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Supreme Court No. _____
No. 63052-1-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
JAN 20 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

JOHN ROBERT HURST,

Appellant.

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Fox

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

John Robert Hurst, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision on appeal, as designated in Part B of this petition, pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), Ms. Winston seeks review of the published Court of Appeals decision in State v. John Robert Hurst, No. 63052-1-I. The opinion was filed on December 6, 2010, and is attached to this petition as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. John Hurst was charged with third degree assault for striking a nurse, and was committed to Western State hospital for two 90-day periods, during which his doctors failed to restore his competency. RCW 10.77.086(4) allows a final 180-day commitment period if the court or jury finds that there is a substantial probability the defendant will regain competency within a reasonable period of time. But RCW 10.77.086 fails to specify the proper standard of proof on the issue of restorability. In Born v.

Thompson,¹ this Court analyzed the misdemeanor competency statute – which also failed to specify the proper standard of proof – under the Mathews v. Eldridge balancing test. Where the Court of Appeals rejected this Court’s analysis in Born and instead adopted the deferential Medina v. California² standard, which allowed the court to avoid analysis of the Mathews factors and defer to its own determination of the Legislature’s intended standard of proof, should this Court grant review under RAP 13.4(b)(1)?

2. Where RCW 10.77.086(4) is silent as to the standard of proof required on the issues of restorability and dangerousness, should this Court grant review to determine what standard of proof due process requires? RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

1. Facts and Competency Hearings. John Hurst was charged with Assault in the Third Degree for allegedly striking a nurse and throwing a shoe at her at Swedish Medical Center on March 11, 2008. CP 1-3.

On March 31, 2008, prior to arraignment and over Mr. Hurst’s objection, Mr. Hurst’s defense counsel argued that he was

¹ 154 Wn.2d 749, 753-62, 117 P.3d 1098 (2005)(citing Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.18 (1976)).

² 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 498 (1996).

not competent to stand trial, and the trial court ordered a competency evaluation at Western State Hospital (WSH). CP 8-11. On May 12, 2008, the trial court found Mr. Hurst incompetent and ordered him to undergo treatment for restoration of competency at WSH for 90 days. CP 12-14.

On August 20, 2009, the court found that WSH had not restored Mr. Hurst's competency, and ordered him to be committed for another 90 days. CP 15-17. On November 17, 2008, WSH therapists reported that they had been unable to restore Hurst's competency and requested a further period of 180 days. CP 19-27. Mr. Hurst's trial counsel requested and was granted a jury trial pursuant to RCW 10.77.086(4) on the issue of whether there was a substantial probability Mr. Hurst would regain competency within the 180-day restoration period (hereinafter "restorability").

12/16/08RP 3; CP 18.³

At trial, several witnesses testified, including the State's witnesses, Dr. Julie Gallagher, Ph.D. and Dr. Peter Bingcang, M.D., as well as defense witness Dr. Kevin Petersen, Ph.D. All of the witnesses testified that Mr. Hurst was incompetent. 2/3/09AMRP

³ The verbatim report of proceedings consists of ten non-consecutively paginated volumes referred to as 12/16/RP, 1/15/09RP, 1/20/09RP, 1/23/09RP, 1/28/09RP, 2/2/09RP, 2/3/09AMRP, 2/3/09PMRP, 2/4/09RP, and 2/5/09RP.

26; 2/4/09RP 10, 58. The defense expert testified that Mr. Hurst was not likely to be restored because his delusions do not respond to medication and prevent him from aiding his attorney in his defense. 2/4/09RP 62-65. The State's experts testified that there was a substantial probability of restoration within 180 days because Mr. Hurst had shown some improvement, and competency had been restored in the past. 2/3/09AMRP 26, 32-33; 2/4/09RP 10, 30-32.

Mr. Hurst's trial counsel requested that the trial court instruct the jury that the standard of proof on the issue of restorability is clear, cogent, and convincing evidence. 1/28/09RP 9-31; CP 19-44.⁴ The trial court denied the request and instructed the jury that the standard of proof on all elements was preponderance of the evidence. CP 49-65 (Instruction 6).⁵

⁴ Mr. Hurst's proposed jury instructions provide in relevant part:

The burden is on the State to establish that the defendant is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety. The burden is on the State to establish there is a substantial probability that the defendant will regain competency in a reasonable period of time. The State must prove each of these elements by clear, cogent, and convincing evidence.

⁵ The superior court's instructions provide in relevant part:

In order to return the defendant to Western State Hospital for a period not to exceed 180 days, the State bears the burden of proving by a preponderance of evidence that:

The jury found by a preponderance of the evidence that there was a substantial probability that Mr. Hurst would regain competency within a reasonable amount of time (i.e., 180 days), and the trial court ordered Mr. Hurst to be committed at WSH for another 180 days. CP 66-68.

2. The Court of Appeals Granted Discretionary Review on the Standard of Proof Issue. Mr. Hurst filed a motion for discretionary review in Division One of the Court of Appeals arguing, among other things, that the superior court erred by instructing the jury on the incorrect standard of proof required under RCW 10.77.086(4) because due process requires the clear, cogent, and convincing evidence standard. See RAP 2.3(b)(2).

Commissioner's Ruling at 7-8.⁶

The Court of Appeals granted review on that issue – although Mr. Hurst's completion of the 180-day restoration period

-
- (1) the defendant presents a substantial danger to others,
OR
 - (2) the defendant presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, AND
 - (3) there is a substantial probability that the defendant will regain competency in a reasonable period of time.

If you find from the evidence that the State has proven EITHER element (1) or element (2) by a preponderance of evidence, then you will consider whether the State has proven element (3) by a preponderance of the evidence.

⁶ A copy of the Commissioner's ruling granting discretionary review is attached at Appendix B.

(wherein WSH was unable to restore his competency) rendered the case moot. The Court reasoned, "This is the type of issue which Washington courts have held meets the standard for continuing and substantial public interest. [. . .] The standard of proof is of a public nature, an authoritative [determination] is desirable for future cases, and the issue is likely to recur." Commissioner's Ruling at 8.

3. Court of Appeals Decision. The Court of Appeals held that the preponderance standard is the appropriate standard of proof for the elements under RCW 10.77.086(4), including the issue of restorability (whether "there is a substantial probability that the defendant will regain competency within a reasonable period of time") as well as dangerousness (whether "the defendant (i) is a substantial danger to other persons or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security").

The Court of Appeals agreed with Hurst that RCW 10.77.086(4) does not specify the proper standard necessary to prove the issues of restorability and dangerousness before the court may order the final 180-day commitment. Slip Op. at 4. Hurst argued that because the Legislature did not identify the proper standard of proof, the Court of Appeals should determine the

proper standard through an analysis of the Mathews factors, as this Court did in Born. Slip Op. at 5-6; App. Op. Br. at 7-14.

The Court of Appeals rejected this approach, instead adopting the deferential standard under Medina because this case involved a criminal matter. Slip. Op. at 5-6 (citing State v. Heddrick, 166 Wn.2d 898, 904 n.3, 215 P.3d 201 (2009)(footnote stating that the Medina analysis, not the Mathews balancing test, is the appropriate analytical framework for due process challenges in criminal cases). But, without a specified standard of proof to which to defer, the Court of Appeals had to defer to its own determination of the Legislature's judgment. The Court of Appeals concluded that the Legislature must have intended to require the preponderance standard because the previous section of the statute specifies the preponderance standard for the question of competency at the hearing prior to the second 90-day commitment period.⁷ Slip Op. at 4-5. The Court of Appeals further explained that the Legislature's decision to include the elements of dangerousness and restorability in the same section as the competency element in section (4) leads to the "inevitable" conclusion that the Legislature intended courts to use the standard specified in section (3) – which addresses a

⁷ The full text of RCW 10.77.086 is attached at Appendix C.

separate hearing that does not require proof of additional elements.
Slip Op. at 5.

Without addressing the Mathews factors, the Court of Appeals then concluded that the preponderance standard satisfies due process and that the trial court correctly instructed the jury.
Slip Op. at 6-9.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(B)(1) BECAUSE DIVISION ONE'S USE OF THE DEFERENTIAL MEDINA ANALYSIS CONFLICTS WITH THIS COURT'S USE OF THE MATHEWS BALANCING TEST IN BORN

"[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Born v. Thompson, 154 Wn.2d at 755 (quoting Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)). In Born, this Court analyzed the question of what standard of proof due process requires where a defendant charged with a misdemeanor – which involved one or more violent acts – faces involuntary commitment in order to restore his competency to stand trial. 154 Wn.2d at 753-757. The competency statute addressed in Born – former RCW 10.77.090(1)(d)(i) – did not specify the requisite standard of proof,

so the Court utilized the Mathews balancing test to determine which standard due process demanded. Id. This Court explained,

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 (emphasis added) (quoting Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (citing Mathews, 424 U.S. at 335.

The Born Court did not, as the Heddrick Court did, label the case as a criminal case and apply the Medina analysis. See Heddrick, 166 Wn.2d 898, 904 n.3 (finding that the Mathews balancing test was the inappropriate analytical framework for a criminal case where the defendant argued that the trial court’s failure to follow statutory procedures in finding him competent to stand trial violated due process). Rather, the Court treated the case as one involving civil commitment and followed civil commitment cases such as Addington, LaBelle, and McLaughlin. Id. at 754-62 (citing In re Detention of LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986); In re McLaughlin, 100 Wn.2d 832, 843, 676 P.2d 444 (1984)). That is because, unlike Heddrick, the outcome faced

by Born was involuntary civil commitment, which – although stemming from a criminal case – rendered the case more of a civil commitment case than a criminal case. Heddrick’s due process challenge, in contrast, implicated his right to be competent at trial and not his liberty interest associated with involuntary commitment. So, whereas the Medina analysis was adequate in Heddrick, it was not the proper analysis in Born because it would have ignored the defendant’s liberty interest and risk of erroneous deprivation.

Further, the Medina analysis was inappropriate in Born because there was no legislative judgment to which to defer – as the statute was silent on the requisite standard of proof. 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)). But such deference is absurd where the State has made no such judgment.

As in Born, the Medina analysis was inappropriate here. Mr. Hurst faced involuntary commitment based on probable cause that he had committed a crime, so this case, like Born, is more of a civil commitment case than a criminal case where Medina would apply. Further, because the statute, RCW 10.77.086(4), failed to specify a standard of proof, it made little sense for the Court of Appeals to defer to a judgment the Legislature never made.

The Court of Appeals should have analyzed the competing interests under Mathews in order to determine the proper standard of proof. This Court should grant review under RAP 13.4(b)(1) because Division One's decision conflicts with Born, and hold that the proper analysis is the Mathews balancing test.

2. THIS COURT SHOULD GRANT REVIEW AND
HOLD THAT DUE PROCESS REQUIRES
PROOF OF RESTORABILITY UNDER RCW
10.77.086(4) BY CLEAR, COGENT, AND
CONVINCING EVIDENCE

a. RCW 10.77.086 is silent as to the standard of proof required to commit a person to restore competency for a final period of 180 days. Under RCW 10.77.086, if a superior court determines a defendant charged with a felony is incompetent, it may commit the defendant for evaluation and treatment for no more than ninety days. After this 90-day period, the superior court must

hold a hearing to determine the defendant's current competency before it may commit the defendant for a second 90-day period. RCW 10.77.086(2)-(3). Before the expiration of the second 90-day period, the court must conduct another competency hearing before it may commit the defendant for a final 180-day commitment period. RCW 10.77.086(3)-(4).

Under RCW 10.77.086(3), the standard of proof for the court's determination of competency for the second 90-day commitment period is preponderance of the evidence. However, the statute is silent on the standard of proof for the additional elements required to commit the defendant for the final 180-day restoration period. The statute provides in relevant part:

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

RCW 10.77.086(4).

b. The preponderance standard is inadequate considering the significant deprivation of liberty and risk of erroneous deprivation at stake where a person is committed for a second 180-day period to restore competency. “[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Born, 154 Wn.2d at 755 (quoting Addington, 441 U.S. at 425).

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 cases involving restriction of an individual’s rights, “the standard of proof [. . .] reflects [. . .] the value society places on individual liberty.” Id. at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)).

Courts hold that the preponderance standard is inadequate where there is a deprivation of liberty similar to that in this case. In Addington, the United States Supreme Court rejected the preponderance of the evidence standard for involuntary civil commitment proceedings because the individual liberty interests were so significant that the State had to justify confinement by a more substantial burden of proof. Id. at 427; see also McLaughlin, 100n.2d at 843 (following Addington to hold preponderance standard insufficient to satisfy due process in involuntary commitment proceedings).

In Born, the Washington Supreme Court followed the reasoning in Addington and held that the clear, cogent, and convincing standard of proof applies to commitment for the purpose of restoring competency of a defendant charged with a misdemeanor that involves one or more violent acts. 154 Wn.2d at 761-62. The Court reasoned that this standard is justified due to the high risk of erroneous deprivation where a defendant may be committed based solely on probable cause he has committed a crime, and because the individual's liberty interest outweighs the government's interest in public safety and prosecuting misdemeanors. Id. at 756, 761.

In the context of similar deprivations of liberty, the required standard of proof is much higher than the preponderance of the evidence. The standard of proof required for a 90-day involuntary commitment is clear, cogent, and convincing evidence.

McLaughlin, 100 Wn.2d at 843. Where the State seeks civil commitment of a person under the sexually violent predator statute, it must prove each element beyond a reasonable doubt. RCW 71.09.060. When the State seeks to deprive a parent of the fundamental right to parent his children, it must prove the statutory elements by clear, cogent, and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re S.V.B., 75 Wn. App. 762, 768, 880 P.2d 80 (1994).

In this case, as in Addington, Born, and McLaughlin, the preponderance standard was insufficient to satisfy due process. The balancing of the defendant's liberty interest, the risk of erroneous deprivation, and the State's interest is very similar to the balancing of those factors in Born.

As in Born, the risk of erroneous deprivation was high because Mr. Hurst was committed based only on probable cause that he had committed a crime. At the point where a court may commit a defendant for the final 180-day restoration period, both

the defendant's liberty interest and risk of erroneous deprivation are greater than they were at the initial 90-day commitment, where the preponderance standard is sufficient. RCW 10.77.086(3). That is, the lack of success in restoring competency within the first 180-days indicates a low probability for success during an additional 180-days. In Mr. Hurst's case, the defense expert testified that, based on the fact that Mr. Hurst's delusions had not responded to medication during the first two 90-day periods, restoration during the additional 180-day period was unlikely. 2/4/09RP 62-65.

Further, the liberty interest here is greater than that for a 90-day period of involuntary commitment in McLaughlin because the period of commitment is longer.

Also as in Born, the State's interest here does not outweigh Mr. Hurst's liberty interest and risk of erroneous deprivation. The State's interest in prosecuting this Third Degree Assault charge does not justify such a low standard of proof. Nor does the State's interest in public safety justify this low standard, because the State had the option of seeking involuntary commitment in order to address any danger Mr. Hurst might have posed to the public. See Born, 153 Wn.2d at 756.

Thus, the balancing of the Mathews factors in this case indicates that the preponderance of the evidence standard was not sufficient to satisfy due process.

c. This Court should grant review and hold that the standard of proof required under RCW 10.77.086(4) is the same standard required by *Born* and *McLaughlin*, and by the involuntary commitment statute: clear, cogent, and convincing evidence.

Because the balancing of the Mathews factors in this case are similar to that in Born, and the liberty interest here is greater than in McLaughlin, this Court should require the same standard of proof as in those cases: clear, cogent, and convincing evidence.

There is no reason the standard of proof required for involuntary commitment for the final 180-day period of restoration treatment should be any less than that required for involuntary commitment for 90 days. At the point where the defendant has already been committed for two 90-day restoration periods, the need to restore competency is not by itself sufficient for further commitment. RCW 10.77.086(4) requires that the State prove not only incompetency, but also that

(a) The defendant (i) is 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.

Similarly,

[U]nder the voluntary commitment statute, RCW 71.05, persons may be involuntarily committed for treatment of mental disorders if, as a result of such disorders, they either (1) pose a substantial risk of harm to themselves, others, or the property of others, or (2) are gravely disabled.

LaBelle, 107 Wn.2d at 201-02 (citing RCW 71.05.020(1)(3), .150, .240, .280, .320). Thus, for both types of involuntary commitment, the State must prove that the defendant poses some danger.

If this Court finds that the low preponderance standard is sufficient to satisfy due process in the context of the final 180-day restoration period, it would create an end-run around the due process protections surrounding involuntary commitment. Such a holding would encourage the State – as it did in this case – to pursue commitment for competency restoration rather than general involuntary commitment in order to avoid the higher standard of proof, even though general involuntary commitment might be more appropriate. Consequently, defendants would suffer longer periods of involuntary commitment based on less substantial evidence.

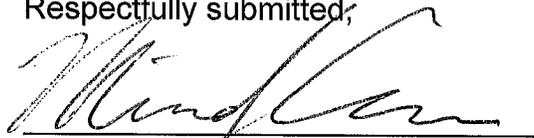
The preponderance standard is not sufficient to satisfy due process in this context. Therefore, this Court should grant review and hold that the standard of proof required for commitment pursuant to RCW 10.77.086(4) is clear, cogent, and convincing evidence.

F. CONCLUSION

For the above reasons, Mr. Hurst respectfully requests this Court grant review under RAP 13.4(b)(1), 13.4(b)(3), or 13.4(b)(4) and hold that due process requires that the elements under RCW 10.77.086(4) be proven by clear, cogent, and convincing evidence.

DATED this 3rd day of January 2011.

Respectfully submitted,



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JOHN ROBERT HURST,)
)
 Appellant.)

No. 63052-1-1
DIVISION ONE
PUBLISHED OPINION
FILED: December 6, 2010

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 DEC -6 AM 9:17

GROSSE, J. — To commit a defendant to a third confinement for restoration of competency, the State must prove that the defendant will be restored to competency, and that the defendant is either a substantial danger to others, or that the defendant will commit criminal acts jeopardizing public safety or security. Here, the jury was properly instructed that it need only find these additional factors by a preponderance of the evidence.¹ We believe that instruction to have been proper.

FACTS

On March 20, 2008, John Hurst was charged with felony third degree assault. On the defense's motion, the trial court ordered a pretrial competency evaluation. In May 2008, the trial court found Hurst incompetent to stand trial and ordered him committed to Western State Hospital (Western) for up to 90 days for competency restoration.² In August 2008, the trial court again found

¹ Although the defendant has since been found to remain incompetent and the criminal charges against him have been dismissed, potentially rendering the issue moot, we nonetheless grant discretionary review because the matter is of continuing and substantial public interest.

² RCW 10.77.086(1).

Hurst incompetent to stand trial and ordered him committed to Western for a second 90-day period for competency restoration.³

On November 17, 2008, Western reported that Hurst remained incompetent to stand trial and requested an additional 180 days for competency restoration. Hurst requested a jury trial on all issues, including his incompetency. Defense counsel argued Hurst was incompetent and not entitled to a jury on this question. Appointed independent counsel agreed, as did the State. After hearing from Hurst and reviewing the reports from the State and defense experts, all of whom agreed Hurst was not competent, the court found Hurst was not competent to stand trial and therefore had no legal right to a jury trial to contest competency.

Pursuant to RCW 10.77.086(4), defense counsel requested a jury trial on the remaining issue of whether the criminal charges should be dismissed. RCW 10.77.086(4) provides that if a defendant is found incompetent, the charges shall be dismissed unless a jury finds that the incompetent defendant "is a substantial danger to other persons; or . . . presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and . . . there is a substantial probability that the defendant will regain competency with a reasonable period of time."

Defense counsel argued that the jury was required to find these additional factors by clear, cogent, and convincing evidence. The trial court disagreed and instructed that the jury need only find these factors by a preponderance of the

³ RCW 10.77.086(3).

evidence. At the conclusion of the evidence, the jury found that Hurst did not present a substantial danger to others, but did find that there was a substantial likelihood that he would commit criminal acts jeopardizing public safety or security, and that there was a substantial probability that he would regain competency within a reasonable period of time.

On February 6, 2009, the trial court entered an order finding Hurst incompetent based on its earlier determination. The court ordered Hurst committed to Western a third time for up to 180 days for competency restoration, in accordance with the jury's findings. Subsequently, Western reported that Hurst remained incompetent. On August 3, 2009, the court dismissed the charges without prejudice and ordered Hurst held pending the filing of a civil commitment petition under chapter 71.05 RCW. Hurst appealed and we granted discretionary review.

ANALYSIS

RCW 10.77.086 sets forth the procedures for a trial court to restore competency. Upon an initial finding of incompetency, the court may commit a defendant to Western for 90 days for evaluation and treatment. At the end of that period, the court is required to hold a hearing in accordance with RCW 10.77.086(2). In order to extend the order of commitment for an additional 90 days, the court must hold another hearing and find the defendant incompetent by a preponderance of the evidence.⁴ At the end of the second 90-day period, if the defendant is still found incompetent, the charges must be dismissed unless the

⁴ RCW 10.77.086(3).

finder of fact makes two additional findings that warrant continued commitment for up to 180 days:

For persons charged with a felony, at the hearing upon the expiration of the second ninety-day period . . . if the jury or court finds that the defendant is incompetent, the charges shall be dismissed without prejudice, and either civil commitment proceedings shall be instituted or the court shall order the release of the defendant. The criminal charges shall not be dismissed if the court or jury finds that: (a) The defendant (i) is 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.^[5]

RCW 10.77.086(4) does not specify the proper burden of proof needed for continued confinement for mental health treatment to restore competency. The State and the defendant both agree that the initial findings of incompetency should be supported by a preponderance of the evidence. The defendant argues that the additional factors needed to continue confinement past the second 90-day period require a higher standard of proof than a preponderance of the evidence.

In interpreting a statute, our fundamental objective is to carry out legislative intent.⁶ The plain meaning of a statute is determined from the language used, the context of the statute, related provisions, and the statutory scheme as a whole.⁷ Here, the previous subsection of the statute explicitly

⁵ RCW 10.77.086(4).

⁶ State v. Alvarez, 128 Wn.2d 1, 11, 904 P.2d 754 (1995).

⁷ State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

imposes a preponderance of the evidence standard of proof.⁸ Had the legislature intended that a different standard of proof applies to the third finding of incompetency, it would have explicitly so stated. The fact that the findings of additional grounds are included in the same section under which a fact finder must find incompetency leads to the inevitable conclusion that the same standard applies to the entire section. This is particularly true because, unlike the present case, the jury is normally presented with the question of competency at the same time it decides the additional factors.

Nonetheless, Hurst argues that he was denied due process of law.⁹ Hurst argues that we should apply the Mathews v. Eldridge¹⁰ balancing test to determine what standard of proof is required to satisfy procedural due process. But in State v Heddrick,¹¹ our Supreme Court explicitly rejected the Eldridge test for criminal matters. Instead, in criminal cases, it found the appropriate analysis to be the due process analysis as articulated in Medina v California.¹²

⁸ RCW 10.77.086(3). The use of a preponderance of the evidence standard for determination of incompetency is in accord with the United State Supreme Court's holding in Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) (overruling Oklahoma statute that imposed clear and convincing standard of proof on a defendant who asserts incompetency).

⁹ U.S. CONST. AMENDS. V, XIV; WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

¹⁰ 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In Mathews, the United States Supreme Court held that courts should weigh the following factors to determine what process is due in a particular situation: (1) the private interest at stake in the governmental action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government interest, including the additional burdens that added procedural safeguards would entail.

¹¹ 166 Wn.2d 898, 904 n.3, 215 P.3d 201 (2009); cf., Born v. Thompson, 154 Wn.2d 749, 117 P.3d 1098 (2005).

¹² 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

Under Medina, courts give substantial deference to state legislative judgments in matters of criminal procedure.¹³ Here, the State has set forth the due process procedures for those defendants who, although found to be incompetent, are still capable of being restored to competency so that they will face the charges. The preponderance of evidence standard satisfies the requirement of due process in these circumstances. Due process does not require the State to adopt a procedure simply because that procedure may produce more safeguards to a defendant.¹⁴ As the Medina court noted, “[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society’s interests against those of the accused ha[s] been left to the legislative branch.”¹⁵

Hurst argues that involuntary civil commitment is a “massive curtailment of liberty.”¹⁶ In Addington v. Texas,¹⁷ the United States Supreme Court held that before an individual may be civilly committed to a mental institution under state law, the State must prove mental illness and present dangerousness by clear and convincing evidence. The court held that clear and convincing evidence is

¹³ 505 U.S. at 446.

¹⁴ Medina 505 U.S. at 451 (“[A] state procedure ‘does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.’”) (quoting Snyder v. Commonwealth of Mass., 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

¹⁵ 505 U.S. at 453 (quoting Patterson v. New York, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)).

¹⁶ In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)).

¹⁷ 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

the minimum standard upon which civil commitments rest.¹⁸ The Addington court "recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."¹⁹

But civil commitment generally differs from those cases where the issue is restoration of competency so that a defendant can face the charges against him. The State has an interest in prosecuting felony criminal charges and in protecting the public. Application of the preponderance standard to the issues of dangerousness and restorability of an incompetent felony defendant does not offend deeply rooted principles of justice. Historically, courts have used the preponderance of evidence standard to commit defendants indefinitely to restore competency.²⁰ No separate findings were necessary to justify such unlimited commitment for restoration of competency until 1972 when the United States Supreme Court issued its decision in Jackson v. Indiana.²¹

In Jackson, the court held that an incompetent defendant may not be committed indefinitely without further protection.²² The court opined that the State can hold a person for a reasonable period of time to determine his competency, and that it can hold a person for a further reasonable time for him to

¹⁸ Addington, 441 U.S. at 433.

¹⁹ 441 U.S. at 425.

²⁰ See Greenwood v. United States, 350 U.S. 366, 76 S. Ct. 410, 100 L. Ed. 412 (1956) (indefinite commitment of incompetent defendant, despite slim chance of restoration).

²¹ 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

²² 406 U.S. at 738.

recover competency to stand trial, so long as the continued commitment is justified by progress towards that goal.²³

Here, the medical testimony supported continued commitment for restoration. A reasonable period is that period of time which is necessarily required to effectuate the overriding state interest in prosecuting felonies and protecting the public. To that extent, the State may commit a person for a reasonable period of time to determine competency and to restore such competency, under the procedures outlined in chapter 10.77 RCW. The preponderance of evidence standard is adequate considering the deprivation of liberty is of a finite duration.

The statute also expressly provides for statutory safeguards to protect individuals from arbitrary governmental action. Under RCW 10.77.020, a person is entitled to assistance of counsel and, if indigent, counsel will be appointed; anyone subjected to an examination may retain an expert to perform an examination on his or her behalf; a defendant is entitled to have counsel present during any examinations; and a defendant may refuse to answer any questions he or she believes might be incriminating.

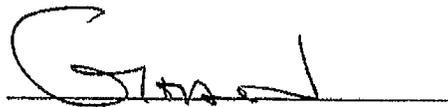
The defendant's reliance on Born v. Thompson²⁴ as requiring a higher standard of proof is misplaced. Born's holding is clearly limited to misdemeanors. There, the court stated that "[t]he government simply does not have the same interest in prosecuting misdemeanor defendants as it does in

²³ Jackson, 406 U.S. at 738.

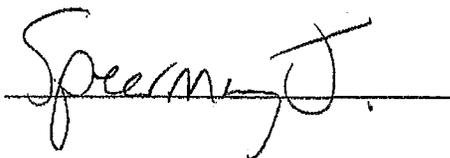
²⁴ 154 Wn.2d 749, 117 P.3d 1098 (2005).

prosecuting defendants charged with felonies."²⁵ The defendant here was charged with a felony.

The due process afforded in the statute is sufficient. The statute provides more than adequate safeguards to protect the defendant from unreasonable governmental interference. Accordingly, we hold that the jury was correctly instructed.

A handwritten signature in cursive script, appearing to be "G. Stone", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to be "Spearmint", written over a horizontal line.A handwritten signature in cursive script, appearing to be "Appelrecht", written over a horizontal line.

²⁵ Born, 154 Wn.2d at 756.

Appendix B

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

RECEIVED

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JOHN ROBERT HURST,)
)
)
 Petitioner.)
 _____)

No. 63052-1-I OCT - 2 2009
Washington Appellate Project
COMMISSIONER'S RULING
GRANTING DISCRETIONARY
REVIEW

John Hurst seeks discretionary review of a trial court order committing him to Western State Hospital for evaluation and treatment for up to 180 days to restore his competency to stand trial. As explained below, review is granted on the single issue of the standard of proof.

On March 20, 2008, Hurst was charged with felony third degree assault based on an incident in which he threw a shoe at a nurse. Defense counsel raised the issue of Hurst's competency. Hurst was transferred to Western State Hospital (WSH) for up to 15 days for a competency evaluation. See RCW 10.77.060. On May 12, 2008, the trial court found Hurst incompetent to stand trial and ordered him committed to WSH for up to 90 days for competency restoration. See RCW 10.77.086(1). On August 20, 2008, the trial court again found Hurst incompetent to stand trial and ordered him committed to WSH for a second 90 days of competency restoration. See RCW 10.77.086(3).

On November 17, 2008, WSH reported that Hurst remained incompetent to stand trial and requested an additional 180 days of treatment for competency

restoration. Defense counsel requested a jury trial under RCW 10.77.086(4). Under this provision, if the jury or the court finds the defendant incompetent, then the charges are dismissed unless the jury or court finds that "(a) [t]he defendant (i) is 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 with a reasonable period of time." RCW 10.77.086(4) (emphasis added). Defense counsel took the position that Hurst was incompetent and not restorable to competency and accordingly sought a jury trial only on the latter question. But Hurst also wanted a jury trial on the issue of competency. So, citing a conflict of interest, counsel requested that Hurst be appointed independent counsel to pursue the issue of competency. The trial court initially denied independent counsel, but then on reconsideration, reversed its earlier ruling and authorized appointment of independent counsel. Subsequently, independent counsel appeared at a hearing and argued that Hurst was incompetent and that he had no right to present the issue of competency to a jury. The State agreed. The court expressed reservations about this approach, but after hearing from Hurst and reviewing the reports from the State and defense experts, who agreed Hurst was not competent, the court found that he was not competent to stand trial. On January 23, 2009, the court entered an order finding that Hurst was not competent to stand trial, that his lack of competency precluded him from asserting his right to a jury trial on

competency, and that under the circumstances, he had no legal right to a jury trial to contest his competency.

Trial commenced on the other statutory issues. Defense counsel argued that the standard of proof required under RCW 10.77.086 must be clear, cogent and convincing evidence and requested a jury instruction to this effect. The State argued that the appropriate standard is preponderance of the evidence. The court agreed with the State and refused Hurst's proposed instruction.

The court granted the State's motion to preclude the defense from presenting evidence or argument regarding the possibility of civil commitment if the jury found Hurst could not be restored to competency. In its ruling, the court also precluded the State from presenting evidence or argument regarding the possibility of releasing Hurst if the jury found his competency could not be restored.

Three experts testified at trial—the State's experts, psychologist Dr. Julie Gallagher and psychiatrist Dr. Peter Bingcang, and the defense expert, psychologist Dr. Kevin Petersen. All three agreed that Hurst was incompetent to stand trial and that he suffered from delusions. Dr. Gallagher and Dr. Bingcang testified that there was a substantial probability of restoring Hurst's competency within 180 days because his competency had been restored once before, he had shown some improvement, and medication changes might help. Dr. Petersen testified that Hurst's delusions were not responsive to medication

and that the delusions affected his ability to assist in his defense.¹ Hurst did not testify.

At the conclusion of the evidence, the jury found that Hurst did not present a substantial danger to others, but there was a substantial likelihood that he would commit criminal acts jeopardizing public safety or security and that there was a substantial probability that he would regain competency within a reasonable period of time.

On February 6, 2009, the court entered an order finding Hurst incompetent based on its earlier determination and ordering his commitment to WSH for up to 180 days for competency restoration. Hurst timely filed a notice of appeal. A commissioner of this court ruled that the challenged order is not appealable and is subject only to discretionary review.

In the meantime, after the notice was filed but before argument on discretionary review, WSH reported that Hurst remained incompetent to stand trial. On August 3, 2009, the court dismissed the charges without prejudice and ordered Hurst held pending the State filing a civil commitment petition under chapter 71.05 RCW.

Hurst seeks discretionary review under RAP 2.3(b)(2), probable error that substantially alters the status quo or substantially limits a party's freedom to act, of three aspects of the case: the trial court's evidentiary ruling excluding

¹ Hurst wanted to present a defense of entrapment based on his beliefs about the role of the CIA/FBI and an individual. The experts agreed that Hurst's beliefs were the result of his delusions.

evidence of the possibility of civil commitment in the event the jury found his competency was not restorable, the court's determination that Hurst was incompetent and had no right to present the issue of competency to a jury, and the determination that the standard of proof was preponderance of the evidence.

The State argues that Hurst has not demonstrated probable error but that in any event review should not be granted because the charges have since been dismissed and the issues are therefore moot.

Generally an appellate court will dismiss review where only moot questions or abstract propositions are involved. Hart v. Dep't of Social & Health Servs., 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). But a court may decide a moot case if it involves matters of continuing and substantial public interest. Id. In determining whether this standard is met, the court considers three essential factors: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance; and (3) whether the issue is likely to recur. Id. at 448; In re Cross, 99 Wn.2d 373, 377, 662 P.2d 828 (1983).

Regarding the evidentiary issue, Hurst argues that it was error to exclude evidence of the possibility of civil commitment and that contrary to the court's ruling, in closing argument the State misled the jury into believing the only way to ensure public safety and treatment was to commit him for a 180 day restoration period. Whether the issue is characterized as a challenge to an

evidentiary ruling, prosecutorial misconduct during closing argument, or both, Hurst has demonstrated neither probable error nor an issue of continuing and substantial public interest.

Regarding the court's determination that Hurst was not entitled to a jury determination of competency, Hurst contends that read together, RCW 10.77.086(3) and (4) unambiguously provide that a defendant may request a jury determination. When a court finds a defendant incompetent and extends commitment for a second 90 days, at the time of the extension the court must set a date for a hearing to determine competency before expiration of the 90 days. "The defendant, the defendant's attorney, or the prosecutor has the right to demand that the hearing be before a jury." RCW 10.77.086(3). Hurst contends that the trial court's decision to limit the jury trial to the issue of restorability is probable, if not obvious, error. He contends that his right to request a jury determination on the issue of competency is meaningless if he must first convince the court that he is competent. The State acknowledges the statutory language, but argues an incompetent defendant has no right to demand a jury trial on an issue that is not in dispute. The State also argues that accepting Hurst's reading of RCW 10.77.086 is in conflict with other aspects of the statutory scheme, e.g., an incompetent defendant cannot personally participate in pretrial proceedings, a defendant must be competent to make intelligent and voluntary decisions about the course of criminal proceedings,

and an incompetent defendant represented by counsel is not permitted to waive the right to counsel. See State's response at 9-11.

The trial court determined that Hurst was not legally entitled to a jury determination on competency. While this suggests a reading of the statute with implications beyond this case, it also appears that the trial court took a practical approach to the issue, concluding that there was no basis for a jury trial on the issue of competency where there was no evidence from any source that Hurst was competent and both Hurst's appointed counsel and his appointed independent counsel opposed a jury determination on the issue of competency. Given the unusual circumstances, the issue is not of such a continuing and substantial public interest to warrant review of a moot issue. Moreover, in his notice of appeal, Hurst specifically sought review of only the February 6, 2009. Because he did not seek review of the January 23, 2009 order, it is questionable whether the jury trial issue is within the scope of review. See RAP 2.4(b).

Regarding the issue of the standard of proof, Hurst contends that due process requires a clear, cogent and convincing standard. He cites Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (rejecting preponderance of the evidence standard for involuntary civil commitment proceedings); McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984) (following Addington to hold the preponderance of the evidence standard insufficient to satisfy due process in involuntary civil commitment under chapter 71.05 RCW);

and Born v. Thompson, 154 Wn.2d 749, 117 P.3d 1098 (2005) (standard of proof necessary to detain an individual charged with a misdemeanor for restoration competency must be clear and convincing evidence).

Washington courts apply the Mathews v. Eldridge² balancing test when determining what standard of proof is required to satisfy procedural due process. The State argues that its public safety interest is stronger than it was in Born, where the State sought to restore the competency of a defendant charged with a misdemeanor. Hurst argues that his liberty interest and the risk of erroneous deprivation are higher than the defendant in Born, where Hurst has already been committed for two 90 day periods and the State seeks an additional 180 days. This is the type of issue which Washington courts have held meets the standard for continuing and substantial public interest. See, e.g., Born, 154 Wn.2d at 762; In re Detention of LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986); McLaughlin, 100 Wn.2d at 838; Cross, 99 Wn.2d at 377; In re Detention of J.S., 138 Wn. App. 882, 159 P.3d 435 (2007). The standard of proof issue is of a public nature, an authoritative determination is desirable for future cases, and the issue is likely to recur. Moreover, the issue was raised below, Hurst proposed an instruction that the State's burden to prove restorability was clear, cogent and convincing evidence, and both parties discussed the standard of proof in closing argument. It also is the type of issue that evades timely review. Review is warranted.

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

63052-1-I/9

Now, therefore, it is

ORDERED that discretionary review is granted on the single issue of the standard of proof.

Done this ____ day of October 2009.

Mary S. Neel

Court Commissioner

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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Appendix C

RCW 10.77.086 provides:

(1) If the defendant is charged with a felony and determined to be incompetent, until he or she has regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense, or has been determined unlikely to regain competency pursuant to RCW 10.77.084(1)(c), but in any event for a period of no longer than ninety days, the court:

(a) Shall commit the defendant to the custody of the secretary who shall place such defendant in an appropriate facility of the department for evaluation and treatment; or

(b) May alternatively order the defendant to undergo evaluation and treatment at some other facility as determined by the department, or under the guidance and control of a professional person.

(2) 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.

(3) 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, but 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. No extension shall be ordered for a second ninety-day period, nor for any subsequent period as provided in subsection (4) of this section, if the defendant's incompetence has been determined by the secretary to be solely the result of a developmental disability which is such that competence is not reasonably likely to be regained during an extension.

(4) For persons charged with a felony, at the hearing upon the expiration of the second ninety-day period or at the end of the first ninety-day period, in the case of a defendant with a developmental disability, if the jury or court finds that the defendant is incompetent, the charges shall be dismissed without prejudice, and either civil commitment proceedings shall be instituted or the court shall order the release of the defendant. The criminal charges shall not be

dismissed if the court or jury finds that: (a) The defendant (i) is 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.

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

STATE OF WASHINGTON,)	
)	
Appellant)	COURT OF APPEALS No. 63052-1
)	
v.)	
)	
JOHN HURST,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 3RD DAY OF JANUARY, 2011, A COPY OF THE **APPELLANT'S PETITION FOR REVIEW** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

Donna Lynn Wise
Attorney at Law
King Co Pros/App Unit
W 554 King Co Courthouse
516 3rd Ave
Seattle WA 98104-2385

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JANUARY, 2011

x *Ann Joyce*