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ORIGINAL

COA No. 71606-9-I

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON

Respondent,

v.

ALFONZIA ALLEN  
Appellant

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The purpose of civil commitment following an insanity acquittal under RCW 10.77 is to treat the individual's mental illness and protect him and society from his proven dangerousness. Civil commitment for mental health treatment is not a conviction. It is not a criminal sentence. It is not punishment. Accordingly, an insanity acquittee is not entitled, under RCW 10.77, to receive credit for pre-commitment incarceration against the maximum term of civil commitment. Refusal to grant all insanity acquittees credit for pre-commitment incarceration does not violate due process or the equal protection clause. The trial court should be affirmed.

## II. FACTS

On August 27, 2003, Alfonzia Allen broke a beer bottle over Brian Larkins's head and stabbed him in the arm with a screwdriver as they rode a Metro bus. CP 2. He was charged with assault in the second degree, and due to his extensive criminal history<sup>1</sup> was facing a third strike. CP 1,

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<sup>1</sup> 1971: Arrested for breaking entering, Naples Florida  
Arrested for assault & battery  
1972: Accessory after the fact/possession of stolen Auto  
1983: Firearm/dangerous weapon  
1986: Assault 4 DV  
1987: DUI  
1990: Menacing, simple assault  
1994: Assault in the second degree (attacked roommate with hatchet)  
1995: NOVL (Tukwila Municipal Court and Federal Way District

393, 444-455. Allen was arrested and held in the King County Jail. Bail was set at \$75,000. CP 2, 379-381.

On January 5, 2004, Allen was ordered to undergo a 15-day competency evaluation at Western State Hospital (WSH). CP 436-438. He was returned to the King County Jail on February 13, 2004 (CP 410) and found competent on February 19, 2004. CP 4-6.

On July 14, 2004, the trial court ordered that Allen be committed to WSH to undergo an evaluation to determine his mental state at the time of his offense. CP 7-9. He was returned to the King County Jail on August 31, 2004. CP 410. According to Dr. Campbell's September 2, 2004 Forensic Evaluation Report, Allen was able to form the requisite intent to commit assault in the second degree. CP 183-195.

On March 2, 2005, the trial court ordered Allen to undergo a mental health evaluation, this time in the King County Jail. Supp. CP (Sub #131).

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	Court)
1996	Rape in the third degree
1997	Forgery
1998	DWLS
1999	DWLS (four different jurisdictions)
2000	DWLS
2001	Arrested: assault fourth degree, DV, interfering with DV reporting
2002	Malicious mischief in the third degree

Allen pleaded not guilty by reason of insanity (NGRI) on June 1, 2005. After considering the reports of WSH dated September 2, 2004 and May 4, 2005, along with the reports of defense expert Thomas Hyde, Ph.D, dated June 23, 2004 and February 25, 2005, the trial court found that Allen's plea of not guilty by reason of insanity was made knowingly, intelligently and voluntarily. CP 402. The trial court found that he committed the crime of assault in the second degree. The court then committed Allen to WSH for observation and treatment in order to determine if he should be committed to the care custody and control of WSH or if he should be conditionally released. CP 401 - 402.

The trial court also requested clarification of Allen's maximum penal sentence. CP 402. The State argued Allen's maximum was life because he was charged with a third strike offense under the Persistent Offender Accountability Act (POAA). CP 393, 444-455. Allen argued that because POAA is a sentencing statute, it did not apply once the court found him not guilty by reason of insanity. CP 451.

On January 13, 2006, the trial court ordered Allen civilly committed to WSH for treatment. CP 405-407. Allen was seeking conditional release. CP 451-455. The court specifically ruled that Allen's "statutory maximum is ten years, beginning June 1, 2005" and "that the SRA

[Sentencing Reform Act] has no application in this matter, including the POAA.” CP 432 .

Allen appealed the January 13, 2006 order. CP 14-24. Then, on July 12, 2006, Allen withdrew his appeal. CP 26. This court dismissed his appeal and issued a mandate terminating review. CP 25-26.

Allen has remained at WSH since June 1, 2005. He was granted a conditional release to the community program at WSH on August 30, 2007, which the trial court revoked on July 13, 2009 for rule violations. CP 26-27. He petitioned for conditional release again in 2010 (CP 27) and 2011. CP 42. The trial court denied both petitions. CP 30-40, 43-52.

Allen petitioned for final discharge on April 23, 2012. CP 53. The trial court dismissed the petition after a 12-person jury unanimously determined Mr. Allen had failed to prove by a preponderance of the evidence that he no longer presents, as a result of his 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. CP 59.

In May 2013, the Attorney General, representing the Department of Social and Health Services and WSH, calculated Allen’s release date as March 8, 2015. CP 410. The calculation is based on the NGRI

commitment date of June 1, 2005 with credit for the days he was committed to WSH undergoing competency evaluations prior to his NGRI commitment. CP 410.

On September 12, 2013, Mr. Allen filed a “Motion for Immediate Release as Maximum Penal Sentence Has Been Served.” CP 61-100. For the first time since his civil commitment, Mr. Allen contested the Attorney General’s calculation, claiming he was entitled to credit for time he served in jail from August 27, 2003 to June 1, 2005 against his ten-year maximum term of commitment. Id.

On October 4, 2013, the trial court granted part of Allen’s motion and denied the remainder. CP 82. The court specifically ruled that:

Nothing in the plain language of the statute (RCW 10.77) allows credit for pre-sentence incarceration against a period of hospital commitment and that "Commitment" means the determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient or a less-restrictive setting. RCW 10.77.101(2). Pre-sentence incarceration credit applies to a term of “imprisonment” resulting from a criminal conviction. The court granted credit for 85 days that Mr. Allen was at Western State Hospital for evaluation and treatment pre NGRI finding pursuant to Lee v. Hamilton, 56 Wn. App. 880, 785 P.2d 1156 (1990).

CP 373, Finding of Fact #6.

On December 5, 2013, Allen renewed his motion. CP 83-361. This time, Allen argued that the court’s failure to credit time spent in jail prior to being found NGRI against the maximum term of commitment of ten

years pursuant to RCW 10.77.025 violates the Equal Protection Clause of the state and federal constitutions. CP 93-97. Allen referenced jail health records to support his claim that he received treatment while being held at the King County Jail and was therefore entitled to credit pursuant to Lee v. Hamilton. 56 Wn. App. 880, 785 P.2d 1156. ((1990). CP 89-93.

The trial court considered Allen's jail health records, over the State's hearsay objection (CP 376, Conclusion of Law #2.13), and held that Allen's jail health records did not provide a basis for credit for time served pursuant to Lee v. Hamilton. CP 10. While being held in the King County Jail, Allen was not subject to a commitment order in the jail and medication compliance was not ordered by the court. CP 374, Finding of Fact #8. The court also found that although Mr. Allen was taking antipsychotic medication, he was not receiving the mental health treatment recommended by the expert evaluators to treat his mental illness and his dangerousness. Id.

The trial court ultimately denied Allen's motion, ruling that the statutory framework of RCW 10.77 is not ambiguous and does not provide for credit of pre-sentence incarceration against a period of hospitalization. CP 374, Conclusion of Law #2.2. The court also ruled that the SRA does not apply to RCW 10.77. CP 375, Conclusion of Law #2.9.

The court further ruled that RCW 10.77 does not violate the Equal Protection Clause, of either the state or federal constitution. CP 375, Conclusion of Law #2.5. The court concluded that civil commitment to the maximum possible penal sentence is rationally related to the purpose of treating the individual's mental illness and protecting him and society from his potential dangerousness. CP 376, Conclusion of Law #2.14.

This appeal followed. Allen is not challenging any of the trial court's findings of fact. He is not challenging the trial court's Conclusions of Law 2.2 and 2.9 regarding the statutory construction of RCW 10.77. These are now verities on appeal.

### **III. ARGUMENT**

An insanity acquittee is not entitled to receive credit for the time he was incarcerated before he was *acquitted* against his maximum term of commitment for mental health treatment. Therefore, the trial court's order should be affirmed.

Allen argues that the trial court's failure to grant him credit for pre-commitment jail time against his ten-year maximum term of commitment for mental health treatment violates the Due Process Clause and the Equal Protection clause of both the state and federal constitutions.

As a preliminary matter, this issue should not be before the court. Allen's appeal is essentially a collateral attack of his January 13, 2006

order of commitment, which is now time-barred. On January 13, 2006 the trial court ruled that:

[T]he statutory maximum in this case is ten years, *beginning 6-1-05*. The court finds the SRA has not application in this matter, including the POAA.”

CP 24. (Emphasis added). Allen initially appealed this order as a matter of right pursuant to RAP 2.2(a)(8). CP 14-39. He later voluntarily withdrew the appeal. See “Motion Declaration and Consent for Voluntary Withdrawal of Review” filed in this matter, attached as Appendix A. The Court dismissed his appeal and issued a mandate. CP. 25. The January 13, 2006 order establishing the ten-year maximum term of commitment under RCW 10.77.025 commencing on June 1, 2005, became final when the mandate issued. Id. The trial court’s ruling that the SRA did not apply to the maximum term of commitment also became final. Id.

Allen knowingly and voluntarily waived his right to appeal that order. State v. Lee, 132 Wn.2d 498, 505-06, 939 P.2d 1233 (1997). The State bears the burden of showing a knowing, voluntary, and intelligent waiver. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Allen’s written consent establishes that upon advice of counsel, he consciously, knowingly, and willingly chose not to pursue an appeal of the June 13, 2006 order. State v. Tomal, 133 Wn.2d 985, 990, 948 P.2d 833 (1997). As a result, Allen is now barred from raising issues contained in that order

or collaterally attacking the issues raised therein. His appeal should be dismissed.<sup>2</sup>

Even if the Court disagrees that the appeal is untimely, the Court still should find that Allen's arguments are without merit because: 1) RCW 10.77 does not authorize credit for pre-commitment jail time against the maximum term of commitment for mental health treatment; and, 2) insanity acquittees are a special class of people that can be treated differently than criminal defendants who receive credit for presentence jail time without violating the equal protection clause.

A. AN INSANITY ACQUITTEE IS NOT ENTITLED TO RECEIVE CREDIT FOR PRE-COMMITMENT INCARCERATION AGAINST THE MAXIMUM TERM OF CIVIL COMMITMENT UNDER RCW 10.77.

It is well-established that when a criminal defendant shows by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the United States Constitution permits the government, on the basis of the insanity judgment, to civilly commit that defendant until such time as he has regained his sanity or is no longer a danger to himself or society. Jones v. United States, 463 U.S. 354, 370, 103 S. Ct. 3043, 77 L.

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<sup>2</sup> The State recognizes that this issue was not raised in the trial court. The State raised a collateral estoppel objection to Allen's second motion for credit for time served. CP 423. Fundamentally, however, if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues. Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 752, 49 P.3d 867 (2002).

Ed. 2d 694 (1983). Insanity acquittees constitute a special class that should be treated differently from other candidates for civil commitment. Id. An insanity acquittee is not convicted, sentenced, incarcerated or punished. Id. at 368-370. The purpose of commitment following an insanity acquittal is to treat the individual's mental illness and protect him and society from his potential dangerousness. Id.

The nature and duration of the commitment must bear some reasonable relation to the purpose for which the individual is committed. Id. It is impossible to predict how long it will take for any given individual to recover, if ever; therefore, the length of commitment is indeterminate. Id. According to the Supreme Court, it is a fundamental mistake to rely upon a criminal sanction to determine the length of a therapeutic commitment, especially for those who have committed serious criminal acts. Id.

In Washington, when a person is found not guilty by reason of insanity, the statute governing civil commitment, RCW 10.77, takes over and the criminal proceedings end. CrR 4.2(c); In re Big Cy Kolocotronis, 99 Wn.2d 147, 149, 660 P.2d 731 (1983). Upon acquittal, the individual may be released only if the court finds "that he or she is not a substantial danger to other persons, and does not present a substantial likelihood of committing criminal acts jeopardizing public safety or security." RCW

10.77.110(1). If the court finds that the insanity acquittee is dangerous, however, he or she may be detained for treatment. Id.

Procedurally, an insanity acquittee detained for treatment may be released into the community subject to conditions if the court finds that “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). An insanity acquittee may also receive a final discharge pursuant to RCW 10.77.200 if he proves by a preponderance of the evidence that he is no longer mentally ill or no longer presents a substantial danger to other persons or substantial likelihood of committing criminal acts jeopardizing public safety or security. Such an individual may be detained until no longer mentally ill or dangerous, but in any event no longer than the maximum possible penal sentence for the crime of which they were acquitted by reason of insanity. RCW 10.77.025. RCW 10.77.025 provides:

Whenever any person has been: (a) Committed to a correctional facility or inpatient treatment under *any provision of this chapter*; or (b) ordered to undergo alternative treatment following his or her acquittal by reason of insanity of a crime charged, such commitment or treatment cannot exceed the maximum possible penal sentence for any offense charged for which the person was committed, or was acquitted by reason of insanity.

(Emphasis added).

In 1990, this Court examined RCW 10.77.025 to determine whether an insanity acquittee should receive credit against his maximum period of commitment for the time he spent at Western State Hospital before he was found not guilty by reason of insanity. Lee, 56 Wn. App. at 884. The Court held that the plain meaning of “Whenever a person has been: (a) Committed to a correctional facility or inpatient treatment under any provision of this chapter,” refers only to provisions of RCW 10.77 that authorize a defendant’s “commitment.” Lee, 56 Wn. App. at 843-844. “Commitment,” according to RCW 10.77.010(2), is defined as a determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient or a less-restrictive setting.<sup>3</sup> Therefore, “commitment” under RCW 10.77 necessarily includes the time an insanity acquittee was committed to WSH undergoing competency and insanity evaluations pursuant to RCW 10.77.060(1), .090(1), .110 .090(3) prior to actually being found NGRI. Lee, 56 Wn. App. at 843-844.

The only time the word “sentence” appears in RCW 10.77 is under RCW 10.77.025(2), which prohibits a civil commitment exceeding the maximum possible penal *sentence* for the charged offense. Furthermore,

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<sup>3</sup> “Treatment” means any currently standardized medical or mental health procedure, including medication. RCW 10.77.010(22).

credit for pre-adjudication incarceration is authorized *only* by RCW 9.94A.505(6), which is a provision of the SRA. The SRA, however, does not apply to RCW 10.77. State v. Sunich, 76 Wn. App. 202, 206, 884 P.2d 1 (1994).

Based upon case law interpreting RCW 10.77.025, it is clear that the legislative intent of limiting civil commitment to the maximum penal term was not to equate civil commitment with a criminal sentence or incarceration pursuant to RCW 9.94A.505. Otherwise, courts would not be precluded from imposing a maximum term of commitment based on consecutive sentences. See State v. Harris, 39 Wn. App. 460, 463-64, 693 P.2d 750 (1985) (citing Jackson v. Indiana, 406 U.S. 715, 93 S. Ct. 1845, 32 L. Ed 2d 435 (1972)). Similarly, courts would not be precluded from imposing an “exceptional” maximum term of commitment that is permitted by the SRA. State v. Reanier, 157 Wn. App. 194, 237 P.3d 299 (2010). These limits on the trial court’s authority show that civil commitment and criminal sentences are different things that serve different purposes.

According to the Supreme Court, it is a fundamental mistake to rely upon a criminal sanction to determine the length of a therapeutic commitments, especially for those who have committed serious criminal acts. Jones, 463 U.S. at 370. The length of a criminal sanction is not a

predictive tool as to an insanity acquittee's dangerousness. Nor is it is not predictive of the necessary length of mental health treatment.

Kolocotronis, 99 Wn.2d at 149.

Realistically, the term of a commitment, pursuant to RCW 10.77, is uncertain. It could be less than the time provided by the sentencing statute; or, if the State seeks a civil commitment under RCW 71.05 near the end of the commitment term, it could be more. The need for treatment entirely determines the length of commitment. Commitment ends when the insanity acquittee proves by a preponderance of evidence that he no longer suffers from a mental disease or defect or is no longer dangerous. RCW 10.77.200.

The legislature obviously did not intend to release a person before treatment is successfully completed. Indeed, the legislature expressly forbids release before the person's mental condition no longer renders him a danger to himself or others:

A county designated mental health professional who receives notice and records under subsection (2) of this section shall, prior to the date of the expiration of the maximum sentence, determine whether to initiate proceedings under chapter 71.05 RCW.

RCW 10.77.025(3). Thus, the statutory scheme reflects the legislature's intent that the length of commitment terms relate to a person's rehabilitation. It also reflects the fact that the legislature did not intend for

pre-sentence incarceration credits apply to reduce the term of mental health commitment.

Although this is a case of first impression in Washington, this issue has been addressed in Arizona. State v. Bomar, 199 Ariz. 472, 19 P.3d 613 (2001), the court reviewed of the statutory framework of Arizona's civil commitment statute and concluded that, as in Washington, the civil commitment statute does not provide for credit for pre-sentence incarceration. Bomar, 199 Ariz. at 475. The court also held that Arizona's civil commitment is not a criminal conviction. Id. at 476. And, like Washington, it determined that pre-sentence incarceration credit applies only to a term of imprisonment resulting from a criminal conviction. Id. The court held that the pre-sentence incarceration credit provisions under Arizona sentencing statute are not applicable to civil commitment proceedings. Id. The Arizona court's reasoning is sound and should be applied here.

Nothing in the plain language of RCW 10.77 construes pre-acquittal incarceration as a "commitment." Therefore, Allen is not entitled to receive credit against his maximum term of commitment for the time held

in the King County Jail prior to have been found not guilty by reason of insanity.<sup>4</sup>

B. ALLEN IS NOT CONSTITUTIONALLY ENTITLED TO CREDIT FOR TIME SPENT IN JAIL BEFORE ACQUITTAL.

It is well-established that the civil commitment of the criminally insane is constitutional. Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). An insanity acquittee belongs to a special class that should be treated differently from other candidates for commitment. Jones, 463 U.S. at 368. The purpose of commitment following an insanity acquittal is to treat the individual's mental illness and protect him and society from his potential dangerousness. Id. Because insanity acquittals serve a very different purpose from criminal sentences, there is no equal protection violation.

**1. Allen's Equal Protection Rights Are Intact.**

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

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<sup>4</sup> Pursuant to Lee v. Hamilton, 56 Wn. App. 880, 785 P.2d 1156 (1990), Allen is entitled to credit for 85 days as calculated by the Attorney General. CP 409-410.

statute so as to uphold its constitutionality.” State v. Reyes, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985).

Allen cannot meet his burden. The date of discharge of an acquittee from confinement is not simply calculated by counting days as if the acquittee were sentenced to prison. Jail time credit is irrelevant in calculating the release of an insanity acquittee because his confinement is based on his mental illness and his dangerousness, and is not a criminal sentence. Jones v. U.S., 463 U.S. at 370; Kolocotronis, 99 Wn.2d 147.

Allen cannot point to any case where an insanity acquittee was entitled to credit for time held in jail before he was civilly committed.

In fact, several other states have held that 1) time for pre-commitment incarceration is not credited to an insanity acquittee’s maximum term of commitment, and 2) failure to grant credit does not violate equal protection of due process rights. See, e.g. State v. Bomar, 199 Ariz. 472, 19 P.3d 613 (2001); Franklin v. Berger, 211 Conn. 591, 560 A.2d 444 (1989); State v. Tuomala, 104 Ohio St.3d 93, 818 N.E.2d 272 (2004); People v. Leppert, 105 Ill. App.3d 514, 434 N.E.2d 21 (1982). The same is true in this case.

## **2. Rational Basis Test.**

Equal protection requires that persons similarly situated with respect to legitimate purposes of the laws receive like treatment. In re Knapp, 102

Wn.2d 466, 473, 687 P.2d 1145 (1984). Equal protection does not mandate that persons be dealt with identically, but it does require that a distinction have some relevance to the purpose for which the classification is made. In re Young, 122 Wn.2d 1, 45, 857 P.2d 989 (1993). Equal protection does not require insanity acquittees and criminal defendants to be subject to the same commitment procedures. Hickey v. Morris, 722 F.2d 543, 547 (9<sup>th</sup> Cir. 1983).

Washington courts review equal protection challenges to civil commitment under the rational basis test if a constitutionally protected class is not involved. Kolocotronis, 99 Wn.2d 147. See generally, Jones, 463 U.S. at 368. The rational basis test is highly deferential, and a legislative enactment reviewed under rational basis will be upheld unless the individual challenging the classification can show that “it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” State v. Thorne, 129 Wn.2d 736, 771, 921 P.2d 514 (1996).

Washington courts apply a three-part test to determine whether a statute survives rational basis scrutiny: (1) whether the classification applies equally to all class members; (2) whether a rational basis exists for distinguishing class members from non-members; and, (3) whether the classification bears a rational relationship to the legislative purpose.

Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992); In re Pers. Restraint of Silas, 135 Wn. App. 564, 570, 145 P.3d 1219 (2006).

Thus, the question before this court is: has Allen proven beyond a reasonable doubt that RCW 10.77 treats civilly committed insanity acquittees differently for a purely arbitrary reason that is wholly irrelevant to the achievement of legitimate state objectives? See State v. Coria, 120 Wn.2d 156, 171–72, 839 P.2d 890 (1992). The answer is clearly no.

Allen argues that intermediate scrutiny applies to an alleged deprivation of liberty based on a classification of wealth. His claim is without merit and the cases he cites as authority are inapposite, as they involve a defendant charged with a crime, convicted, and then sentenced under the SRA. Allen’s argument fails because once found not guilty by reason of insanity under RCW 10.77, the SRA does not apply.

**3. Allen is Not Similarly Situated with Criminal Defendants.**

To suggest that failure to credit time held in jail pre-commitment is a violation of the Equal Protection Clause the Court would have to find that insanity acquittees are similarly situated with criminal defendants who are sane, guilty, and punished for the crime they committed. Allen provides no authority for this premise.

Criminal defendants and insanity acquittees are not similarly situated. A criminal defendant receives credit for time held pre-conviction at the

time of sentencing. “Conviction” means an adjudication of guilt, and includes a verdict of guilty, a finding of guilt, and acceptance of a guilty plea. RCW 9.94A.030(9). A “sentence” is punishment for the “conviction.” See, RCW 9.94A.505. Only a criminal defendant receives pre-incarceration credit at sentencing. RCW 9.94A.505(6).

In contrast, an insanity acquittee has proven that his criminal act was a product of his mental illness. Jones, 463 U.S. at 368. Upon being found mentally ill and dangerous, a criminally insane defendant is acquitted of the crime charged and civilly committed. RCW 10.77.110.

“Commitment” means the determination by the court that the [criminally insane] person should be detained for a period of evaluation or treatment or both, in an inpatient or a less restrictive setting. RCW 10.77.010(2).

Procedurally, if the insanity acquittee does not present a substantial likelihood of committing acts jeopardizing public safety or security, but is in need of control by the court or other persons or institutions, the court shall direct the acquittee’s conditional release. RCW 10.77.110(3). If the acquittee no longer suffers from a mental disease or defect, he must be unconditionally released. State v. Reid, 144 Wn.2d 621, 30 P.3d 465 (2001). Similarly, if he is no longer dangerous he must be unconditionally released. Id. RCW 10.77 also provides the insanity acquittee the ability to petition for a conditional or unconditional release. RCW 10.77.150 and

.200. Should an insanity acquittee continue to present a risk of serious harm or is gravely disabled upon the expiration of his maximum term of commitment, the DSHS Secretary may have the individual assessed to determine whether to initiate civil commitment proceedings under RCW 71.05.

Thus, the fundamental flaw to Allen's claim is that he incorrectly identifies the group with whom he is similarly situated. He is not a criminal defendant, but that is the group with which he compares himself. Allen has a mental illness that caused him to commit a crime. A finding of guilt is wholly inconsistent with the notion that an insanity acquittee is "not guilty by reason of insanity." Allen was not "convicted" of assault in the second degree. To the contrary, he was acquitted. He is not serving a "sentence" for assault in the second degree. He is not required to pay restitution to his victim, as would a criminal defendant. Allen is a patient at WSH – not a prisoner or an inmate – and is receiving treatment, not punishment. As such, Allen will be released from the hospital as soon as, but not before, he is determined to be free from mental illness or no longer poses a risk to public safety. State v. Reid, 144 Wn.2d 621, 30 P.3d 465 (2001). A criminal defendant, on the other hand, will not be released until he has served his sentence.

Not one of the cases cited by Allen in support of pre-commitment credit involves an insanity acquittee. See Brief of Appellant at 19 (citing Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974), In re Knapp, 102 Wn.2d 466, 687 P.2d 1145 (1984), State v. Anderson, 132 Wn.2d 203, 937 P.2d 581 (1997)). The defendants in those cases were not found to have a mental illness that caused them to commit the crime charged. They were not acquitted of the crime charged. They were convicted, sentenced and punished for the crime they were found to have committed.

**4. A Rational Basis Exists for Distinguishing Insanity Acquittees from Criminal Defendants.**

The different legal status between criminal defendants who have been convicted and sentenced versus criminal insanity acquittees who have been civilly committed for mental health treatment is a sufficient basis for distinguishing the two groups. Jones, 463 U.S. at 368. The courts diligently maintain the distinction between “commitment” and “sentence” at the expense of broader rights to those committed on mental illness grounds. See, e.g., In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993) (a person committed as a sexual violent predator lacks rights of criminal defendant because the commitment is civil and remedial in nature and is not punishment pursuant to a conviction and sentence).

In sum, insanity acquittees receive treatment for the mental illness that makes them dangerous, whereas criminal defendants receive punishment. Accordingly, there is plainly a rational basis to treat them differently.

**5. Insanity Acquittee Classification Bears a Rational Relationship to the Legislative Purpose.**

The Washington Supreme Court has ruled that the maximum term of civil commitment should not be tied to the maximum penal term. Kolocotronis, 99 Wn.2d at 157. Because confinement to a mental institution is not incarceration, Article 1, Section 14 of the Washington Constitution should not be applied to judge the length of the civil commitment. Id. The maximum term of commitment does not predict the duration of the defendant's mental illness and dangerousness. Id. Its sole purpose is to prevent continuous, indefinite, indeterminate commitment without release. Id. In other words, the law prohibits the type of civil commitment for which there is absolutely no way out. Accordingly, the procedures contained in RCW 10.77 include a full panoply of due process protections to prevent continuous commitment without release. Id. at 155.

Allen, like Kolocotronis, has taken full advantage of the procedures contained in RCW 10.77 since being civilly committed. He has been granted a conditional release under RCW 10.77.150. He also petitioned

for final release pursuant to RCW 10.77.200. Like Kolocotronis, a jury determined that Allen continues to present a substantial likelihood of committing felonious acts jeopardizing public safety or security.

Clearly, pre-trial incarceration is wholly irrelevant to the length of Allen's civil commitment. The date of release is not based purely on the lapse of time. Rather, release from civil commitment is based on an insanity acquittee's dangerousness. Pre-commitment credit also serves no purpose under RCW 10.77. Allen assumes his pre-commitment jail credit will allow him to walk out of the hospital. However, that would undermine the reason he was civilly committed in the first place, i.e., to treat his mental illness until he is no longer dangerous.

Nonetheless, Allen contends that as a matter of due process and equal protection, a criminal defendant must be credited with pre-sentence jail time when a criminal defendant is unable to or precluded from posting bail or otherwise procuring release from confinement prior to trial, citing Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974). Brief of Appellant at 11-14. Allen further argues that the failure to grant credit for pre-sentence incarceration to insanity acquittees who cannot afford bail constitutes wealth-based discrimination for which intermediate level scrutiny should be applied to the equal protection analysis pursuant to

State v. Phelan, 100 Wn.2d 508, 514, 671 P.2d 1212 (1983). Brief of Appellant at 20 .

Allen misses the point. Reanier and Phelan are criminal defendants convicted and sentenced under a completely different statutory scheme than RCW 10.77, specifically, the SRA:

Fundamental fairness and the avoidance of discrimination and possible multiple *punishment* dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon *conviction* and commitment to a *state penal facility*, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and *sentence*.

Reanier, 83 Wn.2d at 346. (Emphasis added).

In contrast, there is only one class with whom Allen is similarly situated: insanity acquittees. RCW 10.77 does not provide for credit for against the maximum term of commitment; and, the SRA specifically does not apply to RCW 10.77.

Allen's argument is also based on the erroneous premise that all insanity acquittees are discharged at the expiration of the maximum term of commitment and not before.

In 1989, the Connecticut Supreme Court addressed Allen's argument. In Franklin v. Berger, 211 Conn. 591, 560 A.2d 444 (1989), the Connecticut Supreme Court held that the insanity acquittee's reliance on the maximum term of commitment as a measuring point for calculating an

insanity acquittee's date of discharge from confinement is misplaced. Id. The discharge date of an insanity acquittee is not calculated in days. Id. It is dependent on the insanity acquittee's ability to prove that he is no longer either mentally ill or dangerous. Id. If no insanity acquittee receives credit for time served, there is no disparate treatment, and there is no equal protection violation. Id. at 597.

The same principle applies to RCW 10.77. Allen's argument that the refusal to credit his jail time against the ten-year maximum term of commitment creates distinctions that do not exist. Allen is focusing on the wrong issue. Under RCW 10.77 there is no statutory authority for jail credit against the maximum term of commitment. Furthermore, jail time is irrelevant to calculating the release date when civil commitment is based on his mental illness and dangerousness.

The discharge of all insanity acquittees civilly committed under RCW 10.77, rich or poor, is based on their ability to prove that they no longer present, 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).

The trial court's refusal to credit Allen for pre-commitment incarceration because he could not afford bail does not violate the equal protection clause.

#### **IV. CONCLUSION**

An insanity acquittee is not entitled, under RCW 10.77, to receive credit for pre-commitment incarceration against the maximum term of civil commitment. Refusal to grant all insanity acquittees credit for pre-commitment incarceration does not violate due process or equal protection. The trial court should be affirmed.

DATED this 26<sup>th</sup> day of November, 2014.

DANIEL T. SATTERBERG  
Prosecuting Attorney

By:   
ALISON BOGAR, WSBA #30380  
Senior Deputy Prosecuting Attorney  
Attorney for the State/Respondent

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## APPENDIX A

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

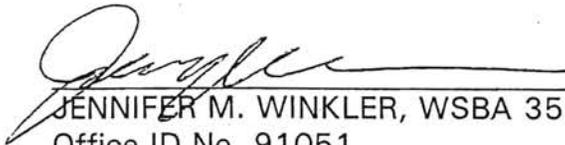
STATE OF WASHINGTON,	)	
Respondent,	)	NO. 57700-0-1
	)	
vs.	)	MOTION, DECLARATION,
	)	CONSENT, AND RULING
ALFONZIA ALLEN, SR.,	)	FOR VOLUNTARY
Appellant.	)	WITHDRAWAL OF REVIEW
	)	

MOTION

The above-named appellant, through appellate counsel and upon all the records, files and proceedings in this case, hereby requests this Court to enter a ruling terminating review in this case. This motion is based upon the attached declaration of counsel for the appellant and the written statement of appellant consenting to withdrawal of review in this case.

DATED this 12 day of July, 2006.

Respectfully submitted,  
NIELSEN, BROMAN & KOCH, PLLC

  
JENNIFER M. WINKLER, WSBA 35220  
Office ID No. 91051

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

STATE OF WASHINGTON,	)	
Respondent,	)	NO. 57700-0-1
	)	
vs.	)	DECLARATION OF
	)	COUNSEL
ALFONZIA ALLEN, SR.,	)	
Appellant.	)	
<hr/>		

Jennifer M. Winkler, being first duly sworn upon oath, states:

1. I am an attorney with the firm of Nielsen, Broman & Koch, appointed counsel for appellant, Alfonzia Allen, Sr., in the above-captioned appeal from a King County acquittal by reason of insanity and commitment order.

2. As counsel for Mr. Allen, I have reviewed the record of the proceedings below, including the verbatim report of proceedings.

3. On March 27, 2006, an attorney at this firm, Eric Broman, had a telephone conversation with Mr. Allen regarding the appeal process and potential issues in the case. According to Mr. Broman's notes, he told Mr. Allen this firm would contact him once we had received and reviewed the record.

4. In June of 2006, I reviewed record in this case.

5. On June 22, 2006, Mr. Allen wrote this firm a letter stating he wanted to withdraw his appeal.

6. On June 28, 2006, I wrote to appellant seeking confirmation that he wanted to withdraw his appeal.

7. On July 3, 2006, appellant wrote this firm another letter stating he wanted to withdraw his appeal.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



---

JENNIFER M. WINKLER      July 5, 2006  
WSBA No. 35220          Seattle, Washington

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

STATE OF WASHINGTON,	)	
Respondent,	)	NO. 57700-0-1
	)	
vs.	)	APPELLANT'S CONSENT
	)	TO VOLUNTARY
ALFONZIA ALLEN, SR.,	)	WITHDRAWAL OF REVIEW
Appellant.	)	
<hr/>		

I am the appellant in this appeal from the King County Superior Court's Order Finding Defendant Not Guilty by Reason of Insanity, entered June 1, 2005, and Order of Acquittal by Reason of Insanity and Committing for Treatment, entered January 13, 2006.

I presently reside at Western State Hospital. On March 27, 2006, I had a telephone conversation with Eric Broman, an attorney at the firm of Nielsen, Broman & Koch. We discussed the appeal process and possible issues on appeal. Mr. Broman informed me that after the firm received and reviewed the transcripts in my case, they would contact me.

On June 22, 2006, I wrote to Mr. Broman stating that I wanted to cancel my appeal. On June 23, the attorney assigned to represent me on appeal, Jennifer Winkler, wrote me to confirm that I wanted to withdraw the appeal. On July 3, I wrote a letter confirming that I want to cancel my appeal.

I am satisfied that further pursuit of this appeal is not in my interest. Therefore, I am hereby requesting that my appeal be terminated without any further proceedings in the Court of Appeals.

I understand that by making this request I am giving up my right to appeal the King County Superior Court's Order Finding Defendant Not Guilty by Reason of Insanity, entered June 1, 2005, and Order of Acquittal by Reason of Insanity and Committing for Treatment, entered January 13, 2006. I am making this request voluntarily.

Alfonzia Allen, Sr. 7-8-06  
ALFONZIA ALLEN, SR. (date)

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

STATE OF WASHINGTON,	)	
Respondent,	)	NO. 57700-0-1
	)	
vs.	)	
	)	RULING GRANTING
ALFONZIA ALLEN, SR.,	)	VOLUNTARY WITHDRAWAL
Appellant.	)	AND TERMINATING
	)	REVIEW
_____	)	

RULING

THIS MATTER having come before the court and the court having reviewed the motion, declaration of counsel, and consent form signed by the appellant, IT IS HEREBY ORDERED that appellant's Motion for Voluntary Withdrawal is granted and review in this cause is terminated.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Court Administrator/Clerk

Presented by:

  
\_\_\_\_\_  
JENNIFER M. WINKLER, WSBA No. 35220  
Attorney for Appellant