

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 26, 2015, 4:26 pm
BY RONALD R. CARPENTER
CLERK

E

NO. 90570-3

RECEIVED BY E-MAIL

by h

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Detention of:

M.W. and W.D.

STATE'S ANSWER TO AMICUS

ROBERT W. FERGUSON
Attorney General

Rebecca Glasgow, WSBA 32886
Deputy Solicitor General

Amber Leaders, WSBA 44421
Assistant Attorney General

Office ID 91087
PO Box 40100
Olympia, WA 98504
360.664.3027



ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT.....2

A. The Initial Civil Commitment Process for People Found Incompetent to Stand Trial for a Violent Felony Is Robust2

B. The Violent Felony Recommitment Provisions Comply With Substantive Due Process Because Recommitment Must Be Predicated on Ongoing Mental Illness and Dangerousness.....6

C. Similarly, The Violent Felony Recommitment Provisions Comply With Procedural Due Process Under *Mathews v. Eldridge*10

1. The violent felony recommitment provisions place the burden of proof on the State.....11

2. Applying the *Mathews v. Eldridge* factors, while the patient’s liberty interest is significant, the State’s interest in public safety is equally significant.....12

3. The middle *Mathews v. Eldridge* factor tips in favor of the State because the recommitment provisions do not increase risk of erroneous recommitment.....13

4. While different from sexually violent predator proceedings, the violent felony recommitment provisions are at least as protective against improper commitment as those upheld in *McCustion*15

D.	The Violent Felony Recommitment Process Was Intended to Avoid a Revolving Door for These Patients and Would Not Result in Continued Commitment Absent Mental Illness and Dangerousness.....	18
III.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Born v. Thompson</i> 154 Wn.2d 749, 117 P.3d 1098 (2005).....	13
<i>Dunner v. McLaughlin</i> 100 Wn.2d 832, 676 P.2d 444 (1984).....	4
<i>Humphrey v. Cady</i> 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972).....	12
<i>In re Det. of J.S.</i> 124 Wn.2d 698, 880 P.2d 76 (1994).....	6, 9
<i>In re Det. of LaBelle</i> 107 Wn.2d 196, 728 P.2d 138 (1986).....	19-20
<i>In re Det. of Morgan</i> 180 Wn.2d 312, 330 P.3d 774 (2014).....	10, 14
<i>In re Det. of R.P.</i> 89 Wn. App. 212, 948 P.2d 856 (1997).....	4
<i>In re Meirhofer</i> 182 Wn.2d 632, 343 P.3d 731 (2015).....	1, 8-9, 11, 17
<i>Jackson v. Indiana</i> 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).....	7
<i>Kansas v. Hendricks</i> 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).....	7
<i>Mathews v. Eldridge</i> 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	10, 12-13
<i>Murphy v. Immigration & Naturalization Serv.</i> 54 F.3d 605 (9th Cir. 1995)	8

<i>O'Connor v. Donaldson</i> 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).....	7
<i>State v. Beaver</i> No. 91112-6, 2015 WL 5455821 (Wash. Sept. 17, 2015)	6, 7
<i>State v. McCuiston</i> 174 Wn.2d 369, 275 P.3d 1092 (2012).....	1, 7-9, 11, 15, 17
<i>Tellevik v. Real Property</i> 120 Wn.2d 68, 838 P.2d 111 (1992).....	9
<i>United States v. Chairse</i> 18 F. Supp. 2d 1021 (D. Minn. 1998).....	17
<i>United States v. Strong</i> 489 F.3d 1055 (9th Cir. 2007)	17

Statutes

Laws of 2013, ch. 289, § 1	18-19
RCW 9A.32.030.....	12
RCW 9A.32.050.....	12
RCW 9A.32.055.....	12
RCW 9A.36.011.....	12
RCW 9A.36.021.....	12
RCW 9A.40.020.....	12
RCW 9A.40.030.....	12
RCW 9A.44.040.....	12
RCW 9A.44.050.....	12
RCW 9A.48.020.....	13

RCW 9A.56.200.....	12
RCW 10.77.025	16
RCW 10.77.040	16
RCW 10.77.086(4).....	2
RCW 10.77.110	16
RCW 10.77.150	16
RCW 10.77.200	16
RCW 71.05	14
RCW 71.05.280	4, 12
RCW 71.05.280(3).....	2-3
RCW 71.05.280(3)(b)	3, 13
RCW 71.05.290	4, 7, 14
RCW 71.05.290(2).....	5
RCW 71.05.290(2)(e)	10
RCW 71.05.290(3).....	2
RCW 71.05.300	3
Former RCW 71.05.320.....	11
Former RCW 71.05.320(3)(c)(ii).....	5-7, 9, 11, 16
RCW 71.05.310	3, 4
RCW 71.05.320	3, 4, 7, 13-14
RCW 71.05.320(1).....	3

RCW 71.05.320(3).....	5
RCW 71.05.320(7) (Laws of 2015, ch. 250, § 11(7))	5
RCW 71.05.325-.340	9
RCW 71.05.340	4
RCW 71.05.360	3-4
RCW 71.05.360(12).....	6
RCW 71.09.010	15
RCW 71.09.030-.060	15
RCW 71.09.060	15
18 U.S.C. §§ 4241, 4246, 4247, 4247(h).....	17

Other Authorities

<i>Black's Law Dictionary</i> (10th ed. 2014).....	8
--	---

I. INTRODUCTION

When the legislature adopted the violent felony recommitment provisions of the Involuntary Treatment Act, it created a recommitment process, similar but not identical to the annual review process for sexually violent predators, for a small number of patients who have committed acts of violence. This recommitment scheme is triggered only after a patient has been initially committed with a full panoply of procedural rights including a right to a jury trial. The violent felony recommitment provisions require the State to petition for recommitment every six months, the petition must be sworn by two treating mental health experts, and it must provide prima facie evidence sufficient to support another 180-day commitment. If the patient produces an admissible expert opinion that disagrees, a full evidentiary hearing must then occur.

This recommitment scheme offers more frequent and robust review of whether continued commitment is appropriate than the scheme this Court upheld in *McCuiston* and *Meirhofer*,¹ where sexually violent predators are committed indefinitely, subject to annual review. It also provides more frequent and robust review than a comparable federal scheme for those committed after they were found incompetent to stand

¹ *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012); *In re Meirhofer*, 182 Wn.2d 632, 343 P.3d 731 (2015).

trial, and Washington's scheme for those committed after a person has been found not guilty by reason of insanity.

The legislature also intended the violent felony recommitment scheme to ensure consistent, appropriate treatment in a state hospital for this population while they remain mentally ill and dangerous. Consistent treatment in a state hospital, rather than repeated cycling through county jails, is better for these patients, something Amici themselves have argued.

II. ARGUMENT

A. **The Initial Civil Commitment Process for People Found Incompetent to Stand Trial for a Violent Felony Is Robust**

Amici's description of the proof required for M.W. and W.D's initial commitment in this case reflects a fundamental misunderstanding of the commitment process and its protections. *See* Amicus Br. at 3-4. Where a court concludes that a felony defendant's competency is unlikely to be restored, the criminal charges are dismissed, and the court must order an evaluation to determine whether civil commitment is warranted. RCW 10.77.086(4). As a result of that evaluation, the State may petition to involuntarily confine the person for up to 180 days of treatment. RCW 71.05.280(3), .290(3). One basis for confinement is that the person has committed acts constituting a felony, and as a result of a mental disorder, there is a substantial likelihood of repeating similar acts.

RCW 71.05.280(3). The petition must be brought and sworn by two medical or mental health professionals and it must specifically address whether less restrictive alternatives would be appropriate. RCW 71.05.320(1).

The person has a right to be represented by an appointed attorney, a right to an expert mental health practitioner at public expense if he or she is indigent, and a right to a jury trial. RCW 71.05.300. There is also a right to have a mental health professional explore possible less restrictive alternatives and testify in support of such alternatives. RCW 71.05.300.

The person has a right to a speedy trial or hearing where all elements supporting commitment must be proven by clear, cogent, and convincing evidence. RCW 71.05.310 (requiring findings made by clear, cogent, and convincing evidence, including commitments under RCW 71.05.280(3)). The person has a right to be present at the trial or hearing, a statutory right to remain silent, and the right to refuse psychiatric medications for the 24 hours before the hearing. RCW 71.05.310, .360. Where alleged, the jury, or commissioner if a jury trial is waived, must also determine by clear, cogent, and convincing evidence whether the person committed the alleged felony acts and whether they constitute a violent offense. RCW 71.05.280(3)(b), .310.

If the jury or commissioner commits the person for involuntary treatment, the patient has a right to adequate care and individualized treat-

ment. RCW 71.05.360. If in the middle of a confinement term, the hospital determines outpatient treatment has become appropriate, the patient may be conditionally released for the remainder of the term. RCW 71.05.340. At the end of any involuntary commitment term under RCW 71.05.280, the patient is entitled to release unless two mental health professionals bring a new petition for continued confinement. RCW 71.05.290, .320; *see also In re Det. of R.P.*, 89 Wn. App. 212, 215-16, 948 P.2d 856 (1997) (applying .290 requirements to subsequent petitions).

Thus, while M.W. and W.D. may have chosen to stipulate that they committed acts constituting a violent felony, they were entitled to have a jury determine by clear, cogent, and convincing evidence upon their initial commitment whether they had committed acts that would amount to a violent felony, considering all elements of the crime except for state of mind. RCW 71.05.280, .310; *Dunner v. McLaughlin*, 100 Wn.2d 832, 846, 676 P.2d 444 (1984); CP at 14-15 (M.W.), 360-61 (W.D.). In both cases, the commissioner entered findings of fact that “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[.]” CP at 22 (M.W.), 368 (W.D.) (first bracketed material in both original sources). This is more than a simple determination that the charged crime was a

violent felony—the commissioner found that M.W. and W.D committed violent assaults. *See* Amicus Br. at 3, 13; CP at 10-11, 163, 202.

An order of confinement in a state mental hospital cannot exceed 180 days under the Involuntary Treatment Act. RCW 71.05.320(3), (7)²; *see also* RCW 71.05.290(2). Under the violent felony recommitment provisions at issue here, state mental health treatment experts must petition for recommitment. But rather than proceeding immediately to a full evidentiary hearing, the court must determine at a preliminary hearing whether the petition contains prima facie evidence that the patient continues to suffer from a mental disorder or developmental disability that results in a substantial likelihood that he or she will commit similar violent acts. Former RCW 71.05.320(3)(c)(ii) (2013) (Laws of 2013, ch. 289, § 5(3)(c)(ii)).³ If so, the patient must produce in rebuttal an admissible expert opinion indicating that the person's condition has so changed such that the mental disorder no longer presents a substantial likelihood that he or she will commit similar violent acts. Former RCW 71.05.320(3)(c)(ii). The patient has a right to have the court appoint an expert mental health professional to evaluate and submit an opinion, which must be at public

² In 2015, the legislature provided that an order for less restrictive treatment may extend for up to one year when the person's previous commitment term was for intensive inpatient treatment at a state hospital. Laws of 2015, ch. 250, § 11(7).

³ In 2015, the legislature amended RCW 71.05.320, and subsection (3) was recodified as RCW 71.05.320(4). Throughout, references to former subsection (3) refer to the 2013 version of the statute. The language of current subsection (4) remains the same.

expense if the patient is indigent. RCW 71.05.360(12).

If the patient's expert presents an admissible opinion containing the required conclusion, then the patient is entitled to a full evidentiary hearing to address whether continued commitment is warranted. Former RCW 71.05.320(3)(c)(ii). If the patient does not rebut the State's prima facie evidence, then he or she is subject to up to 180 days of continued commitment. *Id.* Both the first and subsequent commitments may include a transfer to a less restrictive specialized program of intensive support in the community. Former RCW 71.05.320(3)(c)(ii); *In re Det. of J.S.*, 124 Wn.2d 698, 698, 880 P.2d 76 (1994).

Here, the commissioner concluded that the violent felony recommitment provisions were unconstitutional and M.W. and W.D. could not be recommitted under them, so M.W. and W.D. were recommitted after a full evidentiary hearing. *See* CP at 337-43, 346-47, 396-97.

B. The Violent Felony Recommitment Provisions Comply With Substantive Due Process Because Recommitment Must Be Predicated on Ongoing Mental Illness and Dangerousness

"In the context of involuntary commitment, substantive due process requires that the nature of commitment bear some reasonable relationship to the purpose for which the individual is committed." *State v. Beaver*, No. 91112-6, 2015 WL 5455821, at *4 (Wash. Sept. 17, 2015). To satisfy this standard, civil commitment statutes must require confinement

to be predicated upon both mental illness and dangerousness. *See O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975); *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (previous instances of violent behavior are an important factor in predicting future dangerousness). The statutory scheme must provide for periodic review of a patient's suitability for release. *Beaver*, 2015 WL 5455821, at *4. This Court has indicated it will not assume this periodic review by mental health professionals will fail to identify patients who are no longer mentally ill and dangerous. *McCouston*, 174 Wn.2d at 389.

The violent felony recommitment provisions require periodic review every 180 days, unlike the commitment at issue in *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), on which Amici rely. *Jackson*, 406 U.S. at 720-21 (noting Indiana's statute allowed indefinite commitment and contained no provision for periodic review). Specifically, the violent felony recommitment provisions require two mental health experts to file a new petition every six months. RCW 71.05.290, .320. The court must conduct a hearing to determine whether the petition establishes prima facie evidence that the patient continues to suffer from a mental illness, and that the mental illness makes further violent and dangerous acts substantially likely. Former RCW 71.05.320(3)(c)(ii).

When evaluating whether the State’s petition meets the prima facie standard, the court “‘must determine whether the asserted evidence, if believed, *is sufficient to establish the proposition its proponent intends to prove.*’” *Meirhofer*, 182 Wn.2d at 638 (emphasis added) (quoting *McCustion*, 174 Wn.2d at 382 (quoting *In re Det. of Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002))); *see also* *Murphy v. Immigration & Naturalization Serv.*, 54 F.3d 605, 610 (9th Cir. 1995) (“‘evidence which, if unexplained or uncontradicted, *is sufficient to sustain a judgment in favor of the issue which it supports*’” (emphasis added) (quoting *Black’s Law Dictionary* 1190 (6th ed. 1990))); *Black’s Law Dictionary* 1382 (10th ed. 2014) (prima facie: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted[.]”). This means the petition must set forth sufficient justification for commitment that, if the evidence in the petition is left unrebutted, would be sufficient to meet the clear, cogent, and convincing standard. This is true even though the court is not, at this stage, weighing competing evidence. *See McCustion*, 174 Wn.2d at 382; *Meirhofer*, 182 Wn.2d at 638.

Amici urge this Court to conclude that the prima facie evidence required under the statute is something less, but they ignore *McCustion* and *Meirhofer* and fail to cite to any contrary definition of “prima facie.” *See* Amicus Br. at 11-12 (relying instead on *Davis v. Cox*, 183 Wn.2d 269,

280-81, 351 P.3d 862 (2015), which analyzes a statute with distinctly different language). Reading the term “prima facie” consistent with this Court’s analysis in *McCouston* and *Meirhofer* makes sense because those cases also involved an involuntary commitment scheme. And even if this Court determines that there are other possible definitions of prima facie, it must construe the term in a way that preserves the constitutionality of the statute if possible. *E.g., Tellevik v. Real Property*, 120 Wn.2d 68, 78, 838 P.2d 111 (1992).

Thus, a court must dismiss a violent felony recommitment petition if it does not contain sufficient evidence to meet the clear, cogent, and convincing standard, unless there are alternate grounds for continued confinement. *See* former RCW 71.05.320(3)(c)(ii). Only if the State meets this prima facie burden would a patient need to produce rebuttal evidence. Moreover, if the patient produces the required contrary evidence, the court must proceed to a full evidentiary hearing. *Id.*

Finally, consideration of less restrictive alternatives is required for patients committed and recommitted under this scheme. *In re J.S.*, 124 Wn.2d at 698. Prior to the end of any commitment term, the hospital may release, conditionally release, or place in a less restrictive treatment environment a patient who is no longer dangerous as a result of mental illness. RCW 71.05.325-.340. And each semiannual petition for

recommitment must also address whether less restrictive alternatives are available. RCW 71.05.290(2)(e); CP at 32, 237-38. Amici incorrectly ignore these statutory safeguards. Amicus Br. at 6-8.

In sum, the violent felony recommitment provisions satisfy substantive due process because they require the court to determine whether the State's petition is sufficient to meet the clear, cogent, and convincing standard if left un rebutted, and a full evidentiary hearing is triggered if the patient produces an expert opinion in rebuttal. Thus, the scheme would not permit the continued involuntary commitment of a person who is no longer mentally ill and dangerous.

C. Similarly, The Violent Felony Recommitment Provisions Comply With Procedural Due Process Under *Mathews v. Eldridge*⁴

Procedural due process requires notice and opportunity to be heard at a meaningful time and in a meaningful manner. *E.g., In re Det. of Morgan*, 180 Wn.2d 312, 320, 330 P.3d 774 (2014). Applying the *Mathews v. Eldridge* factors, the violent felony recommitment provisions satisfy procedural due process. The provisions do not shift the burden of proof, the patient has ample opportunity to present his or her case for release, and granting a full hearing upon every recommitment would not lead to a different result in these cases.

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

1. The violent felony recommitment provisions place the burden of proof on the State

As explained above, if at the preliminary hearing the court determines that the petition for recommitment standing alone would not be sufficient to warrant continued commitment under the clear, cogent, and convincing standard, then continued commitment is not justified unless the State can proceed on alternate grounds. Because the State's evidence must be evaluated for sufficiency 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). While Amici complain that the State's petition is evaluated for sufficiency without any weighing of credibility (Amicus Br. at 11), this Court took this into account in *McCuiston* and *Meirhofer*. *Meirhofer*, 182 Wn.2d at 637-38 (discussing *McCuiston*). Amici also fail to comprehend that the same is true for the patient's rebuttal evidence. If the patient produces an admissible expert opinion disagreeing with the State experts' conclusions, then the court must proceed to a full evidentiary hearing. The court does not weigh which expert opinion is more credible at the preliminary stage; the mere production of competing expert opinions is enough to trigger a full hearing. Former RCW 71.05.320. Neither M.W., W.D, nor Amici, have

pointed to any authority for the proposition that the patient must do more than produce an admissible contrary expert opinion. The statute places a burden of production on the patient, not a burden of proof.

2. Applying the *Mathews v. Eldridge* factors, while the patient's liberty interest is significant, the State's interest in public safety is equally significant

Involuntary commitment is a "massive curtailment of liberty" such that the first *Mathews v. Eldridge* factor always weighs in favor of the patient. *E.g., Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972). But it is also irrefutable that the State has a compelling interest both in treating people with mental illness that has caused violent behavior and in protecting members of the public from their actions. While violent offenders are not the same as sexually violent predators, they too constitute a 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 (requiring a finding the person committed a class A or other listed felony, including, for example, first and second degree murder, homicide by abuse (RCW 9A.32.030, .050, .055); first and second degree rape (RCW 9A.44.040, .050); first degree robbery (RCW 9A.56.200); first and second degree assault (RCW 9A.36.011, .021); first and second degree kidnapping (RCW 9A.40.020, .030); first degree arson

(RCW 9A.48.020)). In order for the State to invoke the violent felony recommitment proceedings, the jury or court commissioner must have specifically found upon the original commitment that the patient committed acts constituting a violent felony. Former RCW 71.05.280(3)(b). Thus, the third *Mathews v. Eldridge* factor, the State's interest in protecting members of the public, is compelling.

3. The middle *Mathews v. Eldridge* factor tips in favor of the State because the recommitment provisions do not increase risk of erroneous recommitment

Amici assert that the violent felony recommitment provisions increase risk of ongoing commitment without mental illness and dangerousness. But as explained above, under the violent felony recommitment provisions, the State must file a new petition every 180 days and it must bear the clear, cogent, and convincing burden of proof in order to obtain a new commitment order. RCW 71.05.320. Because the commissioner must consider whether the evidence presented in the petition meets the prima facie burden—the burden to show that, if left un rebutted, the evidence in the petition would be sufficient to meet the clear, cogent, and convincing standard—the burden of proof always rests with the State. Thus, the statutory scheme is consistent with this Court's reasoning in *Born v. Thompson*, 154 Wn.2d 749, 755, 117 P.3d 1098 (2005) (requiring a clear, cogent, and convincing standard of proof for

commitment for competency restoration). It also does not conflict with *In re Morgan*, which did not address the question here, but instead upheld an initial involuntary commitment. *See In re Morgan*, 180 Wn.2d at 320-21.

Amici are wrong when they assert that the violent felony recommitment provisions at issue here allow longer involuntary confinement based on fewer procedural protections. Amici are also wrong to characterize the violent felony recommitment provisions as creating a presumption in favor of ongoing commitment. These arguments ignore that a commitment under RCW 71.05 can last only 180 days, and each recommitment petition, supported by two treating experts, must independently establish that recommitment is warranted because the patient continues to be mentally ill and dangerous. RCW 71.05.290, .320.

If the State meets its prima facie burden, the patient must in turn meet a burden of production, not a burden of proof. The risk of erroneous recommitment is exceedingly low if a patient, in the face of a sufficient petition, cannot produce an expert with an opinion contrary to that expressed by the State's two treating mental health experts about the patient's mental illness and dangerousness. Because existing safeguards allow ample notice and opportunity to be heard, the proposed additional safeguard—a full evidentiary hearing upon every recommitment—would not likely reduce the risk of erroneous continued commitment.

4. While different from sexually violent predator proceedings, the violent felony recommitment provisions are at least as protective against improper commitment as those upheld in *McCustion*

Amici argue that those found incompetent to stand trial for a violent felony are different from sexually violent predators and those who have been acquitted of a crime by reason of insanity. Amicus Br. at 15-16. Of course that is the case (*see, e.g.*, RCW 71.09.010), but the commitment proceedings for those populations offer less regular opportunity for court evaluation of whether continued commitment is appropriate. Because those systems are constitutionally permissible, then this recommitment scheme should also be permissible.

Sexually violent predators can be committed for very long term treatment after their criminal sentence has ended and they would otherwise be released into the community. RCW 71.09.030-.060. Because of their unique nature, sexually violent predators are indefinitely committed, with annual review. *See* RCW 71.09.060. Their indefinite commitment must be supported by a finding that commitment is warranted beyond a reasonable doubt. RCW 71.09.060.

Those found not guilty of a crime by reason of insanity can also be involuntarily committed after their acquittal if they present a substantial danger to others or a substantial likelihood of committing additional

criminal acts. RCW 10.77.110. The initial confinement in these cases can extend to the expiration of the maximum sentence for the criminal offense, with examinations every six months. RCW 10.77.025, .040. In order to be released before the end of the maximum criminal sentence, the State or the patient must petition the court for release. RCW 10.77.025, .150, .200. The patient must show by a preponderance of the evidence that he or she no longer presents substantial danger or substantial likelihood of committing dangerous criminal acts. RCW 10.77.200.

Thus, sexually violent predators, if initially committed with all of the requisite procedural safeguards, are subject to indefinite commitment with periodic review. Those acquitted of crimes by reason of insanity, if committed, are subject to long-term commitment with periodic evaluation but no regular court review. In contrast, those committed under the Involuntary Treatment Act after having been found incompetent to stand trial for a violent felony are entitled to a court ruling on a new commitment petition every 180 days where the State must show continued commitment is warranted. Former RCW 71.05.320(3)(c)(ii). While initial commitments for sexually violent predators are based on findings beyond a reasonable doubt, that difference alone does not undermine this recommitment scheme where here, a new petition must support recommitment every six months. If the indefinite commitment scheme for sexually

violent predators comports with substantive and procedural due process, as this Court recently held in *McCustion* and *Meirhofer*, then the recommitment process at issue here should be held to comport with due process too.

A similar comparison can be made under federal law. 18 U.S.C. §§ 4241, 4246, and 4247 allow a long term commitment in the federal system *after* a person has been found incompetent to stand trial. Amici point to a maximum commitment term, but they consider only the commitment for competency evaluation under 18 U.S.C. § 4241. *United States v. Strong*, 489 F.3d 1055, 1061-62 (9th Cir. 2007). They ignore the longer term, indefinite commitment permitted under 18 U.S.C. §§ 4246 and 4247 after the person has been deemed incompetent, if they are found to present a danger to the community. Once a person has been committed by clear, cogent, and convincing evidence under this federal scheme, the commitment extends until a petitioner shows by a preponderance of the evidence that release is warranted at a hearing he or she can instigate by petition. 18 U.S.C. §§ 4246, 4247(h). Amici point to no case declaring this aspect of the federal system unconstitutional. *See United States v. Chairse*, 18 F. Supp. 2d 1021, 1024 (D. Minn. 1998) (“The provisions of 18 U.S.C. § 4246 have withstood various constitutional attacks.”).

While not identical, sexually violent predators, people found not guilty by reason of insanity, and patients found incompetent to stand trial

for a violent felony all potentially present a danger to the public. The violent felony recommitment provisions under the Involuntary Treatment Act are similar to, but more protective against improper commitment than, the sexually violent predator annual review scheme and the commitment scheme for those found not guilty by reason of insanity. Neither of these similar schemes requires the court to evaluate the sufficiency of a new commitment petition every 180 days. Where those schemes are constitutional, then this scheme should also be held to be constitutional.

D. The Violent Felony Recommitment Process Was Intended to Avoid a Revolving Door for These Patients and Would Not Result in Continued Commitment Absent Mental Illness and Dangerousness

Amici invoke other recent cases where courts have found that people with mental illness were not receiving mental health treatment from the State quickly enough. Amicus Br. at 17-18 (citing *In re Det. of D.W.*, 181 Wn.2d 201, 332 P.3d 423 (2014); *Trueblood v. Dep't of Soc. & Health Servs.*, No. 2:14-cv-01178-MJP (W.D. Wash. Apr. 2, 2015)). When adopting the violent felony recommitment provisions, the legislature intended to enhance public safety *and* to ensure proper care for these patients, avoiding a revolving door through which they might cycle between the state hospital and the criminal justice system. *See* Laws of 2013, ch. 289, § 1. Amici themselves have lamented situations where

defendants with mental illness languish in jails, “a punitive, and non-therapeutic environment,” rather than receiving treatment. See ACLU Trial Br. on Behalf of Plaintiffs, *Trueblood v. Dep’t of Soc. & Health Servs.*, Case 2:14-cv-01178-MJP, Doc. 113 (filed Mar. 4, 2015). The ACLU has argued that the state psychiatric hospitals provide a “marked contrast” to county jails, they are “designed to be therapeutic,” and they provide an environment where patients receive more personal care and freedom. *Trueblood v. Dep’t of Soc. & Health Servs.*, Ninth Circuit Court of Appeals, No. 15-35462, Dkt. 25-1 (Appellees’ Answering Br.).

The violent felony recommitment provisions help to ensure that this population of patients remains in a therapeutic setting until they improve sufficiently to warrant release. The legislature recognized that under prior iterations of the statutory scheme, these individuals were sometimes stuck in a revolving door between the criminal and civil commitment systems. The legislature was attempting to prevent individuals with mental illness from cycling through what is, in Amici’s own words, “a punitive, and non-therapeutic” criminal justice system. The legislature found that the violent felony recommitment scheme could not only improve public safety, but just as importantly provide more consistent care and treatment for this high-need population. Laws of 2013, ch. 289, § 1; see also *In re Det. of LaBelle*, 107 Wn.2d 196, 206, 728 P.2d

138 (1986) (approving amendment to the gravely disabled standard to avoid a “revolving door” for patients).

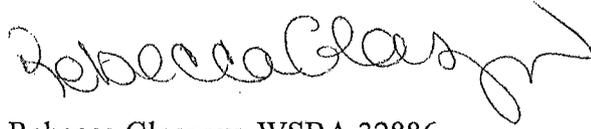
While Amici also argue for community-based treatment (Amicus Br. at 19-20), they fail to show that the violent felony recommitment provisions actually hinder that goal. Each petition for recommitment must address whether less restrictive alternative placements are appropriate, ensuring that if community treatment becomes appropriate, a patient will have that option. RCW 71.05.285, .290. And neither plaintiffs nor Amici have shown that the recommitment provisions would result in recommitment where a person is no longer mentally ill and dangerous. In sum, Amici have not shown that the violent felony recommitment provisions would improperly prolong a person’s treatment in a state hospital.

III. CONCLUSION

The violent felony recommitment provisions enhance public safety while ensuring continued care for this small population of patients with mental illness who have committed acts of violence. The recommitment scheme contains sufficient safeguards that are at least as robust as those recently found to be constitutional in *McCustion* and *Meirhofer*. This Court should reverse the superior court commissioner, and conclude that former RCW 71.05.320(3)(c)(ii), now RCW 71.05.320(4)(c)(ii) is constitutional.

RESPECTFULLY SUBMITTED this 26th day of October 2015.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script that reads "Rebecca Glasgow". The signature is written in black ink and is positioned above the typed name of the signatory.

Rebecca Glasgow, WSBA 32886
Deputy Solicitor General

Amber Leaders, WSBA 44421
Assistant Attorney General

Office ID 91087
PO Box 40100
Olympia, WA 98504
360.664.3027

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, a true and correct copy of State's Answer To Amicus, upon the following:

Kathleen A. Shea
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
katewashapp.org

Nancy L. Talner
ACLU of Washington Foundation
901 Fifth Avenue Suite 630
Seattle, WA 98164
talner@aclu-wa.org

Dated this 26th day of October, 2015.


Wendy R. Scharber
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Scharber, Wendy R. (ATG)
Cc: Glasgow, Rebecca (ATG); Leaders, Amber (ATG); talner@aclu-wa.org; Lindey, Stephanie (ATG); kate@washapp.org
Subject: RE: In re Detention of M.W. and WD.

Received 10-26-15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Scharber, Wendy R. (ATG) [mailto:WendyO@ATG.WA.GOV]
Sent: Monday, October 26, 2015 4:26 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Glasgow, Rebecca (ATG) <RebeccaG@ATG.WA.GOV>; Leaders, Amber (ATG) <AmberL1@ATG.WA.GOV>; talner@aclu-wa.org; Lindey, Stephanie (ATG) <StephanieL1@ATG.WA.GOV>; kate@washapp.org
Subject: In re Detention of M.W. and WD.

Sent on behalf of : Rebecca Glasgow, Deputy Solicitor General WSBA 32886
360-664-3027 : rebeccag@atg.wa.gov

In re Detention of M.W. and W.D. Cause No. 90570-3

State's Answer To Amicus

Wendy Scharber
360-753-3170 : wendyo@atg.wa.gov