

NO. 63052-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN ROBERT HURST,

Appellant.

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APPELLANT'S REPLY BRIEF

Mindy M. Ater  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1305 Fourth Avenue, Suite 802  
Seattle, Washington 98101  
(206) 587-2711

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A. ARGUMENT

John Hurst appeals the superior court's order committing him for 180 days at Western State Hospital in order to restore his competency for an Assault 3 charge, which alleged that Mr. Hurst had thrown a shoe at a nurse. At the point the court ordered this commitment, Mr. Hurst had already undergone competency restoration treatment for two consecutive 90-day periods, and competency had not been restored. Mr. Hurst requested and was granted a jury trial on the issues of dangerousness and restorability under RCW 10.77.086(4), and requested jury instructions requiring the jury to find those elements by clear, cogent, and convincing evidence. The superior court denied the request and required the jury to find the elements by preponderance of the evidence.

In his opening brief, Mr. Hurst argued that due process requires the standard of proof for the elements under RCW 10.77.086(4) to be clear, cogent, and convincing evidence. Br. of App. 6-14. In balancing the deprivation of liberty involved in involuntary commitment for 180 days, the State's interests, and the risk of erroneous deprivation, there is no justification for a lower standard of proof in this situation than that required for a civil commitment hearing. Id.

1. MR. HURST IS NOT ARGUING FOR A  
HEIGHTENED STANDARD OF PROOF FOR  
THE INITIAL OR SECOND DETERMINATIONS  
OF COMPETENCY UNDER RCW 10.77.086(3)

First, a clarification may be necessary. Mr. Hurst does not dispute that the standard of proof for the first and second determinations of competency under RCW 10.77.086(3) – prior to the first and second 90-day periods of commitment – is preponderance of the evidence. The State is correct that the statute clearly provides for the preponderance standard for those hearings, and that other state statutes and case law support this standard. Br. of Resp. at 7-8, 10, 12-17.

The question here, however, is what standard due process requires at the final commitment hearing, where a person has already been committed for 180 days and competency has not been restored. Because the State often fails to make this distinction, many of the authorities it cites are not on point. For example, the majority of the state statutes cited by the State do not support its argument for the preponderance standard under RCW 10.77.086(4) because these statutes only specify the preponderance standard for the initial determination of

competency.<sup>1</sup> Br. of Resp. at 15-16. On the other hand, the statutes that do address requirements analogous to the elements under RCW 10.77.086(4) support Mr. Hurst's argument for a higher standard.<sup>2</sup>

2. THE DEFERENTIAL MEDINA ANALYSIS OF THE DUE PROCESS QUESTION IS INAPPROPRIATE HERE BECAUSE THE LEGISLATURE PROVIDED NO DECISION ON THE STANDARD OF PROOF TO WHICH TO DEFER

The State argues that Mr. Hurst's analysis of the factors under Mathews v. Eldridge<sup>3</sup> is inapplicable, and that, because this is a criminal case, the analysis under Medina v. California, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 498 (1996), should apply. Br. of

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<sup>1</sup> Alaska Stat. § 12.47.110; Cal. Penal Code § 1369-70; Colo. Rev. Stat § 16 16-8, 5-103; Conn. Gen. Stat. § 54-56d; 725 Ill. Comp. Stat. 5/ 104-11; La. Code Crim. Proc. Ann. art. 648; Mass. Gen. Laws ch. 123, § 15; 49 Minn. Stat. Ann. Rules Crim. Proc., Rule 20.02; Mo ann stat 552.020; N.D. Cent Code § 12.1-04-08; N.H. Rev. Stat. Ann. § 135:17; Ohio Rev. Code Ann. §2945.37; Okla. Stat. Ann. § 1175.4; 50 Pa. Cons. Stat. § 7402-03; R.I. Gen. Laws § 1956 40.1-5.3-3; S.D. Codified Laws § 23A-10A-6.1, 23A-10A-14; Tex. Crim. Proc. Code Ann. § 46B.003; Utah Code Ann. 1953 § 77-15-5, 77-15-6(4); Va. Code Ann. § 19.2-169.1; W. Va. Code § 27-6A-3.

<sup>2</sup> Ala. Rule Crim. Proc., Rule 11.6 (requiring clear, cogent, and convincing evidence of dangerousness); 16 Ariz. Rev. Stat., Rules Crim. Proc., Rule 11.5(b)(3) (after initial determination of incompetency, court can order commitment unless defendant proves by clear, cogent, and convincing evidence that he cannot be restored); Iowa Code § 812.8 (commitment may be terminated if defendant shows by preponderance of the evidence he is not restorable within a reasonable period of time); N.M. Stat. Ann., Rules Crim. Proc., Rule 5-602 (commitment requires clear, cogent, and convincing evidence of dangerousness); Wis. Stat. Ann. 971.14 (court must release defendant if, during commitment, it determines the defendant is unlikely to regain competency).

<sup>3</sup> 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.18 (1976).

Resp. at 10-12. Under Medina, courts give substantial deference to state legislative judgments in matters of criminal procedure because

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Medina, 505 U.S. at 445 (quoting Irvine v. California, 347 U.S. 128, 134, 174 S.Ct. 381, 98 L.Ed. 5611 (1954)). Accordingly, a legislative decision in matters of criminal procedure

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.

a. The *Medina* analysis is inapplicable here because there is no relevant legislative decision to which this Court can defer. This Court cannot pay deference to a legislative decision on the required standard of proof under RCW 10.77.086(4) because the Legislature never made such a decision. Because the Legislature did not specify the standard of proof for these elements, the Medina Court’s assumption that “balancing of society’s interests against those of the accused ha[s] been left to the legislative

branch,” does not apply, and this Court must conduct that balancing analysis. Medina, 505 U.S. at 453 (quoting Patterson v. New York, at 210).

The Legislature provided the standard of proof only for the hearing for the second determination of competency under RCW 10.77.086(3):

On or before expiration of the initial ninety-day period of commitment under subsection (1) of this section the court shall conduct a hearing, at which it shall determine whether or not the defendant is incompetent.

If the court finds by a preponderance of the evidence that a defendant charged with a felony is incompetent, the court shall have the option of extending the order of commitment or alternative treatment for an additional ninety-day period. . .

RCW 10.77.086 (2), (3).<sup>4</sup> The statute then continues on to outline the requirements for a separate hearing once that second 90-day commitment has ended:

[B]ut the court must at the time of extension set a date for a prompt hearing to determine the defendant's competency before the expiration of the second ninety-day period. The defendant, the defendant's attorney, or the prosecutor has the right to demand that the hearing be before a jury. [. . .]

The criminal charges shall not be dismissed if the court or jury finds that: (a) The defendant (i) is a

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<sup>4</sup> The full statute is attached at Appendix A.

substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time. In the event that the court or jury makes such a finding, the court may extend the period of commitment for up to an additional six months.

RCW 10.77.086(3), (4). Thus, the statute provides several protections for the final hearing, which do not exist for the first and second hearings, including the right to have the hearing before a jury and the requirement that the State prove dangerousness and restorability. However, the statute does not provide for a standard of proof at this final hearing.

Because the Legislature provided no standard of proof for this stage of the proceedings, it would be inappropriate for this Court to analyze the due process question under the Medina analysis. Because there is no legislative decision to which to defer, this Court does not risk the kind of interference with legislative judgments that the United State Supreme Court was concerned with in Medina.

Indeed, the Washington Supreme Court recently utilized the Mathews analysis rather than the Medina analysis in a criminal case very similar to this one. Born v. Thompson, 154 Wn.2d 749,

753-62, 117 P.3d 1098 (2005). In Born, the defendant argued that due process required a clear, cogent and convincing standard of proof for commitment to restore competency in a misdemeanor case. Id. The statute in Born, like RCW 10.77.086(4), did not provide for a standard of proof, so the Medina analysis was inappropriate, and the Washington Supreme Court analyzed the question under Mathews. Id. This Court should conduct a similar analysis.

b. The State's statutory construction leads to an absurd result. A Court's goal in interpreting a statute is to determine and implement the intent of the Legislature. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Courts do not add or subtract language from a statute, but give meaning to every statutory provision, and the interpretation must not lead to an absurd result. J.P., 149 Wn.2d at 450. "Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other." U.S. West Communications, Inc. v. Wash. Util. & Transp. Comm'n, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997).

Under Washington's involuntary commitment statute, where the State seeks to impose involuntary treatment for a period of 90

days, a person has the right to a jury trial, and the State must prove its case by clear, cogent, and convincing evidence. RCW 71.05.310. The State must prove that the person, “as a result of a mental disorder, (i) presents a likelihood of serious harm; or (ii) is gravely disabled.” RCW 71.05.150. Similarly, RCW 10.77.086(3) and (4) provide the right to a jury trial on the issues of dangerousness and restorability before the State may commit a person for 180 days – which is in addition to the 180 days the person has already been committed.

The State’s interpretation of RCW 10.77.086(4) would allow the State to avoid its burden of proof under the involuntary commitment statute in order to gain a longer period of commitment based on less reliable evidence of dangerousness. It would also encourage prosecutors to pursue commitment for competency restoration despite evidence that restoration is unlikely or where civil commitment would better address the defendant’s mental health issues. This is certainly inconsistent with the Legislature’s intent behind the involuntary commitment statute “[t]o prevent inappropriate, indefinite commitment of mentally disordered persons,” “[t]o provide prompt evaluation and timely and

appropriate treatment of persons with serious mental disorders,” and “[t]o safeguard individual rights.”

The State’s interpretation also ignores the differences between the initial two hearings on the issue of competency versus the final hearing on the issues of competency, dangerousness, and restorability. The preponderance standard is appropriate at the former hearings because the standard must be low in order to protect the defendant’s right to be competent at trial. Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); Medina, 505 U.S. at 453. However, at the point where the defendant’s competency has not been restored during the first 180+ days of treatment, the likelihood of restoration and trial has decreased, and there are different interests at stake, which are akin to the interests involved in a civil commitment hearing. That is why, at this stage in the proceedings, the Legislature requires proof of dangerousness and restorability in addition to incompetence. RCW 10.77.086(4). These additional requirements, along with the Legislature’s decision to grant the defendant the right to have a jury decide these issues, indicate that the Legislature recognized that this hearing is different from the previous hearings, and that additional protections must apply. Therefore, the simple fact that

the preponderance standard applies at the earlier hearings does not mean that it applies at the final hearing.

Finally, the State cites no controlling or persuasive authority in support of its position that the Legislature intended the preponderance standard to apply to the court's or jury's decision regarding the elements under RCW 10.77.086(4). Instead, the State relies entirely on the dissenting opinion in Born (which the State cites as if it were the majority opinion), which only addressed the standard of proof required under RCW 10.77.086(3) for the determination of competency before the second 90-day commitment period. Br. of Resp. at 8-9. This provides little evidence of legislative intent regarding the standard of proof required for the dangerousness and restorability elements at the separate hearing under RCW 10.77.086(4).

For these reasons, this Court should not defer to the State's interpretation of RCW 10.77.086(4), and should conduct an analysis of the Mathews factors as the Court did in Born.<sup>5</sup>

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<sup>5</sup> Commissioner Neel noted in her ruling that the proper analysis is under Mathews v. Eldridge. Ruling at 8. Further, the State's analysis under the "fundamental fairness" prong of its analysis under Medina weighs the same factors. Br. of Resp. at 17-24.

3. DUE PROCESS REQUIRES THAT THE STATE  
PROVE DANGEROUSNESS AND  
RESTORABILITY BY CLEAR, COGENT, AND  
CONVINCING EVIDENCE

“[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Born, 154 Wn.2d at 755 (quoting Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

Determining the standard of proof that applies for civil commitment is a due process inquiry that requires a court to balance [ . . . ] “both the extent of the individual’s interest in not being involuntarily confined indefinitely and the state’s interest in committing the emotionally disturbed under a particular standard of proof” [ . . . and] “the risk of erroneous decisions.”

Born, 154 Wn.2d at 754 (quoting Addington, 441 U.S. at 425). The standard of proof “instruct[s] the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”

Addington, 441 U.S. at 423 (quoting In re Winship, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

In his opening brief, Mr. Hurst argued that because an individual’s interests implicated by a forced 180-day commitment period to restore competency are of such weight and gravity that due process requires the State to prove the elements of

dangerousness and restorability by clear, cogent, and convincing evidence. Br. of App. at 6-14. A person in this situation has the same – if not stronger – interests as a person who faces a 90-day commitment under the involuntary commitment statute, which are interests so weighty that due process requires the clear, cogent, and convincing standard. Addington, 441 U.S. at 427; In re McLaughlin, 100 Wn.2d 832, 843, 676 P.2d 444 (1984) (following Addington to hold preponderance standard insufficient to satisfy due process in involuntary commitment proceedings).

The State argues that its interests in bringing a defendant to trial and protecting the public outweigh the defendant's liberty interests and risk of erroneous deprivation. Id. However it fails to explain why these interests justify use of the low preponderance standard.

Most importantly, the State fails to explain why due process requires a lower standard under RCW 10.77.086(4) than under the involuntary commitment statute, even though both statutes require proof of dangerousness and impose similar periods of commitment. The same individual liberty interests exist under both statutes. The risk of erroneous deprivation is greater for an individual committed under RCW 10.77.086(4) because detention is based solely on

probable cause he has committed a crime. Born, 154 Wn.2d at 757. Further, the risk of erroneous deprivation increases if the standard of proof for restorability is lower because there is a higher chance that commitment will fail to restore competency.

The State has the same interests, except that (1) the state interest in prosecuting felonies does not exist under the involuntary commitment statute, and (2) the state interest in protecting public safety under RCW 10.77.086 is minimal because the State always has the option of seeking commitment under the involuntary commitment statute to address any danger posed by the public. See Born, 153 Wn.2d at 756. The State's interest in prosecuting a defendant's crime must also decrease as restorability decreases and trial becomes more unlikely. Thus, if the State can only prove restorability by preponderance of the evidence, the likelihood of bringing the defendant to trial is very small, and this state interest is minimal.

The State's interest in prosecuting felonies is not sufficient to tip the balance of interests in Addington, especially where the risk of erroneous deprivation is higher for competency commitments, and especially where the relative importance of the State's interest in prosecuting this Assault 3 – which would constitute a

misdemeanor but for the victim's status as a nurse – is so minimal.

As in Addington, due process requires the clear, cogent, and convincing standard of proof.

**B. CONCLUSION**

For these reasons, this Court should hold that due process requires that the State prove the elements under RCW 10.77.086(4) by clear, cogent, and convincing evidence.

Respectfully submitted this 16th day of March 2010.



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MINDY M. ATER – WSBA # 40755  
Washington Appellate Project – 91052  
Attorneys for Appellant Hurst

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63052-1-I
v.	)	
	)	
JOHN HURST,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JOHN HURST WSH 9601 STAILACOOM BLVD TACOMA, WA 98498	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF MARCH, 2010.

X \_\_\_\_\_  


**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710