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THE SUPREME COURT
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LOUIS CHAO CHEN,

Petitioner.

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STATE OF WASHINGTON
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AMICUS BRIEF OF THE
WASHINGTON DEFENDER ASSOCIATION,
DISABILITY RIGHTS WASHINGTON, AND
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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 ORIGINAL

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INTEREST OF AMICUS CURIAE

The Washington Defender Association (“WDA”) is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. WDA is a not-for-profit corporation with 501(c)(3) tax-exempt status. WDA represents 21 public defender agencies and has over 1000 members. WDA has received permission on many occasions to file amicus briefs with Washington and United States appellate courts. The WDA amicus committee has approved filing of this motion.

The association’s objectives and purposes include the following: A) To protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights; B) To promote, assist, and encourage public defense systems to ensure that all accused persons receive effective assistance of counsel, and C) To improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

Amicus Disability Rights Washington is the organization designated by federal law and the Governor of Washington to provide protection and advocacy services to people in Washington with mental, developmental, physical, and sensory disabilities. *See*

Motion to Appear as *Amici Curiae* and Declaration of Mark Stroh in support thereof. Disability Rights Washington has a Congressional mandate to advocate on behalf of people with disabilities through the provision of a full range of legal assistance including legal representation, regulatory and legislative advocacy, and education and training. Stroh Decl., ¶ 2.

Disability Rights Washington has extensive experience representing the interests of people with a variety of disabilities. Disability Rights Washington fields hundreds of calls annually from individuals with legal problems related to their disabilities, including issues relating to the criminal justice system. *Id.* at ¶ 5. Over the years, Disability Rights Washington has commented extensively on RCW 10.77 and other bills that affect people with mental illness in criminal proceedings. *Id.* at ¶ 4. Disability Rights Washington uses its congressionally-granted authority to monitor jail and prison conditions across the state and to investigate allegations of abuse and neglect of individuals with disabilities in jails and prisons. *Id.* at ¶ 6. Disability Rights Washington has also filed numerous lawsuits that have resulted in systemic changes for people with mental illness. *Id.* at ¶ 7.

The *Washington Association of Criminal Defense Lawyers* (“WACDL”) was formed to improve the quality and administration of justice. A professional bar association founded in 1987,

WACDL has over 1000 members – private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system.

ISSUES TO BE ADDRESSED BY AMICUS

Whether the mental health reports prepared to assess competency by RCW 10.77, which contain sensitive and privileged medical and mental health records, should remain confidential and whether release beyond the parties authorized by RCW 10.77 impacts the right to a fair trial and the effective relationship defense counsel must have with their client.

STATEMENT OF THE CASE

This brief relies largely upon the petitioner's statement of the case, which appears to be supported by the record.

ARGUMENT

Reports prepared to assess competency were intended by RCW 10.77 to remain confidential, and this court should order that the records in this case remain confidential. Competency reports include sensitive and privileged medical and mental health information. Release beyond those authorized by RCW 10.77 impacts the right to a fair trial and an effective relationship with counsel. This court should order that these records should remain confidential.

I. The Washington Legislature has acknowledged that individuals have a privacy interest in mental health care records.

In 1991, the Washington State Legislature made findings about the sensitive and private nature of health care records when enacting laws to protect health care information. RCW 70.02.005. The legislature found health care information, which includes information related to diagnosing, treating, or maintaining a patient's mental condition, "is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests." RCW 70.02.005(1), .010(5). Further, the legislature stated: "In order to retain the full trust and confidence of patients, health care providers have an interest in assuring that health care information is not improperly disclosed...." RCW 70.02.005(3). Federal law similarly protects mental health records and provides that certain types of mental health information must be more protected than other types of information. For instance, under the Health Insurance Portability and Accountability Act ("HIPAA"), most uses of psychotherapy notes require specific permission from a patient to be released, not just generalized consent. *See* 45 C.F.R. § 164.508(a)(2).

Protecting private mental health information is important because of the stigma that often attaches to individuals with mental

illness. People with mental illness have been historically vulnerable to abuse and neglect in the United States. *See* 42 U.S.C. § 10801 (explaining the reasons behind establishing the protection and advocacy system for people with mental illnesses). It is a widely known concept that people with mental illnesses have to deal with societal stigma and often simply labeling a person with a mental illness engenders unfounded fear in others. *See* Stephanie O. Corley, *Protection for Psychotherapy Notes under the HIPAA Privacy Rule: As Private as a Hospital Gown*, 22 Health Matrix 489, 501-04 (2013). Unnecessary release of stigmatizing mental health information seriously threatens an individual's important privacy right of protecting sensitive health care information. *See id.* at 504.

II. The Washington Legislature considered the privacy of mental health information in enacting RCW 10.77.

The Washington State Legislature balanced privacy and the public's right to open courts when it enacted and subsequently amended the laws governing competency determinations in criminal proceedings. Each time the court has considered the issue of who may access the information contained in competency reports, it has kept the group of individuals very narrow.

Prior to 1973, Washington's statutory scheme under RCW 10.76 was silent as to the process of evaluating a criminal

defendant's competency. RCW 10.76, *repealed by* Laws of 1973, 1st Ex. Sess., ch. 117, § 29; *see also Survey of Washington Law*, 9 Gonz. L. Rev. 228, 267 (1973). This was in line with much of the country's failure to afford people with mental illness due process protections. *See Protection for Psychotherapy Notes*, 22 Health Matrix at 502.

In 1973, the Washington Legislature adopted a comprehensive new statutory scheme that emphasized the due process and privacy rights of criminal defendants whose competency to stand trial was in question. Laws of 1973, 1st Ex. Sess., ch. 117, § 29; *see also Survey of Washington Law*, 9 Gonz. L. Rev. at 266-67. These new laws were largely in response to *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), which held that Indiana's indefinite commitment of a defendant based solely on his incompetency to stand trial violated the Fourteenth Amendment's due process clause. *Jackson*, 406 U.S. at 731 ; *see also Survey of Washington Law* , 9 Gonz. L. Rev. at 266.

The new RCW 10.77, which replaced RCW 10.76, recognized several constitutional rights of people with mental illness in competency proceedings. It set timelines for the determination of competency, thus attempting to satisfy the due process and equal protection requirements of *Jackson*. *See Survey*

of *Washington Law*, 9 Gonz. L. Rev. at 267. The statute also acknowledged the privacy interests involved in a court's determination of competency by only allowing records or reports made pursuant to 10.77 to be distributed to a select group of individuals, which included, but were not limited to, the court, the prosecuting attorney, the committed individual, and his or her attorney. RCW 10.77.210. The onus of getting the records to be disclosed was put on the person requesting the records, who had to fall within one of the approved groups. *Id.* Therefore, the sensitive mental health records were not presumed open and available to all interested parties.

Since 1973, the legislature amended RCW 10.77.210 a few times to add entities that may receive these records.¹ In 1998, the legislature enacted RCW 10.77.065, which specifically dealt with competency reports and limited disclosure of the report to the designated mental health professional, the court, the prosecuting attorney, and the defense attorney. RCW 10.77.065. Again, the legislature presumed these sensitive mental health records were private and limited disclosure to certain parties.

¹ In 1989, the legislature acknowledged *amici* Disability Rights Washington's existing federal record access as the state protection and advocacy agency. Laws of 1989, ch. 420, § 12; *see also* 42 U.S.C. § 10806. The legislature granted supervising community corrections officers the opportunity to get records in 1993, and in 1998 certain records were to be made available to criminal justice agencies upon request. Laws of 1993, ch. 31, § 12; Laws of 1998, ch. 297, § 45. With each amendment expanding disclosure of records, the legislature took into account the privacy interests of the individual detained, committed, or hospitalized pursuant to RCW 10.77.

III. GR 31 establishes that personal privacy interests may rise above any right or interest in open and public court rooms.

GR 31 provides that “[t]he public shall have access to all court records except as restricted by federal law, *state law*, court rule, court order, or case law.” GR 31(d)(1) (emphasis added).

This rule seeks to balance the public’s constitutional rights to judicial openness under article 1, section 7 with individual privacy under article 1, section 7. It recognizes that privacy interests can overcome public access. The rule makes clear in its policy and purpose section that “[a]ccess to court records is **not absolute and shall be consistent with reasonable expectations of personal privacy** as provided by article 1, section 7 of the Washington State Constitution and shall not unduly burden the business of the courts.” GR 31(a) (emphasis added).

Competency evaluations necessarily involve extremely private information. The competency evaluator has broad access to personal information and records. RCW 10.77.060(1)(b). This can include “access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant.” *Id.* The defendant’s consent is not sought nor is it required before these records are made available. *Id.* This is information an individual would reasonably expect that medical doctors and psychologists

would keep private. *See, e.g.*, 45 C.F.R. §§ 160.101-.552; 45 C.F.R. §§ 164.102-106, .500-534.

In order to complete a competency report, best practices dictate that an evaluator should seek personal, family and social history from the defendant in order to gain important background information and to assess intelligence and social functioning. *See* Douglas Mossman, *et al.*, *AAPL Practice Guide for the Forensic Evaluation of Competency to Stand Trial*, Vol. 35, No. 4, 32-33 (2007) (supplement). The evaluator obtains and reviews collateral source records, including past medical and mental health treatment records “which can provide a longitudinal view of a defendant’s mental illness and can thereby shed diagnostic light on current symptoms.” *Id.* The evaluator reviews police reports and other case discovery materials, such as transcripts or recording of hearings or interrogations which “may contain information relevant to understand if a defendant’s current mental condition and competence.” *Id.* An evaluator may also conduct collateral interviews with friends or family or in some instances with the defense attorney.² *Id.*

During a competency evaluation, the evaluator performs a mental status examination. *Id.* at 33. This involves questions

² “A defendant’s attorney will often have information that is not otherwise available, such as what has happened during previous attorney-client contacts and the reasons the attorney believes the defendant may be incompetent to stand trial.” *AAPL Practice Guide for the Forensic Evaluation of Competency to Stand Trial*, Vol. 35, No. 4, 32-33 (2007)

intended to probe and assess current mental health symptoms, thought content, mood, memory, information processing, and concentration. *Id.* Psychological testing is involved in some cases. *Id.* at 36-37. All of the information discovered and considered by the evaluator is included in a written report.³

It is hard to imagine anything that is more personal and private than a person's medical and mental health information. GR 31 recognizes the importance of privacy interests and that there are times when those interests are more important than public access to the personal information that can be found in court records.

IV. Failure to assure confidentiality in competency reports hinders the defendants' right to a fair trial.

Making competency reports generally available to the public will increase the reluctance of the accused to share the information that an evaluator needs in order to conduct a complete evaluation and may impact the defendant's right to a fair trial.

Due process requires that a defendant be competent at the time of trial. *Pate v. Robinson*, 383 U.S. 375, 376, 86 S. Ct. 836, 837, 15 L. Ed. 2d 815 (1966); *Drope v. Missouri*, 420 U.S. 162, 95

³ The statute also provides that the forensic mental health report must include the following information about the defendant:

- (a) A description of the nature of the [mental health] examination;
- (b) A diagnosis or description of the current mental status of the defendant;
- (c) If the defendant suffers from a mental disease or defect, or has a developmental disability, an opinion as to competency....

RCW 10.77.060(3). In addition, the report must include an opinion as to whether the defendant should be referred for evaluation by the Designated Mental Health Provider. RCW 10.77.060(f).

S. Ct. 896, 43 L. Ed. 2d. 103 (1975). RCW 10.77.050 provides that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues,” and the court is required to order a mental evaluation whenever there is a reason to doubt the defendant's competency. RCW 10.77.060(1). Once there is reason to doubt a defendant's competency, failure to order an investigation is a denial of due process. *State v. Marshall*, 144 Wn.2d 266, 279, 27 P.3d 192 (2001).

Before an evaluation begins, the evaluator notifies the individual of the purpose of the evaluation and any limits on confidentiality of the report or information contained within the report.⁴ Defense attorneys must also inform their clients about limits on confidentiality of the report. RPC 1.4(3) (duty to keep client reasonably informed about the status of the matter.) If trial courts make public forensic mental health reports that assess an accused person's competency, it may chill a defendant's willingness to participate in an evaluation, thereby decreasing the accuracy and completeness of the evaluation. Accused persons may resist their attorneys' efforts to bring competency concerns to

⁴ Standard 3.10(c) of the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct states that “when psychological services are court ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are court ordered or mandated and any limits of confidentiality, before proceeding.” APA Ethical Principles of Psychology and Code of Conduct 4.01, 4.02 (Adopted June 1, 2010).

the court's attention, and could lead to some defendants being tried while incompetent. Candor and openness on the part of the defendant are necessary for an evaluation to be thorough, accurate and reliable.

Because of the history of stigma associated with mental illness or results such as unwanted treatment that may come from a mental health assessment, many individuals are uncomfortable sharing personal mental health information. Making these reports available to the public will only increase reluctance on the part of criminal defendants to share this information.

V. Publically available competency evaluations will further strain the attorney-client relationship.

When defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise competency at any time "so long as such incapacity continues." *In re Fleming*, 142 Wn.2d 853, 867, 16 P.3d 610, 617 (2001), *citing* RCW 10.77.050.

Raising competency is a challenging stage of a criminal case for the defense attorney. The defendant is by definition exhibiting noticeable signs of a mental impairment. Many defendants with mental illnesses are distrustful of their defense attorney, and often uncooperative. Much of the time when competency is at issue, the attorney-client relationship is strained or compromised.

Many criminal defendants, like any members of the general public, do not want their competency questioned and do not want to be required to submit to an evaluation. They may not want their private records made available to court evaluators or to the court or prosecution. All information that defense counsel knows relating to competency is information learned in the course of representation and protected under RPC 1.6. However, even when the defendant specifically directs his attorney not to raise competency, counsel has an ethical duty to bring competency concerns to the court's attention.⁵

Raising an attorney's doubts regarding competency triggers a mental evaluation and release of highly sensitive and personal information to the court, prosecutor and evaluator. It both stops the speedy trial clock and significantly delays the proceedings. CrR 3.3(e)(1). If raising competency also opens to the general public a defendant's personal and sensitive mental health information,

⁵ See WSBA Informal Opinion 2190 (2008)(when there is a legal obligation to raise competency, defense counsel has an ethical duty to raise competency). ABA Criminal Justice Mental Health Standards § 7-4.2 also address the situation, recommending that counsel provide information to the court, even over the client's objection:

[d]efense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. *In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.* (emphasis added).

attorneys will be required to warn and counsel their clients about this consequence as well. This will likely further strain the relationship with counsel. Release of competency reports beyond those authorized by statute negatively impacts the attorney client relationship and erodes the right to counsel during the challenging competency stage of a case.

CONCLUSION

Competency reports prepared for the court should remain confidential and release should be limited by RCW 10.77.065 and 10.77.210. Failure to assure confidentiality in reports that are prepared for the court and include sensitive and privileged medical and mental health information hinders the right to a fair trial and an effective relationship with counsel. These records should remain confidential as provided in RCW 10.77.065 and 10.77.210 and should be presumptively filed under seal.

Dated this 12th day of April, 2013.

Respectfully submitted,



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SUPREME COURT
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**DECLARATION OF MARK STROH IN SUPPORT OF
DISABILITY RIGHTS WASHINGTON'S MOTION TO
APPEAR AS AMICUS IN SUPPORT OF APPELLANTS**

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I, Mark Stroh, declare as follows:

1. I am the executive director of Disability Rights

Washington. I have been the executive director of Disability Rights Washington since 1990.

2. Disability Rights Washington is the organization

designated by federal law and the Governor of Washington to provide protection and advocacy services for people in Washington with mental, developmental, physical, and sensory disabilities. Disability Rights Washington has a congressional mandate to advocate on behalf of people with disabilities through the provision of a full range of legal assistance including legal representation, regulatory and legislative advocacy, and education and training. Disability Rights Washington provides litigation, administrative, legislative, and community advocacy to protect and advocate for the rights of people with physical disabilities, developmental disabilities, and mental illness. Disability Rights Washington's mission is to promote dignity, equality, and self-determination for people with disabilities. This mission includes advocating for the privacy and due process rights of people with mental illness.

3. Disability Rights Washington is governed by a board of

directors mostly comprised of people with disabilities or the family members of people with disabilities. Disability Rights Washington is also

advised by both a Mental Health Advisory Council and Disabilities Advisory Council. At least 60% of each advisory council is comprised of individuals with disabilities or their family members. Disability Rights Washington staff, board, and advisory council members regularly organize and participate in meetings and trainings about the rights of people with disabilities.

4. Disability Rights Washington also plays an important role in the development of policies regarding people with disabilities. It closely monitors the state legislature and it drafts and comments on proposed legislation relating to issues that affect the lives of people with disabilities. Over the years, Disability Rights Washington has commented extensively on RCW 10.77 and other bills that affect people with mental illness in criminal proceedings.

5. Disability Rights Washington fields complaints and questions every day from people with disabilities. These communications include hundreds of phone calls per year from individuals with legal problems related to their disabilities, including issues relating to the criminal justice system and conditions in jails, prisons, and state psychiatric hospitals.

6. Disability Rights Washington uses its congressionally-granted authority to monitor jail and prison conditions across the state and

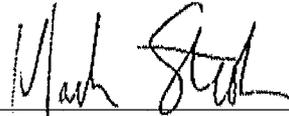
to investigate allegations of abuse and neglect of individuals with disabilities in jails and prisons. Based on information learned from the individual calls, monitoring visits, and investigations, Disability Rights Washington recently published a report, *Lost and Forgotten*, about the human toll paid by individuals with mental illness and other cognitive disabilities while they wait in jail for adjudication of their competency. Exhibit A. Disability Rights Washington has worked with individual jails to improve conditions for the people with mental illness they serve, and over the last year and a half has been working with the Department of Corrections to improve conditions in prisons for people with developmental disabilities, mental illness, and traumatic brain injury.

7. Disability Rights Washington has also filed numerous lawsuits that have resulted in systemic changes for people with mental illness. These cases include *Allen, et al. v. Western State Hospital, et al.*, USDC C99-5018 RBL (class action regarding treatment of individuals with dual diagnosis of developmental disabilities and mental illness); *Marr, et al. v. Eastern State Hospital, et al.*, USDC CV-02-0067 WFN (similar to Allen covering dually diagnosed patients at Eastern State Hospital); *Rust., et al. v. Western State Hospital, et al.*, USDC C00-5749 RJB (class action regarding treatment of forensic mental health patients including patients with brain co-occurring traumatic brain injuries,

borderline intellectual functioning, and other cognitive disabilities); *D.S., et al., v. Western State Hospital, et al.*, USDC C03-5271 RBL (class action regarding discharge of involuntarily detained patients with dual diagnosis of developmental disabilities and mental illness); and *Pierce County, et al. v. Washington State et al.*, Thurston County Superior Court, 03-2-00918-8 (organizational plaintiff in case regarding the admissions and discharges of people at Western State Hospital).

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

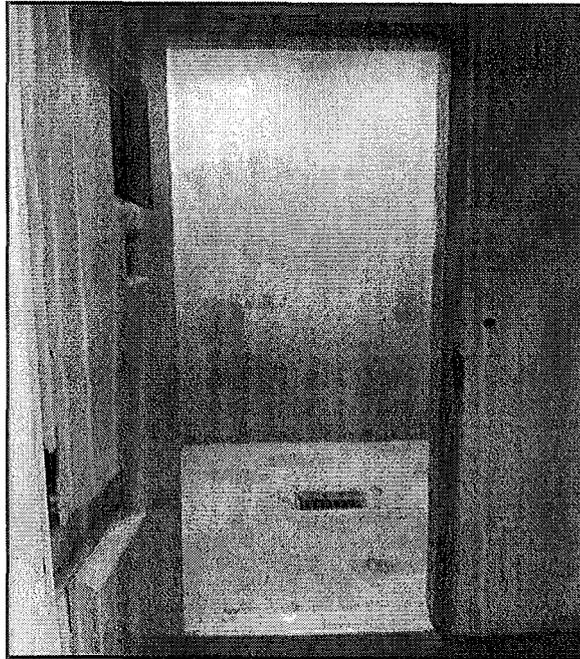
Dated this 12th day of April, 2013 at Seattle, Washington.



Mark Stroh

Lost and Forgotten

Conditions of Confinement While Waiting for Competency
Evaluation and Restoration



This report was completed by Disability Rights Washington, a federally funded non-profit organization mandated to provide protection and advocacy services to people with disabilities in Washington.

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Introduction

People with mental illness, developmental disabilities, and traumatic brain injuries are being held in county jails from several weeks to months awaiting evaluation or restoration of their competency to stand trial. In this report, Disability Rights Washington (DRW) documents the human cost of the time these individuals spend in jail, with inadequate or no mental health treatment, usually in isolation.

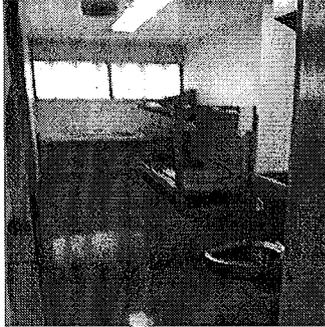
The personal stories in this report include people who were arrested for low level crimes like trespassing and harassment. The charges were in some cases eventually dropped. None of them were convicted of the crime, yet all were held in jail for weeks or months – more punishment than if they had been tried and convicted of the crimes that were charged. All of these men and women needed medication or other treatment in response to a personal crisis, usually a result of their disabilities. Instead, they were jailed, treated as prisoners rather than patients, and subjected to conditions that caused their mental illness to worsen.

These stories underline the need to remember that the costs associated with evaluation and restoration of competency to stand trial are not just borne by the county and state governments. The delays in resolving questions of competency to stand trial result in people with severe disabilities languishing unnecessarily in our county jails, *for months*. These people, sitting in jail, bear a huge, largely unrecognized cost. The price they pay is time out of their lives, time that is spent behind bars, in fear and often in desperate conditions. Many experience lasting trauma, and the extended lack of mental health treatment often does permanent damage. The recognition of this awful price – paid by people who are in jail for reasons chiefly related to their disability – should motivate us to act with urgency to right this injustice.

DRW wants to thank each individual who shared his or her personal and painful story with us. Without you, this report could not have been written.

DRW also want to thank jail staff, law enforcement officers, attorneys, advocates, state hospital employees, and others who allowed us to interview them, shared information, or otherwise provided information. DRW greatly appreciates how each jail took the time to provide DRW with a tour and explanation of the jail's policies and procedures. We consistently heard from jail staff that correctional facilities are ill-equipped to respond to or treat individuals with acute mental illness, developmental disabilities, and traumatic brain injuries. However, DRW has identified several promising practices currently being provided by county jails that are described more fully in the "Promising Practices" section of this report.

Background



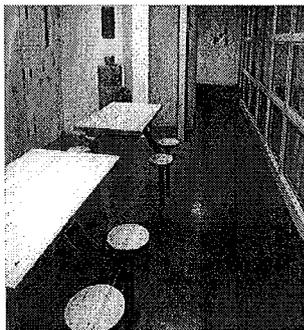
A double cell at Yakima County Jail

When an individual is charged with a crime and is also identified as lacking mental capacity, the law requires state hospitals to evaluate or restore these individuals to determine if they are competent to stand trial. See RCW 10.77, (forensic commitment statute).

Similarly, RCW 71.05, the civil commitment statute, requires state hospitals to provide services to civil patients. The obligation to accept patients when ordered to do so by the courts in this context has been examined by the court. The state hospital cannot refuse to accept individuals who received a court order for involuntary commitment pursuant to RCW 71.05. *Pierce County v. State*, 144 Wash. App. 783 (2008). There, the court affirmed a Washington State Supreme Court ruling from 1982:

In short, the statutory language was binding even if the Department or the hospital faced practical problems in following it: “[M]uch as the courts may sympathize with the institutions which have to bear the frustration and discomforts of overcrowding ... the problem is one which can be solved only by the Legislature, as it is one of providing for the creation and funding of adequate facilities.” *Pierce County* at 272, 644 P.2d 131; see also *Clark County Sheriff*, 95 Wash.2d at 449–50, 626 P.2d 6 (noting Department’s inadequate facilities for receiving convicted felons but finding no statutory authority to pass some of its responsibilities on to local authorities).

Pierce County v. State at 808.



A King County Correctional Facility common area where inmates are allowed, one at a time, outside their cell for one hour a day

Further, a similar problem with long forensic delays in jails existed in Oregon. There, the Ninth Circuit held that the state hospital has a duty to accept defendants identified as incompetent and who have been court ordered to a hospital due to lack of competency. *Oregon Advocacy Center et al v. Mink*, 322 F.3d 1101, 1121-23 (2003). The court held that transportation to the hospital within seven days of the order was constitutional, but prolonged detention in jails was not. *Id.*

Washington hospitals routinely delay the admission of individuals who have been court ordered to receive competency evaluation or restoration services. For over three years, DRW has received monthly reports from the state hospitals documenting the delays in providing both evaluation and restoration services. DRW also meets with both hospitals’

Background (continued)

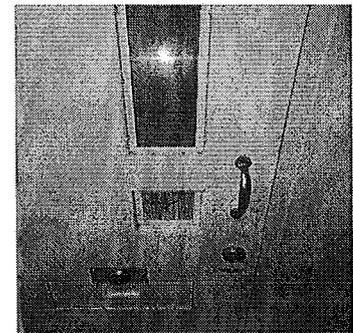
administration on a regular basis and these delays have been a long standing issue.

Based on the information provided to DRW at by both Eastern State Hospital and Western State Hospital administrations, the hospitals point to several causes for the delays including lacking sufficient funding to recruit and retain enough doctors to provide the evaluation or restoration services. The delay in providing evaluation and restoration services results in many individuals with acute mental illness, developmental disabilities, and traumatic brain injuries being held for weeks or months in jail without adequate services.

In the Spring of 2011, the jail delay list grew from a small handful of people waiting for evaluation or restoration to dozens. DRW along with defense attorneys, prosecutors, judges, sheriffs, mental health providers, and advocates worked with legislators and legislative staff to develop legislation to address the delays. Substitute Senate Bill 6492 was signed into law on March 30, 2012. The legislative intent behind the law included reducing “the time defendants with mental illness spend in jail awaiting evaluation and restoration of competency.”

The law amended certain sections of RCW 10.77 to address the delay. In particular, section 2 provided seven-day aspirational “performance targets” for all evaluations and all admissions for restoration services to take place. RCW 10.77.068.

SSB 6492 also established that the Joint Legislative Audit and Review Committee (“JLARC”) would report on how well the state hospitals were meeting these goals. According to the JLARC December 2012 report, both state hospitals are failing to meet the seven-day performance targets.



Cell door with cuffing and meal slot at Spokane County Jail

Purpose and Scope

This report seeks to illuminate the human cost of the inability of the state hospitals, Western State Hospital (WSH) and Eastern State Hospital (ESH), to timely evaluate or treat individuals who have been charged with crimes, but have a disability so severe as to prevent the individual from assisting in his or her own defense.

This report focuses on the people who wait in jail. Their stories illustrate why this problem must be addressed. DRW has written this report so that these voices are not lost and forgotten.

Methodology

DRW's methodology in creating this report was based on monitoring, interviewing, reviewing records, and conducting focus groups.

DRW conducted a six month monitoring plan at King, Snohomish, Pierce, Clark, Yakima, Benton, Franklin, and Spokane County Jails. We documented the jail conditions during each monitoring visit. We also reviewed the policies and procedures of each jail we visited.

DRW staff interviewed people with disabilities who waited in jail for evaluation or restoration services. DRW also interviewed state hospital staff, jail staff, stakeholders, defense attorneys, prosecutors, and law enforcement officers.

DRW reviewed documents requested from county jails, the state hospitals, community mental health providers, and assigned counsel. Additionally, for each personal story listed in this report, DRW requested and reviewed the following individuals records:

- All records of legal status, including court orders;
- All records detailing disability-related needs, including but not limited to mental health records and progress notes;
- All incident reports and records of the jail's response to those incidents;
- All records of kites (complaints) or grievances, and all records of the consideration and responses to those kites and grievances; and
- All records of internal and external communication, including but not limited to written correspondence, emails, and hand written notes, regarding the receipt of evaluation services.

Finally, DRW conducted two separate focus groups in Spokane and Seattle where we solicited feedback from jail staff, stakeholders, defense attorneys, and other advocates.

“My office frequently represents clients who would be able to resolve their cases pretty expeditiously and on favorable terms with treatment options in the community. But, all that gets delayed while they wait in jail for months and months and months pending competency restoration, sometimes on cases were they are facing no more than 60 days in jail [if convicted]. This seems like an absolute waste.”

- Daron Morris, The Defender's Association

Jail Conditions

This section of the report provides a brief description and photographs of the eight jails DRW monitored. While each jail is distinct, there were commonalities in all eight jails.

First, the vast majority of mental health treatment in each jail comes in the form of medication. If involuntary medication is required (because the individual is unable or is unwilling to consent), the jails may not force medication without a hearing. *Washington v. Harper*, 494 U.S. 210, 233-234, 110 S. Ct. 1029, 1043-1044(1990); see also *United States v. Sell*, 539 U.S. 166, 169-70 (2003). Based on our review of jail policies, many jails do not pursue this option. According to DRW's interviews of jail staff, the reasons many jails do not pursue going to court to receive an order for involuntary medication include the time and cost necessary for filing these court petitions, preparing for the hearing, and attending the hearing.

Second, all of the jails monitored had staff that indicated they did not have sufficient mental health treatment resources, expertise, or professionals to evaluate competency or provide restoration services to individuals who have been evaluated and determined incompetent. While mental health treatment may prevent inmate deterioration and enhance protection from self-harm and suicidal or homicidal ideation, jails are ill-equipped to respond appropriately to the needs of individuals with mental illness seeking mental treatment. Human Rights Watch, "Mental Illness, Human Rights, and U.S. Prisons," (September 2009).

Without adequate mental health treatment, individuals in jail with mental illness experience painful symptoms and decompensate. James, D and Glaze, L "Mental Health Problems of Prison and Jail Inmates," Bureau of Justice Statistics (September 2006). As of 2006, a national study by the Bureau of Jail Statistics found only 17% of jail inmates who had a mental illness had received treatment since admission into jail, as opposed to 33% of state prisoners. *Id.* As the personal stories found later in this report illustrate, these individuals lacked access to adequate mental health services in jail and decompensated to the point of smearing themselves with feces, considering suicide, and experiencing hallucinations and extreme fear.

Third, many people with disabilities spend most of their time in jail isolated in the "hole", which is typically reserved for punishment. As correctional facilities, jails control and respond with discipline to volatile behavior or actions that cause a disturbance. Individuals with mental illness are especially at risk of punishment as their disability may prevent them from following jail directions resulting in multiple infractions. As a result of

Jail Conditions (continued)

infractions, these individuals lose privileges and end up in solitary confinement. This trend is not unique to Washington. In 2006, a national study by the Bureau of Jail Statistics found jail inmates with mental illness were twice as likely as those without to have been charged with facility rule violations (19% compared to 9%). Doris J. James and Lauren E. Glaze, "Mental Health Problems of Prison and Jail Inmates," Bureau of Justice Statistics, September 2006.

Additionally, the study found inmates in local jails with a mental health diagnosis were also four times as likely as those without to have been charged with a physical or verbal assault on correctional staff or another inmate (8% compared to 2%). *Id.* The study further showed individuals in local jails with diagnosed mental health issues can be subject to sexual or physical abuse by higher functioning inmates. *Id.* Jail inmates who had a mental health issue (24%) were three times as likely as jail inmates without (8%) to report being physically or sexually abused in the past. *Id.* As a result, individuals with mental health issues are more likely to be placed in segregation or have even more restrictions on their movement. *Id.*

Consistent with this trend to isolate people with disabilities, every jail DRW visited had a segregation unit where individuals are confined in their cells for at least 23 hours a day. Jail staff reported the reasons they used the segregation units to include: behavior (even that which is entirely related to their disability), failure to follow the rules, and risk of harm. Each of the personal stories included in this report involve an individual with disabilities spending most, if not all, of their time isolated in a segregation unit.

The most severe form of isolation DRW observed at the majority of jails was a housing placement referred to by jail staff as "rubber rooms." According to jail staff, these rooms are used when a person is at risk of self-harm. These rooms are small, with small windows on the outer cell door, and coated with a layer of rubber to lessen the impact of someone throwing themselves against a wall or floor. (See cover for photograph of a "rubber room"). Individuals placed in these rooms are often stripped of all of their clothing, including undergarments, and given a suicide smock to wear. (See page 18 for a photograph of a suicide smock.) There is no furniture in these rooms, so individuals must sleep on the floor and use a hole in the floor to relieve themselves. Jail staff reported that often toilet paper is not provided as the individual may swallow the material or otherwise use it to engage in self-harm. Similar safety concerns were raised when DRW asked if the individuals had access to water or soap to clean themselves up after relieving themselves. As discussed in the specific "Jail Conditions" in the

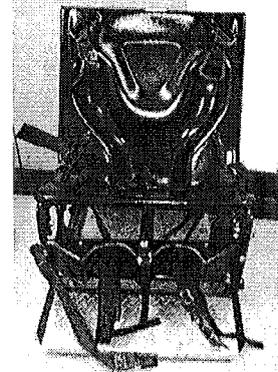
Jail Conditions (continued)

next section of this report, many of these rooms were stained and still smelled of human waste.

Fourth, every jail we visited also had restraint chairs. The chairs themselves had straps at each arm and leg, and one for the head.

Fifth, jails offer very limited opportunities for activities and interaction for individuals during the hour each day when the inmate may leave his or her cell. Any interaction with other inmates or jail staff is usually either through their windows or slots in the cell doors. Many individuals DRW visited stated that they have not touched nor had a face to face conversation with another human being for weeks to months.

While DRW has significant concerns with the overall jail conditions, its monitoring revealed several promising practices that we list at the conclusion of this report. These practices are examples of how some jails currently seek to improve the conditions of confinement.



Franklin County
Jail's restraint
chair

A Typical Day in Isolation

“[T]here are few if any forms of imprisonment that appear to produce so much psychological trauma and in which so many symptoms of psychopathology are manifested [as isolation].” - Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124 (2003).

DRW's monitoring found inmates in isolation spend 23 to 24 hours a day locked alone in small, often windowless cells. They are deprived of books, radios, or any other form of activity to divert their minds from their living circumstances. They are fed in their cells, their food passed to them on trays through a slot in the door. In addition, they have extremely limited opportunities to participate in any form of mental health therapy.

Through interviews of jail staff and inmates, DRW learned that often the only contact with mental health professionals occurs during rounds when staff walk through the jail and occasionally stop by to speak to inmates through the bars or slot in their cell door, all within earshot of neighboring cells. Inmates who have medication side effects, who feel depressed, or who may believe that they no longer need medications, often begin to refuse medications because there is little to no opportunity to talk privately with the mental health professionals. See Sharon Shaley, *Sourcebook on Solitary Confinement*, Mannheim Centre for Criminology, London School of Economics and Politics (2008), available at www.solitaryconfinement.org/sourcebook (last visited January 23, 2013).

Finally, studies report the effects of isolation including sleep disturbances, nightmares, depression, anxiety, phobias, impaired memory, and concentration long after the release from isolated environments implying “a degree of irreversibility.” *Id.* at 22.

Franklin County Jail



General population unit at Franklin County Jail.

Franklin County Jail opened in 1986 and originally had the capacity for 102 beds, increasing to 156 beds since being modified with double bunks. The daily average population of 196 far exceeds that capacity.

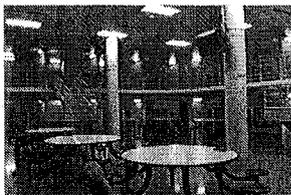
Inmates with acute mental illness are housed in either a booking cell or in a shared cell just outside booking, in the unit designed for individuals with medical or mental health needs. In the hallway outside the shared cell was a restraint chair with holes drilled into the seat of the chair. Jail staff told DRW the holes in the restraint chair were drilled so that inmates who relieved themselves while in the restraint chair would not have an "excuse" to be released. Jail staff also explained that they routinely place individuals in the restraint chair in an isolation room with the chair facing the wall.

DRW staff were also told by jail staff that inmates were required to dip their hands in diluted bleach water before every meal to address the spread of disease. In the general population unit, DRW staff remarked that the bars on the second story didn't reach the ceiling. Jail staff explained that, yes, they have had inmates who jumped "and went splat" when they attempted to hurt themselves by jumping. DRW staff were told that the inmates have no scheduled time outside their cells, because not allowing inmates outside their cells prevents fights and makes the jail easier to manage.

Benton County Jail

Located less than ten miles from Franklin County Jail, Benton County Jail has the current capacity for 800 inmates but has the average daily population of 650 inmates. The 800 inmate capacity is due to a jail expansion in 2003 when the county built the new jail addition next to the old jail, which previously had the capacity for 561 inmates. The new jail addition is cleaner and brighter than the old portion of the jail.

Similar to other jails, inmates with acute mental illness are often held in individual cells in the booking area of the jail. Weeks prior to DRW's visit to the facility, an inmate committed suicide in a booking cell by tying a blanket around his neck as a noose and hanging himself. DRW observed that the room identified as the one used for inmates with acute mental illness had an electronic scanner allowing jail staff to enter the time in which they checked on the inmate and their observation notes. There was also a window approximately 12 inches wide that would provide the only means for line of sight observation.



A Benton County General Population Unit

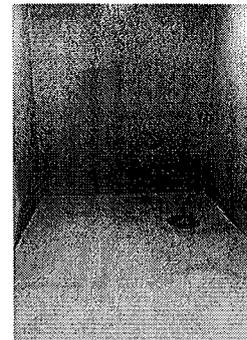
The other housing units at the jail are a mixture of general population and single or double cell units where one to four inmates were released at a time for their hour out a day (excluding weekends). Mental health services are provided through a contract with an outside mental health provider.

Clark County Jail

Clark County Jail was built in 1984 with the capacity to house 250 inmates. Currently, the jail has an average daily population of 600. The jail houses this many people by triple bunking or placing mattresses on the floor in the general population units.

At the time of DRW's visit, the general population units were crowded and hot. The beds are bunked up to the point where individual inmates are sleeping immediately adjacent to one another with little room to walk. DRW toured the segregation and suicide watch units where individuals are on a 23-hour lockdown. Individuals who are on suicide watch wear only suicide smocks. The lighting in the unit is dark. Also, there are four rubber room cells behind the booking area. Each cell is coated with brown rubber. The one DRW toured smelled like fecal matter.

Mental health services are provided through a contract with an outside mental health provider. There are only three mental health counselors to serve the mental health needs for 600 individuals. This past year alone there have been four suicides and one homicide directly tied to the jail's use of restraint during a self-harm event. Last year, the Clark County Auditor found the suicide rate has more than doubled since 2007, in part, because the jail "continues to be heavily impacted by special-needs inmates: the mentally ill, geriatric, physically or mentally challenged."



Clark County Jail's rubber room with brown stains near the hole in the floor

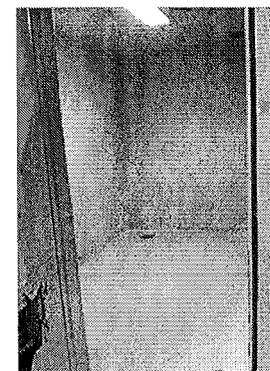
Yakima County Jail

Yakima County Jail has a current capacity of 800.

Inmates in general population are housed in bunk beds, and jail staff informed DRW that this unit was full to capacity when DRW visited. The hallways leading to the cells and the cells themselves have very low level lighting. Because of the lack of air circulation, the temperature throughout the jail is very warm.

Individuals in isolation are housed in single-celled units, separated from the general population. There is a common area where individuals are allowed to leave their cell, in a rotation, for one hour per day (excluding weekends, when they do not leave their cells at all). Inmates who are in these units told DRW that they were doing everything they could in order to be released into general population where they are allowed to interact with others and not locked down for 23 hours a day.

Individuals not on lockdown have access to a library and classrooms, but the classrooms visited contained very few materials for the inmates. Finally, there was one rubber room at the jail that contained an open hole in the floor for inmates to relieve themselves. The room smelled strongly of human waste.



Yakima Jail rubber room completely bare except for the hole in the floor

Snohomish County Jail



Doorway to a rubber room at Snohomish County Jail

Snohomish County Jail consists of two buildings; the Wall Street wing was recently built and the older Oak Street building was built in 1980's. The jail has a current capacity of 1226 beds plus an additional 88 beds in a work release facility.

While the Wall Street building is brightly colored, well-lit, and has good air circulation, the Oak Street building is dimly lit and has poor air circulation. Cells in both units are on two separate floors, with a chain-link fence preventing individuals from jumping off of the second floor. Inmates in segregation under 23-hour lockdown are provided with one hour to walk in the exercise yard.

There are two rubber room cells in booking where inmates who are suicidal are often placed. The rooms are stained and smell of human waste. Inmates have carved words like "help" into the coated flooring.

The jail has a mental health observation wing that is currently unoccupied. The unit contains suicide watch cells and private interview rooms. Jail staff explained that the unit is vacant due to limited funds to adequately staff the unit. Unlike the rest of the jail, this unit provides single rooms with large windows allowing staff to more closely observe and monitor inmates who are at risk of self-harm.

King County Correctional Facility

King County Correctional Facility was built in 1985 and has the current capacity for 2800. It is the largest jail in Washington.

The concrete floors and walls are caked with dirt and sticky. The exercise rooms are either completely empty or are used as storage. One floor of the jail is dedicated to those with medical or mental health issues. DRW observed that were designed for medical isolation were being used as mental health isolation rooms where a jail staff person maintained line of sight and documents behaviors.



King County Correctional Facility exercise room used as storage

The other units on this floor contain a mix of individuals who were either isolated in their cells for 23 hours a day or in general population where the cell doors were left open to the common room. The most restrictive housing unit had each inmate in a cell with a common room where only one inmate at a time was released for one hour a day. The common room has several tables and chairs bolted to the floor. On this unit, conversations on the payphones cannot be private, because the speakerphone feature must be used given that the cords have been removed for safety after a Department of Justice ("DOJ") investigation. The DOJ investigation also resulted in several other changes to the facility improving overall safety including a comprehensive booking screen, which is more fully discussed in the "Promising Practices" described in the conclusion of this report.

Pierce County Jail

Pierce County Jail is a medium and maximum security facility that consists of two wings, the New Jail and the Main Jail, confining over 1300 inmates. DRW staff touring the facility observed that the jail was dimly lit, with gray walls, and it was very cold on all of the wings visited.

The cells and entry points to all wings in Pierce County Jails are lined with bars. One of the interview rooms has a strong draft that comes in through a door that leads to an exercise yard. In addition, during one of the visits, rain leaked through the door into the interview room causing several small puddles to form.

Similar to other jails, Pierce County has a variety of housing placements with corresponding levels of restrictions depending on what the individual was charged with and his or her behavior. This included standard segregation cells as well as a unit specifically designed for people with mental illness. In segregation, inmates are only allowed out of their cell for one hour a day on a rotating basis so that only one person is out at a time. DRW staff observed on segregation units that when inmates were provided lunch, several officers simply slid the food tray through the slot in the door while announcing "feed time". In comparison, on the mental health housing units, inmates are allowed out for up to four hours a day and with other inmates where they can eat a meal or interact with others.

"The jail has become a cul-de-sac for mental health issues." - Sheriff Paul Pastor of Pierce County Jail. Steve Maynard, *Jail Overtime Bill Skyrockets*, News Tribune, Aug. 12, 2012.

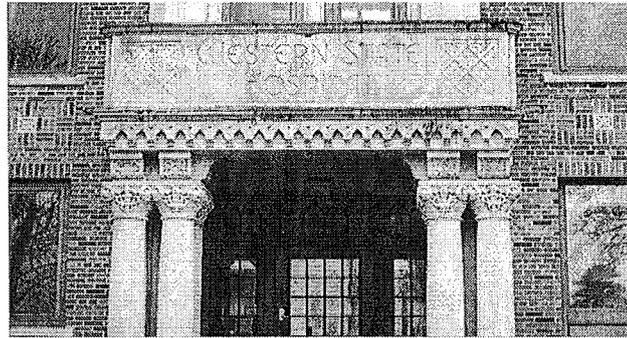
Spokane County Jail

The Spokane County Jail and the Geiger Corrections Center together have current capacity for 1285 inmates with the average daily population of 1170.

Spokane County's jail is different from the other jails we monitored in that it has a "Spokane County Detention Services Mental Health Team" providing 24 hour mental health services to inmates as part of the jail. The team assesses each inmate at booking and coordinates with the county court, defense council, and providers.

Similar to other jails DRW visited, Spokane County separates inmates into housing units based on charges, mental health needs, and behavioral issues. The majority of male inmates with acute mental illness were housed in segregation where they were only let out of their cell and into the common area for one hour per day (excluding weekends). Also similar to other jails, inmates who have threatened or demonstrated self-harm are housed in booking cells. Female inmates with mental health issues are housed behind an additional closed door. This unit was referred to as "the dog house" by jail staff and inmates. When asked why it was called this, the staff replied that similar to a dog shelter, there was an additional door to help muffle the yells and screams coming from that unit.

When asked why the unit housing female inmates with mental illness was called "the dog house", the staff replied that similar to a dog shelter, there was an additional door to help muffle the yells and screams coming from that unit.



Western State Hospital's front doors

How Does a Hospital Differ From a Jail?

Jails are simply not set up to provide care to individuals in mental health crisis. Those who have been court ordered to receive mental health competency evaluation or restoration services must be timely sent to either state hospital, Eastern State Hospital and Western State Hospital or risk substantial—and possible permanent—deterioration of their mental health.

To understand why moving to ESH or WSH sooner is prudent, it is helpful to compare the jail conditions you just read about with that of the state psychiatric hospitals. Both hospitals have secure forensic units to provide mental health competency evaluation and restoration services to individuals with disabilities who have also been charged with crimes.

Each locked unit has a central nursing station staffed by a psychiatrist, a psychologist, a social worker, mental health technicians, and nurses. From the central nursing unit, there are hallways leading to individual rooms with unlocked doors. Individuals walk around freely, approach the nursing station if they need anything, or reside in common areas on the unit. Any use of isolation or seclusion is time-limited, done on an individual basis, and requires a physician's order. During the time on these units, individuals receive assessment as well as medication evaluation and management. The hospitals also routinely seek involuntary medication orders from the court if the individual is unable or unwilling to take their prescribed medication. There are no rubber rooms.

Additionally, competency restoration patients in the hospital attend a daily treatment mall where they receive individual and group therapy as well as legal skills training to assist patients in learning about the law, pleas, and returning to court. The purpose of this treatment is designed to restore or assist the individuals regain competency to proceed to trial. This treatment is all provided in a secure hospital setting with clinical oversight.

Finally, individuals with developmental disabilities may be placed on the Habilitative Mental Health unit at both state hospitals. The units provide specialized mental health services provided by clinicians and staff with skills and training to treat individuals with co-occurring both mental health issues and developmental disabilities.

Personal Stories

DRW interviewed over fifty individuals with disabilities who currently or previously were in jail awaiting either a competency evaluation or restoration treatment. The following is a selection of summaries of interviews conducted between May 2012 and November 2012.

Starting with Tommy Manning's story, these four stories illustrate the effects on people with disabilities who spend extended periods in jail awaiting competency evaluation or restoration. Each story is unique to the individual but also represent the common themes that DRW found during its monitoring. For example, it was common to hear stories about how individuals tried, but failed, to obtain needed mental health services in the community causing his or her symptoms and behavior to get worse. These individuals were often arrested for low level crimes like trespassing, harassment, or vagrancy. With all the people we talked to, their symptoms got even worse in jail due to their conditions of confinement. It was also common to hear about how people felt lost and forgotten in 23 to 24 hour isolated confinement where they rarely interacted with another human being.

These stories are based on interviews conducted by DRW staff. In many cases, DRW also spoke with family members, jail staff, and defense attorneys. DRW was able to confirm the facts alleged in these stories within the inmates' written records.

“Jail is the worst possible place for people struggling with serious mental illness. As a society, we need to stop the pattern of unnecessary incarceration of people with mental illness. They are not criminals. Nobody chooses to have a mental illness, and therefore nobody should be jailed for having one. Instead, they should be offered treatment.”

- Gordon Bopp, President, Washington State Chapter of the National Alliance on Mental Illness (NAMI)

Tommy Manning—Pierce County Jail

Tommy Manning is an experienced and well-known advocate for the rights of people with disabilities.

In 2007, the legislature passed the Tommy Manning Act, RCW 74.31.060, to help fund programs for people with traumatic brain injury. The Act is named after Tommy for his determined advocacy for its passage and improvements in services for people with brain injury. This issue is something deeply personal to Tommy. When he was ten years old, his family was involved in a car accident that killed his mother, severely injured his sister, and left Tommy with a traumatic brain injury. He continues his advocacy for people with brain injuries on the Traumatic Brain Injury Council as well as other coalitions.



Tommy Manning holding up a flyer about the Tommy Manning Act on the Capital Steps in Olympia, WA

About a year ago, Tommy injured his hip after moving items out of his apartment. He also began having a hard time getting and taking his prescribed medications. For months, Tommy began to decline due to this injury and inability to obtain his medication. In April 2012, he decided to make the long slow painful walk to his pharmacy. Along the way, Tommy got into a verbal altercation with someone who apparently called the police to say that Tommy was yelling at them. When the police arrived, they arrested Tommy for harassment and took him to jail.

On April 24, 2012, the court ordered him to receive a mental health evaluation by Western State Hospital, which routinely conducts these evaluations in jail. However, like many, this did not happen timely. After a week in jail, Tommy's mental and physical health had rapidly deteriorated to the point where he was found sitting in his own feces. According to jail records, it was "unknown how long he had been in that position," but long enough that he "had badly macerated inner thighs down to his knees. It is most probably from sitting in waste."

After this first week, the jail moved Tommy to solitary confinement where he lived for weeks in a suicide smock, was only allowed out of his cell for one hour a day, and was brought to his mental health evaluation in wrist-to-waist restraints.

Tommy was also "written up" because he did not return his meal tray. Tommy reports that he did not understand that he was expected to do so. The jail noted that in the community Tommy had paid care staff that assisted him with activities of daily living like cleaning and preparing meals due to his disabilities and that Tommy was "slow to grasp how jail is."

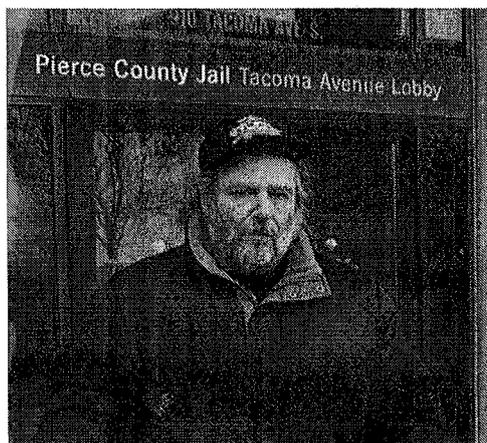
Tommy Manning—Pierce County Jail (continued)

The mental health evaluation found Tommy not competent to stand trial. The charges against him were eventually dismissed.

In the two months he had been in jail, Tommy lost his apartment and all his services. Jail staff reached out to determine if he could go to a community mental health treatment facility. Because none were available, Tommy was involuntarily taken to Western State Hospital where he remained several more weeks. Ultimately, Tommy spent over two months in jail, lost his apartment and many of his belongings, experienced a serious decline in his physical and mental health, and was treated like criminal. He remains emotionally scarred from his experience.

Tommy is now back out in the community living in his own home. With the support of friends and providers, he is trying to get his life back on track. In part, it is this report that has him fired up yet again to improve the lives of people with disabilities in Washington.

When Tommy looks back, he thinks about all the thousands of people with disabilities living in the community and believes that, like him, one slip-up and they can end up isolated in jail where they are lost and forgotten. "I have been an active advocate and important person at the Capitol. Even a law was named after me. Yet, I was carted off to jail like I was a common criminal. If it can happen to me, it can happen to anyone."



**Tommy Manning standing
outside the front doors of Pierce
County Jail in November 2012**

L.W. – Pierce County Jail/Puyallup County Jail

In the Spring of 2011, L.W.'s mental health became increasingly unstable due to the death of her husband and the loss of her home. L.W. sought help at the Good Samaritan Hospital in July 2011, but was turned away. With nowhere else to go, L.W. holed up in the hospital bathroom. Hospital staff called the police to forcibly remove L.W. from the premises. L.W. was charged with a misdemeanor trespass and was transported to the Puyallup County Jail.

L.W. remained at Puyallup County Jail for one month. In August 2011, L.W. was released and driven by officers to the Recovery Response Center (RRC), an emergency treatment facility. Once at the RRC, L.W. was confused and refused to get out of the police vehicle. Officers then attempted to drive her to several other locations including St. Joseph's Hospital, but L.W. became increasingly upset, scared, and made threatening statements to the officers. The officers noted in their police report that because she was only making verbal threats, they were unable to get her involuntarily committed to receive mental health services and even if she was involuntarily committed she "would also be charged with harassment." Instead of getting the mental health treatment everyone agreed that she needed, but couldn't find, L.W. was taken back to jail and charged with additional crimes.

Upon arriving at the jail, officers asked L.W. to get out of the police car but she refused. The police report notes that once the officer forcibly removed her from the patrol car, "She began to actively resist and tried to pull her arms away from the officers and began to kick at me as she was trying to free herself from the officer's grasp. She was tazed by a corrections officer." The report states that she was tazed two additional times once the officers had her on the ground. L.W. was subsequently charged with harassment and resisting arrest and booked into jail.

Because L.W. was in a mental health crisis, she was unable to maintain in general population for only two days. Jail officials' descriptions of her included expressions of deep concern, because it was clear that she was experiencing acute and untreated mental health issues. As a result, L.W. was housed in an isolated crisis cell for her entire stay. She continued to deteriorate while in isolation.

After another month of incarceration, L.W. was evaluated by WSH and found not competent to stand trial. She waited another two months before she was sent to WSH for restoration treatment at the end of October 2011. She was at WSH for three months and once her competency to stand trial was restored she returned to Pierce County Jail in January 2012. Within a month, L.W.'s mental health deteriorated in the jail environment and another competency order was entered at the end of January 2012. L.W. remained in a crisis cell and was re-evaluated two months later and was found not competent in March 2012.

The charges against L.W. were subsequently dropped. L.W. spent over five months in jail and three months at Western State Hospital. Currently, L.W. resides in the community where she has obtained the services and treatments she needed to respond to the grief of losing her husband.

M.K. – Clark County Jail

M.K. was arrested in March 2012 for Fourth Degree Assault and displaying a weapon. M.K. and his neighbor got into a prior dispute and M.K. claims that he carried a knife around in self-defense.

M.K. has been receiving community mental health treatment for several years and works with his prescriber to adjust his medication as needed.

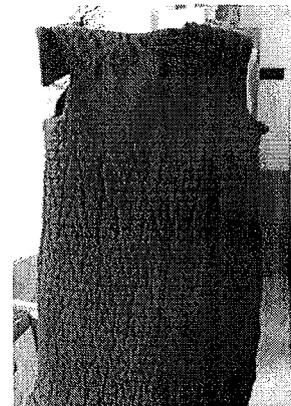
Upon arriving at the jail, M.K. was experiencing acute mental health symptoms. He was subsequently court ordered to receive a mental health evaluation from Western State Hospital (WSH). While waiting for an in-jail evaluation, M.K. did not receive his prescribed medication, despite asking jail staff for them and having hallucinations for four days. In addition, M.K. only slept a few hours per night and ate poorly.

M.K. was assaulted by a cell mate. Guards then placed him in protective custody (isolation) for five days. M.K. was only allowed one hour out of his cell each weekday. He said the prolonged isolation and inability to move beyond his very small cell exacerbated his mental health symptoms to the point where they were the worst he had ever known. He was left alone with his hallucinations with little human interaction.

M.K. remained in Clark County Jail for over 60 days until May 2012, when the court found him incompetent to stand trial. Ten days later, M.K. went to WSH for restoration services. While at WSH, M.K. received treatment and observation for three weeks. With the assistance of mental health treatment and proper medication, the medical staff found him to be competent to stand trial. M.K. also mentioned that along with proper treatment, he slept and ate better and was able to have more recreation time including going outside and getting fresh air. Each of these things, according to M.K., help him manage his mental health symptoms

M.K. went back to Clark County Jail and, as was the case in his prior stay, waited ten days to receive the correct medication. While the prosecutor dropped the Fourth Degree Assault charge, M.K. ended up entering a guilty plea for displaying a weapon because he no longer wanted to stay in jail due to the deplorable conditions and problems with getting the medication he needed.

Ultimately, he chose to accept a criminal record instead of being incarcerated any longer due to the severe toll staying in jail was taking on his mental health.

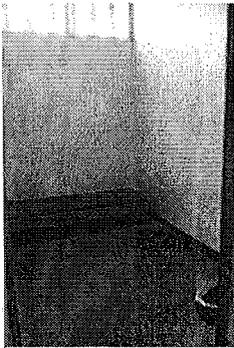


A suicide smock, which is the only garment inmates on suicide watch in Clark County Jail are allowed to wear

J.P. - Benton County Jail

J.P. was arrested for Third Degree Assault. J.P. stated that his mental health was deteriorating at the time he was arrested. He remembers receiving calls and visits from his mental health providers reminding him to go to his group therapy meetings and to pick up his medication; but, J.P. states that he was hearing things and felt safest staying in his apartment, away from others.

He remembers how terrified he felt when two police officers banged on his front door demanding that he open the door so that they can take him away. He now knows that they planned on taking him to the crisis triage center. Then, however, he was scared and ran. The officers chased him down, handcuffed him, and took him to jail.



**A typical
isolation cell**

Upon arriving at the jail, J.P. was placed in an isolation cell. According to jail records, he was on suicide watch for four days where he was checked every 15 minutes to ensure that he did not commit suicide. He does not recall much of this time except that it was a “blur” of graphic hallucinations.

Eventually, he was placed in a double cell in general population. He stabilized once we was able to obtain the medications he needed. However, the jail told him that his insurance would not provide coverage for his medications while he is in jail. Therefore, he was charged several hundreds of dollars per day for his medication. He now needs assistance disputing these charges.

J.P. then waited in jail for over three months before going to Eastern State Hospital (ESH) for competency evaluation. During the evaluation, his doctors expressed concern that he ended up in the criminal justice system. They wrote a letter to the judge explaining that J.P. was arrested because his mental health had deteriorated, even though he had “sought treatment.” The evaluator concluded, “He and the community would be best served by focusing on treatment rather than punishment.”

J.P.’s charges were eventually dropped. He remains at the hospital as a civil patient so that he can obtain the mental health services he needs. J.P. expressed to DRW that he hopes that by sharing his story, people will learn about what happens to people whose only “crime” is to have a mental illness.

Conclusion

Several jurisdictions across the country have taken steps to address the problem of the rising number of individuals with disabilities in the criminal justice system. Council of State Governments, *Criminal Justice/Mental Health Consensus Project Report*, http://consensusproject.org/the_report. The Council of State Governments created the Consensus Project to provide resources and technical assistance to legislators, policymakers, and practitioners who seek to improve the response to individuals with disabilities who enter the criminal justice system.

There are also several standards addressing conditions of confinement. See National Commission on Correctional Health Care, *Correctional Mental Health Care: Standards and Guidelines for Delivering Services* (1999). If adopted, these standards would help improve how jails identify, house, and provide services to individuals with disabilities.

As a conclusion to this report, we include the following "Promising Practices" that DRW observed in our six months of monitoring eight county jails in Washington. These are practices currently used by some of Washington's counties to improve the conditions of confinement for individuals with disabilities. As the descriptions of jail conditions and the personal stories contained in this report show, the costs associated with evaluation and restoration of competency to stand trial are not just borne by the county and state governments. However, the Council of State Government, National Commission on Correctional Health Care, and the promising practices already found in several Washington jails show that county and state governments have the ability to reduce the human cost paid by people with disabilities housed in our jails.

"Myself and my team are committed to this population because they cannot be heard very loudly through the cinder block jails they are housed in. It is really true that I have seen over the years an attitude of out of sight out of mind. Many people are arrested solely due their disability, such as criminal trespass when they may lack the ability to understand or follow directions. The jail environment exacerbates their symptoms so much that it is really astounding how quickly that can happen and how lasting the effects of that are."

- Judy Snow, Manager of Pierce County Jail Mental Health Services

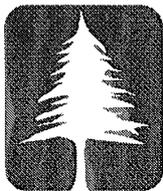
Promising Practices

- **Eliminate bare isolation rooms.** The use of bare isolation cells referred to as “rubber rooms” reinforce isolation and is degrading. Individuals are forced to lay on the ground in the small room next to the hole in the floor that they must use as a toilet. Spokane County Jail closed their rubber rooms and instead use short-term suicide watch cells where individuals are placed in single cells with a bed and a toilet. There is a wide window on each cell door where jail staff are able to maintain constant monitoring and document behaviors.
- **Provide 24 hour access to mental health staff.** The majority of jails we visited provide contracted mental health with outside providers. Some of the jails have a contracted mental health provider come in only once a day for about an hour, drastically limiting the provision of mental health services. Spokane County provides access to jail mental health staff twenty-four hours a day so that clinicians can respond to any emergent issues.
- **Jail as licensed mental health provider.** Spokane County Jail is itself a licensed mental health provider. DRW, as well as many of the stakeholders, are concerned that jails have become the de facto mental health provider. According to Kristina Ray, Spokane County Jail’s Mental Health Supervisor, “The reality is you are going to have people with mental illness in jail. The question is do we just want to provide okay care or the best care while they are there.” Credentialing jails as mental health providers allows for greater continuity of care, communication with the courts, hospital, and defense council, and sets standards of care throughout the entire facility. The National Council for Correctional Health Care also provides licensing standards.
- **Isolation Should be Sharply Limited.** Isolation can cause an exacerbation of mental health symptoms. Benton County, Pierce County, Clark County, and Spokane County jails allow family, friends, outside community groups, and attorney visits while someone is in isolation. Also, Pierce County jail has a mental health housing unit where inmates are allowed out of their cells for up to four hours a day when they are also allowed to interact with other inmates.
- **Reject Individuals with Acute Mental Illness from Booking.** Recently, Pierce County Jail implemented a policy rejecting individuals with acute mental illness when they are brought to booking where the jail mental health professionals have determined they are unable to meet the individuals needs. The policy, instead, directs arresting officers to transport the individual to the county crisis triage center so that the individual can be stabilized. Nearly every other county had similar medical health policies but not for mental health.

Promising Practices (continued)

- **Involve Family Members and Advocates.** Often friends, family members, and advocates have background information, including medication needs and medical and mental health history. Pierce County Jail actively reaches out to friends and family members to gather needed information. They also have a dedicated mental health line where family members can link directly with jail mental health staff rather than having to route through the complicated and time-consuming general county phone line.
- **Improve Mental Health Screening in Jails.** All jails should have a comprehensive booking processes to ensure that individuals with disabilities are being properly screened upon coming to jail. Similar to the King County Correctional Facility, other county jails should evaluate their mental health services and develop corrective action plans to ensure that they are appropriately identifying and screening individuals with disabilities at booking. Screening to identify individuals with developmental disabilities and mental illness has been the subject of recent legislation and report. See HB 2078 WORK GROUP, TASK FORCE REPORT—PART I and II, 61st Leg., Reg. Sess. (2009) available at http://www.ddc.wa.gov/HB_2078_Work_Group.html (last visited January 23, 2013).
- **Enhance Jail Safety with Physical Improvement.** Several jails, including Franklin County, do not have bars or other mechanisms to prevent inmates from jumping off the second story railing. Jails should consider following King County Correctional Facility's lead and provide suicide prevention training, observation, and intervention techniques to coincide with physical improvements to the jail like installing a barrier on the second story to prevent jumping. www.justice.gov/crt/about/spol/documents/KCCF_MoA_01-14-09.pdf. A review of the Department of Justice's settlement agreement may provide additional information regarding physical and policy improvements to increase jail safety.

Other physical improvements to jail safety include Benton County Jail's use of line of sight observation coupled with an electronic scanner to record the time and observations of jail staff monitoring is also promising. Finally, Snohomish County's Observation Unit has single rooms with large windows allowing staff to more closely observe and monitor inmates who are at risk of self-harm, but as jail staff informs us, it has never been used due to a lack of funding for staff.



DISABILITY RIGHTS WASHINGTON

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www.DisabilityRightsWA.org

Disability Rights Washington is a member of the National Disability Rights Network. A significant portion of the DRW budget is federally funded.

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January 2013

OFFICE RECEPTIONIST, CLERK

To: Travis Stearns
Cc: Todd Maybrow; barrylfp@aol.com; Cindy Arends; Ray McFarland; Strand-Polyak, Adam (strandpo@seattleu.edu); Heather McKimmie (heatherm@dr-wa.org); 'Suzanne Elliott'; Lila J. Silverstein (Lila@washapp.org); Summers, Ann
Subject: RE: STATE v. LOUIS CHAO CHEN, No. 87350 AMICUS MOTION AND BRIEF OF WDA DRW AND WACDL

Rec'd 4-12-13

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Subject: RE: STATE v. LOUIS CHAO CHEN, No. 87350 AMICUS MOTION AND BRIEF OF WDA DRW AND WACDL

Dear Supreme Court Clerk:

Attached please find the Amicus Motion and Amicus Brief of the Washington Defender Association, Disability Rights Washington and the Washington Association of Criminal Defense Lawyers in State v. LOUIS CHAO CHEN, No. 87350 along with the declaration of Mark Stroh.

Counsel for the parties are copied on this message and an affidavit of service is also attached, which is contained within the Motion. This acts as service for all parties.

Please let me know if there are any difficulties with this filing.

Regards,

Travis Stearns

Travis Stearns
Deputy Director
Washington Defender Association
(206) 623-4321

