTION

Bao Dang suffers from a major depressive disorder with psychotic features. He was prosecuted for attempted arson, but was found not guilty by reason of insanity and conditionally released to the community. As required by statute, before releasing him, the trial court found that Dang was not dangerous.

Dang initially did very well on conditional release; so well, in fact, that his conditions were relaxed and he was even permitted to travel to Vietnam, where he was born. When Dang returned from Vietnam, however, he was homesick and sad. He asked his mother to buy him a ticket to return, and when she would not do so, he became upset and began to endorse delusional beliefs. Concerned that Dang might pose a risk to the community, his CCO tried twice to have him involuntarily committed, but both times the CDMHP did not find probable cause to believe that he was dangerous. The court nevertheless revoked Dang's conditional release based on his mental deterioration. Dang was otherwise in perfect compliance with the court-imposed conditions.

According to RCW 10.77.190, the court may revoke an insanity acquittee's conditional release based solely upon a finding that he has violated a condition of release, without ever finding him dangerous. This Court should hold the statute creates an unacceptable risk that a person

will be involuntarily committed based on mental illness alone, in violation of due process, and is unconstitutional. Given an insanity acquittee's liberty interest and the danger that a lesser standard will increase the number of individuals erroneously committed, this Court should further hold that the standard of proof at a hearing to revoke conditional release must be clear and convincing evidence. Finally, this Court should reverse Division One's ill-considered opinion permitting the introduction of hearsay at a revocation hearing without a showing of good cause, and hold that the evidence was insufficient to prove Dang was dangerous.

**B. ISSUES PRESENTED FOR REVIEW**

1. Involuntary civil commitment violates due process unless it is based upon proof of mental illness and dangerousness. Under RCW 10.77.110(3), before an insanity acquittee may be released, he must be found to be non-dangerous. RCW 10.77.190, however, permits revocation based solely upon proof of a violation of a term of release. Should this Court hold that to prevent involuntary commitment based on mental illness alone, due process requires proof of dangerousness before an insanity acquittee's conditional release may be revoked?

2. Should this Court conclude that in light of the liberty interest an insanity acquittee has in his conditional release and the State's interest in avoiding the erroneous confinement of people simply because they are

mentally ill, the State's burden at a revocation hearing should be clear and convincing evidence?

3. Although there is no Sixth Amendment right to confrontation at a revocation hearing, the Supreme Court and this Court hold that the Fourteenth Amendment requires confrontation absent a showing of good cause so as to ensure that the evidence presented is reliable. Should this Court hold that this standard is equally applicable to hearsay from live witnesses as well as documentary evidence?

4. Was the evidence insufficient to prove Dang was dangerous?

C. STATEMENT OF THE CASE

For purposes of the instant supplemental brief, and in the interest of brevity, Dang relies on the Statement of the Case in his Petition for Review, at 2-11.

D. ARGUMENT

**1. RCW 10.77.190 violates due process because it permits involuntary civil commitment without proof of current dangerousness.**

a. A person cannot be involuntarily confined for mental health treatment except upon proof of mental illness and dangerousness.

Individuals have a constitutionally-protected interest in their liberty, which protects them from involuntary confinement without due process of law. "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). Pursuant to its police power, the State “may of course imprison convicted criminals for the purposes of deterrence and retribution.” Id. With regard to a person who has been found not guilty by reason of insanity, however, the State “has no such punitive interest.” Id. Confinement of insanity acquittees is only permissible, therefore, if the State shows “by clear and convincing evidence that the individual is mentally ill and dangerous.” Jones v. United States, 463 U.S. 354, 362, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983).

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. Assuming that that term can be given a reasonably precise content and that the ‘mentally ill’ can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

O’Connor v. Donaldson, 422 U.S. 563, 575, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).

A verdict of not guilty by reason of insanity establishes: “(i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness.” Jones, 463 U.S. at 364. The fact that the defendant has committed a criminal act beyond a reasonable

doubt permits a presumption that the defendant is dangerous, and authorizes the State to confine him in a mental institution. *Id.* A statutory scheme of confinement must be “carefully limited,” however, so the State does not unconstitutionally warehouse the mentally ill or confine people based upon dangerousness alone. *Foucha*, 504 U.S. at 81.

- b. To the extent that RCW 10.77.190 permits the revocation of an insanity acquittee’s conditional release without a finding of dangerousness, the statute violates due process.
  - i. *The statute permits confinement of an insanity acquittee based solely upon proof of a violation of a condition of release, creating an impermissible risk of involuntary confinement based on mental illness alone.*

Washington’s statutory scheme allows the State to involuntarily confine a person who has been acquitted of a crime by reason of insanity only if the court makes a specific finding that she or he is “a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions.” RCW 10.77.110(1). But, “[i]f it is found that such defendant is not a substantial danger to other persons, and does not present a substantial likelihood of committing criminal acts jeopardizing public safety or security, but that he or she is in need of control by the court or other persons or institutions, the court shall direct the defendant’s conditional release.” RCW 10.77.110(3)

(emphasis added). An affirmative finding that the defendant is not dangerous, therefore, is a mandatory predicate for conditional release.<sup>1</sup>

The procedures for the revocation of an insanity acquittee's conditional release are set forth in RCW 10.77.190.<sup>2</sup> At a hearing on a motion to revoke conditional release, "[t]he 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." RCW 10.77.190(4).

The statute does not require a specific finding that the person is dangerous in order to revoke his or her conditional release; the court only need find that the person did not adhere to the terms and conditions of his or her release. *Id.* The statute thus allows a person to be confined based

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<sup>1</sup> The State contended in the Court of Appeals that a person on conditional release is at all times subject to a commitment order – or “civilly committed” – as the State phrased it. Br. Resp. at 24. The State neglected to address the fact that conditional release is impossible without an explicit judicial finding that the person is not dangerous. Thus, beyond the obvious reality that a person who is conditionally released is physically at liberty, not confined, a person on conditional release has not met the twin criteria for civil commitment. The State's arguments are thus of little help to this Court.

<sup>2</sup> The statute provides:

If the prosecuting attorney, the secretary of social and health services, the secretary of corrections, or the court ... reasonably believes that a conditionally released person is failing to adhere to the terms and conditions of his or her conditional release the court or secretary of social and health services or the secretary of corrections may order that the conditionally released person be apprehended and taken into custody.

RCW 10.77.190(2).

upon mental illness alone, in violation of due process.

- ii. *Division One's published opinion accorded the statute this unconstitutional construction and found the question of dangerousness "not relevant" to whether an insanity acquittee's conditional release may be revoked without violating due process.*

In its published opinion in this case, Division One held that the statute does not require proof of dangerousness before a court may revoke an insanity acquittee's conditional release. State v. Dang, 168 Wn. App. 480, 484, 280 P.3d 1118, review granted, 291 P.3d 253 (2012).<sup>3</sup>

The court was untroubled by the fact that revocation of conditional release based solely on proof of a violation of a condition could lead to a person's confinement based on mental illness alone:

The issue at the hearing was not whether the State proved Dang's dangerousness. Dang's argument that the evidence was insufficient to show he was dangerous is, therefore, not relevant to whether the trial court properly revoked his

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<sup>3</sup> Dang had argued on appeal that the language of RCW 10.77.190 permitting revocation of conditional release without a finding of dangerous is ambiguous given the statutory scheme's otherwise exacting due process safeguards against improper confinement. Br. App. at 22. He suggested that it was the Court's duty to accord the statute a construction that would ensure its constitutionality. Br. App. at 23-26. Division One responded:

The statute plainly allows revocation of a conditional release upon a determination either that Dang did not adhere to the terms and conditions of his release or that he presented a threat to public safety. Given that the trial court found that Dang did not adhere to the terms and conditions of his release, revocation of his conditional release based on that finding alone was proper.

Dang, 168 Wn. App. at 484.

conditional release.

Id. at 486.

Confusingly, in refusing to find its construction of the statute unconstitutional, the Court criticized Dang for not “cit[ing] any authority involving the revocation of a conditional release, and instead rel[ying] on statutes and cases involving other determinations and proceedings.” Id. at 485.<sup>4</sup> But involuntary civil confinement is permissible only of the “dangerous mentally ill.” Kansas v. Hendricks, 521 U.S. 346, 363, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); see also O’Connor, 422 U.S. at 574 (“The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement”). As noted, requiring proof of both dangerousness and mental illness ensures that the involuntary commitment comports with due process and does not unconstitutionally infringe on protected liberty interests. Foucha, 504 U.S. at 80; Jones, 463 U.S. at 362.

Below the State cited several cases dealing with the conditional release of a person who was previously adjudicated a Sexually Violent Predator under Chap. 71.09 RCW. Br. Resp. at 23-26. The analogy is inapt, as conditional release to a less restrictive alternative placement does

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<sup>4</sup> In addition to extensively analyzing the statute in question using principles of statutory construction, Dang referred the Court of Appeals to Foucha, Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), and Jones.

not require the court to find that the person is not dangerous. See RCW 71.09.090(1). Rather, the court must find that “conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community.” Id.

By contrast, an insanity acquittee on conditional release has been expressly found to be safe to be at large, albeit subject to the court’s supervision. RCW 10.77.110(1). Under Division One’s narrow reading, however, revocation of conditional release under RCW 10.77.190 need not be premised upon proof of dangerousness, but only upon a violation of a condition of release. This Court should conclude that the construction Division One accorded RCW 10.77.190 is unconstitutional.

c. So that future revocation proceedings do not result in the unconstitutional confinement of the non-dangerous mentally ill, this Court should construe RCW 10.77.190 to require an express finding of dangerousness as a predicate to revocation of conditional release.

As Dang noted in the Court of Appeals, the disjunctive in RCW 10.77.190 is anomalous given the Legislature’s evident intent to ensure that commitment of insanity acquittees be premised only upon proof of both mental illness and dangerousness.<sup>5</sup> Br. App. at 22. For example,

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<sup>5</sup> For this reason, the State’s reliance on this Court’s opinion in State v. Keller, 98 Wn.2d 725, 657 P.2d 1384 (1983), is misplaced. See Br. Resp. at 23-24. Keller not only preceded the decisions in Addington and Foucha, but also construed an earlier version of the statute. See Keller, 98 Wn.2d at 730 n. 1 (“We note that RCW 10.77.190(3) was recently amended. Under this statute, presumably the judge must make

elsewhere in the statute, the Legislature expressly stipulated that civil commitment is permissible only upon proof of dangerousness. RCW 10.77.040; RCW 10.77.080; RCW 10.77.150. It is plain from the Legislature's emphasis on ensuring involuntary commitment comport with due process and protect individual liberty that the Legislature did not intend an end run around the Fourteenth Amendment.<sup>6</sup>

If revocation of conditional release is based on a judicial finding that the insanity acquittee is a threat to public safety, then the statute satisfies the core constitutional concern that involuntary civil commitment be predicated upon proof of mental illness and dangerousness. It is only where the revocation is based upon a singular finding of a violation of a term of conditional release that the statute contravenes this fundamental requirement. This Court should conclude that the statute is unconstitutional as applied.<sup>7</sup>

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lack of dangerousness an explicit condition of release. We reserve this issue, however, for a case arising under the new statute.”).

<sup>6</sup> Generally, courts presume “or” is used in a statute disjunctively unless there is clear legislative intent to the contrary. Guijosa v. Wal-Mart Stores, Inc., 101 Wn. App. 777, 790, 6 P.3d 583 (2000). In certain instances, however, the disjunctive “or” and conjunctive “and” may be interpreted as substitutes.

<sup>7</sup> Holding a statute unconstitutional as applied “prohibits future application of the statute in a similar context, but the statute is not totally invalidated.” State v. Hunley, \_\_ Wn.2d \_\_, 281 P.3d 584, 592 (2012).

**2. Given the constitutional liberty interest possessed by a person who has been found not guilty of a crime by reason of insanity, due process demands the revocation of conditional release be based on clear and convincing evidence.**

a. Insanity acquittees on conditional release have a constitutionally-protected interest in their liberty.

~~Like probationers and parolees, a person who has been granted~~  
conditional release pursuant to RCW 10.77.110 has a liberty interest in his freedom from confinement that is protected by the Fourteenth Amendment. Vitek v. Jones, 445 U.S. 480, 491-92, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (involuntary transfer of prisoner to mental hospital implicated a liberty interest protected by the constitution); Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972);<sup>8</sup> U.S. Const. amend. XIV; Const. art. I, § 3. As the Supreme Court stated in Morrissey, “the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a ‘grievous loss’ on the parolee and often on others.” 408 U.S. at 482.

Society shares the insanity acquittee’s interest in his continued conditional liberty. In the context of parole, the Supreme Court said:

Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law.

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<sup>8</sup> Cf. also State v. Dahl, 138 Wn.2d 678, 684, 990 P.2d 396 (1999) (applying Morrissey to SSOSA recipients) and People v. Tillbury, 54 Cal.3d 56, 813 P.2d 1318 (1991) (California Supreme Court recognizes “the importance of the insanity acquittee’s liberty interest” and notes right to “substantial procedural safeguards”).

Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions ... And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

Morrissey, 408 U.S. at 484 (internal citation omitted).

- b. To safeguard an insanity acquittee's liberty interest and minimize the risk of erroneous deprivation, proof of dangerousness at a hearing to revoke conditional release must be by clear and convincing evidence.

The due process liberty interest of an insanity acquittee in his conditional liberty may even be greater than that of a parolee. First, the insanity acquittee who is on conditional release has been found not guilty of a crime. Second, the insanity acquittee who is conditionally released has been found non-dangerous. Id. The finding that permits the court to restrict his liberty, above and beyond the determination of mental disease or defect necessary for the acquittal, is that he is "in need of control by the court or other persons or institutions." RCW 10.77.110(3). The insanity acquittee on conditional release, therefore, is much like an ordinary citizen subject to civil commitment. Cf., Addington, 441 U.S. at 431-32.

Chap. 10.77 RCW is silent as to the standard of proof at a hearing on a motion to modify or revoke an insanity acquittee's conditional release. However, the rules promulgated by this Court to address the

standard of proof when a person has been taken into custody for violating the terms and conditions of a mental health conditional release, pursuant to RCW 71.05.340, are instructive.

MPR 4.5, pertaining to the burden of proof, provides:

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

MPR 4.5.

In rejecting Dang's argument that this same standard should apply to the revocation of the conditional release of an insanity acquittee, Division One noted that "[t]he preponderance of the evidence standard is the appropriate standard for a number of determinations under provisions of chapter 10.77 RCW." Dang, 168 Wn. App at 485 and 485 n. 9. None of the provisions cited by Division One, however, are germane here.

RCW 10.77.086(3), relating to the determination of the competency of a person who has been charged with a felony, does not directly implicate a person's liberty interest in freedom from unjust confinement. Further, the statute only permits confinement for the purpose of restoring competency. RCW 10.77.200, pertaining to final

discharge, sets forth the burden imposed on an insanity acquittee of proving that he or she is not a substantial danger to other persons or substantially likely to commit further criminal acts if not kept under further control of the court and other institutions. Id. The question at such a hearing, therefore, is whether a person already under an order of commitment should be released. The Legislature appropriately fixed the standard of proof the insanity acquittee must bear to secure his or her release at a preponderance of the evidence. A similar circumstance is presented by State v. Paul, 64 Wn. App. 801, 828 P.2d 594 (1992) (the standard of proof on an insanity acquittee seeking conditional release from involuntary confinement is a preponderance of the evidence).

The final authority cited by Division One was State v. Hurst, 173 Wn.2d 597, 269 P.3d 1023 (2012). In Hurst, this Court found a statute constitutional that fixed the standard of proof at a third and final hearing to determine whether a person should be committed for competency restoration and mental health treatment at a preponderance of the evidence. This Court applied the balancing test set forth in Medina v. California, 505 U.S. 537, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), which the Court held is the appropriate framework for evaluating state procedural rules which are part of the criminal process. Medina, 505 U.S. at 445-46. According to that test, “because the States have considerable expertise in

matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition,” the Court exercises “substantial deference to legislative judgments.” Id. A State’s decision in this regard thus

is not subject to proscription under the Due Process Clause ~~unless “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”~~

Id.

Applying Medina, this Court concluded that there was no historical practice of allocating a higher standard of proof, that numerous safeguards exist to ensure that no incompetent person will be compelled to stand trial, and that only persons likely to regain competence will be committed for the additional six-month restoration period. Hurst, 173 Wn.2d at 604-06.

Unlike a person who is subject to competency proceedings, a person who has been found not guilty by reason of insanity has, by definition, been acquitted of a crime. Proceedings to commit such an individual for mental health treatment necessarily are civil, not criminal. See Allen v. Illinois, 478 U.S. 364, 370, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1988) (involuntary civil commitment proceedings are not criminal); Addington, 441 U.S. at 429 (same).<sup>9</sup> The balancing test set forth in

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<sup>9</sup> Cf., also, In re Detention of Stout, 159 Wn.2d 357, 368-69, 150 P.3d 86 (2007) (emphasizing that commitment proceedings pursuant to Chap 71.09 RCW are civil, not

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976),

not Medina, is applicable.

Under the Mathews test,

[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

Applying the Mathews factors, the Court in Addington first noted that civil commitment constitutes a significant deprivation of liberty meriting due process protection. Addington, 441 U.S. at 425 (citing cases). Second, the Court noted that while the State possesses a *parens patriae* interest in caring for persons who, because of mental illness, are unable to care for themselves, and authority under its police power to protect the community from the dangerous mentally ill, “the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others.” Id. at 426. Third, the Court noted that a preponderance-of-the-evidence standard in civil commitment proceedings provides inadequate protection against criminal, and applying Mathews to procedural due process claim).

erroneous decision-making, Id. The Court concluded:

[T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

Id. at 427.

~~Addington is dispositive. The Court of Appeals characterized the preponderance-of-the-evidence standard as "appropriate,"<sup>10</sup> but this conclusion is unjustifiable. There is no legitimate basis to apply a diluted standard of proof to the civil commitment of a person whom a court explicitly has found to not be dangerous simply because that person is under judicial supervision according to the provisions of Chap. 10.77 RCW. Further, as the Court in Addington commented, since permitting such a finding to be made by a preponderance of the evidence "creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings."~~

Laws in other jurisdictions accord with this result. See e.g. In re Commitment of Burris, 682 N.W.2d 812 (Wis. 2004) (revocation of the supervised release of a sexually violent person must be premised on clear and convincing evidence); People v. Jurisec, 766 N.E.2d 748 (Ill. 2002) (allegations in support of revocation of conditional release of an insanity

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<sup>10</sup> Dang, 168 Wn. App. at 480.

acquittee must be proven by clear and convincing evidence); Oh. Rev. Code § 2945.40(F) (court must make finding that insanity acquittee is a mentally ill person subject to hospitalization by court order by clear and convincing evidence).

As the Illinois Supreme Court stated in Jurisec, “[a] hearing to vindicate the liberty interest of insanity acquittees is not an empty formality.” 766 N.E.2d at 658. This Court should hold that the standard of proof of dangerousness at a hearing to revoke the conditional release of an insanity acquittee is clear and convincing evidence.

**3. Principles of due process prohibit the admission of hearsay at a hearing revoking an insanity acquittee’s conditional release barring a showing of good cause.**

Washington has long applied the requirements of fundamental fairness in the context of parole and probation revocations. See e.g. In re Personal Restraint of Boone, 103 Wn.2d 224, 230-33, 691 P.2d 964 (1984). While there is no Sixth Amendment right to confront witnesses at probation modification and similar hearings, the Fourteenth Amendment supplies a due process right to confrontation. U.S. Const. amend. XIV; Morrissey, 408 U.S. at 489; State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005). The admission of hearsay testimony requires, at a minimum, “the right to confront and cross-examine adverse witnesses

(unless the hearing officer specifically finds good cause for not allowing confrontation).” Morrissey, 408 U.S. at 489 (emphasis added).

This Court has applied Morrissey to the revocation of a special sex offender sentencing alternative (“SSOSA”) and to probation modification hearings, on the basis that due process requires loss of liberty be based upon “verified facts” to ensure the decision is reliable. State v. Dahl, 139 Wn.2d 678, 687, 990 P.2d 396 (1999); Abd-Rahmaan, 154 Wn.2d at 289. Hearsay may be considered “only if there is good cause to forgo live testimony.” Dahl, 139 Wn.2d at 686. “Good cause is defined in terms of ‘difficulty and expense of procuring witnesses in combination with ‘demonstrably reliable’ or ‘clearly reliable’ evidence.’” Id. (citation omitted).

In Dahl, this Court reversed the revocation of Dahl’s SSOSA where the trial court had admitted hearsay allegations that Dahl had exposed himself to two young girls. Id. at 681. This Court disagreed that some corroboration rendered the evidence sufficiently reliable to justify its admission without live testimony, and held that under the good cause standard, “the reliability of the hearsay must be considered in light of the difficulty in procuring live witnesses.” Id. at 687. This Court noted that in addition to failing to establish the evidence’s reliability, the State had not shown that it would be difficult or expensive to procure live testimony

or sworn affidavits. Id. This Court therefore concluded that the evidence did not meet either prong of the “good cause” standard: “it was neither demonstrably reliable nor necessary, due to the difficulty in procuring live witnesses.” Id.; accord Abd-Rahmaan, 154 Wn.2d at 290.

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

Further, the hearsay testimony was not reliable evidence. The statements Dang allegedly made to the CDMHPs wholly lacked context, and so the court lacked any means of ensuring that it had an “accurate knowledge” of Dang’s behavior. Dang’s alleged claims that he wanted to blow up a gas station, if they were made, were a legitimate basis for concern. But the CDMHPs who supposedly heard Dang’s statements must have determined that he did not pose a threat, or they would not have directed his release. This conclusion is compelled given that all that is required to detain a person under Chap. 71.05 RCW is probable cause, RCW 71.05.150(1). If Dang had had the opportunity to cross-examine these witnesses, these questions would have been fully addressed so as to

ensure that the revocation of Dang's conditional release was based upon "verified facts." In short, due process necessitates that modification or revocation of conditional release be based upon "verified facts" and an "accurate knowledge" of Dang's behavior. Morrissey, 408 U.S. at 484; Abd-Rahmaan, 154 Wn.2d at 287.

Divison One arbitrarily differentiated live witnesses from documentary evidence, holding "[t]he requirement of good cause ... is not applicable here." Dang, 168 Wn. App. at 487. This Court should reject this arbitrary distinction, and hold that hearsay – whether offered through live witnesses or documents – is inadmissible at revocation proceedings under RCW 10.77.190 barring a showing of good cause. Here, the admission of the hearsay evidence denied Dang due process.

**4. The evidence was insufficient to support a finding of dangerousness.**

Insufficient evidence was presented to prove that Dang was dangerous under any standard of proof. For this reason, this Court should vacate the revocation order and direct Dang be released.

None of the witnesses who testified was able to establish that because of his depression following his return from Vietnam, Dang posed a substantial likelihood of endangering other persons. During the two-week period before Vanzandt decided to arrest Dang, Dang was presented

to Harborview as a psychiatric emergency on two occasions. RP 30-32.

On both occasions, the CDMHP found no basis to confine him.

Under Chap. 71.05 RCW, in order to detain a person for evaluation and treatment, a CDMHP must find probable cause to believe that the person, “as a result of a mental disorder: (i) presents a likelihood of serious harm;<sup>11</sup> or (ii) is gravely disabled.” RCW 71.05.150. This determination must be based upon a personal interview of the person by the CDMHP. RCW 71.05.150(1).

The fact that Vanzandt was concerned about Dang’s alleged statements cannot substitute for the fact that on two separate occasions, following a clinical assessment of Dang, the CDMHP did not even find probable cause to believe he presented a likelihood of serious harm. Further, the fact that Dang evidenced exacerbated symptoms of depression

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<sup>11</sup> “Likelihood of serious harm” means:

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

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

RCW 71.05.020 (25).

after his return from Vietnam must be weighed against his near perfect compliance with the other terms of his conditional release. Dang appeared for all of his appointments with his doctor, case manager, and CCO. RP 24. Dang took his medications as prescribed. Id. He performed so well on conditional release that he was permitted to decrease his appointments to pick up his medications from five times per week to three times per week, and to leave the country. RP 25.

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

E. CONCLUSION

This Court should construe RCW 10.77.190 to require a finding of dangerousness before an insanity acquittee's conditional release may be revoked. The State's burden of proof at a revocation hearing should be clear and convincing evidence, and the State should be prohibited from adducing hearsay evidence barring a finding of good cause and reliability.

In this case, the evidence was insufficient to support a finding that Dang was dangerous. The revocation order should be reversed.

DATED this 11<sup>th</sup> day of February, 2013.

Respectfully submitted:

s/ SUSAN F. WILK (WSBA 28250)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

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**State v. Bao Dinh Dang**  
**No. 87726-2**

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**Supplemental Brief of Petitioner (with cover letter to the Court)**

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