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NO. 51245-9-II

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

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In re Detention of Z.C.,  
STATE OF WASHINGTON,

Respondent,

v.

Z.C.,

Appellant.

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

The Honorable Amy Swingen, Commissioner

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering a 180-day less restrictive alternative to civil commitment order (LRA) without a valid waiver of appellant's right to a jury trial.

2. In the absence of substantial evidence in the record, the court erred in finding Eric Lillibridge was of the opinion appellant suffered from a mental disorder with a substantial adverse effect on his volitional and cognitive functions and as a result of the mental disorder, appellant presents as gravely disabled. CP 11 (Finding of Fact 2).<sup>1</sup>

3. In the absence of substantial evidence in the record, the court erred in finding Patricia Morgan was of the opinion appellant's mental disorder had a substantial adverse effect on his volitional functions. CP 11 (Finding of Fact 2).

4. In the absence of substantial evidence in the record, the court erred in finding Morgan was of the opinion that appellant presented as in danger of serious physical harm resulting from a failure to provide for essential human needs of health and safety. CP 11 (Finding of Fact 2.B(1)).

5. In the absence of substantial evidence in the record, the court erred in finding Morgan was of the opinion appellant manifested severe deterioration in routine functioning as evidenced by repeated and escalating

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<sup>1</sup> The findings of fact and conclusions of law are attached as an appendix.

loss of cognitive or volitional control over his actions and is not receiving such care as is essential for his health or safety. CP 11 (Finding of Fact 2.B.(2)).

6. The court erred in finding, in the absence of substantial evidence in the record, that appellant is gravely disabled. CP 12-13 (Conclusion of Law 2.B).

7. In the absence of sufficient evidence in the record, the court erred in ordering 180-days of involuntary mental health treatment under a less restrictive alternative to commitment.

8. In the absence of a written finding that a less restrictive alternative placement was in appellant's best interests the court erred in ordering 180 days of involuntary mental health treatment under a less restrictive alternative to commitment.

9. The written findings of fact and conclusions of law are insufficient to permit meaningful appellate review.

#### Issues Pertaining to Assignments of Error

1. Washington law provides the right to a jury trial for 180-day civil commitment hearings. Where the record does not show appellant waived that right, is reversal of the trial court's commitment order required?

2. Involuntary mental health treatment may be ordered only upon clear, cogent, and convincing evidence that the person is gravely disabled. Was the conclusory testimony by mental health professionals that simply parroted the statutory requirement without any supporting evidence insufficient to support the court's finding of grave disability and the corresponding less restrictive alternative order imposed in this case?

3. Involuntary mental health treatment under a less restrictive alternative to commitment may be ordered only if the court finds that the less restrictive alternative is in the person's best interests. When the court's written findings of fact and conclusions of law contain no mention of appellant's best interests, did the court err in ordering the 180-day less restrictive alternative?

4. Written findings of fact and conclusions of law must be sufficiently specific and detailed to permit meaningful appellate review of a civil commitment matter. The findings here did no more than recite the requirements of the statute and declare that they were met. No findings specific to appellant were entered. Must the case be remanded for entry of specific findings?

B. STATEMENT OF THE CASE

Clark County filed a petition to continue, for an additional 180 days, appellant Z.C.'s civil commitment for involuntary mental health treatment at

a less restrictive alternative facility. CP 1-4. The petition alleged that prior history or a pattern of decompensation and discontinued treatment resulted in repeated hospitalizations or peace officer interventions. CP 3. It also alleged Z.C. had been failing to adhere to the terms of his conditional release by taking only medication of his choice. CP 3. It alleged there was substantial decompensation because he believes he does not have schizophrenia. CP 3. It alleged he has difficulty making sound decisions because he plans to stop medication after his conditional release ends. CP 4. Finally, it alleged there was a likelihood of serious harm or he was gravely disabled because he was not following his treatment recommendations and not taking medication as prescribed. CP 4.

After a hearing, the court ordered Z.C. to comply with numerous conditions including to reside at Elahan Place, the less restrictive alternative facility, and comply with all treatment recommendations. CP 13. At the hearing, the court heard testimony from Patricia Morgan, a psychiatric nurse practitioner at Elahan Place, and Dave Lyski, a designated mental health professional. RP 7, 25.

Morgan had been working with Z.C. for slightly over one month. RP 14. There had been no transitional period when she took over from Z.C. previous provider, and she had not yet established a good treatment rapport with him. RP 14.

Before she came on the case, Z.C.'s previous prescriber had taken him off all medication. RP 15. Morgan, on the other hand, was pushing Z.C. to pursue medication. RP 8. She testified she put him back on medication because he was not sleeping well. RP 15-16. At her urging, Z.C. has been taking 10 mg of Zyprexa daily, but has been resistant to considering other medication or increased dosage. RP 8-9. He complains to her about side effects but refuses to take additional medication to deal with those side effects. RP 8. She admitted Z.C. was not refusing to work with her but explained he also had not completely followed her treatment recommendations or those of the mental health team. RP 20, 21-22.

Morgan testified she agrees Z.C. has schizophrenia based on "continual discussion and using words like 'royal blue, angels, kings,' thwarting three different AFHS – which is an adult family home." RP 9. She explained that, when there was a possibility for him to transfer to an adult family home, he seemed to sabotage the process. RP 9. One home he refused because "they didn't allow procreation." RP 9. The other declined to accept him after he declared his intent to refuse medication and denied that he has schizophrenia. RP 9. This lack of insight into his diagnosis is, Morgan claimed, itself a symptom of schizophrenia. RP 9. Morgan also testified Z.C. has delusions, a flat affect, and no relationships, instead isolating himself. RP

10. She hoped that, with increased medication, he could be free from delusions and able to contain his impulses. RP 17.

She was asked whether he was currently decompensating and admitted he was not. RP 21. However, she explained, she feared he could decompensate and might become violent towards others. RP 21. According to Morgan, Z.C. told her if he left Elahan Place, he would live in his van. RP 11. She claimed he has no resources or income and his family does not want him on their property. RP 11. She opined that, due to his schizophrenia, he is gravely disabled. RP 11.

Lyski, who had met with Z.C. twice and had not reviewed his medical records, apparently agreed with Morgan's assessments. RP 25-27. When asked whether Z.C. has schizophrenia, he replied, "That's the only diagnosis that's in there." RP 25. When asked whether Z.C. was gravely disabled, he deferred to Western State Hospital (WSH): "[I]n their opinion he needed that high – it's the highest level of care in the community just short of involuntary hospitalization. He's been receiving that care since his discharge." RP 26.

Lyski reported Z.C.'s functioning deteriorated when he was released from WSH and negotiated for reduced medication at Elahan Place. RP 26. He opined Z.C. was currently maintaining his function, rather than deteriorating as he had been doing without medication. RP 28-29. He

testified it was necessary to force Z.C. to continue medication because Z.C. does not believe he has schizophrenia and would otherwise refuse it. RP 28. Based on their two meetings, Lyski did not believe Z.C. could care for himself in the community. RP 27. He also testified Z.C.'s discharge plan was to live in his van, which did not run. RP 27.

Z.C. testified on his own behalf. He testified he is currently doing well mentally and only rarely hears voices of angels. RP 32. His restless legs, a side effect of medication, have improved. RP 23. His sleep has also improved, although it is still not as good as before he went to the hospital. RP 32.

Regarding his medication, he testified he was not refusing it, he just does not like it. RP 34. He believes the medication is not particularly effective, was more effective at a lower dose, and has too many side effects. RP 32-33, 36. He testified he would like to stay at Elahan Place until he can transition to somewhere better, and could, as a last resort, sleep in his van in the interim. RP 33-34.

In closing, Z.C. argued the testimony failed to establish a grave disability. RP 39. Counsel argued Z.C.'s plan to transition slowly showed his current ability to make sound decisions. RP 38-39. He argued the witnesses did not describe any extreme disfunction that could amount to a grave

disability. RP 37-38. The record makes no mention of any exhibits being admitted or considered.

In its oral ruling, the court explained Z.C. was doing well but the court believed the LRA would be helpful so to sort out his medication, finances, and living situation. RP 44-45. The court believed that, without the LRA, Z.C. would stop taking his medication and deteriorate. RP 45. The court also entered written findings of fact and conclusions of law. CP 24-26.

The court found, “The Respondent is suffering from a mental disorder diagnosed as Schizophrenia.” CP 10 (Finding of Fact 1). The Court also found:

The evaluators, Patricia Morgan, PMHNP and Eric Lillibridge, MS, MHP, are of the opinion that the Respondent is suffering from a mental disorder which has a substantial adverse effect upon Respondent’s volitional and cognitive functions and, as a result of such mental disorder, Respondent:

B. presents as gravely disabled by virtue of:

(1) Danger of serious physical harm resulting from a failure to provide for essential human needs of health or safety; or

(2) Manifestation of severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his actions and is not receiving such care as is essential for his health or safety.

(3) Both (1) and (2) above.

CP 11. The conclusions of law include a conclusion that the court has jurisdiction and a repetition of Finding of Fact 2. CP 12-13 (Conclusion of Law 2). The court ends with a conclusion that “the same has been established to the satisfaction of the court by clear, cogent, and convincing evidence. CP 13. The remaining pages constitute the order but contain no additional findings of fact or conclusions of law. CP 13-16.

Z.C. moved for revision of the Commissioner’s order, arguing the evidence was insufficient and the order was not in his best interests. CP 17-52. However, that motion was never considered on the merits because counsel filed it after the 10-day deadline. CP 53-54. Notice of appeal was timely filed. CP 55.

C. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE RECORD FAILS TO SHOW Z.C. WAIVED HIS RIGHT TO A JURY TRIAL.

Z.C. did not validly waive his constitutional right to a jury trial on the 180-day LRA commitment petition. The record does not show he was advised of his jury trial right in open court, as required by MPR 3.3(b). His commitment also violates the constitution because the record does not show a knowing waiver of this right. The commitment order must therefore be reversed.

Under the Washington Constitution, “[t]he right of trial by jury shall remain inviolate.” Const. art. I, § 21. The constitutional right to a jury trial applies to involuntary civil commitments. Quesnell v. State, 83 Wn.2d 224, 240-41, 517 P.2d 568 (1973).

Consistent with the constitutional guarantee, the statute governing 180-day commitment trials affords the right to a jury. RCW 71.05.320(6); RCW 71.05.310; RCW 71.05.300. Hearings on petitions for a second 180-day commitment shall occur “as provided in RCW 71.05.310.” RCW 71.05.320(6). The referenced statute, RCW 71.05.310, governs trials for 90-day commitment hearings. Prior to such a hearing, the court must advise the person of the right to a jury trial in open court. RCW 71.05.300(2) provides “[a]t the time set for appearance the detained person shall be brought before the court, unless such appearance has been waived and the court shall advise him or her of his or her right to be represented by an attorney [and] his or her right to a jury trial.”

The legislature may provide “for waiving of the jury in civil cases where the consent of the parties interested is given thereto.” Const. art. I, § 21. Under CR 38(d), which generally applies to civil actions, the right to a jury trial is impliedly waived if not demanded. Sackett v. Santilli, 101 Wn. App. 128, 133-34, 5 P.3d 11 (2000), aff’d, 146 Wn.2d 498, 47 P.3d 948

(2002). However, this general principal is superseded by specific rules governing jury trials, and waivers of jury trial, under chapter 71.05 RCW.

In enacting the Involuntary Treatment Act, the legislature conferred express authority on the Supreme Court to “adopt such rules as it shall deem necessary with respect to the court procedures and proceedings provided for by this chapter.” RCW 71.05.570. In response, the Supreme Court promulgated the Superior Court Mental Proceedings Rules. In re Detention of McLaughlin, 100 Wn.2d 832, 844, 676 P.2d 444 (1984). The rules specify that a jury is available in a hearing for 180-day commitment proceedings pursuant to RCW 71.05.320. MPR 3.3(a). MPR 3.3(b) provides:

Within two judicial days after the person detained is advised in open court of his right to a jury trial as provided in RCW 71.05.300 the person detained may demand a trial by jury in the hearing on the petition for 90-day or 180-day detention by serving upon the prosecuting attorney a demand therefor in writing, by filing the demand therefor with the clerk. No jury fee shall be required. If no party, within the time above specified, serves and files a demand for jury trial, the matter shall be heard without a jury.

Like statutes, court rules are interpreted by applying principles of statutory construction. State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). One such principle is that a specific provision supersedes a general one when both could apply. Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). CR 38 is

the general rule. MPR 3.3 is the specific rule that applies to involuntary commitment proceedings under chapter 71.05 RCW. MPR 3.3 thus governs when the right to a jury trial is waived. Although he did not request a jury trial, Z.C. did not waive his right to a jury trial under MPR 3.3(b) because he was not advised of that right in open court.

The language of a court rule “must be given its plain meaning according to English grammar usage. When the language of a rule is clear, a court cannot construe it contrary to its plain statement.” State v. Raper, 47 Wn. App. 530, 536, 736 P.2d 680 (1987). MPR 3.3(b) directs the detained person be “advised in open court of his right to a jury trial as provided in RCW 71.05.300” within two days. This plain language ensures that any jury trial waiver is knowing, rather than inadvertent.

Contrary to MPR 3.3(b), Z.C. was not advised in open court of his right to a jury trial. The record of the hearing contains no mention of his right to a jury trial. There is no signed written waiver. The hearing minutes, which contain several typographical errors,<sup>2</sup> contain a checked box next to the phrase, “Respondent given their rights by the court.” CP 83. The file contains a declaration that a notice of advice of rights, mentioning the right to a jury trial, was served on Z.C. CP 78, 81. But none of this indicates Z.C. was advised of the right to a jury trial in open

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<sup>2</sup> For example, the minutes state, “DATE: LeAnn @ 9:02 am” and “HEARING TYPE: 11/16/2017.” CP 83.

court, as required. On the contrary, the record fails to show whether the court even held the preliminary appearance mandated by RCW 71.05.300, RCW 71.05.310, MPR 3.1 and MPR 3.2.

The lack of advisement in open court carries makes a valid waiver impossible. MPR 3.3(b) goes on to state: “If no party, *within the time above specified*, serves and files a demand for jury trial, the matter shall be heard without a jury.” (emphasis added). The jury trial demand, and waiver, are each predicated on being advised of the right to a jury trial under the plain language of the rule. There can be no waiver if the detained person, like Z.C., is not advised of the right in open court. MPR 3.3(b) cannot be interpreted to allow for waiver of the jury trial right based simply on the failure to demand a jury because such an interpretation would render superfluous that portion of the rule requiring advisement of the right. “A court rule must be construed so that no word, clause or sentence is superfluous, void or insignificant.” Raper, 47 Wn. App. at 536.

Involuntary commitment for mental illness constitutes a significant deprivation of liberty. In re Detention of C.W., 147 Wn.2d 259, 277, 53 P.3d 979 (2002) (citing Addington v. Texas, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). As such, court rules involving civil commitment must be strictly construed. See In re Detention of W.C.C., 185 Wn.2d 260, 265, 370 P.3d 1289 (2016) (applying principle to

statutory construction). “Strict construction requires that, ‘given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option.’” In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010) (quoting Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973)). A strict construction of MPR 3.3(b) mandates that a valid waiver of the jury trial right must be predicated on knowing the right exists, as demonstrated by notice in open court. The detained person does not lose the right to a jury trial by failing to demand it if, in violation of MPR 3.3(b), the person is not advised of the right in open court.

This conclusion is consistent with the constitutional dimension of the jury trial right. Quesnell, 83 Wn.2d at 240-41 (recognizing constitutional right to jury trial in civil commitment proceedings). Court rules, like statutes, are construed to avoid constitutional problems, if possible. See State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (addressing statutes). Construing the court rule to require that any waiver of the right to a jury trial be knowing avoids the constitutional problem that would otherwise result if waiver occurred by an unknowing failure to demand a jury trial.

“[T]he right to trial by jury in civil commitment proceedings is clearly fundamental.” Quesnell, 83 Wn.2d at 242. Courts “‘indulge every reasonable presumption against waiver’ of fundamental constitutional rights and that we ‘do not presume acquiescence in the loss of fundamental rights.’ A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” Id. at 239-40 (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 82 L. Ed. 1461 (1938)); cf. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (in addressing right to jury trial in a criminal case, “a court must indulge every reasonable presumption against waiver of fundamental rights”). The record does not show Z.C. intentionally relinquished his fundamental right to a jury trial because the record does not show he knew the right existed.

Moreover, an attorney is not permitted to waive the right to a jury trial without specific authorization by the client. See State v. Ford, 125 Wn.2d 919, 922, 891 P.2d 712 (1995) (quoting In re Adoption of Coggins, 13 Wn. App. 736, 739, 537 P.2d 287 (1975)). “An attorney is impliedly authorized to stipulate to, and waive, procedural matters in order to facilitate a hearing or trial; but, in his capacity as an attorney, he is without authority to waive any substantial right of his client unless specifically authorized to do so.” Id. (emphasis added). The right to jury trial is a

substantial right to which this principle attaches. Graves v. P. J. Taggares Co., 94 Wn.2d 298, 305, 616 P.2d 1223 (1980). Thus, the right to a jury trial cannot be waived by an attorney without the knowing consent of the client. Quesnell, 83 Wn.2d at 238-39, 242; cf. State v. Hos, 154 Wn. App. 238, 250, 225 P.3d 389, review denied, 169 Wn.2d 1008 (2010) (“the record must contain the defendant’s personal expression of waiver; counsel’s waiver on the defendant’s behalf is not sufficient.”).

Specific authorization to waive a jury trial is required. Quesnell, 83 Wn.2d at 238-39 (citing In re Welfare of Houts, 7 Wn. App. 476, 481-82, 499 P.2d 1276, 1280 (1972)). The record does not show Z.C. gave specific authorization for his attorney to waive his right.

Crucially, while waiver of the jury trial right in a civil case may generally occur by the failure to timely request a jury, such waiver is valid only if it is “knowing, voluntary and intelligent.” Godfrey v. Hartford Casualty Insurance Co., 142 Wn.2d 885, 898, 16 P.3d 617 (2001) (quoting Acrey, 103 Wn.2d at 207); accord Adler v. Fred Lind Manor, 153 Wn.2d 331, 360-61, 103 P.3d 773 (2004). Godfrey, relying on Acrey, invoked the stringent standard for waiver that is applied in criminal cases. Godfrey, 142 Wn.2d at 898. Under that standard, the State bears the burden of showing a knowing, intelligent and voluntary waiver of the constitutional

right to a jury trial. Acrey, 103 Wn.2d at 207. The record must show an express waiver that is affirmative and unequivocal. Id. at 205, 207.

The record here does not show Z.C. knowingly, voluntarily and intelligently waived his constitutional right to a jury trial. There is no express waiver of any kind.

The right to a jury trial is a cornerstone of our justice system. “[T]he jury plays an essential role in guarding against wrongful commitment.” Quesnell, 83 Wn.2d at 241. “[T]he jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.” Id. at 241-42 (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 1052, 31 L. Ed. 2d 394 (1972)). Because the State cannot show Z.C. knowingly, intelligently and voluntarily waived his right to a jury trial, this Court should reverse the commitment order.

2. INSUFFICIENT EVIDENCE SUPPORTED THE ORDER FOR 180 DAYS OF INVOLUNTARY TREATMENT BECAUSE THE STATE FAILED TO ESTABLISH THAT Z.C. WAS GRAVELY DISABLED.

The trial court granted the petition for an additional 180 days of involuntary treatment under a less restrictive alternative based on its conclusion of law that Z.C. was gravely disabled due to a mental disorder.

CP 9-13. Although the State presented opinion testimony from a psychiatric nurse practitioner and a designated mental health professional, it failed to present substantive evidence to support a finding of grave disability as defined by Washington law. Because the State failed to satisfy its burden of proof, the court erred in ordering the order.

- a. Involuntary mental health commitment requires clear, cogent, and convincing evidence that the person is gravely disabled.

Involuntary commitment for mental illness is ““massive curtailment of liberty,”” subject to due process of law. In re Detention of LaBelle, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (quoting Humphrey, 405 U.S. at 509); accord U.S. Const. amend. XIV; Const. art. I, § 3. Mental illness alone is not a constitutionally adequate basis for involuntary commitment. LaBelle, 107 Wn.2d at 201. “[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” O’Connor v. Donaldson, 422 U.S. 563, 576, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).

In keeping with due process, Washington’s civil commitment statutes impose detailed procedures expressly intended to end inappropriate commitment of persons with mental illness and safeguard their individual rights. RCW 71.05.010(1)(a), (c).

Under chapter 71.05 RCW, following 90 days of commitment ordered under RCW 71.05.280 (4) and .320 (1), individuals may be involuntarily committed for an additional 180 days only if, as a result of a mental disorder, they remain gravely disabled. RCW 71.05.320(4)(d), (6). Subsequent orders for further 180 days must meet the same standards and procedures as the initial 180-day order. RCW 71.05.320(6)(b). The State has the burden of proving to the trier of fact that a person is gravely disabled by clear, cogent and convincing evidence. RCW 71.05.310; LaBelle, 107 Wn.2d at 109; In re Det. of R.H., 178 Wn. App. 941, 945-46, 316 P.3d 535 (2014).

- b. The evidence does not establish whether Z.C. is gravely disabled.

The testimony presented in this case is insufficient to show whether or not Z.C. meets the statutory standard of being gravely disabled.

“Grave disability” means that, as a result of a mental disorder, the person

- (a) Is in danger of serious physical harm resulting from a failure to provide for [his] essential human needs of health or safety; or
- (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over [his] actions and is not receiving such care as is essential for [his] health or safety.

RCW 71.05.020(17).

To evaluate a claim of insufficient evidence, a reviewing court must determine whether substantial evidence supports the elements that

must be proven. LaBelle, 107 Wn.2d at 209. Evidence is substantial only if it is sufficient to persuade a fair-minded, rational person of the element's truth. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). When the State's burden of proof is clear, cogent and convincing evidence, such evidence exists only if the evidence shows the fact at issue is "highly probable." LaBelle, 107 Wn.2d at 209. Conjecture is not substantial evidence. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

First, the State failed to present substantial evidence that Z.C. was in danger of serious physical harm as a result of failure to provide for his own essential health and safety needs, as required by subsection (a) of the grave disability definition. To prove this first prong, the State bears the burden to show "recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment." LaBelle, 107 Wn.2d at 204-05.<sup>3</sup> Additionally, the State must establish that this failure or inability "presents a high probability of serious physical harm within the near future unless adequate treatment is afforded." Id. The individual's inability to provide for these essential needs must arise from the mental disorder and not other factors. Id. at 205.

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<sup>3</sup> LaBelle addressed former RCW 71.05.020(1), which the legislature recodified at RCW 71.05.020(17) without substantive changes.

Neither Morgan nor Lyski testified to any recent failure to provide for Z.C.'s basic needs. They offered only conclusory opinions regarding grave disability. Morgan did not even say whether Z.C. was unable to meet his essential needs for health or safety, but only that he was, in her opinion, gravely disabled due to schizophrenia. RP 11. She did not clarify which aspect of the definition she believed Z.C. would meet. Presumably, her opinion was based on Z.C.'s lack of income or family support and his plan to live in his van. RP 11. Lyski also testified Z.C. was gravely disabled and, in Lyski's opinion, would be unable to care for himself in the community. RP 27. The only evidence for this was his mention of Z.C.'s plan was to live in his van. RP 27.

This testimony fails to amount to clear, cogent, and convincing evidence that Z.C. is unable to meet his basic needs. It also fails under the requirement from LaBelle that the evidence be both recent and tangible. LaBelle, 107 Wn.2d at 204. Neither Morgan nor Lyski offered any tangible observations or experiences to support the bare opinion that Z.C. would be unable to provide for his own basic health and safety needs. The state failed to show whether Z.C. is gravely disabled under subsection (a) of the definition.

Second, the State also failed to offer substantial evidence to support the second prong of the definition of grave disability. Subsection

(b) of the definition requires the State to prove the individual *both* manifests severe deterioration in routine functioning *and* is not receiving essential care. *Id.* at 205. The legislature added this second definition in 1979. Laws of 1979, 1st Ex. Sess., ch. 215, § 5. The provision is aimed at treating “discharged patients who, after a period of time in the community, drop out of therapy or stop taking their prescribed medication and exhibit ‘rapid deterioration in their ability to function independently.’” LaBelle, 107 Wn.2d at 206 (quoting Mary L. Durham & John Q. LaFond, The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment, 3 Yale L. & Pol’y Rev. 395, 410 (1985)). Before the legislature enacted this expanded grave disability standard, these chronically ill persons could not be treated until they decompensated to the point they were in danger of serious harm from their inability to care for themselves. LaBelle, 107 Wn.2d at 206.

The LaBelle Court noted this broadened commitment standard “raises serious constitutional concerns as to its application.” *Id.* at 207. For instance, it puts individuals at risk of unconstitutional commitment “solely because they are suffering from mental illness and may benefit from treatment.” *Id.* And, because the definition incorporates medical terminology, “there is a danger that excessive judicial deference will be

given to the opinions of mental health professionals, thereby effectively insulating their commitment recommendations from judicial review.” Id.

Therefore, when the State seeks to commit an individual under prong (b), “it is particularly important that the evidence provide a factual basis for concluding that an individual ‘manifests several [mental] deterioration in routine function.’” Id. at 208 (alteration in original). This must include “recent proof of significant loss of cognitive or volitional control.” Id.

The State presented no such evidence in this case. Morgan relied on Z.C.’s “continual discussion and using words like ‘royal blue, angels, kings,” and the fact that Z.C. appeared to sabotage his ability to join an adult family home by denying his mental illness or saying he would refuse medication. RP 9. She did not claim the mention of certain words or a desire not to go to two adult family homes showed a “significant loss of cognitive or volitional control.” RP 9-10. She testified he continues to have delusions, a flat affect, and no relationships. RP 10. She testified he lacks insight into his illness, which she feared could bring him into “a difficult situation.” RP 11-12. The only mention of volitional control was a comment on cross examination that she hoped better medication could help him contain his impulses. RP 17.

She did not testify to any severe deterioration in function. On the contrary, when asked if he was currently decompensating, she said he was not. RP 21. She was concerned that he might. RP 21. She wished he were more open to taking more medication that she believed could help him. RP 13. She acknowledged that he was not refusing to work with her; he simply was resistant to all the medication she recommended, likely in part because she had known him only a short time and had, as yet, been unable to establish a good working rapport. RP 14, 20.

Lyski also testified Z.C. was not currently deteriorating. RP 28. He explained Z.C. was currently maintaining since resuming his medication under Morgan's care. RP 28. He explained Z.C. had been deteriorating earlier in the year when his prescriber stopped prescribing any medication for him. RP 29.

Even in the light most favorable to the State, the evidence is insufficient to show the severe deterioration in routine functioning that is required under the second part of the definition of grave disability. LaBelle, 107 Wn.2d at 208. There is no "recent proof of significant loss of cognitive or volitional control," as required under LaBelle. Id.

These unsupported opinions by two witnesses with very little relationship with Z.C. are insufficient. "[T]he opinions of expert witnesses are of no weight unless founded upon facts in the case." Prentice Packing

& Storage Co. v. United Pac. Ins. Co., 5 Wn.2d 144, 164, 106 P.2d 314 (1940); see also Davidson v. Seattle, 43 Wn. App. 569, 575, 719 P.2d 569 (1986) (“[T]here is no value in an opinion where material supporting facts are not present.”). Although Morgan and Lyski offered opinions that Z.C. was gravely disabled under and would have difficulty in the community, the State failed to introduce substantive evidence to support their opinions.

In summary, insufficient evidence supports the Commissioner’s determination that Z.C. was gravely disabled under either part of the definition. As for subsection (a), the State offered expert opinions that Z.C. would refuse medication and live in his van in the community, but provided no “recent, tangible evidence” of his failure to provide for his essential needs. LaBelle, 107 Wn.2d at 204-05. As for subsection (b), the State presented scant evidence of Z.C.’s “base line” functioning and did not even attempt to offer evidence of a recent and severe decline from this base line.

Additionally, finding of fact 2, insofar as it pertains to Eric Lillibridge, is entirely unsupported by any evidence whatsoever in the record. Lillibridge filed an affidavit in support of the petition underlying this proceeding. CP 75-77. But he did not testify at trial and no declaration or other documentary evidence from him was admitted into evidence. The court’s findings regarding Lillibridge should be stricken as unsupported by the record.

Because there was insufficient evidence supporting grave disability under either prong, this Court should vacate the 180-day LRA order and the related findings. *Id.* at 225; CP 9-16 (order, findings, and conclusions).

3. THE FINDINGS OF FACT ARE INSUFFICIENT TO SUPPORT THE 180-DAY LRA ORDER BECAUSE THE COURT ENTERED NO FINDING THAT AN LRA IS IN Z.C.'S BEST INTERESTS.

The findings of fact in this case fail to support the court's order for 180 days less restrictive alternative treatment because the court did not enter a finding that such treatment was in Z.C.'s best interest, as required by law. RCW 71.05.320(2) describes the process for ordering 180 days of involuntary treatment. Under that statute, "If the court . . . finds that treatment less restrictive than detention will be in the best interest of the person or others, then the court shall remand him or her to the custody of the department or to a facility certified for ninety-day treatment by the department or to a less restrictive alternative for a further period of less restrictive treatment." RCW 71.05.320(2). Although this provision specifically references the hearing for 90 days of treatment, the procedure for subsequent 180-day treatment periods is the same. RCW 71.05.320(6).

In response, the State may argue the oral finding should suffice. This argument should be rejected. MPR 3.4 requires that "Unless the matter is tried to a jury, the court shall make and enter findings of fact and conclusions

of law.” The reference to both making and entering findings indicates the findings must be written. Moreover, an oral finding is not final or conclusive. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). “A trial court’s oral opinion and memorandum opinion are no more than oral expressions of the court’s informal opinion at the time.” Id. The oral opinion has “no final or binding effect.” Id. Because the court did not enter the requisite finding, the order for 180 days of less restrictive alternative treatment must be reversed.

4. THE FINDINGS OF FACT ARE INSUFFICIENT TO SUPPORT MEANINGFUL APPELLATE REVIEW OF THE ORDER.

The findings of fact are insufficient because they merely parrot the statutory language and contain no specific information regarding the facts supporting Z.C.’s commitment. As a matter of due process, RCW 71.05.310’s civil commitment proceeding requires proof by clear, cogent, and convincing evidence. Dunner v. McLaughlin, 100 Wn.2d 832, 839, 843, 676 P.2d 444 (1984). The trial court’s preprinted findings fail to show the court held the State to this standard. This Court should reverse. LaBelle, 107 Wn.2d at 218-20 (condemning similar preprinted, “check the box” findings as inadequate to support the commitment orders); accord In re C.R.B., 62 Wn. App. 608, 619, 814 P.2d 1197 (1991) (findings that parrot the termination statute are inadequate).

Findings of fact must be sufficiently specific to permit meaningful appellate review. C.R.B., 62 Wn. App. at 618 (citing LaBelle, 107 Wn.2d at 218). The purpose of written findings is to allow the reviewing court to determine the basis upon which the case was decided and to review the issues raised on appeal. State v. Pena, 65 Wn. App. 711, 715, 829 P.2d 256 (1992), overruled on other grounds, State v. Alvarez, 128 Wn.2d 1, 18-19, 904 P.2d 754 (1995)). Meaningful appellate review requires findings of fact “that show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact . . . with knowledge of the standards applicable to the determination of those facts.” State v. Jones, 34 Wn. App. 848, 851, 664 P.2d 12 (1983). Factual findings should at least be specific enough to indicate the factual basis for the ultimate conclusions. Id.

In LaBelle, the court found the factual findings of grave disability were not sufficiently specific because they were standardized and very general. 107 Wn.2d at 219. The court noted the findings in the two consolidated cases before it were virtually identical, despite very disparate facts. Id. Although the court’s oral rulings explained the factual basis for its conclusions, the court held review was hampered by the spare findings of fact and declared, “such findings hereafter are not adequate.” Id. at 219-20.

Unlike the situation in LaBelle, where the court’s oral rulings permitted review because they showed the trial court properly considered the

necessary factors, the Commissioner's oral ruling here is similarly devoid of actual facts. See RP 39-47. The court's oral ruling essentially concludes that, while Z.C. has been doing better and there have been some steps in the right direction, Z.C. was only released from WSH last year and is not yet stabilized on his medication. RP 39-40. The court also found that without a court order, Z.C. would stop taking his medication and would deteriorate quickly. RP 45. A court's oral decision may be used to interpret consistent written findings. State v. Moon, 48 Wn. App. 647, 653, 739 P.2d 1157 (1987). This oral ruling sheds no light on the actual underlying facts supporting the court's conclusions, presumably because, as discussed above, there were virtually no such facts presented at the hearing.

The lack of specific findings hampers appellate review. Labelle, 207 Wn.2d at 220. The appellate court should not have to comb the oral ruling to determine if there are appropriate findings, nor should a defendant be required to interpret oral rulings. Head, 136 Wn.2d at 624. "When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, the same principles governing the need for clear and detailed findings apply in the case of involuntary mental health treatment under chapter 71.05 RCW.

Assuming more detailed findings and conclusions are entered later, reversal will be still be required if the delayed entry prejudices Z.C. State v. Portomene, 79 Wn. App. 863, 864, 905 P.2d 1234 (1995); see also State v. B.J.S., 72 Wn. App. 368, 371, 864 P.2d 432 (1994). Where no actual prejudice would arise from the failure of the court to appropriate written findings, the remedy is remand for entry of written findings. Head, 136 Wn.2d at 624. But prejudice results from untimely written findings and conclusions when there is indication the findings have been “tailored” to meet issues raised on appeal. Head, 136 Wn.2d at 624-25; Portomene, 79 Wn. App. at 865. “[I]f the State fails to file written findings and conclusions until after the appellant has submitted his or her opening brief, and the record reflects that the findings and conclusions were tailored to address the assignments of error raised in appellant’s brief, prejudice may be found.” State v. Litts, 64 Wn. App. 831, 837, 827 P.2d 304 (1992). Since Z.C. has now pointed out the deficiencies of proof, if on remand the findings are twisted into findings that more are specific to facts required for commitment, that will be evidence of tailoring and prejudice to Z.C.

If this Court does not simply reverse the order for lack of substantial evidence, it should remand this case for entry of findings and conclusions. Depending on their content, Z.C. reserves the right to address the issue of prejudice or tailoring in a reply brief or, if necessary, in a supplemental brief.

D. CONCLUSION

For the foregoing reasons, Z.C. requests this Court reverse the order requiring him to comply with 180 days of involuntary mental health treatment under a less restrictive alternative placement or, at a minimum, remand for entry of more specific findings of fact.

DATED this 27<sup>th</sup> day of April, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

# Appendix

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**FILED**

NOV 16 2017

10:05am

Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

In Re the Detention of:

ZEBERIAH CAMERON,

Patricia Morgan, PMHNP, and  
Eric Lillibridge, MS, MHP, and  
David Lyski, BS, DMHP

Petitioners.

ZEBERIAH CAMERON,

Respondent.

NO. 17-6-00158-7

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW FOR AN  
ORDER FOR  
180 - DAY LESS RESTRICTIVE  
ALTERNATIVE

THIS MATTER, having come before the Court on November 16, 2017, upon the petition filed by Patricia Morgan, PMHNP, and Eric Lillibridge, MS, MHP, for a 180-day less restrictive alternative to involuntary detention; and Respondent, Zeberiah Cameron; counsel for Respondent, Maggie Smith Evansen; and counsel for Petitioners, Le Ann Larson, Deputy Prosecuting Attorney, having determined that a need for treatment exists because Respondent is suffering from a mental disorder diagnosed as Schizophrenia, and, as a result of said mental disorder, Respondent:

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW FOR AN ORDER FOR 180-DAY  
LESS RESTRICTIVE ALTERNATIVE - Page 1

CLARK COUNTY PROSECUTING ATTORNEY  
CIVIL DIVISION  
1013 FRANKLIN ST. • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2478 (OFFICE) / (360) 397-2184 (FAX)

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- A. presents a likelihood of serious harm by posing a substantial risk that:
  - (1) physical harm will be inflicted by the Respondent upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm upon one's self;
  - (2) physical harm will be inflicted by the Respondent upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm;
  - (3) physical harm will be inflicted by the Respondent upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; and/or
  - (4) Respondent has threatened the physical safety of another and has a history of one or more violent acts within the ten years preceding the date of the hearing.

- x B. presents as gravely disabled by virtue of:
  - (1) Danger of serious physical harm resulting from a failure to provide for essential human needs of health or safety; or,
  - (2) Manifestation of severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his actions and is not receiving such care as is essential for his health or safety;
  - x (3) Both (1) and (2) above;

and the Court having been advised in the premises and having before it the records and file herein, enters the following:

FINDINGS OF FACT

1. The Respondent is suffering from a mental disorder diagnosed as Schizophrenia.

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2. The evaluators, Patricia Morgan, PMHNP and Eric Lillibridge, MS, MHP, are of the opinion that the Respondent is suffering from a mental disorder which has a substantial adverse effect upon Respondent's volitional and cognitive functions and, as a result of such mental disorder, Respondent:

- A. presents a likelihood of serious harm by posing a substantial risk that:
  - (1) physical harm will be inflicted by the Respondent upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm upon one's self;
  - (2) physical harm will be inflicted by the Respondent upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm;
  - (3) physical harm will be inflicted by the Respondent upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; and/or
  - (4) Respondent has threatened the physical safety of another and has a history of one or more violent acts within the ten years preceding the date of the hearing.
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  - (2) Manifestation of severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his actions and is not receiving such care as is essential for his health or safety;
  - x (3) Both (1) and (2) above.

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From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. This matter is properly before the Court, and the Court has jurisdiction of the parties thereto and the subject thereof.

2. The Respondent is suffering from a mental disorder diagnosed as Schizophrenia and that by virtue of such mental disorder, the Respondent presents:

- A. presents a likelihood of serious harm by posing a substantial risk that:
  - (1) physical harm will be inflicted by the Respondent upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm upon one's self;
  - (2) physical harm will be inflicted by the Respondent upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm;
  - (3) physical harm will be inflicted by the Respondent upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; and/or
  - (4) Respondent has threatened the physical safety of another and has a history of one or more violent acts within the ten years preceding the date of the hearing.
- x B. presents as gravely disabled by virtue of:
  - (1) Danger of serious physical harm resulting from a failure to provide for essential human needs of health or safety; or,
  - (2) Manifestation of severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his actions and is not receiving such care as is essential for his health or safety;

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x (3) Both (1) and (2) above;

and the same has been established to the satisfaction of the Court by clear, cogent and convincing evidence.

IT IS HEREBY ORDERED that the Respondent shall comply with the following conditions of the 180-day Less Restrictive Alternative:

1. The Mental Health Service Provider is Elahan Place, Columbia River Mental Health Services.
2. The assigned care coordinator is David Hutchison.
3. Reside at Elahan Place, telephone (360) 253-6019, or other residence as approved by case manager and care coordinator. Follow all applicable rules and regulations, and allow case manager and care coordinator to visit place of residence at will.
4. Cooperate with all services, follow-up mental health care, appointments, and treatment recommendations planned or recommended by the Mental Health Service Provider, the assigned care coordinator, or any other mental health care provider.
5. Participate in follow-up mental health care through Elahan Place and/or Columbia River mental Health Services, located at 6926 NE Fourth Plain Blvd, Vancouver WA. 98666, and/or Elahan Place 7415 NE 94<sup>th</sup> Ave, Vancouver,

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WA, 98662. Keep all appointments and follow all treatment recommendations of assigned care coordinator or any other designated mental health care provider. The contact person will be David Hutchison, telephone (360) 253-6019.

6. Take all medications exactly as prescribed and cooperate with all clinically indicated medication monitoring and/or laboratory work as requested.

Medication management will be provided by Patricia Morgan, telephone (360) 253-6019.

7. Columbia River Mental Health Services will provide services for duration of Less Restrictive Alternative.

8. Refrain from the use of alcohol, hallucinogens, marijuana, synthetic cannabinoids, and any other controlled substances, or from the use of any non-prescribed medications without the approval of the case manager. Participate in drug/alcohol treatment if requested by Columbia River Mental health Services, including submitting to random urine analysis requests.

9. Refrain from threats or acts of harm to self, others, or property.

10. Maintain own health and safety in the community and not substantially deteriorate in routine level of functioning.

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11. Follow and adhere to any No Contract Orders/Orders of Protection issued out of any other Jurisdiction, including but no limited to Municipal Court, District Court or Superior Court.

12. Will be assessed at the end of the order to see if a request for another order is warranted. Respondent, Zeberiah Cameron, may be assessed on an on-ongoing basis to see if this level of care is still required and referred to less restrictive programs as he reaches his treatment goals.

13. Respondent, Zeberiah Cameron, will utilize the services of the Southwest Washington Crisis Hotline at (360) 696-9560 as needed. Care provider will assess him for appropriate level of crisis services. He will be referred to Clark County Crisis Services Designated Mental Health Professional or the local emergency department for crisis services as needed for evaluation.

**NOTICES**

In the event that Zeberiah Cameron fails to abide by these conditions, or substantially deteriorates in his routine level of functioning, he may be detained pending further hearing on a petition to revoke this less restrictive pursuant to RCW 71.05.590.

In the event Zeberiah Cameron is or becomes subject to supervision by the Department of Corrections, he shall notify his treatment team and his mental health treatment information shall be shared with the Department of Corrections for the duration of his incarceration and supervision, pursuant to RCW 71.05.445.

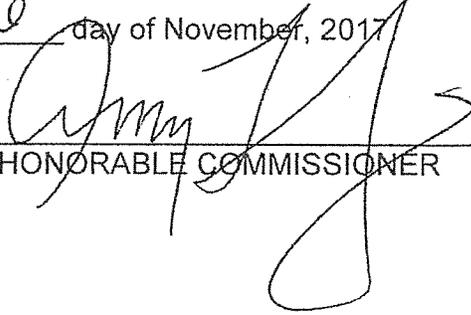
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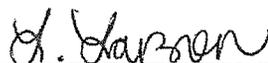
Zeberiah Cameron has been detained pursuant to RCW 71.05.310 and is prohibited from possessing, in any manner, a firearm as defined in RCW 9.41.010.

This Order shall be in effect as of November 16, 2017.

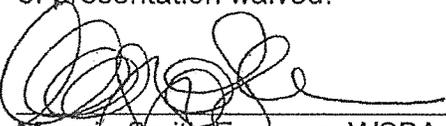
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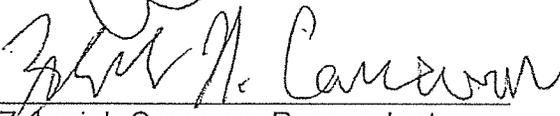
  
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HONORABLE COMMISSIONER

Presented by:

  
\_\_\_\_\_  
Le Ann Larson, WSBA #25787  
Deputy Prosecuting Attorney

Approved for entry, notice  
of presentation waived:

  
\_\_\_\_\_  
Maggie Smith Evahsen, WSBA # 30014  
Attorney for Respondent

  
\_\_\_\_\_  
Zeberiah Cameron, Respondent

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**April 27, 2018 - 3:00 PM**

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