No. 75318-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE DETENTION OF T.M.L.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

At issue in this case is the due process constitutionally required in civil commitment proceedings. Individuals facing involuntary treatment and long periods of civil detention have a significant liberty interest at stake, and must be able to meaningfully participate in their commitment trials. Substantial research proves that participating in a judicial proceeding by video increases the risk of an erroneous deprivation of liberty. The liberty interest at stake in civil commitment trials and the risk that appearing by video will lead to a wrongful deprivation is not outweighed by any demonstrated government interest. Substantive due process therefore requires that civil commitment respondents have the opportunity to appear at their trials in person and creates a presumption against participation by video. The lower court's decision should be reversed.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of *Amicus Curiae* American Civil Liberties Union of Washington (ACLU) are set forth in the Motion for Leave to File, which accompanies this Brief.

III. STATEMENT OF THE CASE

As set forth in Appellant's Opening Brief, King County Superior Court recently adopted a rule requiring individuals detained at video-

equipped hospitals to participate in their civil commitment hearings including trials remotely by video unless they can show "good cause" to attend in person. *See* King Cty. Local Mental Proceedings Rule (LMPR) 1.8(b). This rule evolved out of the County's inability to contract with ambulance service providers—in part due to unpaid bills—even though only 10 percent of civil commitment respondents must be transported to their hearing via ambulance. Clerk's Papers (CP) 214–15.

T.M.L. was detained at Navos Mental Health Solutions in West Seattle, one of the video-equipped hospitals listed in LMPR 1.8(b). Appellant's Br. at 9 (citing CP 42).[1] She faced 180 days of involuntary commitment, and filed a motion requesting to appear at her civil commitment trial in person rather than by video. CP 46–53. T.M.L.'s motion raised several arguments, including that LMPR 1.8(b) violated her right to due process. *Id.* at 48–51.

The Involuntary Treatment Act (ITA) court denied T.M.L's motion to appear in person. CP 237–56. Responding to T.M.L.'s due process arguments, the court found that her significant interest in her physical liberty was outweighed by the procedural protections already in place, the reduced need to place respondents participating remotely by video into

[1] Because this part of the record is confidential, *Amicus* relies on Appellant's characterization of the evidence as described in the opening brief.

physical restraints, and the cost of ambulance transportation to the court. CP 245–48.

The court relied heavily on an assertion that "appearing" by video was "far more humane" than being transported by ambulance in restraints. CP 247. This overlooks the fact that only ten percent of civil commitment respondents require ambulance services, CP 215, or that there was no evidence that T.M.L. herself even required transport by ambulance. In fact, T.M.L. was released from Navos the day after the ITA court denied her motion, indicating that she likely would have been suitable for van transport without restraints. Appellant's Br. at 15 n.4 (citing CP 260).[2]

The court also rejected any contention that video participation prevented T.M.L. from observing the other trial participants. CP 250–51. The court found that the video's capability to zoom in was sufficient to observe demeanor and credibility, and that the video allowed for the parties to hear and see each other as well as simultaneously review exhibits and examine witnesses. CP 250. The court further dismissed T.M.L's argument that she had a right to make eye contact with a judicial officer during her hearing. CP 251.

[2] *See* note 1, *supra.*

T.M.L. timely appealed to this Court. Appellant's Br. at 11 (citing CP 267).[3]

IV. STANDARD OF REVIEW

Appellate courts review questions of law *de novo* and findings of fact for substantial evidence. *D.W. v. Dep't of Soc. & Health Servs.*, 181 Wn.2d 201, 207, 332 P.3d 423 (2014). Substantial evidence requires "a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

V. ARGUMENT

A. Prohibiting T.M.L. From Appearing for her Civil Commitment Trial in Person Violated her Right to Procedural Due Process

Civil commitment is a significant deprivation of liberty that requires due process of law. *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). In determining what degree of due process applies to a particular liberty deprivation, Washington State courts apply the three-part balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). This test balances: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and

[3] *See* note 1, *supra.*

the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Post v. City of Tacoma*, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009) (quoting *Mathews*, 424 U.S. at 335). It is "important to focus on the nature of the interest at stake in the sense that the more important the interest, the more process is required." *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 525–26, 29 P.3d 689 (2001).

1. T.M.L's individual interest in her liberty weighs heavily in her favor.

The Respondent has conceded that the first factor, the private interest that will be affected by the official action, weighs in T.M.L.'s favor. Respondent's Br. at 30. However, the key question is not just whether this factor favors T.M.L.; rather, the assessment concerns the importance of the interest at stake in order to determine its appropriate weight in the *Mathews* balancing test. *See Nguyen*, 144 Wn.2d at 525–26. The scope of this interest is the "primary concern," *id.* at 526, and this Court must examine the different facets of a potential deprivation in its assessment. *Id.* at 526–29.

It is well-established that civil commitment for involuntary treatment is "a massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 394 (1972); *In re LaBelle*, 107 Wn.2d 196, 201, 738 P.2d 138 (1986). Here, T.M.L. faced 180 days of involuntary treatment, the maximum period of time permitted under the ITA. *See* RCW 71.05.320(8). It is undisputed that six months is a significant period of time to be detained against one's will. Respondent's Br. at 30.

But the loss of freedom from confinement is just one factor at stake in civil commitment proceedings. *Vitek v. Jones*, 445 U.S. 480, 492, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). This Court should also consider the subjection of an individual to involuntary treatment, including mandatory behavior modification and the possibility of forced medication. *See id.* at 492–94; *Washington v. Harper*, 494 U.S. 210, 221–22, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (finding an individual has a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs). Further, the collateral social consequences of civil commitment (including the associated stigma) can also have "a very significant impact on the individual," and must be taken into account in assessing the individual liberty interest at stake. *See Addington*, 441 U.S. at 425–26.

The holistic interest at stake in civilly committing T.M.L. for 180 days—including the loss of physical liberty, period of detention, possibility of forced medication and behavior modification, and potential collateral consequences—is significant. In many respects, the confluence of these factors is even more intrusive on an individual's liberty interest than incarceration for a criminal conviction. *See Jones v. United States*, 463 U.S. 354, 384–86, 103 S. Ct. 3043, 77 L. Ed. 694 (1983) (Brennan, J., dissenting). This factor not only favors T.M.L., but is given substantial weight in the *Mathews* balancing test.

2. Requiring T.M.L. to appear for her civil commitment trial by video instead of in-person increased the risk of a wrongful deprivation of liberty.

The second factor considers the risk of an erroneous deprivation of T.M.L.'s liberty interest if she is required to participate in her trial by video, and the probable value, if any, of permitting her to appear in person. *See Post*, 167 Wn.2d at 313. In upholding LMPR 1.8(b), the ITA court determined that T.M.L. could adequately evaluate the demeanor of others participating in her video hearing. CP 250–51. This was in error.

Substantial research demonstrates that corresponding by video interferes with communication and impacts judicial decisions. As many courts have recognized, participating by video is simply not equivalent to appearing in person—particularly for individuals with severe mental

illness, who face particular challenges when trying to communicate by video. The many ways in which video hinders communication and participation in a civil commitment trial significantly increases the risk of a wrongful deprivation of liberty for respondents like T.M.L.

a. Participating in a civil commitment trial by video is not the same as appearing in person.

Published studies on hearings conducted by video indicate that the use of video strips nonverbal cues from communication, interferes with eye contact, and negatively impacts the viewer's assessment of credibility. *See, e.g.*, Harvard Law Review Association, *Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 Harv. L. Rev. 1181, 1184–86 (2009) (summarizing research findings). As a result, witnesses who testify by video are significantly less persuasive to the viewer than those who appear in person, a fact that has been shown to impact the outcome of judicial proceedings in a variety of contexts. *See, e.g.*, David F. Ross et al., *The Impact of Protection Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 Law & Hum. Behav. 553, 563 (1994) (juries are less likely to convict a defendant when the child victim of sexual abuse testifies by video as opposed to in the courtroom); Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of*

Teleconferencing in Asylum Removal Proceedings, 22 Geo. Immigr. L.J. 259, 271 (2008) (appearing by video doubles the likelihood that an asylum applicant will be denied asylum); Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 892 (2010) (conducting bail hearings by video increases the average bail amount by fifty-one percent). As these studies and others demonstrate, video is not a sufficient substitute for physical presence in the courtroom, and increases the risk of a decision adverse to the interests of a civil commitment respondent.

In light of the serious limitations, many courts have explicitly recognized that participating in a proceeding by video is not equivalent to appearing in-person. Several federal appellate courts, including the Fourth, Sixth, and Seventh Circuits, have noted the limitations of video. *See Thorton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005) ("Clearly, a jury trial conducted by videoconference is not the same as a trial where the witnesses testify in the same room as the jury."); *Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002) ("[V]ideo conferencing may render it difficult for a factfinder in adjudicative proceedings to make credibility determinations and to gauge demeanor."); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) ("[V]irtual reality is rarely a substitute for actual presence"); *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993) (noting

that "the immediacy of a living person is lost" with video technology); *see also People v. Heller*, No. 326821, __ N.W. 2d __, 2016 WL 3765997 (Mich. Ct. App. July 14, 2016) (per curiam) ("Abundant social science research demonstrates that video conferencing 'as a mediating technology' may color a viewer's assessment of a person's credibility, sincerity, and emotional depth.").

Critically, participating in a civil commitment hearing by video presents unique challenges for individuals suffering from severe mental illness. For example, some may suffer from delusions about the images they see on the video screens, limiting their ability to interact with others via video. *See, e.g.*, *United States v. Baker*, 45 F.3d 837, 846 (4th Cir 1995) (acknowledging that an individual with mental illness may react adversely to the presence of a video camera); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1101 (W.D. Wis. 2001) (noting that inmates with severe mental illness refused video visits from friends and family, believing the images on the screen to be manipulated due to the poor quality of the visits). Whatever limitations video imposes on communication, these limitations are potentially further compounded for individuals with severe mental illness, and may impede their ability to meaningfully participate in their commitment trials. *See* GR 33, Comment 1 ("It is the policy of the

courts of this state to assure that persons with disabilities have equal and meaningful access to the judicial system.").

b. T.M.L., like most civil commitment respondents, did not require physical restraints to appear in-person at her trial.

Respondents argue that participation by video eliminates the need to strap patients to gurneys for transportation to the court downtown. Respondent's Br. at 31. The ITA court similarly found that video hearings protect against one of "the most severe types of deprivation of liberty"—the placement in physical restraints—and thus improves respondents' access to the court. CP 246–47. But the liberty interest at stake in this case is not the right to be free from restraints during a civil commitment trial, but the right to be free from involuntary commitment. Although avoiding the use of physical restraints is a commendable goal, here the choice between restraints or appearing by video is a false dilemma: there is no evidence in the record that T.M.L. required ambulance transport, much less physical restraints, to appear in-person at her hearing. In fact, the record suggests that—like 90 percent of others requiring such hearings—she was a suitable candidate for van transport. Appellant's Br. at 15 n.4 (citing CP 260); CP 215 ("Prior to the establishment of video-only ITA court, approximately 10 percent of ITA respondents were brought by gurney in order to be transported to Harborview for their

hearing. The other 90 percent were transported by van without restraints."). The ITA court's consideration of the need for physical restraints was misplaced in the context of this case and should not factor into the *Mathews* analysis.

3. Any fiscal or administrative burdens on the government in transporting T.M.L. to appear in person are minimal.

The third element of the *Mathews* balancing test considers the government's interest, including the fiscal and administrative burdens, in having T.M.L. appear for her civil commitment trial in person. *See Post*, 167 Wn.2d at 313. The record, taken as a whole, does not demonstrate by substantial evidence any significant costs associated with transporting T.M.L. from Navos to ITA court, or any administrative efficiency achieved through video hearings. As a result, the third element does not weigh in the government's favor.

Both the ITA court and Respondent focus on the cost savings of video hearings as *compared to ambulance transportation.* CP 248; Respondent's Br. at 37–39. But because ninety percent of civil commitment respondents do not require ambulance services, *see* CP 215, the relevant cost comparator is the cost savings of video hearings *as compared to van transportation*. Unfortunately, the record is not developed with regard to this comparative cost. *See* CP 219 (assessing the

cost savings in implementing video hearings at Navos—as compared to cost of "ambulance expenditures, staff time and vehicle costs"—as $53,513). Accordingly, there is no evidence in the record to suggest that the cost of providing van transport from Navos to the ITA court outweighs the cost of providing hearings by video.

Even if T.M.L. required costly transportation services, a lack of financial resources does not justify violating her right to be present at her civil commitment trial. LMPR 1.8(b) was enacted because of the County's inability to contract with ambulance providers, in part because it failed to pay bills on time. Appellant's Br. at 28; CP 214. The Washington Supreme Court has recognized that a lack of resources is not a sufficient justification to deny the constitutional rights of civil commitment respondents. *See D.W.*, 181 Wn.2d at 208 (violating civilly committed individuals' constitutional rights to treatment is not justified by a lack of funds, staff, or facilities) (quoting *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003)). The State's mental health system is already significantly underfunded, and justifying the denial of due process protections to the most vulnerable citizens on the basis of cost would set a dangerous precedent. *See* Drew Atkins, *Washington trails the nation in mental health treatment*, Crosscut, July 7, 2016, *available at* http://crosscut.com/2016/07/how-washington-is-failing-the-mentally-ill/.

Here, even assuming that T.M.L. required costly transportation services to attend her civil commitment trial, the County's failure to pay its bills on time is not a sufficient justification to deny her right to be present.

Neither are the ITA court's findings and Respondent's claims of the increased efficiency of video hearings, CP 248; Respondent's Br. at 39, supported by substantial evidence in the record. The record reflects that allowing civil commitment respondents to appear in person may avoid the need for a hearing altogether, as defense attorneys have the opportunity to work with respondents' families on less restrictive alterative options. CP 215. The record also contains evidence that video hearings require defense attorneys to spend a "significant amount of time traveling" between facilities to represent their clients. *Id.* Although trials by video may speed up the ITA court's docket, the tradeoff is an increased administrative burden in other areas. Because the efficiency of video hearings is not supported by substantial evidence in the record, it should not factor into assessing the government's interest.

VI. CONCLUSION

T.M.L.'s liberty interest is significant: she faces not only a loss of physical liberty for a 180-day detention period, but also involuntary medication and behavior modification. Substantial research demonstrates that participating by video interferes with communication and impacts

judicial outcomes, resulting in an impermissible increase in the risk of an erroneous deprivation. The government's burden is minimal, with no demonstrated substantial costs or administrative inefficiencies that will result. In light of the significant individual interest and the serious risk of an erroneous deprivation of that interest, the *Mathews* balancing test tips in favor of T.M.L. Due process requires that she be permitted to appear in person for her civil commitment trial.

Respectfully submitted this 15th day of February, 2017.

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I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the Brief of *Amicus Curiae* American Civil Liberties Union of Washington via email and submission to the Division I JIS Link system to the following addresses with consent to electronic service:

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