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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Detention of

DAVID McCUISTION

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**BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING  
ATTORNEYS**

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ORIGINAL

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**I. INTEREST OF AMICUS CURIAE**

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. By law, prosecuting attorneys are responsible for the prosecution of all felony matters in this state and have primary jurisdiction over the prosecution of RCW 71.09 civil commitment matters. WAPA members are concerned that the decision initially issued by this Court unduly expands substantive due process (as argued by the Attorney General), fails to grant due deference to the Legislature, and expands substantive due process "strict scrutiny" analysis beyond existing constitutional doctrine. WAPA urges this Court to abandon its prior majority decision in this case and affirm the trial court.

**II. THE LEGISLATURE ACTED WELL WITHIN ITS CONSTITUTIONAL PEROGATIVES WHEN IT ADOPTED THE 2005 AMENDMENTS TO RCW 71.09.090**

By adopting RCW 71.09, the Washington Legislature established a special proceeding designed to address the unique hazards presented by sexually violent predators.<sup>1</sup> The commitment scheme is limited to the "worst of the worst" sex offenders who terrorize innocent children, women, and even men with repeated acts of rape and molestation. In order to prove that a sex offender is the "worst of the worst," the statute

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<sup>1</sup> *E.g. Putman v. Wenatchee Valley Medical Center, P.S.* 166 Wn.2d 974, 981, 216 P.3d 374, 377 - 378 (2009)(recognizing that RCW 71.09 establishes a "special proceeding" subject to procedural and substantive rules adopted by the Legislature).

establishes a higher bar than is constitutionally necessary for civil commitment. Once the State successfully scales the high wall justifying *indefinite* civil commitment of a sexually violent predator, the Legislature rightly focuses on successful treatment as the primary means for a predator to safely re-join society. The 2005 amendments to RCW 71.09.090 were adopted to ensure that the focus of release proceedings remained on treatment completion in order to minimize the hazards faced by the public when a sexually violent predator is conditionally or unconditionally released. Because the 2005 amendments were fully within the constitutional authority of the Legislature, amicus WAPA urges this Court to abandon its prior majority opinion and affirm the trial court.

**A. THE LEGISLATURE ACTED  
CONSTITUTIONALLY BY REQUIRING A  
DEMONSTRATED CHANGE IN A SEXUALLY  
VIOLENT PREDATOR'S CONDITION THROUGH  
TREATMENT OR PHYSIOLOGICAL INJURY  
BEFORE AUTHORIZING A RE-COMMITMENT  
PROCEEDING**

In order to deem someone a sexually violent predator, the Legislature has placed a higher burden on the State than is constitutionally necessary in order to protect against erroneous civil commitments. For example, the constitution requires only "clear and convincing" evidence to support a civil commitment case, *In re Detention of Turay*, 139 Wn.2d 379, 423, 986 P.2d 790, 813 (1999), whereas RCW 71.09.060 requires

proof "beyond a reasonable doubt" in order to support civil commitment.<sup>2</sup> Likewise, even though this Court has recognized that, in civil commitment cases, "due process guaranties are satisfied when a verdict is reached by 10 members of a 12-member jury or a verdict of 5 members of a 6-member jury," *In re McLaughlin*, 100 Wn.2d 832, 845, 676 P.2d 444, 452 (1984), the statute imposes unanimous juries for an initial civil commitment as a sexually violent predator. RCW 71.09.060. Among other things, the Washington SVP statute also imposes a danger threshold -- more likely than not -- that is higher than in most other states, and retains a "predatory" requirement not found in other state SVP laws.

With the danger of a sexually violent predator firmly established through proceedings that exceed constitutional requirements, the Legislature acted reasonably in predicating release from that commitment on demonstrated treatment progress or a showing a substantial physiological change. In this regard, the Legislature's actions comport with common sense. For example, having utilized thorough and comprehensive procedures to determine the overwhelming danger of an item (e.g. a hazardous chemical, a virulent virus, a harmful carcinogen, etc.), it is prudent to exercise extreme caution and additional procedures

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<sup>2</sup> See also *In re Van Orden*, 271 S.W.3d 579, 585-86 (Mo.,2008) ("Whether a beyond a reasonable doubt or clear and convincing evidence burden of proof is utilized to commit sexually violent predators is a matter of legislative prerogative.").

before removing that dangerous item from its prior classification.

Similarly, because a sex predator has been determined mentally ill and dangerous beyond a reasonable doubt, there is more need for deliberate caution (and less excuse for error) when acting to remove an SVP from this judicially determined classification. The constitution does not require the Legislature to place the entire risk for error on the public when releasing a person previously determined to be mentally ill and dangerous-- especially when that person has committed a number of violent sexual crimes. "The state's interest in preventing the premature release of individuals who have already proven their dangerousness to society by committing a criminal act is substantial." *Williams v. Wallis*, 734 F.2d 1434, 1439 (11th Cir. 1984).

Indeed, in the context of civil commitment under RCW 10.77 for the criminally insane, this Court has presumed a continuing basis for civil commitment absent a showing of change. "Washington law since 1905 has presumed the mental condition of a person acquitted by reason of insanity continues and the burden rests with that individual to prove otherwise." *State v. Platt*, 143 Wn.2d 242, 251 n. 4, 19 P.3d 412 (2001). As a result, this Court has held that it is "logical that those who have reached the attention of the State because of serious antisocial acts, would be subject to more procedural burdens in obtaining their release than are

those whose acts are less threatening to the public safety.<sup>3</sup> *Id.* at 252. See also *Petersen v. State*, 104 Wn.App. 283, 290-91, 36 P.3d 1053 (2000) (“differences in dangerousness, treatment methods and prognosis” justify differing release procedures for sexually violent predators); *In re Bradford*, 712 N.W.2d 144 , 150 (Iowa 2006) (upholding annual review statute imposing “rebuttable presumption” that commitment of sexually violent predators should continue).

By requiring a showing of continuous participation in treatment and/or a substantial physiological change in condition before allowing a new trial, the Legislature was acting to preserve the prior beyond a reasonable doubt civil commitment determination until objective evidence showed it was not longer appropriate. The Legislature required a showing of treatment or physiological change because it found that these factors were necessary to illustrate that a sexually violent predator had changed and to protect the public in the event of a release from commitment. By incorporating these requirements into RCW 71.09.090(4), the Legislature

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<sup>3</sup> The *Platt* holding forecloses any conclusion that there is a “carefully described right” that is deeply rooted in this nation's history and implicit in the concept of ordered liberty to a new commitment trial based on the dissenting opinion of a defense expert. See *Washington v. Glucksberg*, 521 U.S. 702, 721-23 (1997). The criminally insane are subject to the same constitutional civil commitment doctrine as sexually violent predators. Because *Platt* recognizes that a *presumption* of a continuing basis for commitment is constitutional, the Legislature is free under RCW 71.09 to allow commitment to continue absent a showing of *change* due to treatment or severe physiological injury. The understanding of constitutional civil commitment doctrine in *Platt* cannot be squared with the substantive due process pronouncements of the prior *McCustion* majority.

acted well within its powers.

**B. THE LEGISLATURE'S 2005 FINDINGS SHOULD BE ACCORDED SUBSTANTIAL DEFERENCE UNDER SEPARATION OF POWERS DOCTRINE**

The opinion of the prior *McCuiston* majority fails to accord the deference owed to the Legislative findings that accompanied the 2005 amendments, which address the inherent hazards of conditionally or unconditionally releasing sexually violent predators. These amendments, which arose from Senate Bill 5582, were passed to correct the Court of Appeals opinions in *In re Young*, 120 Wn.App. 753, review denied 152 Wn. App. 381 (2004) and *In re Ward*, 125 Wn.App. 381 (2005). See Laws of 2005, ch. 344, sec. 1 (SB 5582). *Young* and *Ward* broadly interpreted RCW 71.09.090 to allow a recommitment trial based solely on an opinion from a new defense expert — rather than on actual change in the person's physical or mental condition from the time of the last commitment proceeding — and to permit committed persons to use RCW 71.09 procedures as a mechanism to readily collaterally attack a prior civil commitment determination. The 2005 legislation mandated new proceedings only if there was a showing of actual change. The reasoning of these decisions was effectively reinstated by the *McCuiston* prior majority opinion, which declares the 2005 legislative changes unconstitutional.

Like the *McCuiston* majority, the *Young* and *Ward* decisions were predicated on the factual premise that an age-based expert opinion was sufficient to negate an initial commitment and justify a re-commitment trial proceeding. The Legislature, however, rejected the factual predicate for this position in detailed Legislative Findings that accompanied the 2005 amendments. SB 5582, sec. 1. The prior *McCuiston* majority violated separation of powers doctrine by failing to grant sufficient deference to these Legislative Findings.

In the course of adopting SB 5582, which was unanimously passed by both houses, the Legislature heard testimony in both the House and the Senate on how paid defense experts were using the *Young* and *Ward* decisions to essentially grant their own clients new commitment trials based on highly questionable theories.<sup>4</sup> The Final Bill Report observed that the *Young/Ward* interpretation of RCW 71.09.090 required a trial court to "assume the validity of the petition, even where it knows it is not valid."<sup>5</sup> According to the testimony of Dr. Henry Richards, then SCC Superintendent, the bill would reverse this trend by encouraging

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<sup>4</sup> The Senate Human Services and Corrections Committee held a hearing on SB 5582 on February 3, 2005. The record of this hearing is available commencing one hour and fifteen minutes into the hearing at <http://www.tvw.org/MediaPlayer/Archived/WME.cfm?EVNum=2005021042&TYPE=A>. The House Criminal Justice and Corrections Committee considered SB 5582 on March 25, 2006. The record of this hearing is found 15 minutes into the hearing at <http://www.tvw.org/MediaPlayer/Archived/WME.cfm?EVNum=2005030188&TYPE=A>.

committed sexually violent predators to seek change through treatment participation, rather than by hiring a new expert.<sup>6</sup> As noted in testimony before the House, "[t]his bill prevents a misapplication of relatively weak and sometimes not carefully thought through 'scientific evidence' . . . that is not generally accepted or empirically validated."<sup>7</sup>

Based on the testimony and submissions to the Legislative committees, the Legislature adopted extensive and detailed findings. Laws of 2005 c 344 § 1 (attached as Appendix A). These findings explain the basis of the Legislature's decision to limit recommitment trials to individuals with a continuous course of treatment or a substantial physiological change. They also explain why age alone does not justify a new trial. These findings were consistent with findings that were adopted by the Legislature in 1990. See RCW 71.09.010 (Legislative findings).

Under separation of powers doctrine, the legislative findings in SB 5582 are entitled to substantial deference. See *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 320, 931 P.2d 885 (1997) (noting need to defer to legislative findings of fact). After considering testimony and submissions, the Legislature found that the mental conditions involved

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<sup>5</sup> The Final Bill Report for SB 5582 is available at <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/Senate%20Final/5582.FBR.pdf>

<sup>6</sup> House Criminal Justice and Corrections Committee Hearing at 31:00

<sup>7</sup> The House Bill Report is available at <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/House/5582.HBR.pdf>

in RCW 71.09 civil commitments are chronic and long term, that they are unlikely to ameliorate without treatment, that conditional release following treatment completion is the best course for public safety and that the statutory interpretation adopted by the *Young* and *Ward* decisions -- and reflected in the Fall 2010 *McCustion* majority -- undermines the treatment and public safety purposes of the statute. Laws of 2005 c. 344 sec. 1.

Such legislative findings of fact are owed "an additional measure of deference out of respect for [the Legislature's] authority to exercise the legislative power." *Turner Broadcasting System v. F.C.C.*, 520 U.S. 180, 196 (1997). Particularly when the Legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997)(affirming civil commitment of sexually violent predators).

The prior *McCustion* majority failed to grant sufficient deference to the Legislative process by substituting its own views on how sexually violent predators change, including the impact of aging, for the Legislative Findings. The constitution does not place this Court in the position of "reviewing" the adequacy of the legislative record so long as the Legislature has not acted irrationally to resolve societal problems. *Turay*, 139 Wn.2d at 410. It cannot be said that the Legislature acted irrationally

by tying release proceedings to successful treatment.<sup>8</sup> Indeed, with the 2005 amendments to RCW 71.09.090, the Legislature was rationally acting to re-center the annual review process around the "irrefutable" compelling state interests "both in treating sex predators and protecting society from their actions." *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

"Even in the absence of [legislative findings], the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). In addressing a similar Fourteenth Amendment argument under equal protection, this Court has noted that facts need not appear in the record because "rational speculation" is sufficient to affirm an act of the Legislature under the deference owed legislative enactments:

We uphold a legislative classification " 'unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.' " *Turay*, 139 Wn.2d at 410, 986 P.2d 790 (quoting *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996)). As the

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<sup>8</sup> The Legislature is free to have a more optimistic view on the effectiveness of treatment with regard to sexually violent predators than the one forwarded by petitioner McCuiston. Although treatment will not always cause positive change in the "worst of the worst," the Legislature has fulfilled its constitutional and moral duty by making such treatment *available* to committed predators. The fact that treatment might not "work" in some sexually violent predators is not a good reason to eliminate or lower the release procedures required by the Legislature. RCW 71.09 is constitutional even though not all sexually violent predators are treatable. The U.S. Supreme Court has explained that for those individuals with untreatable conditions, "there [is] no federal constitutional bar to their civil confinement, because the State [has] an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions." *Seling v. Young*, 531 U.S. 250, 261-262, 121 S.Ct. 727, 734 (2001).

United States Supreme Court has held, “[a]s long as [the State] ‘rationally advances a reasonable and identifiable governmental objective, we must disregard’ the existence of alternative methods of furthering the objective’ that we, as individuals, perhaps would have preferred.’ ” *Heller v. Doe*, 509 U.S. 312, 330, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981)). Even “rational **speculation** unsupported by evidence or empirical data” provides a basis for upholding the classification under this level of review. *Heller*, 509 U.S. at 320, 113 S.Ct. 2637. The burden rests with the party challenging the classification to show it is purely arbitrary. *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997).

*In re Thorell*, 149 Wn.2d 724, 749, 72 P.3d 708, 722 (2003).

Certainly, if "rationale speculation" is sufficient to defeat a challenge to a statute and to satisfy the deference that this Court should be affording the Legislature, then actual Legislative Findings should be accorded substantial respect under Separation of Powers principles.

Although this case involves the Due Process Clause, rather than the Equal Protection Clause of the Fourteenth Amendment,<sup>9</sup> this Court should afford the same consideration to the factual determinations of the Legislature in adopting the challenged law. *City of Pasco v. Shaw*, 161 Wn.2d 450, 458, 166 P.3d 1157, 1161 (2007) (A challenger must demonstrate that a law "is unconstitutional beyond a reasonable doubt and there are no factual circumstances under which the [law] could be constitutional."). In short,

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<sup>9</sup> Even under the due process clause, because McCuiston has failed to identify a "carefully described" fundamental liberty interest, RCW 71.09.090 is subject only to the same rational basis review that informs an equal protection challenge. *Washington v.*

the prior *McCustion* majority violated separation of powers principles by failing to give substantial deference to the 2005 legislative findings and substituting its policy positions for those of the Legislature.

**C. THE LEGISLATURE'S DECISION TO LIMIT RECOMMITMENT TRIALS BASED ON CONTINUOUS TREATMENT OR PHYSIOLOGICAL CHANGE IS CONSISTENT WITH WELL-RECOGNIZED COLLATERAL ESTOPPEL PRINCIPLES**

By lending a degree of finality to the civil commitment trial and focusing on the need for change brought about by treatment participation, the Legislature has also acted consistently with long recognized principles of collateral estoppel. Although collateral estoppel may not be strictly applicable to civil commitment proceedings, it nonetheless counsels that adjudicated facts are final between the parties unless there is a relevant change in the sexually violent predator's condition. Collateral estoppel, or issue preclusion, refers to the preclusive effect of a judgment in foreclosing the re-litigation of an issue that was actually litigated and decided in an earlier action. *Hiser v. Franklin*, 94 F.3d 1287, 1290 (9th Cir. 1996) (citing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984)).

The Legislature has acted rationally in requiring some showing of

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*Glucksberg*, 521 U.S. 702, 735 (1997).

change due to treatment activities or severe physiological injury before granting a recommitment trial.<sup>10</sup> This Court has recognized and upheld that the purpose of a show cause hearing is to ferret out those cases where there is evidence of a *change* in the person's condition before ordering a new trial. *In re Petersen (Petersen II)*, 145 Wn.2d 789, 798-799, 42 P.3d 952 (2002). The Legislature, rather than granting a new trial to anyone who presents bare evidence of an expert opinion contrary to the predator's initial or current commitment, may require the supporting facts of treatment or physiological change in order to overcome the preclusive effects of the initial commitment determination. It is the Legislature's desire "that judicial resources not be burdened annually with full evidentiary hearings for sexually violent predators absent at least *some* showing of probable cause to believe such a hearing is necessary." *In re Petersen (Peterson I)*, 138 Wn.2d 70, 86, 980 P.2d 1204 (1999) (emphasis added).

Indeed, the ease of obtaining a new trial under the Fall 2011

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<sup>10</sup> In his supplemental brief, McCuistion complains that he cannot be held absent mental illness and danger. No one disputes this point, but it wholly begs the question presented in this appeal: "What evidence is necessary on the record to overcome the prior beyond a reasonable doubt determination that he in fact suffers from a mental condition that renders him dangerous?" The Legislature is merely recognizing that in the absence of *facts* supporting continuous treatment participation or substantial physiological change, there is no need to revisit the mental illness and danger determinations that already support Mr. McCuistion's indefinite civil commitment. Absent facts to support a change, there is no need for a recommitment trial regardless of what opinion is available to a sexually violent predator through a paid expert.

majority opinion would impose substantial unwarranted costs on the state. See Brief of Amicus Curiae King County Prosecuting Attorney in support of reconsideration at 7-10. The administrative costs of requiring the State to conduct recommitment trials based solely on the contrary opinion of a retained defense expert who disputes the initial commitment would be tremendously high. See *In re Brock*, 126 Wn. App. 957, 964, 110 P.3d 791 (2005) (recognizing substantial governmental interest in burden imposed by annual review procedures). The Minnesota Supreme Court noted that "[d]eterminate commitment and yearly petition renewal is a substitute procedural safeguard, but the fiscal and administrative burden on the state would be heavy." *In Re Harhut*, 385 N.W.2d 305, 311 (Minn. 1986).

Although the prior *McCuiston* majority reflects a policy view that recommitment trials should occur frequently – regardless of substantiated treatment or physiological change – such a determination steps outside the powers available to this Court under substantive due process and separation of powers doctrine. Because the Legislature has acted rationally to address a vexing area where there is room for reasonable disagreement, this Court should recognize the deference owed to the Legislature and affirm the 2005 amendments.

**III. SUBSTANTIVE DUE PROCESS REQUIRES ONLY NARROW TAILORING OF THE OVERALL COMMITMENT SCHEME, WHILE ALLOWING THE LEGISLATURE SUBSTANTIAL LATITUDE TO DEFINE THE CONSTITUENT COMPONENTS OF THE COMMITMENT STATUTE**

The prior *McCuiston* majority misinterprets substantive due process to require that each discrete aspect of RCW 71.09 be "narrowly tailored" to represent the least possible imposition on liberty. The prior majority opinion derives support for this proposition EXCLUSIVELY through various citations to *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993):

At the same time, we have recognized that, because the SVP statute contemplates indefinite civil commitment, it presents substantive due process concerns.<sup>FN1</sup> *Id.* at 25-42, 857 P.2d 989 (exploring several aspects of due process). Civil commitment impairs an individual's fundamental right to liberty and so is subject to strict scrutiny. *Id.* at 26, 857 P.2d 989. Strict scrutiny requires that any deprivation of a fundamental right be narrowly tailored to the State's compelling interests. *Id.*

*In re McCuiston*, 169 Wn.2d 633, 638, 238 P.3d 1147, 1149 (2010).

The broad, *Young* "strict scrutiny" holding claimed by the prior *McCuiston* majority, however, applies only "to the statute as a whole," not to its constituent parts. *In re Young*, 122 Wn.2d at 26. Indeed, with the "statute as a whole" approved, the *Young* opinion flatly rejects the argument that each constituent part of the statute must be "narrowly tailored" to inflict the least injury to liberty. Because *Young* rejects the

very analysis ascribed to it by the prior *McCustion* majority and the *Young* analysis is consistent with *Glucksberg*, this Court should abandon its prior *McCustion* majority position.

In *Young*, the court noted that substantive due process requires that a statute impacting liberty be narrowly drawn to serve a compelling state interests. Rather than applying this "strict scrutiny" requirement to each constituent part of RCW 71.09, the court held that the strict scrutiny analysis was properly applied only "to the statute as a whole." 122 Wn.2d at 26. Indeed, the court made quick work of its analysis, pointing out that RCW 71.09 served the compelling interests of treatment of sexual predators and protection of the public from danger. *Id.* The court noted that "the court has consistently upheld civil commitment" under the strict scrutiny test. *Id.*

The court went on to determine the statute was "narrowly drawn." *Id.* In examining this aspect of strict scrutiny, the court again focused on the statute as a whole, not on its constituent parts. This Court found that the civil commitment scheme was focused on individuals with a mental condition that satisfied constitutional requirements. *Id.* at 26-31. The court also noted that "the sexually violent predator statute" required proof of dangerousness as a prerequisite for civil commitment. *Id.* at 31. Maintaining its focus on the statute as a whole, this Court held that "[i]n

short, the Statute satisfies the due process concerns outlined in *Addington v. Texas*, 441 U.S. 418." *Id.*

At this point, the *Young* court concluded its strict scrutiny analysis. Contrary to the analysis in the prior *McCuiston* opinion, there was no inquiry into each constituent part of RCW 71.09.

In fact, the strict scrutiny approach of the prior *McCuiston* majority is without support in law and represents a tremendous infringement on Legislative authority. It is impossible to draft a workable statute that is narrowly tailored in each of its constituent parts. For example, in the civil commitment context, strict scrutiny would require that every decision-point in the statute offer the least impact on the person's liberty and the best chance to avoid civil commitment. There is no room for balance or discretion, only the perfection of the least infringement on individual liberty. This might mean that it is impermissible to hold a civil commitment detainee in jail pending a hearing because the government could, theoretically, build high security, temporary civil commitment facilities in each county. Indeed, a centralized state-run facility would be in jeopardy because each person would be entitled, under the strictest scrutiny, to custody conditions that are narrowly tailored to the individual's particular risks and dangers. Under the constituent strict scrutiny analysis of the prior *McCuiston*

opinion, when sufficient to protect the public, the State would be required to tether certain SVPs to twenty-four hour guards if it meant a greater opportunity for that person to roam the community and exercise freedom.

Contrary to this approach, the "nature and duration" portion of the *Young* opinion rejects the need for an individualized civil commitment scheme.<sup>11</sup> Petitioners in *Young* argued that they were "constitutionally entitled to the least restrictive alternatives to confinement available." 122 Wn.2d at 34. This Court flatly rejected that argument, refusing to "place undue limitations on the administration of state institutions."<sup>12</sup> *Id.* As with strict scrutiny, the court limited its constitutional due process review to the overall statutory scheme, not the constituent parts of the statute: "*Facially*, the Statute and associated regulations suggest that the nature and duration of commitment is compatible with the purposes of the commitment." *Id.*(emphasis added). The *Young* opinion rejects the very analytical framework that the prior *McCustion* opinion claims it supports. *See Young*, 122 Wn.2d at 42 ("In sum, *the Statute* does not violate substantive due process."; emphasis added). Under substantive due process, it is not

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<sup>11</sup> Although related, the *Young* opinion notes that "nature and duration" is separate from strict scrutiny analysis. *See id.* at 33 (treating nature and duration as a separate, but related topic).

<sup>12</sup> Although rejected as a matter of substantive due process, a later section of the *Young* opinion requires the possibility of a less restrictive alternative placement under an equal protection analysis. 122 Wn.2d at 47.

appropriate for this Court to strictly scrutinize each constituent part of RCW 71.09 because *Young* has already determined that the scheme itself is narrowly tailored to satisfy compelling state interests.

The *Glucksberg* decision likewise presents a bar to strictly scrutinizing each constituent part of RCW 71.09. Because *McCuiiston* failed to establish a "carefully described" fundamental right to a new trial under substantive process, the provisions of RCW 71.09.090(4) must be upheld so long as they bear "a reasonable relation to a legitimate state interest." 521 U.S. at 722. As detailed above in Section II, the 2005 amendments were adopted with the legitimate and compelling state interest of tying release decisions to treatment participation.

Although this Court's role in reviewing the constitutionality of statutes is one of the bulwarks of our system, an equally important bulwark is deferring to the Legislature when it acts within its authority. Strict scrutiny doctrine should not be expanded to require that every provision in a complicated statutory scheme match the least restrictive approach necessary to preserve a modicum of freedom.<sup>13</sup> Such an approach would

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<sup>13</sup> In this regard, the prior *McCuiiston* majority opinion appears to confuse the differences between due process strict scrutiny review and the rule of statutory construction where a statute is "strictly construed." The later should never operate as a vehicle to revise a legislative enactment contrary to the Legislature's intent. This Court has recognized that "our paramount duty in statutory interpretation is to give effect to the Legislature's intent." *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). It would be error of a constitutional magnitude for this court to utilize strict construction as a quasi-"rule of

paralyze the state and sacrifice valid, necessary statutory schemes on the alter of the perfect. Because the prior *McCuiston* majority expanded strict scrutiny beyond any reasonable interpretation of precedent, it should be abandoned.

**IV. CONCLUSION**

For the foregoing reasons, the court should abandon its prior *McCuiston* majority opinion and affirm the trial court.

DATED this 12th day of April, 2011.



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Attorney for Amicus Curiae  
Washington Association of Prosecuting Attorneys

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lenity" to thwart the Legislature's actual intent. *See In re Aqui*, 84 Wash.App. 88, 101, 929 P.2d 436 (1996) (refusing to apply the rule of lenity and presumption of innocence in SVP cases).

## APPENDIX A

The legislature finds that the decisions in *In re Young*, 120 Wn. App. 753, *review denied*, 152 Wn.2d 1007 (2004) and *In re Ward*, 125 Wn. App. 381 (2005) illustrate an unintended consequence of language in chapter 71.09 RCW.

The *Young* and *Ward* decisions are contrary to the legislature's intent set forth in RCW 71.09.010 that civil commitment pursuant to chapter 71.09 RCW address the "very long-term" needs of the sexually violent predator population for treatment and the equally long-term needs of the community for protection from these offenders. The legislature finds that the mental abnormalities and personality disorders that make a person subject to commitment under chapter 71.09 RCW are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors.

The legislature finds, although severe medical conditions like stroke, paralysis, and some types of dementia can leave a person unable to commit further sexually violent acts, that a mere advance in age or a change in gender or some other demographic factor after the time of commitment does not merit a new trial proceeding under RCW 71.09.090. To the contrary, the legislature finds that a new trial ordered under the circumstances set forth in *Young* and *Ward* subverts the statutory focus on treatment and reduces community safety by removing all incentive for successful treatment participation in favor of passive aging and distracting committed persons from fully engaging in sex offender treatment.

The *Young* and *Ward* decisions are contrary to the legislature's intent that the risk posed by persons committed under chapter 71.09 RCW will generally require prolonged treatment in a secure facility followed by intensive community supervision in the cases where positive treatment gains are sufficient for community safety. The legislature has, under the guidance of the federal court, provided avenues through which committed persons who successfully progress in treatment will be supported by the state in a conditional release to a less restrictive alternative that is in the

best interest of the committed person and provides adequate safeguards to the community and is the appropriate next step in the person's treatment.

The legislature also finds that, in some cases, a committed person may appropriately challenge whether he or she continues to meet the criteria for commitment. Because of this, the legislature enacted RCW 71.09.070 and 71.09.090, requiring a regular review of a committed person's status and permitting the person the opportunity to present evidence of a relevant change in condition from the time of the last commitment trial proceeding. These provisions are intended only to provide a method of revisiting the indefinite commitment due to a relevant change in the person's condition, not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition. Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials. Therefore, the legislature intends to clarify the "so changed" standard.

Laws of 2005 c 344 § 1.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 81644-1

Respondent,

DECLARATION OF SERVICE

vs.

DAVID McCUISTION

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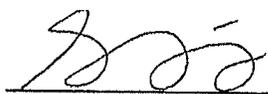
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Dated this 12<sup>th</sup> day of April 2011

  
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No 81644-1

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