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Division II  
State of Washington  
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No. 54392-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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In re. the Detention of P.R.

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

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BRIEF OF APPELLANT

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KATE L. BENWARD  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711  
katebenward@washapp.org

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A. INTRODUCTION

The involuntary commitment statutory scheme requires a person be notified of their jury trial right when the State seeks an order of commitment of over 90 days. Here P.R. was recommitted for 180 days without evidence he was notified or waived this critical right, requiring reversal of the 180-day order of commitment under the governing statutory scheme and the constitution.

B. ASSIGNMENTS OF ERROR

The court erred in involuntarily committing P.R. without obtaining a valid of his waiver of his jury trial right as required by RCW 71.05 and the Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person who is subject to 180-day involuntary commitment has the right to a jury trial. Where here the record does not reflect that P.R. knew of his jury trial right and knowingly waived it, is reversal of the trial court's commitment order required?

2. Civil commitment for any purpose is a significant deprivation of liberty requiring constitutional protections. Does

a person have a constitutional right to a jury trial when the State seeks to recommit them for 180 days?

D. STATEMENT OF THE CASE

P.R. was found incompetent to stand trial on felony assault and harassment charges. CP 32-33. The charges were dismissed without prejudice after it was determined his competency could not be restored. CP 32-33. P.R. was committed to the Secretary of the Department of Social and Health Services for evaluation to permit the filing of a petition for civil commitment. CP 5-6, 33. A petition for 180-day involuntary commitment was filed soon after. CP 2. The court committed him on the grounds that he was “in custody pursuant to RCW 71.05.280(3)” and “as a result of a mental disorder continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior” and “Is/Continues to be gravely disabled.” CP 37-38.

The State filed a second 180-day petition six months later, and P.R. was recommitted on the basis that he was “gravely disabled,” this time by stipulation. CP 52. The court’s order

stated that P.R. waived his appearance at the re-commitment hearing through a “separate appearance waiver.” CP 40; 50.

The State filed a third petition for involuntary commitment—the subject of this appeal—alleging P.R. continued to be gravely disabled and “continues to be in custody pursuant to RCW 71.05.280(3) and as a result of a mental disorder . . . continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior” as provided for in RCW 71.05.320(4)(c). CP 55.

P.R. was not present in court on the day of the scheduled hearing on the State’s third petition and his counsel asked for a continuance of one day to meet with him. RP 4-6. The court noted there was an issue as to whether P.R. wanted to represent himself and his hearing was set over for the next day for his attorney to speak to him. RP 4-6, 9.

P.R. was not present in court for his hearing the next day. RP 13. P.R.’s counsel informed the court that P.R. instructed her to proceed in his absence, specifically asking the court to “waive his presence.” RP 13-14. Although P.R.’s right to self-representation was addressed and the court explicitly waived

P.R.'s presence, there was no mention of P.R.'s jury trial right, and whether P.R. waived this right. *See* RP 13-15.

The evidentiary hearing proceeded with the testimony of Dr. Bradley Antonides, a clinical psychologist at Western State Hospital where P.R. was being treated. RP 15. Based on this testimony, the court found P.R. met the criteria for recommitment to 180 days of involuntary treatment both on the basis that he was “gravely disabled” and that “as a result of a mental disorder,” he “continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior.” CP 69.

The court entered an order after the hearing, finding P.R. “waived his presence,” and separately finding he “waived his/her appearance.” CP 67. The order does not state that P.R. waived his jury trial right. CP 67-71.

#### E. ARGUMENT

**P.R. was not apprised of his jury trial right, and did not validly waive it, requiring reversal of the 180-day commitment order.**

The record does not show that P.R. was advised of his jury trial right prior to his 180-day recommitment hearing, or that he

waived this right, requiring reversal of the order involuntarily committing him for 180 days.

- a. The court must notify a person facing commitment of the right to a jury trial when the State seeks to involuntarily commit them for 90 days or more.

Under RCW 71.05, P.R. had a jury trial right on the State's 180 day re-commitment petition and had to be informed of his jury trial right, which did not occur here.

The ITA statutory scheme provides for a right to demand that a jury determine whether the person's mental disorder justifies commitment based on a 90- or 180-day petition. RCW 71.05.300, .310; *In re Det. of M.W.*, 185 Wn.2d 633, 664, 374 P.3d 1123 (2016) (RCW 71.05.310 gives individuals the right to request a jury trial at recommitment proceedings for 180 days); *In re Det. of S.E.*, 199 Wn. App. 609, 613, 400 P.3d 1271 (2017).

Under the 71.05 commitment scheme a person receives notice of this jury trial right at the initial 14-day commitment:

**The court shall specifically state to such person and give such person notice in writing that if involuntary treatment beyond the fourteen day period or beyond the ninety days of less restrictive treatment is to be sought, such person will have the right to a full hearing or jury trial as required by RCW 71.05.310.**

RCW 71.05.240(5) (emphasis added).

Likewise, when the State seeks a 90-day order of commitment, the person is entitled to explicit notice of the jury trial right:

At 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, his or her right to a jury trial**, and, if the petition is for commitment for mental health treatment, his or her loss of firearm rights if involuntarily committed.

RCW 71.05.300(2) (emphasis added).

When the State seeks recommitment under RCW 71.05.320, as in P.R.'s case, the hearing must be held as provided for in RCW 71.05.310, which governs hearings pursuant to 90-day commitments and mandates due process procedural protections:

If the person named in the petition requests a jury trial, the trial shall commence within ten judicial days of the first court appearance after the probable cause hearing. The burden of proof shall be by clear, cogent, and convincing evidence and shall be upon the petitioner. The person shall be present at such proceeding, which shall in all respects accord with the constitutional guarantees of due process of law...

RCW 71.05.310.

The Supreme Court adopted the Superior Court Mental Rules which govern mental health court procedures and

proceedings. *In re Detention of McLaughlin*, 100 Wn.2d 832, 844, 676 P.2d 444 (1984). Courts “interpret court rules as if they were statutes.” *In re Det. of D.F.F.*, 144 Wn. App. 214, 225, 183 P.3d 302 (2008), *aff’d*, 172 Wn.2d 37, 256 P.3d 357 (2011). MPR 3.3(b) provides the procedure for demanding a jury in an ITA proceedings, which applies to petitions for both 90-day and 180-day commitments:

Within 2 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.

Thus by statute and court rule, a person must be notified of their jury trial right on 90 and 180-day commitments.

- b. The record does not reflect that P.R. was either notified of his jury trial right, or that he waived it.

When an individual’s liberty is at stake, “whether the proceedings be labeled ‘civil’ or ‘criminal’ [ . . . ] Fourteenth Amendment due process requires that the infirm person, or one acting in his behalf, be fully advised of his rights and accorded each of them unless knowingly and understandingly waived.” *Quesnell v. State*, 83 Wn.2d 224, 230, 517 P.2d 568 (1973).

P.R.'s claim affecting his due process right to notice and his liberty interests are subject to review under RAP 2.5(a)(3). *See e.g., In re Det. of Strand*, 167 Wn.2d 180, 187, 217 P.3d 1159 (2009) (State statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment).

In *M.W.*, the Court interpreted the former version of RCW 71.05.320(4)(c)(ii), the current version of which P.R. was committed under, to “meet [ ] constitutional standards” because even if the language of that provision did not provide for a jury trial, RCW 71.05.310 gives individuals the right to request a jury trial upon initial commitment and at evidentiary hearings for recommitment periods of 180 days. 185 Wn.2d at 664. *M.W.* determined RCW 71.05's statutory scheme providing for a jury trial was adequate to protect s person's jury trial right *Id. M.W.* did not discuss the notice required for waiver of this right.

Division I has required notice of the rights at stake in an involuntary commitment hearing to be evident from the record. In *In the Matter of Detention of T.C.*, Division I ordered reversal of the commitment order where the record did not reflect the

respondent was informed of the potential loss of his firearm rights as required under RCW 71.05.320(2). 11 Wn. App.2d 51, 65, 450 P.3d 1230 (2019). *T.C.* contrasted the facts of that case with an unpublished opinion, *J.G.*,<sup>1</sup> which found the failure to advise the respondent under RCW 71.05.240(2) was harmless because “the record was clear that J.G. was aware of the possibility of his loss of firearm rights prior to the hearing.” *T.C.*, 11 Wn. App. at 64 (citing *In the Matter of the Detention of J.G.*, No. 78338-6-I, Slip op. at 2019 WL 2583025 (Wash. Ct. App. June 24, 2019)). In *J.G.*, this was evident from the record because the Respondent “made comments as he prepared for the hearing expressing concern over the potential loss of those rights.” *Id.*

But in *T.C.*, the Court determined “[w]e simply do not have sufficient facts before us to reach the conclusion that T.C. was informed in any meaningful way of his potential loss of rights, or how that loss could be avoided.” 11 Wn. App.2d at 65. The Court rejected the notion that providing notice *after* the hearing, or by counsel rather than the court, was sufficient: “it

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<sup>1</sup> Cited pursuant to GR 14.1.

still does not comply with the statute as it delegates the task to counsel and would have occurred after the order on commitment was already granted.” *Id.*

In *C.B.*, where the record reflected the respondent was in fact informed of her jury trial right, Division I held MPR 3.3(b)’s and RCW 71.05.300(2)’s requirement of notice in open court is waived when the respondent does not appear in court. *Matter of Det. of C.B.*, 9 Wn. App. 2d 179, 188, 443 P.3d 811, *review denied sub nom. In re Det. of C.B.*, 194 Wn.2d 1005, 451 P.3d 333 (2019). Division I’s interpretation of an implied waiver is contrary to a plain reading of MPR 3.3(b), which requires notice, “in open court of his right to a jury trial as provided in RCW 71.05.300” within two days of being detained. MPR 3.3(b) does not imply waiver where the person was not apprised of their right. Rather, it provides only that, “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).

MPR 3.3(b) cannot be interpreted to allow for waiver of the jury trial right based simply on the failure to appear in court because such an interpretation would render superfluous that

portion of the rule requiring advisement of the right, in open court. *City of Kent v. Beigh*, 145 Wn.2d 33, 39, 32 P.3d 258 (2001) (“a statute should, if possible, be so construed that no clause, sentence or word shall be superfluous, void, or insignificant.”). Under the plain language of the rule, demand for a jury trial, and its waiver, requires the person be advised of their right to a jury trial in open court and on the record.

Moreover, “[b]ecause civil commitment statutes involve a deprivation of liberty, they should be construed strictly.” *In re Det. of W.C.C.*, 185 Wn.2d 260, 265, 370 P.3d 1289 (2016). This requires courts to choose a “narrow, restrictive construction” over a “broad, more liberal interpretation” of the statute. *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). A strict construction of MPR 3.3(b) requires that a valid waiver of the jury trial right must be predicated on knowing the right exists. 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.

“It is essential to keep in mind the need to satisfy the intent of the statute while avoiding absurd results.” *Matter of*

*Swanson*, 115 Wn.2d 21, 28, 804 P.2d 1 (1990). It would be absurd to require a person believed to suffer a mental impairment to know that if he is unable to attend court on a given day, he waives other statutory rights of which he was not told. Any notice and waiver of this right should be put on the record, in open court to avoid absurd results and comport with a narrow reading of the statute.

*C.B.* erroneously rejected the requirement of informing the respondent of their jury trial right as “unreasonable” and “unnecessarily burdensome” because it “would eliminate the right to waive an appearance conferred by the statute and force every subject of a petition to appear, regardless of their physical or mental conditions, so the court could advise them of their right to a jury.” *C.B.*, 9 Wn. App. 2d at 188. However, even when the respondent chooses not to come to court, the court could still provide the required notice of a jury trial right by placing on the record the existence of that right and ensuring counsel had meaningfully conveyed it to the client. Notice and waiver of this right should not be inferred when a strict construction of the statute does not permit this inference.

Regardless, in *C.B.*, it was apparent that the respondent had received notice of their right to jury trial and waived it because of the procedures for 90-day commitment set out in RCW 71.05.300. C.B.'s counsel signed an order indicating C.B. received notice and orally waived her right to jury trial. 9 Wn. App. at 181, 189. Additionally, C.B.'s attorney signed the scheduling form and initialed the statement confirming C.B.'s oral waiver of a jury trial. *Id.* at 181–82.

The record in P.R.'s case reflects no such evidence of either notice or waiver of his jury trial right. After P.R.'s criminal charges were dismissed without prejudice he was committed to the state hospital for up to 72 hours “for evaluation for the purposes of filing a civil commitment petition under 71.05 RCW.” CP 33. The State filed for 180-day commitment pursuant to RCW 71.05.280(3) and RCW 71.05.290(3). CP 2-3, 6. As permitted by RCW 71.05.290(3), the State was not required to proceed through the requirements for initial commitment of 14 days. *Id.*

For P.R.'s third recommitment that is the subject of this appeal, the State again petitioned for 180-day involuntary

commitment, alleging he was “gravely disabled” and “continues to be in custody pursuant to RCW 71.05.280(3), and as a result of a mental disorder,” “continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior.” CP 55 (citing RCW 71.05.320(4)(c)(ii)).

Prior to this hearing, P.R. did not appear, and his counsel requested a brief continuance to consult with her client about the court’s concern that P.R. had filed a motion indicating he may want to proceed pro se, with the court wanting to confirm this: “My only concern is I want to make sure that this gentlemen just gets -- especially if he wants to go pro se . . . RP 6. The evidentiary hearing was set over to the next day at the request of P.R.’s counsel. RP 8, 12.

The next day, P.R.’s counsel informed the court that she had consulted with her client and asked the court to find he had waived his presence for the hearing:

I informed him of the court’s finding with regard to the violent offense recommit, and I informed him of his rights and asked him how he wished to proceed with the case at this point. [P.R.] was very clear that at this time he does not wish to retain an independent expert as to the recommit on violent offense, and so we are not offering any independent expert testimony on that basis. He did

instruct me to move forward with the hearing today, so I am prepared to do so...

THE COURT: Any objection to Mr. Rees being excused?

MR. ZISER: Your Honor, not from Petitioners,

THE COURT: All right. I find it's a voluntary waiver.

RP 14.

Counsel did not state she had informed P.R. of his jury trial right, or put on the record that he waived it. The court's order found, "Respondent waived his appearance," and "The Court separately finds Respondent has waived his/her appearance." CP 67. The court made no determination that P.R. was apprised of his jury trial right, which is necessary to determine that he waived it.

The only mention of P.R.'s jury trial was the boilerplate statement entered *after* the commitment hearings, that the court "orders" the "right to full hearing or jury trial" if "involuntary treatment beyond a 14-day period is sought," as "required by RCW 71.05.310." CP 71, 39, 53.

This boilerplate statement entered after the hearing does not tell the committed person how to request a jury trial, or that it is waived if he fails to appear in court.

This order could not have informed P.R. of his right to a jury trial in this hearing because it was entered as an order after the hearing. CP 71. In *C.B.*, the Court of Appeals noted that there was a written order committing her for 14 days which included the same boilerplate statement in P.R.'s order, that "If involuntary treatment beyond the fourteen day period ... is to be sought, respondent will have the right to a full hearing or jury trial as required by RCW 71.05.310." 9 Wn. App. 2d at 189. However, in *C.B.*, there was also express evidence that the respondent was informed of the right and waived it. *Id.*

In *T.C.*, a boilerplate reference to the loss of firearm rights contained in an order entered *after* the hearing was deemed inadequate to provide notice of the gun right at stake in the hearing, even where the petition stated commitment could result in a loss of firearm rights, but the record did not reflect this was conveyed by the court. 11 Wn. App.2d at 63.

Without this assurance P.R. was informed of his jury trial at the initial commitment, and without additional evidence in the record P.R. was notified of his jury trial right prior to the hearing, this Court should reverse.

- c. This Court should hold that the significant liberty interests at stake in involuntary commitment proceedings require a knowing, intelligent, and voluntary waiver of the jury trial right.

The Washington Constitution guarantees "[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*, 83 Wn.2d at 240. The 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 (citing *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048 31 L. Ed.2d 394 (1972)).

In *M.W.*, the Supreme Court stated it had never "affirmatively" recognized the right to a trial in a proceeding "like this one." *M.W.*, 185 Wn.2d at 663 (referring to recommitment under the former version RCW 71.05.320(4)(c)(ii), which is identical to the relevant section here). *M.W.* distinguished the 180-day civil commitment scheme from "indefinite civil commitment schemes that require jury trials on

initial commitment because the ITA involves only short periods of commitment and requires the State to file a new petition and carry a high burden of recommitment at the expiration of each period (here, every 180 days).” *Id.* at 663.

In the end, *M.W.*, did not decide whether a person facing 180-day recommitment under this statute had a constitutional jury trial right but assumed they did. *Id.* at 664. This Court should hold there is a constitutional right to a jury trial for 180-day commitment, which would require a knowing, intelligent and voluntary waiver of this right. *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010) (“to be sufficient, the record must contain the defendant's personal expression of waiver; counsel’s waiver on the defendant's behalf is not sufficient.”).

This Court conducts de novo review of a constitutional challenge to a statute, with a presumption that the statute is constitutional. *M.W.*, 185 Wn.2d at 647 (citing *City of Bothell v. Barnhart*, 172 Wn.2d 223, 229, 257 P.3d 648 (2011)). Courts apply a two-part test to determine whether a provision grants the right to a jury trial. *Id.* at 662. First, courts “determine the scope of the right to a jury trial as it existed at the time of our

founding in 1889; second, we determine if the type of action at issue is similar to one that would include the right to a jury trial at that time.” *Id.*

Division I analyzed this history in the context of 14-day involuntary commitments in *S.E.*, and 90-day commitments in *C.B.* *S.E.*, 199 Wn. App. at 618-24; *C.B.*, 9 Wn. App.2d at 183-86. In both cases, the court looked to the Code of 1881 and early statutes. *Id.* In 1889, the jury trial right attached to a case involving a request for indefinite detention. *S.E.*, 199 Wn. App. at 619; *C.B.*, 9 Wn. App.2d at 183. Section 1632 of the 1881 Code provided an individual with the right to demand a jury trial in a case to decide whether she could be committed indefinitely to a

“hospital for the insane.”<sup>2</sup> *Id.*; see also *Sherwin v. Arveson*, 96 Wn.2d 77, 83, 633 P.2d 1335 (1981) (“[T]he Code of 1881, s 1632, which was in effect when the constitution was adopted, provided that when the mental condition of a person was the subject of judicial inquiry, he had the right to demand a jury trial”).

*S.E.*’s detailed analysis of the laws at the time of statehood and later territorial statutes found that “available authority suggests that, in 1889, persons suspected of suffering from insanity were often subject to being detained without prior jury authorization for up to 60 days or more.” *S.E.*, 199 Wn. App. at 619. *S.E.* also considered that “the 1915 legislature did not require that a jury determine whether a person’s suspected insanity justified up to 60 days detention.” *Id.* at 622 (citing

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<sup>2</sup> Section 1632 of the Code of 1881 read: “The probate court of any county in this territory, or the judge thereof, upon application of any person under oath, setting forth that any person by reason of insanity is unsafe to be at large, or is suffering under mental derangement, shall cause such person to be brought before said court or judge at such time and place as the court or judge may direct; and shall cause to appear at said time and place, one or more respectable physicians who shall state under oath in writing, their opinion of the case, which opinion shall be carefully preserved and filed with the other papers in the case, and if the said physician or physicians shall certify to the insanity or idiocy of said person, and it appear to the satisfaction of the court or judge that such is the fact, said court or judge shall cause such insane or idiotic person to be taken to and placed in the hospital for the insane in Washington territory[5]: Provided, That such person or any person in his behalf, may demand a jury to decide upon the question of his insanity, and the court or judge shall discharge such person if the verdict of

Laws of 1915, ch. 105, § 1, at 303-04) Likewise, later, in 1951, 60 days continued to be the amount of time a person could be detained without a jury to decide “whether a person’s suspected insanity justified the 60-day detention period.” *Id.* at 622 (citing Laws of 1951, ch. 139, § 28, at 350). Accordingly, *S.E.* determined there was no constitutional right to a jury trial on a 14-day commitment where “there was no proceeding in 1889 to which the jury trial right attached akin to the proceeding referenced as a probable cause hearing in RCW 71.05.240.” *Id.* at 627.

However, *S.E.’s* analysis supports the right for a jury trial for 180-day commitments, because the jury trial right followed commitment for more than 60 days. *S.E.*, 199 Wn. App. at 619-20. Though Division I extended *S.E.’s* holding to 90-day commitment in *C.B.*, 9 Wn. App. at 185, this does not follow from *S.E.’s* analysis and certainly should not apply to 180-day commitments. This Court should hold the right to a jury trial in proceedings of 180 days based on *S.E.’s* finding that 60 days was

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the jury is that he is not insane.” Code of 1881, ch. 110, § 1632, at 277.

the amount of time a person could historically be detained “without controversy.” *S.E.*, 199 Wn. App. at 624.

*M.W.* briefly referenced these historical antecedents in reference to the 180-day recommitment period at issue here, stating in dicta that “[t]his civil commitment process is distinguishable from indefinite civil commitment schemes that require jury trials on initial commitment because the ITA involves only short periods of commitment and requires the State to file a new petition and carry a high burden of recommitment at the expiration of each period (here, every 180 days).” *M.W.*, 185 Wn.2d at 663. The Court noted that *Quesnell* stands for the contrary conclusion, *id.* (citing *Quesnell*, 83 Wn.2d at 240, which held there is a constitutional right to a jury in involuntary commitment hearings), but ultimately assumed this constitutional right applied in its analysis of former RCW 71.05.320(3)(c)(ii). *M.W.* 185 Wn.2d at 663-64. Even if this Court does not hold that a person has a constitutional right to a jury trial for 180-day recommitments, at a minimum, this Court should assume the constitutional protections are required in respect to 180-day recommitment as in *M.W.*, and find this this

requires the constitutional protections of a knowing, intelligent, and valid waiver of the jury trial right. *Hos*, 154 Wn. App. at 250. Because the record does not reflect that P.R. knowingly and voluntarily waived this right, reversal and remand for a new trial is required.

F. CONCLUSION.

A person must be told of their jury trial right in order to waive it. A mentally ill person's absence from a court hearing should not be deemed sufficient to waive this right absent evidence in the record they were explicitly advised of this right prior to the commitment hearing. This is required based on the governing statutes, or alternatively, required because of the significant liberty interest at stake that requires treating this as a constitutional right. Because the record in P.R.'s case does not establish he was apprised of his right or waived it, the order of commitment should be reversed and remanded for a new hearing and advisement of his jury trial right.

DATED this 2nd day of September, 2020

Respectfully submitted,

s/ Kate Benward

Washington State Bar Number 43651  
Washington Appellate Project  
1511 Third Ave, Suite 610  
Seattle, WA 98101  
Telephone: (206) 587-2711  
Fax: (206) 587-2710  
E-mail: [katebenward@washapp.org](mailto:katebenward@washapp.org)

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

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IN RE DETENTION OF )

P.R., )

Appellant. )

) NO. 54392-3-II  
)  
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