

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Jul 31, 2014, 4:16 pm  
BY RONALD R. CARPENTER  
CLERK

90570-3

NO. 46499-3

RECEIVED BY E-MAIL

---

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,

Petitioner,

v.

M.W.,

Respondent.

---

MOTION FOR DISCRETIONARY REVIEW

---

ROBERT W. FERGUSON  
Attorney General

AMBER L. LEADERS  
Assistant Attorney General  
WSBA #44421  
7141 Cleanwater Dr. SW  
PO Box 40124  
Olympia, WA 98504-0124  
(360) 586-6565  
OID Number: SHO Division 91021

ORIGINAL

**TABLE OF CONTENTS**

I. IDENTITY OF PETITIONERS.....1

II. DECISION BELOW .....1

III. ISSUE PRESENTED FOR REVIEW .....1

IV. STATEMENT OF THE CASE.....1

    A. The Enactment of RCW 71.05.280(3)(b) and  
    71.05.320(3)(c)(ii).....1

    B. M.W. Was Found To Have Committed Acts Constituting  
    A Violent Offense When He Was Initially Civilly  
    Committed.....3

    C. DSHS Sought Continued Commitment for M.W. Under  
    71.05.320(3)(c)(ii), and the Trial Court Declared That  
    Statute Unconstitutional.....4

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED .....5

    A. Review Should be Granted Under RAP 2.3(b)(4) .....6

    B. Alternatively, The Trial Court Committed Probable Error  
    Which Substantially Alters The Status Quo And Limits  
    DSHS’ Freedom To Act.....8

        1. The Trial Court Committed Probable Error By  
        Failing To Apply The Appropriate Standards of  
        Statutory Construction.....8

        2. The Trial Court Committed Probable Error By  
        Failing To Require M.W. To Show The Statute Was  
        Unconstitutional Beyond A Reasonable Doubt.....10

            a. RCW 71.05.320(3)(c)(ii) Is Not An Indefinite  
            Commitment Scheme.....10

b.	RCW 71.05.320(3)(c)(ii) Is Constitutional Under The Procedural Due Process Standard .....	11
c.	RCW 71.05.320(3)(c)(ii) is Constitutional Under The Substantive Due Process Standard.....	14
d.	RCW 71.05.320(3)(c)(ii) Is Constitutional Under Equal Protection .....	16
e.	RCW 71.05.320(3)(c)(ii) Is Not Unconstitutionally Vague .....	17
3.	The Trial Court’s Errors Have Substantially Altered The Status Quo And Substantially Limit DSHS’ Freedom To Act .....	19
VI.	CONCLUSION .....	20
APPENDIX		

## **I. IDENTITY OF PETITIONERS**

The State of Washington, Department of Social and Health Services (DSHS), asks the Court to accept review of the decision designated in Part II of this motion for discretionary review.

## **II. DECISION BELOW**

DSHS seeks review and reversal of the trial court's Findings of Fact, Conclusions of Law, and Order dated July 8, 2014, declaring RCW 71.05.320(3)(c)(ii) to be unconstitutional.<sup>1</sup>

## **III. ISSUE PRESENTED FOR REVIEW**

If the Court grants discretionary review, the issue will be:

Did the trial court err when it declared RCW 71.05.320(3)(c)(ii), which provides a particular civil commitment procedure for individuals who have been found to have committed a violent offense, to be unconstitutional?

## **IV. STATEMENT OF THE CASE**

### **A. The Enactment of RCW 71.05.280(3)(b) and 71.05.320(3)(c)(ii)**

In 2013, the Legislature added two related provisions to the Involuntary Treatment Act (RCW 71.05) that refine the civil commitment process for "a small number of individuals who commit repeated violent acts against others while suffering from the effects of a mental illness and/or developmental disability that both contributes to their criminal

---

<sup>1</sup> Attached as Appendix A.

behaviors and renders them legally incompetent to be held accountable for those behaviors.” Laws of 2013 ch. 289, § 1. The first provision, now codified at RCW 71.05.280(3)(b), provides that “[f]or any person subject to commitment under this subsection where the charge underlying the finding of incompetence is for a felony classified as violent under RCW 9.94A.030, the court shall determine whether the acts the person committed constitute a violent offense under RCW 9.94A.030.”

The second provision, now codified at RCW 71.05.320(3)(c)(ii), provides that where the court has made a special finding that the acts the person committed constituted a violent offense, “[their] commitment shall continue for up to an additional one hundred eighty day period whenever the petition presents prima facie evidence that the person continues to suffer from a mental disorder or developmental disability that results in a substantial likelihood of committing acts similar to the charged criminal behavior, unless the person presents proof through an admissible expert opinion that the person’s condition has so changed such that the mental disorder or developmental disability no longer presents a substantial likelihood of the person committing acts similar to the charged criminal behavior.” The Legislature explicitly found that these changes to the Involuntary Treatment Act were necessary to serve the state’s compelling

interests in protecting the public safety and providing proper care for these violent offenders. Laws of 2013 ch. 289, § 1.

**B. M.W. Was Found To Have Committed Acts Constituting A Violent Offense When He Was Initially Civilly Committed**

While residing at Navos Psychiatric Hospital, M.W. assaulted a fellow patient, stomping on the victim's head approximately three times. Appendix (App.) B at 2. The victim's injuries included multiple facial fractures and lacerations. *Id.* M.W. was charged with Assault in the Second Degree in King County Superior Court. App. B at 1. M.W. was referred to Western State Hospital for an evaluation of his competency, and after finding him incompetent to stand trial, the King County Superior Court dismissed the criminal charge without prejudice and committed him pursuant to RCW 10.77.086(4). App. C at 1, 3.

Western State Hospital filed a petition for civil commitment under RCW 71.05.280(3) and (4). App. D at 2. M.W. stipulated to commitment, and the Pierce County Superior Court entered an order detaining him for up to 180 days of involuntary treatment. App. E. The court also entered Supplemental Findings of Fact and Conclusions of Law, stating "[w]ithin the meaning of RCW 71.05.280(3), and for the purposes of this proceeding alone, the Respondent is found to have committed acts constituting the felony of assault in the second degree

[RCW 9A.36.021(1)(a)], which is classified as a violent offense under RCW 9A.94.030.” App. F at 2.

**C. DSHS Sought Continued Commitment for M.W. Under 71.05.320(3)(c)(ii), and the Trial Court Declared That Statute Unconstitutional**

Before M.W.’s treatment period expired, Western State Hospital filed a petition for an additional 180 days of involuntary treatment pursuant to RCW 71.05.320(3). App. G. The petition alleged that M.W. met the commitment grounds under RCW 71.05.320(3)(c)(i), (c)(ii), and (4). App. G at 2.

M.W. is one of the first individuals to whom the statutory changes in RCW 71.05.280(3)(ii) and 71.05.320(3)(c)(ii) have been applied. After M.W.’s recommitment petition was filed, he filed a Motion for Order Declaring Statute Unconstitutional. Soon after, another respondent, W.D. filed an identical motion. The cases were combined under an amended brief<sup>2</sup>. The King County Prosecutor moved to intervene. M.W. and W.D. objected to intervention, and the Court denied the motion to intervene, but allowed the King County Prosecutor to participate as amicus.

The trial court ruled in favor of M.W. and W.D. and declared RCW 71.05.320(3)(c)(ii) unconstitutional on its face and as applied. The

---

<sup>2</sup> The W.D. and M.D. cases were consolidated at the trial level for purposes of the constitutional motion and order. Pursuant to RAP 3.3, these cases should be consolidated in the appellate court for purposes of review.

trial court specifically declared the statute unconstitutional under the Fourteenth Amendment to the United States Constitution and Article 1, sections 3, 12, and 21 of the Washington Constitution.

The trial court further ruled that the pending petitions would go forward under the original procedures of RCW 71.05, “as if the provisions of RCW 71.05.320(3)(c)(ii) never had been enacted.” App. A at 6. The parties stipulated and the court certified that the Order meets the criteria for review under RAP 2.3(b)(4). App. A at 6-7.

DSHS filed the Notice for Discretionary Review to the Court of Appeals on the same day the Order was entered. On July 9, 2014, the civil commitment hearing of M.W. was held according to RCW 71.05, and the trial court entered a commitment order for M.W. for an additional 180 days of involuntary treatment pursuant to RCW 71.05.320(3)(c)(i) and (d).

#### **V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

This Court should accept discretionary review because the criteria under both RAP 2.3(b)(2) and (4) have been met. First, the superior court has certified, and all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. RAP 2.3(b)(4). Second, the superior court committed probable error by

declaring RCW 71.05.320(3)(c)(ii) unconstitutional, and in doing so substantially altered the status quo and substantially limited the freedom of DSHS to act. RAP 2.3(b)(2).

**A. Review Should be Granted Under RAP 2.3(b)(4)**

RAP 2.3(b)(4) allows for discretionary review if “[t]he superior court has certified, or all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” The Order contains both a stipulation and a certification that these factors are met. App. A at 6.

There is no dispute that the challenge to RCW 71.05.320(3)(c)(ii) involves a controlling question of law as to which there is substantial ground for a difference of opinion. Even though the trial court entered a subsequent order committing M.W. for another 180 days under alternative grounds, the issue presented here could easily recur at the end of this 180-day commitment. Thus, immediate review of the trial court’s order declaring RCW 71.05.320(3)(c)(ii) to be unconstitutional will materially advance the ultimate determination of a significant legal question of ongoing relevance to these patients, as well as other patients who are similarly situated. Moreover, the constitutionality

of RCW 71.05.320(3)(c)(ii) is a matter of continuing and substantial public interest. *In re Det. of C.W.*, 147 Wn.2d 259, 270, 53 P.3d 979, 984 (2002); *See also In re Det. of Swanson*, 115 Wn.2d 21, 25, 804 P.2d 1 (1990) (“the need to clarify the statutory scheme governing civil commitment is a matter of continuing and substantial public interest”) (quoting *In re the Det. of LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986) (quoting *Dunnér v. McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984))) (internal quotation marks omitted).

If a subsequent full hearing and order of commitment were to negate the possibility of review, then the constitutionality RCW 71.05.320(3)(c)(ii) might never be resolved by an appellate court. *See Swanson*, 115 Wn.2d at 25. While DSHS theoretically had the option of seeking a stay of the full commitment hearing pending the appellate courts’ resolution of this constitutional question, doing so would have potentially subjected M.W. to involuntary detention for an indefinite period of time while the stay was in place. This would have created an unfair and unreasonable restriction of his liberty. *See In re Det. of LaBelle*, 107 Wn.2d 196, 204, 728 P.2d 138 (1986) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 1052, 31 L. Ed. 2d 394 (1972)). For these reasons, DSHS accepted entry of the final order of commitment for M.W. on alternative grounds. Yet this subsequent order should not

prevent review of the July 8, 2014, order declaring RCW 71.05.320(3)(c)(ii) unconstitutional.

**B. Alternatively, The Trial Court Committed Probable Error Which Substantially Alters The Status Quo And Limits DSHS' Freedom To Act**

Alternatively, RAP 2.3(b)(2) allows for discretionary review when “[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.” The trial court committed several probable legal errors in analyzing the constitutionality of RCW 71.05.320(3)(c)(ii), meeting the first prong of RAP 2.3(b)(2). Each of these errors, taken individually or together, substantially alters the status quo and substantially limits the freedom of DSHS to act under RCW 71.05.320(3)(c)(ii). If this Court does not accept review under RAP 2.3(b)(4), it should accept review under RAP 2.3(b)(2).

**1. The Trial Court Committed Probable Error By Failing To Apply The Appropriate Standards of Statutory Construction**

Courts must presume that the Legislature intends to enact effective laws, and must construe a statute, if at all possible, in a way that preserves its constitutionality. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013); *State v. Rice*, 174 Wn.2d 884, 899, 279 P.3d 849 (2012). DSHS provided an interpretation of RCW 71.05.320(3)(c)(ii) that would

allow it to work in harmony with the rest of the Involuntary Treatment Act and preserve the constitutionality of the statute. At a preliminary hearing, the court decides whether the petitioners have established by prima facie evidence the grounds in RCW 71.05.320(3)(c)(ii). If the petitioners do not satisfy this standard, the petition is dismissed. If the court concludes that the petitioners do satisfy prima facie evidence, the respondent is given the opportunity to produce rebuttal evidence in the form of an “admissible expert opinion that the person’s condition has so changed such that the mental disorder or developmental disability no longer presents a substantial likelihood of the person committing acts similar to the charged criminal behavior.” RCW 71.05.320(3)(c)(ii). If the prima facie evidence is not rebutted at the preliminary hearing, then the court will enter an order for an additional 180 days of involuntary treatment. If the evidence is rebutted, then the respondent is entitled to a full evidentiary hearing, where the burden of proof is clear, cogent, and convincing evidence and lies with the petitioner. The respondent also has the right to a jury trial at the evidentiary hearing. RCW 71.05.310, .320(3)(c)(ii).

The trial court gave no effect to DSHS’ interpretation of the statute, stating that RCW 71.05.320(3)(c)(ii) “carved out an isolated subset of individuals . . . without establishing clear processes and procedures for its application and implementation.” App. A at 5. But

RCW 71.05.320(3)(c)(ii) can be read in harmony with the Involuntary Treatment Act, which provides clear processes and procedures for all civil commitments pursuant to that chapter. See RCW 71.05.300, .310, .360. The trial court committed probable error by not giving proper deference to the Legislature in construing the statute as constitutional to the greatest extent possible.

**2. The Trial Court Committed Probable Error By Failing To Require M.W. To Show The Statute Was Unconstitutional Beyond A Reasonable Doubt**

The party challenging a statute bears the heavy burden to show it is unconstitutional beyond a reasonable doubt. *City of Bothell v. Barnhart*, 172 Wn.2d 223, 257 P.3d 648 (2011). The trial court ruled the statute unconstitutional based on substantive and procedural due process, equal protection and the vagueness doctrine, but M.W. failed to overcome the clear presumption that enacted statutes are constitutional, especially in light of the beyond a reasonable doubt standard.

**a. RCW 71.05.320(3)(c)(ii) Is Not An Indefinite Commitment Scheme**

The trial court committed probable error by interpreting RCW 71.05.320(3)(c)(ii) to create a “subset of persons subject to *indefinite* commitment.” App. A at 4 (emphasis added). The statute does not create an indefinite commitment scheme. Individuals subject to the

Involuntary Treatment Act can only be committed for finite periods of up to 180 days, and no order of commitment may exceed this length. RCW 71.05.320(7). The 2013 amendments to the Involuntary Treatment Act did not alter this finite requirement. In addition, individuals subject to civil commitment may be released at any time during the commitment period if DSHS determines, in its discretion, that they have made sufficient progress. *See* RCW 71.05.325, 330, 335, 340. The court erred in characterizing RCW 71.05.320(3)(c)(ii) as an indefinite scheme.

**b. RCW 71.05.320(3)(c)(ii) Is Constitutional Under The Procedural Due Process Standard**

The trial court found that RCW 71.05.320(3)(c)(ii) violated procedural due process. App. A at 3. Procedural due process “[a]t its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context.” *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). To determine the adequacy of procedures provided, courts balance the three *Mathews* factors: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures.

*In re the Det. of Harris*, 98 Wn.2d 276, 285, 654 P.2d 109 (1982) (citing *Mathews*, 424 U.S. at 335).

The first *Mathews* factor weighs in M.W.'s favor. The private interest at stake, his liberty, is significant. *In re Det. of V.B.*, 104 Wn. App. 953, 964, 19 P.3d 1062 (2001). The United States Supreme Court has described involuntary commitment as a “ ‘massive curtailment of liberty.’ ” *LaBelle*, 107 Wn.2d at 204, (1986) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 1052, 31 L. Ed. 2d 394 (1972)). The third *Mathews* factor, “the governmental interest, including costs and administrative burdens of additional procedures,” weighs as heavily in favor of the State, especially where public safety is at stake. The State has a strong interest in detaining “mentally unstable individuals who present a danger to the public.” *U.S. v. Salerno*, 481 U.S. 739, 748-49, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The Legislature set forth the procedures in RCW 71.05.320(3)(c)(ii) to better serve a distinct, and difficult to treat population—violent offenders—and recognized that prior iterations of the statutory scheme were not adequately serving these individuals. Laws of 2013 ch. 289, § 1.

The middle factor in the *Mathews* balancing test is the risk of erroneous deprivation and the likely value of any additional procedures. The risk of erroneous deprivation in these matters is low because if

continued commitment for up to an additional 180 days under RCW 71.05.320(3)(c)(ii) is sought, several procedural safeguards apply. Two mental health experts must examine the person and file a petition supported by sworn affidavits to initiate the recommitment proceeding, and the affidavits must amount to prima facie evidence justifying continued commitment under RCW 71.05.320(3). The rights to counsel, to remain silent, to refuse psychiatric medications prior to the hearing, and to a less restrictive alternative placement if appropriate all must be observed. Persons being petitioned against are also entitled to a trial by jury and a clear, cogent, and convincing burden of proof during a full evidentiary hearing upon the offering of expert testimony that disputes the State's prima facie evidence. Finally, persons being petitioned against are afforded a panoply of rights at the initial commitment hearing held pursuant to RCW 71.05.280. The trial court failed to correctly weigh the *Mathews* factors and therefore committed probable error by finding the statute unconstitutional on procedural due process grounds.

Furthermore, the trial court committed probable error by declining to apply the reasoning adopted in *McCuiston*, which upheld a civil commitment scheme in RCW 71.09 that is less protective than the one at issue here. *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012). The Washington Supreme Court concluded that limiting the avenues for

obtaining a full evidentiary hearing in civil commitments comports with procedural due process. *Id.* at 393. The Court found that extensive procedural safeguards offered in an initial commitment hearing, annual written reviews to assure that the individual continues to meet commitment criteria, and the right to an evidentiary hearing (again with a panoply of procedural rights) if DSHS finds that the individual no longer meets criteria, amounted to sufficient process. *Id.* at 393-94. If RCW 71.09's indefinite civil commitment scheme satisfies procedural due process, then this less restrictive, finite civil commitment scheme, requiring a prima facie showing every six months (as opposed to once per year) must satisfy due process as well.

The trial court further erred by reasoning that RCW 71.09 "provides for robust processes and procedures *far more elaborate* than" RCW 71.05.320(3)(c)(ii) (emphasis added). To the contrary, when RCW 71.05.320(3)(c)(ii) is read in conjunction with the Involuntary Treatment Act as required, individuals are afforded a judicial review of continued commitment every 180 days, with the opportunity for a full evidentiary hearing, including a jury trial, *each time*. The Involuntary Treatment Act also allows for release of individuals at any time during the commitment period if DSHS determines release or less restrictive care is warranted. *See* RCW 71.05.325, .330, .335, and .340. The statutory

scheme in RCW 71.05 is far less restrictive than the one in RCW 71.09, which has been upheld as constitutional. It was error for the trial court to ignore *McCuiston* and find the statute unconstitutional. App. A at 4.

**c. RCW 71.05.320(3)(c)(ii) is Constitutional Under The Substantive Due Process Standard**

A civil commitment scheme satisfies substantive due process constraints if it is narrowly drawn to serve compelling state interests. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Civil commitment statutes are narrowly drawn and serve a compelling state interest when both the initial and continued confinements are predicated on the individual's mental abnormality and dangerousness. *Foucha v. Louisiana*, 504 U.S. 71, 77-78, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975). Under RCW 71.05.280(3)(b) and .320(3)(c)(ii), the initial and continued commitment of a violent offender is not possible without the continued existence of a mental illness that contributes to dangerousness. At every stage of a violent offender's commitment under RCW 71.05.280(3)(b) and .320(3)(c)(ii), mental illness and dangerousness are present, ensuring that substantive due process is not violated.

Moreover, the Washington Supreme Court in *McCuiston* held that the less protective statutory scheme in RCW 71.09 comports with

substantive due process because it does not permit continued involuntary commitment of a person who is no longer mentally ill and dangerous. *McCouston*, 174 Wn.2d at 388. This was true even though the statute altered “the requirements necessary to gain a full evidentiary hearing[.]” *Id.* RCW 71.05.320(3)(c)(ii) provides a more protective level of review for violent offenders because a recommitment petition and judicial review is necessitated every 180 days, rather than annually. RCW 71.05.290(e); RCW 71.05.320(3). The trial court erred in ignoring *McCouston* and declaring RCW 71.05.320(3)(c)(ii) violates substantive due process.

**d. RCW 71.05.320(3)(c)(ii) Is Constitutional Under Equal Protection**

Under an equal protection analysis, civil commitment statutes that create different classes of persons are analyzed under the rational basis standard, which is “relaxed and highly deferential.” *In re Petersen*, 104 Wn. App. 283, 288, 36 P.3d 1053 (2000); *In re Dydasco*, 135 Wn.2d 943, 951, 959 P.2d 1111 (1998); *Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999). The statute is presumed constitutional and the party challenging the statute bears the burden of proving “beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification, or that the facts have so far changed as to

render the classification arbitrary and obsolete.” *State v. Smith*, 93 Wn.2d 329, 337, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S. Ct. 213, 66 L. Ed. 2d 93 (1980); *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).

With RCW 71.05.320(3)(c)(ii), the Legislature intentionally distinguished between violent offenders and other persons civilly committed. *See* Laws of 2013 ch. 289, § 1. The distinction affects only the procedure for the recommitment of those who have been committed pursuant to RCW 71.05.280(3)(b), following dismissal of a violent felony charge. These legislative distinctions are rationally related to legitimate government interests, including public safety, and M.W. failed to meet the high burden required under rational basis review to overturn the Legislature’s classification. The trial court committed probable error in declaring the statute unconstitutional on these grounds.

**e. RCW 71.05.320(3)(c)(ii) Is Not Unconstitutionally Vague**

The vagueness doctrine serves two purposes: “to provide fair notice to citizens as to what conduct is proscribed and to protect against arbitrary enforcement of the laws.” *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988); *Labelle*, 107 Wn.2d at 201 (standard of “gravely disabled” was not unconstitutionally vague). The challenging party bears

the burden of proving a statute is unconstitutionally vague beyond a reasonable doubt. *Eze*, 111 Wn.2d at 26.

A reviewing court will not invalidate a statute for vagueness simply because the statute could have been drafted with greater precision. *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). Nor will it be invalidated simply because there is not “absolute agreement” on the statute’s application. *State v. Sullivan*, 143 Wn.2d 162, 182, 19 P.3d 1012 (2001). “For a statute to be unconstitutional, its terms must be so loose and obscure that they cannot be clearly applied in any context.” *In re Bergen*, 146 Wn. App. 515, 530, 195 P.3d 529, 536 (2008) (internal quotation marks omitted). If the language is “susceptible to understanding by persons of ordinary intelligence,” then the statute must be upheld. *Id.* at 532.

The statute in this case is not unconstitutionally vague. The trial court contended that the statute “[i]n allowing continued commitment on the basis of *prima facie* evidence . . . without specifying a process for review thereof, and in shifting the burden of proof . . . without stating either a standard of proof or a process or procedure by which this is to be done, the statute is unconstitutionally vague.” App. A at 4. But RCW 71.05.320(3)(c)(ii) should be read in conjunction with the Involuntary Treatment Act as a whole, which “shall in all respects accord

with the constitutional guarantees of due process of law and the rules of evidence.” RCW 71.05.310; *Burton v. Twin Commander Aircraft, LLC*, 171 Wn. 2d 204, 221, 254 P.3d 778, (2011). In context, RCW 71.05.320(3)(c)(ii) requires a judge to find that the prima facie burden be met, and if not, or if the patient presents rebuttal expert testimony, the Involuntary Treatment Act requires a full evidentiary hearing with a clear and convincing burden of proof. RCW 71.05.310. When read in context with the rest of the chapter, RCW 71.05.320(3)(c)(ii) is not unconstitutionally vague.

**3. The Trial Court’s Errors Have Substantially Altered The Status Quo And Substantially Limit DSHS’ Freedom To Act**

The order issued by the trial court has substantially altered the status quo and substantially limits DSHS’ ability to act. *See* RAP 2.3(b)(2). The trial court’s Order eliminates a procedural option adopted by the Legislature and potentially implicates other civil commitment cases in which the State would otherwise allege the grounds in RCW 71.05.320(3)(c)(ii). The freedom of DSHS to act pursuant to statute has not just been substantially limited, it has been prohibited. In addition, this prohibition on proceeding pursuant to currently enacted law substantially alters the status quo. DSHS is precluded from using legally proscribed procedures pursuant to RCW 71.05.320(3)(c)(ii), even though

the Legislature has specifically recognized a need for further treatment and heightened scrutiny in these cases.

In sum, the trial court committed probable error by declaring RCW 71.05.320(3)(c)(ii) unconstitutional. That declaration substantially limits DSHS' freedom to act and substantially alters the status quo. Therefore, this Court should accept review under RAP 2.3(b)(2).

## VI. CONCLUSION

This Court should accept discretionary review. The trial court and the parties all recognize that the constitutionality of RCW 71.05.320(3)(c)(ii) requires immediate review. Furthermore, the trial court erred in determining that RCW 71.05.320(3)(c)(ii) is unconstitutional, and this determination has substantially altered the status quo and substantially limits DSHS' ability to act.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of July, 2014.

ROBERT W. FERGUSON  
Attorney General



AMBER L. LEADERS, WSBA No. 44421  
Assistant Attorney General  
Attorneys for DSHS  
7141 Cleanwater Drive SW  
PO Box 40124  
Olympia, WA 98504-0124  
(360) 586-6565  
Amberl1@atg.wa.gov

**PROOF OF SERVICE**

*Beverly Cox*, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On July 23, 2014, I served a true and correct copy of this **MOTION FOR DISCRETIONARY REVIEW** and this **PROOF OF SERVICE** on the following parties to this action, as indicated below:

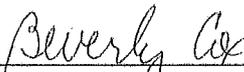
**Counsel for Defendant**

Christopher Jennings  
Department of Assigned Counsel  
Western State Hospital Division  
9601 Steilacoom Blvd. SW  
Tacoma, WA 98498-7213

**By E-mail PDF:** [cjennin@co.pierce.wa.us](mailto:cjennin@co.pierce.wa.us) ; [rjohns5@co.pierce.wa.us](mailto:rjohns5@co.pierce.wa.us)

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

Dated this 23 day of July 2014, at Tumwater, Washington.

  
\_\_\_\_\_  
BEVERLY COX  
Legal Assistant