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63052-1

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NO. 63052-1-1

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN ROBERT HURST,

Appellant.

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APPELLANT'S OPENING BRIEF

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**A. SUMMARY OF ARGUMENT**

John Robert Hurst appeals the superior court's order committing him to Western State Hospital for 180 days to restore competency, after his doctors were unable to restore competency during the first two 90-day restoration periods. The superior court violated Mr. Hurst's right to due process when it instructed the jury that the standard of proof was a preponderance of the evidence. As a result of Mr. Hurst's substantial liberty interest and high risk of erroneous deprivation, and the State's comparatively low interest, this Court should hold that the correct standard of proof required for commitment pursuant to RCW 10.77.086(4) is clear, cogent, and convincing evidence.

**B. ASSIGNMENT OF ERROR**

The superior court erred when it instructed the jury that the standard of proof under RCW 10.77.086(4) was a preponderance of the evidence.

**C. ISSUE PERTAINING TO ASSSIGNMENT OF ERROR**

RCW 10.77.086(4) is silent as to the standard of proof required to commit a person for a final 180-day period to restore competency, after the person's competency has not been restored during two prior 90-day periods. The standard of proof required to

satisfy due process for similar deprivations of liberty is clear, cogent, and convincing evidence. Did the superior court violate due process when it instructed the jury that the standard of proof was preponderance of the evidence?

D. STATEMENT OF THE CASE

1. Charge. John Hurst was charged with Third Degree Assault for allegedly striking a nurse and throwing a shoe at her at Swedish Medical Center on March 11, 2008. SuppCP(Sub 1).

2. Mr. Hurst is Committed for Two 90-Day Periods to Restore Competency. On March 31, 2008, prior to arraignment, Mr. Hurst's defense counsel raised the issue of competency over Mr. Hurst's objection, and the trial court ordered a competency evaluation by Western State Hospital (WSH). SuppCP(Sub 4). On May 12, 2008, the trial court found Mr. Hurst incompetent and ordered him to be committed to WSH for 90 days. SuppCP(Sub 6). On August 20, 2009, the court found Mr. Hurst incompetent again and ordered him to be committed for another 90 days. SuppCP(Sub 8). On November 17, 2008, Western State Hospital reported that Hurst remained incompetent and requested a further restoration period of 180 days. SuppCP(Sub 32).

3. Trial on the Issue of Restorability. Mr. Hurst's trial counsel requested and was granted a jury trial pursuant to RCW 10.77.086(4) on the issue of whether there was a substantial probability Mr. Hurst would regain competency within the 180-day restoration period. 12/16/08RP 3;<sup>1</sup> SuppCP(Sub 14).

On January 28, 2009, Mr. Hurst's trial counsel moved to clarify the standard of proof required under RCW 10.77.086(4) as clear, cogent, and convincing evidence. 1/28/09RP 9-31; SuppCP(Sub 32).<sup>2</sup> Mr. Hurst's trial counsel proposed jury instructions that incorporated this standard of proof. SuppCP(Sub 33).<sup>3</sup> The trial court ruled that the standard of proof was preponderance of the evidence. 1/28/09RP 32.

King County Superior Court Judge Michael J. Fox presided over Mr. Hurst's jury trial on January 28, 2009, and February 3-4,

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

<sup>2</sup> The full text of RCW 10.77.86 is attached at Appendix A.

<sup>3</sup> Mr. Hurst's proposed jury instructions provide in relevant part:

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

2009. At trial, several witnesses testified, including the State's witnesses, Dr. Julie Gallagher, Ph.D. and Dr. Peter Bingcang, M.D., as well as defense witness Dr. Kevin Petersen, Ph.D.

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

The superior court instructed the jury that the standard of proof on all elements was preponderance of the evidence.

SuppCP(Sub 54) (Instruction 6).<sup>4</sup>

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<sup>4</sup> The superior court's instructions provide in relevant part:

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

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

On February 5, the jury rendered a verdict finding that (1) Mr. Hurst presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (2) there is a substantial probability that the defendant will regain competency within a reasonable period of time (180 days). SuppCP(Sub 56).

Mr. Hurst appeals the order finding him incompetent and committing him for 180 days at WSH. SuppCP(Sub 63).

4. Commissioner's Ruling Granting Review. Mr. Hurst filed a motion for discretionary review in this Court, arguing the superior court committed probable error that substantially altered the status quo by finding that the standard of proof required under RCW 10.77.086(4) is preponderance of the evidence. See RAP 2.3(b)(2). Mr. Hurst argued that due process requires that the standard of proof be clear, cogent, and convincing evidence. Ruling at 7-8.<sup>5</sup> The State responded that the Court should dismiss the issues as moot. Ruling at 5. Mr. Hurst argued that, although the decision could not be rendered before he completed the 180-day restoration period, the Court should grant review because the

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

<sup>5</sup> A copy of the Commissioner's ruling granting discretionary review is attached at Appendix B.

issue involves matters of continuing and substantial public interest.  
Mot. Disc. Rev. at 20-22.

The Commissioner granted review on the issue of the standard of proof under RCW 10.77.086(4), reasoning, "This is the type of issue which Washington courts have held meets the standard for continuing and substantial public interest." Ruling at 8.<sup>6</sup> The Commissioner added, "The standard of proof is of a public nature, an authoritative [determination] is desirable for future cases, and the issue is likely to recur." Ruling at 8.

#### E. ARGUMENT

##### THE SUPERIOR COURT DEPRIVED MR. HURST OF DUE PROCESS WHEN IT INSTRUCTED THE JURY THAT THE STANDARD OF PROOF WAS PREPONDERANCE OF THE EVIDENCE

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

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<sup>6</sup> Citing Born v. Thompson, 154 Wn.2d 749, 762, 117 P.3d 1098 (2005); In re Detention of LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986); In re McLaughlin, 100 Wn.2d 832, 838, 676 P.2d 444 (1984); In re Cross, 99 Wn.2d 373, 377, 662 P.2d 828 (1983); In re Detention of J.S., 138 Wn.App. 882, 159 P.3d 435 (2007).

than ninety days.<sup>7</sup> After this 90-day period, the superior court must hold a hearing to determine the defendant's current competency before it may commit the defendant for a second 90-day period. RCW 10.77.086(2)-(3). Before the expiration of the second 90-day period, the court must conduct another competency hearing before it may commit the defendant for a final 180-day commitment period. RCW 10.77.086(3)-(4).

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

The criminal charges shall not be dismissed if the court or jury finds that: (a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time.

RCW 10.77.086(4).

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<sup>7</sup> See Appendix B for full text of RCW 10.77.086.

b. The preponderance of the evidence standard is inadequate considering the significant deprivation of liberty and risk of erroneous deprivation at stake where a person is committed for a second 180-day period to restore competency. “[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Born v. Thompson, 154 Wn.2d 749, 755, 117 P.3d 1098 (2005) (quoting Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

Determining the standard of proof that applies for civil commitment is a due process inquiry that requires a court to balance [ . . . ] “both the extent of the individual’s interest in not being involuntarily confined indefinitely and the state’s interest in committing the emotionally disturbed under a particular standard of proof [ . . . and] “the risk of erroneous decisions.”

Born, 154 Wn.2d at 754 (quoting Addington, 441 U.S. at 425); see also Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The standard of proof “instruct[s] the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” Addington, 441 U.S. at 423 (quoting In re Winship, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). In cases involving restriction of an individual’s rights, “the standard of

proof [. . .] reflects [. . .] the value society places on individual liberty.” Id. at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)).

Courts hold that the preponderance standard is inadequate where there is a deprivation of liberty similar to that in this case. In Addington, the United States Supreme Court rejected the preponderance of the evidence standard for involuntary civil commitment proceedings because the individual liberty interests were so significant that the State had to justify confinement by a more substantial burden of proof. Id. at 427; see also In re McLaughlin, 100 Wn.2d 832, 843, 676 P.2d 444 (1984) (following Addington to hold preponderance standard insufficient to satisfy due process in involuntary commitment proceedings).

In Born, the Washington Supreme Court followed the reasoning in Addington and held that the clear, cogent, and convincing standard of proof applies to commitment for the purpose of restoring competency of a defendant charged with a misdemeanor. 154 Wn.2d at 761-62. The Court reasoned that this standard is justified due to the high risk of erroneous deprivation where a defendant may be committed based solely on probable cause he has committed a crime, and because the individual’s

liberty interest outweighs the government's interest in public safety and prosecuting misdemeanors. Id. at 756, 761.

In the context of similar deprivations of liberty, the required standard of proof is much higher than the preponderance of the evidence. The standard of proof required in Washington for a 90-day involuntary commitment is clear, cogent, and convincing evidence. McLaughlin, 100 Wn.2d at 843. This is the same standard required in other states for involuntary commitment. See, e.g., In re Stephenson, 67 Ill.2d 544, 367 N.E.2d 1273 (1977); In re Beverly, 342 So.2d 481 (Fla.1977); In re D.C., 146 N.J. 31, 679 A.2d 634 (1996); In re Hatley, 291 N.C. 693, 231 S.E.2d 633 (1977).

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

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

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

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

Also as in Born, the State's interest here does not outweigh Mr. Hurst's liberty interest and risk of erroneous deprivation. The State's interest in prosecuting this Third Degree Assault charge – which would have been charged as a misdemeanor but for the fact that the alleged victim was a nurse – does not justify such a low standard of proof. Nor does the State's interest in public safety justify this low standard, because the State had the option of seeking involuntary commitment in order to address any danger Mr. Hurst might have posed to the public. Born, 153 Wn.2d at 756.

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

c. This Court should hold that the standard of proof required under RCW 10.77.086(4) is the same standard required by Born and the involuntary commitment statute: clear, cogent, and convincing evidence. Because the balancing of the Mathews factors in this case are similar to that in Born and in cases of involuntary commitment, this Court should require the same standard of proof: clear, cogent, and convincing evidence.

There is no reason the standard of proof required for involuntary commitment for the final 180-day period of restoration

treatment should be any less than that required for involuntary commitment for 90 days. At the point where the defendant has already been committed for two 90-day restoration periods, the need to restore competency is not by itself sufficient for further commitment. That is, RCW 10.77.086(4) requires that the State prove not only incompetency, but also that

(a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time.

Similarly,

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

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

If this Court finds that the lower preponderance standard is sufficient to satisfy due process in the context of the final 180-day restoration period, it would create an end-run around the due process protections surrounding involuntary commitment. Such a

holding would encourage the State – as it did in this case – to pursue commitment for competency restoration rather than general involuntary commitment in order to avoid the higher standard of proof, even though general involuntary commitment might be more appropriate. Consequently, defendants would suffer longer periods of involuntary commitment based on less substantial evidence. See Jackson v. Indiana, 406 U.S. 715, 734, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) (citing several studies indicating that many defendants committed before trial are never tried, and that people committed pursuant to ordinary civil proceedings are released sooner than defendants committed due to incompetence).

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

#### B. CONCLUSION

For these reasons, the superior court erred when it instructed the jury on the standard of proof. Therefore, Mr. Hurst asks that this Court reverse the superior court's order finding him incompetent and committing him to Western State Hospital.

Respectfully submitted this 16th day of November 2009.

A handwritten signature in black ink, appearing to read "Mindy M. Ater", written over a horizontal line.

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Washington Appellate Project - 91052  
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## Appendix A

## Appendix A

RCW 10.77.086 provides:

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

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

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

(2) On or before expiration of the initial ninety-day period of commitment under subsection (1) of this section the court shall conduct a hearing, at which it shall determine whether or not the defendant is incompetent.

(3) If the court finds by a preponderance of the evidence that a defendant charged with a felony is incompetent, the court shall have the option of extending the order of commitment or alternative treatment for an additional ninety-day period, but the court must at the time of extension set a date for a prompt hearing to determine the defendant's competency before the expiration of the second ninety-day period. The defendant, the defendant's attorney, or the prosecutor has the right to demand that the hearing be before a jury. No extension shall be ordered for a second ninety-day period, nor for any subsequent period as provided in subsection (4) of this section, if the defendant's incompetence has been determined by the secretary to be solely the result of a developmental disability which is such that competence is not reasonably likely to be regained during an extension.

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

dismissed if the court or jury finds that: (a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time. In the event that the court or jury makes such a finding, the court may extend the period of commitment for up to an additional six months.

## Appendix B

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

**RECEIVED**

STATE OF WASHINGTON, )  
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Respondent, )  
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v. )  
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JOHN ROBERT HURST, )  
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Petitioner. )  
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No. 63052-1-I      OCT - 2 2009  
Washington Appellate Project  
COMMISSIONER'S RULING  
GRANTING DISCRETIONARY  
REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

63052-1-1/9

Now, therefore, it is

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

Done this \_\_\_\_ day of October 2009.

*Mary S. Neel*

Court Commissioner

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 OCT -1 PM 1:51

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63052-1-I
v.	)	
	)	
JOHN HURST,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] DEBORAH DWYER, DPA DONNA WISE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] JOHN HURST WESTERN STATE HOSPITAL 9601 STEILACOOM BLVD TACOMA, WA 98498</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

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STATE OF WASHINGTON  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2009.

X \_\_\_\_\_ 

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