

**STATE OF WISCONSIN
IN SUPREME COURT**

Case No. 2005AP003141

In the Interest of Ruby Washington

CITY OF MILWAUKEE,

Petitioner-Respondent,

v.

RUBY WASHINGTON,

Petitioner-Appellant-Petitioner.

**BRIEF OF AMICUS CURIAE
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COUNTY CORPORATION COUNSELS**

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STATEMENT OF INTEREST

The Wisconsin Association of County Corporation Counsels (“Association”) is an unincorporated association of county corporation counsels. Its membership consists of 65 attorneys from 37 counties and it is governed by officers selected by its member attorneys.

Under Wis. Stat. § 59.42, a county corporation counsel is responsible for providing necessary civil legal services to a county government and the county’s various boards, commissions, committees, and departments. Thus, a county corporation counsel is responsible for prosecuting actions that are referred by a county health department pursuant to Wis. Stat. § 252.07 in the same way that the Milwaukee city attorney was responsible for representing the city health department in this case.

The issue in this case is of interest to the Association because, as the City notes, public health functions are assumed by county health departments throughout most of the state.¹ And the issue is of interest to the Association because, as Ms. Washington’s counsel notes, the cost of jail confinement would be borne at the county level.²

The Association believes that the Court of Appeals was correct in affirming the lower court’s order that a noncompliant tuberculosis patient should be confined in a correctional facility to assure that she completed the prescribed course of treatment for the disease. The Association believes that jail confinement under these circumstances is a proper exercise of public health powers under Wis. Stat. § 252.07 and of remedial contempt powers under Wis. Stat. Ch. 785.

¹BRIEF OF THE PETITIONER-RESPONDENT CITY OF MILWAUKEE (CITY BRIEF) at p. 46 n.5.

²BRIEF-IN-CHIEF AND APPENDIX OF RESPONDENT-APPELLANT-PETITIONER (WASHINGTON BRIEF) at p. 36.

ARGUMENT

I. CONFINEMENT OF A NONCOMPLIANT TUBERCULOSIS PATIENT TO A CORRECTIONAL FACILITY IS A PROPER EXERCISE OF PUBLIC HEALTH POWERS.

A. The Tuberculosis Statute Provides Appropriate Due Process Protection.

A local health officer may order that an individual who has tuberculosis be confined to a facility if certain conditions are met.³ However, the local health officer must petition a court for a hearing to determine whether the individual should be confined for longer than 72 hours in a facility where proper care and treatment will be provided and spread of the disease will be prevented.⁴ The health officer must demonstrate all of the following:

1. That the individual named in the petition has infectious tuberculosis; that the individual has noninfectious tuberculosis but is at high risk of developing infectious tuberculosis; or that the individual has suspect tuberculosis.

2. That the individual has failed to comply with the prescribed treatment regimen or with any rules promulgated by the department under sub. (11); or that the disease is resistant to the medication prescribed to the individual.

3. That all other reasonable means of achieving voluntary compliance with treatment have been exhausted and no less restrictive alternative exists; or that no other medication to treat the resistant disease is available.

4. That the individual poses an imminent and substantial threat to himself or herself or to the public health.⁵

The individual must be given written notice of the hearing, the grounds and facts upon which confinement is sought, an explanation of the individual's rights, and the actions proposed to be taken and the reason for those actions.⁶ Additionally, the individual has a right to appeal at the hearing, the right to present evidence, the right to cross-examine witnesses, and the right to be

³Wis. Stat. § 252.07(8).

⁴Wis. Stat. § 252.07(9)(a).

⁵Wis. Stat. § 252.07(9)(a)1-4.

⁶Wis. Stat. § 252.07(9)(b).

represented by adversary counsel.⁷ If the individual is ordered to be confined for more than six months, the court must review the confinement every six months.⁸ And any order of the court may be appealed as a matter of right.⁹

Finally, the statute provides that the Department of Health and Family Services may promulgate any rules necessary for the administration and enforcement of the statute.¹⁰ To that end, the Department has enacted Wis. Admin. Code Ch. HFS 145 pertaining to the control of communicable diseases and Wis. Admin. Code Ch. 145, Subch. II pertaining to tuberculosis. These rules authorize a local health officer to take the following actions:

- (a) order a medical evaluation of a person.
- (b) require a person to receive directly observed therapy.
- (c) require a person to be isolated under ss. 252.06 and 252.07(5).
- (d) Order the confinement of a person if the local health officer decides that confinement is necessary and certain conditions are met.¹¹

Confinement must be to a location that will meet the person's needs for medical evaluation, isolation, and treatment.¹² Under the Department's rules, no person may be confined for more than 72 hours, excluding Saturdays, Sundays, or legal holidays, without a court hearing.¹³

Clearly, both the statute and the administrative code provide substantial due process protection to an individual who has tuberculosis.

⁷Wis. Stat. § 252.07(9)(d).

⁸Wis. Stat. § 252.07(9)(c).

⁹Wis. Stat. § 252.07(9)(e).

¹⁰Wis. Stat. § 252.07(11).

¹¹See Wis. Admin. Code § HFS 145.10(6).

¹²Wis. Admin. Code § HFS 145.10(6)(e).

¹³Wis. Admin. Code § HFS 145.10(6)(f).

B. Ms. Washington's "Plain Text" Argument Attempts To Rewrite The Tuberculosis Statute.

Despite the clear and substantial due process protections provided by the tuberculosis control statute and the administrative code, Ms. Washington argues that she has been denied due process. Her argument, she claims, is supported by the "plain text" of the statute. She asserts that an individual cannot be confined to jail when a less restrictive alternative is available, that the place of confinement must be the "(least) restrictive alternative available," and that a hospital is the least restrictive environment.¹⁴

Confinement of an individual with tuberculosis for more than 72 hours requires that a local health officer demonstrate to a court, among other things, that "all other reasonable means of achieving voluntary compliance with treatment have been exhausted and no less restrictive alternative exists."¹⁵ Ms. Washington correctly asks, "Alternative to what?"¹⁶

The City states that the phrase "less restrictive alternative" means that there is no less restrictive alternative to the **fact** of confinement, not the **place** of confinement.¹⁷ The Court of Appeals concurred and noted that "the section does not reference the *nature* of the place of confinement."¹⁸

Ms. Washington disagrees and asserts that the phrase "naturally, necessarily and grammatically refers to the overarching issue of confinement in a specified, and therefore, *identified* 'facility.'"¹⁹ Washington also claims that the phrase "least restrictive alternative" had a settled meaning when sec. 252.07(9) was adopted and claims that this showed a legislative intent to impose a "least restrictive alternative" requirement on placement.²⁰

¹⁴WASHINGTON BRIEF at 24, 25 (citing Wis. Admin. Code § HFS 146.06(5), and 36.

¹⁵Wis. Stat. § 252.07(9)(a)3.

¹⁶WASHINGTON REPLY BRIEF at 4.

¹⁷CITY BRIEF at 31 (emphasis in original).

¹⁸*In re Washington*, 2006 WI APP 99 ¶ 12 (emphasis in original).

¹⁹WASHINGTON BRIEF at 26.

²⁰WASHINGTON REPLY BRIEF at 7.

The principal problem²¹ with Washington’s argument is that the phrase “least restrictive alternative” doesn’t appear in Chapter 252 at all. And, as the Court of Appeals observed:

Certainly if the legislature intended to engraft a “least restrictive facility” dictate, it could have easily done so in § 252.07(9)(a)3 as it has elsewhere.²²

The Court of Appeals correctly noted that “We apply statutes as they are written.”²³ And this statute states that an individual may be confined only if a public health officer demonstrates that there is “no less restrictive alternative.”

In this case, Ms. Washington was provided with a less restrictive alternative than confinement when she was allowed to reside with her sister and participate in directly observed therapy on an outpatient basis. But she refused to follow the prescribed treatment and confinement became the only way to assure that she was available to participate in directly observed therapy. But because the legislature did not include “least restrictive alternative” language in the statute, the Court of Appeals correctly concluded that Ms. Washington “is not entitled to choose the place of her confinement.”²⁴

C. Cost Is A Legitimate Consideration When Determining The Place Of Confinement.

Ms. Washington asserts that cost is not a proper consideration when making the determination about where an individual with tuberculosis should

²¹A secondary problem is the way in which the language in her argument shifts about. The argument is initially presented as a “plain text” argument concerning the statutory phrase “no less restrictive alternative.” But Ms. Washington promptly rewrites the phrase as “(least) restrictive alternative.” WASHINGTON BRIEF at 24 ¶ D. She then substitutes her “(least) restrictive alternative” language for the City’s use of the phrase “less restrictive alternative” when she summarizes the City’s argument. *Cf.* WASHINGTON REPLY BRIEF at 4 and CITY BRIEF at 31. Then she drops the parentheses denoting her revision of the text and uses the phrase “least restrictive alternative” as if that’s what the statute actually said. WASHINGTON REPLY BRIEF at 6. Finally, she simply shifts to the acronym “LRA” and uses that acronym fairly indiscriminately in her reply brief.

²²*In re Washington*, 2006 WI APP 99 ¶ 12 (discussing the other statutes where the legislature actually used the “least restrictive alternative” language and distinguishing Wisconsin’s statutes from those in other jurisdictions).

²³*Id.* at ¶ 12 (citations omitted).

²⁴*Id.* at ¶ 15.

be confined.²⁵ And she claims that the sole basis for rejecting her placement in a hospital was that it would cost too much, rather than because it was not suitable to her treatment needs. She attempts to bolster this claim by pointing out that she was compliant while she was at the hospital.²⁶

Her argument overlooks a critical fact — she was originally confined to the hospital because her tuberculosis was infectious and medical quarantine was required. But when her disease became noninfectious, the local health officer was required to discharge her from the hospital. That is because a local health officer may direct that a person with a contagious disease “[b]e placed in an appropriate institutional treatment facility *until the person has become noninfectious.*”²⁷

At the time of the confinement order, Ms. Washington’s treatment needs were limited. She only needed to be confined so her compliance with the directly observed therapy order could be monitored. But she had no medical need that required her to be hospitalized and a hospital was not suitable to her treatment needs. On the other hand, the jail where she was confined was perfectly able to provide the proper care and treatment that she required. In short, she was confined to the jail because it was the appropriate place to assure her confinement and provide for her limited treatment needs.

Ms. Washington cites *D.E.R. v. La Crosse County*²⁸ for the proposition that taxpayer cost is an impermissible placement consideration. But despite this assertion, cost is a legitimate consideration in deciding where a person should be confined. As the Court of Appeals noted, subsequent changes to the statutes reflect a legislative concern that was similar to those expressed by the trial court and that were shared by the Court of Appeals.²⁹

And, as the City points out, even under *D.E.R.*, the cost to hospitalize Washington would have been so great and the benefit so small, that it would have been unreasonable for the court to mandate that the City hospitalize her.³⁰ Washington’s response is that “[t]here is nothing in the record to indicate what

²⁵WASHINGTON BRIEF at 33.

²⁶WASHINGTON BRIEF at 36.

²⁷Wis. Admin. Code § HFS 145.06(4)(g) (emphasis added).

²⁸*D.E.R. v. La Crosse County*, 155 Wis. 2d 240, 248, 455 N.W. 2d 239, 243 (1990).

²⁹*In re Washington*, 2006 WI APP 99 ¶ 14.

³⁰CITY BRIEF at 44-45.

the costs would be, let alone that they would be ‘huge.’” Instead, she suggests that “a hearing would be necessary to establish a record on the point.”³¹

But the record does indicate enough about the additional costs that would be required to confine Ms. Washington in a hospital. Specifically, taxpayers would have to pay the additional cost of providing a guard at the hospital 24 hours a day, 7 days a week, for a period of approximately 9 months.³² Even at minimum wage, this would easily cost the taxpayers more than \$37,000.³³ And that does not even take into account the difference between the per capita daily rate at a jail and at a hospital.³⁴

Moreover, Ms. Washington’s own arguments show that cost factors are legitimate considerations in deciding where tuberculosis patients are to be placed. She specifically notes that there has been a substantial reduction in the number of tuberculosis cases. She states that the number is “well below the number needed to justify the expense of sanitariums dedicated to that purpose.”³⁵ Moreover, she has acknowledged that “[a] graduated scheme of coercive intervention seems to be *the most cost-effective mechanism* for delivering treatment” and that “Wisconsin’s TB control regime follows this model.”³⁶

Despite Washington's predilection for pointing out what she claims to be “absurd results,” she overlooks the most obvious — requiring that the public pay a substantial amount to place her in a hospital bed that she doesn’t need when all that is really warranted is confinement to assure compliance with her

³¹REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER (WASHINGTON REPLY BRIEF) at 9.

³²APPENDIX TO WASHINGTON BRIEF at 57:13-24.

³³The cost of providing a guard at the State minimum wage of \$5.70 per hour, 24 hours per day, 30 days per month, for 9 months would be \$36,936. There are probably not many City police officers who are paid only at the minimum wage, and this doesn’t include the cost of social security taxes or any fringe benefits.

³⁴Experience at the county level suggests that the per capita daily rate for a jail would be around \$50 – \$55 per day, while the per capita daily rate for a hospital would be on the order of \$900 – \$1,000 per day.

³⁵WASHINGTON BRIEF at 29.

³⁶*Id.* (emphasis added).

treatment regimen.³⁷

Taken as a whole, there is sufficient evidence in the record to support the application of cost as a factor in determining the place of confinement.

II. COURT-ORDERED CONFINEMENT OF A NONCOMPLIANT TUBERCULOSIS PATIENT IN A CORRECTIONAL FACILITY IS A PROPER EXERCISE OF REMEDIAL CONTEMPT POWERS.

A. Judicial Estoppel Should Not Bar Review Of The Remedial Contempt Issue.

Ruby Washington argues that the City is estopped from arguing that jail confinement is an appropriate remedial contempt sanction in her case. She notes that the City initially brought a contempt motion before the trial court, but elected to proceed under the tuberculosis control statute.³⁸ Moreover, she claims that the City's inconsistent positions "induce[d] the court of appeals to hold that the confinement order was...a contempt order."³⁹

The problem with Ms. Washington's claim is that it misrepresents the evolution of the remedial contempt issue on appeal. As the Court of Appeals noted:

This appeal comes to us in two interconnected postures. First, an appeal from the trial court's order in which the trial court specifically did not invoke its contempt power. Second, by virtue of an order issued by this district's motions judge on January 9, 2006, that nevertheless characterized the trial court's order as "at base, an appeal from a contempt order."⁴⁰

It is true that the City pursued a remedy under the tuberculosis control statute, rather than under the remedial contempt statute, at the trial court level. But the motions judge for the Court of Appeals reintroduced the remedial

³⁷Washington suggests that the City is merely trying to shift the cost to the county. WASHINGTON BRIEF at 36. But the fact is that 100% of the cost of her confinement and treatment will be borne by taxpayers.

³⁸WASHINGTON BRIEF at 37-38

³⁹WASHINGTON BRIEF at 37.

⁴⁰*In re Washington*, 2006 WI APP 99 ¶ 9.

contempt issue to the proceedings in the January 2006 order. And contrary to Ms. Washington's claims, the City has not taken an inconsistent position on appeal. It's position now is precisely the same as its initial position at the trial level. Under these circumstances, the City should not be estopped because of the way in which the Court of Appeals elected to characterize the issue when it accepted the case on appeal.

Additionally, Ms. Washington's own reasoning favors consideration of the remedial contempt issue. She argues that her case falls within settled exceptions to the mootness doctrine.⁴¹ She points to *State v. Michael S.*, which states:

A court may decide a moot issue when the issue is of great public importance; occurs frequently and a definitive decision is necessary to guide the circuit courts; is likely to arise again and a decision of the court will alleviate uncertainty; or will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties.⁴²

The same reasons that Ms. Washington relies on to argue that her case is not moot also warrant this Court's consideration of the remedial contempt issue.

This case raises an issue of great public importance. And while noncompliant tuberculosis patients are fortunately not a frequent occurrence, guidance is necessary because the situation may arise again. A decision by this Court will resolve questions about the appropriateness of remedial contempt sanctions in such cases that will be of benefit to other courts. And, as the history of this case demonstrates, the appellate review process cannot be completed in time to benefit the parties when the issue arises again.

Under these circumstances, this Court should consider the remedial contempt issue in order to provide prospective guidance.

B. The Confinement Order Contained A Proper Purge Condition.

Ruby Washington argues that the confinement order was not a proper remedial contempt sanction because it set "*a clean bill of health*" as the purge

⁴¹WASHINGTON BRIEF at 43-45.

⁴²WASHINGTON BRIEF at 44 citing *State v. Michael S.*, 2005 WI 82 ¶ 6.

condition and that this was “*quite outside her capabilities.*”⁴³ The problem with this argument is that it misstates what the court actually ordered.

The trial court ordered that Ms. Washington be confined in the Milwaukee County Justice facility until further order of the court and set a date to review the matter for April 7, 2006. Additionally, the trial court ordered that Ms. Washington was to comply with the Milwaukee Health Department’s order for Directly Observed Therapy (DOT) while she was confined.⁴⁴

The purge condition was not, as Ms. Washington claims, that she have “a clean bill of health.” The purge condition stated in the order was that she complete the prescribed course of treatment for her disease.

The requirement that Ms. Washington comply with the DOT order is, itself, wholly unremarkable. Ms. Washington had been confined to a hospital in August 2005 because her tuberculosis was contagious. At that time she entered into a stipulation with the City that she would continue a course of supervised treatment for approximately nine months after she was discharged from the hospital to ensure that she was cured.⁴⁵ The reason that confinement became necessary was solely because of Ms. Washington’s repeated noncompliance with the terms of this stipulation.

Compliance with the prescribed course of treatment while confined to jail was clearly within Ms. Washington’s ability. As Ms. Washington points out, a person confined to a jail may refuse treatment.⁴⁶ Thus, she had a choice about whether to comply with the treatment regimen and ultimately held the key to her own release.

This Court has previously found that setting treatment for a medical condition as a purge condition was within a circuit court’s authority and did not violate an individual’s due process rights.⁴⁷

Gaylon Larsen suffered from Post Traumatic Stress Disorder (PTSD).

⁴³WASHINGTON BRIEF at 41 (emphasis in original).

⁴⁴APPENDIX TO WASHINGTON BRIEF at pp. 138-39.

⁴⁵*In re Washington*, 2006 WI APP 99 ¶ 4.

⁴⁶WASHINGTON BRIEF at 22.

⁴⁷*In Re Marriage of Larsen: State ex rel. Larsen v. Larsen*, 165 Wis. 2d 676, 681, 478 N.W.2d 18, 19 (1992).

During a child support proceeding, the circuit court found that PTSD was a factor in his inability to maintain employment and pay child support. Mr. Larsen stipulated to continuing a PTSD counseling program and the court entered an order for him to do so. Larsen failed to comply with the order and the circuit court subsequently found him in contempt. At the same time, the court provided that the contempt would be purged if Larsen agreed to receive treatment for PTSD and seek work. Larsen appealed the PTSD treatment condition.⁴⁸

This Court found that the purge condition did not violate Mr. Larsen's due process rights. It noted that "Larsen had been ordered to jail, not to a treatment program. The treatment was only a purge condition, exercisable at Larsen's will."⁴⁹ Citing *Lessard*,⁵⁰ this Court acknowledged that the circuit court could not have ordered inpatient treatment without a Chapter 51 hearing. But this Court has distinguished *Larsen* from *Lessard* and has concluded that "allowing Larsen to seek treatment for PTSD as an opportunity to purge his contempt, without a ch. 51 hearing, did not violate his right to due process."⁵¹

In the present case, as in *Larsen*, the purge condition was designed to compel Ms. Washington to do what she had already agreed to do. Thus, it did not violate her due process rights.

The purge condition set by the trial court was proper and the Court of Appeals' decision should be affirmed.

C. The Confinement Order Complied With Statutory Requirements For Remedial Contempt Orders.

Ruby Washington complains that she was deprived of her due process rights because the order confined her to jail for more than six months.⁵² Ms. Washington predicates her argument on Wis. Stat. § 785.04(1)(b), which provides that imprisonment for contempt "may extend only so long as the person is committing the contempt of court or 6 months, whichever is the

⁴⁸*Id.* at 681-82.

⁴⁹*Id.* at 684.

⁵⁰*Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).

⁵¹*In re Larsen*, 165 Wis. 2d at 684-85.

⁵²WASHINGTON BRIEF at 42.

shorter period.”

Ms. Washington ignores Wis. Stat. § 785.04(1)(e), which expressly provides that a court may also impose “[a] sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.” And, as the Court of Appeals found:

Here, the trial court fully explained why confinement for more than six months was necessary to ensure Washington’s compliance with her treatment regimen; namely, that the six-month limitation would be “ineffectual to terminate” Washington’s continuing failure to comply with its September 27, 2005, order, which directed, upon the parties’ stipulation, Washington to voluntarily complete her course of treatment.⁵³

Nonetheless, Ms. Washington asserts that the order violated her due process rights and her counsel invokes images of a “health bureaucracy” with “unreviewable authority” that would “eliminate judicial oversight with respect to whether the patient was receiving proper care.”⁵⁴

Hyperbole aside, this claim is simply wrong on the facts. The trial court order expressly set a date on which the matter was to be reviewed by the court.⁵⁵

CONCLUSION

The Wisconsin legislature has created a comprehensive program to protect the public against the spread of tuberculosis. This program includes a progressive system of measures designed to assure that a tuberculosis patient is compliant with the medically necessary treatment regimen. When a patient is noncompliant and threatens both the patient’s and the public’s health, a court may order the patient confined to a facility where proper care and treatment can be provided.

Ruby Washington repeatedly failed to comply with the required treatment regimen and the court ordered that she be confined to a correctional facility. Ms. Washington complained that she would rather be confined to a medical facility and asserted that she could not be jailed for more than six

⁵³*In re Washington*, 2006 WI APP 99 ¶ 19.

⁵⁴WASHINGTON REPLY BRIEF at 5 and 6.

⁵⁵APPENDIX TO WASHINGTON BRIEF at 139 ¶ 4.

months under the court's remedial contempt powers.

The fact is that Ms. Washington had no medical need that required hospitalization, and the correctional facility was able to provide her with proper care and treatment. Ms. Washington's repeated escapes meant that confinement to a facility was necessary to assure her compliance, and a correctional facility is a "facility" within the meaning of the statutes. Under these circumstances, the trial court properly concluded that a jail — not a hospital — was the appropriate facility where Ms. Washington should be confined.

Finally, the Court of Appeals noted that although the remedial contempt statute generally limits confinement to not more than six months, it also expressly permits a trial court to customize an order when the general provisions are inadequate. And the Court of Appeals found that "the trial court fully explained why confinement of more than six months was necessary."⁵⁶

The order of confinement to a correctional facility in this case was both a proper application of public health law and an appropriate exercise of remedial contempt powers. Accordingly, the Court of Appeals' decision should be upheld.

Dated this 8th day of September 2006.

Respectfully submitted,

WISCONSIN ASSOCIATION OF
COUNTY CORPORATION COUNSELS

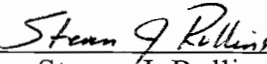
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⁵⁶*In re Washington*, 2006 WI APP 99 ¶ 19.

CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is 4,935 words.




Steven J. Rollins

CERTIFICATE OF FILING

I certify that I filed the original and twenty-two copies of the foregoing BRIEF OF AMICUS CURIAE WISCONSIN ASSOCIATION OF COUNTY CORPORATION COUNSELS on this date by causing the original and copies to be sent by FedEx, a third-party commercial carrier, to:

Clerk of the Supreme Court
110 East Main Street
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Dated: September 8, 2006



Steven J. Rollins

CERTIFICATION OF SERVICE

I certify that I served three copies of the foregoing BRIEF OF AMICUS CURIAE WISCONSIN ASSOCIATION OF COUNTY CORPORATION COUNSELS on this date by causing the copies to be sent to the following persons by first class mail, postage prepaid:

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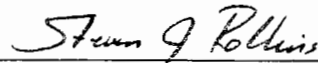
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