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TESTIMONY ON SENATE BILL No. 179
TO THE SENATE COMMITTEE ON HUMAN RESOURCES AND FACILITIES
By
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Nevada Disability Advocacy & Law Center

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This testimony is submitted on behalf of Nevada Disability Advocacy & Law Center (NDALC), Nevada's federally mandated, governor designated protection and advocacy system for individuals with disabilities. See the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. §10801 et seq); the Developmental Disabilities Assistance and Bill of Rights Act of 1975 (42 U.S.C. §6041 et seq); and the Protection and Advocacy for Individual Rights Program of the Rehabilitation Act of 1973 (29 U.S.C. §794e).

NDALC's testimony today is directed towards two issues addressed by SB 179; (1) the time frame in which individuals alleged to be a "mentally ill person" may be detained before a facility must either release them or file a petition for their civil commitment and (2) the procedure and standard by which mentally ill pretrial detainees may be medicated against their will.

1. Time Limitation on Emergency Detentions of "Mentally Ill Persons"

That no person may be deprived of life, liberty or property without due process of law is a principle which is fundamental to our system of jurisprudence and the very concept of being an American. It is well settled that civil confinement constitutes "a massive curtailment of liberty." Vitek v. Jones, 445 U.S. 480, 491 (1980) (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972). As a result, persons subject to detention are entitled to procedural due process[1].

As a general rule, the Due Process Clause requires that "an individual be given the opportunity for a hearing ***before*** he is deprived of any significant [liberty] interest." See Boddie v. Connecticut, 401 U.S. 371, 379 (1971). However, the law dispenses with the pre-deprivation hearing when justified by an emergency situation.

In Nevada, we have made provisions for the ***emergency*** detention and admission, without a prior hearing, of an individual who is alleged to be a "mentally ill person" as that term is defined in NRS 433A.115. This is essentially a person who presents a clear and present danger of harm to himself or others as a result of a mental illness.

[1] As the Supreme Court has recognized, "[t]here can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." O'Connor v. Donaldson, 422 U.S. 563, 580 (1975).

State law currently provides that anyone alleged to be a mentally ill person may be "be detained in a public or private mental health facility or hospital under an emergency admission for evaluation, observation, and treatment." See NRS 433A.150(1). However, a person so detained must be released ***within 72 hours*** unless a petition for his or her involuntary court-ordered admission is filed with the court. NRS 433A.150(2).

The 72 hour period, then, is a critical limitation on the amount of time an allegedly mentally ill person may lawfully be held without being accorded due process. The Legislature deemed 72 hours as a sufficient period of time in which to make the determination whether further detention of a person is necessary.

SB 179 seeks to "clarify" the law so that the 72 hour time period is not deemed to begin until a person is actually "***admitted***" to a mental health facility or hospital. This would be of little import if it were not for the fact that, in Southern Nevada, it can take several days before an allegedly mentally ill person is admitted anywhere. NDALC submits that the interpretation urged by SB 179 makes the 72 hour time limitation largely meaningless.

As you are all likely aware by now, before anyone is admitted to a mental health facility, he must first be medically screened. Because the state's mental health facility does not provide medical screenings, those who must rely on being treated there, generally the poor and/or indigent, must be screened at one of the area's emergency rooms.

This would typically be a relatively prompt process, as the current law clearly contemplates, if it were not for the fact that the number of individuals who are being detained for emergency admission to the state's mental health facility greatly exceeds that facility's capacity to accept more individuals. As a result, individuals alleged to be mentally ill and awaiting transport to the state facility can languish in area emergency rooms for days on end. It is NDALC's understanding that these individuals are not actually "admitted" to those medical facilities for the purpose of the 72 hour time limitation.

I understand that there are efforts underway to attempt to alleviate this situation and, given the scope of SB 179, it probably suffices to acknowledge the problems with which we are faced rather than delving into their underlying causes. Nevertheless, while this "crisis," as it can fairly be termed, may diminish, our mental health laws must change to reflect the realities of the conduct they are designed to govern.

The position that the 72 hour time period does not begin until a person is "admitted" to a mental health facility only serves to sanction, at least under state law, the practice of detaining individuals for days at a time before any of the procedures designed to afford them due process are actually triggered. Because there exist no time limitations with respect to when a person must be "admitted" to a facility the amount of time an individual may remain detained prior to his admission to a facility is limitless. State law would, therefore, seem to allow for indefinite confinement of a mentally ill person, or others simply alleged to be such, so long as no admission has occurred.

Such an interpretation lends itself to the absurd conclusion that the amount of time a person is detained before being admitted to a facility is less meaningful than the amount of time he is confined after his admission. Certainly this initial period is no less a massive curtailment of liberty than any subsequent period and is thus subject to the same constitutional concerns and safeguards. An individual's Constitutional rights are not suspended until the state can simply get around to admitting him to its facility nor is his confinement less meaningful simply because he is mentally ill.

In passing on this issue, I ask this Committee to be aware of the devastating impact these emergency detentions can have on an individual's life. Aside from the deprivation of liberty, these detentions can effect individuals' employment and familial relations as "even a short detention in a mental facility may have long lasting effects on the individuals ability to function in the outside world due to the stigma attached to mental illness." See Lessard v. Schmidt, 349 F.Supp. 1078, 1091 (E.D.Wis.1972).

CONCLUSION

While clarification normally implies an effort to find the law's true purpose and meaning, SB 179 is nothing more than an apparent attempt to legitimize the current illegitimate practice of allowing individuals to remain confined and untreated without being afforded any due process.

NDALC, therefore, submits that the 72 hour time frame referenced in NRS 433A.150 should commence as soon as an individual is deprived of his or her freedom rather than when the state determines that the individual has been "admitted" to a facility. The right to due process should be triggered by the deprivation of liberty, not by the state's ability to timely meet the mental health needs of its populace.

As the state only has an interest in detaining those who are mentally ill and dangerous, it should ensure that all individuals detained based upon an allegation that they are mentally ill persons are evaluated by mental health professionals as soon as possible otherwise there is an intolerably high risk that individuals who do not meet the state's strict statutory definition of a mentally ill person will be detained. [2] This obligation could be fulfilled, in part, by the state's mobile

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[2] "[T]he function of legal process is to minimize the risk of erroneous decisions." Addington, 441 U.S. 418, 425. It must be emphasized that not every individual for whom an emergency admission is applied meets the criteria for that admission. This is, in part, due to the nature of mental illness and the fact that emergency detentions are not necessarily initiated by trained mental health professionals. Any one of a number of individuals may make an application for the emergency admission of a mentally ill person and, *without a warrant*, take an allegedly mentally ill person into custody and transport that person to a hospital. These include law enforcement agents, social works, marriage and family therapists, registered nurses and physicians. The law gives a great deal of deference to these individuals' on-site assessment that there is probable cause to believe that the person is a mentally ill person and that, because of that illness, is likely to harm himself or others if allowed his liberty. While this assessment of probable cause is supposed to arise as a result of personal observation, police in particular, do not always do this.

response team, which would assess the individual prior to his actual "admission" to the state's mental health facility and make a determination whether the individual should be released or whether a petition for civil commitment should be filed. Of course this assumes that the requested funding for such a team is provided.

In criminal cases, the state's ability to deprive an individual of his or her liberty is tempered with stringent procedural safeguards. We would not dispense with such protections in that context and should not do so here simply because it is the mentally ill we are discussing.

Ultimately it is the state that has the burden of justifying the deprivation of a protected liberty interest by determining that good cause exists for the deprivation. Suzuki v. Yuen, 617 F.2d 173, 176-78 (9th Cir. 1980). The state, through the district attorney's office, is currently responsible for presenting evidence in support of the involuntary court-ordered admission of individuals at civil commitment hearings and should, likewise, be responsible for ensuring that the petitions for these hearings are filed in a timely manner.

In closing, I believe that most of you would agree that our State's mental health delivery system is simply not meeting the needs of its populace. However, NDALC asks this Committee not to allow this to serve as an excuse to simply dispense with individuals' constitutional rights until this problem is remedied.

2. The Involuntary Administration of Medication to Mentally Ill Pretrial Detainees

Senate Bill 179 also includes proposed changes to N.R.S. Chapter 178 which governs procedures relating to criminal defendants subject to evaluation and treatment for competency to stand trial. NDALC's comments are limited to the absence of procedural protections for pretrial detainees subject to proceedings for the involuntary administration of medication under this chapter.

Although these comments are limited to the absence of procedural due process protections, this committee should be aware that the United States Supreme Court, in the case *Sell v. United States*, is currently considering the question of whether or not the government has the power to involuntarily medicate a pretrial defendant solely to render him competent to stand trial for a non-violent offence. The United States Supreme Court decision in the *Sell* case could impact the proposed change in SB 179 in that it would allow for the administration of medication "if appropriate for treatment to competency" without reference to the nature of the offence. N.R.S. 178.425 (1).

SB 179 proposes amendment to N.R.S. 178.415 which would allow for introduction of evidence related to the "possibility of ordering the involuntary administration of medication." There is no proposed language in SB 179 which articulates the right of the defendant to be present and testify at the hearing described in 178.415.

Similarly, the proposed amendment to N.R.S. 178.425 allows for the court to order the involuntary administration of medication but does not articulate the right of the pretrial defendant to be present, testify or cross-examine witnesses prior to issuance of such an order.

Lakes Crossing Center for the Mentally Disordered Offender (LCC) is the only facility in the state of Nevada operated by the Division of Mental Health and Developmental Services (hereinafter "Division") that exists for the purpose of detention and treatment of mentally ill pretrial detainees. Currently, motions are filed on behalf of the state seeking a court order to allow for the involuntary administration of medication for pretrial defendants detained at LCC. Most if not all LCC detainees are not permitted to appear, testify or cross examine witnesses at any hearing on the state's motion to allow for the involuntarily medication of the pretrial detainee.

NDALC contends the current process is constitutionally deficient. In *Washington v. Harper*, 110 S. Ct. 1028 (1990), the United States Supreme Court found that procedures which allowed a convicted prisoner notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses at a hearing set to consider whether or not to allow for involuntary administration of medication, satisfied due process. No such protections currently exist in N.R.S. 178 or are otherwise proposed in SB 179.

NDALC requests that SB 179 be amended to include language which articulates a defendant's right to appear, testify, and cross-examine witnesses at any proceeding which considers the involuntary administration of medication.