

**IN THE
INDIANA COURT OF APPEALS
CAUSE NO. 49A02-0812-CV-1140**

STEVEN THOMAS, by his mother and)	
next friend Yulondia Thomas, and)	
DERRICK DAUSMAN, by his mother)	
and next friend Connie Dausman,)	
) Appeal from the Marion County Superior
Plaintiffs/Appellants,)	Court
)
v.)	Trial Court Cause No. 49D13-0802-PL-7019
)
ANNE WALTERMANN MURPHY, in)	The Honorable S.K. Reid, Judge
her official capacity as Secretary of the)	
Indiana Family and Social Services)	
Administration, and GINA ECKART,)	
in her official capacity as Director of the)	
Div. of Mental Health and Addiction,)	
)
Defendants/Appellees.)	

REPLY BRIEF OF APPELLANTS

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SUMMARY OF THE ARGUMENT

1. The very most that may be said for the State's arguments in this case is that they rely on the repeated assertion that Logansport State Hospital is the least restrictive environment suitable to each of the appellants' needs. Given that "nothing [in this case] could be more disputed than whether assignment to [a state institution] is the least restrictive assignment for" the appellants, Defts.' Response to Mot. for Summ. Judgment, at 23 (App. 281), this is a fact that may not be considered in this case at its present posture, and the trial court's decision must be reversed regardless.

2. However, insofar as the appellants are challenging a State policy that has undoubtedly been applied to them, a remand for an evidentiary hearing is not necessary. As has previously been noted, the mere application of a challenged policy suffices to establish ripeness as a matter of law. Moreover, the State is under the continual obligation to evaluate and consider *all* institutionalized patients for placement in the community, IND. CODE § 12-24-12-9, and the undisputed facts of this case demonstrate that this is considered "good clinical practice," Dep. of Parker, at 50 (App. 226). The manner in which, at the very least, the appellants have been deprived of "good clinical practice" constitutes far more than the "identifiable trifle" necessary to render this case ripe for adjudication, *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973).

3. Moreover, although the State contends that judicial action in this case is barred

by the separation-of-powers doctrine, it has not and cannot cite a single case in which this doctrine was deemed to excuse a governmental actor from compliance with a mandatory provision of state law. This Court answered this question squarely in *Center Township v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991), and the State’s argument constantly refuses to acknowledge that the Indiana General Assembly has already spoken on the issues presented by this case. It is thus these pronouncements that are being enforced by the appellants, and the “unbridled discretion” that the State insists it possesses in rendering placement decisions, Brief of Appellees, at 27, cannot be exercised in contravention of controlling law or the United States Constitution. Indeed, to recognize such discretion would be to jettison numerous statutory and constitutional protections afforded disabled individuals, which ensure that less restrictive alternatives are constantly considered and that institutionalized patients have an opportunity to demonstrate their appropriateness for these alternatives.

4. The State’s arguments on the merits of this case are thus entirely unavailing. Indiana law is clear: incompetent criminal defendants must be placed in the “least restrictive environment” appropriate to their needs, IND. CODE § 35-36-3-1(b), and the State must continually “facilitate and plan” institutionalized patients’ transitions to the community, IND. CODE § 12-24-12-9. It is impossible to conceive how a policy whereby all criminal defendants are automatically placed in the restrictive environs of a state institution—without any consideration given to alternative placements absent a

- I. THE STATE’S ARGUMENTS REPEATEDLY RELY ON ITS ASSERTION THAT THE “LEAST RESTRICTIVE ENVIRONMENT” APPROPRIATE FOR THE APPELLANTS IS AN UNDISPUTED ISSUE OF MATERIAL FACT, ALTHOUGH THIS FACTUAL ISSUE IS BOTH DISPUTED AND IMMATERIAL.

The State relies entirely on its assertion that Logansport State Hospital is the least restrictive environment appropriate to the needs of each appellant. However, this is a highly disputed issue, which necessarily may not be considered in this appeal from a summary judgment disposition. The State admitted as much before the trial court, where it argued that “nothing [in this case] could be more disputed than whether assignment to [Logansport State Hospital] is the least restrictive assignment for” the appellants. Defts.’ Response to Mot. for Summ. Judgment, at 23 (App. 281). Qualified treatment professionals have thus indicated that community placement is appropriate for both Steven Thomas and Derrick Dausman. Dep. of Parker, at 23 & Exh. 2 (App. 213, 239) (Steven Thomas); Aff. of Martin, ¶ 16 (App. 179) (Derrick Dausman).

However, as the appellants have repeatedly stressed, insofar as the State’s policy presently at issue—whereby incompetent criminal defendants are automatically and indefinitely placed in the restrictive confines of a state institution without any consideration given to alternative placements—has indubitably been applied to both appellants, and insofar as the State is under the ongoing duty to “facilitate and plan” patients’ transitions to the community from the very outset of institutionalization, this disputed issue is not material to resolution of the issues in this case. A remand for an evidentiary hearing is therefore not necessary, and the appellants are entitled to

judgment as a matter of law.

II. NOTWITHSTANDING THE STATE'S ASSERTIONS TO THE CONTRARY, THE APPELLANTS' CLAIMS ARE RIPE FOR REVIEW.

The State's argument that this case is not presently ripe for review is predicated on its assertion that there is no dispute concerning the appropriate placement for the appellants. As noted immediately above, this is simply incorrect.² Even were that not so, however, this case is presently ripe for two (2) reasons, and it must therefore be resolved on its merits:

- *First*, it is indisputable that the State's policy whereby incompetent defendants are automatically placed in a state institution without any consideration given to lesser restrictive alternatives has been applied to both appellants, and this suffices to establish ripeness as a matter of law.
- *And second*, the State possesses the statutory and constitutional duty to facilitate and plan the transition of any institutionalized individual to the community—and does so for all institutionalized individuals against whom criminal charges are not pending—from the day that an individual begins his or her institutionalization, and the fact that this duty is being shirked by the policy at issue constitutes present injury for both appellants.

² The State places significant weight on the precise language of the appellants' request for relief in their complaint in this case. Brief of Appellees, at 13. This request is perhaps more appropriately characterized as seeking the present consideration for alternative placements. In any event, the precise relief requested does not bind the appellants or this Court in fashioning an appropriate remedy. See *Holt City Club v. City of Tuscaloosa*, 439 U.S. 60, 65 (1978) (holding that a court "should not dismiss a meritorious . . . claim because the complaint seeks one remedy rather than another plainly appropriate one"); *Bontowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) (holding that, while a complaint must contain a demand for judgment, "the demand itself is not a part of the plaintiff's claim . . . and so failure to specify relief to which the plaintiff was entitled would not warrant dismissal").

The State's assertions concerning ripeness therefore rest on an infirm legal foundation.³

A. The policy presently at issue has been applied to both appellants, and this suffices to establish ripeness as a matter of law.

The State has implemented a policy whereby all incompetent criminal defendants are automatically placed in a state institution with no consideration given to less restrictive placements. It does not dispute the established legal principle that an individual seeking to challenge a governmental practice or policy may demonstrate that he has standing to do so—or, correspondingly, that the controversy is ripe as to him—by demonstrating that the challenged practice or policy has, in fact, been applied to him. *See* Brief of Appellants, at 21–23, and cases cited therein. To the contrary, the State argues only that the “practice or policy has *not* been applied to [the appellants].” Brief of Appellees, at 16 (emphasis added). This, of course, is erroneous.

At issue in this case is the State's practice or policy of automatically placing incompetent defendants in the restrictive confines of a state institution without any consideration given to less restrictive alternatives. The trial court overseeing Steven Thomas's criminal case heard testimony from multiple treatment professionals, and

³ Since the filing of the appellants' brief, this Court decided *Faris v. State*, 901 N.E.2d 1123 (Ind. Ct. App. 2009), *trans. pending*. In *Faris*, which arose as an appeal from the denial of a criminal defendant's motion to suppress certain evidence, the State argued that the appeal should be dismissed because the defendant had been found incompetent to stand trial and had not yet been certified competent, *id.* at 1125, which is an argument very much akin to the State's ripeness argument at present. Disposing of the State's argument, the *Faris* Court noted that, if it failed to reach the merits of the appeal, the defendant “could potentially be detained for decades, even if he never is competent to stand trial.” *Id.* The same, of course, may be said of the case at bar.

explicitly ordered that the State provide services to Mr. Thomas “in the location where [he] currently reside[d].” *See* Complaint, ¶ 17 & Exh. 1 (App. 49, 59–60). At the time, Mr. Thomas resided at home with his mother. *Aff. of Yulondia Thomas*, ¶ 3 (App. 172).⁴ Notwithstanding this order, however—and in contravention to every medical professional whose opinion was known at that time, including the State’s own medical director—Mr. Thomas was transferred to Logansport State Hospital. Not only did this transfer not take into account the opinions of qualified professionals regarding the appropriate environment for Mr. Thomas, but it *could* not have done so, for the decision was unilaterally made by attorneys enforcing the blanket policy presently at issue. *Dep. of Boggs*, at 26–28 & Exh. 4 (App. 90–92, 95); *Dep. of Parker*, at 22–23 & Exh. 2 (App. 212–13, 240).

Similarly, Mr. Dausman was transported to the state institution even though no qualified professional at the time determined such placement suitable to his needs, *see*,

⁴ The State argues that it “was given discretion by the order and chose to place [Mr.] Thomas at Logansport State Hospital.” *Brief of Appellees*, at 18. Of course, while this order no doubt affords the State discretion in deciding whether to provide competency restoration services itself or to enter into a contract for the provision of these services—as does the statute on which the order was based, *see* IND. CODE § 35-36-3-1(b)—no discretion is afforded in *where* these services are to be provided. The State does not and cannot seriously argue otherwise.

Although the State insists that Mr. Thomas “should file a petition for contempt in the [criminal] court,” *Brief of Appellees*, at 19, there is, of course, no authority (nor has any been cited) compelling the pursuit of this particular alternative. To the contrary, the appellants at present are not seeking to *enforce* this order, which might give fodder to a contempt proceeding. Nonetheless, this order is telling—indeed, conclusive—evidence that the policy presently at issue has been applied to Mr. Thomas, and his claim is therefore ripe for review.

e.g., *Aff. of Martin*, ¶¶ 16–17 (App. 179), and even though a residential facility offering constant supervision was prepared to arrange for Mr. Dausman to reside at one of its facilities, *see Aff. of Planck*, ¶ 11 (App. 193).

In light of these facts, it is clear that the policy presently at issue has been applied to both appellants, and this suffices to establish ripeness as a matter of law.

B. The duty to transition a patient to a less restrictive environment begins at the very outset of that patient’s institutionalization, and the undisputed facts of this case indicated that this constitutes “good clinical practice,” and this case is therefore ripe for review.

The State next argues the duty to “facilitate and plan” an institutionalized patient’s transition to the community, IND. CODE § 12-24-12-9, is satisfied by attempts to restore the patients to competency such that they may stand trial for their criminal charges. *Brief of Appellees*, at 17. However, as explained below, this is an incorrect interpretation of the statutory framework at issue in this case, and one that would lead to absurd and unconstitutional results. *See infra* Part IV.B.

Moreover, the State does not divorce its ripeness argument that the duty to transition patients to community settings is satisfied by the provision of competency restoration services from its similar argument on the merits. Regardless of the statutory framework, the undisputed evidence in this case is that the planning of an individual’s release from an institutional setting beginning at the outset of that institutionalization constitutes “good clinical practice,” *Dep. of Parker*, at 50 (App. 226), and that this planning is undertaken for all patients against whom criminal charges are not pending,

id. at 49–50 (App. 226); Dep. of Meadows, at 41–42 (App. 257–58); Dep. of Shields, at 14–16 (App. 103–05). At the very least, then, the undisputed facts demonstrate that both appellants have been deprived of “good clinical practice,” and this certainly constitutes the “identifiable trifle” necessary to render these issues fit for judicial resolution, *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973).

This therefore suffices to establish ripeness in this case, particularly insofar as numerous medical professionals have opined that a less restrictive setting *is* appropriate for both appellants. The fact of the matter is that the State has created an irrebutable presumption that the restrictive confines of a state institution are appropriate for any patient against whom criminal charges are pending simply because this is the only environment in which the State has decided to offer competency restoration services. However, as the appellants have previously noted, the State possesses the “constitutional and statutory duty to *consider* the appropriateness of community placement” for all institutionalized patients in its care. *Messier v. Southbury Training Sch.*, 562 F.Supp.2d 294, 326 (D. Conn. 2008) (emphasis added). This is a duty that has been entirely jettisoned by the policy at issue in this case, and the mere jettisoning of this duty establishes that this case is ripe for review.⁵

⁵ The State attempts to distinguish the cases relied upon by the appellants in one (1) of two (2) manners.

First, it insists that the decisions in *Hotel & Restaurant Employees Union v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988), and *Messier*, *supra*, are not controlling in Indiana. Brief of Appellees, at 18–19. While this is, of course, correct, the holdings in each of these cases

III. JUDICIAL INTERVENTION IN THIS CASE WILL NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES.

A review of the State's separation-of-powers argument in this case would lead a reader to conclude that the appellants are presently seeking to compel the State to erect new buildings or create new programs in violation of some form of statutory discretion. However, the appellants seek only to require the State to abide by a statutory scheme to which it is specifically bound. Not surprisingly, the State has failed entirely to cite a single case in which this Court—or any other court, for that matter—has determined that separation-of-powers principles prevent the judiciary from enforcing a mandatory provision of state law.

are nonetheless persuasive; indeed, the weight to be afforded decisions of federal courts is particularly hefty given that ripeness itself is a federal constitutional requirement. *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991).

And second, the State argues that these cases are distinguishable because the appellants at present have not demonstrated the hardship required by *Pacific Gas & Electric Co. v. State Energy Resource Conservation & Development Commission*, 461 U.S. 190 (1983). However, as noted immediately above, it is a fundamental principle of standing law that “an identifiable trifle is enough for standing to fight out a question of principle: the trifle is the basis for standing and the principle supplies the motivation.” *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). The policy presently at issue has unilaterally removed the opinions of multiple treatment professionals from the decision-making process. Indeed, it has rendered the order of at least one (1) judge meaningless. This, particularly when combined with the manner in which the undisputed facts demonstrate that the appellants are being deprived of “good clinical practice,” certainly constitutes more than “an identifiable trifle.”

Moreover, the State's argument appears to be self-contradictory. While, on the one hand, it argues that this policy has *not* been applied to the appellants, Brief of Appellees, at 16, on the other hand it appears to argue that the application of this policy to the appellants has not caused them any hardship, *id.* at 17–18. Both assertions are erroneous as a matter of law.

A. Judicial action in this case will not intrude on the traditional province of the Indiana General Assembly, for this action seeks only to enforce legislative enactments.

The State argues first that judicial action in this case would violate the separation-of-powers doctrine insofar as it would usurp discretion traditionally afforded to the legislature. Brief of Appellees, at 21–25. However, in so arguing, it refuses to acknowledge that the legislature has already expressed its intent as it relates to the provision of competency restoration services. Indiana law is explicit that competency restoration services are to be provided in the “least restrictive environment” appropriate to the needs of a patient, IND. CODE § 35-36-3-1(b), and that the State has the duty to “facilitate and plan” all institutionalized patients’ transitions to alternative placements from the very outset of their institutionalization, IND. CODE § 12-24-12-9. The appellants in this case are thus simply seeking to *enforce* the relevant legislative enactments, and—the State’s arguments notwithstanding—this Court has never held that a mandatory provision of state law may not be enforced by the judiciary.

This case is thus not about the expenditure of additional funds, and it is certainly not about the creation of new facilities. To the contrary, it concerns a statutory scheme that requires that “competency restoration services” be provided in the least restrictive environment appropriate to a patient and that requires that the State “facilitate and plan” patients’ transitions to the community from the day their institutionalization begins. It is also about the manner in which the State is studiously avoiding compliance

with this statutory scheme.

Thus, in arguing that judicial action in this case is barred by the separation-of-powers doctrine, the State barely acknowledges this Court's holding in *Center Township v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991), in which the mandatory duty of local trustees to provide poor relief was reaffirmed. Said the Court in *Coe*:

The statutory duty to provide benefits is not limited by practicality. Temporary lack of funds is not an excuse. At no place in the statutory plan of providing benefits can it be implied that the . . . duty may be tempered by lack of sufficient funds. . . . In short, the trial court ordered the [defendant] to comply with the statute, nothing more.

Id. at 1358. As in *Coe*, the appellants are presently seeking only an order that the State “comply with the statute,” and there is simply no authority for the proposition that the State may resort to the separation-of-powers doctrine to excuse its decision to apportion its funds in a manner contrary to controlling law. As the appellants have previously noted, courts in at least six (6) other jurisdictions have reached the precise issue presented by this case, and have thus held that a statutory provision requiring treatment in the “least restrictive environment” is, indeed, enforceable by the judiciary.

The State thus relies only on cases in which this Court has invalidated orders made without any statutory authority. In *Y.A. v. Bayh*, 657 N.E.2d 410 (Ind. Ct. App. 1995), *trans. denied*, for instance, this Court held only that the statute there at issue “evinced a clear intent by the legislature to limit mental health services to the amount of . . . annual appropriations” and, in so doing, cited the holding in *Coe* with approval.

Id. at 417 (noting also that “the executive may not refuse to carry out its responsibility” when the legislature “appropriately delegate[s] to the executive branch of state government the duty and responsibility for implementing an[d] carrying out . . . programs”). As such, it is clear that the State may not escape the mandatory nature of its statutory duties by resort to the separation-of-powers doctrine, and its arguments to the contrary are unavailing.⁶

B. Judicial action in this case will not unconstitutionally intrude upon the discretion of the State, for no state agency possesses discretion to implement a policy that is violative of controlling law or the United States Constitution.

The State next argues that it possesses unbridled discretion to determine the placement of institutionalized individuals. Brief of Appellees, at 25–32. In so doing, however, it does not address the rudimentary notion that *no* state agency possesses the discretion to act in a manner contrary to controlling law or the United States Constitution. *See* Brief of Appellants, at 32–35. To the contrary, it argues only that “[i]ndividuals who are charged with serious crimes would not be appropriate for community-based restoration services.” Brief of Appellees, at 25.

This, of course, is neither what Indiana law commands nor is it an argument that the judiciary is prohibited from invading the province of the executive.⁷ Rather, it is a

⁶ The other cases relied upon by the State have previously been distinguished by the appellants, and the State does not address these distinctions. *See* Brief of Appellants, at 35, 40–41 & n.9.

⁷ Indeed, as the appellants have previously noted, were this Court to hold that the judiciary is prohibited from reaching the merits of the present case as a result of the

simple regurgitation of the State’s argument that this case is not ripe for review insofar as neither appellant is presently appropriate for placement in a less restrictive environment. The State’s assertion, then—for which no authority or citation to the record is provided—turns entirely on its head the basic constitutional principle whereby individuals are deemed innocent until proven guilty. It is certainly important—if not vital—to note that the decision that a particular individual should be institutionalized is made not by treatment professionals (who may certainly take the gravity of an alleged offense into consideration in rendering an opinion), but by the Office of Legal Counsel within the Indiana Family and Social Services Administration.

The State has thus removed entirely from the equation the opinions of qualified treatment professionals—including its own treatment professionals—and has instead established an irrebutable presumption that institutionalization is appropriate for *all* criminal defendants on the basis of a single pending charge, regardless of the gravity of that charge or the guilt of the defendant. *Cf. Jackson v. Indiana*, 406 U.S. 715, 724 (1972) (“If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice.”). In light of the established—and self-evident—legal principle that no

limited discretion afforded to the State, it would be—in effect—jettisoning the entire statutory structure related to commitments of any variety in favor of affording unbridled discretion in rendering such decisions to the State. *See* Brief of Appellants, at 34. The constitutional infirmity of such a holding scarcely need be reiterated.

discretion exists to implement a policy in violation of controlling law, judicial intervention in this cause will not unconstitutionally infringe on the limited executive authority bestowed upon the State.

IV. THE AGENCY POLICY PRESENTLY AT ISSUE IS VIOLATIVE OF INDIANA LAW, AND THE STATE HAS NOT SERIOUSLY CONTENDED OTHERWISE.

A. *The State's policy violates Indiana Code § 35-36-3-1(b), which requires that incompetent defendants be placed in the least restrictive environment appropriate to their needs.*

Relying on no authority other than the statute at issue in this case and the well-established principle that this statute should be afforded its plain meaning, the State next argues that "Indiana Code § 35-36-3-1(b) clearly authorizes [it] to place all [developmentally] disabled persons in state hospitals, if it so chooses." Brief of Appellees, at 32–34. However, in so arguing, the State relies once again only on its conclusory assertion that it possesses the discretion to define state institutions as the least restrictive setting for all individuals against whom criminal charges are pending simply because this is the only location in which it has chosen to provide restorative services. At issue in this case, however, is the legality and constitutionality of this irrebuttable presumption that has been established by the State.

After adversarial proceedings, Indiana courts have now held that both appellants could and should be served in the community, and the State's arguments that it may place all incompetent defendants indefinitely within its state institutions upon a showing only that they are incompetent to stand trial for a criminal charge is entirely

unavailing. *Cf. Habibzadah v. State*, -- N.E.2d --, slip op. at 10 (Apr. 17, 2009) (Mathias, J., concurring) (describing the practical consequences of such a policy as “fail[ing] miserably when faced with the likely long-term or permanent mental illness of a criminal defendant”).⁸ The fact that courts have twice now held a less restrictive setting appropriate for the appellants—and the fact that multiple treatment professionals have recommended similar placement—is conclusive evidence that the irrebuttable presumption employed by the State exists without consideration to professional opinion or the individual needs of a particular patient.⁹

⁸ While the appellants have not argued at present that the State is collaterally estopped from asserting that a less restrictive environment is appropriate for either appellant, they reserve the right to do so in the event that this case is remanded to the trial court.

⁹ Once again, the State purports to rely on evidence that “community programs cannot provide the same quality or quantity of services . . . as are provided . . . at Logansport State Hospital.” Brief of Appellees, at 14. As has previously been explained, this is a mischaracterization of the facts in this case. Rather than presenting evidence that such programs *cannot* provide such services, qualified professionals simply indicated that they *do not* offer such services. See Brief of Appellants, at 39, 41 nn.12–13 (providing citations to the record in this case). Of course, as the appellants have previously argued, this is the very issue in the present case: whether the State violates Indiana law and the United States Constitution by failing to offer services outside the restrictive environs of its state institutions. The State’s argument is therefore entirely circular, and it cannot rely on its failure to provide services in the community to justify its failure to provide services in the community.

Additionally, the State purports to rely on evidence concerning the amount of treatment received by the appellants at Logansport State Hospital, the fact that neither appellant has been victimized while institutionalized, and the appellants’ progression toward competence. As has also been argued previously, this evidence is immaterial to whether the State may impose substantially on the appellants’ liberty without any sort of determination that institutionalization is necessary. See Brief of Appellants, at 39 n.12; *cf. Addington v. Texas*, 441 U.S. 418, 425 (1979) (“[C]ommitment for any purpose constitutes a significant deprivation of liberty.”).

B. By implementing the policy presently at issue, the State has entirely shirked its duties under Indiana Code § 12-24-12-9 to continually “facilitate and plan” institutionalized patients’ transitions to the community.

The State next argues that the requirement that it “facilitate and plan” the appellants’ transitions from a state institution to the community, IND. CODE § 12-24-12-9, is being met insofar as the State is “making every effort to make [the appellants] competent” to stand trial. Brief of Appellees, at 34. Initially, this argument was not raised in the trial court, *see* Defts.’ Response to Mot. for Summ. Judgment, at 25–34 (Supp. App. 25–34), and the issue is therefore waived, *see, e.g., Lindsey v. DeGroot*, 898 N.E.2d 1251, 1259 (Ind. Ct. App. 2009).

Waiver notwithstanding, the State’s argument lacks merit. The issue at this point is whether the Indiana General Assembly, in enacting this provision, envisioned that its requirements could be satisfied by efforts to restore an incompetent defendant to competence. However, Indiana Code § 12-24-12-9 does not distinguish between patients against whom criminal charges are pending and those against whom such charges are not pending. To the contrary, the duty “[t]o facilitate and plan the committed individual’s transition from the state institution to the community” exists for all patients, IND. CODE § 12-24-12-9, and there is nothing in the statutory framework to indicate that this duty might be satisfied by the simple provision of competency restoration services. This is particularly true in light of the fact that Indiana law requires that even these services be provided in the “least restrictive setting appropriate

to the needs of the defendant.” IND. CODE § 35-36-3-1(b). Had the Indiana General Assembly desired that Indiana Code § 12-24-12-9 be interpreted to mean something different when applied to criminal defendants than it does when applied to all other institutionalized individuals, it could have made this intent clear. However, this it did not do.

Indeed, were the State’s interpretation of Indiana Code § 12-24-12-9 meritorious, it would lead to absurd and unconstitutional results in two (2) manners:

- *First*, when applied to those individuals for whom restoration to competency is *not* a possibility, this interpretation will require life-long institutionalization on the basis of a single unproven charge. Dep. of Parker, at 39–40, 46 & Exh. 3 (App. 221, 224, 245–49). Insofar as “courts will attempt to avoid absurd results which the legislature could not have intended,” *Spoljaric v. Pangan*, 466 N.E.2d 37, 43 (Ind. Ct. App. 1984), *trans. denied*, this interpretation cannot be so.
- *And second*, for individuals who, although incompetent to stand trial, do not meet the criteria for civil commitment, this interpretation will prove blatantly unconstitutional. *Jackson v. Indiana*, 406 U.S. 715, 724–31 (1972) (concluding unequivocally that the “indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment’s guarantee of due process [or equal protection]”). “It is a familiar canon of statutory interpretation that statutes should be interpreted so as to avoid constitutional issues,” *City of Vincennes v. Emmons*, 841 N.E.2d 155, 162 (Ind. 2006), and to bestow upon Indiana Code § 12-24-12-9 the meaning ascribed by the State would be to bestow upon the statute an unconstitutional interpretation.

As such, there is simply no authority for ascribing to Indiana Code § 12-24-12-9 the meaning proffered by the State; to the contrary, the Indiana General Assembly has been eminently clear as to where competency restoration services must be provided.

It is thus impossible to conceive how the State may be “facilitating and planning”

the appellants' transition to a less restrictive setting while at the same time implementing a policy whereby such a transition will not take place absent a restoration to competency that may never occur.

V. THE POLICY PRESENTLY AT ISSUE IS VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND THE STATE'S ASSERTIONS TO THE CONTRARY ARE UNAVAILING.

Finally, the State argues that the Supreme Court's decision in *Youngberg v. Romeo*, 457 U.S. 307 (1982), does not stand for the principle that "an institutionalized patient's placement must be determined by medical and psychiatric treatment professionals." Brief of Appellees, at 35–38. However, this argument evinces a misinterpretation of *Youngberg* and its progeny, as well as a fundamental misapprehension concerning the nature of the appellants' claims in this case. As such, the State's constitutional argument lacks merit.

Although the State contends differently, the *Youngberg* Court *did* expressly extend its holding to decisions related to placement. Said the Court: the State "may not restrain [patients] except when and to the extent professional judgment deems this necessary to assure . . . safety or to provide needed training." *Youngberg*, 457 U.S. at 324; *see also id.* (holding that patients "enjoy[] constitutionally protected interests in . . . reasonably nonrestrictive confinement conditions"). The professional judgment demanded by *Youngberg* is rendered altogether meaningless if it is not exercised against the backdrop of *alternatives*, and—as courts interpreting *Youngberg* have made clear—

the constitutional demand is that these alternatives be actually contemplated. The State's policy at issue in this case has ensured that they are not.

Relying on *Youngberg*, federal courts have almost uniformly extended the due process right to habilitation recognized in *Youngberg* to situations in which professional judgment is not exercised in determining whether an individual is appropriate for community placement. See *Clark v. Cohen*, 794 F.2d 79, 87 (3d Cir. 1986) (relying on *Youngberg* in holding that the refusal to place an individual "in a far less restrictive environment" must be made pursuant to the judgment of qualified treatment professionals); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1247-49 (2d Cir. 1984) (applying *Youngberg's* "professional judgment" standard to decisions regarding the appropriateness of community placement); *Messier v. Southbury Training Sch.*, 562 F.Supp.2d 294, 319 (D. Conn. 2008) ("Community placement decisions are . . . subject to scrutiny under *Youngberg*. Like any other decision to place restraints on a patient's freedom, the decision to keep a resident in an institution instead of placing the resident in a community setting must be a rational decision based on professional judgment."); *Association for Retarded Citizens of North Dakota v. Olson*, 561 F.Supp. 473, 486 (D.N.D. 1982), *aff'd on other grounds*, 713 F.2d 1384 (8th Cir. 1983) ("The right against unreasonable restraint also involves the much discussed question of alternatives to institutionalization, such as community homes.").

Although the State engages in a lengthy analysis of the factual circumstances

underlying each of these cases in an attempt to distinguish them from the case at bar, it refuses to acknowledge the far more fundamental point: each of these holdings is not only unlikely but impossible if the Fourteenth Amendment does not guarantee that placement decisions be rendered on the basis of professional judgment.

Moreover, although the State again refuses to admit as much, the district court in *Messier*—in an exceedingly comprehensive opinion—went so far as to find a constitutional violation when institutionalized patients are not considered for less restrictive environments, regardless of whether they are presently appropriate for such alternative placements. Said this court:

The court does not doubt that placement in the community would be beneficial for many class members, but community placement may not be a possibility or a necessity for every class member. . . . The most that [the] plaintiffs can accomplish is to require [the State] to conform with its constitutional and statutory duty to consider the appropriateness of community placement.

Messier, 562 F.Supp. at 326; see also *id.* at 329–42 (tracing the manner in which professional judgment had not been exercised in rendering placement decisions). In light of this “constitutional and statutory duty,” the *Messier* court found that the State “had failed adequately to provide for the evaluation of all class members for community placement,” *id.* at 345, and thus entered judgment in favor of both individuals for whom alternative placements were presently appropriate and those for

whom they were not.¹⁰

This holding is, of course, entirely apposite to the case at bar. After all, the State at present has implemented a policy whereby professional opinion is taken entirely out of the mix, and whereby individuals against whom criminal charges are pending are not even considered for alternatives less restrictive than a state institution. Although the State appears to argue that the fact that restorative services “are not currently available in the community” should somehow factor into the constitutional analysis, this is erroneous. First and foremost, unlike in *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983), community placements for many incompetent defendants *do* presently exist in Indiana—professionals have recommended that Mr. Thomas receive services in his own home and that Mr. Dausman receive services at a community facility that has expressed a willingness to accept him—and this is not a case in which new facilities would need to be created. What does not exist is the provision of competency restoration services *in* these community placements, and this is the issue very much at the heart of this case.

Of course, the State cannot justify a constitutional violation by resort to a statutory violation, and it is clear that the policy at issue is violative of the Fourteenth

¹⁰ The State insists once again that the holding of *Messier* is not controlling in Indiana. Brief of Appellees, at 38 n.8. Although this is true, the court’s decision is in complete accord with the decisions of multiple circuits—as well as *Youngberg* itself—and the State has provided no rationale for departing from its well-reasoned opinion. Moreover, while the State argues that the *Messier* court “did not hold that incompetent and developmentally disabled persons . . . must be considered for community placement,” *id.* at 38, this is *precisely* what the *Messier* court held. The State’s contentions are therefore unavailing.

Amendment to the United States Constitution.¹¹

CONCLUSION

For the foregoing reasons, the trial court erred in entering summary judgment in favor of the State. This decision should be reversed, and summary judgment should be entered in favor of the appellants.

Respectfully submitted,

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¹¹ Finally, the State insists in a footnote that the Office of Legal Counsel within the Indiana Family and Social Services Administration “do[es] not actually make the decision to place [incompetent criminal defendants] in a” state institution, and that these gatekeepers instead “act as part of a team and . . . assist the professionals with the legal task of reporting to the court and keeping track of such persons.” Brief of Appellees, at 36 n.7. However, this insistence is not supported by a single citation to the record, *see* IND. R. APP. P. 46(A)(8)(a) (requiring that “[e]ach contention . . . be supported by citations to the parts of the Record on Appeal relied on”), and indeed the State’s assertions are betrayed by the undisputed facts of this case. Dep. of Boggs, at 26–28 & Exh. 4 (App. 90–92, 95); Dep. of Parker, at 22–23 & Exh. 2 (App. 212–13, 240).

CERTIFICATE OF WORD COUNT

I hereby verify, pursuant to Rule 44(E) of the Indiana Rules of Appellate Procedure, that the unredacted version of this brief contains no more than seven thousand (7,000) words, including footnotes and excluding the parts of the brief exempted by Rule 44(C) of the Indiana Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following persons by U.S. mail, postage pre-paid, on this 23rd day of April, 2009:

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