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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of:

D.W. et al.,

Respondents.

v.

Department of Social and Health Services and Pierce County,

Appellants.

Filed 
Washington State Supreme Court

JUN - 3 2014

Ronald R. Carpenter
Clerk 

**AMICUS CURIAE BRIEF OF
DISABILITY RIGHTS WASHINGTON,
NATIONAL ALLIANCE ON MENTAL ILLNESS WASHINGTON,
AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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I. INTRODUCTION

Disability Rights Washington (“DRW”), the National Alliance on Mental Illness Washington (“NAMI Washington”), and the American Civil Liberties Union of Washington (“ACLU”) submit this Amicus Curiae brief to provide the Court with additional authority regarding the rights of the Respondent patients. Amici present legal authority regarding the liberty interests of people with disabilities who are inappropriately confined without constitutionally appropriate treatment. Consideration of the authority in the amicus brief lends additional support to the trial court’s ruling that detaining patients in general hospital emergency rooms (facilities not certified as an Evaluation and Treatment (E&T) facility) for a period of 72 hours up to 14 days violates the civil commitment statute and the patients’ constitutional rights. Therefore, this Court should affirm the trial court’s ruling.

II. INTERESTS AND IDENTITY OF AMICI

Amicus DRW has been designated by federal law and the Governor of Washington to provide protection and advocacy services for people in Washington with physical, sensory and mental disabilities. DRW has the authority to pursue a full range of legal assistance to people with disabilities including legal representation, regulatory and legislative advocacy, and education and training. Because of its extensive

involvement in the legal and social construct of community mental health integration in Washington, DRW is well placed to assist the Court in surveying the impact that detention without the statutorily required treatment – a practice termed “psychiatric boarding” – has upon the disability community.

Amicus NAMI Washington, – a state affiliate of the nationwide organization, – offers education, support, advocacy and hope backed by science for individuals with mental illnesses and their families and friends. NAMI Washington actively pursues a strong mental health public policy agenda on behalf of individuals with mental illnesses in Washington State and supports the work of 22 local NAMI affiliates in communities large and small around the state. NAMI Washington's continuing mission is to improve the quality of life for all those affected by mental illness by providing a statewide, unifying voice of advocacy and coordinating the delivery of education, support and recovery.

Amicus ACLU is a statewide, non-partisan, non-profit organization with over 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties. The ACLU strongly supports the constitutional right to due process in civil commitment proceedings, since a substantial deprivation of personal liberty is involved, and it has filed numerous amicus briefs in support of that right.

III. STATEMENT OF THE CASE

As set forth in Respondents' brief, the ten Respondent patients in this case spent from 3 to 10 days detained in general hospital emergency rooms. The trial court's factual findings confirm that these facilities were neither certified as E&Ts nor state psychiatric hospitals. CP 297-305.

The detentions were based on "single bed certifications" pursuant to WAC 388-865-0526 because there was no room available at a certified E&T. *Id.* "Uncontroverted" testimony established that in the general hospital emergency rooms the patients did not receive the counseling and therapeutic support necessary to recovery, and were placed in a more restrictive environment than in a certified E&T. *Id.*

Moreover, the trial court's ruling explained that statutes did not authorize use of single bed certification except when required by the patient's physical condition, and the statutes provided for methods to deal with lack of capacity other than single bed certification. The trial court concluded that the Respondent patients' civil rights were violated by the detention because the patients lacked the adequate care and individualized treatment required by the civil commitment statute, RCW 71.05.

IV. ARGUMENT

A. A Massive Deprivation of Liberty Occurs with Civil Commitment. Thus, Constitutional Considerations Support Strict Construction of RCW 71.05 and the Trial Court’s Ruling.

State and federal case law has long recognized that civil commitment is a “massive” curtailment of liberty. *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012); *In re Detention of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010); *In re Detention of LaBelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L.Ed.2d 394 (1972)); *Vitek v. Jones*, 445 U.S. 480, 491–92, 100 S. Ct. 1254, 63 L.Ed.2d 552 (1980). *Accord.*, *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979): “commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” The significance of the constitutionally protected liberty interests involved compels state and local governments to comply with both substantive and procedural due process under U.S. Const. amend. XIV and Wash. Const. art. I, § 3. *McCuiston*, *supra*, 174 Wn.2d at 387.

The “massive” deprivation of liberty which results from civil commitment requires that the patient be detained for the purpose of providing remedial treatment rather than suffering punitive conditions:

“Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Youngberg v. Romeo*, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 73 L.Ed.2d 28 (1982). The nature of the detention must bear a reasonable relationship to the purpose the deprivation was ordered. *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L.Ed.2d 435 (1972).

It follows from this rule that the right to adequate treatment is required as part of a constitutionally valid civil commitment system. It is not enough to simply label the detention under single bed certification in general hospital emergency rooms a form of “treatment” when, as here, the general hospitals are not able to provide the treatment needed by the patients. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003); *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000); *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980).

A recent study indicated that 20% of patient committed under the Involuntary Treatment Act (“ITA”) are being “boarded” often at locations like general hospital emergency rooms without appropriate staffing or equipment “to handle the acute psychiatric needs of these individuals.” Mason Burley, *Inpatient Psychiatric Capacity in Washington State: Assessing Future Needs and Impacts*, Wash. State Inst.

for Public Policy (July 2011), p. 11.¹ The WSIPP report also recognized that the use of single bed certification swelled to “nearly 200” per month in 2010, and “Many of these admissions are to hospital emergency departments or facilities without resources to meet all the treatment needs of an ITA patient.” *Id.* at 23.

The lack of adequate treatment in general hospital emergency rooms, in contrast to certified E&T’s, is clear. The trial court properly considered that fact in conjunction with the constitutional interests of the patients in order to reach the conclusion that the use of single bed certifications here was invalid.

B. RCW 71.05 and Federal Statutory Law are Inconsistent with the Use of the Single Bed Certification Rule Here.

The civil commitment statute, RCW 71.05, recognizes the above-described constitutional interests inherent when the state is considering depriving a person with a mental health disability of their liberty through the involuntary commitment process. Respondent patients in their brief clearly outline the civil commitment statute so we will not repeat that description. However, Amici will highlight two important factors: the purposes of the commitment statute, RCW 71.05.010; and federal laws

¹ Retrieved from the WSIPP website:
http://www.wsipp.wa.gov/ReportFile/1092/Wsipp_Inpatient-Psychiatric-Capacity-in-Washington-State-Assessing-Future-Needs-and-Impacts-Part-One_Full-Report.pdf

that promote integration and prohibit discrimination on the basis of disability.

1. Inappropriate Commitment in a Hospital Emergency Room Violates Numerous Provisions of State Statutes.

Even if constitutional due process did not require actual and adequate treatment as part of civil commitment, Washington's statute makes clear that the only statutorily authorized purpose of civil commitment is "appropriate," "adequate" and "individualized" treatment. RCW 71.05.010(2) states that the authorized purpose of detention for civil commitment is "To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders." RCW 71.05.360(2) also specifies "Each person involuntarily detained or committed pursuant to this chapter shall have the right to adequate care and individualized treatment." *See, In re Detention of W*, 70 Wn.App. 279, 285, 852 P.2d 1134 (1993) (upholding this right).

The statute further defines E&T facilities as "a facility that is both certified by DSHS and able to provide 'appropriate inpatient care to persons suffering from a mental disorder.'" RCW 71.05.020(16). The statute mandates that E&T's either immediately accept a patient or the patient will be transported home. RCW 71.05.170 and 190.

Strict construction of these statutes, in light of their constitutional underpinnings, is required. *In re LaBelle, supra*, 107 Wn.2d at 205; *In re Detention of Swanson*, 115 Wn.2d 21, 28, 804 P.2d 1 (1990); *In re Detention of C.W.*, 147 Wn.2d 259, 277, 53 P.3d 979, 987 (2002). Here, strict construction compels the conclusion reached by the trial court: the use of single bed certification to detain patients for days in general hospital emergency rooms that are not capable of providing the treatment mandated by RCW 71.05, simply because certified E&T beds are full, is legally invalid.

The civil commitment statute's purposes also include preventing inappropriate, indefinite commitment, providing prompt evaluation and timely and appropriate treatment, safeguarding of rights, and encouraging services to be provided in the community. RCW 71.05.010. The right to be free from inappropriate commitment and to have timely and appropriate treatment is also provided in the "Treatment and Care" section of the civil commitment statute consistent with the Fourteenth Amendment. RCW 71.05.210(2) and U.S. Const. amend. XIV; *see also Youngberg v. Romeo, supra*, 457 U.S. at 322 (Court reviewed the liberty interests inherent in confinement and held the Constitution requires that professional judgment be exercised regarding the care and treatment of individuals who have been involuntarily committed).

Further, as noted in the civil commitment statute, Appellant DSHS must encourage services to be provided in the community. RCW 71.05.210. The civil commitment statute goes on to provide consideration of the less restrictive alternative in lieu of petitioning for continuation of commitment upon “consideration of the person’s mental condition.” RCW 71.05.145. Finally, the civil commitment statute also states that *each* person involuntarily detained “shall receive such treatment and care as his or her condition requires including treatment on an outpatient basis.” RCW 71.05.210(2).

These provisions establishing an integration requirement in the civil commitment statutes are also reflected in the Community Mental Health Services Act (the “Act”):

The legislature intends to encourage the development of regional mental health services with adequate local flexibility to assure eligible people in need of care access to the least-restrictive treatment alternative appropriate to their needs.

RCW 71.24.015. This same statute goes on to clarify the legislative intent to “integrate the provision of services to provide continuity of care through all phases of treatment.” Notably, the next section of the Act references the state psychiatric hospitals and their role as providing care to those individuals who are the most acutely mentally ill. RCW 71.24.016. However, the Act states that it is “the intent of the legislature that the

community mental health service delivery system focus on maintaining mentally ill individuals in the community.” RCW 71.24.016.

Further confirming that the civil commitment statute requires use of the least restrictive alternative in the continuum of care, in the list of possible integrated services beyond the state psychiatric hospitals, the Act lists crisis triage, evaluation and treatment facilities in the community, residential beds, and programs for community treatment teams, and outpatient services. *Id.*; see also *Pierce County v. State*, 144 Wn.App. 783, 797, 185 P.3d 594 (2008) (Court held the goal of the Community Mental Health Services Act was “to maintain the mentally ill in the community as much as possible.”)

The civil commitment statutes thus make clear that the State and County must avoid inappropriate more restrictive confinement as well as provide individualized mental health services in the most integrated environment. Yet here, in violation of those laws, the governmental parties seek to prolong inappropriate and more restrictive confinement in a hospital emergency room (licensed and designed for short term services) rather than provide treatment in an appropriate mental health setting (licensed and designed to deliver longer term services), claiming “Treatment delayed and inadequate must surely be better than no treatment at all.” DSHS brief pp. 28 and 29. However, as Designated

Mental Health Professional (“DMHP”) Hinrichs acknowledged, individuals detained in hospital emergency rooms under single bed certification are not provided with counseling and “other therapeutic support that is probably necessary for them to recover.” RP 14. Based on these statements and the record before this Court, it appears that individuals with mental illnesses confined in hospital emergency rooms are not getting the appropriate or individualized mental health treatment they are entitled to consistent with the Fourteenth Amendment and the civil commitment statute.

Further, it is unclear, based on the record before this Court, what steps, if any, the State and County took to encourage services to be provided in integrated settings including consideration of residential beds, programs for community treatment teams, and outpatient services consistent with the civil commitment statute. Instead, the Appellant DSHS simply alleges that these individuals would be released into the streets at risk of harming themselves or others. DSHS Opening Brief 28-29. Such an argument fails to address DSHS’s constitutional and statutory obligations to provide appropriate mental health treatment and avoid inappropriate confinement in hospital emergency rooms.

2. Confinement Based on Assumed Dangerousness Raises Discrimination Concerns and Violates the Federal Integration Mandate of the ADA

Prolonged or inappropriate confinement of people with mental illness in general hospital emergency rooms pursuant to single bed certification without the provision of constitutionally adequate treatment is inconsistent with established federal protections against discrimination. Due to society's negative stereotypes, people with disabilities have been subjected to a long history of pervasive discrimination in all aspects of society, including but not limited to forced institutionalization and segregation from the community. Michael L. Perlin, *I Ain't Gonna Work on Maggie's Farm No More: Institutionalization, Segregation, Community Treatment, the ADA and the Promise of Olmstead*, 17 T.M. Cooley L. Rev. 53, 63 (2000).

In enacting the Americans with Disabilities Act ("ADA"), Congress likewise found that "historically, society has tended to isolate and segregate individuals with disabilities, and...such forms of discrimination...continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). In furtherance of the objective of eliminating discrimination against people with disabilities, Congress stated "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and

economic self-sufficiency for such individuals,” 42 U.S.C. § 12101(a)(8). “[I]ntegration is fundamental to the purposes of the Americans with Disabilities Act.” 28 C.F.R. Part 35, App. A, § 35.130. The regulation implementing the ADA states: “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities.” 28 C.F.R. § 35.130(d).

The ADA’s requirement that individuals with disabilities be served in integrated community settings rather than unnecessarily in institutions was addressed by the Supreme Court’s decision in *Olmstead v. LC*, 527 U.S. 581, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999). The *Olmstead* Court addressed the ADA’s integration mandate and interpreted that such mandate includes forbidding “unjustified isolation of the disabled.” *Id.* at 597. There, the plaintiffs had a history of treatment in institutions and remained institutionalized even after their treating professionals found them ready for community-based settings. The *Olmstead* Court held that in enacting the ADA, Congress intended to remedy historical isolation and segregation of individuals with disabilities, the discrimination of forced institutionalization, and the failure to make accommodations to existing services and practices. *Id.* at 588-589.

The *Olmstead* requirements and the ADA’s integration mandate have also been recognized in cases involving Washington’s funding for

services for people with disabilities. *See Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003). The *Townsend* plaintiff sought funding from the state for nursing services (i.e. assistance in bathing, preparing meals, taking medications) he was eligible to receive in a nursing home but wanted to obtain in an integrated, community-based setting. *Id.* at 517-518. The *Townsend* Court reviewed the DSHS services provided in an institutional and isolated setting and rejected characterizing the community-based or integrated provision of services as a “new program of services.” *Id.* Instead, the *Townsend* Court held that denying services in an integrated setting, despite their availability in isolated settings, violates the integration mandate of the ADA and would impermissibly gut *Olmstead*’s requirements, unless the State proved its services would be “fundamentally altered.” *Id.* at 520.

As the trial court in the case at bar implicitly recognized, in its references to least restrictive alternative requirements, the integration mandate of federal law under *Olmstead* and the ADA supports the invalidation of the use of single bed certification here. Confinement for days in the general hospital emergency rooms without the necessary treatment that would be provided in certified E&Ts is the kind of inappropriate isolation condemned by the ADA and the other authorities discussed above.

Additionally, Washington State law, like the ADA, provides the right to be free from unnecessary isolation and discrimination because of disability. *See* RCW 71.05.010 and RCW 49.60.030. As noted above, the very purpose of the civil commitment statute includes *preventing inappropriate, indefinite commitment*, safeguarding of rights, and *encouraging services to be provided in the community*. RCW 71.05.010 (emphasis added). These provisions, too, are implicated by the use of single bed certification in this case.

Moreover, it is unclear what steps the Appellant State and County have taken to ensure that the full continuum of mental health treatment options are available to the Respondent patients. It is insufficient to claim that inappropriate confinement “in a warm and dry facility” is preferable to “individuals like the respondents ... not [being] out on the street posing a danger to themselves and others.” Pierce County Opening brief, page 23. As noted by DMHP Hinrichs, individuals confined in hospital emergency rooms pursuant to single bed certifications are “generally confined to a room” and such confinement is even more restrictive than a certified mental health care treatment facility. RP 14-15. The evidence shows Appellants failed to reference or consider the full continuum of mental health service options or less restrictive alternatives, as clearly prescribed in statute and common law. Because of this failure, Appellants

violated the ADA's integration mandate and the established rights of people with mental health issues to be free from inappropriate confinement without consideration of integrated, appropriate mental health services.

C. The Government's Claimed Lack of Resources Does Not Justify the Violations of the Patients' Constitutional and Statutory Rights which Occurred when they were Detained for Days in Facilities Unable to Provide Appropriate Treatment.

As discussed above and as the trial court ordered, the state and federal constitutions and RCW 71.05 require that detention for civil commitment occur in the certified E&T's capable of providing the mental health treatment the patients need. CP 302-303. The County and State offer no valid authority justifying single bed certification based on overcrowding or cost concerns.

This Court has repeatedly ruled that trial courts in civil commitment proceedings under RCW 71.05 have the authority to order the State and county to place detained patients in the appropriate setting required by the statute. *In re Detention of J.S.*, 124 Wn.2d 689, 880 P.2d 976 (1994); *Pierce County v. Western State Hospital*, 97 Wn.2d 264, 644 P.2d 131 (1982). In *J.S.*, the Court upheld trial court rulings requiring that civilly committed patients be moved out of Western State Hospital into less restrictive forms of treatment. In *Pierce County*, the Court required

certified facilities to accept patients who had been ordered committed. Contrary to the arguments raised by the State and County in this case, these cases clearly rejected the argument that the courts' authority to order the statutorily required form of treatment was limited. This Court correctly noted that the civil commitment court had the authority to enforce the requirements of RCW 71.05 in light of the statute's purposes. *J.S.*, *supra*, 124 Wn.2d at 698.

Furthermore, the *J.S.* case, 124 Wn.2d at 698-99, explained why the State was wrong to claim it could not be forced to spend more money on appropriate treatment:

The State finally argues the court has improperly ordered it to incur expenditures beyond its appropriation by essentially creating new services for the respondents. The State maintains the trial court is attempting to modify policy choices made at the legislative level. This argument, however, is misplaced. The Legislature has granted the court the power to determine the best interests of the individual and in so doing, to consider less restrictive treatment. The statutory framework represents a legislative policy choice to create this role for the court. We find that because the court has the power under the statute to order less restrictive treatment, it necessarily has the power to compel compliance with its order.

The *J.S.* Court also stated that treatment in the least restrictive setting was neither constitutionally nor statutorily required only so long as professional judgment supported the treatment setting being used. Here, in contrast, the Respondent patients are not in an appropriate treatment setting. Instead, the Appellants State and County attempt to justify the

placement decision based solely on lack of resources despite the clinician witnesses confirming that the general hospital emergency rooms could not provide the services needed by the patients. The trial court's ruling here correctly applied this placement and treatment reasoning and this Court should uphold it.

Federal cases similarly have explained that the state's lack of money is not a valid excuse for failing to provide the adequate treatment required by due process. *Ohlinger, supra*. The *Sharp* and *Mink* cases, *supra*, also specifically condemned warehousing patients under the guise of delayed treatment until resources for adequate treatment became available, even if the patients are detained in a "warm and dry" place with some medication as the County argues. *See* Pierce County's Opening Brief, page 23. As the trial court correctly recognized, the government's lack of resources does not make the patients' detentions legally valid.

V. CONCLUSION

Ample authority supports the trial court's ruling and this Court should affirm it.

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Dated this 23rd day of May, 2014.

Respectfully submitted,

By 

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Certificate of Service

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on May 23, 2014, a true and correct copy of the foregoing document was served upon counsel listed below by electronic mail, per prior agreement, which agreement also applies to service of any amicus curiae brief authorized by this motion:

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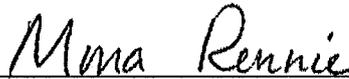
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DATED May 23, 2014 at Seattle, Washington.



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Subject: RE: In re Detention of D.W. et al.; No. 90110-4 Motion for Leave to File Brief of Amicus Curiae and Amicus Curiae Brief

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Subject: In re Detention of D.W. et al.; No. 90110-4 Motion for Leave to File Brief of Amicus Curiae and Amicus Curiae Brief

Dear Clerk,

Please accept for filing in In re Detention of DW, Case No. 90110-4 the attached documents:

1. Motion of Disability Rights Washington, American Civil Liberties Union of Washington and National Alliance on Mental Illness Washington to Appear as Amici Curiae; and
2. Amicus Curiae Brief of Disability Rights Washington, American Civil Liberties Union of Washington and National Alliance on Mental Illness Washington

Thank you,

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Disability Rights Washington (DRW) is a private non-profit organization that protects the rights of people with disabilities statewide. Our mission is to advance the dignity, equality, and self-determination of people with disabilities. We work to pursue justice on matters related to human and legal rights.

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