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SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Detention of:

M.W. and W.D.

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

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I. INTRODUCTION

Violent repeat offenders found incompetent to stand trial have been slipping through a gap in the involuntary civil commitment system, resulting in a significant threat to public safety and a revolving door between the criminal and civil systems. In response, the legislature adopted RCW 71.05.280(3)(b) and .320(3)(c)(ii), the violent felony recommitment provisions of the Involuntary Treatment Act. These provisions take steps to alleviate serious public safety concerns by providing consistent, long-term care to this population.

Where a person has committed a violent felony but is incompetent to stand trial, he or she is subject to evaluation and up to 180 days of commitment in a state hospital under the Involuntary Treatment Act. If the court has found that the patient committed acts constituting a violent felony, he or she can be recommitted to an additional 180-day term under RCW 71.05.320(3)(c)(ii). Rather than proceeding straight to a full evidentiary hearing on whether recommitment is warranted, RCW 71.05.320(3)(c)(ii) requires a preliminary determination of whether the State's petition for recommitment presents prima facie evidence that continued commitment is warranted. If so, the burden of production shifts to the patient to produce evidence, through an admissible expert opinion, that the patient's condition has so changed that there is no longer a

substantial likelihood of the patient committing similar violent acts. RCW 71.05.320(3)(c)(ii). If the patient presents such rebuttal evidence, then he or she is entitled to a full evidentiary hearing or jury trial.

A Pierce County superior court commissioner declared this recommitment scheme unconstitutional even though it is at least as protective as the indefinite commitment scheme this Court upheld in *State v. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012), and recently applied in *In re Meirhofer*, No. 89251-2, 2015 WL 596928, at *1-2 (Feb. 12, 2015). The addition of a preliminary hearing to the recommitment process where the State must meet a prima facie burden, and then the patient must produce evidence in rebuttal to show a change in condition, fully complies with substantive and procedural due process under *McCuiston* and *Meirhofer*. The violent felony recommitment provisions are rationally related to a legitimate government interest and therefore provide equal protection of the law, and they do not deprive patients of a jury trial right. As a result, this Court should reverse the superior court commissioner and conclude that the violent felony recommitment provisions are constitutional, facially and as applied.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding that RCW 71.05.320(3)(c)(ii) is unconstitutional beyond a reasonable doubt, facially and as applied.

2. The trial court erred by failing to read the violent felony recommitment provisions in context with the rest of the Involuntary Treatment Act and failed to apply the rule that, if possible, the statute must be read to preserve its constitutionality.
3. The trial court erred when it read the violent felony recommitment provisions to shift the burden of proof to the patient, where they only impose on both parties a burden of production.
4. The trial court erred by concluding the violent felony recommitment provisions violate substantive due process under the state and federal constitutions.
5. The trial court erred by concluding that the violent felony recommitment provisions improperly denied M.W. and W.D.:
 - a. a right to have the state bear the burden of proof;
 - b. a right to a full judicial hearing or jury trial governed by the rules of evidence;
 - c. a right to present evidence and confront and cross-examine witnesses;
 - d. a statutory right to remain silent; and
 - e. a right to have the state show no less-restrictive alternatives are appropriate.
6. The trial court erred by concluding the violent felony recommitment provisions violate procedural due process under the state and federal constitutions.
7. The trial court erred by concluding the violent felony recommitment provisions are unconstitutionally vague under the state and federal constitutions.
8. The trial court erred by concluding the violent felony recommitment provisions violate equal protection under the state and federal constitutions.

9. The trial court erred by concluding the violent felony recommitment provisions violate article I, section 21 of the state constitution.
10. The trial court's Finding of Fact No. 3 implies that the State petitioned for renewed commitment of M.W. and W.D. solely based on RCW 71.05.320(3)(c)(ii), but the State also petitioned on alternative grounds.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does this case present issues of continuing and significant importance warranting a decision on the merits?
2. Did the superior court commissioner erroneously conclude the violent felony recommitment provisions shifted the burden of proof to the patient when instead they require both parties to meet a burden of production before proceeding to a full evidentiary hearing?
3. Did the trial court too restrictively interpret the violent felony recommitment provisions in isolation without reading them in context with the rest of the Involuntary Treatment Act?
4. Do the violent felony recommitment provisions violate substantive due process where the scheme is as protective as the indefinite commitment procedures for sexually violent predators upheld in *McCustion* and recently applied in *Meirhofer*?
5. Read in context with the rest of the Involuntary Treatment Act's procedural protections, did the violent felony recommitment provisions deprive M.W. and W.D. of procedural protections listed in Assignment of Error No. 5?
6. Do the violent felony recommitment provisions violate procedural due process where the scheme is as protective as the indefinite commitment procedures for sexually violent predators upheld in *McCustion*?
7. Do the violent felony recommitment provisions pose a standard that is sufficiently definite to overcome a vagueness challenge?

where the standard is the same as applied for the patient's first commitment?

8. Is there a rational basis to support treating those found incompetent to stand trial for violent felonies differently from patients committed without a preceding violent felony act?
9. Do the violent felony recommitment provisions article I, section 21 of the state constitution where shifting a burden of production does not violate this provision in other circumstances?

IV. STATEMENT OF THE CASE

A. Amendments to the Involuntary Treatment Act to Address Violent Felony Defendants Found Incompetent to Stand Trial

In 2013, the legislature adopted changes to the way that a particularly dangerous population—defendants found incompetent to stand trial for violent felonies—can be recommitted for an additional 180-day term where necessary under the Involuntary Treatment Act, RCW 71.05.

Where a felony defendant's competency cannot be restored, criminal charges are dismissed, and the court must order an evaluation for civil commitment. RCW 10.77.086(4). The State may then involuntarily confine the person for up to 180 days of treatment if the State can prove by clear, cogent, and convincing evidence that the person has committed acts constituting a felony, and as a result of a mental disorder, there is a substantial likelihood of repeating similar acts. RCW 71.05.280(3), .290(3). No order of commitment under the Involuntary Treatment Act may exceed 180 days, but if necessary, the State can renew a patient's

commitment by petitioning the court for another 180-day commitment term. RCW 71.05.320(3), (7); *see also* RCW 71.05.290(2).

The system of successive petitions and hearings for continued commitment created problems with people who were found incompetent to stand trial for violent felonies. Sometimes these patients would benefit enough from treatment that they no longer met the criteria for involuntary civil commitment, but once released in the community, their mental health would decline and they would again present a serious danger to the public. App. A at 004a (House Judiciary Committee, Public Hearing on H.B. 1114). Frequently, in cases where the hospital was required to release the patient, but the statute of limitations on their violent felony had not expired, the county prosecutor would re-file the criminal charges. These defendants often decompensated to the point where they were again incompetent. *See* App. A at 004a. As a result, these violent individuals bounced back and forth between the criminal and civil systems, sometimes for many years, depriving them of consistent treatment and depleting thin resources, while also creating a grave risk to public safety if they were released. *E.g.*, App. B at 003b (House Appropriations Committee, Public Hearing on H.B. 1114).

Recognizing these problems, the 2013 legislature found the usual tools for protecting the public, either criminal conviction or a finding of

not guilty by reason of insanity, were unavailable for these individuals.¹ Laws of 2013, ch. 289, § 1. Meanwhile, the civil system of repeated short-term commitments was insufficient to protect the public. Laws of 2013, ch. 289, § 1

The legislature therefore required that every incompetent felony defendant must be evaluated for involuntary commitment at a state hospital. Laws of 2013, ch. 289, § 2(4). At their first commitment hearing, the court must determine whether the person committed acts that constitute a violent felony under RCW 9.94A.030.² RCW 71.05.280(3)(b) (Laws of 2013, ch. 289, § 4(3)).

If treatment beyond the first 180-day commitment is needed, the 2013 amendments created a new recommitment scheme where the court has found, at the first commitment hearing, the person committed acts constituting violent felony. Two State experts must still petition for recommitment. But rather than proceeding immediately to a full evidentiary hearing, the court must determine at a preliminary hearing whether the petition contains prima facie evidence that the patient

¹ A person found not guilty by reason of insanity can be involuntarily committed for up to the maximum length of the criminal sentence for the charged crime, with the opportunity for release or conditional release if the person or the State petitions and can show he or she no longer meets involuntary commitment criteria. RCW 10.77.025, .110, .200.

² These felonies include, for example, all Class A felonies, first and second degree manslaughter, kidnapping, arson, and second degree assault and robbery.

continues to suffer from a mental disorder or developmental disability that results in a substantial likelihood that he or she will commit similar violent acts. RCW 71.05.320(3)(c)(ii) (Laws of 2013, ch. 289, § 5(3)(c)(ii)). If so, the patient must produce in rebuttal an admissible expert opinion indicating that the person's condition has so changed that there is no longer a substantial likelihood that he or she will commit similar violent acts. Laws of 2013, ch. 289, § 5(3)(c)(ii). The patient has a right to have the court appoint a reasonably available expert mental health professional to evaluate and submit an opinion, which must be at public expense if the patient is indigent. RCW 71.05.360(12).

If the patient's expert presents an admissible opinion containing the required conclusion, then the patient is entitled to a full evidentiary hearing to address whether continued commitment is warranted. Laws of 2013, ch. 289, § 5(3)(c)(ii); RCW 71.05.320(3)(c)(ii). If the patient does not rebut the State's prima facie evidence, then he or she is subject to up to 180 days of continued commitment. RCW 71.05.320(3)(c)(ii). Both the first and subsequent commitments may include a transfer to a less restrictive specialized program of intensive support in the community. RCW 71.05.320(3)(c)(ii).

B. M.W. and W.D. Were Charged with Violent Crimes, Found Incompetent to Stand Trial, and Involuntarily Committed With All of the Required Procedural Protections

1. M.W.

M.W. has a long history of admissions to Western State Hospital for both competency restoration and civil commitment, as well as an extensive criminal history. CP at 27-28, 194 (listing five prior commitments and eight criminal convictions). Since 2005, he has repeatedly been charged with crimes, found to be incompetent, and received competency restoration treatment that ultimately failed. CP at 5-7, 57, 75 (describing three failed competency restorations, and two instances of subsequent commitment under the Involuntary Treatment Act).

In 2013, while residing at Navos Psychiatric Hospital, M.W. assaulted a fellow patient, throwing a punch around a staff member and then stomping on the victim's head three times. CP at 10-11, 65. The victim suffered multiple facial fractures and lacerations and had to remain on a liquid diet for six weeks. CP at 11, 65. The State charged M.W. with Assault in the Second Degree. CP at 7. M.W.'s competency could not be restored and the court dismissed the charge without prejudice. CP at 7, 67.

M.W. was then referred to Western State Hospital. CP at 7, 81. After evaluation, a hospital physician and psychologist filed a petition for civil commitment under RCW 71.05.280(3) and (4). CP at 1-3. They

asserted there was a substantial likelihood M.W. would continue to be a danger to others and, because of a mental disorder, he would likely commit crimes and similar to assaults if released. CP at 12. They diagnosed M.W. with schizophrenia, paranoid type; schizophrenia, bipolar type; and substance abuse disorder. CP at 11, 18.

M.W. stipulated to commitment for up to 180 days. CP at 14-15. The court found that, as a result of a mental disorder, he presented a substantial likelihood of repeating similar acts and a less restrictive alternative was not appropriate. CP at 19. The court alternatively concluded he was gravely disabled. CP at 19. Finally, the court entered supplemental findings and conclusions, stating “[w]ithin the meaning of RCW 71.05.280(3), and for the purposes of this proceeding alone, [M.W.] is found to have committed acts constituting the felony of assault in the second degree [RCW 9A.36.021(1)(a)], which is classified as a violent felony under RCW [9.94A].030.” CP at 22 (first, second and fourth alterations ours).

M.W. was treated at Western State Hospital. Before his 180-day treatment period expired, a Western State physician and psychologist filed a petition for 180 days of continued involuntary civil commitment under RCW 71.05.320(3). CP at 23-33. The petition alleged that M.W. was gravely disabled and that he continued to present a substantial likelihood

of repeating acts similar to his charged crime, when considering his life history, progress in treatment, and public safety. CP at 24. The petition reflected the court's prior special finding under RCW 71.05.280(3)(b) that M.W. had committed acts constituting a violent felony. CP at 24.

The petition provided extensive information to support the treatment providers' conclusion that continued commitment was warranted. It explained that this was M.W.'s sixth admission to Western State Hospital. CP at 27. It also outlined his 25 prior criminal charges and his eight prior convictions. CP at 27-28.

The treatment providers reported that while M.W. had demonstrated improvements and was consistently taking his medication and attending treatment groups, he was guarded, isolative, and exhibited paranoid ideation. CP at 28. M.W. continued to have difficulty with emotional and behavioral regulation, getting into frequent verbal conflict and assaulting people. CP at 30-31. He continued to show aggression toward staff and peers, pushing a peer into a wall and punching a peer in the chest. CP at 28. One instance was severe enough to require five-point restraints. CP at 31.

During the evaluation, M.W. demonstrated good hygiene, a cooperative but guarded attitude, good memory, and a normal ability to communicate, and he showed he was oriented to person, place, and time.

CP at 29. He said that he was experiencing auditory hallucinations, however, hearing male and female voices, consistent with recent reports in his chart. CP at 29. M.W. presented moderate judgment and reported he did not yet feel ready to leave the hospital because he had “‘more to do and more to learn about people.’” CP at 30. He said that he would continue to take his medications and he thought they were helpful in controlling his symptoms. CP at 30-31. Yet his chart reflected that he told staff he did not believe medications were necessary. CP at 30. He displayed moderate insight, understanding that he was being treated for paranoid schizophrenia, but he would not discuss the crime that led to his commitment. CP at 30.

The petition noted that M.W.’s history included repeated instances of criminal assault, 11 assault charges, and 3 felony assault convictions. CP at 31. The treatment providers concluded: “He continues to exhibit assaultive behaviors toward peers, and he continues to experience marked and pervasive symptoms of psychosis (such as paranoid ideation and auditory hallucinations.” CP at 31. Thus, they concluded he continued to present a substantial likelihood of repeating assaultive behavior. CP at 31. His diagnosis continued to include schizophrenia, paranoid type. CP at 32.

The providers also concluded that M.W. was not ready for a less restrictive alternative placement because he was assaultive and had

marked symptoms of psychosis, including auditory hallucinations. CP at 32. Thus, they recommended that he remain in the hospital. CP at 32. The providers submitted their declaration under penalty of perjury. CP at 33.

2. W.D.

W.D. has also had frequent contact with the criminal justice and civil commitment systems. W.D.'s criminal history includes convictions for one felony and five lesser crimes. CP at 105-06. He had two prior determinations of incompetency to stand trial, and three prior involuntary commitments. CP at 107-08, 213-14.

In 2013, he attacked a stranger unprovoked, resulting in facial fractures requiring multiple surgeries. CP at 95. W.D. was charged with assault but found incompetent. CP at 101. His competency could not be restored (CP at 115) and the court dismissed the charge without prejudice. CP at 117-20.

After evaluation, a hospital physician and a psychologist petitioned for civil commitment, asserting that W.D. was gravely disabled and that he had inflicted physical harm on another person and continued to present a likelihood of serious harm. CP at 208. They also asserted that W.D. had been found incompetent to stand trial for second degree assault, a violent felony offense, and he presented a substantial likelihood of repeating similar acts. CP at 209. They concluded W.D. was not ready for a less

restrictive alternative. CP at 210. The court entered an order detaining him for up to 180 days. CP 220-24. The court also entered a supplemental finding that W.D. “committed acts constituting assault in the second degree, a violent felony offense under RCW [9.94A].030.” CP at 226.

W.D. received treatment at Western State Hospital. Before the 180-day treatment period expired, a physician and a psychologist filed a petition to continue commitment for an additional 180 days under RCW 71.05.320(3). CP at 227. The petition alleged that W.D. continued to meet the commitment grounds because he was gravely disabled and because he continued to present a substantial likelihood of repeating acts similar to the charged assault, considering his life history, progress in treatment, and public safety. CP at 228. The petition reflected the court’s prior finding under RCW 71.05.280(3)(b) that W.D. had committed acts constituting a violent felony. CP at 228. They concluded W.D. was not ready for less restrictive placement, and he required continued treatment at Western State Hospital. CP at 229.

The petition set forth extensive support for these conclusions. This was W.D.’s fifth admission to Western State Hospital, and he had 31 prior criminal charges and 8 prior convictions. CP at 231-32. Treatment providers reported that though W.D. had been taking his medications, his

participation in treatment was inconsistent and he was often disruptive. CP at 232.

At his evaluation, W.D.'s hygiene was good. CP at 233. He was lethargic, and although he was cooperative in his interview, his chart reflected that he was often defiant, hostile, and verbally aggressive. CP at 233. He was oriented to person, time, and place, but had memory limitations. CP at 233-34. W.D. showed moderate judgment, planning to go to a group home upon discharge, but he also showed difficulty abiding by ward rules. CP at 235. He had moderate insight and said his medications were helpful. CP at 235.

W.D. reported auditory and visual hallucinations and delusional beliefs. CP at 232, 234. (“‘I see the devil every day.’”) He also showed paranoid ideation, claiming people were stealing from him. CP at 234. His hallucinations caused him to assault other patients in several instances, and he remained aggressive toward staff. CP at 232. The petition described recent assaultive behavior, including fighting with a peer, punching another peer, and assaulting a staff member. CP at 236.

His diagnosis was schizoaffective disorder, bipolar type. CP at 237. The petition asserted he was not ready for a less restrictive alternative and that he required continued treatment at the state hospital. CP at 237.

C. When the Initial Commitments Expired, the Violent Felony Recommitment Provisions Applied to M.W.'s and W.D.'s Renewed Commitment, but the Superior Court Commissioner Declared RCW 71.05.320(3)(c)(ii) Unconstitutional

In response to the petitions for their continued commitment, M.W. and W.D. challenged the constitutionality of RCW 71.05.320(3)(c)(ii) facially and as applied. CP at 332, 381. They asserted that allowing continued commitment based only on prima facie evidence would violate various constitutional provisions. CP at 331, 381. The King County Prosecutor sought to intervene, but the superior court commissioner denied intervention, allowing participation as amicus instead. CP at 244-46. After considering the arguments of the parties and amicus, the commissioner declared RCW 71.05.320(3)(c)(ii) unconstitutional, holding the provision violates the Fourteenth Amendment of the United States Constitution and article I, sections 3 (due process), 12 (equal protection), and 21 (trial by jury) of the Washington Constitution. CP at 332. The Court subsequently held full hearings, though neither requested a jury trial, and renewed the commitments of both M.W. and W.D. on the ground that they continue to be gravely disabled and they present a substantial likelihood of repeating similar acts as a result of a mental disorder under RCW 71.05.320(3)(c)(i). CP at 344-47, 393-97.

The State moved for discretionary review in the Court of Appeals, which transferred the case to the Washington Supreme Court. CP at 327-29. This Court accepted review, but the Supreme Court Commissioner's ruling directed the parties to address whether the case should be decided on the merits because it presents an issue of continuing substantial importance, even though M.W. and W.D. are subject to continued commitment on other grounds. Supreme Ct. Commr's Ruling at 3; CP at 346-47, 396-97.

V. ARGUMENT

A. **This Case Presents Issues of Continuing and Significant Public Importance Warranting a Decision on the Merits**

The parties agree that validity of RCW 71.05.320(3)(c)(ii) is a matter of continuing and substantial public interest warranting this Court's review, even though these cases are technically moot. *See* Resp'ts' Answer To Mot. For Disc. Review at 3. The following criteria determine whether a sufficiently substantial public interest is involved: “(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.” *In re Det. of Swanson*, 115 Wn.2d 21, 24-25, 804 P.2d 1 (1990) (quoting *Dunner v. McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984)).

This Court has not hesitated to decide these criteria are met when “there is a need for guidance in applying the statutory civil commitment scheme.” *In re Det. of Swanson*, 115 Wn.2d at 24; *see also In re Det. of C.W.*, 147 Wn.2d 259, 270, 53 P.3d 979 (2002). Involuntary commitment for those who have committed violent felonies affects public safety as well as the individual patient. *See* Laws of 2013, ch. 289, § 1. Moreover, the public officers implementing the commitment scheme need to know whether the violent felony recommitment provisions are available as one manner of obtaining continued commitment for this population of patients. Finally, even though M.W. and W.D. are currently involuntarily committed on alternate grounds, and those commitments have not been challenged, the issue presented in this case will recur. The issue could arise at the end of M.W.’s and W.D.’s current 180-day commitments unless the State determines they are eligible for release. The issue will also undoubtedly arise with other Western State Hospital patients found incompetent to stand trial for violent felonies.

If a subsequent full evidentiary hearing and order of commitment on alternate grounds negates all possibility of review, then the constitutionality of the violent felony recommitment provisions might never be resolved by an appellate court. The State could have theoretically avoided entry of orders committing M.W. and W.D. on alternative

grounds by seeking stays pending appellate review of this constitutional question. Yet this would have subjected M.W. and W.D. to ongoing involuntary commitment while an indefinite stay was in place pending appeal. This should not be required. This Court should instead recognize, consistent with prior cases, that the issue presented is one of continuing and substantial public interest warranting a decision on the merits. *See In re Det. of Swanson*, 115 Wn.2d at 24-25

B. The Violent Felony Recommitment Provisions, Read in Context with the Entire Involuntary Treatment Act, Do Not Shift the Burden of Proof to the Patient

The superior court commissioner erred when she concluded that the Involuntary Commitment Act, as amended, shifted the burden of proof to the patient and failed to set forth adequate processes or procedures for applying the recommitment scheme for those found incompetent to stand trial for violent felonies. Specifically, the commissioner failed to read the violent felony recommitment provisions within the context of the entire Involuntary Treatment Act. Related statutory provisions “must be harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective statutes.” *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). This Court should therefore read RCW 71.05.320(3)(c)(ii) within the context of the Act’s larger statutory

framework. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 221, 254 P.3d 778 (2011).

The chart attached as Appendix C reflects the recommitment process for those found incompetent to stand trial for violent felonies within the existing involuntary commitment system. Under this system, the burden of proof always lies with the state physician and psychologist as petitioners. RCW 71.05.310. One commentator has succinctly explained that “[i]n some jurisdictions and in some contexts, the introduction of prima facie evidence will discharge the proffering party’s obligation to establish its case and will shift the burden of *proof* to its adversary. In other jurisdictions and contexts, however, prima facie evidence merely shifts the burden of *production* thereby creating a presumption that vanishes once the opposing party produces credible evidence inconsistent with the proffering party’s showing.” Charles C. Cook & Theodore H. Davis, *Litigating the Meaning of “Prima Facie Evidence” Under the Lanham Act: The Fog and Art of War*, 103 Trademark Rep. 437, 437 (2013). The violent felony recommitment provision, by its plain language, takes the latter approach, shifting the burden of production, but not the burden of proof.

Under RCW 71.05.320(3)(c)(ii), the State bears the initial burden of *production*—to present prima facie evidence. Prima facie evidence is

typically defined as: “‘evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.’” *Murphy v. Immigration & Naturalization Serv.*, 54 F.3d 605, 610 (9th Cir. 1995) (emphasis added) (quoting *Black’s Law Dictionary* 1190 (6th ed. 1990)); see also *Black’s Law Dictionary* 677 (10th ed. 2014). Thus, in this context, the petition must set forth sufficient justification for commitment that, if left un rebutted, would meet the applicable standard. See *Murphy*, 54 F.3d, at 610; see also *In re Meirhofer*, No. 89251-2, 2015 WL 596928, at *2 (Feb. 12, 2015).

All 180-day civil commitment petitions must be supported by affidavits signed by two petitioners, usually the patient’s treating psychiatrist and psychologist, that “describe in detail the behavior of the detained person which supports the petition and shall explain what, if any, less restrictive treatments . . . are available to such person” RCW 71.05.290(2)(e); see also *In re Det. of R.P.*, 89 Wn. App. 212, 217, 948 P.2d 856 (1997) (applying 90-day petition requirements in RCW 71.05.290 to 180-day petitions). In addition to whether there is a substantial likelihood the person will repeat similar acts as a result of a mental disorder or developmental disability, the court considers life history, progress in treatment, and public safety. RCW 71.05.320(3)(c)(i).

If the initial burden of *production* is not satisfied, continued commitment is not justified under RCW 71.05.320(3)(c)(ii), and the petition will be dismissed unless the State can proceed on an alternate ground for commitment, like grave disability. Only if the initial burden is satisfied would a patient need to rebut the State's prima facie evidence.

An obligation to present rebuttal evidence that arises upon successful presentation of prima facie evidence is not uncommon, and it often shifts the burden of production, while keeping the burden of proof squarely with the plaintiff or petitioner. For example, a nonmoving party at the summary judgment stage of civil proceedings has no burden to prove anything, but is required to produce some evidence that raises an issue of material fact in order to continue to an evidentiary hearing. *See Balise v. Underwood*, 62 Wn.2d 195, 198-200, 381 P.2d 966 (1963); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Penson v. Inland Empire Paper Co.*, 73 Wash. 338, 345-46, 132 P. 39 (1913) (*res ipsa loquitur*, requiring a defendant to show he is free from negligence in certain circumstances where the plaintiff has met a prima facie burden does not relieve the plaintiff of the ultimate burden of proof); *Dubner v. City & County of San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001) (explaining when a § 1983 plaintiff made out a prima facie case, the burden of production, but not the burden of proof,

shifted to the defendant to rebut with some evidence); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (offering similar description of the *McDonnell Douglas* test for employment discrimination). While RCW 71.05.320(3)(c)(ii) may shift to the patient the burden to *produce* expert evidence to dispute the State's evidence, it never shifts the burden of *proof* to the patient.

In sum, when read in context with the remainder of the Involuntary Treatment Act, the violent felony recommitment provisions do not shift the burden of proof to the patient.

C. The Violent Felony Recombitment Provisions Do Not Violate Substantive Due Process as They Are at Least as Protective as the Indefinite Commitment Scheme Upheld in *McCuiston*

The violent felony recommitment provisions comply with substantive due process because the statutory scheme ensures that patients will remain committed only if they are mentally ill and dangerous. This Court upheld a similar, but indefinite commitment in *McCuiston*.

The party challenging a statute bears the heavy burden to prove it is unconstitutional beyond a reasonable doubt and this Court must construe the statute, if at all possible, in a way that preserves its constitutionality. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013); *City of Bothell v. Barnhart*, 172 Wn.2d 223, 229, 257 P.3d 648 (2011). The substantive due process challenge raised here is facial because

M.W. and W.D. do not argue that they, themselves, are being detained absent a mental illness or dangerousness. “[A] facial challenge must be rejected unless there exists no set of circumstances in which the statute can constitutionally be applied.” *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999) (quoting with approval *Ada v. Guam Soc’y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S. Ct. 633, 121 L. Ed. 2d 564 (1992) (Scalia, J., dissenting)).

A civil commitment scheme does not violate substantive due process if it is narrowly tailored to serve compelling state interests. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). Civil commitment statutes meet this requirement when both initial and continued confinement are predicated upon mental illness and dangerousness. *See O’Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975); *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (previous instances of violent behavior are an important factor in predicting future dangerousness). The Washington Supreme Court reaffirmed this standard in *State v. McCuiston*, 174 Wn.2d 369, 387-88, 275 P.3d 1092 (2012).

In *McCuiston*, this Court evaluated the system for annually reviewing indefinite commitments of sexually violent predators under RCW 71.09. *McCuiston*, 174 Wn.2d at 379-81. Under

RCW 71.09.090(2)(b), after an individual is proven to meet commitment criteria,³ the prosecuting agency is required to annually evaluate the sexually violent predator and submit prima facie evidence at an annual show cause hearing that the predator continues to meet statutory criteria for commitment. The burden of production then shifts to the sexually violent predator to produce “current evidence from a licensed professional” that either a major physiological change has rendered the person unable to offend, or that the person has changed through a positive response to treatment. RCW 71.09.090(4)(a)-(b). Only then will the court proceed to a full evidentiary hearing on whether continued commitment is warranted.

The *McCuiston* Court concluded that there is no substantive due process right to a full evidentiary hearing every year. *McCuiston*, 174 Wn.2d at 385; *see also In re Meirhofer*, 2015 WL 596928, at *7-8; *Williams v. Wallis*, 734 F.2d 1434 (11th Cir. 1984) (an adversarial hearing is not always required), Substantive due process requires only that the State conduct a periodic review of the patient’s suitability for release. *Williams*, 734 F.2d at 385. This scheme of annual review satisfied substantive due process even though the sexually violent predator had a

³ While the initial commitment under RCW 71.09 requires a finding beyond a reasonable doubt, the result is an indefinite commitment. *McCuiston*, 174 Wn.2d at 379.

burden to produce evidence that he had changed in order to proceed to a full evidentiary hearing. *Id.* at 390-92.

In this case, the core of the superior court commissioner's substantive due process reasoning seems to be that the 2013 amendments for incompetent violent offenders could allow continued commitment based only on prima facie evidence without a full evidentiary hearing. But the *McCuiston* Court upheld the RCW 71.09 annual review process against a substantive due process challenge, even when the statute created a prerequisite that prevented McCuiston from obtaining a full evidentiary hearing. *McCuiston*, 174 Wn.2d at 384. Substantive due process requires only that the State conduct periodic evaluation of a patient's suitability for release, and a substantive due process challenge cannot depend on an assumption that the periodic evaluation will fail to properly identify those who are no longer mentally ill and dangerous. *See id.* at 385, 389.

Under RCW 71.05.280(3)(b) and .320(3)(c)(ii), neither the initial nor continued commitment of a violent offender is possible without continued mental illness that contributes to the person's dangerousness. Each petition must establish that the patient continues to suffer from a mental illness, and that the mental illness makes further violent behavior substantially likely. RCW 71.05.320(3)(c)(ii). The court must dismiss the petition if this standard is not met, unless there are alternate grounds. *See*

RCW 71.05.320(3)(c)(ii). Further, prior to the end of any commitment term, the hospital may release, conditionally release, or place in a less restrictive treatment environment a patient who is no longer dangerous as a result of mental illness. RCW 71.05.325-.340. The hospital can do so without court approval. RCW 71.05.325-.340.

Given the semiannual evaluation and petition for recommitment, the requirement that the State present prima facie evidence warranting renewed commitment, the opportunity for the patient to present rebuttal evidence, and the mechanisms for mid-commitment release the likelihood that a violent offender will be detained absent a mental illness and dangerousness is at least as low as it was in *McCuistion*. M.W. and W.D. fail to demonstrate that there exist no circumstances under which RCW 71.05.320(3)(c)(ii) can be constitutionally applied, and therefore their facial substantive due process claim must be rejected.

D. The Violent Felony Recommitment Provisions Do Not Violate Procedural Due Process Because They Provide Procedural Safeguards as Protective as Those Addressed in *McCuistion*

The violent felony recommitment provisions similarly do not run afoul of procedural due process. This Court also recognized in *McCuistion* that requiring the patient to meet a burden of production before advancing to a full evidentiary hearing did not violate procedural due process. The violent felony recommitment provisions do not deprive the patient of

existing procedural protections, nor do they fail the Mathews balancing test. Moreover, the provisions are not unconstitutionally vague because when read in context with the rest of the Involuntary Treatment Act, they provide both a clear process and a clear standard for evaluating whether a person continues to meet the commitment requirements.

1. The violent felony recommitment provisions do not deprive a patient of the procedural protections provided elsewhere in the Act

The superior court commissioner incorrectly held that RCW 71.05.320(3)(c)(ii) deprived M.W. and W.D. of procedural due process because it deprived them of a full hearing or jury trial governed by the rules of evidence, denied them the ability to confront and cross-examine witnesses, abrogated their right to remain silent by requiring them to produce admissible evidence, and relieved the State of the burden to address less restrictive alternatives. CP at 332. This Court should conclude that the violent felony recommitment provisions do not deprive patients of these other procedural protections provided in the Involuntary Treatment Act.

When a patient is the subject of a petition for recommitment, he continues to receive protections available to him for his first commitment proceeding: the right to counsel and to an expert funded at public expense if the patient is indigent, the right to present evidence to rebut the State's

petition, the right to remain silent, and the right to have the court consider less restrictive alternative placements. RCW 71.05.310, .320(3), .320(6), .360(5)(c)-(d); *In re Det. of J.S.*, 124 Wn.2d 689, 698, 880 P.2d 976 (1994) (finding that “[t]he Legislature has . . . directed the court to consider less restrictive treatment at each stage of involuntary commitment proceedings”).

Contrary to the commissioner’s conclusion, requiring a patient to meet a burden of production to present some admissible expert evidence does not destroy the statutory right to remain silent. *See* RCW 71.05.360(5)(c); *In re Det. of McLaughlin*, 100 Wn.2d 832, 847, 676 P.2d 444 (1984). A right to remain silent is personal to the individual whose testimony may be compelled, “not to information that may incriminate him.” *Couch v. United States*, 409 U.S. 322, 328, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973); *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990). At the preliminary hearing, the patient is represented by counsel (RCW 71.05.360(11)) who speaks on his or her behalf. If the patient chooses to present rebuttal evidence in the form of an admissible expert opinion, it is the expert who will be called upon to testify, not the respondent as an individual. The personal right to remain silent remains intact.

Nor does the violent felony recommitment provision abrogate the right to proceedings governed by the rules of evidence or any right to confront or cross-examine witnesses as the commissioner held. CP at 388. M.W. and W.D. pointed to no evidence presented in the State experts' petitions that would not be admissible. *See, e.g., State v. Christopher*, 114 Wn. App. 858, 862, 60 P.3d 677 (2003) (recognizing medical chart notes pertinent to diagnosis and treatment are admissible as business records). Moreover, the right to confrontation under the Sixth Amendment of the United States Constitution does not apply in civil commitment cases. *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007) (remarking that the Sixth Amendment right applies only to criminal defendants). It was therefore the legislature's prerogative to permit cross-examination at an evidentiary hearing only if the patient can first produce evidence rebutting the petition.

If the patient offers in rebuttal admissible expert evidence to dispute the State's prima facie case, then a full evidentiary hearing on the merits must occur without any shift in the burden of proof. RCW 71.05.320(3)(c)(ii). At the evidentiary hearing, the State would continue to bear the ultimate burden of proving that continued commitment is warranted by clear, cogent, and convincing evidence. RCW 71.05.310. The patient would be entitled by statute to a full hearing

or jury trial, to present evidence and cross-examine witnesses, and to again have less restrictive alternatives addressed. In sum, the trial court erred by reading RCW 71.05.320(3)(c)(ii) in isolation. The act's protections remain in place and must be considered when evaluating whether the violent felony recommitment provisions violate procedural due process.

2. Taking into account all of these protections, the procedures set forth in RCW 71.05.320(3)(c)(ii) do not violate procedural due process because they are at least as protective as those upheld in *McCustion*

The violent felony recommitment provisions do not violate procedural due process. Requiring a patient who has committed acts constituting a felony to meet a burden of production in order to advance to a full evidentiary hearing does not deprive the patient of procedural due process.

To determine the adequacy of procedures provided, courts balance the three *Mathews*⁴ factors: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. *In re Det. of Harris*, 98 Wn.2d 276, 285, 654 P.2d 109 (1982) (citing *Mathews*, 424 U.S. at 335).

⁴ *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The Washington Supreme Court concluded in *McCuiotion* that the similar procedural approach employed in the sexually violent predator context did not violate procedural due process. Applying the *Mathews* balancing test, this Court concluded that limiting the avenues for obtaining a full evidentiary hearing by requiring the sexually violent predator to produce some evidence to establish probable cause for release comported with procedural due process. *McCuiotion*, 174 Wn.2d at 395. This was true, even though there was a shift in the burden of production and even though the commitment would continue based on prima facie evidence alone if the sexually violent predator could offer no rebuttal evidence from a licensed professional. *Id.* at 380.

The *McCuiotion* Court recognized that under the first *Mathews* factor, the individual liberty interest at stake was substantial. *Id.* at 395; *see also Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972) (describing involuntary commitment as a “massive curtailment of liberty”). Under the third factor, the governmental interest, the *McCuiotion* Court emphasized the State’s substantial interest in preventing premature release of dangerous individuals, encouraging their consistent treatment, and avoiding the administrative costs associated with unnecessary evidentiary hearings. *McCuiotion*, 174 Wn.2d at 394; *see also United States v. Phelps*, 955 F.2d 1258, 1266 (9th Cir.1992) (recognizing

the strong governmental interest in preventing premature release of a person already proved to be violent and mentally ill).

The governmental interest weighs as heavily in favor of the State in this case. The State has a strong interest in detaining “mentally unstable individuals who present a danger to the public.” *United States v. Salerno*, 481 U.S. 739, 748-49, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The legislature specifically found that violent felony offenders who were incompetent to stand trial were falling into a statutory gap, endangering public safety. Laws of 2013, ch. 289, § 1. The legislature also recognized that under prior iterations of the statutory scheme, these individuals were sometimes stuck in a revolving door between the criminal and civil commitment systems. Laws of 2013, ch. 289, § 1. The legislature found that creating a preliminary burden of production would take steps to improve public safety and provide more consistent care for this population. Laws of 2013, ch. 289, § 1.

Under the last *Mathews* factor, the risk of erroneous deprivation and the likely value of any additional procedures, the *McCustion* Court found existing procedural safeguards sufficiently alleviated the risk of erroneous continued commitment. *McCustion*, 174 Wn.2d at 393-94. These included the extensive protections provided for in the initial commitment hearing, annual written reviews to ensure the individual

continued to meet commitment criteria, and the right to an evidentiary hearing (again with a panoply of procedural rights) if the State found that the individual no longer met commitment criteria. *Id.* at 393. Every year, the State must present prima facie evidence that the sexually violent predator was still mentally ill and dangerous. *Id.* at 393-94. At a preliminary show cause hearing, the sexually violent predator needed only produce evidence to rebut the State's showing, but the rebuttal evidence had to show more than a change in a single demographic, and it had to show the change resulted from participation in treatment or a permanent physiological change. *Id.* at 393-94. Even so, these protections were enough to guard against erroneous continued commitment.

The process at issue here is at least as protective as the one upheld in *McCuiiston*. The violent offenders here also receive robust procedural protections upon their initial commitment. These include the right to counsel, the right to an expert at public expense if indigent, the right to a jury trial, the right to cross-examine and review evidence, the right to remain silent, the right to refuse psychiatric medications twenty-four hours prior to the hearing, and the right to a less restrictive alternative placement if appropriate. RCW 71.05.210, .300-.320, .360.

The State must seek renewed commitment every 180 days under RCW 71.05.320(3)(c)(ii), an obligation that arises twice as frequently as

the annual review for sexually violent predators under RCW 71.09. Upon a recommitment petition, several procedural safeguards continue to apply. Two examining mental health experts must support the petition by sworn affidavit, which must address whether less restrictive alternatives are appropriate. The petition must amount to prima facie evidence justifying continued commitment under RCW 71.05.320(3). Additionally, the rights to counsel, to an expert at public expense if indigent, to remain silent, and to refuse psychiatric medications twenty-four hours prior to the hearing all must be observed.

Furthermore, requiring the patient to produce rebuttal evidence does not appreciably increase the risk of erroneous continued commitment. If a patient cannot offer an expert opinion to contradict the sworn affidavits of the two petitioning experts that present prima facie evidence of why the respondent “continues to suffer from a mental disorder . . . that results in a substantial likelihood of committing acts similar to the charged criminal behavior” (RCW 71.05.320(3)(c)(ii)), then there is minimal likelihood that the respondent would be able to prevail in a full evidentiary hearing.

While the superior court commissioner expressed concern that, absent rebuttal evidence, a patient could be subject to continued commitment based only on prima facie evidence, relieving the State of its

clear, cogent, and convincing burden of proof, this reasoning fails to appreciate two things. First, this Court has already found that a similar burden of production did not violate procedural due process. *McCustion*, 174 Wn.2d at 392-94. Second, part of the court's evaluation under the prima facie standard is whether the evidence presented, if left un rebutted, would be *sufficient*. *Murphy v. Immigration & Naturalization Serv.*, 54 F.3d 605, 610 (9th Cir. 1995) (“[Prima facie evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.” (quoting *Black's Law Dictionary* 1190 (6th ed. 1990))). Here, this involves an analysis of whether the evidence presented would meet the clear, cogent, and convincing standard if left un rebutted. *See, e.g., In re Meirhofer*, No. 89251-2, 2015 WL 596928, at *1 (Feb. 12, 2015) (“[T]he court can and must determine whether the asserted evidence, if believed, is *sufficient* to establish the proposition its proponent intends to prove.” (quoting *In re Det. of Petersen*, 145 Wn.2d 789, 798, 42 P.3d 952 (2002))).

Moreover, unlike a sexually violent predator, if the hospital determines in the middle of a commitment period that an Involuntary Treatment Act patient no longer meets commitment criteria, the respondent can be discharged, with no requirement for court review.

RCW 71.05.330. The hospital may also release the individual to a less restrictive placement outside of the hospital whenever such a placement becomes appropriate. RCW 71.05.340, .330(1). Courts have recognized that hospital professionals act as unbiased decision makers in this regard. *E.g., Williams v. Wallis*, 734 F.2d 1434, 1438 (11th Cir. 1984)

The violent felony recommitment procedures are more procedurally protective than those evaluated in *McCuiston* in other ways too. Here, the hospital must show continued commitment is warranted every six months, rather than once a year. Finally, RCW 71.05.320(3)(c)(ii) requires rebuttal evidence in the form of expert opinion testimony 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). This limitation is less restrictive than the one imposed under RCW 71.09 because it permits the testifying expert to submit any basis for concluding that the person no longer meets commitment criteria, including, for example, that the person has improved despite a refusal to participate in treatment. The basis for such an opinion under RCW 71.09, in contrast, is limited to a major physiological change or progress in treatment.

In sum, because the indefinite civil commitment scheme at issue in *McCouston* satisfies procedural due process, then this determinate civil commitment scheme must as well.⁵

3. The statute is not void for vagueness because it provides both a procedure through which the State must show continued commitment is warranted and a comprehensible standard of proof

The vagueness doctrine implicates procedural due process. *In re Det. LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986). It serves two purposes: “to provide fair notice to citizens as to what conduct is proscribed and to protect against arbitrary enforcement of the laws.” *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988); *Labelle*, 107 Wn.2d at 201. The challenging party bears the burden of proving a statute is unconstitutionally vague beyond a reasonable doubt. *Eze*, 111 Wn.2d at 26.

A reviewing court will not invalidate a statute for vagueness simply because the statute could have been drafted with greater precision or because there is not “absolute agreement” on the statute’s application. *State v. Sullivan*, 143 Wn.2d 162, 182, 19 P.3d 1012 (2001). ““Condemned to the use of words, we can never expect mathematical

⁵ With regard to claims based on the state constitution, this Court has held that the Washington Constitution’s due process clause is as protective, but no more so, than the U.S. Constitution. *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398, 409 (2014).

certainty from our language.’” *Eze*, 111 Wn.2d at 27 (quoting *Grayned v. Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). “For a statute to be unconstitutional, its terms must be so loose and obscure that they cannot be clearly applied in any context.” *In re Det. of Bergen*, 146 Wn. App. 515, 530, 195 P.3d 529 (2008) (internal quotation marks omitted). If the language is susceptible to understanding by persons of ordinary intelligence, then it must be upheld. *Id.* at 532. Statutory language that has been challenged for vagueness cannot be examined in a vacuum. *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990) “Rather, the context of the entire enactment is considered,” and the statutory language must be “afforded a sensible, meaningful, and practical interpretation.” *Id.*

The superior court commissioner incorrectly concluded that the violent felony recommitment provision failed to provide a clear standard for renewed commitment. The statute provides that the standard for renewed commitment is whether “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.” RCW 71.05.320(3)(c)(ii). This is a clearly articulated standard, wholly consistent with the standard for a violent offender’s initial commitment under RCW 71.05.280(3). Contrast with *In re Treatment of Mays*, 116

Wn. App. 864, 876, 68 P.3d 1114 (2003) (statute was vague because the necessary degree of dangerousness was not defined). Similarly, the standard for triggering a full evidentiary hearing is not vague. A patient meets his burden of production with an expert opinion concluding he has so changed that the mental disorder no longer presents such a substantial likelihood.

Finally, M.W. and W.D. cannot show that the standard for recommitment was so vague that it is impossible to tell whether their own recommitments were warranted. *See State v. Lee*, 135 Wn.2d 369, 393, 957 P.2d 741 (1998) (holding a defendant whose conduct clearly fits within the statute's parameters does not have standing to raise a vagueness challenge); *In re Treatment of Mays*, 116 Wn. App. at 874 (vagueness challenge not involving First Amendment must be evaluated as applied). Their petitions established that each continued to suffer from a mental disorder that made him substantially more likely to commit acts similar to his prior assault by explaining that each was having hallucinations and exhibiting assaultive behaviors.

When the violent felony recommitment provisions are afforded a sensible and practical interpretation, the applicable standards, burdens, and procedures for renewing the commitment of violent offenders are

susceptible to understanding by persons of ordinary intelligence. M.W. and W.D cannot prove vagueness beyond a reasonable doubt.

E. The Violent Felony Recommitment Provisions Do Not Violate Equal Protection

RCW 71.05.320(3)(c)(ii) does not deny M.W. and W.D. equal protection. The legislature articulated legitimate reasons for adopting the provision, and the resulting different treatment of the small number of people who were incompetent to stand trial for violent felonies is rationally related to legitimate government interests.

“Equal protection does not require that all persons be dealt with identically; it only requires that distinctions have some relevance to the purpose for which the classification is made.” *In re Det. of Ross*, 114 Wn. App. 113, 117, 56 P.3d 602 (2002) (citing *In re Det. of Turay*, 139 Wn.2d 379, 409-10, 986 P. 2d 790 (1999)).⁶ Civil commitment statutes that treat certain people differently are analyzed under the rational basis standard, which is “relaxed and highly deferential.” *In re Det. of Turay*, 139 Wn.2d at 410; *see also In re Det. of Dydasco*, 135 Wn.2d 943, 951, 959 P.2d 1111 (1998). A legislative distinction will withstand rational basis review if, “‘first, all members of the class are treated alike; second, there is a rational basis for treating differently those within and without the class;

⁶ Washington courts construe the federal and state equal protection clauses identically. *State v. Scherner*, 153 Wn. App. 621, 648, 225 P.3d 248 (2009).

and third, the classification is rationally related to the purpose of the legislation.’” *American Legion Post 149 v. Dep’t of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008) (quoting *O’Hartigan v. Dep’t of Pers.*, 118 Wn.2d 111, 122, 821 P.2d 44 (1991)). The statute is presumed constitutional and the challenger must prove “beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification, or that the facts have so far changed as to render the classification arbitrary and obsolete.” *State v. Smith*, 93 Wn.2d 329, 337, 610 P.2d 869 (1980).

With RCW 71.05.320(3)(c)(ii), the legislature has decided to distinguish between those who were found incompetent to stand trial for a violent felony and other persons civilly committed. This legislative distinction is rationally related to legitimate government interests. First, all members of the designated class—those found incompetent to stand trial for violent felonies—are treated alike under the statute. Once the person is initially committed and the statutory special finding is made, the subsequent procedure prescribed by the legislature applies uniformly. RCW 71.05.320(3)(c)(ii).

Second, there is a rational basis for the legislature to distinguish those who have committed violent felonies and were incompetent to stand trial from other civilly committed persons. The legislature identified two

compelling state interests for this distinction: to protect the public safety and to provide proper care for those who suffer from mental illness but are not committed under the potentially longer term “not guilty by reason of insanity” provisions. Laws of 2013, ch. 289, § 1. In equal protection challenges, Washington courts have consistently recognized that the legislature may rationally distinguish between persons civilly committed on these bases. *See, e.g., In re Det. of Patterson*, 90 Wn.2d 144, 151, 579 P.2d 1335 (1978), *overruled on other grounds by In re Det. of McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984) (distinguishing persons civilly committed after dismissal of a felony charge from others was justified); *State v. Platt*, 143 Wn.2d 242, 247, 19 P.3d 412 (2001) (quoting *Alter v. Morris*, 85 Wn.2d 414, 420-21, 536 P.2d 630 (1975) “the State’s interest in the safety of its citizens is strong enough to allow the legislature some leeway [under the Act] in formulating what are essentially predictive standards”); *In re Det. of Petersen*, 104 Wn. App. 283, 290, 36 P.3d 1053 (2000) (“differences in dangerousness, treatment methods, and prognosis for the mentally ill and violent sex offenders justify treating the two groups differently”).

The public safety interest is particularly strong in this case. The class identified by the legislature implicates individuals who have committed acts constituting a violent felony as defined in

RCW 9.94A.030(54), including all Class A felonies, manslaughter, indecent liberties by forcible compulsion, second degree kidnapping, second degree arson, and second degree assault. By tying the distinction to an objective, consistent definition of violent felony, the legislature has carefully and explicitly decided that certain persons pose a particularly high risk to the public safety. This is a rational distinction, based on the severity of a person's criminal behavior. The classification in this case is not arbitrary or obsolete.

Third, the classification in this case is rationally related to the purpose of the challenged statute. In identifying a rational relationship, this Court may assume the existence of any necessary state of facts which it can reasonably conceive. *Smith*, 93 Wn.2d at 336. Importantly, “a legislative choice is not subject to courtroom fact-finding,” and “equal protection [analysis] is not a license for the courts to judge the wisdom, fairness, or logic of the legislative choices.” *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). “As long as [the legislature] ‘rationally advances a reasonable and identifiable governmental objective, [courts] must disregard’ the existence of alternative methods of furthering the objective ‘that we, as individuals, perhaps would have preferred.’” *Heller v. Doe*, 509 U.S. 312, 330, 113 S. Ct. 2637, 125 L. Ed 2d 257 (1993) (quoting

Schweiker v. Wilson, 450 U.S. 221, 235 101 S. Ct. 1074, 67 L. Ed. 2d 186 (1981)).

The means by which the legislature has chosen to achieve its objectives are rational. The commitment process now requires an additional period of treatment for those determined to have committed acts constituting a violent felony each time the court is presented with an opinion from two petitioning experts, supported by prima facie evidence, and unrebutted by admissible expert testimony to the contrary. An additional provision requires notice to, and advice from, the independent public safety review panel anytime such a patient will be released. RCW 10.77.270(1), (4). It is conceivable that this procedure will reduce the likelihood that violent offenders will be released into the community prematurely, before their condition has improved such that they no longer present a substantial likelihood of repeating violent acts. It is also conceivable that, by mitigating against this potential, the commitment process will now increase the likelihood that violent offenders will receive consistent and appropriate care in a secure, therapeutic hospital, avoiding the revolving door between the criminal and civil systems.

A similar legislative approach was upheld against an equal protection challenge in *In re Detention of Petersen*, 104 Wn. App. at 288-91. In affirming the more stringent release procedure for sexually violent

predators, the court explained that it was rational for the legislature to create additional procedural hurdles to protect the public safety. *Id.* at 290. It was also rational for the legislature to lessen the burden on courts by creating a type of preliminary hearing by which a threshold presentation of the evidence may preclude a full evidentiary hearing. *Id.* at 291; *see In re Application for Writ of Habeas Corpus of Alter*, 85 Wn.2d 414, 420, 536 P.2d 630 (1975) (under the Act “it is logical that those who have reached the attention of the State because of serious antisocial acts, would be subject to more procedural burdens in obtaining their release than are those whose acts are less threatening to the public safety”). That is the same rational approach chosen by the legislature in this case.

Reasonable minds can debate the most effective and efficient means to protect the public safety while providing effective treatment and care for those suffering from a mental illness. But an equal protection challenge to a statute is not the appropriate forum for that debate. The legislature has identified a rational basis for a classification that is rationally related to legitimate government objectives. Accordingly, this Court must defer to the legislature’s approach.

F. Shifting a Burden of Production Does Not Violate Article I, Section 21 of the Washington Constitution’s Jury Trial Right

Finally, the superior court commissioner improperly declared that the violent felony recommitment provisions violate article I, section 21 of the Washington Constitution. CP at 332. The right to a jury trial under article I, section 21 is satisfied under the Involuntary Treatment Act even where the violent felony recommitment provision applies.

M.W. and W.D. have a *statutory* right to trial by jury after rebutting the State's prima facie case, but it is not clear that article I, section 21 conveys a constitutional right in Involuntary Treatment Act proceedings.

The Washington Constitution, article I, section 21 provides: "The right of trial by jury shall remain inviolate[.]" This provision has long been interpreted to afford a right to trial by jury in causes of action that were triable by jury at the time of the constitution's adoption in 1889. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 768-69, 287 P.3d 551 (2012). Thus, this Court applies a two part test. The first step is to determine the scope of the jury trial right as it existed in 1889. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, 224 P.3d 761 (2010). The second step is to determine the causes of action to which the right attaches. *Endicott*, 167 Wn.2d at 884. As to the second step, the inquiry is whether the type of action is one analogous to one available in 1889. *Id.*

This Court has held that the jury right extended to civil commitment proceedings under prior civil commitment statutes that provided for indefinite commitment. *In re Ellern*, 23 Wn.2d 219, 224, 160 P.2d 639 (1945); *see also* Laws of 1883, p.37 (amending Code of 1881, ch. CX, §1632);⁷ *Quesnell v. State*, 83 Wn.2d 224, 240, 517 P.2d 568 (1973) (holding article I, section 21 guaranteed a right to trial by jury in civil commitment proceedings brought under former RCW 71.02, the predecessor of RCW 71.05, repealed in 1973).

Both *Ellern* and *Quesnell* recognized only that article I, section 21 afforded a right to a jury trial under now-abandoned indefinite civil commitment schemes. The current graduated progression of determinate periods of civil commitment (72 hours, 14 days, 90 days, 180 days) was not in effect in Washington until 1974. Only an unpublished opinion from the Court of Appeals has expressly held that article I, section 21 affords a right to trial by jury for the current Involuntary Treatment Act's 90-day civil commitment proceedings.

Moreover, merely holding that all current civil commitment proceedings are subject to the constitutional jury right would result in significant impracticalities. Would article I, section 21 afford *all* persons facing civil commitment, even those facing a 72-hour or 14-day

⁷Available at
<http://www.leg.wa.gov/CodeReviser/documents/sessionlaw/1883pam1.pdf>

commitment, a constitutional right to trial by jury? This would be an unworkable interpretation of article I, section 21.

Furthermore, nothing about the violent felony recommitment provisions suspends a person's ability to obtain a jury trial upon their initial commitment. Upon recommitment, the provisions merely require a patient to meet a burden of *production* before advancing to a full hearing or jury trial. Nothing in the language of RCW 71.05.320(3)(c)(ii) precludes a jury trial once the patient meets his or her burden of production to rebut the State's prima facie evidence supporting continued commitment. RCW 71.05.300.

Similarly, even though Washington courts have recognized a jury trial right where a plaintiff seeks damages at law (in tort, for example), this right has not prevented dismissal of plaintiffs' claims where the plaintiff cannot produce evidence sufficient to overcome a defendant's summary judgment motion. *LaMon v. Butler*, 112 Wn.2d 193, 199 n.5, 770 P.2d 1027 (1989). Even if M.W. and W.D. have a constitutional jury trial right, requiring them to meet a preliminary burden of production does not violate article I, section 21.

VI. CONCLUSION

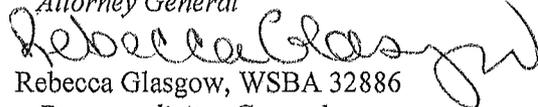
The violent felony recommitment provisions merely added a preliminary hearing to the process of recommitting a person who was

found incompetent to stand trial for a violent felony. The process helps to assure more consistent treatment of these violent offenders while also protecting public safety. This Court should reverse the superior court commissioner and declare RCW 71.05.320(3)(c)(ii) to be constitutional facially, and as applied to M.W. and W.D.

RESPECTFULLY SUBMITTED this 19th day of February 2015.

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Appendix A

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HOUSE JUDICIARY COMMITTEE
PUBLIC HEARING ON HOUSE BILL 1114
(Addressing criminal incompetency and civil commitment)

January 24, 2013
John L. O'Brien Building
Olympia, Washington

Official Transcript of Recording
Reed Jackson Watkins
Court Certified Transcription
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206.624.3005

1 significant fiscal note as they're drafted, so we're very
2 open to -- to working with people to figure out how we can
3 make this a manageable obligation. And I appreciate the
4 visits that I've had so far and suspect that I will
5 continue to have from folks as we work toward something
6 that will make an improvement for all of us in -- in
7 public safety.

8 With that, I'd be happy to take any questions; but,
9 otherwise, I think it's -- we can turn it over and hear
10 the testimony. Okay?

11 Mr. Vice Chair.

12 VICE CHAIR HANSEN: Let's begin by hearing from Seth
13 Dawson, Tom McBride, and Mark Lindquist. We do have a
14 large number of people signed in to testify, so if you all
15 wouldn't mind keeping your remarks to three minutes, that
16 would help make sure we can hear from everyone who has
17 come to speak today. Thank you.

18 MR. MCBRIDE: Thank you, Mr. Chair, Members of the
19 Committee. For the record, Tom McBride with the
20 Washington Association of Prosecuting Attorneys. I
21 appreciate you hearing this bill. It's a complex area,
22 but I think sticking with it and working through it is
23 worth it in terms of some policy that will do a better job
24 for the citizens.

25 I appreciate the -- the Chair mentioning what we -- what

1 we use -- just a term we use amongst ourselves, what we
2 call "gap" cases. And we call them gap cases because they
3 fall between the gap between the criminal justice system,
4 which handles criminal acts, public risk, and a civil
5 commitment system that also handles public risk in many
6 respects.

7 And -- and the gap is when a person is not competent to
8 be tried and that's not something that's going to change,
9 criminal charges are required to be dismissed and that
10 case will no longer be addressed in the criminal justice
11 system. What we have is these cases where that's happened
12 on a referral to civil commitment, there's a release soon
13 after, and it doesn't appear the risk has been addressed.

14 So what we're coming to ask you is there's nothing in
15 this bill that seeks to keep these cases in the criminal
16 justice system or to handle the mentally ill under a
17 criminal law kind of system, but there is an expectation
18 that when we're not going to act to address particularly
19 violent criminal acts, that the civil commitment side is
20 going to take some action to address that situation, and
21 we think in a -- in a fair process here.

22 I have handouts that have gone up to you. One is a
23 one-page summary of my testimony so I could talk freely.
24 The other one is a four-pager, which is four
25 representative cases. And the reason why I call them

1 representative cases is they're taken from across the
2 state: Benton County, Douglas County, King County, and
3 Pierce County.

4 And what they show you is right now, with the system
5 that has a gap where cases fall through the middle, you'll
6 see repeatedly: Murder charges filed, person found
7 incompetent, charges dismissed, referred to civil
8 commitment, released; murder charges filed, person found
9 incompetent, charges dismissed, referred for civil
10 commitment, released; murder charges filed...

11 And I'm not saying this repetitiously. I'm saying in
12 both those first two examples, from Benton County and
13 Douglas County, murder charges and attempted murder
14 charges were -- were filed and refiled three times
15 sequentially trying to force the case to be resolved and
16 handled. And so what we need is for it to be handled.

17 In these cases with genuine mental illness, it needs to
18 be handled in the civil commitment side of our state
19 system. The bill has three major changes in my
20 perspective. The first is that -- and all three of them
21 take place after somebody has had criminal charges
22 dismissed based on an incompetency to be able to be tried
23 or handled in the criminal justice system.

24 And what it says is when that person is referred for
25 civil commitment -- and this applies more broadly to all

1 crimes -- they need to be evaluated at the state hospital,
2 either Western State or Eastern State, to see whether they
3 should be civilly committed.

4 The second change deals with persons where it's not a
5 mental illness that's involved but a developmental
6 disability, and it seeks to say we need to make some
7 prioritization of services for that person because we've
8 had this behavior in the community.

9 The third piece, which I think is the most complicated,
10 is if the charge is dismissed for violent felonies,
11 what -- what this bill envisions, and it's on -- in
12 Section 7, which is on page 10 of the bill, we don't
13 change the standard for civil commitment when violent
14 felony charges have been dismissed because a person is
15 incompetent.

16 We still have to meet the same standard in current law
17 but we ask for an additional finding, and the additional
18 finding is on that page 10 at the end of Section 7. That
19 additional finding is that the person's mental illness or
20 developmental disability, not only is it creating this
21 substantial risk that they're going to repeat similar
22 acts, it also leads to the fact that they're incompetent
23 and can't be handled by the criminal justice system making
24 a priority that the civil system deal with this case
25 because there isn't a back-up system operating.

1 When we first drafted this bill, we had a standard that
2 I think was going to end up being unconstitutional, kind
3 of a substantive due process challenge in that it lowered
4 the standard for getting a person into the civil
5 commitment at the state hospital. When we realized that
6 that wasn't going to be good enough -- if you look on that
7 page 7 -- or page 10, you'll notice on lines 12 and 13, we
8 keep the current law standard.

9 The new language on lines 17 to 23, we go for an
10 additional finding, and that's that additional finding
11 that this mental illness leads to both conditions. So
12 rather than lowering the standard, we have a greater
13 burden here. But if we get this greater burden and we --
14 and we meet it and we get this finding, then you get that
15 new language on the bottom of page 11, which is a greater
16 ability to hold that person for a longer period of time,
17 up to 180 days, and a sequential up to 180 days until the
18 risk is addressed or the issues affecting incompetency.

19 So that's a big change. I think the -- the draft we had
20 earlier -- like I said, it's a complex area. When we
21 realized that, we took that to the Chair and realized what
22 we need to actually do is put a bigger burden on us up
23 front in order to have that greater authority to hold.

24 The Intent section, you have the amendment in there. I
25 think it was insensitive of us to describe solely this

1 small group of the mentally ill that -- that have this
2 risk of repeated violent offenses because most mentally
3 ill people don't commit crime. They're more likely to be
4 a victim of crime.

5 In that new amendment, you'll see we try to put this
6 into context. But it is important we deal with these
7 cases because I don't think the public accepts that we
8 won't deal with the case on the criminal side, the civil
9 side won't deal with it. It's not okay for this to be a
10 situation that resolves itself on the sidewalk.

11 And so I think this is a good bill. I think there are
12 some changes we'll have to make as we go forward, and I'll
13 be around and happy to answer any questions whenever you'd
14 like.

15 CHAIR PEDERSEN: And Representative Klippert does have a
16 question.

17 REPRESENTATIVE KLIPPERT: Thank you, Mr. Chair.

18 Tom, are you also -- you spoke to the bill itself. Are
19 you okay with the language in the amendment also?

20 MR. MCBRIDE: Yes. I support the amendment in that
21 language. And -- and, like I said, I do think there's a
22 couple more amendments you'll need to look at on the cost
23 drivers on the number of misdemeanor flips and -- and
24 where those evaluations will take place and also on the
25 developmental disability services. I think we can work

Appendix B

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HOUSE APPROPRIATIONS COMMITTEE
PUBLIC HEARING ON HOUSE BILL 1114
(Addressing criminal incompetency and civil commitment)

February 19, 2013
John L. O'Brien Building
Olympia, Washington

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1 And so we're working with them to try to see if there's
2 a better assumption that we could do, but frequently these
3 individuals who stay longer than 90 days may be at the
4 state hospital for a year or longer; and so we want to try
5 to make sure we've got a better sense of what that impact
6 on these 20 individuals would be.

7 The other thing I'll say about this is the 20 number
8 is -- is an estimate that the note has identified has come
9 to the prosecutors. We don't really have good data that
10 we've received to identify whether 20 is the right number.
11 So if that number were to grow, then it could even have a
12 greater impact than we're currently looking at in the
13 fiscal note.

14 CHAIR HUNTER: Questions for staff?

15 Representative Pedersen, do you want to -- I mean, this
16 is an expensive bill.

17 REPRESENTATIVE PEDERSEN: Yeah.

18 CHAIR HUNTER: And so if members have questions as they
19 get further into doing their analysis on this, of course,
20 our staff are available. But I think our staff are not
21 available the rest of today.

22 Andy, go home.

23 REPRESENTATIVE PEDERSEN: Thank you, Mr. Chair, for
24 hearing the bill. Jamie Pedersen from the 43rd
25 Legislative District, Central Seattle.

1 From the Judiciary Committee, what I can report is that
2 we view this as one of the most important public safety
3 bills that we'll have before us this session. This is
4 requested legislation from the prosecutors.

5 This case -- this bill really covers what are called
6 felony flips, or these gap cases. It isn't intuitive to
7 people who aren't lawyers, but there's a group of people
8 who commit acts that would otherwise be crimes if they
9 were competent.

10 They are incompetent to stand trial, so they flip over
11 into the civil system; but because the civil system
12 doesn't believe that they can be cured, they flip out of
13 the civil system and go back on the streets where, as
14 you'll hear I think from the prosecutors, a number of them
15 have committed -- continued to commit acts against other
16 people that would otherwise be considered crimes.

17 It's a terrible cycle and a lot of costs that are
18 inflicted both on members of the public and on the local
19 criminal justice and civil system as they ping-pong back
20 and forth, sometimes for periods of years. We
21 really -- there are a number of cases in which there have
22 been really tragic outcomes because of our inability to
23 find a way to -- to hold these folks and make sure that
24 they get treatment.

25 So I really urge your support of the bill. I'm happy to

1 answer any questions.

2 CHAIR HUNTER: Representative Green.

3 REPRESENTATIVE GREEN: Thank you, Mr. Chair.

4 So Jamie -- I mean Representative Pedersen, you said a
5 couple times that -- about the civil side not believing
6 they could be cured. Well, you know, my understanding of
7 the many years I've worked in mental -- mental health is
8 that no mental illness can really be cured. We can only
9 move to recovery.

10 So can you give me an idea of what kinds of mental
11 illness they're saying can't be cured in the civil side?

12 REPRESENTATIVE PEDERSEN: Well, I think -- my
13 understanding -- the prosecutors are probably better to
14 talk about their experience with an actual set of
15 defendants, but my understanding of these folks is that
16 they -- they get flipped over into the civil system, and
17 then there's -- there isn't an adequate basis in the
18 Involuntary Treatment Act to keep them confined for a
19 period. And the -- as a result, they just wind up getting
20 released from their -- from their civil commitment.

21 CHAIR HUNTER: Representative Alexander?

22 REPRESENTATIVE ALEXANDER: Thank you, Chair.

23 A couple of things, Representative Pedersen. One of the
24 things is the bill expands the definition from involuntary
25 commitments of mental health issues to also include

1 REPRESENTATIVE PEDERSEN: Thank you all.

2 CHAIR HUNTER: The first panel will be Sandi Ando -- I
3 hope I got that right, Sandi -- Tom McBride, and Don
4 Pierce.

5 MR. MCBRIDE: Thank you, Mr. Chair, Members of the
6 Committee. For the record, Tom McBride with the
7 Washington Association of Prosecuting Attorneys.

8 This is a priority request from us, probably the
9 priority request from us to the legislature this year.
10 There's a handout going out to you on our letterhead, and
11 it addresses the fiscal impacts of this bill. It's
12 drastically different than the original bill that came to
13 House Judiciary.

14 There's three main points I want to address, and then
15 I'll answer a couple questions at your request if you
16 want. First, the biggest driver in the fiscal note in the
17 out biennium was a requirement to provide services to the
18 developmentally disabled if they've had crimes dismissed
19 because they were incompetent.

20 It just was too expensive. It was 65 percent of the
21 fiscal note once you got out to the 2015/2017 biennium.
22 That piece has been removed entirely. I think providing
23 those services is a great idea. It's just too expensive
24 for us to do right now. And so that's the first point is
25 that's not in the bill any longer.

1 The second piece is that on the issue of the state
2 hospital evaluating persons for civil commitment, one of
3 the things we heard from the state hospital was: 40
4 percent of the referrals don't meet the civil commitment
5 standard, and we don't want to transport those persons
6 from the jail to the state hospital using up resource and
7 then just release them or kick them back to the jail where
8 the Court has to review that decision.

9 So what we put in this bill is the ability to screen
10 those cases before they're transported, before they even
11 go to the state hospital. And it allowed those 40 percent
12 to not be dealt with, to be released. It actually also
13 has some relief for the jail in that it avoids the 48-hour
14 hold for a judge to decide whether or not to overrule that
15 initial screen decision.

16 And part of the reason we're comfortable doing that is
17 the Courts responded and said: We've never exercised that
18 48-hour hold authority. So why keep people in if we're
19 not actually going to change the decision?

20 The final point is, to us, the biggest driver
21 budget-wise in this bill is this issue of if you have
22 violent felony charges dismissed because you're
23 incompetent and not restorable, it allows you to be held
24 for longer than 180 days at the hospital's discretion.
25 And the other release point is if you can show a changed

1 circumstance.

2 I actually think the fiscal note's projection of ten
3 beds, that maturing to ten beds, is accurate. It could be
4 higher, as Andy indicated. The -- the bill -- the fiscal
5 note speaks to a ward, which is 30 beds. I suspect you're
6 going to pass five or six mental health bills this
7 legislative session, and maybe all together they mature to
8 the need for another ward. I do want to say, I believe
9 this bill drives about a third of that ward need, and
10 that's what should be credited against it.

11 The final thing I'd say is that it's hard to factor into
12 a fiscal note is the four examples we brought the House
13 Judiciary Committee. On average, those cases had bounced
14 back and forth between the criminal justice system and the
15 civil commitment system for five years. There was a lot
16 of resource expended at the state hospitals, a lot of
17 resource expended at the jail.

18 Now, that's a tough calculation. I've talked to Andy
19 about whether we can do it or not, but these cases don't
20 go away --

21 CHAIR HUNTER: Thank you.

22 MR. MCBRIDE: -- cheaply.

23 CHAIR HUNTER: Thank you.

24 MR. MCBRIDE: Thank you.

25 MR. PIERCE: Mr. Chair, Members of the Committee, for

Appendix C

Two State experts must file a sworn petition detailing facts that support the need for continued confinement. RCW 71.05.290(2). Petition must address appropriateness of less restrictive alternatives. RCW 71.05.290(2).

Preliminary hearing must occur where the Commissioner decides whether the State has met its burden to produce 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.” RCW 71.05.320(3)(c)(ii).

Appropriateness of less restrictive alternatives must also be addressed. RCW 71.05.290(2)(e).

If the State does not satisfy prima facie burden, then the petition is dismissed, unless the State can proceed on alternative grounds. See RCW 71.05.320(3)(c)(ii).

If prima facie evidence is not rebutted at the preliminary hearing, then the court will enter an order for an additional 180 days of involuntary treatment. RCW 71.05.320(3)(c)(ii).

If prima facie evidence is rebutted, then the patient is entitled to a full *evidentiary hearing*. The patient has the right to a jury trial at the evidentiary hearing. RCW 71.05.320(3)(c)(ii), (6).

If the State satisfies the prima facie burden, then the patient has opportunity to produce rebuttal evidence in the form of “an admissible expert opinion that the person’s condition has so changed such that the mental disorder or developmental disability no longer presents a substantial likelihood of the person committing acts similar to the charged criminal behavior.” RCW 71.05.320(3)(c)(ii).

NO. 90570-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Detention of:

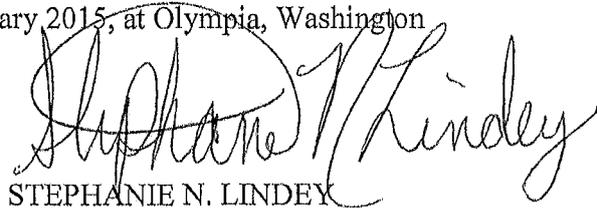
M.W. and W.D.

CERTIFICATE OF
SERVICE

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

Christopher Paul Jennings
Pierce County Assigned Counsel
9601 Steilacoom Blvd SW, Building 25
Lakewood, WA 98498-7212
cjennin@co.pierce.wa.us

DATED this 19th day of February 2015, at Olympia, Washington


STEPHANIE N. LINDEY

OFFICE RECEPTIONIST, CLERK

To: Lindey, Stephanie (ATG)
Cc: 'cjennin@co.pierce.wa.us'; Glasgow, Rebecca (ATG); Cox, Beverly (ATG); Leaders, Amber (ATG)
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Dear Clerk,

Attached for filing in case number 90570-3, please find the Opening Brief of the State of Washington Department of Social and Health Services.

Thank you,

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