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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FRED BINSCHUS, individually and a Personal Representative of the Estate of JULIE ANN BINSCHUS; TONYA FENTON, TRISHA WOODS; TAMMY MORRIS; JOANN GILLUM, as Personal Representative of the Estate of GREGORY N. GILLUM; CARLA J. LANGE, Individually and as Personal Representative of the Estate of LEROY B. LANGE; NICOLAS LEE LANGE, Individually; ANDREA ROSE, Individually and as Personal Representative of the Estate of CHESTER M. ROSE; STACE ROSE, Individually; RICHARD TRESTON and CAROL TRESTON, and the marital community thereof; BEN MERCADO; PAMELA RADCLIFFE, Individually and as Personal Representative of the Estate of DAVID RADCLIFFE; and TROY GIDDINGS, Individually,

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency; OKANOGAN COUNTY, a political subdivision of the State of Washington,

Defendants.

and

SKAGIT COUNTY, a political subdivision of the State of Washington,

Petitioner.

BRIEF OF *AMICUS CURIAE* ACLU OF WASHINGTON



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I. INTRODUCTION

No one can contest that the crimes committed by Isaac Zamora following his release from confinement were terrible, and it is natural to ask whether in hindsight anything could have been done to prevent them. But Plaintiffs' position that a county jail must "take charge" of inmates scheduled for release who are not subject to civil involuntary commitment creates too great a risk of a regimen of preventive detention and compelled medication. Such a proposal cannot be reconciled with basic rights guaranteed by the state and federal constitutions.

The ACLU of Washington ("ACLU") has advocated and will continue to advocate in support of incarcerated people's right to receive appropriate medical services and treatment. Notwithstanding those governmental duties, however, well established civil liberties protections forbid unconstitutional practices of forcing such services and treatment on people who have completed their sentence, much less detaining them for the purposes of doing so.

Mental illness can be a ground for civil involuntary confinement, but only when constitutionally valid commitment criteria are met. Medication may be involuntarily prescribed to a jail inmate only when other constitutional standards are satisfied. For these reasons, the ACLU

respectfully requests that this Court reverse the decision of the Court of Appeals.

II. INTEREST OF AMICUS CURIAE

The ACLU is a statewide, non-partisan, non-profit organization with over 50,000 members and supporters, dedicated to the preservation and defense of constitutional and civil liberties. The ACLU has a long track record of supporting the constitutional rights of individuals in jail settings and is actively involved in mental health related litigation, legislative and rulemaking processes, and other aspects of mental health policy at the state, county and local level. Based on its experience with issues arising from both jail conditions and mental health, the ACLU offers the Court its perspective on the implications that imposition of a tort duty on a county jail would have on constitutionally protected liberty interests under the circumstances of this case.

III. ISSUE TO BE ADDRESSED BY AMICUS

Whether a county jail may be held liable in tort for the actions of a former inmate one month after release, where the inmate received a mental health evaluation, and that evaluation deemed him not dangerous to himself or others thus precluding civil involuntary treatment, the inmate declined prescribed mental health medication, and was timely released from a subsequent facility for good behavior?

IV. STATEMENT OF THE CASE

Isaac Zamora was an inmate at the Skagit County Jail from April 4 to May 29, 2008. CP 3553-55; 1335. Zamora was serving a sentence for felony possession of cocaine and misdemeanor malicious mischief. CP 3491-3503.

A mental health counselor evaluated Zamora several days after his incarceration began. CP 2412; CP 3681-85. The counselor recommended Lamictal, a mood stabilizing drug, be prescribed to Zamora. *Id.* Although the medication was prescribed, Zamora did not take it, and he later expressly rejected any “mental” medication. CP 2414, 3687. Zamora served his time in the Skagit County Jail with limited incident.¹ Skagit County transferred Zamora to the Okanagan County Jail on May 29, 2008, where he was classified as a non-violent offender and a low risk of escape. CP 1335-39. Zamora repeated to Okanagan County personnel that he was declining his prescribed medication. CP 3700. Zamora served the remainder of his sentence in Okanagan County with no issues, and was released early based on good behavior. CP 1338.

¹ “The only evidence of any violent occurrence involving Zamora was a jail record reporting that another inmate attacked Zamora and was charged with assaulting Zamora.” *Binschus v. State, Dep’t of Corr.*, 186 Wn. App. 77, 84, 345 P.3d 818 review granted *sub nom. Binschus v. Skagit Cty.*, 184 Wn.2d 1001, 357 P.3d 665 (2015).

Shortly after his release from Okanagan County, Zamora was arrested again on an outstanding misdemeanor warrant. *See* CP 1589-1604. He was held for approximately one day in the Skagit County Jail, and then ordered released by the court. *See* CP 3564. Although Zamora had interactions after this date with state Department of Corrections' Community Corrections staff and law enforcement, this was the last time Zamora was in custody before the events giving rise to this case.

Nearly a month after his release from the Skagit County Jail, Zamora killed six people and injured five others. CP 2768-70. He was arrested, pleaded guilty to multiple counts of aggravated murder, and is currently serving a life sentence without possibility of parole. CP 3453-82.

V. ARGUMENT

Plaintiffs ask this Court as a matter of common law to impose a tort duty that at best perpetuates and at worst increases the impetus to unlawfully detain or forcibly medicate mentally ill persons who do not meet the standard for civil commitment. As Plaintiffs acknowledge, the imposition of such a common law duty is essentially a policy directive that the correctional system assume greater responsibility for long term mental health treatment. *See* Supp. Br. of Resp't's at 21. Any such policy directive must be considered against the backdrop of basic constitutional protections.

A. Jails Must Adhere to a Constitutional Standard of Care and Can Neither Hold Inmates Beyond their Release Date nor Forcibly Medicate Inmates Unless Constitutional Requirements are Followed.

Jails have a constitutional duty to provide adequate medical care – including evaluation and treatment for mental health conditions - to inmates in their custody. *See, e.g., Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 646, 244 P.3d 924 (2010) (Madsen, J., concurring & dissenting) (describing “a duty on the jail to screen for mental illness and provide emergency medical care....”) In fact, “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.” *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (internal citations omitted). Systemic deprivation of adequate mental health care falls within this prohibition. *E.g., Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982); *Coleman v. Wilson*, 912 F. Supp. 1282, 1298 (E.D. Cal. 1995).

Conversely, other constitutional protections limit the ability of jail personnel to force medical care upon inmates against their wishes, particularly when forcible administration of psychotropic medication is involved. “[T]he Due Process Clause permits the State to treat a prison

inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.” *Washington v. Harper*, 494 U.S. 210, 227, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (emphasis added). The courts have consistently recognized, as *Harper* did, that a mentally ill prisoner possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Fourteenth Amendment's due process clause; forcibly medicating an individual against his will “represents a substantial interference with that person's liberty.” *Harper*, 494 U.S. at 229. Confirming this point, the Western District of Washington recently affirmed “Due process must be observed prior to the deprivation of the liberty interest found in *Harper*, and the courts are charged with evaluating whether due process has been accorded an inmate subjected to involuntary medication.” *Williams v. Gage*, No. C14-453 MJP, 2015 WL 1538105, at *2 (W.D. Wash. Apr. 6, 2015) (citing *Wilkinson v. Austin*, 545 U.S. 209, 229, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005)).

Despite the clearly established law imposing strict constitutional limits on jails' forcible administration of medication to an inmate, Plaintiffs' position is that, under this Court's prior “take charge” decisions, the County owed a duty “to prevent the deterioration of the condition of

the individual over which it had to [sic] control to such a degree that such individual foreseeably would cause harm to others....” Supp. Br. of Resp’t’s at 14 n. 15. This includes, Plaintiffs contend, a duty “to control Zamora’s conduct” even after his court-ordered release. Supp. Br. of Resp’t’s at 15. The Court of Appeals similarly acknowledged that “[o]nce the take charge relationship is established, the actor has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of the third party.” *Binschus v. State, Dep’t of Corr.*, 186 Wn. App. 77, 93, 345 P.3d 818 review granted *sub nom. Binschus v. Skagit Cty.*, 184 Wn.2d 1001, 357 P.3d 665 (2015) (quoting *Joyce v. State, Dep’t of Corr.*, 155 Wn.2d 306, 310, 119 P.3d 825 (2005) (internal punctuation omitted))).

But neither Plaintiffs nor the Court of Appeals explained what “precautions” the jail should have taken without engaging in “precautions” that constitute an unconstitutional deprivation of liberty. Pursuant to the above authority, forced medication of the inmate would have been unlawful, and Zamora declined the medication offered to him on a voluntary basis.² This Court should make clear that the “take charge” duty

² Respondents appear to imply that Zamora should, in fact, have been involuntarily committed. Answer to Pet. for Review at 14 n. 17; Resp’t’s Supp. Br. at 15 n. 16. Even assuming this to be true, such a claim would implicate RCW 71.05.120(1), which provides in relevant part that no “unit

cannot include forcible administration of psychotropic medication outside the applicable constitutional rules for such forcible medication.

Likewise, holding Zamora in jail beyond his release date would equally have violated due process. Release from imprisonment on the date a person's sentence has been served is a clearly recognized liberty interest protected by due process. *See Monohan v. Burdman*, 84 Wn.2d 922, 530 P.2d 334 (1975) (due process protections triggered by cancellation of parole date, when a lesser conditional liberty interest than that the interest here is at stake); *see also, Ex Parte Cavitt*, 170 Wash. 84, 15 P.2d 276 (1932) (granting habeas writ since court lacked authority to return inmate to jail after he had already served his sentence and been discharged from it according to the sheriff). If a jail's "take charge" duty extends to holding a person beyond their sentence, where would the length of confinement end?

This is why imposing tort liability for failing to hold an inmate beyond their sentence, absent some other constitutionally valid process,

of local government... shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence."

would result in prohibited preventive detention. As the United States

Supreme Court has said:

Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the due process] Clause protects. And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint.

Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992); *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)) (internal quotations and citations omitted).

None of the constitutionally valid reasons for prolonging incarceration occurred here. If Zamora actually met the criteria and had been detained on that basis, that would be one thing. Imposing tort liability if that does not occur based on an after the fact opinion that it should have is another. This Court should, therefore, make clear that any “take charge” duty of a jail cannot encompass prolonged detention without a constitutional basis beyond the date an inmate’s sentence has been completed.

B. Deinstitutionalization Has Made Jails De Facto Mental Health Institutions and Finding Tort Liability Here Will Further This Harmful Trend.

Unfortunately, after decades of deinstitutionalization³ of the mentally ill on the one hand, coupled with an increased reliance on the criminal justice system for all sorts of social ailments on the other, jails have been forced to house ever greater numbers of the mentally ill. *See, e.g.,* Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 Notre Dame L. Rev. 1415, 1436 (2007) (“Rather than ending institutionalization, the deinstitutionalization movement resulted in many people being housed in jails rather than state mental institutions.”); E. Fuller Torrey, Editorial, *Jails and Prisons--America's New Mental Hospitals*, 85 Am. J. Pub. Health 1611 (1995) (“Quietly but steadily, jails and prisons are replacing public mental hospitals as the primary purveyors

³ “Deinstitutionalization” as defined by the U.S. General Accounting Office is “the process of (1) preventing both unnecessary admission to and retention in institutions; (2) finding and developing appropriate alternatives in the community for housing, treatment, training, education, and rehabilitation of persons who do not need to be in institutions, and (3) improving conditions, care, and treatment for those who need to have institutional care. This approach is based on the principle that... persons are entitled to live in the least restrictive environment necessary and lead lives as normally and independently as they can.” Segal, S. P. and Jacobs, L., *Deinstitutionalization*, Encyclopedia of Social Work, 21st Edition. Co- published by the NASW Press and Oxford University Press (2013) (citing U.S. GAO, 1977, p. 1).

of public psychiatric services for individuals with serious mental illnesses in the United States.”).

On December 31, 1989, 1.6% of the adult population in the United States was under correctional supervision (*U.S. Department of Commerce, 1992*). By year-end 2005, this proportion had doubled to 3.2%, or 1 of every 32 adults. State and federal prison authorities had in custody 1,446,269 inmates—1,259,905 in state and 179,220 in federal custody. Local jails held 747,529 persons awaiting trial or serving a sentence at midyear 2005 (*Bureau of Justice Statistics, 2007*). State and federal prison populations rose from 212,953 in 1960 to 1,446,269 in 2005—almost a 700% increase during the period of deinstitutionalization policy implementation. Similarly, county jail populations grew steadily from 158,394 in 1978 to 747,529 in 2005, a 472% increase in this period.

Segal, S. P. and Jacobs, L. Deinstitutionalization, *Encyclopedia of Social Work*. 21st Edition. Co- published by the NASW Press and Oxford University Press (2013).⁴

⁴ “The presence of large concentrations of mentally ill persons within prisons and jails has been noted for almost a hundred years (Fazel and Danesh, 2002; Morgan et al., 2010; Torrey, 1995), but attention to this issue has increased since the closing of mental hospitals in the 1970s. Between 1970 and 2002, the number of public psychiatric hospital beds fell from 207 to 20 per 100,000 population (Yoon, 2011).

Deinstitutionalization was intended to shift patients to more humane care in the community, but insufficient funding instead left many people without access to treatment altogether (Baillargeon et al., 2010b; Lamb and Weinberger, 2005; Lamb et al., 2004). As a result, mentally ill individuals likely became at greater risk of incarceration.” *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, at 205 (Jeremy Travis, Bruce Western, and Steve Redburn, Eds.; Committee on Causes and Consequences of High Rates of Incarceration;

In light of the above, “[t]he mentally ill live in a world where their sickness is often addressed within the criminal justice system, a trend that is both taxing on government resources and insufficient for providing treatment for the mentally ill who are caught within the system.” Kasey Mahoney, *Addressing Criminalization of the Mentally Ill: The Importance of Jail Diversion and Stigma Reduction*, 17 Mich. St. U. J. Med. & L. 327, 328 (2013).

If the jail is found liable here, the consequence will likely be increased forcible medication and prolonged detention for inmates with a history of mental illness. While the ACLU agrees that Zamora was in need of mental health treatment, it does not follow that the jail had the duty to provide it through forcible medication or holding him after his release date.

For example, Zamora could have been provided with community based care that offered services and treatment aimed at preventing his breakdown, even if he did not rise to the level where civil commitment was required. Similarly when Zamora was first contacted by law enforcement for alleged crimes, he could have been diverted to services and treatment.

Committee on Law and Justice; Division of Behavioral and Social Sciences and Education; National Research Council 2014); *see also* Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates* (Bureau of Justice Statistics Special Report, Revised 2006).

Not only are these recommendations good public policy, they also stem from existent provisions of state and federal law. In *Olmstead v. LC*, 527 U.S. 581, 597, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999), the Court concluded that the Americans with Disabilities Act forbids “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 isolation and segregation of individuals with disabilities, including discrimination associated with forced institutionalization. *Id.* at 588-589. Washington law, like federal law, provides the right to be free from unnecessary isolation and discrimination because of mental illness. *See, e.g.*, RCW 71.05.010(1)(g); RCW 49.60.030. To that end, if those suffering from mental illness cannot be indefinitely detained in a civil hospital setting, they should not face prolonged detention in a correctional setting.

The duty Respondents seek to impose also fosters the assumption that the mere confluence of mental illness and violation of the law (in the case of Zamora’s grounds for incarceration, drug possession and a misdemeanor property crime) equates to a “violent propensity” justifying prolonged detention or involuntary medication. If jails are held liable for

post-release conduct of this nature, we can easily anticipate the consequences: increased use of involuntary medication even where it is not medically justified and prolonged but unjustified detention after a sentence is completed. A chilling effect could also occur in which family and community members eschew seeking assistance, fearing that loved ones and friends suffering from mental illness will face prolonged confinement in a correctional setting. The Court should take these concerns into account when being asked to adopt a tort law duty likely to lead to greater incarceration of those suffering from mental illness.

VI. CONCLUSION

Jails must adhere to constitutional criteria for forcibly administering medication, and they cannot prolong an inmate's confinement beyond his release date without satisfying constitutional standards. The jail's duty in this case must be interpreted in light of those constitutional limits.

The ACLU respectfully requests that this Court reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 4th day of December, 2015.

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agency; OKANOGAN COUNTY, a
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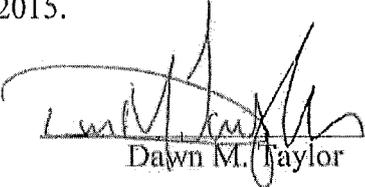
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 4th day of December, 2015.



Dawn M. Taylor

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Subject: RE: Binschus et al. v. State of Washington, et al.: Brief of Amicus Curiae ACLU of Washington: Cause No.: 91644-6

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Cc: Dawn Taylor <Dawn.Taylor@pacificallawgroup.com>

Subject: Binschus et al. v. State of Washington, et al.: Brief of Amicus Curiae ACLU of Washington: Cause No.: 91644-6

Good afternoon.

Attached please for filing and service are the Brief of Amicus Curiae ACLU of Washington and a Proof of Service in regards to the above-referenced matter.

Should you have any difficulty with the attachments, please do not hesitate to contact me.

Thank you.

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