No. 1032528

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE DETENTION OF M.E.

REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

Toby J. Marshall
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Petitioner
King County Department of Public Defense

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATE CASES

FEDERAL CASES

RULES

OTHER AUTHORITIES

I. REPLY

Petitioner King County Department of Public Defense (DPD) asserts that discretionary review of this matter is warranted for two reasons. First, review is appropriate under RAP 2.3(b)(2) because the superior court committed probable error, and its decision substantially alters the status quo and limits the freedom of DPD to act. Second, review is appropriate under RAP 2.3(b)(4) because the court certified that its order involves a controlling question of law as to which there is substantial ground for a difference of opinion, and review will materially advance resolution of the disputed issues in future ITA cases.

The King County Prosecuting Attorney's Office (KCPAO) opposes review but fails to address any of DPD's positions. Instead, KCPAO argues that the case presents only abstract questions, that DPD lacks standing, and that the controversy is not justiciable.

Each of KCPAO's arguments fails. First, the superior court's order presents questions of continuing and substantial public interest that necessitate review, thus providing an

exception to mootness. Second, DPD is an "aggrieved party" and has standing to obtain review because the order imposed a burden or obligation on DPD. And third, the controversy is justiciable because DPD and KCPAO have genuine and opposing interests, and a judicial determination on the issues will be final and conclusive.

A. Review is appropriate because the contested issues are matters of continuing and substantial public interest.

The superior court dismissed this case on July 16, 2024. Supp-App-0374–75. As a result, the order requiring DPD to have an attorney represent M.E. is no longer operative. While moot cases are generally not reviewed, appellate courts have "discretion to decide an appeal if the question [presented] is one of continuing and substantial public interest." *State v. Beaver*, 184 Wn.2d 321, 330 (2015) (accepting review of "moot claim" deemed to be "of continuing and substantial public interest"); *see also In re Dependency of L.C.S.*, 200 Wn.2d 91, 98-99 (2022) (granting review "despite the fact that the [case] is moot"). KCPAO fails to address this well-known exception to the general rule despite citing cases in which the exception is

applied. *See Beaver*, 184 Wn.2d at 330; *Eyman v. Ferguson*, 7 Wn. App. 2d 312, 322-23 (2019).

"In deciding whether a case presents an issue of continuing and substantial public interest, this [C]ourt considers the following factors: whether the issue is of public or private nature, whether an authoritative determination is desirable to provide future guidance, and whether the issue is likely to reoccur." *Dependency of L.C.S.*, 200 Wn.2d at 99. The Court may also consider "the likelihood that the issue will escape review." *Id*. Each factor is satisfied here.

1. <u>The disputed issues are public in nature, and an authoritative determination will provide future guidance</u>.

This Court has recognized that "[t]he right of effective counsel…[is] fundamental to, and implicit in, any meaningful modern concept of ordered liberty." *State v. A.N.J.*, 168 Wn.2d 91, 96 (2010). Because "the promise of effective assistance of counsel" has often been "more myth than fact, more illusion than substance," *id*. at 98, the Court adopted the Standards for Indigent Defense accompanying CrR 3.1. The purpose of these standards is "to address certain basic elements of public

defense practice related to the effective assistance of counsel." CrR 3.1, Standards for Indigent Def., Preamble. This includes "the constitutional importance of maintaining proper caseloads…." *State v. Graham*, 194 Wn.2d 965, 970 (2019) (citing *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013), and *A.N.J.*, 168 Wn.2d at 102).

As the Director of the Office of Public Defense stated to the Court last year, "[t]he criminal public defense system in the State of Washington is on the verge of collapse." Letter from Larry Jefferson to the Justices of the Washington Supreme Court (Nov. 27, 2023).[1] This ongoing crisis stems from a mass exodus of experienced public defenders and a corresponding dearth of replacements, circumstances driven by low pay and high caseloads. *Id*.

Because of the shortage of available attorneys, DPD (like many other Washington jurisdictions) finds itself in a dilemma: its public defenders are at capacity, but the cases keep coming.

---

[1] Available at https://opd.wa.gov/sites/default/files/2023-12/000045-Memo%20to%20WSSC%20on%20Workload.pdf.

DPD submits that applicable standards, ordinances, and contractual provisions oblige it to decline representation beyond relevant caseload limits, a choice that safeguards the right to effective counsel as to the individuals whom DPD does represent. *See* App-0027–31. The court below disagreed, holding that DPD must accept all cases assigned to it regardless of caseload capacities. *See* App-0005–09. KCPAO argues that the court's holding is correct. *See* Answering Br. at 9.

The central question presented is whether the court erred by ordering DPD to appoint attorneys to represent ITA respondents like M.E. even though the attorneys had reached the maximum number of ITA cases permitted by the Standards for Indigent Defense.[2] The answer to that question turns in large part on how court rules and standards are interpreted

[2] DPD maintains the superior court did so err. *See, e.g.*, *Lozano v. Circuit Court of Sixth Judicial Dist.*, 460 P.3d 721, 724, 738 (Wyo. 2020) (holding trial court erred by ordering public defender to accept cases when defender was at capacity); *Carrasquillo v. Hampden Cnty. Dist. Courts*, 142 N.E.3d 28, 41, 48 (Mass. 2020) (same); *State ex rel. Missouri Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 597, 601 (Mo. 2012) (same). But this Court has never addressed such a scenario.

and applied, which raises other significant questions—such as whether the caseload limits set forth in the Standards are mandatory or advisory;[3] whether public defenders who cannot meet the certification requirements of the Standards can nevertheless continue taking cases;[4] and whether the superior

---

[3] DPD maintains the caseload limits are mandatory. *See* CrR 3.1, Standards for Indigent Def., Standard 3.3 (caseload limits in Standard 3.4 "reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified). KCPAO assumes, without explanation or analysis, that the limits are merely "advisory." Answering Br. at 4, 5, 7. This Court has never addressed the issue.

[4] DPD maintains a public defender cannot take cases (or be ordered to take cases) when doing so would preclude the attorney's ability to certify compliance with the Standards for Indigent Defense. *See* CrR 3.1(d)(4) ("at the first appearance of the lawyer in the case, the court shall ensure the lawyer is in compliance with the Certification of Compliance requirement in the Supreme Court's Standards for Indigent Defense"); *Davison v. State*, 196 Wn.2d 285, 298-99 (2020) (Standards for Indigent Defense "require attorneys to certify to the courts that they comply with caseload limits"); CrR 3.1, Standards for Indigent Def., Certification of Compliance (appointed attorneys "must" certify that they "limit the number of cases and mix of case types to the caseload limits required by Standards 3.2, 3.3, and 3.4"). This Court has never addressed that question.

court violated GR 42's prohibition against judicial officers managing public defense services.[5]

The Court's resolution of these issues will impact proceedings not only in King County but also throughout the state and will guide the provision of public defense services to countless individuals.[6] Accordingly, the case presents issues of continuing and substantial public interest. *Dependency of*

---

[5] DPD maintains the superior court has no authority to order public defenders to exceed caseload limits. *See* GR 42(d) (judicial officers and staff may not "manage" or "oversee" public defense services, which includes "monitoring attorney caseload limits and case-level qualifications"). Again, this Court has never addressed the issue.

[6] Contrary to KCPAO's assertion, DPD is not asking the Court to determine whether ITA patients "should be denied the right to counsel." Answering Br. at 5-6. If the Court agrees with DPD's positions, various stakeholders—prosecutors, hospitals, public defenders, counties, and judicial officers—will need to come together to find solutions to the shortage of public defenders. For example, hospitals could reduce caseloads by limiting the number of involuntary treatment petitions; this Court could approve licensed legal technicians to provide representation in ITA matters; counties could increase funding to secure more contract attorneys. Ultimately, though, the superior court should not allow an ITA petition to proceed if the respondent lacks an attorney.

L.C.S., 200 Wn.2d at 99 (mootness exception met where determination would "provide guidance to future courts facing the issue"); *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143153 (2019) (mootness exception met where "case present[ed] issues implicating [court] rules").

2. The disputed issues are likely to recur while escaping review.

The issues in dispute are virtually certain to recur. DPD repeatedly hits its capacity for ITA cases, but the superior court continues to require DPD to represent additional ITA respondents. App-0005–6; App-0016–22; App-0060 ¶¶ 55–60; App-0305–13; Supp-App-0398–401. Indeed, in the eight-day period of July 23 to July 30, 2024—after this matter was dismissed—the court ordered DPD to assign counsel in more than 90 ITA cases even though its attorneys had once again reached their caseload limits. *See* Supp-App-0398–401.

King County has also expanded (or will soon expand) the number of ITA beds. App-0060 ¶ 60. As such, "[t]he problem will be ongoing and worsening." *Id*. Recognizing the disputed issues will continue to arise, the superior court certified under

RAP 2.3(b)(4) that review of its order "may materially advance the resolution of…related ITA cases." App-0009.

Finally, ITA cases tend to resolve quickly—under three weeks in M.E.'s case. *See* Supp-App-0374–75; *see also* Mizuta Decl. ¶¶ 16–23. Because ITA proceedings are short-lived, there is a substantial likelihood that the disputed issues would escape review even if DPD were to appeal in every case in which the court orders it to appoint an attorney who has reached caseload capacity.

Though the case below is over, the Court should grant discretionary review and proceed to the merits.

B. DPD is an aggrieved party and thus has standing to appeal.

KCPAO argues that DPD lacks standing to "bring a legal claim," Answering Br. at 3, but this is not the correct analysis for determining whether DPD may pursue an appeal. Any "aggrieved party" may seek review. RAP 3.1. "Washington courts have long held that for a party to be aggrieved, the decision [to be reviewed] must adversely affect that party's property or pecuniary rights, or a personal right, or impose on

a party a burden or obligation." *Randy Reynolds*, 193 Wn.2d at 150 (citation and internal marks omitted). So long as this standard is met, "persons who were not formal parties to trial court proceedings…may appeal as 'aggrieved parties.'" *State v. G.A.H.*, 133 Wn. App. 567, 574 (2006).

DPD is an "aggrieved party" under the rule because the superior court's order required DPD to appoint one of its attorneys to represent M.E. and to ensure that such representation continued until the case was resolved. App-0005–09. The order thus imposed an obligation on DPD and adversely affected DPD's independent authority to manage and oversee public defense services. *See* GR 42(d); King Cnty. Code §§ 2.60.020 & .026.[7]

The case of *G.A.H.* is instructive. There the superior court ordered DSHS "to assume custodial and financial

[7] At the time DPD filed its notice for discretionary review, the superior court's order was still in effect. *Compare* App-0001 (notice filed July 10, 2024), *with* Supp-App-3075 (case dismissed on July 16, 2024). Though DPD's obligation to represent M.E. subsequently ended, the continuing-and-substantial-public-interest exception to mootness applies for the reasons set forth in Section I.A.

responsibility for G.A.H.'s welfare." 143 Wn. App. at 575. Though it "was not a party to the juvenile offender proceeding," DSHS appealed on the ground "that the juvenile court lacked the authority" to impose such an obligation on DSHS. *Id*. at 570. The State and the juvenile challenged DSHS's standing, but the Court of Appeals rejected their arguments. *Id*. at 574-75. Because the juvenile court's order "directly affected the rights of DSHS," DSHS was an "aggrieved party." *Id*. at 575.

In this case, the superior court imposed an obligation on DPD and, in doing so, infringed on DPD's independent authority. DPD has standing to obtain review of the court's order.[8]

[8] Even if this Court were to examine standing based on "injury in fact," as KCPAO does, review would be appropriate because the superior court's order negatively affected DPD. Among other things, the order prevented DPD from adhering to the caseload standards required under its contract with the union representing line attorneys (APP-0054 ¶¶ 13-17), and the order has impacted DPD's ability to assign attorneys to future ITA cases (App-0056 ¶¶ 26, 43).

C. The superior court's order presents a justiciable controversy.

KCPAO argues that review should be denied for lack of a justiciable controversy. Answering Br. at 6-7. But the elements of justiciability that KCPAO discusses are those required for an action under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW. *See id*. (citing *Stevens Cnty. v. Stevens Cnty. Sheriff's Dep't*, 20 Wn. App. 2d 34, 40-41 (2021) ("justiciability is a jurisdictional prerequisite to an action under the UDJA"); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001) ("before the jurisdiction of a court may be invoked under the [UDJA], there must be a justiciable controversy"); and *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15 (1973) (same)). Because this is not a UDJA action, those elements are inapplicable. And to the extent the elements apply, they are satisfied.

A controversy is deemed justiciable if (1) there is an actual, present and existing dispute as opposed to a moot disagreement; (2) the parties have genuine and opposing interests; (3) those interests are direct and substantial; and (4) a judicial determination will be final and conclusive. *To-Ro*, 144

Wn.3d at 411. "Folded into these elements are the common law restraint doctrines of mootness, ripeness, and standing." *Stevens Cnty.*, 20 Wn. App. 2d at 41.

The first and third elements (mootness and standing, respectively) have been addressed. *See* Sections I.A & B, *supra*. As for ripeness, KCPAO maintains the superior court can require DPD to exceed caseload limits "to ensure due process and legal representation for involuntarily detained ITA patients…." Answering Br. at 9. KCPAO also maintains the caseload limits set forth in the Standards for Indigent Defense are advisory. *Id*. Thus, KCPAO has genuine and opposing interests to those of DPD.

Finally, the superior court has ordered DPD to appoint attorneys to represent ITA respondents more than 100 times and will continue to do so despite the attorneys having reached their caseload limits. A judicial determination by this Court will be final and conclusive on the disputed issues.

II. CONCLUSION

DPD respectfully asks the Court to grant the motion and accept review.

RAP 18.17(b) CERTIFICATION

Petitioner's counsel certifies that this brief contains 2,440 words in compliance with RAP 18.17(b) and RAP 18.17(c)(18).

RESPECTFULLY SUBMITTED AND DATED this 18th day of September, 2024.

TERRELL MARSHALL LAW
GROUP PLLC

By: /s/ Toby J. Marshall, WSBA #32726
Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
936 North 34th Street, Suite 400
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Petitioner King County Department of Public Defense

CERTIFICATE OF SERVICE

I certify that on September 18, 2024, I caused a true and correct copies of the foregoing to be served on the following via the Court of Appeals Electronic Filing Notification System:

Kris Shaw, WSBA #32332
Email: kris.shaw@kingcounty.gov
Public Defense Supervisor, ITA Court

Anne Mizuta, WSBA #31589
Email: anne.mizuta@kingcounty.gov
Andrea Vitalich, WSBA #25535
Email: Andrea.Vitalich@kingcounty.gov
Email: paoita@kingcounty.gov
Email: paoappellateunitmail@kingcounty.gov
Email: paoitastaff@kingcounty.gov
Senior Deputy King County Prosecutor

Timothy G. Leyh, WSBA #14853
Email: timothy.leyh@bclplaw.com
Randall T. Thomsen, WSBA #25310
Email: randall.thomsen@bclplaw.com
Erica R. Iverson, WSBA #59627
Email: erica.iverson@bclplaw.com
BRYAN CAVE LEIGHTON PAISNER LLP
999 Third Avenue, Suite 4400
Seattle, Washington 98104
Telephone: (206) 623-1700

Attorneys for King County Executive Dow Constantine

I further certify that on July 19, 2024, I caused true and correct copies of the foregoing to be served via electronic mail upon the following:

Hollis Holman, WSBA #12253
Email: hollis.holman@kingcounty.gov
King County Superior Court Commissioner

Joseph Mansor
Email: joseph.mansor@kingcounty.gov
ITA Court Manager

Katy Wallace
Email: katy.wallace@kingcounty.gov
Public Defense Supervisor, ITA Court

Peggy Wu, WSBA #35941
Email: pwu@kingcounty.gov

Colin George, WSBA #45131
Email: cogeorge@kingcounty.gov

David Hackett, WSBA #21236
Email: David.Hackett@kingcounty.gov

Jerry Taylor, WSBA #40739
Email: Jerry.Taylor@kingcounty.gov

The Honorable Ketu Shah
Email: Ketu.Shah@kingcounty.gov
Email: Shah.Court@kingcounty.gov

SC ITA Orders
Email: scitaorders@kingcounty.gov

SC ITA Court
Email: SCITACourt@kingcounty.gov

Faifax Efiling
Email: fairfaxitaservices@uhsinc.com

TDA ITA
Email: TDAITAEfiling@kingcounty.gov

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of September, 2024.

By: /s/ Toby J. Marshall, WSBA #32726
Toby J. Marshall, WSBA #32726

TERRELL MARSHALL LAW GROUP PLLC

September 18, 2024 - 1:38 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,252-8
Appellate Court Case Title:	Access to case information is limited

The following documents have been uploaded:

- 1032528_Answer_Reply_20240918131833SC774868_1872.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Motion for Discretionary Review
  The Original File Name was Reply iso Mtn for DR.pdf

A copy of the uploaded files will be sent to:

- Andrea.Vitalich@kingcounty.gov
- Kris.shaw@kingcounty.gov
- anne.mizuta@kingcounty.gov
- docketrequests@terrellmarshall.com
- erica.iverson@bclplaw.com
- filing@terrellmarshall.com
- florine.fujita@bclplaw.com
- hrota@terrellmarshall.com
- kbrown@terrellmarshall.com
- paoappellateunitmail@kingcounty.gov
- paoitastaff@kingcounty.gov
- randall.thomsen@bclplaw.com
- timothy.leyh@bclplaw.com

Comments:

Sender Name: Holly Rota - Email: hrota@terrellmarshall.com
Filing on Behalf of: Toby James Marshall - Email: tmarshall@terrellmarshall.com (Alternate Email:)

Address:
936 N. 34th Street
Suite 300
Seattle, WA, 98103
Phone: (206) 816-6603

Note: The Filing Id is 20240918131833SC774868

TERRELL MARSHALL LAW GROUP PLLC

February 18, 2025 - 12:36 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,252-8
Appellate Court Case Title:	Access to case information is limited

The following documents have been uploaded:

- 1032528_Answer_Reply_20250218123539SC695556_4727.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Motion for Discretionary Review
  The Original File Name was REDACTED KCDPD Reply iso Mtn for Discr Rev.pdf

A copy of the uploaded files will be sent to:

- Andrea.Vitalich@kingcounty.gov
- COLING@GMAIL.COM
- Cloretta.James@kingcounty.gov
- Jerry.Taylor@kingcounty.gov
- Kris.shaw@kingcounty.gov
- ann.summers@kingcounty.gov
- anne.mizuta@kingcounty.gov
- connie.jory@bclplaw.com
- david.hackett@kingcounty.gov
- docketrequests@terrellmarshall.com
- eric@terrellmarshall.com
- erica.iverson@bclplaw.com
- feve.retonio@bclplaw.com
- filing@terrellmarshall.com
- florine.fujita@bclplaw.com
- hollis.holman@kingcounty.gov
- hrota@terrellmarshall.com
- jboschen@terrellmarshall.com
- kbrown@terrellmarshall.com
- paoappellateunitmail@kingcounty.gov
- paoitastaff@kingcounty.gov
- pwu@kingcounty.gov
- randall.thomsen@bclplaw.com
- timothy.leyh@bclplaw.com

Comments:

Sender Name: Holly Rota - Email: hrota@terrellmarshall.com
Filing on Behalf of: Toby James Marshall - Email: tmarshall@terrellmarshall.com (Alternate

Email:)

Address:
936 N. 34th Street
Suite 300
Seattle, WA, 98103
Phone: (206) 816-6603

Note: The Filing Id is 20250218123539SC695556