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No. 54362-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

IN RE THE DETENTION OF
N.G., Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Commissioner Diana L. Kiesel
No. 20-6-00105-8

BRIEF OF APPELLANT

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I. INTRODUCTION

N.G. was involuntarily committed to Western State Hospital due to her mental illness under cause number 14-6-00862-7. A petition for 180-days of involuntary inpatient mental health treatment was filed and granted by the Pierce County superior court on June 27, 2019, with an expiration of December 24, 2019.

At the expiration of the 180-day order, there was no petition for an additional 180-day order, yet N.G. was not released. Instead, she was involuntarily held, with no court order, until January 23, 2020.

On January 23, 2020, at the request of Western State Hospital, a designated crisis responder (DCR) came and re-detained N.G. under a new cause number, 20-6-00105-8. N.G.'s counsel filed a motion to dismiss for a "total disregard" of the statutory rights and requirements of RCW 71.05. The motion was denied.

The 14-day petition under cause number 20-6-00105-8, and later, a 90-day petition, was granted. N.G. appeals the superior court findings.

II. ASSIGNMENTS OF ERROR

1. The superior court's ruling that there was not a total disregard for the statutory requirements of RCW 71.05 was error.
2. The superior court's ruling that there must be intentional conduct to warrant a dismissal for "total disregard" of the statutory requirements of RCW 71.05 was error.

3. The superior court's order detaining N.G. for up to 14 days of involuntary inpatient mental health treatment was error.
4. The superior's order detaining N.G. for up to 90-days (or any other subsequent commitment) of involuntary inpatient mental health treatment predicated upon the 14-day order, under cause number 20-6-00105-8, was error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the legislature intend to prevent detention without court authority (indefinite detention) by codifying the rules and requirements set forth in RCW 71.05?
2. Did the Legislature intend that some cases filed under RCW 71.05 would be dismissed for violation of the statutory rules and requirements?
3. Did the Supreme Court of Washington and the Court of Appeals, Division I and II intend that some cases filed under RCW 71.05 would be dismissed for violation of the statutory rules and requirements?
4. What constitutes a "total disregard" of RCW 71.05?
5. When the legislature creates a remedy within statute, that is to be strictly construed based on the plain language of the statute, may the court insert a mental state into that statute?

IV. STATEMENT OF CASE

N.G. was involuntarily committed to Western State Hospital due to her mental illness under cause number 14-6-00862-7. CP 83-86. The last petition filed on cause number 14-6-00862-7 was a 180-day involuntary inpatient commitment petition granted by Pierce County Superior Court on June 27, 2019. CP 75-86. The 180-day petition expired on December 24, 2019. CP 83-86.

On January 23, 2020, thirty days after the expiration of her petition under 14-6-00862-7, N.G. was still involuntarily detained at Western State Hospital. CP 2. No subsequent involuntary treatment petition had been filed by the petitioners pursuant to the timeline laid out in RCW 71.05.310 and 71.05.320 to ensure that N.G. had the right to a hearing, jury trial, voluntary status, stipulation and waiver or continuance of her case. And, there was no court order authorizing her involuntary detention. N.G. was not a voluntary patient.

On January 23, 2020, after N.G. had been unlawfully detained for thirty days, a Designated Crisis Responder (“DCR”) finally reported to Western State Hospital to evaluate N.G. for an initial seventy-two-hour detention. N.G. was detained under a new cause number, 20-6-00105-8. CP 1-8. On January 27, 2020, Peter Bingcang, M.D., and Jeff Crinean Ph.D., (collectively the Department of Social and Health Services herein after, “the Department”) filed a “Petition for Fourteen Day Involuntary Treatment.”

CP 9-12. These were the exact same petitioners who were on the expired 14-6-00862-7 petition. CP 75-82. Nowhere in the “Petition for Fourteen Day Involuntary Treatment” was there any indication that N.G. had been detained unlawfully for thirty-four days (at that point), or for any period of time. CP 9-12. N.G.’s counsel was not notified by the Department of her unlawful detention. RP1¹ 18.

A 14-day petition was filed on January 27, 2020 with a hearing date of January 28, 2020. CP 9-12. On January 28, 2020, N.G.’s counsel filed a “Motion to Dismiss Petition for ‘Total Disregard’ of Statutory Requirements Set Forth Under Ch. 71.05 RCW.” CP 13-22. The Pierce County Superior Court Commissioner continued the hearing to January 29, 2020 for the petitioner to respond to the motion. CP 23-24. On January 29, 2020 the Petitioner filed a “Brief of Petitioner” in response to N.G.’s motion to dismiss. CP 25-27.

On January 29, 2020 the Pierce County superior court heard oral argument from both N.G. and petitioner’s counsel. RP1 3-23. N.G.’s counsel argued for dismissal of the 14-day petition on the basis that a thirty-five-day involuntary commitment without any legal authority was a “total disregard” of the rights and requirements provided by RCW 71.05. RP1 8-11, 21-23, at CP 13-22. N.G.’s counsel argued that the disregard need not be intentional, that there was no statutory requirement or case law to support

¹ RP1 refers to the Report of Proceedings from the 14-day hearing held January 29, 2020.

that position. RP1 22. N.G.'s counsel further argued that the proper remedy under RCW 71.05.010 was a dismissal and that *In re the Detention of C.W.*, 147 Wash.2d 259, 53 P.3d 979 (2002) supported that conclusion. RP1 8, at CP 13-22. Finally, N.G.'s counsel argued that to rule otherwise would be to embolden and encourage petitioners to disregard the timelines provided in RCW 71.05 because there is no greater violation of a detainee's right than to hold them without lawful authority. RP1 8, 23.

Petitioners called Dr. Jeff Crinean to testify regarding the lapse of time between petitions. RP1 13. Dr. Crinean testified that he wrote the petition in the 14-6-00862-7 cause number, that he was familiar with N.G., and that the lapse of time between petitions was brought to his attention by Dr. Peter Bingcang, the other petitioner who did not appear to testify. RP1 14. Dr. Crinean testified that he "investigated" how this could have happened. RP1 15. Dr. Crinean testified, "it was entirely a computer screw up, Your Honor." RP1 15. He testified, "[i]t turns out that the database on which we keep track of all of our petitions had not been maintained for five years." RP1 15. He informed the court that he was not as diligent because he was transitioning from a ward psychologist to a psychologist supervisor and was not as attentive as he should have been. RP1 16.

Dr. Crinean testified that he did not inform N.G.'s attorneys that her petition had lapsed. RP1 18. And, he did not write in his petition, filed with the court, that there had been a lapse. RP1 19. Finally, Dr. Crinean testified

that this issue with the computer system had happened in the past at Western State Hospital and that “there was some serious issues with it.” RP1 19.

The court ruled that in reviewing *In re the Detention of C.V.*, 5 Wash.App.2d 814, 428 P.3d 407 (2018), that this situation does not warrant a dismissal. RP1 24. In pertinent part, the court ruled: “there was no intentional act here on behalf of the doctor or the persons working with the respondent, so I am denying the motion.” RP1 24.

The parties proceeded with the 14-day hearing and N.G. was detained for involuntary inpatient mental health treatment at Western State Hospital. RP1 24-40, at CP 28-32. On February 10, 2020, the Pierce County Superior Court held a 90-day involuntary mental health treatment hearing immediately following the 14-day order and again ordered that N.G. be involuntarily detained at Western State Hospital. RP2³.

V. ARGUMENT

1. N.G.’s Due Process Rights Were Violated When She was Unlawfully Detained for Involuntary Mental Health Treatment for Thirty-Five Days Without a Hearing or Court Order.

N.G. was deprived of her liberty and her due process rights by being held for thirty-five days without court authority and against her will for mental health treatment. Being held without any hearing or court order is an egregious deprivation of liberty without due process.

³ RP2 refers to the Report of Proceedings from the 90-day hearing held February 10, 2020.

No person shall be deprived of liberty without due process of law. *See* U.S. CONST. amend. V, XIV; WASH. CONST. art. I § 3, 7. When a governmental body seeks to deprive a person of a protected interest, that person must (1) receive sufficient notice of the deprivation and (2) have an opportunity to be heard. *Amunrud v. Board of Appeals*, 158 Wash. 2d 208, 216, 143 P.3d 571, 30 A.L.R.6th 775 (2006). Further, the opportunity to be heard must be “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Washington State’s involuntary treatment act, codified in RCW 71.05, is a system that at its foundation seeks to deprive a select class of people of their liberty; specifically, those who meet the diagnostic criteria of grave disability, danger to others, or danger to self due to a mental disorder. To ensure that individual rights are respected the legislature enacted rules for proceeding, including timelines, and a remedy of dismissal for “total disregards” of RCW 71.05.

N.G. was unlawfully detained in a mental hospital. She was held after the expiration of a court order authorizing her involuntary commitment. She was detained without notice, without counsel, and without a hearing. She was held against her will and subjected to inpatient mental health treatment. N.G. was deprived of thirty-six days of her liberty before she was even permitted to argue for her release before a court. This

was a clear and egregious deprivation of her liberty, with no notice and no opportunity to be heard.

2. The Petition to Detain N.G. for Involuntary Mental Health Treatment, Filed After Her Unlawful Detention, Should Have Been Denied Because There was a “Total Disregard” of the Statutory Rights and Requirements of RCW 71.05.

a. *A Petition for Involuntary Mental Health Treatment Should be Dismissed When There is a “Total Disregard” for the Requirements of the Statute.*

Petitions for civil commitment should normally be considered on their merits; however, “dismissal may be appropriate in the few cases where hospital staff or the CDMHP [county designated mental health professional] ‘totally disregarded the requirements of the statute.’” *In re Det. of C.W.*, 147 Wn.2d at 283, citing *In re the detention of Swanson*, 115 Wash.2d 21, 31, 804 P.2d 1, 6-7 (1990).

The legislature carefully crafted RCW 71.05, the statute that addresses mental illness, to protect individuals with mental illness from unlawful deprivation of their liberties. The statute allows for persons with a diagnosed mental disorder, who are a danger to themselves or others, or who are gravely disabled, to be detained for involuntarily mental health treatment. *See* RCW 71.05.150, 240. This denial of liberty was carefully balanced with protections. *See* RCW 71.05.

The legislature made it clear that the purpose of the civil commitment process was to protect those suffering from mental illness, as well as the public, while preventing inappropriate or indefinite commitments, providing timely evaluations, and “[t]o safeguard individual rights.” RCW 71.05.010(1).ⁱ

When construing the requirements of this chapter the court must focus on the merits of the petition, except where requirements have been totally disregarded, as provided in *In re C.W.*, 147 Wn.2d 259, 281 (2002).

RCW 71.05.010(2).

Minor violations of the statute do not constitute a “total disregard” of the statute. *In re C.W.*, 147 Wn.2d 259, dealt with six consolidated cases where the designated crisis responders (DCR) did not comply with time constraints to meet with and evaluate clients who were held in a hospital setting awaiting evaluation for an initial 72-hour mental health detention pursuant to RCW 71.05.050(3). By statute, the DCR is required to meet with the detainee within six-hours. RCW 71.05.050(3). The violations in the consolidated cases of *In re C.W.*, ranged from 6 minutes to potentially 6 hours. *Id.* at 264-69.

In *C.W.*’s case, prior to the 72-hour detention expiring, a petition for up to 14-days of involuntary mental health treatment was filed. *Id.* at 264. *C.W.* filed a motion to dismiss the 14-day petition on the grounds that the

six-hour time limit set forth in RCW 71.05.050 had been violated. *Id.* The superior court commissioner granted C.W.’s motion and dismissed the 14-day petition on the basis of the timeline violation. *Id.* The State appealed and the court of appeals reversed, and the Supreme Court of Washington affirmed the court of appeals decision, holding that “dismissal will not usually be the appropriate remedy for violations of RCW 71.05.050.” *Id.* at 263-64.

While the Supreme Court held that a dismissal is not warranted for every violation of the statute, it made clear that dismissal is appropriate when there is a “total disregard” of the statute.

[T]he purpose of the statute as well as the presumption in favor of deciding cases on the merits tends to weigh against dismissing all cases in which RCW 71.05.050 is violated. *Furthermore, allowing dismissal in cases where the professional staff totally disregarded the statutory requirements serves as a general safeguard against abuse.*”

Id. at 283 (italics added for emphasis).

In coming to this conclusion, the court in *In re C.W.* relied heavily on the analysis of, *In re the Detention of Swanson*, 115 Wn.2d 21, a case devoted to analyzing at what point the 72-hour detention starts and holding that a hearing begins when the court calendar begins, not the time at which it is actually called. The court in *In re Swanson*, determined, dismissal may be appropriate in the few cases where hospital staff “totally disregarded the

requirements of the statute,” stating that had that happened, “certainly dismissal would have been proper. Indeed, it would have been required. However, if the intent of the statute is to be fulfilled and absurd results are to be avoided, dismissal cannot turn on the vagaries of scheduling.” *Id.* at 31.

In re C.W., based on its analysis and heavy reliance on the analysis of *In re Swanson*, comes to stand for the proposition that involuntary commitment proceedings under RCW 71.05 are to proceed on the merits except in such cases where there has been a “total disregard” of statutory requirements.

In re the Detention of K.R., 195 Wn.App. 843, 381 P.3d 158 (2016), is the only Division II decision that wrestles with the concept of a “total disregard” of RCW 71.05, the court held that “[h]ere, the requirements of former RCW 71.05.154 were totally disregarded.” *Id.* at 847⁴. In *In re K.R.*, the designated mental health professional (DMHP) did not consult with the “examining physician” or any physician to determine if detention was appropriate prior to filing the 14-day petition to detain K.R., as required by statute, but did consult with a CDC and RN. *Id.* at 846-47. Division II held that the DMHP’s failure to consult with a physician was a “total

⁴ Division I declined to follow the Division II holding in *K.R.* in a 2018 decision, *In re the Detention of C.A.C.*, 6 Wn.App.2d 231, 430 P.3d 276 (2018) on the same subject matter.

disregard” of the statutory requirements of former RCW 71.05.154 and reversed the superior court’s commitment order. *Id.* at 848.

b. There is a “Total Disregard” for the Requirements of the Statute in This Case.

The most blatant and significant violation of the statute is that N.G. was never released after the expiration of the previous order on December 24, 2019. The statute requires that “the committed person *shall* be released unless a petition for an additional 180-day period of continued treatment is filed and heard in the same manner as provided in this section.” RCW 71.05.320(6)(b) (emphasis added). There was no attempt made to comply this section. In fact, this blatant disregard for the statute was never acknowledged. The Department did not inform N.G.’s attorneys or acknowledge in the petition that there was a significant period, or any period at all, of unlawful detention. RP1 18-19.

i. The Department “Totally Disregarded” RCW 71.05.280, Requiring Judicial Determination of Grave Disability.

Pursuant to RCW 71.05.280, “the court shall determine whether such person is gravely disabled.” That provision was totally disregarded as there was no judicial finding made to hold N.G. N.G.’s hearing that should have been held no later than December 24, 2019 was not held until January 29, 2020.

ii. *The Department “Totally Disregarded” RCW 71.05.300, Requiring 3 Days’ Notice Requirement.*

RCW 71.05.300 sets forth the 3-day notice requirement for 90-day petitions, reading in part: “the petition for ninety day treatment shall be filed with the clerk of the superior court at least three days before the expiration of the fourteen day period of intensive treatment.” The Supreme Court of Washington, *In re the Detention of Dydasco*, 135 Wn.2d 943, 952, 959 P.2d 1111, 1115 (1998), extended the 3-day notice requirement set forth in RCW 71.05.300 to 180-day petitions as well. Applying this statutory requirement to the facts of N.G.’s case the Department should have filed N.G.’s follow-up petition for 180-days of treatment on December 21, 2019. The Department, thirty-seven days later, on January 27, 2020, filed a petition to hold N.G. for up to 14 days of involuntary treatment. There was no attempt by the Department to comply with 3-days’ notice prior to the expiration of the petition. This was clearly a “total disregard” of the requirements of RCW 71.05.300 and the holding by the Supreme Court in, *In re Dydasco*.

iii. *The Department “Totally Disregarded” RCW 71.05.320(4), Requiring Release.*

RCW 71.05.320(4) requires that “[t]he person shall be released from involuntary treatment at the expiration of the period of commitment imposed...unless the superintendent or professional person in charge of the facility in which he or she is confined...files a new petition for involuntary

treatment.” This is the fundamental issue of N.G.’s appeal. She was not released on December 24, 2019 when her petition expired. She was never released from Western State Hospital. There was a “total disregard” the requirement that she be released pursuant to RCW 71.05.320(4).

iv. *The Department “Totally Disregarded” RCW 71.05.320(6)(a), Requiring the Court to Make Findings to Continue a Person’s Involuntary Detention.*

RCW 71.05.320(6)(a) states in pertinent part: “[t]he hearing shall be held as provided in RCW 71.05.310, and if the court or jury finds that the grounds for additional confinement as set forth in this section are present...the court may order the committed person returned for an additional period of treatment not to exceed one hundred eighty days from the date of judgment.”

N.G. is not disputing that she was eventually, although quite untimely, permitted a hearing pursuant to the requirements set forth in RCW 71.05.310. However, N.G. was not ordered by the court to return to treatment for any period of time from December 24, 2019 to January 28, 2020. She was held at the will of the Department, with no legal authority for thirty-five days before her case was brought before the superior court. This is a complete deviation from and “total disregard” of the requirements set forth in RCW 71.05.320(6)(a).

v. *The Department “Totally Disregarded” RCW 71.05.320(6)(b), Requiring Release.*

Subsection (6)(b) states, “[a]t the end of the one hundred eighty day period of commitment...the committed person shall be released unless a petition for an additional one hundred eighty day period of continued treatment is filed and heard in the same manner as provided in this section. Successive one hundred eighty-day commitments are permissible on the same grounds and pursuant to the same procedures as the original one hundred eighty day commitment.” N.G. has not been released at any point since this violation occurred. There has been no attempt to comply with this subsection of RCW 71.05.320.

vi. *The Department “Totally Disregarded” RCW 71.05.320(8), Requiring a Valid Court Order to Detain a Person, That Cannot Exceed 180 Days.*

Subsection (8): “[n]o person committed as provided in this section may be detained unless a valid order of commitment is in effect. No order of commitment can exceed one hundred eighty days in length.” N.G.’s order did not exceed 180 days, yet she was detained for thirty-five additional days without a valid order of commitment. N.G. was detained for a total of 215 days on a 180-day order.

This subsection of RCW 71.05.320 makes clear that what happened to N.G. is not to happen. “No person may be detained unless valid order of commitment is in effect.” From December 24, 2019 to January 28, 2020,

there was no court order in effect to allow the Department to hold N.G. There is no exception in the statute. There is not an exception for “forgetting,” for being “distracted,” for being “too busy.” There is no exception allowing the Department to substitute their judgment for the court’s. There is no exception.

N.G.’s case is the exact circumstance that 71.05.320(6)(b) sought to prevent. This portion of the statute, like many others in this case, was “totally disregarded” by Department and by the superior court in denying N.G.’s motion to dismiss.

It is clear that RCW 71.05, was “totally disregarded” in this case, in many respects. N.G. was held after the 180-day order expired, without notice, without a hearing, and without a court order, all in violation of the statute.

c. There is no Requirement That the “Total Disregard” for the Requirements of the Statute Must be Intentional.

There is no requirement, in statute or case law, that there must be an intentional disregard of the statute in order for there to be a “total disregard” that warrants dismissal. *See* RCW 71.05; *In re Det. of C.W.*, 147 Wn.2d 259; *In re Swanson*, 115 Wn.2d 21; *In re the Detention of K.R.*, 195 Wn.App. 843; *In re the Detention of C.V.*, 5 Wn.App.2d 814.

Questions of statutory interpretation are reviewed *de novo*. *State v. Dang*, 178 Wn.2d 868,874, 312 P.3d 30 (2013) . Case law interpreting RCW 71.05 clearly states, “[w]hereas here a significant deprivation of liberty is involved, statutes must be construed strictly.” *In re LaBelle*, 107 Wn.2d 196, 205, 728 P.2d 138, 145 (1986) citing *In re Cross*, 99 Wn.2d 373, 379, 662 P.2d 828, 832 (1983). “Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.” *In re the Detention of Swanson*, 115 Wn.2d at 27 (quoting *Human Rights Comm'n v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). There is no language in RCW 71.05.010(2) that requires that the Department acted intentionally. The statute states, “[w]here construing the requirements of this chapter the court must focus on the merits of the petition, except where requirements have been totally disregarded.” That language is quite plain, it is unambiguous, and it does not require an intentional violation of the statute. If the legislature intended to limit dismissals of petitions only cases of intentional disregard for the statute, it would have said intentional disregard.

In making its ruling in this case, the superior court relied heavily on *In re the Detention of C.V.*, 5 Wn.App.2d 814, 428 P.3d 407 (2018). *In re C.V.* is a Division I case. It is important to note that this court is not bound by *In re C.V.* “One division of the Court of Appeals should give respectful

consideration to the decisions of other divisions of the same Court of Appeals, but one division is not bound by the decision of another division.” *In the Matter of the Personal Restrain of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133, 1142 (2018). Decisions from other divisions of the Court of Appeals are considered to be persuasive rather than binding to encourage debate. *Id.* at 153.

The superior court in its ruling erroneously held, that pursuant to *In re C.V.*, dismissal was not an appropriate remedy in N.G.’s case because there was no “intentional” disregard of RCW 71.05’s statutory requirements. *In re C.V.* dealt with a rubber stamping of a generic single-bed certification request contrary to statutory requirements. *Id.* at 817-21. Both the State and the Court in *In re C.V.*, acknowledge “that detaining a person at an uncertified facility without a single bed certification would constitute total disregard of the involuntary treatment act.” *Id.* at 827. However, in C.V.’s case the superior court judge reviewed C.V.’s medical records from the facility and determined that C.V.’s interests had in fact been safeguarded. *Id.* at 828.

The court in *In re C.V.* did not uphold the detention because the violation was not intentional; instead, the court found that the violation was technical, and did not constitute a total disregard for the statute or its intent, and did implicate C.V.’s liberty interests.

Although the single bed certification form used for C.V. violated involuntary treatment act requirements, the violation does not rise to the level of total disregard under these circumstances. As in C.W., Evergreen's conduct did not violate C.V.'s constitutional liberty interests or undermine the involuntary treatment act's purpose.

Id. at 826-27. There is no reference to the violation having to be "intentional." *Id.*

The superior court in N.G.'s case held that *In re C.V.*, attributed a *mens rea* of "intentional." There is no evidence to support that interpretation as the case never mentions the idea of inserting a *mens rea*, certainly not an "intentional" *mens rea*. The word intentional is not ever used in the entirety of the case. The statute and case law both require a finding of "total disregard" of the statute to warrant a dismissal. In this case, there was clearly a total disregard of the statute, its intent, and N.G.'s constitutional liberty interests were clearly violated.

d. Dismissal is the Only Appropriate Remedy for Such an Egregious and "Total Disregard" of RCW 71.05.

"[C]ourts [weighing dismissal] should focus on the merits of the petition, the intent of the statute, and whether the State 'totally disregarded the requirements of the statute.'" *In re C.V.*, 5 Wn.App.2d at 824 citing *In re Det. of C.W.*, 147 Wn.2d 259. "To decide whether dismissal of the involuntary commitment petitions was warranted, our Supreme Court considered the statutory provisions at issue, the intent behind those

provisions, the need to have a “safeguard against abuse,” and the facts of the case.” *Id.* In this case, there was a “total disregard” for the rights and requirements in RCW 71.05 and the intent of the statute when N.G. was detained for involuntary mental health treatment, without notice, without a hearing, and without any court authorization, for thirty-five days.

The Department acted with a “total disregard” to the requirements of RCW 71.05 in their detention of N.G. They blamed an outdated computer system, that hadn’t been updated in five years, that apparently had “serious problems” that they knew about. Sole reliance on an outdated computer system to monitor N.G.’s court ordered treatment does not comply with the intent or requirements of RCW 71.05. Specifically, her right to have prompt evaluation and individualized treatment. RCW 71.05.010 (c). *See also In re the Detention of D.W.*, 181 Wn.2d 201, 204, 332 P.3d 423, 424 (2014) (citing RCW 71.05.153, .230, .360(2)). Part of individualized treatment, logically, would include the treating psychiatrist and psychologist to review the chart frequently enough that petitions do not expire by thirty days before anyone notices, regardless of whether a computer system is also supposed to notify them of filing dates.

Unlike *In re C.W.*, N.G. was not held hours beyond the statutory requirement, she was held over a month. *In re C.W.*, dealt with timeline violations from 8 minutes to potentially 6 hours. N.G. was deprived of her

liberty without any process of law for thirty-five days, or at least 840 hours. That dwarves any violation that was considered *In re C.W.*

In *In re C.V.*, there was at least an attempt to comply with the statute, and the court took it upon itself to review C.V.'s medical record to ensure that C.V. had been receiving individualized treatment and concluded that this was not a "total disregard" because C.V. had received such treatment to safeguard C.V.'s interests. That was not the case here.

N.G.'s case most resembles the facts in *In re K.R.* As in *In re K.R.*, N.G.'s statutory rights were completely ignored. K.R.'s petition failed to include consultation with the examining physician as required by former RCW 71.05.154. This Court determined that was a "total disregard" and reversed the superior court's commitment of K.R. Here too, there was a "total disregard" of the statute. However, in this case, the disregard was even more significant and egregious than in *In re K.R.*

It is clear from the statute and case law that there is a scenario where there can be a dismissal without reaching the merits of the case due to a "total disregard" of the statute. There is no more egregious or blatant disregard for the statute than detaining someone for thirty-five days with no notice, no opportunity to be heard, and no court order.

This is not a case about the Department failing to address a specific provision of the statute. This is not N.G. requesting a dismissal on a

technicality. N.G.'s case is a complete and "total disregard" by the Department of the rights and requirements of RCW 71.05. Dismissal is the only appropriate remedy in this case.

e. If Dismissal is Not the Appropriate Remedy the Statute is Unconstitutional As-Applied.

In order for the statute RCW 71.05 to be constitutional it must protect and safeguard individual rights as it claims to do in RCW 71.05.010(d). It must protect individuals' right to due process. If dismissal cannot be a realistic and applicable remedy to "total" and egregious violations and disregards the statute is unconstitutional as-applied. Without a remedy for violations, there is little or no incentive for petitioners to timely file petitions or to file them at all. A civil damages action is not enough.ⁱⁱ

It is important to consider the doctrine of avoidance: "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court. *Clark v. Martinez*, 543 U.S. 371, 380-381, 125 S. Ct. 716, 724, 160 L.Ed.2d 734 (2005).

RCW 71.05 was designed to protect those who are gravely disabled, danger to self or others. To hold that the statutory safeguards only apply to

those individuals who either don't meet criteria or are only "slightly" gravely disabled, danger to self or others is contrary to logic but also contrary to the entire purpose of enacting timelines to safeguard individual rights.

If dismissal is not a realistic or applicable option for respondents upon violation of their constitutional and statutory rights then the statute is unconstitutional as-applied and there is little or no incentive for petitioners to comply with any of the timelines or requirements.

VI. CONCLUSION

In this case, the Department acted with a "total disregard" for the rights and requirements of RCW 71.05. Despite the preference to determine petitions on their merits, N.G. is entitled to a dismissal of her petition due to the egregious, extensive and "total disregard" of her rights and the requirements of the statute in this case.

There can be no greater disregard of the statute than completely failing to adhere to its most basic requirements and timelines to safeguard N.G.'s individual rights. For thirty-five days N.G. was held against her will, without court authority or a hearing. She was detained unlawfully and without due process. Because of the "total disregard" for the statute and

N.G.'s rights, the 14-day petition must be dismissed and any subsequent involuntary treatment orders under this cause number must be vacated.

RESPECTFULLY SUBMITTED this 1st day of June 2020.



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Endnotes

¹RCW 71.05.010 summarizes the legislative intent:

(1) The provisions of this chapter are intended by the legislature:

(a) To protect the health and safety of persons suffering from mental disorders and substance use disorders and to protect public safety through use of the *parens patriae* and police powers of the state;

(b) To prevent inappropriate, indefinite commitment of mentally disordered persons and persons with substance use disorders and to eliminate legal disabilities that arise from such commitment;

(c) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders and substance use disorders;

(d) To safeguard individual rights;

(e) To provide continuity of care for persons with serious mental disorders and substance use disorders;

(f) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures; and

(g) To encourage, whenever appropriate, that services be provided within the community.

(2) When construing the requirements of this chapter the court must focus on the merits of the petition, except where requirements have been totally disregarded, as provided. *In re C.W.*, 147 Wn.2d 259, 281 (2002). A presumption in favor of deciding petitions on their merits furthers both public and private interests because the mental and physical well-being of individuals as well as public safety may be implicated by the decision to release an individual and discontinue his or her treatment.

ii While there is certainly a civil damages remedy that could be pursued practically speaking that is not going to be an adequate remedy for this subsection of the population. While these respondents are provided counsel for deprivations of liberty like involuntary treatment petitions, they are not provided counsel in pursuing damages for past violations of their liberty interests.

Many people subject to detention under RCW 71.05 do not have guardians to assist them with the process. So they must somehow, while in involuntary inpatient treatment, while suffering from a mental disorder have the insight and ability to recognize their issue and reach out to appropriate counsel. They then must negotiate terms with their civil counsel and be able to assist them even if in the most simplistic ways with their case. The civil counsel must be willing to work with these individuals who can have mood lability, personality disorders and can be just generally disorganized.

All of these obstacles would make it particularly unlikely that this population would be able to retain counsel or that their counsel would have the appropriate experience or patience to work with them for the years it may take to conclude their civil case. Finally, even if they can retain counsel and are successful in their civil case, they may very possibly still be institutionalized and have limited or no access to spending whatever settlement they may receive.

N.G. has no guardian and her thirty-five-day deprivation of liberty was reported to the Disability Rights Washington and Northwest Justice Project by her involuntary treatment attorney. To date no civil action has been initiated on her behalf.

CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this Appellant's Brief were delivered electronically to the following:

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DATED: 6-1-2020



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