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SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Detention of:

M.W. and W.D.

**REPLY BRIEF OF THE STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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TABLE OF CONTENTS

- I. INTRODUCTION.....1
- II. ARGUMENT2
 - A. M.W. and W.D. Must Show the Violent Felony
Recommitment Provisions of the Involuntary Treatment
Act are Unconstitutional Beyond a Reasonable Doubt.....2
 - B. The Violent Felony Recommitment Provisions Comply
with Substantive Due Process Because They Are at Least
as Protective as the Sexually Violent Predator Scheme
Upheld in *McCuiston* and Applied in *Meirhofer*2
 - 1. *McCuiston* squarely held that substantive due
process does not require a full evidentiary hearing
upon each periodic review.....3
 - 2. The violent felony recommitment provisions are at
least as protective as the sexually violent predator
scheme upheld in *McCuiston* and applied in
Meirhofer5
 - 3. The legislature was entitled to create a different
recommitment scheme for the small number of
mentally ill patients who have committed violent
felonies but were incompetent to stand trial.....10
 - 4. The violent felony recommitment procedures do not
permit commitment for patients who are no longer
mentally ill and dangerous, therefore satisfying
substantive due process12
 - C. The Violent Felony Recommitment Provisions Comply
with Procedural Due Process in Light of *McCuiston*15
 - 1. The violent felony recommitment provisions comply
with procedural due process under the *Mathews*
balancing test15

a.	The provisions merely shift a burden of production, they do not shift the burden of proof	15
b.	Applying the <i>Mathews</i> balancing test to the violent felony recommitment provisions should lead to the same result this Court reached in <i>McCustion</i>	18
2.	The Violent Felony Recombitment Provisions Are Not Unconstitutionally Vague	22
D.	The Violent Felony Recombitment Provisions Comply with the Right to a Jury Trial	24
III.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>City of Bothell v. Barnhart</i> 172 Wn.2d 223, 257 P.3d 648 (2011).....	2, 17
<i>Dunner v McLaughlin</i> 100 Wn.2d 832, 676 P.2d 444 (1984).....	24
<i>In re Det. of J.S.</i> 124 Wn.2d 689, 880 P.2d 976 (1994).....	20
<i>In re Det. of Turay</i> 139 Wn.2d 379, 986 P.2d 790 (1999).....	2
<i>In re Pers. Restraint Meirhofer</i> 182 Wn.2d 632, 343 P.3d 731 (2015).....	2-3, 5, 8, 15, 17, 23
<i>In re Pers. Restraint Petition of Young</i> 122 Wn.2d 1, 857 P.2d 989 (1993).....	3
<i>In re Treatment of Mays,</i> 116 Wn. App. 864, 68 P.3d 1114(2003).....	23
<i>Mathews v. Eldridge,</i> 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	15, 18, 22
<i>Sherwin v. Arveson</i> 96 Wn.2d 77, 633 P.2d 1335 (1981).....	24
<i>State v. Jorgenson</i> 179 Wn.2d 145, 312 P.3d 960 (2013).....	2
<i>State v. McCuiston</i> 174 Wn.2d 369, 275 P.2d 1092 (2012)	passim
<i>Yakima County Deputy Sherriff's Ass'n v. Bd. of Comm'rs,</i> 92 Wn.2d 831, 601 P.2d 936 (1979).....	14

Constitutional Provisions

Const. art. I, § 21..... 24
U.S. Const. amend. VI..... 21

Statutes

18 U.S.C. § 4246..... 6
18 U.S.C. § 4247..... 6
18 U.S.C. § 4241..... 6
Laws of 2013, ch. 289, § 1..... 10-11, 13
RCW 71.05 1, 5, 10-11
RCW 71.05.010 14
RCW 71.05.210 7
RCW 71.05.280 9
RCW 71.05.280(3)(b) 9
RCW 71.05.290(2)..... 16
RCW 71.05.290(2)(e) 16
RCW 71.05.310 7, 20
RCW 71.05.320 6, 7, 9, 17, 21
RCW 71.05.320(3)..... 20
Former RCW 71.05.320(3)(2013) 6, 9, 15-17, 22
RCW 71.05.320(6)..... 20
RCW 71.05.325-.340 6

RCW 71.05.360	7
RCW 71.05.360(5)(c)-(d);	20
RCW 71.05.360(12).....	17
RCW 71.09	3, 6, 9
RCW 71.09.070	6
RCW 71.09.090	6
RCW 71.09.090(4)(a)	4, 7
RCW 71.09.090(4)(b)	4, 7
RCW 9A.32.030.....	9
RCW 9A.32.050.....	9
RCW 9A.32.055.....	9
RCW 9A.36.011.....	9
RCW 9A.36.021.....	9
RCW 9A.40.030.....	9
RCW 9A.44.040.....	9
RCW 9A.44.050.....	9
RCW 9A.48.020.....	9
RCW 9A.56.200.....	9

Other Authorities

Fiscal Note E2SHB 1114	
https://fortress.wa.gov/ofm/fnspublic/legsearch.aspx?BillNumber=1114&SessionNumber=63	11

I. INTRODUCTION

When the legislature adopted the violent felony recommitment provisions of the Involuntary Treatment Act, it explained that it was responding to a need for increased public safety and a more effective commitment scheme for patients who had been found incompetent to stand trial for violent felonies. In order to meet these needs, the legislature was entitled to create a recommitment procedure similar to the annual review procedure for sexually violent predators for this small number of patients who have committed significant violence.

M.W. and W.D. assert that the violent felony recommitment provisions are unconstitutional both facially and as applied. To prevail, they must show that the provisions are unconstitutional beyond a reasonable doubt. Throughout their brief they ask this Court to read the provisions in ways they then assert would render the statutes unconstitutional. But this Court does not go out of its way to interpret statutes to create constitutional infirmities, and instead, this Court must read the statutes, if possible, in a way that preserves their constitutionality.

M.W. and W.D. received robust procedural protections when they were initially committed, including, for example, the right to counsel, the right to an expert at public expense if indigent, the right to a jury trial, the right to cross examine witnesses, and the right to a less restrictive

alternative placement if appropriate. The violent felony recommitment provisions also provide protections that ensure that these violent patients will not be recommitted absent mental illness and dangerousness. The scheme at issue here is at least as protective as the scheme upheld in *McCustion* and *Meirhofer*. As a result, this Court should reverse.

II. ARGUMENT

A. **M.W. and W.D. Must Show the Violent Felony Reccommitment Provisions of the Involuntary Treatment Act are Unconstitutional Beyond a Reasonable Doubt**

M.W. and W.D. must show that the violent felony recommitment provisions are unconstitutional beyond a reasonable doubt. And this Court must read the statute in a way that preserves, its constitutionality if at all possible. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013); *City of Bothell v. Barnhart*, 172 Wn.2d 223, 229, 257 P.3d 648 (2011). To the extent that M.W. and W.D. seek to have the statute facially invalidated, they must also show there is no set of circumstances under which the statute can be constitutionally applied. *E.g.*, *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999).

B. **The Violent Felony Reccommitment Provisions Comply with Substantive Due Process Because They Are at Least as Protective as the Sexually Violent Predator Scheme Upheld in *McCustion* and Applied in *Meirhofer***

Substantive due process requires that a commitment scheme must be narrowly tailored to serve compelling government interests.

In re Pers. Restraint Petition of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). The United States Supreme Court has held civil commitment statutes meet this strict scrutiny when confinement is predicated upon mental illness and dangerousness. Br. Resp't at 9 (*citing Foucha v. Louisiana*, 504 U.S. 71, 75, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). The violent felony recommitment procedures at issue here are at least as protective as the sexually violent predator annual review scheme upheld in *McCustion* and recently applied in *Meirhofer*. *State v. McCustion*, 174 Wn.2d 369, 384-86, 275 P.2d 1092 (2012); *see also In re Pers. Restraint Meirhofer*, 182 Wn.2d 632, 343 P.3d 731 (2015). This Court should conclude, as it did in those cases, that the violent felony recommitment provisions require a patient to be both mentally ill and dangerous before he or she will be recommitted.

1. *McCustion* squarely held that substantive due process does not require a full evidentiary hearing upon each periodic review

In *McCustion* and *Meirhofer*, this Court analyzed, upheld, and applied the annual review scheme for committed sexually violent predators under RCW 71.09. Under that scheme, the State must annually submit prima facie evidence at a show cause hearing that the predator continues to meet statutory criteria for commitment. RCW 71.09.090(2)(b). The burden of production then shifts to the

sexually violent predator to produce “current evidence from a licensed professional” that either a major physiological change has rendered the person unable to offend, or that the person has changed through a positive response to treatment. RCW 71.09.090(4)(a)-(b). Only then will the court proceed to a full evidentiary hearing on whether continued commitment is warranted.

M.W. and W.D. assert that the *McCuiston* Court did not address the constitutionality of continued confinement absent a full evidentiary hearing. Br. Resp’t at 22-23. They assert that *McCuiston* challenged only the restrictions on what kinds of evidence he could present to obtain a full evidentiary hearing, and thus, this Court has not addressed the issue that M.W. and W.D. raise here: whether ongoing commitment without a full evidentiary hearing upon each periodic review complies with substantive due process. *See* Br. Resp’t at 23.

This argument ignores *McCuiston*’s claim that substantive due process requires a full evidentiary hearing. The *McCuiston* Court unequivocally explained: “Requiring change as a prerequisite for an evidentiary hearing—a statutory requirement that pre-dated the 2005 amendments [to RCW 71.09]—does not offend substantive due process principles,” and “this court has already upheld the pre-2005 requirement that an individual seeking an evidentiary hearing present *prima facie*

evidence of a change in condition.” *McCouston*, 174 Wn.2d at 384-85. The Court held that “[s]ubstantive due process requires only that the State conduct periodic review of the patient’s suitability for release.” *McCouston*, 174 Wn.2d at 385.

In sum, the *McCouston* Court recently reiterated that there is no substantive due process right to a full evidentiary hearing upon every periodic review, and requiring a patient to meet a prerequisite to obtain a full evidentiary hearing is constitutional even under strict scrutiny. *Id.*; *Meirhofer*, 182 Wn.2d at 649. Certainly if substantive due process required an evidentiary hearing upon every periodic review of confinement, *McCouston* and *Meirhofer* would have been decided differently.

2. The violent felony recommitment provisions are at least as protective as the sexually violent predator scheme upheld in *McCouston* and applied in *Meirhofer*

This Court should follow *McCouston* and *Meirhofer* and hold that the violent felony recommitment procedures in RCW 71.05 comply with substantive due process. While the sexually violent predator scheme and the violent felony recommitment provisions are certainly not identical, where there are differences, the violent felony recommitment provisions are more protective against recommitment than those upheld in *McCouston*.

Under the Involuntary Treatment Act a person cannot be committed into a state hospital for more than 180 days, and at the expiration of a commitment period, the patient “shall be released from involuntary treatment” unless a new petition for involuntary treatment is filed, unlike RCW 71.09 where the commitment order is indefinite.¹ Former RCW 71.05.320(3) (2013); CP at 1-3, 14-15, 23-25 (petitions for 180-day commitment, stipulations for 180-day commitment, and orders limited to 180-day commitment at Western State Hospital).² Under the Involuntary Treatment Act, a new petition must be filed at least every six months, where sexually violent predators are entitled only to annual review. Former RCW 71.05.320(3) (2013); RCW 71.09.070. Violent felony offenders committed under the Involuntary Treatment Act can be placed on conditional release if the state hospital at any time concludes detention in a state hospital is no longer needed. RCW 71.05.325-.340. In contrast, only a court can authorize change in placement or release of a sexually violent predator. RCW 71.09.090 (requiring patient to petition for

¹ Compare 18 U.S.C. §§ 4241, 4246-47. When a federal defendant is incompetent to stand trial and his condition has not improved, he can be committed by clear and convincing evidence. *Id.* Once committed, if not transferred to a state system, he remains committed until the director of the mental health facility certifies the person has recovered and the court finds he has recovered by a preponderance of the evidence. 18 U.S.C. § 4246. The director need only submit to the court a report about the person’s condition every six months. 18 U.S.C. § 4247.

² In 2015, the legislature inserted a new subsection (3) to RCW 71.05.320, requiring an order for less restrictive alternative treatment to identify the services the person will receive. Former RCW 71.05.320(3) (2013) was recodified at RCW 71.05.320(4).

release even if the Department of Social and Health Services believes release is appropriate). Sexually violent predators can argue release is warranted only based on a major physiological change that has rendered the person unable to offend, or that the person has changed through a positive response to treatment. RCW 71.09.090(4)(a)-(b). In contrast, violent felony offenders can offer any basis for a change in their mental health warranting release because RCW 71.05 does not contain such restrictions.

Moreover, like sexually violent predators, the violent offenders here receive robust procedural protections upon their initial commitment. They have a right to be informed of their rights, a right to counsel even if they do not request counsel, a right to an expert at public expense if they are indigent, and a right to access all petitions and reports in the court file. RCW 71.05.300, .360. They can present evidence and cross examine witnesses, they have a right to be present at the hearing, they can remain silent, and they can refuse psychiatric medications twenty-four hours prior to the hearing. *See* RCW 71.05.210, .310, .360. They can have their case heard by a jury upon request. RCW 71.05.310. The State bears the burden of proof by clear, cogent, and convincing evidence, and the court must consider whether placement in a less restrictive environment is appropriate. RCW 71.05.310-320. M.W. and W.D. point out that the

elements supporting initial commitment of a sexually violent predator must be proven beyond a reasonable doubt where a commitment under the Involuntary Treatment Act can be warranted only by clear, cogent, and convincing evidence. This difference in burdens of proof for the initial commitments does not warrant a departure from the *McCuiston* and *Meirhofer* reasoning. Under the sexually violent predator scheme, the patient is committed indefinitely with only annual review, where commitments requiring detention in a state hospital under RCW 71.05 must be renewed every 180 days.

M.W. and W.D. assert that the difference in dangerousness between mentally ill patients committed under RCW 71.05 and sexually violent predators, means that the *McCuiston* substantive due process analysis cannot be relevant here. Br. Resp't at 17-21. But the *McCuiston* Court focused on whether periodic review was available and whether procedural safeguards were sufficient to ensure the commitment was tailored to mental illness and dangerousness—the relevant legal inquiry necessary to satisfy strict scrutiny under substantive due process. *McCuiston*, 174 Wn.2d at 385-86. M.W. and W.D. also rely on one purpose of the Involuntary Treatment Act—to promote treatment in the community. Br. Resp't at 10-12. They fail to acknowledge, however, that the challenged violent felony recommitment procedures apply only to

patients found to have committed certain violent felonies, not all mentally ill patients.

The legislature has undoubtedly determined that sexually violent predators should be treated differently from other patients with mental illness. *See generally* RCW 71.09. But this does not prevent the legislature from adopting a similar process for another small group of particularly dangerous patients, all of whom have committed at least one violent felony act that warrants an emphasis on community protection. *See* RCW 71.05.280, .320 (requiring a finding the person committed a class A or other listed felony, including, for example, first and second degree murder, homicide by abuse, first and second degree rape, first degree robbery, first and second degree assault, first and second degree kidnapping, and first degree arson); RCW 9A.32.030; .050, .055; RCW 9A.44.040, .050; RCW 9A.56.200; RCW 9A.36.011, .021; RCW 9A.40.030; RCW 9A.48.020. In order for the State to invoke the recommitment proceedings under former RCW 71.05.320(3)(c)(ii) (2013), there must have been a special finding upon the original commitment that the patient committed acts constituting a violent felony. RCW 71.05.280(3)(b).³

³ While W.D. asserts that his special finding involved an attack on a fellow patient, the police report indicates that W.D. did not know his victim, who required multiple surgeries to repair facial fractures. CP at 95. Similarly, M.W.'s victim suffered facial fractures requiring him to be on a liquid diet for approximately six weeks. CP at 65.

Thus, while not identical, sexually violent predators and patients found to have committed a violent felony both present a danger to the public. The violent felony recommitment provisions under the Involuntary Treatment Act are similar to, but more protective than, the sexually violent predator annual review scheme.

3. The legislature was entitled to create a different recommitment scheme for the small number of mentally ill patients who have committed violent felonies but were incompetent to stand trial

The legislature was entitled to carve out a special recommitment proceeding for the subset of mentally ill patients who have committed violent felonies but were incompetent to stand trial, in order to ensure public safety and encourage effective treatment for these violent patients. *See McCuiston*, 174 Wn.2d at 391-92.

In 2013, when it amended the Involuntary Treatment Act to add the violent felony recommitment provisions, the legislature found that “there are a small number of individuals who commit repeated violent acts against others while suffering from the effects of mental illness and/or developmental disability that both contribute to their criminal behaviors and render them legally incompetent to be held accountable for those behaviors.” Laws of 2013, ch. 289, § 1. The legislature also found that these criminal defendants’ incapacity to stand trial meant that they could

not be found guilty and sent to prison for their crimes, nor were they subject to long term civil commitment like those found not guilty by reason of insanity. Laws of 2013, ch. 289, § 1. The existing civil commitment system was insufficient to protect the public from these patients and their violent acts. *Id.* Thus, for a small number of patients, a change in the Involuntary Treatment Act was necessary to serve the compelling state interest in public safety, and provide proper care for these individuals who had been found incompetent to stand trial for certain violent felonies. *Id.*

The 2013 amendments to the Involuntary Treatment Act were intended to solve a particular problem that the legislature found existed with regard to the small number of patients found incompetent to stand trial for violent felonies. *See* Opening Br., App. A at 004a. The fiscal note for the 2013 legislation indicates that 15-25 state hospital patients per year were predicted to fall into this affected category. Fiscal Note E2SHB 1114, <https://fortress.wa.gov/ofm/fnspublic/legsearch.aspx?BillNumber=1114&SessionNumber=63>, at 3 (last visited Aug. 13, 2015). Thus, while M.W. and W.D. tend to refer throughout their response brief to patients with mental illness generally, the violent felony recommitment provisions impact only a small subset of mentally ill state hospital patients. The legislature's surgical problem-solving did not alter the recommitment

system for any patients other than those previously found to have committed certain violent acts, but were incompetent to stand trial.

M.W. and W.D. reach back to the 1970s, invoking the legislature's intent to maximize the ability of those with mental illness to live in their local communities. While integration in the community is certainly a laudable goal, it is also within the modern legislature's prerogative to refine the Involuntary Treatment Act to ensure public safety. The motivations of the 1974 legislature when drafting the Involuntary Treatment Act certainly do not prevent a later legislature from taking steps to solve a particular problem affecting a small number of violent and dangerous patients.

While M.W. and W.D. assert that the 2013 amendments will not increase public safety or result in better treatment for this subset of patients, this court has recognized that the legislature's findings supporting such problem-solving deserve deference. In *McCustion*, this Court discussed the deference due to the legislature, explaining that courts will not ordinarily controvert or even question legislative findings of fact. *McCustion*, 174 Wn.2d at 391 (citing *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 270-71, 534 P.2d 114 (1975)).

4. The violent felony recommitment procedures do not permit commitment for patients who are no longer

**mentally ill and dangerous, therefore satisfying
substantive due process**

M.W. and W.D. appear to concede that the violent felony recommitment provisions “[do] not allow the State to commit individuals who would otherwise have been released.” Br. Resp’t at 16. And the United States Supreme Court has recognized that a mental health commitment scheme satisfies strict scrutiny under substantive due process so long as the scheme allows a person to be released when he is no longer mentally ill and dangerous. *See McCuiston*, 174 Wn.2d at 384-85 (listing United States Supreme Court cases).

M.W. and W.D. complain that the provisions may not be fully effective in preventing the revolving door between civil treatment and the criminal system. Br. Resp’t at 23-25. But this Court has also held that where the legislature has declared the necessity for an enactment, that declaration is deemed to be conclusive as to the circumstances asserted, and it must be given effect unless the court can declare the findings are obviously false. *McCuiston*, at 391-92 (citing *Hoppe v. State*, 78 Wn.2d 164, 169, 469 P.2d 909 (1970)). Here, the legislature stated that the 2013 amendments would improve public safety as well as treatment for these individuals. Laws of 2013, ch. 289, § 1.

So long as patients are not committed absent mental illness and dangerousness, the legislature should not be constrained to enact only perfectly effective solutions. *E.g. Yakima County Deputy Sherriff's Ass'n v. Bd. of Comm'rs*, 92 Wn.2d 831, 601 P.2d 936 (1979) (recognizing this principle in the context of an equal protection challenge). Indeed, M.W. and W.D. cite to no case to support their argument that a less-than-completely-effective solution to an ongoing problem fails to comply with substantive due process. Br. Resp't at 23-25. Finally, M.W. and W.D. ignore previously-recognized state interests including encouraging treatment and preventing premature release. *See McCuiston*, 174 Wn.2d at 394 (having found that the initial commitment hearing provides full procedural protections, the *McCuiston* court recognized "the State has a substantial interest in encouraging treatment, preventing premature release of SVP's, and avoiding the significant administrative and fiscal burdens associated with evidentiary hearings"); RCW 71.05.010.

In sum, this Court should conclude that because the periodic review of indefinite commitments for sexually violent predators complies with substantive due process, then the violent felony recommitment procedures certainly do. While the patients and schemes are not identical, the violent felony recommitment provisions are more protective against improper confinement than the scheme upheld in *McCuiston*. The

differences between sexually violent predators and those found to have committed violent felonies are significant; but not significant enough to warrant a different result, especially where the legislature's findings and judgment are entitled to deference.

C. The Violent Felony Recommitment Provisions Comply with Procedural Due Process in Light of *McCustion*

1. The violent felony recommitment provisions comply with procedural due process under the *Mathews*⁴ balancing test

a. The provisions merely shift a burden of production, they do not shift the burden of proof

In *Meirhofer*, this Court reiterated what the State must establish when it is required to make a prima facie case for continued commitment. *Meirhofer*, 182 Wn.2d at 637-38. Where the State bears the burden of presenting prima facie evidence that continued commitment is appropriate, as is the case under former RCW 71.05.320(3)(c)(ii) (2013), the court does not weigh competing evidence or determine whose evidence is more believable. *Meirhofer*, 182 Wn.2d at 638. But the court “‘ must determine whether the asserted evidence, if believed, is *sufficient* to establish the proposition its proponent intends to prove.’” *Id.* (quoting *McCustion*, 174 Wn.2d at 394). Thus, this Court very recently explained that evaluation of the State's prima facie case requires the court to determine whether the

⁴ *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

State's evidence, if believed and if it remains unrebutted, would be sufficient to meet the applicable burden of proof.

Under former RCW 71.05.320(3)(c)(ii) (2013), at the prima facie stage, the court must consider the petition for recommitment and the two required affidavits, typically signed by the patient's treating psychiatrist and psychologist. The affidavits must describe in detail both the behavior of the detained person that supports continued commitment *and* what, if any, less restrictive treatment is available. RCW 71.05.290(2)(e). Because the State must submit two affidavits from a limited list of treating mental health care professionals, not just one expert, the State is arguably more constrained in its method of providing prima facie evidence than the patient. RCW 71.05.290(2).

If at the preliminary hearing the court determines that the affidavits standing alone would not be sufficient to warrant continued commitment under the clear and convincing standard, then continued commitment is not justified unless the State can proceed on alternate grounds. In addition, if the patient produces an admissible expert opinion stating that there is no substantial likelihood the patient will repeat similar acts as a result of a mental disorder or developmental disability, then the court must proceed to a full evidentiary hearing. Former RCW 71.05.320(3)(c)(ii)(2013). If a

patient is indigent, he or she is entitled to an expert evaluation and opinion at public expense. RCW 71.05.360(12).

Because the State's evidence must be sufficient to warrant recommitment in order to meet the prima facie evidence requirement, even if the patient never provides any rebuttal evidence, the burden of proof does not shift. *See Meirhofer*, 182 Wn.2d at 637-38; former RCW 71.05.320(3)(c)(ii) (2013); RCW 71.05.360(12).

M.W. and W.D. attempt to characterize the patient's burden of production as more onerous than is actually provided in the plain language of the statute. The plain language requires the patient to produce at the preliminary hearing "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." RCW 71.05.320. They argue that "proof" must mean something more than an admissible expert conclusion. Br. Resp't at 31. But this Court must take care to interpret statutes in the way that preserves their constitutionality wherever possible and it should decline the invitation to read the statute as M.W. and W.D. suggest. *City of Bothell v. Barnhart*, 172 Wn.2d 223, 229, 257 P.3d 648 (2011). If a lower court were to require more than an admissible expert opinion reaching the conclusion outlined

in the statute, in conflict with the statute or constitution, the affected patient could certainly bring an as applied challenge. This Court should not speculate that some future court will ignore the plain requirement of the statute.

b. Applying the *Mathews* balancing test to the violent felony recommitment provisions should lead to the same result this Court reached in *McCustion*

In *McCustion*, the Court addressed a procedural due process challenge to the sexually violent predator annual review procedures. While a patient's liberty interest is undoubtedly substantial, the risk of erroneous confinement was low and the patient's interest was outweighed by the state's interests in increased public safety, encouraging effective treatment, and avoiding unnecessary hearings. *McCustion*, 174 Wn.2d at 392-95. This was true even though the annual review procedures required the patient to produce evidence to refute the state's prima facie case before proceeding to a full evidentiary hearing. *Id.*

In *McCustion*, this Court recognized that erroneous commitment was a low risk given the procedural protections in place. The sexually violent predator was entitled to a full evidentiary hearing upon initial commitment at which full procedural protections were provided. *Id.* at 393. Thereafter, the patient was entitled to annual written review by a

qualified professional to ensure ongoing commitment was still warranted. *McCustion*, 174 Wn.2d at 393. The patient was also entitled to their own qualified expert. *Id.* Even where the State found continued confinement was warranted, the patient was entitled to a preliminary hearing where the State had to present prima facie evidence sufficient to show the patient is still mentally ill and dangerous. *Id.* at 394. The patient had to produce evidence of a change resulting from treatment in order to proceed to a full evidentiary hearing. *Id.* The *McCustion* Court concluded that these procedures were sufficient to ensure that the individuals who remain committed continue to be both mentally ill and dangerous, and thus constitutional error was unlikely. *Id.*

Finally, the *McCustion* Court recognized the State's interest in encouraging treatment, preventing premature release of dangerous patients, and avoiding significant administrative and cost burdens associated with unnecessary evidentiary hearings. *Id.* at 395.

Here, the violent felony recommitment procedures maintain more procedural protections resulting in even less likelihood of erroneous confinement. And the State's interests in community safety and preserving resources are equally weighty.

Under RCW 71.05, the patient's initial confinement must be supported by clear, cogent, and convincing evidence at a full evidentiary

trial with an array of procedural protections. *Cf McCuiston* 174 Wn.2d at 393. Under RCW 71.05, the State must petition for recommitment prior to the expiration of the initial confinement or the patient will be released. When a patient is the subject of a petition for recommitment, he continues to receive protections that were available to him for his initial commitment proceeding, for example, the right to counsel and to an expert funded at public expense if the patient is indigent, the right to access to the evidence against him, the right to present evidence to rebut the State's petition, the right to remain silent, and the right to have the court consider less restrictive alternative placements. RCW 71.05.310, .320(3), (6), .360(5)(c)-(d); *In re Det. of J.S.*, 124 Wn.2d 689, 698, 880 P.2d 976 (1994) (finding that the "Legislature has . . . directed the court to consider less restrictive treatment at each stage of involuntary commitment proceedings"). While M.W. and W.D. assert that a less restrictive alternative will not be considered as part of the prima facie requirement, that would be contrary to RCW 71.05.320, .360 and *J.S.* If a patient is actually deprived of this consideration in some future case, he can certainly bring an as applied challenge and present those facts.

At a preliminary hearing, the State must present prima facie evidence in the form of affidavits from two treating professionals showing that the person continues to suffer a mental disorder that creates a

substantial likelihood he or she will continue to commit acts similar to the charged behavior. RCW 71.05.320. If the state fails to present sufficient prima facie evidence, the person must be released unless there are alternative grounds for commitment. If the patient provides an admissible expert opinion in rebuttal, concluding that the patient has so changed that there is no longer a substantial likelihood that mental illness will cause continued acts similar to the charged behavior, then he or she is entitled to a full evidentiary hearing with a full panoply of procedural rights. RCW 71.05.320. This Court has already held that it will not assume the State's review process will fail to properly identify those who are no longer mentally ill and dangerous. *McCuiston*, 174 Wn.2d at 389.

Nothing requires the RCW 71.05 patient to testify or submit to evaluation (because his expert could opine based on the treatment file alone); M.W. and W.D. concede that the Sixth Amendment confrontation right does not apply in commitment hearings, the State's petition must address less restrictive alternatives, and M.W. and W.D. have only speculated that a state's petition could rely on inadmissible evidence. None of M.W. and W.D.'s arguments establish a higher risk of erroneous commitment than was present in *McCuiston*.

Finally, where a person has committed prior acts constituting a violent felony as a result of mental illness, the State's interests in

protecting the public and ensuring adequate treatment are no less weighty than in *McCustion*. While the State also has an interest in promoting community treatment for mentally ill patients, this interest does not outweigh the compelling state interest in protecting public safety where a patient with a history of violence is still mentally ill and dangerous.

In sum, application of the *Mathews* factors indicates a low risk of erroneous confinement and strong state interests in public safety and promoting necessary treatment. Balancing these factors resulted in a finding of compliance with procedural due process in *McCustion*, and this court should come to the same result in this case.

2. The Violent Felony Recommitment Provisions Are Not Unconstitutionally Vague

M.W. and W.D. assert that the State engages in guesswork when it tracks statutory language to articulate the burden of production a patient must meet to trigger a full evidentiary hearing. Former RCW 71.05.320(3)(c)(ii) (2013) provided that the patient can rebut the State's prima facie evidence with "proof through an admissible expert opinion that the . . . mental disorder or developmental disability no longer presents a substantial likelihood of the person committing acts similar to the charged criminal behavior." M.W. and W.D. assert that the statute is unconstitutionally vague as to the level of "proof" required. But a

reasonable interpretation consistent with the statutory language is that the patient must provide an admissible expert opinion making the required conclusion. Because a court does not weigh competing evidence at the prima facie stage (*Meirhofer*, 182 Wn.2d at 638), simply presenting an admissible, contrary expert opinion concluding there is no substantial likelihood of future similar acts is enough to trigger a full evidentiary hearing under the statute.

To the extent that M.W. and W.D. speculate that a court could impose a more onerous burden of production on the patient, such speculation is improper where this court should assume lower courts will follow the statutory requirements, and this Court is obligated to interpret the statute in a way that preserves its constitutionality wherever possible. If some future patient is denied a full evidentiary hearing, despite having produced sufficient evidence to trigger a hearing, the patient can certainly seek reversal based on statutory or constitutional grounds. But facial challenges are not the proper avenue for solving speculative problems that have not yet arisen in practice. *E.g.*, *In re Treatment of Mays*, 116 Wn. App. 864, 68 P.3d 1114 (2003) (vagueness challenge not involving First Amendment must be evaluated as applied).

D. The Violent Felony Recombitment Provisions Comply with the Right to a Jury Trial

The cases that M.W. and W.D. cite have not expressly established that there exists a state constitutional right to a jury trial for a definite term commitment. *Sherwin* simply confirms that the state constitutional right to trial by jury is preserved to the same extent it existed at the time the constitution was adopted. *Sherwin v. Arveson*, 96 Wn.2d 77, 83, 633 P.2d 1335 (1981). And the *McLaughlin* Court included a single reference to article I, section 21 of the Washington Constitution, noting that it permits the legislature to provide for a less than unanimous verdict in civil cases, without further discussion. *See Dunner, v McLaughlin*, 100 Wn.2d 832, 844, 676 P.2d 444 (1984).

Yet even assuming a constitutional jury trial right applies, M.W. and W.D. fail to cite to any case where a threshold burden of production required to proceed to trial was deemed unconstitutional. In fact, such a holding could impact many civil cases where a right to jury trial exists, but the parties must meet some burden of production to avoid dismissal or judgment as a matter of law before trial. Even in circumstances where there exists a clear constitutional jury trial right, that does not prevent the legislature or court from requiring that certain prerequisites be met or from

permitting dismissal where warranted as a matter of law before the case can move to trial.⁵

III. CONCLUSION

This Court should recognize that the superior court commissioner's order declaring the violent felony recommitment provisions unconstitutional is inconsistent with this Court's holdings in *McCouston* and *Meirhofer*. The statutes are facially valid because M.W. and W.D. have not shown the violent felony recommitment provisions cannot be applied constitutionally in any circumstance. The provisions are at least as protective of patients' rights as the sexually violent predator annual review process and they ensure that a patient will not be subject to a new commitment term absent mental illness and dangerousness. This Court should reverse.

RESPECTFULLY SUBMITTED this 14th day of August, 2015.

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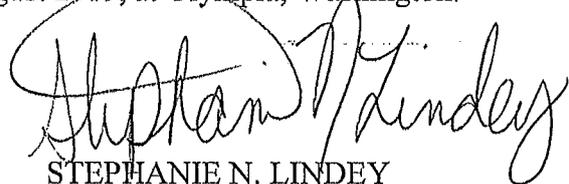
⁵ M.W. and W.D. do not address the State's argument that the trial court erred when it found the violent felony recommitment procedures violate equal protection.

Certificate of Service

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via regular United States Postal Service mail and electronic mail, a true and correct copy of the Reply Brief of the State of Washington Department Of Social And Health Services, upon the following:

Kathleen A. Shea
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Dated this 14th day of August 2015, at Olympia, Washington.



STEPHANIE N. LINDEY
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Dear Clerk,

Attached for filing in case number 90570-3, please find a Reply Brief of the State of Washington DSHS.

Thank you,

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