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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Detention of:

M.W. and W.D.

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

BRIEF OF RESPONDENT

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7-1-15*

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A. INTRODUCTION

When the Involuntary Treatment Act was enacted in 1974, it transformed the civil commitment procedures in Washington State. Viewed as representing a huge leap forward in our understanding of mental illness, the statute was designed to protect the individual rights of the mentally ill and provide individualized treatment in the least restrictive setting feasible. The statute contemplated mentally ill individuals would receive temporary psychiatric treatment and return to the community as quickly as possible.

In 2013, the legislature enacted several amendments to RCW 71.05 and RCW 10.77 related to the detention of individuals who had been charged with a felony, been found incompetent, and had their charge dismissed. The State makes the specious argument that the amendments made to RCW 71.05.280(3)(b) and RCW 71.05.320(3)(c) fill a “gap” in the involuntary civil commitment system that has previously led to a “revolving door between the criminal and civil systems.” In fact these two amendments do nothing more than relieve the State of its burden to hold an evidentiary hearing in order to commit a mentally ill individual indefinitely.

The trial court found one of the amendments to the statute, codified in RCW 71.05.320(3)(c)(ii), unconstitutional because it instructs the court to commit an individual for an additional six months each time the State presents prima facie evidence that he continues to suffer from a mental disorder or developmental disability and is likely to commit an act similar to the dismissed charge, unless the individual presents proof through admissible expert testimony to the contrary. Because there are no time constraints on the exception, it allows for an individual to be committed indefinitely without the benefit of an evidentiary hearing.

This provision is contrary to the stated purpose of the Involuntary Treatment Act and is reminiscent of the era that predated the statute's enactment, in which mental illness was feared and not as well understood. This Court should reject the State's groundless conclusion that the new procedure meets a need not otherwise accounted for in the statute. RCW 71.05.320(3)(c)(ii) violates substantive and procedural due process, as well as an individual's constitutional right to a jury trial. This Court should affirm the trial court's holding.

B. ISSUES ON APPEAL

1. Did the trial court properly determine RCW 71.05.320(3)(c)(ii) violates substantive due process where it permits the State to commit a mentally ill individual indefinitely in the absence of a compelling State interest?

2. Where RCW 71.05.320(3)(c)(ii) shifts the burden to the individual in a civil commitment proceeding and denies him several important rights, including the right to an evidentiary hearing, right to cross-examine the State's witnesses, right to be proceeded against according to the rules of evidence, right to remain silent, and the right to have the State show there is no less restrictive alternative, did the trial court properly determine the statutory provision violates procedural due process?

3. Did the trial court properly find RCW 71.05.320(3)(c)(ii) void for vagueness where it fails to articulate the standard the individual must meet in order to obtain an evidentiary hearing and provides no guidance regarding the process required to ensure the individual has the opportunity to meet this vague burden?

4. Where this Court has found Article I, section 21, applies to civil commitment proceedings, did the trial court properly find RCW

71.05.320(3)(c)(ii) violates the individual's right to a jury trial when it permits the State to involuntarily commit him without the opportunity to exercise his right to a full evidentiary hearing before a jury?

C. STATEMENT OF FACTS

M.W. and W.D. suffer from mental illness. CP 72, 101. In separate incidents, each was charged with second degree assault after punching a fellow patient at a psychiatric facility. CP 65, 95. In both cases, the charge was dismissed without prejudice after the trial court made a finding of incompetency and determined that competency was unlikely to be restored within a reasonable period of time. CP 80-81, 118-19. At the time of dismissal, M.W. had been in custody at Western State Hospital (WSH) for 79 days. *See* CP 79, 83. W.D. had been in custody at the hospital for 43 days at the time the trial court dismissed his case.¹ *See* CP 117, 121.

Upon dismissal of the charges, and as required by RCW 10.77.086(4), the trial court temporarily detained M.W. and W.D. so WSH could preform an evaluation and determine whether the men met the criteria for involuntary civil commitment. CP 81, 119. The State

¹ Both men were detained at the King County jail on the assault charge prior to their detention at WSH. *See* CP 73, 102.

filed a petition under RCW 71.05 in both cases, in each instance alleging the men should be committed on three alternative grounds: (1) they were gravely disabled²; (2) they were taken into custody as a result of conduct in which they attempted or inflicted physical harm upon the person of another and continued to present a likelihood of serious harm as a result of a mental disorder; and (3) they were found incompetent, felony charges were dismissed pursuant to RCW 10.77.086(4), and as a result of a mental disorder presented a substantial likelihood of repeating similar acts. CP 2, 349; *see also* RCW 71.05.280(2), (3), (4). In each case, the State also alleged the dismissed charge was a “violent offense,” as defined in RCW 9.94A.030. CP 2, 349.

M.W. and W.D. stipulated to the 180-day commitment, each waiving his right to a full evidentiary hearing and agreeing that grounds for involuntary commitment had been satisfied. CP 14-15; 360-61. M.W. agreed to commitment on all three grounds alleged by the State. CP 14-15. W.D. only agreed he was gravely disabled and that he had been charged with a felony act and was likely to commit a

² An individual is “gravely disabled” when, as a result of a mental disorder, he either (a) is in danger of serious physical harm resulting from a failure to provide for his essential needs of health or safety or (b) manifests severe deterioration in routine functioning, as evidenced by repeated and escalating loss of cognitive or volitional control over his actions, and is not receiving such care as essential for his health or safety. RCW 71.05.020(17).

similar act. CP 360-61. The trial court ordered M.W. and W.D. committed based on the grounds to which they had stipulated. CP 19, 365. In M.W.'s case, the trial court entered supplemental findings stating the dismissed charge against M.W. was classified as a violent offense under RCW 9A.94.030. CP 22. In W.D.'s case, the court endorsed boilerplate language which stated it had "previously made a special finding that the underlying offense was a violent offense under RCW 9.94A.030."³ CP 365.

Before the 180-day periods of confinement expired, the State moved to commit the men for an additional 180 days. CP 23, 369. In each petition the State alleged another six-month period of commitment was appropriate due to grave disability and because each continued "to be in custody pursuant to RCW 71.05.280(3) and as a result of a mental disorder or developmental disability continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior, when considering the person's life history, progress in treatment, and the public safety." CP 24, 370. Under the second basis for commitment, RCW 71.05.280(3)(c)(ii) denied M.W. and W.D. the right

³ It does not appear from the record that any such finding was "previously" made.

to an evidentiary hearing on the State's petition because the trial court had previously determined the dismissed charge that led to their commitment constituted a "violent offense." *See* CP 24, 3270.

M.W. and W.D. challenged the trial court's ability to commit them for a second six-month period based on nothing more than the allegations in the State's petition and moved for an order declaring RCW 71.05.320(3)(c)(ii) unconstitutional. CP 37, 381. The trial court granted their motions, finding the statutory provision violated due process, the right to a jury trial, and equal protection.⁴ CP 332.

In each case, the trial court "heard testimony from and considered evidence per the Clerk's Memorandum of Journal Entry."⁵ CP 344, 397. In both instances, it appears only one witness, a psychologist from Western State Hospital, testified for the State. CP 345, 394. It also appears W.D., but not M.W., chose to present testimony at his hearing. CP 346, 395. The trial court detained both M.W. and W.D. for a second 180-day period after the trial court

⁴ A copy of the trial court's Findings of Fact, Conclusions of Law, and Order Declaring Statute Unconstitutional is also attached as Appendix A.

⁵ Because the State did not include the verbatim report of proceedings of the hearings as part of the record on appeal, information regarding the evidentiary hearing is limited. *See* RAP 9.2 (party seeking review should arrange for transcription of necessary portions of verbatim report of proceedings).

determined each was gravely disabled and that each had been charged with a felony and was likely to commit a similar act. CP 346, 396.

D. ARGUMENT

1. **RCW 71.05.320(3)(c)(ii) Violates Substantive Due Process**

a. The statutory provision is subject to strict scrutiny.

“[T]he Due process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 329, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)). When a state’s law impinges on the fundamental right to liberty, it is subject to strict scrutiny. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Substantive due process is satisfied only if the law furthers compelling State interests and is narrowly drawn to serve those interests. *Id.*

The involuntary commitment of a mentally ill individual is a “massive curtailment of liberty.” *In re Det. of Harris*, 98 Wn.2d 276, 280, 654 P.2d 109 (1982); *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972). Because of the gravity of the liberty interest at stake, “[t]here is no question that due process

guaranties must accompany involuntary commitment for mental disorders.” *Harris*, 98 Wn.2d at 280; *see also In re Det. of C.W.*, 147 Wn.2d 259, 277, 53 P.3d 979 (2002); *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

When the State seeks to commit an individual against his will, the United States Supreme Court has held that due process requires the State demonstrate both that the person is mentally ill and that he poses a risk of harm to himself or others. *Foucha v. Louisiana*, 504 U.S. 71, 75, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992); U.S. Const. amends. V, XIV; Const. Art. I, § 3. A law that permits the involuntary detention of individuals who are no longer mentally ill or dangerous is not narrowly tailored to the State’s compelling interests and cannot survive strict scrutiny. *Foucha*, 504 U.S. at 77. The constitutionality of a statute is an issue of law, which this Court reviews de novo. *State v. Watson*, 160 Wn.2d 1, 5, 154 P.3d 909 (2007).

- b. The State’s reliance on *McCustion* is misguided because for purposes of care and treatment, the mentally ill are not similarly situated to sexually violent predators.

The trial court found RCW 71.05.320(3)(c)(ii) violates substantive due process. CP 340-41. The State relies on *State v. McCustion* for its claim that the court’s finding was made in error.

174 Wn.2d 369, 275 P.3d 1092 (2012); Op. Br. at 23. However, in *McCustion*, the Court examined the amendments made to RCW 71.09.090, a section of the Sexually Violent Predator (SVP) civil commitment statute. 174 Wn.2d at 374. As this Court has held, when it comes to care and treatment, mentally ill individuals are not similarly situated to sexually violent predators. *Young*, 122 Wn.2d at 51; *see also In re Det. of D.A.H.*, 84 Wn. App. 102, 106, 924 P.2d 49 (1996). *McCustion* has no applicability here.

i. *The Involuntary Treatment Act and Resulting Overcrowding of the State Hospitals*

“Historically, the only right retained after commitment was the ‘right to be forgotten.’” Ross E. Campbell, *Progress in Involuntary Commitment*, 49 Wash. L. Rev. 617, 640 (1974) (quoting *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. On Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess., at 3 (1969-70)). When the Involuntary Treatment Act (ITA) was enacted in 1974, it reflected a more accurate understanding of mental illness, overhauling our involuntary commitment procedures and serving as a model to other states. *Id.* at 620. The statute was viewed as a major step toward reform and the de-institutionalization of the mentally ill. *See id.*

The purpose of the ITA was “[t]o prevent *inappropriate, indefinite* commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment.” RCW 71.05.010(1) (emphasis added). It was designed “[t]o safeguard individual rights” and “[t]o encourage, whenever appropriate, that services be provided within the community.” RCW 71.05.010(3), (6). The State’s interest was to provide intensive, *temporary* treatment for the mentally ill while maintaining respect for the individual’s autonomy and allowing him to return to the community as quickly as possible.

Since the enactment of the ITA, the civil commitment system has had difficulty providing the necessary services to people in need. *In re Det. of D.W.*, 181 Wn.2d 201, 204, 332 P.3d 423 (2014). By 1981, the number of individuals detained exceeded WSH’s capacity, and the problems with overcrowding continue today. *Id.* In *D.W.*, this Court described the alarming regularity with which Pierce County was forced to board detained individuals in the emergency room, denying them the individualized, psychiatric treatment required by statute. *Id.* at 208.

Similarly, in *Trueblood v. Wash. State Dep’t of Soc. and Health Serv.*, the district court recently found the constitutional rights of the

mentally ill were violated when the State regularly failed to provide timely competency evaluations and restoration services to individuals in need. ___ F.Supp.3d ___, 2015 WL 1526548, *1 (No. C14-1178, April 2, 2015). The court determined financial constraints have led to staff shortages and a lack of beds at both state hospitals. *Id.* at *7. It found the State “failed to plan ahead for growth in the demand for competency services, which has increased every year for the last decade, and has failed to show the leadership and capacity for innovation that is required to address the crisis.” *Id.* The court noted that in the King County jail, where M.W. and W.D. were held after their arrests, “those with mental illness spend on average three times more time incarcerated than those without mental illness.” *Id.* at *5.

ii. *RCW 71.05.320(3)(c)(ii) Provides for the Indefinite Commitment of the Mentally Ill*

Despite the continuing problems with overcrowding, and despite recognizing a mentally ill individual was more likely to be the *victim* of a crime rather than the perpetrator of a crime, the legislature enacted several amendments to RCW 71.05 and RCW 10.77 in 2013 that were designed to increase the frequency and length of confinement for individuals found incompetent to stand trial for felony charges. Laws

of 2013, ch. 289. Only one of the changes, codified at RCW 71.05.320(3)(c)(ii), is challenged here.

As part of the 2013 amendments, the the legislature eliminated the court's discretion to release an individual after he was found incompetent and the charges against him were dismissed without prejudice. Laws of 2013, ch. 289, §2; RCW 10.77.086(4). It required, instead, that the court commit the defendant to a state hospital for up to 72-hours in order to evaluate him for the purpose of filing a civil commitment petition pursuant to RCW 71.05. *Id.*

Typically, upon conducting the evaluation during the first 72 hours of confinement, the trial court may commit an individual for up to 14 days, after which period the State may petition to commit the individual for up to an additional 90 days. RCW 71.05.240; RCW 71.05.280. However, when an individual has been charged with a felony and found incompetent, he may be immediately committed for up to 180 days. RCW 71.05.290(3); RCW 71.05.320(1). This allows the State to bypass the 14-day commitment entirely and permits the commitment of the individual for twice the amount of time than is typically authorized. RCW 71.05.290(3); RCW 71.05.320(1).

In order to confine an individual for this initial commitment period, whether 90 days in the typical circumstance or 180 days for a person found incompetent, the court must determine that:

(1) Such person after having been taken into custody for evaluation and treatment has threatened, attempted, or inflicted: (a) Physical harm upon the person of another or himself or herself, or substantial damage upon the property of another, and (b) as a result of mental disorder presents a likelihood of serious harm; or

(2) Such person was taken into custody as a result of conduct in which he or she attempted or inflicted physical harm upon the person of another or himself or herself, or substantial damage upon the property of others, and continues to present, as a result of mental disorder, a likelihood of serious harm, or

(3) Such person has been determined to be incompetent and criminal charges have been dismissed pursuant to RCW 10.77.086(4), and has committed acts constituting a felony, and as a result of a mental disorder, presents a substantial likelihood of repeating similar acts.

(a) In any proceeding pursuant to this subsection it shall not be necessary to show intent, willfulness, or state of mind as an element of the crime; (b) *For any person subject to commitment under this subsection where the charge underlying the finding of incompetence is for a felony classified as violent under RCW 9.94A.030, the court shall determine whether the acts the person committed constituted a violent offense under RCW 9.94A.030; or*

(4) Such person is gravely disabled.

RCW 71.05.280 (emphasis added). As part of the 2013 amendments, the legislature added subsection (3)(b).

The State is required to meet its burden by clear, cogent, and convincing evidence. RCW 71.05.310. Pursuant to RCW 71.05.320, the “person *shall be released* from involuntary treatment at the expiration of the period of commitment” unless a designated mental health professional files a new petition for involuntary treatment on the grounds almost identical to those provided in RCW 71.05.280. RCW 71.05.320(3) (emphasis added).

However, as part of the 2013 amendments, the legislature carved out an exception to this directive in RCW 71.05.320(c)(ii). Under this exception, if the court has made a finding under RCW 71.05.280(3)(b) that the person’s acts constituted a “violent offense,” indefinite commitment, rather than release, is presumed. Instead of requiring the individual be allowed to return to the community unless the State is able to demonstrate he presents a likelihood of harm as the result of a mental disorder or is gravely disabled, it directs:

the commitment *shall continue* for up to an additional one hundred eighty day period whenever the petition presents *prima facie evidence* that the person continues to suffer from a mental disorder or developmental disability that results in a substantial likelihood of committing acts similar to the charged criminal behavior, unless the person presents *proof* through an admissible expert opinion that the person’s condition has so changed such that the mental disorder or developmental disability

no longer presents a substantial likelihood of the person committing acts similar to the charged criminal behavior.

RCW 71.05.320(3)(c)(ii) (emphasis added).

In the portion of the public hearing transcripts attached to the State's opening brief, the limited excerpts the State provides suggest the legislature believed the amendments would provide a basis for detention not previously contemplated by the ITA, which would allow incompetent individuals to be held when they would otherwise be released. Op. Br. at App. A, p. 10 (Representative Jamie Pedersen states, "my understanding of these folks is that they – they get flipped over into the civil system and then there's – there isn't an adequate basis in the Involuntary Treatment Act to keep them confined for a period").

The changes enacted in RCW 71.05.320(3)(c)(ii) do not address this concern because this provision does not allow the State to commit individuals who would have been otherwise released. It simply provides the State with a way to commit individuals indefinitely without having to prove its case at an evidentiary hearing. Pursuant to RCW 10.77.086(4), individuals whose criminal charges are dismissed due to incompetency will immediately be evaluated for civil commitment at WSH. Once that occurs, the State may petition for

commitment. RCW 71.05.290(3); 71.05.320(1). It is difficult to imagine under what circumstances a court would find the requirements of RCW 71.05.280(3), but not the requirements of RCW 71.05.280(2), had been met. If the individual presents a substantial likelihood of repeating an act similar to a violent crime, surely the requirements of RCW 71.05.280(2) have also been satisfied. Regardless, RCW 71.05.320(3)(c)(ii) does not provide an alternative basis for commitment. It simply allows the State to bypass the evidentiary hearing.

iii. *The Mentally Ill are Not Similarly Situated to Sexually Violent Predators*

The State attempts to sidestep this issue by simply relying on *McCuisition*. Op. Br. at 23. Its reliance is misguided because the SVP statute, not the ITA, was at issue in *McCuisition*. 174 Wn.2d at 374. This distinction is important because this Court has repeatedly held that sexually violent predators and the mentally ill are not similarly situated and should be treated differently. *Young*, 122 Wn.2d at 51; *In re Det. of Turay*, 139 Wn.2d 379, 410-11, 986 P.2d 790 (1999); *In re Det. of Campbell*, 139 Wn.2d 341, 353-54, 986 P.2d 771 (1999); *see also In re Det. of Albrecht*, 98 Wn. App. 426, 438, 989 P.2d 1204 (1999); *In re Det. of Skinner*, 122 Wn. App. 620, 632, 94 P.3d 981 (2004).

With good reason, the State must treat the mentally ill differently than sex offenders when it comes to their care and treatment. *Young*, 122 Wn.2d at 51 (finding there is good reason to deny the right to remain silent to sexually violent predators despite granting the right to the mentally ill); *D.A.H.*, 84 Wn. App. at 106, 924. This is because sexually violent offenders are not only more dangerous than other mentally ill individuals, but also require an entirely different treatment approach. *Young*, 122 Wn.2d at 44; *D.A.H.*, 84 Wn. App. at 107.

Sexually violent predators suffer from disorders that are “severe and chronic,” and require long-term treatment and removal from the community. *McCouston*, 174 Wn.2d at 390; *Turay*, 139 Wn.2d at 411. The same cannot be said for individuals committed under the ITA. An incompetent individual may be committed under the ITA for any “organic, mental, or emotional impairment which has substantial adverse effects on a person’s cognitive or volitional functions.” RCW 71.05.020(26). Thus, while sexual offenders suffer from disorders that are either particularly difficult to treat or untreatable, mental illness encompasses a wide range of abnormalities that are not subject to general presumptions about the treatment approach.

In addition, unlike sexually violent predators, once a mentally ill individual's symptoms subside he may not be detained out of a fear that he poses a risk of future dangerousness. *In re Det. of Gordon*, 102 Wn. App. 912, 915, 10 P.3d 500 (2000) (finding an individual did not meet the criteria for commitment under the ITA because his schizophrenia had been stabilized by medication). As the legislature recognized when enacting the ITA, individuals struggling with mental illness should be treated in the community whenever possible. RCW 71.05.010(6).

The fact that a mentally ill individual has been charged, but not convicted, of a violent offense does not alter the interests at stake. Under the SVP statute, an individual may be committed only after a factfinder determines, *beyond a reasonable doubt*, that the individual is a sexually violent predator. RCW 71.09.060(1); *Campbell*, 139 Wn.2d at 353. Where charges against a mentally ill individual have been dismissed, he is not similarly situated to someone who has been found to be a sexually violent predator beyond a reasonable doubt.

Understanding the considerable differences between these two populations, the legislature designed the SVP statute to augment those situations where the ITA provides an inadequate commitment

procedure. *In re Det. of Pugh*, 68 Wn. App. 687, 693, 845 P.2d 1035

(1993). According to RCW 71.09.010, the legislature determined:

[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community... The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory violence is high... The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.

In *McCustion*, this Court relied on the State's compelling interest in committing sexually violent predators indefinitely to find the statutory amendments satisfied substantive due process. 174 Wn.2d at 389. It adopted the legislature's finding that the mental abnormalities and personality disorders suffered by sexually violent predators were "severe and chronic" and that sexually violent predators "generally required prolonged treatment in a secure facility followed by intensive community supervision in the cases where positive treatment gains are sufficient for community safety." *Id.* at 390 (quoting Laws of 2005, ch. 344, §1). Given the State's interest in providing this type of prolonged

treatment, this Court found substantive due process was satisfied by a periodic review of the individual's suitability for release. *Id.* at 385. Any procedures beyond that, such as granting the individual an opportunity to show his condition had "so changed," exceeded the requirements of due process. *Id.*

The State's reliance on *McCouston* for its general assertion that substantive due process requires nothing more than "the periodic evaluation of a patient's suitability for release," fails to acknowledge that the compelling interest at stake in committing an individual under the ITA is entirely different than the interest at stake in committing an individual under the SVP statute, and that in fact the statutes have contradictory goals. Resp. Br. at 26. Where the SVP statute seeks the indefinite commitment of dangerous individuals for whom change is inherently a long-term prospect, the ITA seeks to *prevent* the indefinite commitment of mentally ill individuals and provide services in the community whenever appropriate. RCW 71.09.010; RCW 71.05.010(1), (6). Contrary to the State's claim, *McCouston* does not govern the issue before the Court in this case.

iv. *The Constitutionality of the Show Cause Hearing Requirement was Not Challenged in McCuiston*

In addition, the Court's holding in *McCuiston* offers no guidance because in that case the constitutionality of requiring a show cause hearing prior to an evidentiary hearing, which existed before the amendments at issue in *McCuiston*, was assumed. 174 Wn.2d at 374.

Under RCW 71.09.090, a sexually violent predator is entitled to an annual show cause hearing, at which the State must present prima facie evidence establishing the committed individual continues to meet the definition of a sexually violent predator. RCW 71.09.090(2)(b). The individual is entitled to a full evidentiary hearing if the State fails to make this showing or the individual demonstrates probable cause exists to believe the person's condition has changed such that he no longer meets the definition of a sexually violent predator or should be released to a less restrictive alternative. RCW 71.05.090(2)(c).

In 2005, the legislature amended the statute to specify the court could only find probable cause exists when presented with specific information from a licensed professional. *McCuiston*, 174 Wn.2d at 380-81; RCW 71.05.090(4). A sexually violent predator must show there has been an identified physiological change, or a change in mental condition as a result of a "positive response to continuing

participating in treatment.” RCW 71.9.090(4)(b)(i), (ii). Evidence of “a change in a single demographic factor” does not establish probable cause. RCW 71.09.090(4)(c).

Mr. McCuiston challenged these amendments as unfairly restricting the type of evidence he could rely on to demonstrate he no longer met the criteria for confinement, but not the show cause hearing requirement itself. *McCuiston*, 174 Wn.2d at 374. Finding that substantive due process required only that the State conduct a periodic review of the sexually violent predator’s suitability for release, this Court determined Mr. McCuiston had no right to an evidentiary hearing based on an expert’s opinion he had never met the criteria for confinement in the first place. *Id.* at 385. This is different than the issue before the Court in this case, where M.W. and W.D. challenge the statutory provision’s elimination of the right to an evidentiary hearing. Thus, the State’s reliance is *McCuiston* is misguided for this reason as well.

- c. RCW 71.05.320(c)(ii) is not narrowly tailored to address a compelling State interest.

Contrary to the legislature’s stated interest in *preventing* the indefinite commitment of the mentally ill, the change to RCW 71.05.320(3)(c) directs the individual *shall* remain committed for an

additional six-month period whenever the State presents prima facie evidence that the conditions for commitment have been met, unless the person presents “proof” through an expert opinion to refute the State’s claim. This provision is not narrowly tailored to serve the State’s interest in temporarily detaining a mentally ill individual and releasing him to the appropriate services in the community as soon as possible.

In its opening brief, the State claims its interest in detaining individuals charged with a felony and found incompetent is different than its interest in detaining other mentally ill individuals. It argues that a “system of successive petitions and hearings for continued commitment” creates a situation in which an individual may benefit from treatment such that he no longer meets the criteria under the ITA, but that once released, the individual’s mental health declines and the individual presents a risk to the public. Op. Br. at 6. The State suggests, without explanation, that RCW 71.05.320(3)(c)(ii) serves to alleviate this concern. Op. Br. at 6, 33.

If, as the State claims, RCW 71.05.320(3)(c)(ii) only permits an individual to be detained when he is demonstrably mentally ill and dangerous, and no longer, then this statutory provision offers no solution to the problem highlighted by the State. Once an individual

who has been found incompetent no longer satisfies the requirements of commitment, he must be released. In all cases, the hospital must notify the prosecuting attorney's office which dismissed the charges without prejudice if the individual is scheduled for release, allowing the State to refile the criminal charges. RCW 71.05.325. If the State elects not to refile the charges and the person is released, it is possible the individual's mental health will decline, prompting recommitment.

Allowing the State to bypass an evidentiary hearing and continue to detain an individual based on a prima facie showing does not remedy this problem unless this Court accepts that such a procedure permits the State to detain an individual after he is no longer both mentally ill and dangerous, in which case there can be no dispute that the statutory provision violates substantive due process. *See Foucha*, 504 U.S. at 77.

Where an individual has not been convicted of a crime, he may not be punished. *Foucha*, 504 U.S. at 80; *Jones v. United States*, 463 U.S. 354, 361, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983). The statutory provision at issue seeks to commit an individual *charged* with a felony indefinitely under a standard that presumes continued commitment based only upon a prima facie showing. This provision is not narrowly

tailored to serve a compelling State interest and cannot survive strict scrutiny. Because the provision violates substantive due process, this Court should affirm the trial court's ruling.

2. RCW 71.05.320(3)(c)(ii) Violates Procedural Due Process

Individuals committed under the ITA are entitled to the safeguards of procedural due process. *Harris*, 98 Wn.2d at 285; U.S. Const. amends. V, XIV; Const. Art. I, § 3. As this Court explained in *Harris*:

[F]ear of the unknown is often greater than fear of the known. The laws of involuntary civil commitment should not reflect these irrational fears of mental illness. This court can endeavor to protect against abuse by requiring demonstration of a substantial risk of danger and by imposing procedural safeguards and a heavy burden of proof.

Id. at 281.

In order to determine whether a procedure satisfies due process, this Court balances three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest, including the burden that an additional or substitute procedural

requirement would entail. *Id.* at 285; *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

The State concedes the liberty interest at stake in these cases is substantial. Resp. Br. at 32; *Harris*, 98 Wn.2d at 280. However, it argues that reading the ITA’s protections as a whole, the procedures in place under RCW 71.05.320(c)(ii) are sufficient because they are as protective as those upheld in *McCustion*. Op. Br. at 28, 31. In support of this claim the State makes several related arguments. First, that because the statutory provision only shifts the burden of production, rather than the burden of persuasion, placing this burden on the individual comports with due process. Op. Br. at 19. Second, that RCW 71.05.320(3)(c)(ii) does not deny the individual the procedural protections provided elsewhere in the ITA. Op. Br. at 28. And third, that the “robust” procedural protections provided at the initial commitment provide the required process to hold the individual indefinitely. Op. Br. at 34. As the trial court found, these arguments are meritless. CP 339.

- a. The statutory provision unconstitutionally shifts the burden from the State to the individual.

“Both this [C]ourt and the United States Supreme Court agree that the State must bear the burden of proof in involuntary civil

commitment hearings.” *In re Det. of Petersen*, 145 Wn.2d 789, 796, 42 P.3d 952 (2002) (Petersen II). In order to detain a mentally ill individual against his will, due process requires the State to demonstrate, by clear and convincing evidence, that the individual is mentally ill and dangerous. *Foucha*, 504 U.S. at 75. The ITA complies with this statute, insofar as it requires the State to meet its burden by clear, cogent, and convincing evidence when seeking to commit an individual for more than 14 days. RCW 71.05.310.

However, RCW 71.05.320(3)(c)(ii) carves out an exception to this requirement. Rather than require the State to prove its case against the individual at an evidentiary hearing, this subsection of the statute permits the State to bypass the hearing if it presents “prima facie” evidence that the individual is mentally ill and dangerous. RCW 71.05.320(3)(c)(ii). Once the State presents evidence that, on its face, appears to justify continued commitment, the burden shifts to the individual to present “proof” that his condition has changed to such a degree that his “mental disorder or developmental disability no longer presents a substantial likelihood of the person committing acts similar to the charged behavior.” RCW 71.05.320(3)(c)(ii). Unlike the State, which is at liberty to rely on what it wishes for its prima facie showing,

the individual must prove he no longer meets the requirements for commitment “through an admissible expert opinion.” RCW 71.05.320(3)(c)(ii).

The State claims the trial court erred in finding this provision shifts the burden to the individual, arguing that the provision only shifts the burden of production, not the burden of proof. Op. Br. at 20. It asserts that in evaluating the State’s prima facie showing, the court must determine whether the State has met “the clear, cogent, and convincing standard if left un rebutted.” See Op. Br. at 36.

This argument is misguided. As this Court has found, a prima facie showing requires nothing more than “bare assertions or allegations.” *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012). When a prima facie showing has been made, *probable cause* exists. *Petersen*, 145 Wn.2d at 797. “[T]he court determines whether the facts (or absence thereof) – *if believed* – warrant more proceedings.” *Id.* (emphasis added). In *Petersen II*, this Court examined the SVP statute and specifically rejected the idea that other trial standards could apply in a probable cause hearing that involved only a prima facie showing:

It is argued by trial counsel that certain trial standards, e.g., *clear and convincing*, beyond a reasonable doubt, or

preponderance of the evidence should apply to these probable cause hearing. However, such evidentiary standards are inconsistent with former RCW 71.09.090(2) because they more than simply determine if “facts exist,” they seek to weigh and measure asserted facts against potentially competing ones... A trial standard of proof has no application to probable cause determinations, only determinations on the merits after a full presentation of all the evidence where that evidence can be weighed and disputes can be resolved by the fact finder according to the appropriate standard of proof. Courts do not “weigh evidence” to determine probable cause.

Id. 797-98 (emphasis added). Thus, requiring the State to make only a prima facie showing relieves the State of its burden to prove its assertions by clear, cogent, and convincing evidence.

The State further analogizes RCW 71.05.320(3)(c)(ii) to a summary judgment motion. Op. Br. at 22. Because of the significant liberty interest at stake in an ITA case, a comparison to other civil proceedings is limited in its utility. In addition, summary judgment is different than the procedure outlined in RCW 71.05.320(3)(ii). *See Davis v. Cox*, __ Wn.2d __, 2015 WL 3413375, *5 (No. 90233-0, May 28, 2015) (distinguishing a summary judgment motion and a procedure that involves “degrees of likelihood or probability”).

A summary judgment motion will be denied if the nonmoving party presents a dispute regarding a material fact. *Id.* In contrast, the

ITA requires the individual present “*proof through an admissible expert opinion* that [his] condition has so changed such that the mental disorder or developmental disability no longer presents a substantial likelihood of the person committing acts similar to the charged criminal behavior.” RCW 71.05.320(3)(c)(ii) (emphasis added). The word “proof” is undefined in the ITA. *See* RCW 71.05.020. In the dictionary, it means “the cogency of evidence that compels acceptance by the mind of a truth or a fact.”⁶ The legislature’s use of this word suggests the individual must actually demonstrate he is entitled to release. By the statute’s plain language, the individual cannot simply demonstrate there is a dispute regarding a material fact. *See State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003) (a statute must be enforced according to its plain meaning when the language is unambiguous); *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (“the legislature is deemed to intend a different meaning when it uses different terms”). In addition, the individual must present this proof only through admissible expert testimony. RCW

⁶ <http://www.merriam-webster.com/dictionary/proof> (last accessed June 23, 2015).

71.05.320(3)(c)(ii). This is a far greater burden than that held by the nonmoving party in a summary judgment motion.

Due process requires the State show an individual is mentally ill and dangerous by clear and convincing evidence. *Foucha*, 504 U.S. at 75. The legislature impermissibly shifted the burden from the State to the individual when it relieved the State of this obligation and instead required the individual to prove he did not meet the requirements for commitment. For this reason alone, the statute violates procedural due process.

- b. RCW 71.05.320(3)(c)(ii) deprives a small subset of people the protections typically afforded to individuals under the ITA.

The State takes issue with the trial court's finding that 71.05.320(3)(c)(ii) deprives individuals of an evidentiary hearing or jury trial, the right to confront and cross-examine the witnesses against them, the right to be proceeded against according to the rules of evidence, the right to remain silent, and the right to have the State prove there was no less restrictive alternative to commitment. Op. Br. at 28; CP 339. The trial court's ruling was correct. An individual is denied these rights when he is subject to indefinite commitment under RCW 71.05.320(3)(c)(ii).

i. *Right to an Evidentiary Hearing*

The State argues an individual is not denied an evidentiary hearing because if the individual presents “proof” he does not meet the criteria for commitment through admissible expert testimony he is *then* entitled to an evidentiary hearing. Op. Br. at 31. The logic of this argument is undeniably circular. By design, RCW 71.05.320(3)(c)(ii) permits the State to bypass an evidentiary hearing and commit the individual based on nothing more than a prima facie showing. Only when the individual has *proof* he does not meet the requirements of commitment is he entitled to a hearing on the merits.

This procedure turns the concept of due process on its head. Due process requires the State demonstrate, by clear and convincing evidence, that the individual is both mentally ill and dangerous in order to commit him against his will. *Foucha*, 504 U.S. at 77. Requiring the individual to prove that he is not mentally ill and dangerous before the State is held to its burden at an evidentiary hearing is the antithesis of the process that is due when an individual’s liberty is at stake.

ii. *Right to Cross Examine the State’s Witnesses*

Similarly, the State argues the individual is entitled to cross-examine the witnesses against him once he proves he does not meet the

requirements for commitment. Op. Br. at 31. As explained above, this does not satisfy due process.

The State also claims individuals subject to involuntary commitment proceedings have no constitutional right to cross-examine witnesses because the Sixth Amendment right to confrontation does not apply in civil commitment cases, relying on *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Op. Br. at 30. This assertion is misleading because in *Stout*, this Court specifically found that while a sexually violent predator was not entitled to confront a live witness at trial, he was entitled to cross-examine the witness through his counsel at a recorded deposition. *Stout*, 159 Wn.2d at 370. The Court determined that, given the due process protections provided to sexually violent predators, including the right to cross-examine adverse witnesses, there was little value in adding a confrontation right. *Id.* at 371. Thus, an individual subject to involuntary commitment may not be entitled to confront a witness face to face at trial, but due process requires he be given the opportunity to cross-examine an adverse witness. Contrary to the State's claim, it is not "the legislature's prerogative" to eliminate this right. This right is unlawfully denied under RCW 71.05.320(3)(c)(ii).

iii. *Right to be Proceeded Against According to the Rules of Evidence*

The State argues that because M.W. and W.D. cited to no evidence in the State's petition that would be inadmissible, the statutory provision does not infringe on an individual's right to be proceeded against according to the rules of evidence. Op. Br. at 30. This argument is meritless. Simply because no such assertion was made in this case does not mean a State's petition will include only admissible information.

Prima facie evidence is nothing more than "bare assertions." *Hunley*, 175 Wn.2d at 915. Unlike the individual facing commitment, who must prove he does not meet the criteria for commitment though an "admissible" expert opinion, there is no corresponding requirement of the State. RCW 71.05.320(3)(c)(ii). According to the plain language of the provision, the State is not required to present admissible evidence in order to make a prima facie showing. *J.P.*, 149 Wn.2d at 449; *Roggenkamp*, 153 Wn.2d at 625. The provision's failure to require the State present only admissible evidence undermines the reliability of the State's petition and violates due process.

iv. *Right to Remain Silent*

The State argues RCW 71.05.360(5)(c) guarantees an involuntarily detained person the right to remain silent.⁷ Op. Br. at 29. It cites to three cases for its claim that requiring an individual to produce evidence does not eliminate the right to remain silent: *In re Det. of McLaughlin*, 100 Wn.2d 832, 847, 676 P.2d 444 (1984), *Couch v. United States*, 409 U.S. 322, 328, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973), and *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990).

In *McLaughlin*, this Court held the statutory right to remain silent requires the court to instruct the jury that no inference of mental illness may be drawn from the exercise of this right. 100 Wn.2d at 847. *McLaughlin* demonstrates the importance of meaningfully protecting the right to remain silent and offers no support for the State's claim. Similarly, *Couch* and *Kunstler* draw a distinction between information elicited from the individual whose liberty is at stake versus a third party. *Couch*, 409 U.S. at 328; *Kunstler*, 914 F.2d at 517. The State's partial quotation from *Couch* misrepresents the Court's finding. In *Couch*, the United States Supreme Court held:

⁷ RCW 71.05.360(5)(c) states, "The person has the right to remain silent and that any statement he or she makes may be used against him or her."

The Constitution explicitly prohibits compelling an accused to bear witness “against himself”: it necessarily does not proscribe incriminating statements elicited from another... *It is extortion of information from the accused himself that offends our sense of justice.*

409 U.S. at 328 (emphasis added). As articulated in *Couch*, it is the fact that RCW 71.05.320(3)(c)(ii) compels the individual to present information in order to obtain an evidentiary hearing that offends our collective sense of justice and violates the right to remain silent.

v. Right to Have the State Show There is No Less Restrictive Alternative

Although the statute otherwise requires the trial court to consider whether a less restrictive alternative is appropriate for the individual if the grounds for commitment “have been proven,” the plain language of RCW 71.05.320(3)(c)(ii) makes no allowance for this consideration. It simply directs the commitment *shall* continue if the State presents prima facie evidence unrebutted by “proof” to the contrary. RCW 71.05.320(3)(c)(ii). Indeed, the State does not argue otherwise. Instead it again claims the individual is afforded this procedural protection later, after he proves through an admissible expert opinion that he does not meet the commitment criteria. Op. Br. at 30-31. As addressed above, this does not satisfy procedural due process.

- c. *McCuisition* does not support a finding that RCW 71.05.320(3)(c)(ii) satisfies procedural due process.

The State argues RCW 71.05.320(3)(ii) satisfies procedural due process because the procedures are at least as protective as those upheld in *McCuisition*. Op. Br. at 31. This argument fails for several reasons.

First, in *McCuisition*, the Court found the amendments to RCW 71.09.090 satisfied procedural due process because they did not unconstitutionally alter the unchallenged existing procedural safeguards. 174 Wn.2d at 393. This existing process included an initial evidentiary trial during which the State must prove its case beyond a reasonable doubt, annual reviews by a qualified professional, the appointment of an expert if requested by an indigent sexually violent predator, and a full evidentiary hearing if the State failed to make a prima facie showing in support of continued commitment, or the sexually violent predator demonstrated probable cause existed to believe he no longer met the criteria. *Id.* This Court was not reviewing the constitutionality of these procedures, but merely the amendments made to the statute that limited the evidence the sexually violent predator could present to demonstrate probable cause. *Id.* at 392.

In addition, the State is incorrect when it claims the procedural protections afforded under the ITA are greater than those provided

under the SVP statute. Op. Br. at 37. The SVP statute offers greater protection in several important ways. At a SVP hearing, the State must meet its initial burden beyond a reasonable doubt. RCW 71.09.060(1). At an ITA hearing, the State must prove its case only by only clear, cogent, and convincing evidence. RCW 71.05.310. In order to commit the individual indefinitely thereafter, the SVP statute allows the sexually violent predator to counter the State's prima facie showing with its own prima facie showing. RVW 71.09.090(2)(c); *Petersen*, 145 Wn.2d at 797 (*probable cause* exists when a prima facie showing has been made). The ITA requires the individual present "proof" he does not meet the criteria for commitment. RCW 71.05.320(3)(c)(ii). Finally, the SVP statute requires the State demonstrate, as part of its prima facie showing, that there is no less restrictive alternative available. RCW 71.09.090(2)(b). The ITA statute does not require the State address this issue in its prima facie showing, despite the fact it is an element of the criteria for commitment. RCW 71.05.320(3)(c)(ii); RCW 71.05.320(1).

In addition, as explained above, the State has a very different interest in committing an individual under the ITA than under the SVP statute. The State claims its interest is the same, but that is simply not

correct. *See* Op. Br. at 32. Because the treatment needs are different for the mentally ill than for sex offenders, the State does not have the same interest in indefinite commitment. *Young*, 122 Wn.2d at 51.

The State acknowledges RCW 71.05.320(3)(c)(ii) creates some risk of error. Op. Br. at 35. Given the provision's presumption of committing an individual indefinitely, and the requirement the individual present "proof" he does meet the criteria for commitment in order to obtain an evidentiary hearing, the risk of error is significant. The additional procedural safeguard, i.e. an evidentiary hearing, involves nothing more than what is already afforded to the majority of the individuals committed under the ITA, and would place a minimal burden on the State. Indeed, the State makes no showing that there is a large number of individuals subject to RCW 71.05.320(3)(c)(ii). Under the *Mathews* balancing test, the limited process provided in the statutory provision violates procedural due process.

d. RCW 71.05.320(3)(c)(ii) is void for vagueness.

When evaluating criminal statutes, the prohibition of vagueness "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law' and a statute that flouts it 'violates the first essential of due process.'" *Johnson v. United*

States, No. 13-7120 (U.S. June 26, 2015). Vagueness is similarly prohibited in civil commitment statutes. *In re LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986). “The issue of vagueness involves the procedural due process requirements of fair notice of the conduct warranting detention and clear standards to prevent arbitrary enforcement by those charged with administering the applicable statutes.” *Id.* While vagueness is not mere uncertainty, “[a] statute is void for vagueness if persons of common intelligence must necessarily guess at to its meaning and differ as to its application.” *State v. Glas*, 147 Wn.2d 410, 421, 54 P.3d 147 (2002).

The trial court found RCW 71.05.320(3)(c)(ii) unconstitutionally vague because it shifts the burden from the State to the individual to offer “proof” that he does not meet the criteria for commitment, without identifying the standard by which this “proof” is to be measured and without specifying the process by which the individual is entitled to present this evidence. CP 340. The State claims the trial court’s ruling was wrong because an individual satisfies RCW 71.05.320(3)(c)(ii) when he provides “an expert opinion concluding he has so changed that the mental disorder no longer presents such a substantial likelihood.” Op. Br. at 40. This

interpretation of the statutory provision is simply guesswork by the State on appeal.

Nothing in the statute indicates an expert's bare assertion that the individual no longer meets the criteria for commitment entitles the individual to an evidentiary hearing. The provision requires the individual present "proof." RCW 71.05.320(3)(c)(ii). A trial court could easily find it needed to assess the expert's opinion, including an evaluation of the expert's training and experience, the information upon which the expert relied, and the basis for the expert's conclusion, in order to determine whether this evidence would be persuasive at a hearing. Only once the trial court was satisfied the individual could prove his case might the trial court allow the case to proceed to a full evidentiary hearing.

In addition, RCW 71.05.320(3)(c)(ii) provides no guidance as to how the individual will be permitted to seek out and introduce this "proof." In carving out this exception to a full hearing, the provision provides no procedure to ensure the individual is given a meaningful opportunity to respond to the State's prima facie evidence. Given that an individual facing commitment pursuant to RCW 71.05.320(3)(c)(ii) is involuntarily detained at the time the State files its petition, the

failure to make these procedures explicit will lead to guesswork and the inconsistent application of the statute. It is inevitable that some individuals will be given no more than perfunctory notice of their rights. Because the statute fails to provide the necessary guidance to ensure its uniform application, it is void for vagueness.

3. RCW 71.05.320(3)(c)(ii) Violates the Constitutional Right to a Jury

The right to a trial by jury is inviolate, and this Court has long recognized an individual's constitutional right to a jury trial in mental health commitment proceedings. Const. Art. I, § 21; *In re Det. of Ellern*, 23 Wn.2d 219, 223, 160 P.2d 639 (1945); *Quesnell v. State*, 83 Wn.2d 224, 242, 517 P.2d 568 (1973). The trial court determined that because RCW 71.05.320(3)(c)(ii) permits the commitment of an individual for an additional six months without providing him with the opportunity to exercise his right to a jury trial, it violates Article I, section 21. CP 339.

The State asserts this Court only recognized this right prior to the implementation of the graduated civil commitment scheme, which allows for the commitment of increasingly longer periods of time, rather than indefinite commitment. Op. Br. at 48. In making this argument, it fails to acknowledge that individuals subject to RCW

71.05.320(3)(c)(ii) may be initially committed for six months, rather than 14 days, and indefinitely committed thereafter. RCW 71.05.290(3); 71.05.320(1). In addition, the State's argument is meritless because this Court has continued to recognize the constitutional right to a jury trial in mental health commitment proceedings after the ITA became effective in 1974.

In *Sherwin v. Aveson*, this Court recognized the individuals' constitutional right to a jury trial in a 90-day detention proceeding, but found that this right did not entitle the individuals to a jury trial in the county of their residence. 96 Wn.2d 77, 83-84, 633 P.2d 1335 (1981). In *McLaughlin*, the Court referenced article I, section 21, when determining that individuals were not entitled to a unanimous jury in a 90-day commitment proceeding. 100 Wn.2d at 844.

Alternatively, the State argues that RCW 71.05.320(3)(c)(ii) does not violate the right to a jury trial because the individual is entitled to a jury trial for the initial commitment and for a subsequent commitment *if* he can present "proof" through admissible expert testimony that he does not meet the criteria for commitment. Op. Br. at 49. However, regardless of what protections are provided at the initial commitment and after the individual presents "proof," he still may be

committed indefinitely, albeit in six-month increments, without the right to a jury trial. As the trial court rightfully held, this violates article I, section 21.

Finally, the State again compares RCW 71.05.320(3)(c)(ii) to a summary judgment motion, arguing a plaintiff in a tort action is not denied the right to a jury when his case is dismissed for a failure to overcome a defendant's summary judgment motion. Op. Br. at 49. In its repeated comparisons to summary judgment, the State reveals its disregard for the significance of the liberty interest at stake when a mentally ill individual is confined against his will. It also misconstrues RCW 71.05.320(3)(c)(ii). Summary judgment does not involve degrees of probability. *Davis*, 2015 WL 3413375 at *5. Yet the individual facing indefinite commitment is forced to present "proof" he does not meet the criteria for commitment, not simply demonstrate a dispute of material fact as in response to a summary judgment motion. As the trial court held, RCW 71.05.320(3)(c)(ii) violates Article I, section 21.

4. A Decision on the Merits is Warranted

RCW 71.05.320(3)(c)(ii) provides for the indefinite commitment of the mentally ill in violation of due process and the right

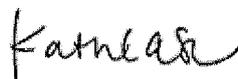
to a jury trial. It is likely this question will continue to reoccur until it is addressed by this Court and M.W. and W.D. could be subject to this unconstitutional provision if the State continues to seek their indefinite commitment under this ITA. This Court should review this case on its merits and affirm the trial court's ruling that RCW 71.05.320(3)(c)(ii) is unconstitutional.

E. CONCLUSION

M.W. and W.D. respectfully request this Court reject the State's arguments and find the trial court properly held RCW 71.05.320(3)(c)(ii) violates due process and the constitutional right to a jury trial.

DATED this 30th day of June, 2015.

Respectfully submitted,



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