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COA No. 70022-7 -I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON

Respondent,

v.

RICKEY BEAVER

Appellant

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Rickey Beaver is criminally insane under RCW 10.77. In the current appeal, he challenges the court's January 11, 2013, revocation of his conditional release based on the absence of a finding that he suffered from a current mental illness. The trial court should be affirmed because a defendant's insanity is presumed to continue under RCW 10.77 once a defendant is acquitted. Moreover, the court conditionally released Mr. Beaver on October 21, 2013, rendering his issue on appeal moot.

II. FACTS

A. PROCEDURAL FACTS

On August 27, 2004, only 19 days after being released from 13 months of incarceration (where he had also received drug and alcohol treatment), Rickey Beaver burglarized a home in Federal Way. CP 1-3. He was charged with one count of Residential Burglary. CP 1. On August 5, 2005, he was found not guilty by reason of insanity (NGRI) and committed to the Center for Forensic Services (CFS) at Western State Hospital (WSH). CP 8-10, 193-196.

Mr. Beaver was first granted a conditional release pursuant to RCW 10.77.150 on January 5, 2007. CP 11-16. The court revoked it on January 7, 2010. CP 41-43.

Mr. Beaver was granted a second conditional release on July 27, 2011. CP 104-109. The court revoked this conditional release on January 11, 2013, after Mr. Beaver was arrested for driving under the influence. CP 142-144. The court found that Mr. Beaver violated his conditions and was dangerous. CP 144.

Mr. Beaver was once again conditionally released on October 21, 2013. CP 270-278.

B. SUBSTANTIVE FACTS (Mental Health Evaluations, Diagnoses and Treatment)

1. Not Guilty By Reason of Insanity

After being charged with one count of Residential Burglary, the court ordered Mr. Beaver undergo a competency evaluation at WSH. CP 279-281. In his 22-page report dated January 27, 2007 (CP 283-304), Doug Campbell, PhD, details the history of Mr. Beaver's mental illness, which according to Mr. Beaver stemmed from being sexually abused as a child. CP 283. For a complete overview of Mr. Beaver's mental health diagnoses and treatment see Appendix A. Dr. Campbell also noted that Mr. Beaver had a significant history with drugs and alcohol. CP 286, 293-294.

Records from Valley Cities Treatment Center and the Department of Corrections (DOC) in 2003 and 2004 indicate that Mr. Beaver was

diagnosed with Depressive Disorder NOS, Cocaine Dependence, Opioid Abuse and Cannabis for Depression. CP 290. It appeared that Mr. Beaver had been receiving treatment for Depression for three years with Trazodone & Zoloft. CP 288.

A psychological/psychiatric evaluation conducted by David Monson, PhD, on July 23, 2004, indicates that Mr. Beaver suffered from severe depressed mood, severe verbal expression of anxiety or fear, severe expression of anger, severe social withdrawal, severe motor agitation, severe motor retardation, severe hallucinations and severe thought disorder. CP 93-95. Dr. Monson diagnosed Mr. Beaver with Major Depressive Disorder, Recurrent, Severe, and PTSD. CP 93. Dr. Monson was of the opinion that Mr. Beaver was chronically mentally ill. CP 94.

Records from St. Francis Hospital on August 27, 2004, the day he committed Residential Burglary, indicate Mr. Beaver's UA showed positive for cocaine metabolites and cannabinoids. CP 290. He also had a Blood Alcohol Concentrate (BAC) level of .10. *Id.*

On September 16, 2004, Trula Thompson, M.D., certified Mr. Beaver for Medicaid benefits based on a diagnosis of Major Depressive Disorder (severe) and PTSD. CP 291. As part of the certification, Dr. Thompson noted that Mr. Beaver had an early onset of mental illness starting in childhood with past psychological/psychiatric and dual

diagnosis treatments, including current treatment for severe depression, anxiety, anger, social withdrawal, motor agitation and retardation, hallucinations and thought disorder; marked hyperactivity; and, paranoid behavior. *Id.* Overall, she described Mr. Beaver as "chronically mentally ill" and recommended psychological/psychiatric treatment. *Id.*

According to Dr. Campbell, when Mr. Beaver was admitted to WSH on December 22, 2004, to undergo the court ordered competency evaluation, he showed no signs of psychotic symptoms even though he reported experiencing ongoing auditory and visual hallucinations. CP 293. Nevertheless, Mr. Beaver was prescribed Zuprexa, an antipsychotic. *Id.* Dr. Campbell diagnosed:

Axis I:	Psychotic Disorder NOS specified by self-report Depressive Disorder NOS specified by history Cocaine Dependence by history Cannabis Abuse by history (rule out Dependence) Alcohol Abuse by history Posttraumatic Stress Disorder by history Rule out Major Depressive Disorder, Severe, with Psychotic Features Rule out Cocaine-Induced Psychotic Disorder Rule out Malingering
Axis II:	Antisocial Personality Disorder

CP 295.

Mr. Beaver retained the services of Arthur G. Davis, PhD, and underwent another psychological evaluation on June 27 and 30, 2005. CP 328-338. Dr. Davis conducted psychometric testing and reached the

opinion that Mr. Beaver's scores indicate a strong pattern of anti-social disposition, depression and anxiety of a post-traumatic type. CP 336. He was of the opinion that the test results suggest that Mr. Beaver was insane when he committed Residential Burglary on August 27, 2004. CP 337.

On August 5, 2005, Mr. Beaver moved for an acquittal on the basis of insanity, which the court accepted. CP 193-196. Based on the written reports of WSH dated January 27, 2005 and February 7, 2005, along with the report of Arthur Davis, PhD, the court found Rickey Beaver committed the crime of Residential Burglary and was insane. CP 8-10. The court found Mr. Beaver mentally ill and dangerous and committed him to the custody of DSHS for hospitalization. CP 8-10.

2. <u>Western State Hospital/Conditional Release</u>

Mr. Beaver was admitted to WSH as an insanity acquittee on August 5, 2005. He petitioned for a conditional release in July 2006, but it was not supported by WSH. CP 340-349. According to WSH's RCW 10.77.140 report, dated July 21, 2006, Mr. Beaver did not appear to have any major psychiatric disorder or psychotic symptoms. CP 348. He was psychiatrically stable. *Id.* The hospital did not support conditional release, however, because it was concerned that should Mr. Beaver begin using drugs and alcohol again he would present a significant risk for committing crimes. He would also be "susceptible to drug induced psychotic states."

CP 347. WSH recommended Mr. Beaver undergo more treatment. CP 349. WSH diagnosed:

Axis I	Depressive Disorder NOS, by History, Post Traumatic Stress Disorder by History, in Remission, Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

CP 348. He was taking Zoloft (200 mg per day) for depression and Buspar (45 mg per day) for anxiety. *Id.*

On December 18, 2006, after an additional six months of treatment, WSH supported Mr. Beaver's conditional release. CP 351 - 355. The hospital proposed several conditions of release including the requirement that 1) he be released to an inpatient drug/alcohol treatment program before being discharged into the community and 2) should Mr. Beaver be unable to follow the conditions of his release he "shall be returned to the Center for Forensic Services at Western State Hospital for *further treatment*." CP 354. (Emphasis added). The hospital again diagnosed:

Axis I	Depressive Disorder NOS, by History, Post Traumatic Stress Disorder by History, in Remission, Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

CP 354. Mr. Beaver was taking Duloxetine (60 mg per day) for depression, Trazodone (50 mg) for sleep, and Clonidine (0.2 mg) for nightmares. *Id.*

On January 5, 2007, after a year and a half at WSH, the court granted Mr. Beaver his first conditional release pursuant to RCW 10.77.150. CP 11-16. He was released to inpatient treatment, which he completed in February 2007. CP 14, 312. In the community, Mr. Beaver received psychiatric medication through Dr. Ignatius Medani. CP 312.

Community Correction Officer (CCO) Thomas McJilton's October 4, 2007, report (CP 310-313) indicates that Mr. Beaver began using cocaine August 2, 2007, and used it daily until August 6, 2007. He also used heroin on August 6, 2007. CP 98, 312. Although, he agreed to participate in intensive outpatient treatment at Sound Mental Health (CP 316), Mr. Beaver stopped attending effective September 27, 2007. CP 312. By October, Mr. Beaver's whereabouts were completely unknown. CP 313.

The court issued a bench warrant for his arrest on October 17, 2007. CP 305-313. Mr. Beaver was picked up on the warrant in November 2, 2007 (CP 36), and returned to WSH on January 1, 2008. CP 19, 98. Mr. Beaver admitted to using drugs as a means to self-medicate

his on-going mental illness. CP 318. He accused WSH of under-medicating him. CP 317-319.

The WSH report dated May 7, 2008, indicates that Mr. Beaver attended substance abuse classes and attended AA meetings at the hospital. CP 97-100. The hospital recommended a conditional release to inpatient drug treatment at Pioneer Center North. CP 98. The hospital again proposed conditions of release, this time requiring Mr. Beaver to participate in outpatient psychiatric care at Sound Mental Health as needed to maintain his psychiatric stability. CP 98. The hospital also recommended that should Mr. Beaver be unable to follow the conditions of his release he "shall be returned to the Center for Forensic Services at Western State Hospital for further treatment." CP 99. The hospital diagnosed:

Axis I	Depressive Disorder NOS, by History, Post Traumatic Stress Disorder by History, in Remission, Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

CP 99. Mr. Beaver was taking Duloxetine (60 mg per day) for depression, Trazodone (50 mg) for sleep and Clonidine (0.2 mg) for nightmares. *Id.*

On May 15, 2008, the court modified his conditional release and released Mr. Beaver to the Pioneer Center North for 60 days of inpatient

treatment. CP 19, 21-24, 357-359. He then received mental health treatment from Sound Mental Health. CP 358.

By August 2008, Mr. Beaver was using drugs again. CP 35. The court modified the conditions of his conditional release by increasing the number of times he was to report to the CCO and by increasing the number of AA meetings he must attend per week. Despite the modifications, on September 21, 2009, the court issued another bench warrant for Mr. Beaver's arrest. CP. 30-38.

According to CCO McJilton's report, Mr. Beaver had not reported since August 24, 2009. CP 30-38. He was picked up on the warrant on November 26, 2009. CP 358. On January 7, 2010, the court revoked his conditional release and he was remanded to the care custody and control of DSHS for inpatient treatment. CP 41-43.

After his conditional release was revoked, the State learned that Mr. Beaver had been arrested for Driving Under the Influence on June 21, 2009, in Snohomish County. CP 236-241. His BAC level was .095 and .090. CP 239- 241.

The State also learned that on October 2, 2009, while Mr. Beaver was on bench warrant status, he stole approximately $268 of meat from a Federal Way Winco. CP 243-249. The loss prevention officer noticed a strong smell of alcohol emanating from Mr. Beaver as he detained him.

CP 243. When Mr. Beaver learned the police had been called, he ran to his vehicle and drove away. *Id.* The loss prevention officer did not attempt to stop Mr. Beaver because he felt Beaver was too dangerous. *Id.*

On June 16, 2010, WSH again recommended that Mr. Beaver undergo 60-150 days of inpatient treatment at Pioneer Counseling Services. CP 203-204, 357-359. WSH was not supporting a conditional release into the community at that time. CP 203. Mr. Beaver was to be returned to WSH upon treatment completion. *Id.* WSH diagnosed Mr. Beaver with:

Axis I:	Bipolar Disorder, mixed type, PTSD Polysubstance Abuse including cocaine and marijuana
Axis II	Antisocial Personality Disorder

CP 358-359.

Pioneer Counselling Services discharged Mr. Beaver on November 2, 2010. CP 102-103. The Pioneer Center diagnosed Mr. Beaver with:

Axis I	Cocaine Dependence with Physiological Dependence Opioid Dependence, with Physiological Dependence Alcohol Dependence, with Physiological Dependence Nicotine Dependence, with Physiological Dependence PTSD Mood Disorder NOS, Rule out Bipolar II Disorder with Psychotic

Features

Axis II Personality Disorder NOS with Antisocial Traits

CP 102. Pioneer also recommended that Mr. Beaver continue with mental health services and continue taking his prescribed medications: Atenol (100mg), Amlodipine (20mg), Buspirone (30mg), Simuastan (20mg), Omeprazole (20 mg) and HTCZ (12.5mg). CP 102-103.

On March 3, 2011, Mr. Beaver petitioned for final discharge. It was supported by WSH. CP 367-369. The newly formed PSRP, however, did not support Mr. Beaver's final discharge.[1] CP 361-365. According to the PSRP, the records did not support WSH's opinion that Mr. Beaver no longer exhibited signs or symptoms of a mental illness. CP 362.

Pursuant to RCW 10.77.200(3), the State had Mr. Beaver evaluated by Brian Judd, PhD. CP 251-260 Dr. Judd also opposed Mr. Beaver's unconditional release based on Mr. Beaver's current Axis I Diagnoses (Polysubstance Dependence, with Physiological Dependence, In a Controlled Environment) and Axis II Antisocial Personality Disorder, his moderate to high levels of risk for violent recidivism, his repetitive

[1] The Public Safety Review Panel (PSRP) was established by the Legislature in 2010 as a safeguard to protect the public from the criminally insane. The Legislature ordered the Governor to appoint the PSRP members to serve for a period of three years. RCW 10.77.270. The panel is to provide the court an independent assessment of a NGRI defendant's risk to public safety for all DSHS Secretary/WSH recommendations that change an NGRI defendant's commitment status. RCW 10.77.270(1)(a) and (3).

relapses and his repeated failures on conditional release. CP 251-260. According to Dr. Judd, Mr. Beaver was not safe to be released to the community and was in need of continued treatment. CP 260.

Mr. Beaver sought an evaluation by Brendon Scholtz, PhD. CP 262-269. Dr. Scholtz also diagnosed Polysubstance Dependence (Cocaine, Opiates, and Alcohol), with Physiological Dependence, In a Controlled Environment and Cannabis Abuse on Axis I and Antisocial Personality Disorder on Axis II. CP 267-268. It was Dr. Scholtz's opinion that if Mr. Beaver ever resumed drug or alcohol use he would immediately pose a serious threat to public safety. CP 269. Dr. Scholtz, however, supported final discharge. CP 268.

On July 27, 2011, Mr. Beaver withdrew his petition for final discharge when the court granted him a conditional release. CP 104-109. In less than six months, he had once again violated his conditions of release. CP 217-222.

On January 9, 2012, Mr. Beaver failed to report to his CCO, failed to attend chemical dependency treatment at Sound Mental Health, and had used cocaine for three full days. CP 219. The State sought revocation and Mr. Beaver was held at WSH from January until April 6, 2012. CP 206-269.

In its March 23, 2012 letter, WSH notified the court that it opposed revocation because Mr. Beaver showed no signs or symptoms of mental illness or psychosis. CP 111-112. According to WSH, he had reached the maximum treatment benefit. The WSH letter did not provide a current Axis I or II diagnosis. CP 111- 112. Hospital reports dated January 22, 2012 and February 28, 2012, however, indicated that Mr. Beaver's psychiatric symptoms were in "remission" and he continued to need community-based chemical dependency treatment. CP 119.

The PSRP supported revocation. CP 113-116. His current treatment provider, Sound Mental Health, recommend an increase in his community based treatment should his conditional release not be revoked. CP 118. The court chose not to revoke Mr. Beaver's conditional release. It modified his conditions instead; ordering him to follow the treatment recommendations of Sound Mental Health. CP 118-121.

Six months later he violated his conditions again. On October 22, 2012, Mr. Beaver failed to report to his CCO and did not attend treatment. CP 163-166. Officer McJilton gave Mr. Beaver twenty-four hours to contact Sound Mental Health and resume treatment otherwise he would take Mr. Beaver into custody. CP 163-166. Mr. Beaver contacted his treatment provider. CP 167.

In its letter dated October 26, 2012, Sound Mental Health diagnosed Mr. Beaver with:

Axis I	Bipolar I Disorder Most Recent Episode Mixed in Partial Remission PTSD Cocaine Dependence Alcohol Dependence
Axis II	Deferred

CP 167. Sound Mental Health recommended that Mr. Beaver continue outpatient chemical dependency treatment and individual mental health counseling with his case manager. *Id.*

On December 4, 2012, just a month and a half later, Mr. Beaver crashed his truck into the side of a jeep parked on the side of the road. RP 9. He was arrested and subsequently charged with Driving Under the Influence. RP 8-15, CP 160, 168.

When Officer Thompson of the Renton Police Department arrived at the scene and contacted Beaver, he could smell the strong odor of alcohol emanating from Mr. Beaver. RP 10. Mr. Beaver was so intoxicated had to use the truck to stand up. He stumbled when he let go. RP 10. Mr. Beaver's BAC level was .191. RP 15.

The State sought revocation of his conditional release at the January 11, 2013 hearing. CP 145-168. Mr. Beaver admitted his violations but argued that his conditional release should not be revoked

alleging WSH cannot treat his Polysubstance Dependence and Alcohol Dependence. RP 28.

The court revoked his conditional release on January 11, 2013. CP 142-144. The court found that Mr. Beaver violated the conditions of release. CP 144. It also found Mr. Beaver extremely dangerous. *Id.*

After the court revoked Mr. Beaver's conditional release, Judge Gain expressed concern regarding the adequacy of drug and alcohol treatment at WSH. RP 30-32. Because WSH had indicated that "there was no mental health disease," Judge Gain was worried that by revoking Mr. Beaver's conditional release, he was just detaining Mr. Beaver at WSH. RP 28-33. Judge Gain also noted that other evaluators and the PSRP disagreed with WSH's opinion. RP 30.

On October 21, 2013, the court once again conditionally released Mr. Beaver. CP 270-278.

III. LEGAL ARGUMENT

A. MR. BEAVER'S APPEAL IS MOOT

Mr. Beaver appeals the trial court's January 11, 2013, revocation of his conditional release. The only remedy the court can provide is to reinstate his conditional release. However, the trial court granted Mr. Beaver his third conditional release on October 21, 2013. As a result, this court can no longer provide him any relief.

Furthermore, Mr. Beaver's case presents no issue of continuing and substantial public interest. This case involves factual issues limited to Mr. Beaver's unique situation. His appeal is moot and should be dismissed.

An issue is moot if a court can no longer effect a remedy or relief. *State v. Harris*, 148 Wn. App. 22, 26, 197 P.3d 1206 (2008) (citing *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004)). "As a general rule, we do not consider questions that are moot." *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). A moot appeal should generally be dismissed. *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

A court may choose to decide an issue that has been deemed moot if it presents a matter of "continuing and substantial public interest." *Hunley*, 175 Wn.2d at 907. In determining whether a sufficient public interest is involved, a court will consider, "(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." *In re Pers. Restraint of Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (citing *Sorenson*, 80 Wn.2d at 558).

Washington courts have invoked the continuing and substantial public interest exception to hear cases involving matters of constitutional interpretation, validity and interpretation of statutes and regulations, and important issues likely to arise in the future. *Hart v. DSHS*, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). Cases that are limited to their facts, and that will be of little use or guidance to others, do not fall within the substantial public interest exception. *Id.* at 451.

Mr. Beaver's case is limited to the unique facts it presents. Mr. Beaver pled and proved his insanity, was found Not Guilty by Reason of Insanity on August 5, 2005, and was civilly committed pursuant to RCW 10.77.110. Mr. Beaver was granted a RCW 10.77.150 conditional release on July 27, 2011, which was modified pursuant to RCW 10.77.190(4) on April 6, 2012.

On January 11, 2013, the trial court found that Mr. Beaver violated those conditions when he drank alcohol, used cocaine and was arrested for driving under the influence. The court also found Mr. Beaver posed an extreme threat to public safety when he drove with a BAC of .19 and smashed into a parked vehicle. The court, therefore, revoked his conditional release.

On October 21, 2013, with the support of WSH, the trial court once again granted Mr. Beaver a conditional release. Mr. Beaver is no

longer civilly committed to the care, custody and control of the Secretary and this court is incapable of providing him any meaningful relief from the revocation order.

Moreover, Mr. Beaver's appeal does not involve a matter of continuing or substantial public interest despite his allegation of substantive due process. There is no statutory or constitutional requirement for the State to prove more than a violation of a condition of release and dangerousness in order to revoke conditional release. RCW 10.77.190(4) modified by *State v. Dang,* 178 Wn.2d 868, 312 P.3d 30 (2013).

His current conditional release is not a matter of public interest. If Mr. Beaver violates his conditional release again then *Dang* applies assuming the court again revokes his conditional release. However, the court has the discretion ***not*** to revoke a conditional release. RCW 10.77.190(4). The court also has the discretion to allow the insanity acquittee to "continue to be conditionally released on the same or modified conditions." *Id.*

This court cannot provide Mr. Beaver any relief and the facts of this case do not involve a matter of continuing and substantial public interest. This Court should dismiss the claim as moot.

B. THERE IS NO CONSTITUTIONAL REQUIREMENT OF A MENTAL ILLNESS FINDING IN ORDER TO REVOKE A CONDITIONAL RELEASE.

Mr. Beaver argues that substantive due process requires a finding of both mental illness and dangerousness before his conditional release can be revoked pursuant to RCW 10.77.190. There is no statutory or constitutional requirement for the State to prove more than a violation of a condition of release and dangerousness in order to revoke conditional release and remand the insanity acquittee to the care, custody and control of DSHS. *State v. Dang,* 178 Wn.2d 868, 312 P.3d 30 (2013).

A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt. *State v. Myles,* 127 Wn.2d 807, 812, 903 P.2d 979 (1995). Wherever possible, "it is the duty of this court to construe a statute so as to uphold its constitutionality." *State v. Reyes,* 104 Wn.2d 35, 41, 700 P.2d 1155 (1985). Mr. Beaver cannot meet this burden.

1. Once Found Criminally Insane, an Insanity Acquittee's Insanity is Presumed.

Substantive due process requirements govern initial commitment. That includes the requirement that only the defendant can plead and prove, by a preponderance of the evidence, his insanity at the time of the offense.

RCW 10.77.080, *State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983). The underpinning of an insanity acquittal is that 1) the defendant committed a crime; and 2) did so because of a mental illness. *Jones v. United States*, 463 US 354, 103 S.Ct. 3043 (1983). An individual acquitted under RCW 10.77 will rarely receive an immediate unconditional release. *State v. Klien*, 156 Wn.2d 103, 114 124 P.3d 644 (2005). Once insanity is proven by the defendant, insanity is presumed to continue until the defendant proves otherwise. *Jones v. United States*, 463 US 354, 103 S.Ct. 3043 (1983).

Washington law has embraced that presumption since 1905. *In re Brown*, 39 Wn. 160, 166, 81 P.2d 552 (1905); *State v. Platt*, 143 Wn.2d 242, 251, 19 P.3d 412 (2001); *State v. Klein*, 156 Wn.2d 103, 124 P.3d 644 (2005).

> [I]n as much as it was a fact established after a full hearing that the petitioner was insane at the time of the [crime], the presumption is that the same condition continues, and the burden is upon him to show to the contrary.

Brown at 166.

The statutory provisions of RCW 10.77 are built on that presumption as well. *State v. Klein*, 156 Wn.2d at 118 (2005). Once deemed criminally insane, the insanity acquittee is subject to state custody in the form of commitment or conditional release. *Id.* at 114. The

presumption of continued insanity applies until the defendant can prove otherwise:

> (3) . . .The burden of proof shall be upon the petitioner to show by a preponderance of the evidence that the person who is the subject of the petition no longer presents, **as a result of a mental disease or defect,** a substantial danger to other persons, or 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 10.77.200(3) (emphasis added), *State v. Platt*, 143 Wn.2d 242, 251, 19 P.3d 412 (2001); *State v. Klein*, 156 Wn.2d at 114 (2005).

The insanity acquittee will be unconditionally released, regardless of the danger he poses to public safety, if he proves he no longer suffers from a mental disease or defect. RCW10.77.200, *State v. Reid*, 144 Wn.2d 621, 30 P.3d 465 (2001); *State v. Klein*, 156 Wn.2d at 114 (2005).

Obviously, if the lack of a mental disease or defect requires unconditional release regardless of danger, a conditional release, pursuant to RCW 10.77.150, presumes the acquittee's continued insanity. *State v. Reid*, 144 Wn.2d 621, 30 P.3d 465 (2001). A conditional release does not inquire into the mental status of the insanity acquittee. The statute only inquires of the "dangerousness" of the insanity acquittee:

> The issue to be determined . . . is whether or not the person may be released conditionally without substantial danger to other persons, or substantial likelihood of committing criminal acts jeopardizing public safety or security.

RCW 10.77.150(3)(c).

A conditional release, therefore, authorizes the reintroduction to society of an insanity acquittee, who continues to be mentally ill and although dangerous, he is not "unacceptably dangerous" if certain conditions are imposed.[2] *State v. Reid*, 144 Wn.2d at 629-630 (2001) (A conditional release is a mechanism whereby mentally ill persons of varying degrees of dangerousness can be conditionally reintroduced into society where it is determined conditions will reasonably mitigate the dangerousness). If he were no longer insane he would be released unconditionally. *Id.*

If a conditional release is premised on the presumption of continuing insanity, the revocation process of RCW 10.77.190 must also presume insanity. Similarly, RCW 10.77.190(4) only inquires whether the insanity acquittee 1) violated the conditions that mitigate his dangerousness and 2) he became dangerous. *State v. Dang,* 178 Wn.2d 868, 312 P.3d 30 (2013) (Due Process requires the court to determine if an insanity acquittee, who was conditionally released upon acquittal, violated

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[2] In *State v. Dang,* 178 Wn.2d 868, 312 P.3d 30 (2013), The Supreme Court stated in dictum that Dang was found "nondangerous" at the time of his acquittal. The trial court actually found that Dang was not a "substantial" danger. That does not mean "nondangerous." Had the court found that Dang was not dangerous at the time of his acquittal, he would have been unconditionally released, not conditionally released. *State v. Reid*, 144 Wn.2d 621, 629, 30 P.3d (2001).

conditions of release and is dangerous before his conditional release can be revoked).

The only issues before the court on January 11, 2013, were whether Mr. Beaver had 1) violated the conditions of his release and/or 2) whether he was dangerous. The court found both.

2. The Presumption of Continuing Mental Illness Does Not Violate Substantive Due Process.

The United States Supreme Court has articulated three due process considerations for a civil commitment scheme: 1) the need for a current determination of mental illness and dangerousness, 2) constitutionally adequate procedures to establish the grounds for confinement, and 3) compliance with those substantive components of the due process clause preventing arbitrary confinement. *Foucha v. Louisiana*, 504 U.S. 71, 77, 112 S.Ct. 1780 (1992).

The Washington Supreme Court found that RCW 10.77 upholds the due process concerns articulated in *Foucha*. *State v. Platt*, 143 Wn.2d 242, 251, 19 P.3d 412 (2001). RCW 10.77.140 provides for a mental evaluation and report every six months. The report is provided to the court. The report provides the basis for the continuing presumption of insanity.

Additionally, RCW 10.77 provides that insanity acquittees undergo regular review and have the ability to petition for conditional and unconditional release pursuant to RCW 10.77.140, 150, & 200. *State v. Platt*, 143 Wn.2d 242, 251, 19 P.3d 412 (2001). The statute also provides insanity acquittees counsel, exams at state expense, and an adversarial hearing process. *Id.* RCW 10.77 passes constitutional muster. *Id.*

The Washington Supreme Court also ruled that requiring the defendant to bear the burden of establishing his sanity does not violate due process. *Id.* After all, the insanity defense is only available to the limited few who the law deems are not culpable for the crime they committed. *State v. Klein*, 156 Wn.2d 103, 114, 124 P.3d 644 (2005). It was the defendant himself who first raised and proved his insanity. *Jones v. United States*, 463 US 354, 103 S.Ct. 3043 (1983). Fairness suggests that the insanity acquittee make his own showing of recovery rather than requiring the state to show continued insanity. *Id.*

The State also has a substantial interest in avoiding premature release of insanity acquittees; those who have committed criminal acts and are declared dangerous to society. *Id.*; *State v. Platt*, 143 Wn.2d at 251 (2001). The past conduct of an insanity acquittee is heavily indicative of the likelihood that a person will commit similar acts which will again endanger others. *State v. Platt*, 143 Wn.2d at 252 (2001). Those that have

reached the attention of the state because of serious antisocial acts and mental illness should be subject to more procedural burdens in obtaining their release than those whose acts are less threatening to the public. *Id.*

The presumption that Mr. Beaver's insanity continues is not a violation of due process. He committed the crime of Residential Burglary in 2004 while suffering from a mental illness that he self-medicated with drugs and alcohol. Mr. Beaver pled and proved his insanity in 2005 based on a diagnosis of:

> Axis I. Psychotic Disorder NOS specified by self-report
> Depressive Disorder NOS specified by history
> Cocaine Dependence by history
> Cannabis Abuse by history (rule out Dependence)
> Alcohol Abuse by history
> Posttraumatic Stress Disorder by history
> Rule out Major Depressive Disorder, Severe, with Psychotic Features
> Rule out Cocaine-Induced Psychotic Disorder
> Rule out Malingering
> Axis II Antisocial Personality Disorder

CP 295. WSH related his 30-year history of severe drug and alcohol abuse to his risk of psychosis. CP 347.

Since then, all the RCW 10.77.140 reports to the court indicate that Mr. Beaver continues to suffer from some sort of Polysubstance Dependence. For example, on July 21, 2006, WSH diagnosed:

Axis I	Depressive Disorder NOS, by History, Post Traumatic Stress Disorder by History, in Remission Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

CP 348. On December 18, 2006, WSH diagnosed:

Axis I	Depressive Disorder NOS, by History, Post Traumatic Stress Disorder by History, in Remission Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

CP 354. On May 7, 2008, WSH diagnosed:

Axis I	Depressive Disorder NOS, by History Post Traumatic Stress Disorder by History, in Remission Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

CP 97-100. On June 16, 2010, WSH diagnosed:

Axis I	Bipolar Disorder, mixed type, PTSD Polysubstance Abuse including cocaine and marijuana
Axis II	Antisocial Personality Disorder

CP 358-359.

Dr. Judd diagnosed Mr. Beaver with Polysubstance Dependence. CP 251-260. Dr. Scholtz diagnosed Mr. Beaver with Polysubstance Dependence. CP 268.

On October 26, 2012, Sound Mental Health diagnosed:

Axis I	Bipolar I Disorder Most Recent Episode Mixed in Partial Remission PTSD Cocaine Dependence Alcohol Dependence
Axis II	Deferred

CP 167.

Polysubstance Dependence ***is*** a mental disease or defect for purposes of RCW 10.77.200. *State v. Klein*, 156 Wn.2d at 123 (2005). Even "Dependence" constitutes a mental disorder independent of the direct physiological effects of psychoactive substance abuse such as intoxication and withdrawal. *State v. Hutsell*, 120 Wn. 2d 913, 917, 845 P.2d 1325 (1993). Mr. Beaver's continuing Polysubstance Dependence relates back to his original insanity diagnosis.

Clearly, there is a sufficient basis to presume that Mr. Beaver's insanity continues. If he is no longer insane, if his Polysubstance Dependence is not related to his insanity, then Mr. Beaver has to prove it. The trial court has not conducted an evidentiary hearing to determine whether Mr. Beaver can prove he no longer suffers a mental disease or defect as he now claims.

The concern expressed by the court regarding WSH's ability to treat Mr. Beaver is not a finding that is a verity on appeal. It is not a

finding that was incorporated into the court's findings of fact and conclusions of law on January 11, 2013. CP 142-144. The concerns expressed by the trial court judge are no more than an oral expression of the court's informal opinion. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1988). Oral concerns have no final or binding effect unless formally incorporated into the findings, conclusions of law and order of revocation. *Id.*

Whether placement at WSH is appropriate for Mr. Beaver is not an issue the court has to decide. It is the Secretary, not the court, who determines the placement of those individuals placed in the care, custody and control of DSHS. *In re J.S.*, 124 Wn.2d 689, 880 P.2d 976 (1994); *In re Eaton*, 110 Wn.2d 892, 899, 757 P.2d 961 (1988); *In re Lowe*, 89 Wn.2d 824, 827, 576 P.2d 65 (1978). For an insanity acquittee, placement may include a DOC facility. RCW 10.77.091 and 120.

Mr. Beaver suggests that *In re McCuistion*, 174 Wn.2d 369, 275 P.3d 1092 (2012) the annual review process for a civilly committed sexually violent predator (SVP) pursuant to RCW 71.09 supports his claim that the court must find that he is mentally ill before it can revoke his conditional release regardless of whether he violated those conditions and became extremely dangerous. Brief of Appellant, p. 8. It does not.

There is nothing about *McCuistion* or the annual review process of RCW 71.09.090 that challenges or abolishes the presumption of insanity following acquittal under RCW 10.77. The fundamental difference between RCW 71.09 and the RCW 10.77 is that Mr. Beaver pleaded and proved his own insanity. The SVP did not. Therefore, the insanity acquittee's continued insanity is presumed, the SVP's is not.

Even without that presumption, RCW 71.09 does not require the State reprove and recommit the respondent each year. The annual review report, like that of the RCW 10.77.140 report is *prima facia* evidence that the SVP continues to meet criteria.

Furthermore, *McCuistion* does not address the procedures governing the revocation of a SVP's conditional release. In fact, like RCW 10.77.190, the court does not have to make a finding of current mental abnormality in order to revoke a conditional release. The court may revoke a SVP's conditional release by showing the SVP violated the terms and conditions of his release **or** is in need of further care, treatment, monitoring or supervision. RCW 71.09.098(1).

C. THE CONSTITUTIONAL CONCERNS ARTICULATED IN *STATE v. DANG* HAVE BEEN SATISFIED.

State v. Dang, 178 Wn.2d 868, 312 P.2d 30 (2013), does not change the outcome of Mr. Beaver's revocation hearing. In this case, the

trial court found that Mr. Beaver had violated the terms and conditions of his release. The court also found that Mr. Beaver was a danger to public safety. Revocation of Mr. Beaver's conditional release was essential. The requirements of *Dang* were satisfied.

Furthermore, nothing in Dang challenges or overturns the constitutional protections articulated in *State v. Platt*, 143 Wn.2d 242, 251, 19 P.3d 412 (2001) or *State v. Klein*, 156 Wn.2d 103, 114, 124 P.3d 644 (2005). The burden of proof for a final discharge pursuant to RCW 10.77.200 remains that of the insanity acquittee.

State v. Dang should not be used as a mechanism to circumvent the constitutional provisions of RCW 10.77. If the court was required to make a finding that an insanity acquittee currently suffers from a mental illness before it could revoke a conditional release it would undermine the purpose and procedures of civil commitment in its entirety.

Requiring the court to make a finding of mental illness at Mr. Beaver's revocation hearing would essentially transform the hearing into a recommitment trial. The State would be required to prove mental illness, especially because Mr. Beaver believes he is no longer mentally ill, along with a violation of a condition of release and dangerousness. Requiring the State to prove insanity is in direct violation of the Sixth Amendment and *State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1982). The

constitutionality of the insanity defense is premised on the fact that the defendant pled and proved his own insanity.

If the State had to prove Mr. Beaver's insanity at a revocation hearing it would also provide him an opportunity to be unconditionally released without having to meet his burden of proof required by RCW 10.77.200. Rather than revoking insanity acquittees who have violated conditions and are dangerous, there would be the potential for very dangerous individuals being unconditionally released instead. This would thwart the entire purpose of civil commitment – avoiding the premature release of the mentally ill who have committed criminal acts and are dangerous to society.

IV. CONCLUSION

Mr. Beaver has been conditionally released since filing this appeal. His appeal should be dismissed as moot.

Once found criminally insane pursuant to RCW 10.77, Mr. Beaver's mental illness is presumed until he proves otherwise. Substantive due process does not require the court conduct a recommitment hearing at the revocation hearing. Due process only requires that the court find a violation and dangerousness before it can revoke a conditional release pursuant to RCW 10.77.190. The trial court's

revocation of Mr. Beaver's conditional release on January 11, 2013, should be affirmed.

DATED this 13th day of February, 2014.

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APPENDIX A

DIAGNOSTIC SUMMARY
2003-2012

1/27/2005 –WSH (CP 295)

Axis I	Psychotic Disorder NOS specified by self-report;
	Depressive Disorder NOS specified by history
	Cocaine Dependence by history
	Cannabis Abuse by history (rule out Dependence)
	Alcohol Abuse by history
	Posttraumatic Stress Disorder by history
	Rule out Major Depressive Disorder, Severe, with Psychotic Features
	Rule out Cocaine-Induced Psychotic Disorder
	Rule out Malingering
Axis II	Antisocial Personality Disorder

6/2005 –Eval Arthur Davis Phd – Insanity (CP 328-338)

MMPI Findings

Marked mental confusion – consistent with thought disorder, transient psychosis, learning difficulties and extreme distrust and suspicion of others.
Paranoia
Clinically significant depression
PTSD
Somatic symptoms
Antisocial difficulties
Significant problems with addiction

7/21/2006 –WSH (CP 348)

Axis I	Depressive Disorder NOS, by History,
	Post Traumatic Stress Disorder by History, in Remission
	Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

12/18/2006 – WSH (CP 354)

Axis I	Depressive Disorder NOS, by History,
	Post Traumatic Stress Disorder by History, in Remission
	Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

5/7/2008 – WSH (CP 97-100)

Axis I	Depressive Disorder NOS, by History,
	Post Traumatic Stress Disorder by History, in Remission,
	Cocaine Dependence, Marijuana Abuse, Alcohol Abuse
Axis II	Antisocial Personality Disorder

5/21/2010 – Pioneer Counseling Services (CP 205)

Dx: Cocaine Dependence
Opioid Dependence
Cannabis Dependence
Nicotine Dependence
Alcohol Dependence

6/16/2010 –WSH (CP 358-359)

Axis I	Bipolar Disorder, mixed type,
	PTSD
	Polysubstance Abuse including cocaine and marijuana
Axis II	Antisocial Personality Disorder

11/2/2010–Pioneer Center North Discharge Summary (CP 102-103)

Axis I	Cocaine Dependence with Physiological Dependence
	Opiod dependence, with physiological dependence
	Alcohol dependence, with physiological dependence
	Nicotine Dependence, with physiological dependence
	PTSD
	Mood Disorder NOS,
	Rule out Bipolar II Disorder with psychotic features.
Axis II	Personality disorder NOS with antisocial traits.

7/14/2011–Brian Judd PhD (CP 251 - 260)

Axis I	Polysubstance Dependence with Physiological Dependence in a controlled environment (258)
Axis II	Antisocial Personality Disorder.

11/11/2010–Brendon Scholtz PhD (CP 262-269)

Axis I	Polysubstance Dependence with Physiological Dependence in a controlled environment (268)
	Cannabis Abuse
Axis II	Antisocial Personality Disorder

10/26/2012 –Sound Mental Health (CP 167)

Axis I	Bipolar I Disorder Most Recent Episode Mixed in Partial Remission
	PTSD
	Cocaine Dependence
	Alcohol Dependence
Axis II	Deferred