 73535-7

FILED
Feb 29, 2016
Court of Appeals
Division I
State of Washington

NO. 73535-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

IN RE: THE DETENTION OF BRADLEY WARD

STATE OF WASHINGTON,

Appellant,

v.

BRADLEY WARD,

Respondent.

---

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

---

# BRIEF OF RESPONDENT

---

NANCY P. COLLINS
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

C. STATEMENT OF THE CASE ..... 3

D. ARGUMENT ..... 7

1. Basic procedural rules limit the issues on review ..... 7

a. The State makes no assignments of error ..... 7

b. The State's factual argument is not properly before the Court ..... 8

2. Where Mr. Ward's severe mental illness has led to in inhumane isolation and unreasonable warehousing at the SCC, the trial court appropriately granted an evidentiary hearing on the lawfulness of his continued confinement ..... 10

a. The State's authority to confine Mr. Ward does not override the constitutional protection of due process ..... 10

b. The court has authority to hear disputes premised on due process violations ..... 14

c. The court's equitable power defines its authority to permit argument and factual presentation for a motion ..... 16

d. The court's serious concerns about the punitive and detrimental confinement, unreasonably related to its purpose, permits it to order an evidentiary hearing ..... 18

3. The State is represented by the attorney general and is a party to the action, rendering the attorney general's joinder argument pertaining to the same law office illogical and incorrect ..... 21

a. The State, including the SCC, is represented by the attorney general's office ..... 22

b. Because the SCC is already represented by the attorney general's office, it is not a separate, indispensable party without whose independent joinder the litigation may not proceed..... 24

c. The court retains authority to order an appropriate remedy ..... 27

E. CONCLUSION ..... 29

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

*Auto. United Trades Org. v. State*, 175 Wn.2d 214, 285 P.3d 52 (2012) ..... 22

*Crosby v. Cty. of Spokane*, 137 Wn.2d 296, 971 P.2d 32 (1999) ..... 14

*Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011) ..... 22

*In re Dependency of Schermer*, 161 Wn.2d 927, 169 P.3d 452 (2007) 10

*In re Det. of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999)..... 20

*In re Det. of D.W.*, 181 Wn.2d 201, 332 P.3d 423 (2014) . 10, 12, 13, 17, 29

*In re Det. of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999)..... 18, 19, 20

*In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005)..... 15

*In re Welfare of Hudson*, 13 Wn.2d 673, 126 P.2d 765 (1942)..... 15

*Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009)..... 17

*State v. Dupard*, 93 Wn.2d 268, 609 P.2d 961 (1980)..... 26

*State v. Kauffman*, 86 Wash. 172, 149 P. 656 (1915)..... 27

*State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995) ..... 7

*State v. Williams*, 132 Wn.2d 248, 937 P.2d 1052 (1997)..... 26

## Washington Court of Appeals Decisions

*Bowcutt v. Delta N. Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999) ..... 15

*In re Marriage of Yocum*, 73 Wn.App. 699, 870 P.2d 1033 (1994) ..... 24

*State v. Cleveland*, 58 Wn.App. 634, 794 P.2d 546 (1990) ..... 26

*State v. G.A.H.*, 133 Wn.App. 567, 137 P.3d 66 (2006) ..... 25

*State v. Johnson*, 69 Wn.App. 189, 847 P.2d 960 (1993) ..... 9

*State v. Phelps*, 113 Wn.App. 347, 57 P3d 624 (2002) ..... 14

*Tamosaitis v. Bechtel Nat., Inc.*, 182 Wn.App. 241, 327 P.3d 1309, *rev. denied*, 181 Wn.2d 1029 (2014) ..... 10

## United States Supreme Court Decisions

*Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed.2d 1083 (1955) ..... 16

*Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 138 L.Ed.2d 591 (1997) ..... 18

*Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) ..... 17

*Seling v. Young*, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.3d 734 (2001) ..... 15

*Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ..... 16

*Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) ..... 11

## Federal Court Decisions

*Ohlinger v. Watson*, 652 F.2d 775 (9th Cir.1981) ..... 11

*Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003) ..... 11, 14

*Trueblood v. Wash. State Dep't Soc. & Health Servs., et al*, 101 F.Supp.3d 1010 (W.D. Wash. 2015) ..... 11, 12

*Wyatt v. Stickney*, 325 F.Supp. 781 (M.D.Ala.1971) ..... 11

## United States Constitution

Fourteenth Amendment ..... 11, 12

## Washington Constitution

Article I, § 3 ..... 11, 12

Article IV, § 6 ..... 15, 27

## Statutes

RCW 4.28.185 ..... 24

RCW 43.10.040 ..... 22

RCW 43.20A.030 ..... 23

RCW 71.09.080 ..... 15

## Court Rules

CR 19 ..... 22, 23, 24

RAP 10.3 ..... 8

RAP 10.7 ..... 8

## Other Authorities

Martha Bellisle, *Center for Sex Predators Told to Reform or Be Sued*, Seattle Times (Oct. 31, 2015) ..... 6

## A. INTRODUCTION.

This interlocutory appeal by the State challenges the trial court's order setting an evidentiary hearing on the lawfulness of Bradley Ward's continued confinement at the Special Commitment Center (SCC). Mr. Ward suffers from severe mental illness. After years of successfully participating in the SCC's treatment program and transitioning into a less restrictive placement (LRA), Mr. Ward's psychosis resurfaced. The State responded by demanding revocation of his LRA and isolating him in solitary confinement. This draconian reaction exacerbated Mr. Ward's mental illness.

Mr. Ward sought an evidentiary hearing on whether his deteriorated mental condition, and the SCC's inability to house him without causing further damage, should result in his hospitalization at a psychiatric facility rather than a sex offender facility that lacks psychiatrists or credentialed psychologists. The judge who had been overseeing Mr. Ward's progress for several years agreed to hold a hearing, but the State filed this appeal to block it. Because the court acted within its authority, this Court should permit the evidentiary hearing to go forward.

B. ISSUES PRESENTED FOR REVIEW.

1. The constitutional right to due process of law includes the right to reasonable care and treatment if involuntarily confined. Over several years' span, the State confined Mr. Ward in isolation without providing meaningful psychological care due to psychosis unrelated sexual offending. Near consensus emerged that the SCC is incapable of providing the level of care Mr. Ward needs and transfer to a psychiatric facility is appropriate. Mr. Ward asked for an evidentiary hearing on whether his commitment under RCW 71.09 should be dismissed and instead he should be detained under RCW 71.05's involuntary treatment act. Does a court have authority to conduct an evidentiary hearing to determine whether a gravely ill individual is unconstitutionally detained at the SCC?

2. The State, represented by the attorney general's office, contends the SCC must be joined in the proceedings, which is also represented by the attorney general's office. The court invited participation from SCC representatives but refused to declare the SCC a separate, indispensable party. Does a court have authority to conduct an evidentiary hearing where one party is represented by the State of

Washington's attorney general's office and other lawyers from the attorney general's office are invited to participate as needed?

C. STATEMENT OF THE CASE.

Bradley Ward was 19 years old when he stipulated to his commitment in 1991. CP 103. He has been confined at the SCC ever since, including a few years at its transitional facility known as the SCTF. CP 62, 86, 87. Despite suffering an organic brain injury as a teenager that impairs his cognitive functioning, he did well in the state's treatment program and showed himself to be a low risk to reoffend. CP 9, 88. He transferred to SCC's less restrictive alternative in 2007 and was preparing for release into the community based on his positive progress.[1] CP 87-88, 151. His reduced risk of re-offending also flows from having committed the predicate offenses as a juvenile. CP 58, 159.

In 2011, the trial court found probable cause that Mr. Ward no longer met the criteria for commitment under RCW 71.09 and ordered an unconditional release trial. Supp. CP _, sub. no. 418 (order granting trial). This trial has been delayed and set to occur in May 2016. CP 1,

[1] The unpublished opinion in this Court's recent denial of a separate State's appeal, COA 71930-1-I, available at 2015 WL 4232058, sets forth factual background in Mr. Ward's treatment history.

88; Supp. CP _, sub. no. 519 (page 2 of Respondent's Motion to Allow Reasonable Access).

Despite Mr. Ward's progress, his mental health rapidly declined in 2012. He was at times catatonic, regularly disheveled, and substantially delusional. 5/4/15RP 4; CP 136; Supp. CP _, sub. nos. 484, 559, 93 (reports of Dr. Mark Whitehill to court). The State moved to revoke his LRA and confined him for extended periods of time in total isolation at the SCC, contrary to the SCC's policy governing seclusion. CP 98-95, 120. From late 2012 to early 2014, Mr. Ward was held in solitary confinement for 276 out of 413 days. CP 89.

Mr. Ward has autism spectrum disorder, neurocognitive disorder due to traumatic brain injury, and psychotic disorder with delusions and hallucinations. CP 58, 159-60. His decompensated mental state has further diminished his risk of engaging in sex offenses. CP 88.

In 2013, while housed at an SCC unit intended for psychotic patients, Mr. Ward was nearly killed by another resident known to be aggressive and sadistic. CP 113, 198, 229-30, 248. Although the trial court and this Court rejected the State's efforts to revoke Mr. Ward's LRA, he remains detained at the SCC due to his declined functioning. COA 71930-1-I (opinion issued July 15, 2015); CP 256-57, 261.

Evaluating psychiatrist Dr. Alan Abrams criticized the SCC's use of isolation as a method of controlling Mr. Ward. After extensively reviewing Mr. Ward's SCC treatment in 2014 and 2015, Dr. Abrams concluded that "[t]he psychiatric treatment provided to Mr. Ward is far below the standard of care and has been for the past four years." CP 152. He received "no therapy or treatment whatsoever that was individualized and appropriate to Mr. Ward's clinical condition." *Id*. SCC's "prolonged punitive isolation and lack of any emotional support has greatly worsened Mr. Ward's pathology." CP 161. "He needs to be transferred to a facility with some ability and expertise in treating persons with complex and chronic mental and neurological disorders." CP 162 78. Dr. Abrams believes the SCC's mistreatment over the past several years is causing Mr. Ward severe and possibly permanent psychological damage. CP 124, 136.

The SCC's treatment team agreed that Mr. Ward is gravely disabled and would be appropriate for treatment at a skilled mental health facility. CP 220, 223, 225-26. The SCC's internal problems exacerbate its inability to care for Mr. Ward: while it had employed only a single psychiatrist for almost 300 residents, more recently there

has been no treating psychiatrist or medical director and only two psychologists. CP 168.[2]

The SCC did not provide Mr. Ward individualized therapy or rehabilitation services after removing him from his LRA. CP 159. In medicating him, the SCC used "chaotic psychopharmacology" that Dr. Abrams deemed ineffective and inexplicable. CP 152, 161. Therapies such as ECT appear beneficial for Mr. Ward but are not available at the SCC. CP 241.

The SCC lacks legal authority to transfer Mr. Ward to a state mental health facility like Western State Hospital. CP 226. However, if Mr. Ward was ordered released from the SCC, the SCC would coordinate with the designated mental health authorities to retain Mr. Ward based on his inability to care for his basic needs. CP 184, 197-98, 226, 241. This type of transfer has happened before. CP 197-98, 242. The trial court has monitored Mr. Ward's condition by monthly updates from Mr. Ward's individual treatment provider, Dr. Mark Whitehill. CP 259; *see, e.g.*, Supp. CP _, sub. no. 487. The court also reviewed and

---

[2] Martha Bellisle, *Center for Sex Predators Told to Reform or Be Sued*, Seattle Times (Oct. 31, 2015) (documenting lack of psychiatric care at SCC), available at: http://www.seattletimes.com/seattle-news/center-for-sex-predators-told-to-reform-or-be-sued/.

carefully considered voluminous reports about his circumstances in 2014, when considering and ultimately denying the State's motion to revoke Mr. Ward's LRA. *See* COA 71930-1-I, 2015 WL 4232058, *5.

Mr. Ward filed a Motion to Dismiss and Detain. CP 85-255. The judge who had been supervising Mr. Ward's LRA and was familiar with the State's efforts to revoke  it expressed "serious concerns" about Mr. Ward's confinement at the SCC. 5/4/15RP 20-21; CP 7. The court declined to order the dismissal of Mr. Ward's commitment but agreed to hold an evidentiary hearing regarding whether his commitment violated due process. CP 6-8.

The State moved for discretionary review to block the hearing and obtained a stay from the Court of Appeals commissioner. A commissioner granted review and directed further briefing.

D. ARGUMENT.

**1. Basic procedural rules limit the issues on review**.

*a. The State makes no assignments of error*.

"[P]roper assignments of error are indeed mandatory in briefs." *State v. Olson*, 126 Wn.2d 315, 324, 893 P.2d 629 (1995) (Talmadge, J., concurring), citing RAP 10.3. Assignments of error are a "separate concise statement of each error a party contends was made by the trial

court." RAP 10.3(a)(4). The State's opening brief contains no assignments of error. The failure to set forth concise assignments of errors obfuscates the issues for which review is sought and does not serve the interest of justice. The Court has discretion to treat the issues as waived or impose sanctions under RAP 10.7. *Olson*, 126 Wn.2d at 323-24.

*b. The State's factual argument is not properly before the Court.*

As the unchallenged Finding of Fact 2 states, the State never contested the merits of Mr. Ward's factual allegations in the trial court. CP 6. It sought only "a preliminary ruling" to bar Mr. Ward from obtaining judicial review of his claim that devastating effects of the SCC's inability to care for his mental illness renders his detention irrational under RCW 71.09. *Id*. Likewise, in its motion for discretionary review, the State offered no counter assessment of Mr. Ward's mistreatment at the SCC.

For the first time in its opening brief, the State portrays Mr. Ward as an out-of-control danger in lengthy footnotes in its Statement of the Case. Placing information in a footnote is "at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the

appeal." *State v. Johnson*, 69 Wn.App. 189, 194 n.4, 847 P.2d 960 (1993).

The citations to the record throughout the opening brief refer to "CP" numbers that do not match the record designated by the superior court clerk. Opening Brief at 3-9, 11, 19, 23. For example, page four cites CP 313 and 315, but the presently designated clerk's papers end at CP 274. Although the superior court originally issued incorrect numbers for the designated documents, starting at 697 through 970, it corrected this error and no documents were ever numbered CP 313 or 315. Even the cites that fall within the numbers the clerk used to designate documents appear inaccurate. *See, e.g.*, Opening Brief at 3, citing CP 82 (which correlates to page three of the State's witness list but the citation purports to refer to a 2007 LRA agreement).

These incorrect citations to the record create an unfair obstacle for Mr. Ward, who is left to guess the source of the State's allegations and is unable to rebut the State's assertions in his Response Brief, which is his only opportunity to file a brief prior to this Court's ruling on the merits.

This Court should disregard the factual representations about Mr. Ward's behavior in the opening brief. *See Tamosaitis v. Bechtel*

*Nat., Inc.*, 182 Wn.App. 241, 253, 327 P.3d 1309, *rev. denied*, 181 Wn.2d 1029 (2014) (court may "simply ignore the offending portions" of a brief that cites to facts that are not part of the record). The miscited factual record is of little value where the State contests preliminary legal rulings and asserts there is no set of factual circumstances under which relief can be granted. Mr. Ward's claims should be viewed in the light most favorable to him at this stage of proceedings. *In re Dependency of Schermer*, 161 Wn.2d 927, 940, 169 P.3d 452 (2007).

**2. Where Mr. Ward's severe mental illness has led to inhumane isolation and unreasonable warehousing at the SCC, the trial court appropriately granted an evidentiary hearing on the lawfulness of his continued confinement**.

*a. The State's authority to confine Mr. Ward does not override the constitutional protection of due process*.

"The State's lawful power to hold those not charged or convicted of a crime is strictly limited." *In re Det. of D.W.*, 181 Wn.2d 201, 207, 332 P.3d 423 (2014). Civil commitment "is permitted" only if it satisfies due process. *Id*. "Anyone" detained in the state's civil commitment program "has a constitutional right to receive 'such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.'" *Id*., citing

*Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir.1981) (quoting *Wyatt v. Stickney*, 325 F.Supp. 781, 784 (M.D.Ala.1971)).

"The mere fact that" a person "has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment." *Youngberg v. Romeo*, 457 U.S. 307, 315, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); U.S. Const. amend. 14; Const. art. I, § 3. Institutionalized individuals have a "fundamental liberty interest" in their "reasonable care and safety, reasonably non-restrictive confinement conditions, and such other treatment as may be required to comport fully with the purposes of confinement." *Trueblood v. Wash. State Dep't Soc. & Health Servs., et al*, 101 F.Supp.3d 1010, 1020 (W.D. Wash. 2015).

"[C]ivilly committed persons must 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.'" *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003), quoting *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000)); *see also Ohlinger*, 652 F.2d at 777–78 ("a person committed solely on the basis of his mental incapacity has a constitutional right to receive such

individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition”).

Due process requires a relation between the nature and duration of confinement and its purpose. *Trueblood*, 101 F.Supp.3d at 1020-21; U.S. Const. amend. 14; Const. art. I, § 3. While a person is being detained due to mental illness, the constitutionality of that on-going detention must be reasonably related to the purpose of the detention, and the reviewing court may “evaluate whether the detention is excessive in relation to those goals.” *Id*. at 1021.

In *Trueblood*, the federal court prohibited the State from delaying competency determinations for people who languished in jail pending competency restoration efforts.

In *D.W*., a mental health commissioner held a hearing on a motion to dismiss filed by several people who were involuntarily detained. 181 Wn.2d at 205. They contested the lawfulness of being placed in hospitals rather than mental health facilities, i.e., the conditions under which they were confined. After an evidentiary hearing, the commissioner ruled it was unlawful to involuntarily confine the petitioners at local medical facilities due to overcrowding. *Id*. at 206. The Supreme Court affirmed, holding that the State was not

permitted by law to detain people in hospital beds rather than mental health facilities, and noting it would be unconstitutional for the law to permit such confinement. *Id*. at 210 and n.5.

The State raised procedural objections in *D.W*., insisting the trial court lacked authority to consider or remedy the detainees' assertions of being unlawfully placed in a certain facility. 181 Wn.2d at 211.[3] The Supreme Court unanimously and summarily dismissed these objections in a footnote, saying, "The State and county brought many challenges to the trial judge's authority to hear the case. We find the judge had authority to consider the lawfulness of the county's actions under the ITA[4] and find the other challenges unavailing." *Id*. at n.6.

The State similarly asserts procedural roadblocks prevent the trial court from even considering whether Mr. Ward is confined unlawfully. But as *D.W.* shows, a trial court has authority to consider the circumstances that render confinement unlawful even when a person has been confined under proper procedures.

---

[3] *See, e.g.,* Brief of Appellant, DSHS, at 18-19, 22-28. Brief of Appellant, Pierce County DMHP, at 5-6, 8; Brief of Respondent, at 26-29. Available at: http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.searchRequest&courtId=A08, search S.Ct. Case Number 90110-4.

[4] ITA refers to the involuntary treatment act under RCW 71.05.

*b. The court has authority to hear disputes premised on due process violations*.

The State asserts that the trial court lacks authority to conduct any hearing not expressly set forth in RCW ch. 71.09. Opening Brief at 10. In some situations, a statute limits a court's authority, such as setting a ceiling on a lawful sentence or determining the time period in which the government has the power to act by statute of limitation. *State v. Phelps*, 113 Wn.App. 347, 356, 57 P3d 624 (2002). Chapter 71.09 RCW requires certain hearings, but it does not prohibit the court from engaging in other fact-finding. It does not override RCW 2.28.150, which authorizes a court to adopt "any suitable process or mode of proceeding" that conforms "to the spirit of the laws" when exercising its constitutional or statutory jurisdiction. Indeed, "the purpose of the civil rules is to place substance over form to the end that cases be resolved on the merits." *Crosby v. Cty. of Spokane*, 137 Wn.2d 296, 303, 971 P.2d 32 (1999).

By constitutional mandate, superior courts are "courts of general jurisdiction and have power to hear and determine all matters legal and equitable in all proceedings known to the common law" unless expressly denied. *In re Parentage of L.B.*, 155 Wn.2d 679, 697, 122

P.3d 161 (2005), quoting *In re Welfare of Hudson*, 13 Wn.2d 673, 697-98, 126 P.2d 765 (1942); Const. art. IV, § 6.

State courts "remain competent to adjudicate and remedy" deficiencies in civil commitments that arise "under the Federal Constitution." *Seling v. Young*, 531 U.S. 250, 265, 121 S.Ct. 727, 148 L.Ed.3d 734 (2001). For example, "due process requires that the conditions and duration of confinement" under a civil commitment order bear "reasonable relation to the purpose" of commitment. *Id*.

In recognition of a committed person's due process rights, RCW 71.09.080(3) guarantees any committed person "the right to adequate care and individualized treatment." Commitment under Chapter 71.09 RCW does not forfeit any legal rights unless "specifically provided" in this chapter. RCW 71.09.080(1). The superior court's jurisdiction extends to using its equitable powers, which the Legislature "is constitutionally prohibited from abrogating or restricting." *Bowcutt v. Delta N. Star Corp.*, 95 Wn.App. 311, 319, 976 P.2d 643 (1999). "Unless the Legislature clearly indicates its intention to limit jurisdiction, statutes should be construed as imposing no limitation." *Id*.

The State's brief turns the presumption of general jurisdiction on its head, proclaiming that the court lacks authority to consider whether

a person's due process rights are being violated because Chapter 71.09 RCW does not expressly bestow that authority. Mr. Ward's motion is premised on the constitutionality of his commitment. CP 5-6, 94, 100. The judge's long involvement in the case included receiving monthly reports from Mr. Ward's treatment provider, Dr. Whitehill. CP 259. These reports and multiple reports spanning several years from Dr. Abrams, detail Mr. Ward's deterioration and its causes, which led the court to express serious concern and order an evidentiary hearing. CP 7-8; 5/4/15RP 20-21. The court acted within its authority.

*c. The court's equitable power defines its authority to permit argument and factual presentation for a motion.*

A court's equitable power gives it "practical flexibility in shaping its remedies" and the means of "adjusting and reconciling public and private needs." *Swann v. Charlotte-Mecklenburg Bd. of Ed*., 402 U.S. 1, 12, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (quoting *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed.2d 1083 (1955)). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id*. at 15. The nature of the remedy is "determined by the nature and scope of the

constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 280, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977).

It is the "right of every individual to claim the protection of the laws" and to "have a right of access to courts." *Putman v. Wenatchee Valley Med. Ctr*., 166 Wn.2d 974, 979, 216 P.3d 374 (2009). In *Putman*, the court found a statute unconstitutional that required filing a certificate of merit before a medical malpractice suit because it was contrary to "the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people." *Id*.

Similarly, setting an evidentiary hearing in a case that has been proceeding before the court for many years does not constitute error. *D.W.* exemplifies a court's authority to inquire into a claim of an unlawful detention. Like *D.W.*, Mr. Ward complains he is being detrimentally warehoused to a degree that violates due process. The judge is intimately familiar with Mr. Ward's circumstances, troubled by his deterioration and the irrational absence of individualized care, and agreed to hold an evidentiary hearing on the lawfulness of his continued confinement.

*d. The court's serious concerns about the punitive and detrimental confinement, unreasonably related to its purpose, permits it to order an evidentiary hearing*.

Mr. Ward's treatment success and maturation has led to a vastly reduced risk of re-offense and convinced a judge to order an unconditional release trial. *See* CP 1, 58; Supp. CP _, sub. no. 418. This trial has not been delayed because of this pending motion, but due to other complexities of the case. 5/4/15RP 4, 22-27, 29. But due to Mr. Ward's deteriorated mental state, exacerbated by the lack of appropriate individualized care provided by the SCC, he appears so gravely disabled that he will be at a great disadvantage in showing he can ably care for himself in the community as needed to show he is safe to be at large as will be at issue in this future trial. 5/4/15RP 5.

Civil commitment is unconstitutional when its purpose is to impose punishment for past crimes or prevent future crimes. *See Kansas v. Hendricks*, 521 U.S. 346, 373, 117 S.Ct. 138 L.Ed.2d 591 (1997) (Kennedy, J., concurring) ("If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function.").

Unlike *In re Det. of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999), the question is not whether a jury may consider the SCC's

treatment conditions when deciding whether the person meets the criteria for confinement. The State relies on *Turay* but it is inapposite. The *Turay* Court's discussion about conditions of confinement arose in the context of a direct appeal from an original commitment trial.

The State cites *Turay*'s discussion of an evidentiary ruling barring evidence of the lack of treatment available at the SCC. 139 Wn.2d at 403; *see* Opening Brief at 11. The *Turay* Court emphasized that the question for the jury was whether Mr. Turay met the criteria for confinement. 139 Wn.2d at 404. The jury was not considering where Mr. Turay would be confined or how he would be treated after he was committed. *Id*. Mr. Ward's case is in a far different procedural posture.

The double jeopardy issue in *Turay* was also not part of Mr. Ward's case despite the State's misleading citation. 139 Wn.2d at 416, 420-21. This discussion is irrelevant because Mr. Ward has not mounted a double jeopardy challenge. CP 94.

Mr. Ward's Motion to Dismiss and Detain under RCW 71.05 argues the SCC's confinement is making his condition worse to the point of causing irreparable harm, therefore to comply with due process he should be retained for commitment in the mental health facility rather than warehoused at the SCC. CP 99-101. This type of transfer

has occurred for other individuals. CP 197-98, 242. *Turay* does not preclude the court from hearing his motion.

The State also misrepresents *In re Det. of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999). Like *Turay*, *Campbell* is an appeal from an initial order of commitment. He raised a similar double jeopardy argument to *Turay* that likewise failed. But the trial court in *Campbell* had also held an evidentiary hearing and concluded that some aspects of SCC "did not meet constitutional muster." 139 Wn.2d at 346. The trial court ruled that these conditions could be remedied, so dismissal was not appropriate. *Id*. at 349. The Supreme Court agreed with the trial court, holding that "the proper relief under the circumstances is to remedy any constitutional defects in the administration of the SCC." *Id*. at 350.

Mr. Ward has mental health problems that are being exacerbated while he remains at the SCC. His prolonged solitary confinement, coupled with an absence of any individualized treatment and poorly administered medication, has left Mr. Ward in far worse shape than ever before and he has been at the SCC for over 20 years. CP 99-101, 159. He shows no signs of sexual deviancy but cannot graduate from

the treatment program due to his lapsed cognitive functioning, yet his condition cannot improve under current circumstances. CP 159.

He is entitled to demonstrate the illegality of his confinement and the need for the remedy of detention at a mental health hospital. Before judging whether Mr. Ward is entitled to the remedy he seeks, he should be permitted to demonstrate his mental health needs in an evidentiary hearing. The trial court acted within its authority by allowing an evidentiary hearing.

**3. The State is represented by the attorney general and is a party to the action, rendering the attorney general's joinder argument pertaining to the same law office illogical and incorrect**.

The trial court refused to label the SCC a separate and indispensable party whose interests were not being adequately represented by the State, who was already represented by the attorney general's office. CP 6. At the same time, the court ruled that SCC's representatives were welcome to take part in the litigation and agreed to set the hearing at a convenient time for the SCC. 5/20/15RP 7-8. The State insists that no litigation may go forward without classifying the SCC a separate and indispensable party, and also claims the court could

not join the SCC, thus undermining any ability to proceed, under CR 19.

"CR 19 addresses when the joinder of absent persons is needed for a just adjudication." *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 221, 285 P.3d 52 (2012). A trial court's decision regarding joinder of parties under CR 19 is reviewed for an abuse of discretion. *Id*.

*a. The State, including the SCC, is represented by the attorney general's office.*

The State cites no case law that parses the attorney general's office into distinct entities constituting wholly unrelated persons for joinder under CR 19.

The attorney general is constitutionally and statutorily charged with representing the state. *Goldmark v. McKenna*, 172 Wn.2d 568, 572, 259 P.3d 1095 (2011) ("Our state constitution directs that the attorney general 'shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.' Const. art. III, § 21"); RCW 43.10.040 ("The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters,

hearings, or proceedings."); RCW 4.92.030 (attorney general or assistant "shall appear and act as counsel for the state").

Mr. Ward is detained by the State, pursuant to its civil commitment authority. The attorney general's website explains,

> The AGO's Sexually Violent Predator Unit was created following the enactment of this law and is responsible for prosecuting sex predator cases for 38 of Washington's 39 counties (King County being the exception). *The expertise of the unit permits it to handle all aspects of sex predator cases*, including pre-filing investigations, pre-trial motion practice, trial, post-commitment proceedings and appeals.

http://www.atg.wa.gov/sexually-violent-predators (emphasis added).

As experts in "all aspects of sex predator cases," including litigation of post-commitment issues, it is hard to understand how the assistant attorney general working on this case would be unqualified to litigate the issues presented such that the SCC is deemed an absent party under CR 19(a). In a footnote, and without citation, the State claims the SCC "has its own counsel within the Attorney General's Office." Opening Brief at 14 n.11. The mere fact that the attorney general's office opts to divide its lawyers into certain groupings does not define the person who must be joined under CR 19.

The State claims the SCC is a separate entity created by statute, citing RCW 43.20A.030. Opening Brief at 14 n.11. But this statute

broadly creates the department of social and health services; it does not mention the SCC and was last amended in 1989, predating Chapter 71.09 RCW's enactment in 1990. *See Laws of 1990*, ch. 3, § 1001 (SSB 6259). In the absence of authority defining an assistant attorney general's internal duties as constituting a separate party under CR 19, the State is adequately and appropriately joined in this litigation because it is represented by a competent, even an expert, representative from the attorney general's office who specializes in civil commitments of sex offenders under Chapter 71.09 RCW. Should the State require further assistance from another attorney in its agency, it may obtain such assistance.

*b. Because the SCC is already represented by the attorney general's office, it is not a separate, indispensable party without whose independent joinder the litigation may not proceed.*

The State cites no case law explaining what aspect of the "personal jurisdiction" doctrine the court erroneously applied. Personal jurisdiction usually involves the connection between this state and a entity that has little contact with the state. *In re Marriage of Yocum*, 73 Wn.App. 699, 702, 870 P.2d 1033 (1994); RCW 4.28.185. Mr. Ward

contests his commitment within this state and all issues to be litigated occurred solely within the state.

There is no question that the SCC may participate in the evidentiary hearing. When setting the hearing, the court scheduled additional time based on the State's representation that the SCC might want to offer additional evidence. 5/20/15RP 7-8.

The State cites *State v. G.A.H.*, 133 Wn.App. 567, 137 P.3d 66 (2006), to claim that the court could not order the State take any action as a matter of personal jurisdiction. But *G.A.H*. is far afield. It involved a criminal prosecution for a juvenile where the child had a troubled home life and the court believed the child would be better served by having DSHS place the child into foster care. *Id*. at 578-79. The court's sentencing order *sua sponte* directed DSHS to place the child in foster care.

The sentencing court had not followed the established statutory avenue for DSHS to place a child in foster care. *Id*. at 578-79. On appeal, the court held that the order of dependency must flow from the governing statutory proceeding, which the trial court had not followed. *Id*. It did not hold that a criminal prosecutor is not part of the state.

In other contexts, the court has held the State is a single party in litigation even when the entities involved are the attorney general's office and a county prosecutor. In *State v. Williams*, 132 Wn.2d 248, 256-57, 937 P.2d 1052 (1997), the court held, "Since the prosecutor's office and DSHS both represent the State, they are in privity." The court similarly ruled that the county prosecutor and Attorney General are both "the State of Washington" and are essentially the same party in a dependency proceeding and criminal prosecution:

> It is immaterial that in the dependency proceeding, the State was represented by the Attorney General and in the criminal prosecution was represented by the county prosecuting attorney.

*State v. Cleveland*, 58 Wn.App. 634, 639-40, 794 P.2d 546 (1990). Likewise, the court rejected the State's claim that the prosecutor was not a party to a parole revocation hearing, "Although the prosecutor was not a participant in the revocation proceeding, an assistant attorney general was. The same sovereign is involved in both instances." *State v. Dupard*, 93 Wn.2d 268, 273, 609 P.2d 961 (1980).

The State has not asserted it has any conflict of interest with the SCC, or claimed the SCC lacks notice of the litigation. It asserts the SCC would be prejudiced by an adverse decision, but the SCC is

simply the facility holding Mr. Ward; if the court finds the SCC lacks authority to continue that detention, the SCC is not prejudiced. The trial court has merely allowed litigation to proceed that relates to the lawfulness of a person's confinement by the State in the context of a civil commitment. The court has discretion to set a hearing to determine whether confinement violates due process for a particular person.

*c. The court retains authority to order an appropriate remedy.*

Not only does the State claim that the case cannot go forward without the court's finding that the SCC is a necessary party, but it further insists that the court has no authority to order a remedy if it finds Mr. Ward's due process rights are violated by his irrational detention in a facility that is exacerbating his mental illness.

It has long been recognized that "by Constitution and by statute the superior court [is], a court of general jurisdiction" with the "power to exercise all of the inherent functions of a court of general jurisdiction" *State v. Kauffman*, 86 Wash. 172, 176, 149 P. 656 (1915); Const. art. IV, § 6 ("The superior court shall also 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."). If

the court has jurisdiction, it may fashion a remedy appropriate to the violation. RCW 2.28.150. Furthermore, the SCC routinely complies with court orders to commit or release a person without making the State bring a second team of SCC-specific lawyers to the courtroom. CP 197-98. (SCC clinical director explains compliance with court order that detainee does not meet criteria for confinement, including referring to mental health authorities). The SCC's authority to confine any person exists only so long as the person is being constitutionally confined

At this preliminary stage of proceedings, it is purely speculative to debate whether the remedy the court might order will be a reasonable exercise of discretion. Mr. Ward asks for the remedy of having his 71.09 commitment dismissed and instead he be retained for civil commitment proceedings under RCW 71.05. The two state employees whose depositions are attached to Mr. Ward's motion both recalled instances in the past where detainees had been ordered released from the SCC and sent to a mental health hospital. These SCC professionals are mandatory reporters obligated to inform mental health authorities if they perceive a dangerous or gravely disabled person is being released into the community. This transfer to a mental health facility is the

precise relief Mr. Ward seeks. As the Supreme Court held in *D.W.*, if a person is being unlawfully confined, a remedy is available to the court.

Mr. Ward reasonably seeks the dismissal of his commitment under Chapter 71.09 RCW and his detention for mental health treatment under Chapter 71.05 RCW. The court has authority to consider this remedy at an evidentiary hearing and grant his request if appropriate. The court reasonably set an evidentiary hearing allowing Mr. Ward to litigate the on-going constitutionality of his confinement.

E. CONCLUSION.

The trial court's order setting an evidentiary hearing should be affirmed.

DATED this 29th day of February 2016.

Respectfully submitted,

*s/ Nancy P. Collins*

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant
(206) 587-2711

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
## DIVISION THREE

| | | |
|---|---|---|
| IN RE THE DETENTION OF | ) | |
| | ) | |
| | ) | |
| BRADLEY WARD, | ) | NO. 73535-7-I |
| | ) | |
| | ) | |
| RESPONDENT. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 29TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARAH SAPPINGTON, AAG
[sarahs@atg.wa.gov]
[crjsvpef@atg.wa.gov]
OFFICE OF THE ATTORNEY GENERAL
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA 98104-3188

( ) U.S. MAIL
( ) HAND DELIVERY
(X) AGREED E-SERVICE
VIA COA PORTAL

**SIGNED** IN SEATTLE, WASHINGTON THIS 29TH DAY OF FEBRUARY, 2016.

X_____

**Washington Appellate Project**
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711