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NO. 45111-5-II

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

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In re Detention of  
D.W., G.K., S.B., E.S., M.H., S.P., L.W., J.P., D.C., and M.P.,

STATE OF WASHINGTON,

Appellant,

v.

D.W., G.K., S.B., E.S., M.H., S.P., L.W., J.P., D.C., and M.P.,

Respondents.

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

The Honorable Kathryn J. Nelson, Judge

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BRIEF OF RESPONDENTS

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A. INTRODUCTION

The centrality of mental health treatment to the Involuntary Treatment Act (ITA), chapter 71.05 RCW, is reflected in its common name. The first word is “Involuntary,” reflecting the massive curtailment of individual liberty it represents. The second word is “Treatment.” The Involuntary *Treatment* Act permits short-term (72-hour and 14-day) civil commitment to certified evaluation and treatment facilities (E&T).

Respondents were detained for periods of time ranging from 72 hours to as long as 10 days in general hospital emergency rooms while awaiting beds at an E&T. The record shows emergency rooms are unequipped to provide therapeutic mental health care. The purported authority for such detention is WAC 388-865-0526, permitting “single bed certification.”

The Superior Court concluded the rule was not intended to resolve overcrowding and these detentions violated the ITA as well as state and federal due process. On appeal, Pierce County argues confinement to an emergency room is constitutionally adequate treatment; WAC 388-865-0526 authorizes the detentions; and the court lacked jurisdiction to decide the validity of the rule in an ITA proceeding. The Department of Social and Health Services (DSHS) challenges the superior court’s decision solely on procedural grounds.

Substantive due process requires that those individuals involuntarily confined by the government, purportedly for treatment, actually receive treatment providing a realistic opportunity for improvement. The ITA reflects awareness of the constitutional parameters by permitting detention solely to a certified E&T and providing for a statutory right to treatment. The superior court reasonably concluded that confining mentally ill persons to an emergency room without therapeutic mental health treatment violates both the ITA and due process. This Court should reject appellants' procedural arguments because there is no adequate remedy for these important constitutional questions under the Administrative Procedure Act (APA).

Mental health treatment has become a scarce resource. The solution urged by the appellants is that mentally ill persons should be locked up in an emergency room to wait their turn. Respondents urge this Court to reject this so-called solution and affirm the Superior Court's ruling.

B. ISSUES

1. The Fourteenth Amendment requires that persons involuntarily committed for mental health treatment must receive treatment offering a realistic opportunity for improvement. The emergency rooms where respondents were confined do not provide therapeutic mental health treatment, which is outside the scope of their practice. Does involuntary confinement while awaiting treatment violate substantive due process?

2. Chapter 71.05 RCW permits short-term detentions only for purposes of providing the statutory right to appropriate individualized mental health treatment in a certified evaluation and treatment facility. Other than an exception for emergency medical care, chapter 71.05 RCW does not permit detention to any other facility or for any other reason. Were respondents unlawfully detained in violation of the law?

3. Exhaustion of administrative remedies is not required when no adequate administrative remedy is available, when issues of broad public import require prompt determination, or when another statute expressly provides for judicial review. These cases present far-reaching and significant constitutional issues, and formal APA proceedings are not reasonably accessible to detained persons. Additionally, the ITA expressly provides for judicial review of the legality of detention, and all necessary parties were permitted to intervene and be heard. Did the Superior Court

properly exercise its authority to reach the merits of the constitutional and statutory questions before it?

C. STATEMENT OF THE CASE

Respondents are all persons who were involuntarily detained for mental health treatment under chapter 71.05 RCW. Because there was no space available in a certified E&T, they were confined to the emergency department of a local general hospital under a single bed certification.

D.W. was detained for at least eight days, from February 5 until February 13, 2013, at Madigan Army Medical Center until he was transferred to an E&T. CP 6, 8, 11, 728. L.W. was detained for six days from February 9 through February 15, 2013, at St. Joseph Medical Center. CP 441, 702-04. E.S. was detained at St. Anthony Hospital and later St. Joseph for nine days from February 12 through February 21, 2013. CP 672, 680. J.P. was detained at Recovery Response Center for six days from February 10 through February 16, 2013. CP 453, 456, 457, 710. G.K. was detained for three days at Good Samaritan Hospital from February 8 through February 11, 2013. CP 18, 652, 660. M.P. was detained for three days at St. Anthony from February 25 through February 27, 2013. CP 497, 502. D.C. was detained for three days from February 25 through February 28, 2013 at St. Joseph. CP 475, 480, 716. M.H. was detained for six days from February 13, 2013 through February 19, 2013 at Good Samaritan Hospital.

CP 409, 684, 691. S.B. was detained for three days at St. Joseph from February 12 through February 15, 2013. CP 662, 670-71. S.P. was detained at Good Samaritan for 2 days from February 14 to February 15, 2013. CP 425, 693.

In each case, there was apparently a single bed certification under WAC 866-065-0526 for an otherwise uncertified facility. The single bed certifications are not included in the court file except where counsel in the superior court attached them to the motions to dismiss. The reasons for the single bed certifications are not stated on the certification forms. CP 6, 456, 457, 475, 497. In none of the respondents' cases does the record indicate a need for ongoing medical treatment requiring hospitalization in a general hospital bed.<sup>1</sup>

Respondents filed motions to dismiss, then withdrew the motions while still requesting other appropriate relief. CP 1-5, 353-54.<sup>2</sup> The superior court Commissioner held a hearing, inviting input from interested parties including DSHS and Optum, the Regional Support Network responsible by contract for short-term mental health services in Pierce County. CP 111-88.

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<sup>1</sup> One respondent, D.W., was initially treated for MRSA in the emergency room. However, it appears he was no longer being treated by the time his 14-day commitment began. CP 8.

<sup>2</sup> Virtually identical pleadings were filed in every case. Citation to the other cases is omitted for purposes of brevity.

Nathan Hinrichs, the supervisor of the designated mental health professionals (DMHPs) in Pierce County testified their practice is to seek single bed certifications if the five local E&Ts have no beds available. CP 117-18. In no case does Western State Hospital ask for a reason why the certification is needed before granting it. CP 119. Hinrichs testified that, while the hospitals do the best they can, the mental health needs of persons detained under the ITA are outside the scope of their practice. CP 124. He explained the hospitals provide less care than an E&T and do so in a more restrictive environment. CP 124. While medication “might” be administered, patients on single bed certifications do not get the counseling or therapeutic support “that’s probably necessary for them to recover.” CP 124.

David Reed, head of adult mental health programs at the Division of Behavioral Health and Recovery agreed, “[I]t’s not optimum treatment.” CP 171. He also testified the single bed certification process was not developed to meet the current lack of inpatient capacity, which was not foreseen at the time WAC 388-065-0526 was written. CP 172. He testified some general hospital emergency rooms can provide evaluations under chapter 71.05 RCW, some have social workers available at all times, and some provide some psychiatric treatment. CP 182.

The parties filed briefs, as did DSHS as amicus. CP 29-42. In each case, the Commissioner ruled the detention was unlawful. CP 47-55.

The Pierce County prosecutor, representing the DMHPs who petitioned for commitment, moved to revise the Commissioner's ruling. CP 82-88. DSHS again filed a substantial amicus brief. CP 60-81. It also filed a response to the court's request for supplemental briefing. CP 260-64. The court later entered an order permitting DSHS to intervene as a party. CP 290-92.

The court entered a ruling revising the Commissioner's ruling but still finding the detentions unlawful. CP 297-305. Citing Hinrich's and Reed's testimony, the court found it essentially "uncontroverted" that individuals held under single bed certifications receive less treatment and are subject to more restrictive conditions than in an E&T. CP 299-300.

The court concluded Washington law does not permit detention under single bed certifications solely because of a lack of capacity at certified evaluation and treatment facilities and such use was not contemplated when the rule was enacted. CP 302. Finally, the court concluded that the use of single bed certifications without a medical reason violated both chapter 71.05 RCW, article XIII, section 1 of the state constitution, and the due process clauses of both the state and federal constitutions. CP 302-03.

D. ARGUMENT

1. CONFINEMENT OF THE MENTALLY ILL IN EMERGENCY ROOMS VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT DOES NOT PROVIDE A REALISTIC OPPORTUNITY FOR IMPROVEMENT.

a. Persons Confined by Their Government, Ostensibly for Purposes of Treatment, Have a Right to Adequate Treatment Under the Due Process Clause of the Fourteenth Amendment.

When the state confines a person under civil commitment proceedings, rather than for violation of criminal law, its only legitimate interest is in rehabilitation. Ohlinger v. Watson, 652 F.2d 775, 777-78 (9th Cir. 1980). Persons so confined are constitutionally entitled to adequate treatment. Id.

The constitutional right to treatment is not a new substantive right. Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974), supplemented, 68 F.R.D. 589 (D. Minn. 1975), aff'd, 525 F.2d 987 (8th Cir. 1975). The State has no general obligation to provide services to its citizens. Id. at 498. Indeed, “the State could close its institutions for the mentally retarded without offending the Constitution.” Id. at 499.

The right to treatment is grounded in the more general due process principle that the nature of detention must bear a reasonable relationship to its purpose. Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1121 (9th Cir. 2003) (discussing Jackson v. Indiana, 406 U.S. 715, 738, 92 S. Ct. 1845,

1858, 32 L. Ed. 2d 435 (1971)). Adequate treatment is required because otherwise, detention for purposes of treatment would essentially be indefinite confinement. Ohlinger, 652 F.2d at 778. “[T]he State cannot be permitted to affirmatively confine or institutionalize these persons on the basis of non-criminal status without providing them with adequate treatment.” Welsch, 373 F. Supp. at 499.

Due process requires that civil commitment “be accompanied by minimally adequate treatment designed to give each committed person ‘a realistic opportunity to be cured or to improve his or her mental condition.’” Id. (quoting Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971) and 344 F. Supp. 373 (1972) aff’d. sub nom. Wyatt v. Aderbolt, 503 F.2d 1305 (5th Cir. 1974)). In short, when the purpose of detention is treatment, constitutionally adequate treatment must be provided. Mink, 322 F.3d at 1121-22.

b. It Falls to the Courts to Determine Whether Treatment Is Constitutionally Adequate.

“It is the Court’s duty, under the Constitution, to assure that every resident of [state hospital] receives at least minimally adequate care and treatment consonant with the full and true meaning of the due process clause.” Welsch, 373 F. Supp. at 498. Federal courts have exercised that duty and reviewed treatment conditions for those detained due to mental

illness since the early 1970s. Ohlinger, 652 F.2d at 778; Welsch, 373 F. Supp. at 487; Wyatt, 325 F. Supp. at 784. They have continued to do so in the current millennium. Mink, 322 F.3d at 1121; Turay v. Seling, 108 F. Supp. 2d 1148, 1151 (W.D. Wash. 2000), aff'd in part, dismissed in part sub nom. Turay v. Anderson, 12 F. App'x 618 (9th Cir. 2001).

Ohlinger illustrates the scope of judicial review of treatment conditions. The fact that something called “treatment” is provided does not preclude judicial review for adequacy. Ohlinger, 652 F.2d at 780. The appellants in Ohlinger were given indeterminate life sentences based on convictions for, and mental conditions predisposing them to, certain sex offenses. Id. at 776. They were then confined at the Oregon State Penitentiary. Id. They appealed after the federal district court denied their request for declaratory judgment and an injunction requiring constitutionally adequate treatment. Id.

Although some group therapy was available at the penitentiary, the court concluded the treatment was insufficient. Id. at 780. While the exact contours of relief should be left to experts in the field, the conditions of confinement violated the constitution. Id.

“Professional judgment, as the Supreme Court has explained, creates only a “presumption” of correctness; welcome or not, the final responsibility belongs to the courts.” Cameron v. Tomes, 990 F.2d 14, 20 (1st Cir. 1993)

(citing Youngberg v. Romeo, 457 U.S. 307, 323, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982)). Furthermore, “Lack of funds, staff, or facilities cannot justify the State’s failure to provide . . . that treatment necessary for rehabilitation.” Ohlinger, 652 F.2d at 779. While mental health professionals should determine what treatment is appropriate, it is for the courts to set a constitutional floor that protects the rights of detained persons in the face of bureaucratic and budgetary wrangling. Mink, 322 F.3d at 1121-22; Cameron, 990 F.2d at 20; Ohlinger, 652 F.2d at 779.

c. “Warehousing” Is Not Constitutionally Adequate Treatment.

Constitutionally adequate treatment means more than keeping a person warm and dry. Substantive due process requires that “civilly committed persons . . . be provided with mental health treatment that gives them a ‘realistic opportunity to be cured or improve the mental condition for which they were confined.’” Mink, 322 F.3d at 1121 (quoting Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000)). Detaining mentally ill persons in emergency rooms while awaiting mental health treatment fails to meet this minimal standard. The superior court correctly ruled WAC 388-865-0526 is unconstitutional to the extent it purports to authorize these detentions.

i. Provision of Basic Necessities While Awaiting Treatment Does Not Constitute Adequate Treatment.

“It is settled that those who are confined by the state, for whatever reason, are entitled under the Constitution to food, clothing, medical care, and reasonable efforts to secure physical safety.” Cameron, 990 F.2d at 18. But the provision of these basic necessities does not amount to constitutionally adequate mental health treatment.

Federal courts have repeatedly distinguished “warehousing” from constitutionally adequate treatment: “All too often the promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation.” Sharp, 233 F.3d at 1172 (quoting Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975)). Those involuntarily confined via civil proceedings “cannot simply be warehoused and put out of sight; they must be afforded adequate treatment.” Turay, 108 F. Supp. 2d at 1151.

The fact that the person being warehoused is awaiting a treatment bed is immaterial. Mink stands for the proposition that persons detained for treatment may not constitutionally be detained while awaiting treatment. 322 F.3d at 1121-22. In that case, persons awaiting trial were detained for a competency determination by the state hospital. Id. at 1105. Because the state hospital was full and refused to accept them, they were forced to wait in jails for weeks or even months. Id. at 1106. The court cited the general rule

that the nature and length of detention must be related to its purpose and the more specific requirement that those detained for treatment are entitled to treatment providing a realistic chance of cure or improvement. Id. at 1121 (citing Jackson, 406 U.S. at 738 and Sharp, 233 F.3d 1166).

The jails in Mink could provide medication management for those willing to be medicated and some basic psychiatry designed to stabilize the person. 322 F.3d at 1106. None, however, provided treatment designed to restore competency. Id. Because the jails were not capable of providing the treatment that was the purpose of the detention, the court found a violation of due process. Id. at 1122. The court determined the state had no legitimate interest that could outweigh the patients' liberty interests in both restorative treatment and freedom from incarceration. Id. at 1121.

The federal district court came to a similar conclusion in Advocacy Center for Elderly & Disabled v. Louisiana Dep't of Health & Hospitals, 731 F. Supp. 2d 603, 621 (E.D. La. 2010). There, potentially incompetent persons awaiting trial were detained in jail because the mental health facility was full. Id. Although a limited treatment program was provided, the court concluded the detention did not bear a reasonable relationship to its purpose of determining or restoring competency. Id.

“The Incompetent Detainees remain in jail because [the state mental health facility] is full, not because there is any suggestion that remaining in

jail might restore their competency.” Id. The court concluded the decision to keep the detainees in jail was an economic one, which could not outweigh the detainees’ liberty interests. Id. at 623. “A state’s constitutional duties toward those involuntarily confined in its facilities does not wax and wane based on the state budget.” Id. at 626. Under Mink and Advocacy Center, mental health detainees may not be detained without treatment designed to cure or at least improve their mental condition. 322 F.3d at 1121; 731 F. Supp. 2d at 621.

ii. The Superior Court’s Ruling Correctly Reflects the Constitutional Standard.

At the show-cause hearing, Hinrichs testified those detained in general hospitals did not receive “therapeutic support that’s probably necessary for them to recover.” CP 124. Patients who are not receiving the care “necessary for them to recover” are not receiving treatment that provides a “realistic opportunity to be cured or improve.” Mink, 322 F.3d at 1121. Therefore, this testimony alone is sufficient evidence to support the superior court’s decision that the detentions violate substantive due process. Id. at 1121-22.

The superior court correctly found the evidence at the hearing regarding the inadequacy of treatment was uncontroverted. CP 299-300. Hinrichs also testified the detainees need mental health care that is outside

the scope of practice of the general hospitals. CP 124. He explained persons detained in emergency rooms receive less treatment and are subject to more restrictive conditions than in an E&T. CP 124.

Reed's acknowledgement that the treatment afforded in emergency rooms was, "not optimum," neither contradicts nor refutes Hinrich's assertions. CP 171. While some patients sometimes receive some psychiatric treatment while confined to emergency rooms, this is insufficient to meet the constitutional standard. CP 182. In both Mink and Advocacy Center, patients detained in jail were similarly provided some minimal psychiatric care such as medication management. Mink, 322 F.3d at 1121-22; Advocacy Center, 731 F. Supp. 2d at 621. Like the minimal care in those cases, emergency room care fails to meet the constitutional standard because it is not designed to provide a realistic chance of improvement. Id.

Indeed, appellants have all but admitted that patients waiting in emergency rooms on single bed certifications receive basic necessities, not mental health treatment. In its memorandum in support of revising the commissioner's ruling below, Pierce County argued "keeping the patients safe and stable is not nothing." CP 85. Single bed certifications are used "to ensure that individuals like the respondents are not out on the street and posing a danger to themselves and/or others, but rather are housed for a few

days in a warm and dry facility.” Brief of Appellant Pierce County DMHPs at 23.

Appellants attempt to distinguish Mink because the patients in this case did not wait in jail, but in hospital emergency rooms. This is a distinction without a difference. Their freedom of movement in the emergency rooms was restricted more than would be necessary to treat their mental illness. CP 124. The reason for their detention in the emergency room was the same as the reason for the jail detention in Mink: the appropriate facilities were full. CP 117-18.

Appellants argue the courts must defer to their determination of what treatment is adequate. Brief of Appellant Pierce County DMHPs at 5. That might be true if the commitment were to an institution designed to provide appropriate treatment. In Kansas v. Hendricks, 521 U.S. 346, 368 n. 4, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), the Supreme Court noted that, by committing sex offenders “to an institution expressly designed to provide psychiatric care and treatment,” the state had “doubtless satisfied its obligation to provide available treatment.” But that is not the case here. The hospitals where respondents were confined are not expressly designed to provide psychiatric care and treatment. On the contrary, the undisputed testimony at the show-cause hearing was that psychiatric care is outside the scope of their practice. CP 124.

Respondents were deprived of their liberty and held in hospital emergency rooms. There, they were provided the bare necessities that the state must provide any confined person, including a convicted criminal. No one believed they needed emergency medical care or that such care was likely to improve their mental condition. They were there for one reason only: the E&T beds were full. The superior court correctly concluded their detention without adequate treatment violated due process. Mink, 322 F.3d at 1121-22.

2. DETENTION TO AN EMERGENCY ROOM WITHOUT THERAPEUTIC TREATMENT VIOLATES CHAPTER 71.05 RCW.

Detentions under the ITA must strictly comply with statutory requirements for two reasons. First, the statute specifically excludes other means of involuntary commitment: “Persons suffering from a mental disorder may not be involuntarily committed for treatment of such disorder except pursuant to the provisions of this chapter.”<sup>3</sup> RCW 71.05.030. Second, the ITA must be strictly construed because it involves a significant deprivation of liberty. In re Detention of G.V., 124 Wn.2d 288, 296, 877 P.2d 680 (1994); In re Detention of LaBelle, 107 Wn.2d 196, 205, 728 P.2d 138 (1986). In fact, courts have repeatedly referred to civil commitment as a

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<sup>3</sup> The statute also lists other exceptions not relevant here: “chapter 10.77 RCW, chapter 71.06 RCW, chapter 71.34 RCW, transfer pursuant to RCW 72.68.031 through 72.68.037, or pursuant to court ordered evaluation and treatment not to exceed ninety days pending a criminal trial or sentencing.” RCW 71.05.030.

“massive curtailment of liberty.” In re Harris, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting Humphrey v. Cady, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)). “[S]trict construction of the civil commitment statutes is required both by the language of those statutes and our case law interpreting them.” In re Detention of Swanson, 115 Wn.2d 21, 28, 804 P.2d 1 (1990).

The superior court correctly concluded the ITA does not permit detention to a general hospital emergency room without medical need. The detentions challenged in this case violate the statutory requirement of detention to a certified evaluation and treatment facility, the statutory right to appropriate treatment, and the purposes of the ITA.

a. Detentions to Emergency Rooms Violate the ITA, Which Authorizes Detention *Only* to Facilities Providing Appropriate Mental Health Treatment.

Under the ITA, individuals may be detained and committed in certified E&Ts and state psychiatric hospitals. RCW 71.05.150; RCW 71.05.153; RCW 71.05.230. The general hospital emergency rooms where respondents were detained are not certified E&Ts. The single bed certification rule attempts to circumvent the statutory requirements by commandeering a bed in a hospital emergency room and “certifying” that bed an E&T. WAC 388-865-5026. But merely “certifying” a bed as an E&T does not make it one.

The ITA defines “evaluation and treatment facility” as a facility that is both certified by DSHS and able to provide “appropriate inpatient care to persons suffering from a mental disorder.” RCW 71.05.020(16). The testimony at the show cause hearing demonstrates, and the superior court correctly found, that general hospital emergency rooms are not able to provide that care. CP 124, 299-300. As discussed above, the testimony showed that the mental health needs of ITA detainees are outside the scope of the hospitals’ practice and the hospitals do not provide the therapeutic mental health treatment that is necessary for recovery. CP 124. Because they do not provide necessary treatment, they are not E&Ts, and detention to them is unlawful.

Only one provision of the ITA permits detention to any facility other than one providing appropriate mental health treatment. If mental health professionals determine the person’s needs would be better served in a chemical dependency facility, the person may be transferred there. RCW 71.05.210. And if the person’s “physical condition reveals the need for hospitalization,” the person must be transferred to an appropriate hospital. RCW 71.05.210. Nothing in the statute permits detention to any type of facility without a demonstrated, specific need for the services of that facility.

In re Detention of W., 70 Wn. App. 279, 852 P.2d 1134 (1993), stands for the proposition that detention under the ITA must be to a certified

facility as required by the statute. In that case, the trial court, based on its own assessment of medical need, ordered an individual be committed for 90 days at Harborview Medical Center, not a certified E&T. Id. at 281. The state, representing Harborview, argued nothing in the ITA permitted detention to an uncertified facility. Id. at 283-84. On appeal, this Court concluded RCW 71.05.320, stating that the court “shall remand” to DSHS or a certified facility, was mandatory and precluded remand to any other facility. Id. at 284.

Like the trial court in Detention of W., the DMHPs and the courts<sup>4</sup> lacked statutory authority to detain people to uncertified facilities in the cases below. Id. at 283-84. The only difference is that, since Detention of W., a rule has been enacted that purports to authorize what the statute does not. WAC 388-865-0526.

Appellants argue WAC 388-865-0526 fills a gap in the statute regarding what to do when the E&Ts are full. Brief of Appellants Pierce County DMHPs at 25-29. This is incorrect. There is no gap. Two statutory provisions address this issue. First, when a designated county mental health professional petitions for detention, “the facility providing seventy-two hour evaluation and treatment must immediately accept on a provisional basis the

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<sup>4</sup> Some of the detentions objected to below were emergency detentions signed only by designated mental health professionals under RCW 71.05.153, while others included both the initial emergency detention and parts of the subsequent court-ordered 14-day commitment. CP 11, 352, 372, 388, 409, 480, 502, 652, 662, 684, 693, 702, 709, 720.

petition and the person.” RCW 71.05.070 (emphasis added). The Legislature thus contemplated immediate access to appropriate evaluation and treatment, not days of a holding pattern in an emergency room.

The court in Pierce County Office of Involuntary Commitment v. Western State Hospital, 97 Wn.2d 264, 269, 272, 644 P.2d 131 (1982), acknowledged this may lead to overcrowding of E&Ts. The court noted that persons could not be detained in jails and did not suggest they could be detained anywhere else. 97 Wn.2d at 269. The Legislature has had thirty years to amend the statute since that case was decided. It has not done so.

The law also provides for what should happen if no evaluation and treatment facility accepts the person: “[T]he facility shall furnish transportation, if not otherwise available, for the person to his or her place of residence or other appropriate place.” RCW 71.05.190. In other words, if no E&T is available, the state must send the person home. It does not say the state may keep a person confined in a hospital emergency room until such time as an E&T deigns to admit the person. The superior court correctly concluded that detention in medical facilities without need for medical treatment violates the ITA. CP 302; RCW 71.05.190.

b. Detentions to Emergency Rooms Violate the Statutory Right to Adequate Care and Individualized Treatment.

Likely in recognition of the constitutional principles discussed in section one of this brief, the ITA provides a statutory right to treatment for those detained. RCW 71.05.360. “Each person involuntarily detained or committed pursuant to this chapter shall have the right to adequate care and individualized treatment.” RCW 71.05.360. Each person involuntarily detained “shall” be evaluated and “shall receive such treatment and care as his or her condition requires.” RCW 71.05.210.

The standard for treatment required by the statute is actually higher than that imposed by the constitution. The constitution merely requires adequate treatment and exercise of professional judgment. The ITA requires “appropriate” treatment, “individualized” treatment, and “such treatment . . . as his or her condition requires.” RCW 71.06.210; RCW 71.05.360.

The statute places the responsibility on the Department to determine what care is appropriate and protect patients’ constitutional rights. RCW 71.05.520. But this does not preclude judicial review. While deference to medical and agency judgment is appropriate, that deference is not absolute. LaBelle, 107 Wn.2d at 207-08 (citing Durham & LaFond, The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment, 3 Yale L. & Pol’y Rev. 395, 430-41 (1985)).

Washington's Supreme Court warned of the risk that excessive judicial deference could lead to indefinite and inappropriate confinement of persons deemed mentally ill in violation of their constitutional rights. LaBelle, 107 Wn.2d at 207-08. "[T]here 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. Courts should, and do, address violations of constitutional and statutory rights to treatment. Mink, 322 F.3d at 1121-22; Advocacy Center, 731 F. Supp. 2d at 621; Turay, 108 F. Supp. 2d at 1151.

Appellants cite Detention of W. to argue that courts should not determine what treatment or placement is appropriate. Brief of Appellant Pierce County DMHPs at 6-8. But that argument ignores crucial language from the court's decision in Detention of W. This Court did not hold that courts may never step in to protect patients' rights to adequate treatment. Instead, the Court criticized the trial court for committing W. to an uncertified facility (Harborview Medical Center) because the court assumed W. would not otherwise receive adequate care. 70 Wn. App. at 285. The court specifically distinguished the "anticipated" violation of the right to treatment from an actual violation. 70 Wn. App. at 285. This Court held that, after remand to a statutorily authorized facility, it was the responsibility of DSHS to determine, in the first place, whether an individual needed

medical care and transfer to a hospital under RCW 71.05.210. Detention of W., 70 Wn. App. at 285. This Court held courts should respond only to an “actual” rather than merely “anticipated” failure to provide appropriate treatment. Id.

The potential that existed in Detention of W. has become actual in this case. Respondents were actually detained in general hospital emergency rooms where they did not receive appropriate, individualized mental health treatment as required by law. CP 124; RCW 71.05.210; RCW 71.05.360. Under these circumstances, the superior court correctly concluded respondents did not receive appropriate treatment under the ITA.

c. Detention to Emergency Rooms While Awaiting Treatment Violates the Purposes of the ITA to Provide Appropriate Treatment, Prevent Indefinite Confinement, and Safeguard Individual Rights.

The ITA authorizes detention in certified E&Ts or state hospitals for purposes of treatment. Detention in general hospitals without appropriate treatment violates not only the plain language but also the expressed intent of the ITA.

RCW 71.05.010 lists the purposes of the ITA:

- (1) To prevent inappropriate, indefinite commitment of mentally disordered persons. . . .
- (2) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders

- (3) To safeguard individual rights;
- (4) To provide continuity of care for persons with serious mental disorders;
- (5) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;
- (6) To encourage, whenever appropriate, that services be provided within the community;
- (7) To protect the public safety

The Legislature has authorized involuntary confinement in order to provide “prompt evaluation” and “appropriate treatment” to persons with mental disorders while preventing “inappropriate, indefinite commitment” and generally safeguarding both public safety and individual rights. RCW 71.05.010.

The detentions challenged in this case conflict with many, if not most, of the stated purposes of the ITA. They fail to prevent inappropriate commitment, because the emergency room is an inappropriate location for commitment. RCW 71.05.150; RCW 71.05.153; RCW 71.05.230. They fail to prevent indefinite commitment, as demonstrated by J.P.’s two back-to-back 72-hour detentions. CP 456, 457. They fail to provide “prompt evaluation, as in J.P.’s case where the evaluation could not occur in the first 72-hour detention. CP 453. All of the cases show the failure to provide “timely and appropriate treatment.” Instead, patients are forced to wait for

days without appropriate treatment. As discussed above in section C.1., these detentions utterly fail to protect individual liberties. They also fail to prevent unnecessary expenditures, as demonstrated by the testimony that it actually costs the state more to house people in emergency rooms than in E&Ts. CP 56.

Respondents agree the lack of certified mental health treatment beds is a dilemma that requires a solution. But that solution must comply with the law and the constitutional principles discussed in part one of this argument. The fact that the people of Washington have not provided sufficient funding to meet these obligations does not warrant depriving respondents of their constitutional and statutory rights. Mink, 322 F.3d at 1121-22; Advocacy Center, 731 F. Supp. 2d at 621.

3. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED BECAUSE THE APA FAILS TO PROVIDE ADEQUATE RELIEF.

Appellants reject the superior court's authority under the Uniform Declaratory Judgments Act (UDJA)<sup>5</sup> and argue the superior court lacked

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<sup>5</sup> In its ruling, the superior court cited its authority under the UDJA to declare the constitutional and statutory rights of individuals. RCW 7.24.020. The UDJA "is to be liberally construed and administered." RCW 7.24.120; Graham v. Northshore Sch. Dist. No. 417, 99 Wn.2d 232, 239, 662 P.2d 38 (1983). The act reflects the judiciary's inherent constitutional authority to judge the constitutionality of acts by the other two branches of government. In re Salary of Juvenile Dir., 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (citing, *inter alia*, United States v. Nixon, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) and Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803)). "The declaration of legal rights and interpretation of legal questions is the

jurisdiction to decide this case because the APA is the exclusive remedy for agency action. But the superior court's jurisdiction is not at issue. "Superior courts in this state 'have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.'" Cost Mgmt. Servs. v. City of Lakewood, \_\_\_ Wn.2d \_\_\_, 310 P.3d 804, 811 (2013) (quoting Const. art. IV, § 6).

Exhaustion of administrative remedies is not a question of jurisdiction. Cost Mgmt. Servs., 310 P.3d at 811. It is a doctrine of judicial administration, under which administrative procedures must be followed before resorting to the courts when two conditions are met: (1) an adequate administrative remedy exists that should be tried first and (2) the agency has special expertise in the area that is outside the traditional areas of expertise of judges. Id.

The court properly did not require exhaustion of administrative remedies in this case because (1) the APA fails to provide a meaningful avenue for relief, (2) this case involves questions of broad public import requiring prompt and ultimate determination (3) the ITA provides for judicial review of the legality of detention, and (4) DSHS has not been prejudiced in its ability to represent its interests.

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province of the courts and not of administrative agencies." Salary of Juvenile Dir., 87 Wn.2d at 240.

a. The APA Fails to Provide Meaningful Relief.

The general rule requiring exhaustion of administrative remedies is conditioned upon the availability of an adequate remedy. The Washington Supreme Court recently stated the rule: “when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene.” Cost Mgmt. Servs., 310 P.3d at 808 (emphasis added) (citing Wright v. Woodard, 83 Wn.2d 378, 381, 518 P.2d 718 (1974)). The primary question is “whether the relief sought can be obtained through an available administrative remedy.” Cost Mgmt. Servs., 310 P.3d at 808. Given the timelines of the ITA and the status of respondents, the superior court properly addressed the issues before it because the APA fails to provide any meaningful relief.

At the time of their confinement, respondents were deemed to be severely mentally ill. They are also indigent, as indicated by the appointment of counsel both below and in this Court. They were also, at the time, confined to a hospital room in Tacoma. Their detentions were brief, 72 hours, or, for some, 14 days following the initial detention. To say that the APA provides inadequate relief under these circumstances is an understatement.

Appellants suggest a petition to review the rule, a petition for rule-making, or a petition for judicial review should have been filed under RCW

34.05.570. Brief of Appellant DSHS at 22-23. That statute requires a petition be filed in Thurston County Superior Court. RCW 34.05.570(2)(b)(i). Presumably, the filing fee of \$200 must also be paid. RCW 34.05.514(1); RCW 36.18.020(2)(c). There is no right to counsel in civil proceedings under the APA. This is not adequate relief for those unlawfully detained in a Tacoma emergency room without access to funds or legal counsel.

Neither appellant has cited any case where a person who is essentially imprisoned by the government must follow the APA in order to challenge conditions of detention. On the contrary, proceedings involving the Department of Corrections (DOC) are expressly exempted from application of the APA. RCW 34.05.030. This is because DOC needs to deal quickly and decisively with prison administration issues, and APA proceedings are too time-consuming and too burdensome: “[T]he unique nature of prison disciplinary matters which require prompt, sure, and fair resolution, as contrasted to the formal, time-consuming and adversarial procedures required by the APA, leads inexorably to the conclusion that prison disciplinary proceedings are outside the scope and intent of the act.” Dawson v. Hearing Comm., 92 Wn.2d 391, 395, 597 P.2d 1353 (1979). The appellants would impose a heavier procedural burden on indigent individuals

confined to hospitals and deemed mentally ill than is placed on an agency of the state government.

Cost Management Services upheld this Court's decision because it was "properly based on the lack of an adequate administrative remedy." 310 P.3d at 810. The inadequacy of administrative remedies in this case likewise provides a basis for affirming the superior court's ruling.

b. The Constitutional and Statutory Rights of Involuntarily Committed Persons Are Matters of Broad Public Import that Do Not Require Exhaustion of Administrative Remedies.

Exhaustion of administrative remedies is also not required when the issue involves statutory interpretation or "issues of broad public import which require prompt and ultimate determination." Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 371, 166 P.3d 667, 677 (2007).<sup>6</sup> That is the case here.

The issue in Qwest was Bellevue's authority to impose a tax on Qwest's telephone services. Id. at 356. Bellevue moved to dismiss Qwest's suit on the grounds that it had not exhausted administrative remedies. Id. at 357. The trial court denied the motion and granted summary judgment in favor of Qwest. Id. at 358. The Supreme Court affirmed that decision,

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<sup>6</sup> The Washington Supreme Court recently rejected much of the discussion of original jurisdiction in Qwest Corp. in Cost Management Services. 310 P.3d at 810-12. But the Court did not alter the principle that exhaustion of administrative remedies was not required when there are issues of statutory interpretation or broad public import. Id.

approving this Court's conclusion that the case "involves issues of broad public import which require prompt and ultimate determination." Id. at 371. The Court also noted the issue was one of statutory interpretation and such questions "need not be referred to administrative agencies." Id. (citing Graham, 99 Wn.2d at 242).

This case likewise involves interpretation of a statute and questions of broad public import, including the constitutional due process rights of mentally ill persons involuntarily confined by the state. The Seattle Times has published a series of articles on the ongoing problem of psychiatric boarding.<sup>7</sup> The issue was significant enough that the Washington State Institute for Public Policy studied it and made recommendations more than two years ago. M. Burley, Inpatient Psychiatric Capacity in Washington State: Assessing Future Needs and Impacts, Document No. 11-10-3401, (Washington State Institute for Public Policy 2011), available at [http://www.wsipp.wa.gov/ReportFile/1093/Wsipp\\_Inpatient-Psychiatric-](http://www.wsipp.wa.gov/ReportFile/1093/Wsipp_Inpatient-Psychiatric-)

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<sup>7</sup> Brian Rosenthal, 'Boarding' mentally ill becoming epidemic in state, Seattle Times, Oct. 5, 2013, available at [http://seattletimes.com/html/localnews/2021968893\\_psychiatricboardingxml.html](http://seattletimes.com/html/localnews/2021968893_psychiatricboardingxml.html); Brian Rosenthal, Caring for mentally ill: 3 counties' success stories, Seattle Times, Oct. 6, 2013, available at [http://seattletimes.com/html/localnews/2021982957\\_psychiatricboardingyakimaxml.html](http://seattletimes.com/html/localnews/2021982957_psychiatricboardingyakimaxml.html); Associated Press, Pierce County judge outlaws 'parking' mentally ill, Seattle Times, May 21, 2013, available at [http://seattletimes.com/html/localnews/2021029280\\_parkingmentallyillxml.html](http://seattletimes.com/html/localnews/2021029280_parkingmentallyillxml.html). This Court can take judicial notice of these articles because their existence and the general nature of their content is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201.

Capacity-in-Washington-State-Assessing-Future-Needs-and-Impacts-Part-Two\_Full-Report.pdf.

c. The ITA Provides for Judicial Review of the Legality of Detention.

The APA specifically states it does not apply when another statute expressly provides for judicial review. RCW 34.05.510(3). The ITA is such a statute. Detained persons enjoy the right to “a hearing to review the legality of his or her detention.” RCW 71.05.360(11). The statute apparently contemplates this hearing occurring before a court, rather than an administrative body, because it expressly provides for the court to appoint counsel and experts, at public expense if necessary. RCW 71.05.360(12). The ITA also contemplates judicial review of the legality of detention by expressly reserving the rights of detainees to petition for a writ of habeas corpus. RCW 71.05.360(13).

The procedural posture of this case is virtually identical to that of Detention of W., where the State, representing Harborview, appealed from the superior court’s order affirming the commissioner’s ruling committing W. to Harborview instead of a certified E&T. 70 Wn. App. at 281. The subsequent enactment of the single bed certification rule should not preclude the superior court, or this one, from reaching the merits of the issues presented.

d. Appellants Have Had Sufficient Opportunity to Present Their Case.

DSHS also argues it had “no opportunity to present its case” below. Brief of Appellant DSHS at 23. This argument is disingenuous given the testimony and participation at the Commissioner’s show-cause hearing and the extensive amicus briefing. Indeed, DSHS filed longer briefs both for that hearing and for the Motion to Revise than did either party. CP 29-42, 60-81.

The ITA favors decisions on the merits of the issues presented. Detention of G.V., 124 Wn.2d at 296. This is partly because there are significant interests, both public and private, in the mental and physical well-being of detained individuals and in public safety. Id. Appellants would have this Court decline to address the important statutory and constitutional issues presented. To begin this case over again would not serve the interests of judicial efficiency. A petition for judicial review of a rule under the APA in Thurston County Superior Court would not significantly change the facts presented or the ability of the parties to develop arguments and respond. Access to the rule-making file would not alter the constitutional standard or the legislative intent against which these detentions must be measured. The true effect of declining to address the merits of this case would be to prevent those merits being addressed at all.

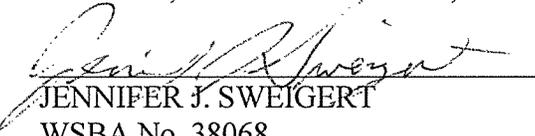
E. CONCLUSION

The problem is inadequate funding for mental health care in this state. This solution is not confining persons with mental illness in emergency rooms until treatment becomes available. This Court should affirm.

DATED this 15<sup>th</sup> day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

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In re Detention of:	)	
	)	
D.W., G.K., S.B., E.S., M.H., S.P., L.W.,	)	
J.P., D.C., and M.P.,	)	
	)	
STATE OF WASHINGTON	)	
	)	
Appellant,	)	
	)	
v.	)	COA NO. 45111-5-II
	)	
D.W., G.K., S.B., E.S., M.H., S.P., L.W.,	)	
J.P., D.C., and M.P.,	)	
	)	
Respondents.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENTS** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- |   |   |
|---|---|
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|---|---|

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF JANUARY 2014.

x *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

**January 15, 2014 - 3:06 PM**

## Transmittal Letter

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