NO. 101520-8

SUPREME COURT OF THE STATE OF WASHINGTON

SPOKANE COUNTY,

Petitioner,

v.

JILMA MENESES, In Her Official Capacity as Secretary of the Washington State Department of Social and Health Services,

Respondent.

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

This Petition must be dismissed because the services that are the basis for this petition are already subject to active and ongoing monitoring and oversight through a federal court injunction. The federal injunction impacts all services demanded in this writ: the 1) timing of competency restoration services for in-custody defendants; 2) timing of competency restoration services for out-of-custody defendants; and 3) timing of competency evaluation services for out-of-custody defendants. The State has made significant investment to address the competency evaluation and restoration system and those efforts are closely monitored by the federal court. That injunction shows there is a plain, speedy and adequate remedy in the ordinary course of law, making mandamus here inappropriate. Any litigation in this Court constitutes re-litigation of the issues addressed in that case.

Spokane County Prosecutor, Lawrence Haskell, has failed to meet the burden for issuance of a writ for several other reasons as well. There is no clear duty to admit out-of-custody defendants for evaluation or restoration services within a mandatory timeframe. Prosecutor Haskell has other remedies at law, even beyond the federal court case. For example, he could file an action under the Administrative Procedures Act. Or, if he objects to the time to wait for a DSHS expert to provide a competency evaluation, he has the authority to complete his own evaluation through another expert of his choosing. Finally, Prosecutor Haskell is not beneficially interested in the issuance of this writ in a way that is necessary to seek the relief here.

Under RAP 16.2(d), the Court must decide whether to retain this case for decision, transfer it to the superior court, or dismiss the case outright. For the reasons stated above, the Court should dismiss the petition outright.

II. COUNTERSTATEMENT OF THE CASE

The Department oversees competency evaluations and restorative services for individuals who have been charged with a crime but there is doubt as to whether they are competent to stand trial. The Department is committed to administering timely competency and restoration services in appropriate settings to pretrial defendants. The Legislature established a "performance target" of seven days or fewer for the Department of Social and Health Services to extend an offer of admission to a criminal defendant in pretrial custody for inpatient competency evaluation or inpatient competency restoration services; 14 days or fewer to complete a competency evaluation in jail; and 21 days or fewer to complete a competency evaluation in the community. RCW 10.77.068(1)(a)–(c). The Legislature recognizes "that these targets may not be achievable in all cases, but intends for the [D]epartment to manage, allocate, and request appropriations for resources in order to meet these targets whenever possible

without sacrificing the accuracy and quality of competency services." RCW 10.77.068(3).

For in-custody defendants, the Legislature also established "maximum time limits" for competency evaluations and restoration treatment, subject to the limitation that these maximum time limits do not create any new entitlements or causes of action related to the timeliness of competency services. RCW 10.77.068(2), RCW 10.77.068(9). There is no "maximum time limit" for out-of-custody criminal defendants. Even for services with a maximum time limit, the Legislature provided the Department a statutory defense for exceeding maximum time limits and set forth a process for the Department to notify the criminal court that it needs additional time. RCW 10.77.068(4), RCW 10.77.068(5).

Based on delays in competency evaluation and restoration services for people detained in jails, a federal district court continues to provide oversight and monitoring of the Department through a permanent injunction entered in *Trueblood v.*

Washington State Department of Social & Health Services. *Trueblood* is a class action lawsuit that challenged delays in competency and restoration services for people detained in jails.[1] That case addresses the issues raised in the current writ. In 2015, U.S. District Court Judge Marsha Pechman held a bench trial on these issues and issued a permanent injunction regarding the State's failure to provide timely competency evaluation and restoration services to in-custody criminal defendants. Findings of Fact and Conclusions of Law, No. C14-1178 (W.D. Wash.), entered April 2, 2015; *available at* 101 F. Supp. 3d 1010, *vacated in part by* 822 F.2d 1037 (9th Cir. 2016) (also attached to the Declaration of Dr. Thomas J. Kinlen as Attachment A.) ((Kinlen Decl., Attach. A)). The permanent injunction set

[1] The class is defined as "[a]ll persons who are now, or will be in the future, charged with a crime in the State of Washington and: (a) who are ordered by a court to receive competency evaluation or restoration services through DSHS; (b) who are waiting in jail for those services; and (c) for whom DSHS receives the court order." Kinlen Decl., Attach. K.

timelines, appointed a special court monitor, and began oversight of the Department's efforts to reach compliance with the injunction. In 2016, Judge Pechman found the Department in contempt for failure to provide timely competency restoration services. Kinlen Decl., Attach. B (Order of Civil Contempt at 18 – 19, entered July 7, 2016). The federal court ordered the State to pay monthly contempt fines. In 2017, the court entered a second contempt order, holding the Department in contempt for failing to achieve compliance with the portion of the injunction focused on in-jail competency evaluations. Kinlen Decl., Attach. C. To date, the Department has paid $101,864,250 into the federal court registry and continues to pay fines every month. Kinlen Decl., ¶ 7.

In 2018, after consultation with hundreds of system partners, the court agreed to a plan for the Department to achieve compliance and to suspend a portion of the monthly contempt fines.

Kinlen Decl., Attach. D (Amended Joint Motion for Preliminary Approval of Settlement Agreement, filed October 25, 2018 as ECF #599 and #599-1 Attach. A). The plan requires the Department to seek funding for a range of new efforts to be implemented in phases over a number of years. *Id*. These efforts have included seeking legislative funding in both the operating and capital budgets over numerous fiscal years, and the initiation of several new programs and capital projects to increase bed capacity. *Id.* The agreement contemplates a multi-year, multi-phase approach to address the wait times. *Id.* The services include new forensic evaluators, creation of an outpatient competency restoration program, creation of forensic navigators, additional crises intervention training, expansion of residential support opportunities and other diversion strategies. Decl. Kinlen, ¶ 16. While this "settlement agreement" resolved some of the ongoing litigation over issues of contempt within the *Trueblood* case, it did not lead to

dismissal of the case; the federal court remains actively engaged in the oversight and enforcement of the permanent injunction.

The federal court continues to hold status hearings on a quarterly basis to review the Department's efforts to come into compliance with the permanent injunction. Kinlen Decl., Attach. E (the most recent minute entry for one such hearing). The parties to the *Trueblood* matter file a joint status report before these hearings. Kinlen Decl., Attach. F. (the most recent joint status report). The court monitor also files a report in advance of these hearings. Kinlen Decl., Attach. G. These reports detail ongoing efforts, barriers to compliance, and recommended actions. The Department also submits monthly reports to the court monitor, providing data about the Department's compliance with the injunction. Kinlen Decl., Attach. H (the November 2022 report to the monitor).[2] The court monitor also conducts regular on-site visits to Department

[2] Reports can be found at: https://www.dshs.wa.gov/bha/court-monitor-reports.

treatment facilities to review treatment and implementation efforts, and issues reports following these visits. Kinlen Decl., Attachs. I-J (two examples of such reports).

Litigation of the Department's efforts to improve the timeliness of competency services is also ongoing in the same case. On December 22, 2022, the *Trueblood* plaintiff class filed a motion to impose new restrictions on admissions into Department facilities in order to decrease wait times for class members who are waiting for competency services. Kinlen Decl., ¶ 15. The next quarterly status hearing is scheduled for January 18, 2023.

Under the contempt settlement agreement approved by Judge Pechman, a portion of the fines are calculated but held in abeyance. The fines can be waived if the Department remains in compliance with the agreement. To date, the suspended fines total $241,521,000. Should the Department materially breach the terms of the agreement approved by the Court, these suspended fines could be reduced to judgment.

Kinlen Decl., Attach. D at 46-48. The parties have prepared a plan for the next phase of the plan, to be implemented over the 2023-2025 biennium, and the Department has sought the necessary funding in the Governor's proposed budget. Kinlen Decl., ¶ 18. The plan will be presented to the court at the upcoming January 2023 status hearing.

During the implementation of the contempt settlement agreement, a number of factors have slowed progress in reducing wait times for competency services. Over the course of the *Trueblood* litigation, the Department has experienced an unpredicted and unprecedented increase in the demand for services. Kinlen Decl. ¶¶ 19-22. Notably, in fiscal year 2022 alone, the state received an increase of 37% in court orders for restoration services for in-custody defendants. *Id.* ¶ 19. The COVID-19 pandemic also negatively affected the forensic services waitlist through the necessary implementation of Centers for Disease Control precautions that impact admissions for forensic services. *Id.* ¶¶ 23-24.

The national staffing shortage of healthcare workers has also affected the department's ability to open additional treatment capacity. *Id.* ¶¶ 25-28. These challenges have frustrated the Department's efforts in reaching waitlist reduction goals despite the significant increased bed capacity and implementation of other services designed to reduce system demands.

III. ARGUMENT

A writ of mandamus is a "rare and extraordinary remedy." *Colvin v. Inslee*, 195 Wn.2d 879, 890-91, 467 P.3d 953 (2020). It is "available only to compel an official to do a nondiscretionary (i.e., 'ministerial') act." *City of Seattle v. McKenna*, 172 Wn.2d 551, 555, 259 P.3d 1087 (2011). To obtain a writ of mandamus, the petitioner must demonstrate that (1) the party subject to the writ has a clear duty to act, (2) the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and (3) the petitioner is beneficially interested. *Seattle Times Co. v. Serko*,

170 Wn.2d 581, 588-89, 243 P.3d 919 (2010) (citing RCW 7.16.160, .170). This is a "demanding burden." *Colvin*, 195 Wn.2d at 894 (quoting *Eugster v. City of Spokane*, 118 Wn. App. 383, 403, 76 P.3d 741 (2003)). And "[e]ven upon satisfying these requirements, a party is not entitled to a writ of mandamus." *Am. Prop. Cas. Ins. Assn. v. Kreidler*, No. 100095-2, 2022 WL 17491572, at *5 (Wash. Dec 8, 2022) (citing *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994)).

Prosecutor Haskell brought this Petition for a Writ of Mandamus against the Department to address three categories of competency services: (1) evaluations for out-of-custody defendants when there is a reason to doubt their competency; (2) restoration services for incompetent criminal defendants who are out-of-custody; and (3) restoration services for incompetent criminal defendants who are in-custody. Petition at 5-6. As to the first two categories involving out-of-custody defendants, there is no clear, mandatory duty on the Department

to provide these services on a strict timeline. As to the third category involving in-custody defendants, there is a plain, speedy, and adequate remedy at law, as evidenced by *Trueblood*, an active class action lawsuit, in which the Department is subject to a permanent injunction with extensive monitoring and oversight. Furthermore, the Administrative Procedure Act specifically authorizes a person "whose rights are violated by an agency's failure to perform a duty that is required by law to be performed" to obtain judicial review under the APA, making unavailable a writ of mandamus. *See* RCW 34.05.570(4)(b). Finally, Prosecutor Haskell is not a beneficially interested party because RCW 10.77, the basis for the writ, is designed to protect the liberty interests of detained individuals and not the interest of the prosecutor seeking to press criminal charges against them.

Prosecutor Haskell cannot establish all three elements necessary to compel issuance of a writ, therefore, the Petition must be dismissed. Even if this Court found the three elements to be met, the Court may still decline

to exercise its equitable powers, and it should do so here and dismiss the Petition based on the priority jurisdiction doctrine. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 601, 229 P.3d 774 (2010).

A. For Out-of-Custody Criminal Defendants, There is No Clear, Mandatory Duty for the Timing of Competency Evaluations or Restoration Services

There is no strict timeline for when the Department must provide evaluations and restoration services for out-of-custody defendants. When directing mandamus to an equal branch of government, the Court is "especially careful not to infringe on the historical and constitutional rights of that branch." *Walker*, 124 Wn.2d at 407. The jurisdiction to issue writs of mandamus to state officers "does not authorize [the Court] to assume general control or direction of official acts." *Id.* (quoting *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 490, 98 P.2d 658 (1940)).

The Court will not use mandamus to direct how state officers should generally perform their duties and

will impose mandamus only to compel ministerial, not discretionary, acts. *Walker*, 124 Wn.2d at 407, 410-11. An act is ministerial when "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment[.]" *State v. City of Seattle*, 137 Wn. 455, 461, 242 P. 966 (1926) (citation omitted).

In a criminal case, if there is reason to doubt the competency of the defendant, the court "shall either appoint or request the [Department] to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant." RCW 10.77.060(1)(a). If a defendant is found incompetent to stand trial, the court may order the defendant to the custody of the Department to undergo inpatient competency restoration treatment or order the defendant to receive outpatient competency restoration. RCW 10.77.086(1); RCW 10.77.088(2).

While the Legislature has established a "maximum time limit" for a "defendant in pretrial custody" to receive inpatient competency evaluation and restoration services, and for a competency evaluation "in jail," the statute contains no mandatory timelines for competency evaluations or restoration for out-of-custody criminal defendants. RCW 10.77.068(1), RCW 10.77.068(2). Rather, the only mention of a timeline in the statute for out-of-custody criminal defendants awaiting competency services is a "performance target" of 21 days to complete an evaluation. RCW 10.77.068(1)(c). This timeframe is a goal, not a nondiscretionary duty. The Legislature specifically acknowledged that the Department may not meet the "performance targets," and the Department should "manage, allocate, and request appropriations for resources in order to meet these targets whenever possible without sacrificing the accuracy and quality of competency services." RCW 10.77.068(3). That the Legislature established

a "performance target," while explicitly acknowledging that the target may not be met, is not the type of law that "prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Colvin*, 195 Wn.2d at 893 (citations omitted). "Doubtful rights do not justify a writ of mandamus." *Eugster*, 118 Wn. App. at 404 (citing *United States ex rel. Arant v. Lane*, 249 U.S. 367, 371 (1919)). RCW 10.77 contains no clear duty for the Department to provide competency evaluations or restoration services to out-of-custody defendants within any particular time frame; the statute cannot form the basis for a writ of mandamus.

There is no other legal authority that would impose a timeline that Prosecutor Haskell seeks and he cites no other authority to support a finding that the Department has failed to act pursuant to a clear, legal duty. With respect to *Trueblood*, out-of-custody defendants awaiting services are not class

members, though they are affected by the permanent injunction. Under that injunction, the Department must first admit class members based on the court's finding that long stays in jail violate a defendant's due process rights when they have been ordered to receive restoration treatment. Kinlen Decl., Attach. A.

As to out-of-custody criminal defendants, the Petition should be dismissed because Prosecutor Haskell has failed to establish that there is a clear, legal duty to provide evaluations and competency restoration services within a particular time frame. Rather, the law clearly anticipates that the Department must utilize discretion when managing and allocating resources available to meet the targets when possible. RCW 10.77.068(3).

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B. For In-Custody Criminal Defendants, there is a Plain, Speedy, and Adequate Remedy in the Ordinary Course of Law To Address the Timeliness of Competency Evaluations and Competency Restoration Services

The Petition must be dismissed because other plain, speedy, and adequate remedies exist under the ordinary course of law, making mandamus unavailable. RCW 7.16.170. In determining whether a plain, speedy, or adequate remedy exists, the court relies on the facts of the particular case. *Kreidler*, 2022 WL 17491572, at *5 (citing *State ex rel. O'Brien v. Police Ct.*, 14 Wn.2d 340, 348, 128 P.2d 332 (1942)). A remedy is not inadequate "merely because it is attended with delay, expense, annoyance, or even some hardship." *Id*. (quoting *O'Brien*, 14 Wn.2d at 347-48).

a. The *Trueblood* lawsuit provides an adequate remedy for in-custody criminal defendants.

The existence of an ongoing injunction in a case brought by a class of defendants is reason alone to deny the Petition. As detailed above, the federal court issued a permanent injunction regarding competency services.

Kinlen Decl., Attach. A. Following imposition of the injunction, additional litigation led to a finding of contempt and entry of a contempt settlement agreement, which includes a plan for phased implementation over many years. Kinlen Decl., Attach. D. The Department has implemented new services and programs and has created significant capacity in compliance with that agreement. *Id.* ¶¶ 16-18. The *Trueblood* case remains subject to extensive federal court monitoring and oversight, with regular court status hearings, including one coming up in January 2023. Kinlen Decl., Attach. H.

Prosecutor Haskell acknowledges the permanent injunction. He argues that the federal lawsuit is insufficient as evidenced by the Department's ongoing failure to meet the maximum time limits established by the Legislature for evaluation and restoration of in-custody criminal defendants. Petition at 28. But this frustration with the speed at which the Department is coming into compliance with the federal court injunction

does not mean the federal court's oversight of this topic is inadequate. "A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship." *Riddle v. Elofson*, 193 Wn.2d 423, 434, 439 P.3d 647 (2019).

Solving the problem of providing timely evaluation and restoration services to in-custody criminal defendants is a major undertaking, requiring years of work, the creation of new inpatient forensic mental health beds, increasing the number of evaluators, expanding of outpatient competency restoration, developing new programs ranging from crisis triage to housing supports, and the building of a work force capable of operating the system. The efforts to reduce forensic wait times are hindered by unprecedented demand for services, facility restrictions necessitated to respond to the COVID-19 pandemic and the national staffing shortage. The State continues to implement the contempt settlement agreement and

additional programs, services and beds will continue to come online in the next few years.

Given the demand for in-patient competency services, the Court in *Trueblood* ordered the Department to implement an admissions algorithm to assist in making admission decisions. Order Modifying Permanent Injunction, *Trueblood, No. 14-cv-01178,* ECF #186 at 12-13; U.S. Dist. Ct for Western Dist. Of Washington at Seattle filed June 27, 2019. The admissions algorithm—developed in effort to create a good faith, equitable solution to honor all incoming orders and meet the rising demand for competency services—takes into account factors such as whether the defendant in in jail, the acuity of the defendant's mental illness, and various other modifiers. Kinlen Decl., at ¶ 29. The federal court is actively monitoring these issues and oversees the prioritization of admissions to Department's facilities. *Id*.

The Petition has failed to establish that there is not an adequate remedy at law to address the timeliness of competency services for in-custody criminal defendants.

b. The Washington Administrative Procedure Act also provides a plain, speedy, and adequate remedy at law to obtain judicial review.

In addition to the adequate remedy already provided by *Trueblood*, the Washington Administrative Procedure Act (APA) specifically authorizes a person "whose rights are violated by an agency's failure to perform a duty that is required by law to be performed [to] file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance."[3] RCW 34.05.570(4)(b). Prosecutor Haskell contends that there is no plain, speedy, or adequate remedy available but makes no argument on why the APA cannot

[3] The Department does not concede that Prosecutor Haskell would have standing under the APA. But even when standing under the APA has yet to be determined, the APA remains a plain, speedy, and adequate remedy sufficient to preclude mandamus. *Kreidler*, at *3, (filed December 8, 2022).

provide that avenue. As this Court recently held, "[j]udicial review under the APA is plain, speedy, and adequate remedy at law." *Kreidler*, 2022 WL 17491572, at *11. And the mandamus chapter "does not apply to state agency action reviewable under chapter 34.05 RCW." RCW 7.16.360.

Granting mandamus when APA review of a claim exists "is not only counter to the purpose of the writ (justified when no adequate remedy exists at law), it also conflicts with the express intent of the legislature that the APA be the 'exclusive means of judicial review.'" *Kreidler*, 2022 WL 17491572, at *9 (quoting RCW 34.05.510).

Prosecutor Haskell alleges that a writ of mandamus is appropriate because one was upheld to compel the Department and Western State Hospital to accept persons under chapter 71.05 RCW in *Pierce Cnty. Office of Involuntary Commitment v. Western State Hosp.*, 97 Wn.2d 264, 644 P.2d 131 (1982). Petition at ¶ 37. But the *Pierce* opinion was issued in 1982,

years before the Legislature amended the APA to provide that the APA, not the mandamus chapter, governs judicial review for allegations of an agency's failure to perform a duty that is required by law to be performed. Laws of 1988, ch. 288, § 516(4)(b), *codified at* RCW 34.05.570(4)(b); Laws of 1989, ch. 175, § 38, *codified at* RCW 7.16.360; *see also* William R. Anderson, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 822 & 822 n.252 (1989) (there is "little need for special writs and 'inherent' review power" under the modern APA, which was confirmed when the Legislature "excepted action reviewable under the APA from the statutes granting courts authority to issue writs of mandamus and declaratory judgments"). *See, e.g., Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997) (explaining agency inaction is judicially reviewable by a petition filed under RCW 34.05.570(4)(b)).

c. Prosecutor Haskell could use his own evaluators to alleviate any delays, thus providing an adequate remedy.

Finally, with respect to competency evaluations, Prosecutor Haskell has the ability to present their own experts to the criminal court to complete the evaluations and is not solely reliant on the Department to do so. RCW 10.77.060 authorizes the criminal court, with the prosecutor's permission, to *either* directly appoint a qualified expert or to request the Department to designate one. Prosecutor Haskell's discretionary choice to order evaluations to be completed only by the Department, and the failure to alleviate any alleged delay by appointing different evaluators, does not render this remedy inadequate.

C. Larry Haskell, the elected Spokane County Prosecutor, is not beneficially interested for the purposes of mandamus

The third element Prosecutor Haskell must establish in requesting mandamus is that he is "beneficially interested." RCW 7.16.170; *see also State ex rel. Lay v. Simpson*, 173 Wn. 512, 514-15, 23 P.2d 886 (1933). This third element

is a standing requirement that requires a petitioner to have "protected interest" under the statute. *Steilacoom Historical School Dist. No. 1 v. Winter*, 111 Wn.2d 721, 724, 763 P.2d 1223 (1988); *cf. Nw. Immigrant Rights Project v. U.S. Citizenship & Immigration Servs.*, 325 F.R.D. 671, 686-90 (W.D. Wash. 2016) (explaining why organizational plaintiffs did not fall within the zone of interests under its APA and Mandamus Act claims).

The mandatory time limits in RCW 10.77.068 are clearly meant to protect the rights of criminal defendants waiting in jail for competency services. This is demonstrated by the fact that there are no statutory time limits for out-of-custody defendants. Prosecutor Haskell tacitly acknowledges that criminal defendants are the persons beneficially interested in enforcing RCW 10.77 by providing tables listing the wait times of specific criminal defendants in the Petition.

Petition, at 9-11. Prosecutors who seek to curtail the liberty interests of criminal defendants competent to stand trial, do not have a protected interest sufficient to confer standing for a writ of mandamus.

Prosecutor Haskell alleges he is beneficially interested based upon his duty to execute justice as a representative of the people. Petition at 42. He asserts the ability to represent the interests of a multitude of groups, including fellow prosecutors, criminal defendants, the Spokane County jail, crime victims, and the community at large. Petition at 35, 44-51. The very assertion of interests on behalf of all of these stakeholders, including the community at large, shows that Prosecutor Haskell's interest is shared in common with other citizens. This shared interest runs directly contrary to the requirements of a beneficially interested party whose interests are protected by statute.

Steilacoom Historical School Dist. No. 1 v. Winter, 111 Wn.2d at 724.

Furthermore, despite captioning the case in a manner identifying "Spokane County" as the petitioner, Prosecutor Haskell identifies himself, acting in his capacity as the elected prosecuting attorney pursuant to RCW 36.27.020, as the Petitioner. Petition at 4. As such, his interests are limited to his authority and duties prescribed therein. *Bates v. School Dist. No. 10 of Pierce County*, 45 Wash. 498, 88 P. 944 (1907). Unless the Spokane County's Board of Commissioners directed him to file this action on its behalf, which has not been alleged, Prosecutor Haskell does not have authority to make arguments on behalf of county entities, such as the County jail. *See* RCW 36.32.120(6); RCW 36.27.020(3); *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 385 P.3d 769 (2016), *as amended* (Feb. 8, 2017).

D. Even if the Court finds that the mandamus elements are met, the Court should nonetheless dismiss the Petition

Mandamus is an extraordinary remedy and even if the Court finds that the remedy is suitable here, the Court should exercise its discretion and dismiss the Petition. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn. 2d 593, 601 (2010). Here, several reasons counsel in favor of dismissal.

First, under the priority jurisdiction doctrine, the Court should dismiss the Petition to avoid issuing a writ related to issues currently being litigated in federal court. *Trueblood*, 101 F. Supp. 3d 1010, *partially vacated by* 822 F.3d 1037 (9th Cir. 2016). The United States Supreme Court has warned that a departure from priority jurisdiction will lead to conflict between courts, "…whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit." *Buck v. Colbath*, 70 U.S. 334, 341 (1865). The priority jurisdiction doctrine (also known as

priority of action doctrine or the first-in-time rule) is the long-standing principle assisting courts of concurrent jurisdiction to determine which should proceed with the case. In its simplest form, the court first obtaining jurisdiction maintains that jurisdiction throughout the proceedings as well as the exclusive authority to resolve all issues presented. *City of Yakima v. Int'l Ass'n of Fire Fighters*, 117 Wn.2d 655, 675 (1991) (emphasis added).

In addition to avoiding conflicts between different courts, the policies behind the priority jurisdiction doctrine include promoting comity between courts, avoiding conflicting outcomes, preventing additional expense of litigation, and the ability to apply res judicata, to name a few. *State v. Stevens County District Court Judge*, 194 Wn.2d 898, 903, 453 P.2d 984, 987 (2019); *In re Guardianship of Freitas*, 53 Wn.2d 722, 727 336 P.2d 865, 868 (1959); *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*,

111 Wn.2d 586, 607, 49 P.3d 894, 907 (2002). The application of priority jurisdiction requires meeting three elements. Each suit generally share the same subject matter, parties, and relief, though these elements are not to be applied inflexibly. *Bunch v. Nationwide Mut Ins Co.*, 180 Wn. App. 37, 41, 321 P.3d 266, 270 (2014). As a starting point, the subject matter (right to timely pretrial competency evaluation and restoration) is identical to that litigated in *Trueblood*.

Next, Prosecutor Haskell claims party status but only insomuch as it has a duty to participate in reforming the criminal justice system. Petition at ¶1 and 3. Prosecutor Haskell otherwise attempts to claim he is a beneficially interested party to protect the rights of others, including criminal defendants (the very persons whose liberty interests successful prosecutions would curtail) but does not cite to any statutory authority that would support such a claim. Petition at ¶46, 48 and 49. The criminal defendants who await competency services in jail,

identified in the Petition, are members of the *Trueblood* class and whose interests are best represented there. The *Trueblood* Court has ordered the State to admit those Defendants in priority over those who have been released from custody. Kinlen Decl., Attach. A.

Finally, the relief sought in *Trueblood* included an injunction, declaratory judgment, nominal damages, and attorneys' fees. The relief sought in the current action is a writ of mandamus compelling the Secretary to perform purported statutory obligations. The permanent injunction ultimately awarded is functionally equivalent to an injunction and declaratory judgment, and it requires the Department to transport and treat class members within reasonable times after the entry of a competency restoration order. *Trueblood v. DSHS*, No. 14-cv-01178-MJP (Dkt. No. 131, Findings of Fact and Conclusions of Law, entered April 2, 2015).

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Trueblood is a statewide class action lawsuit subject to court monitoring and oversight. The federal court reviews and monitors the State's progress in all aspects of competency evaluation and restoration services for in-custody criminal defendants. The policies behind priority jurisdiction such as conflicting outcomes, minimizing additional expenses and resources, and re-litigation plainly apply here. Likewise, the policy of vesting exclusive authority to one court to resolve all issues is appropriate. Because the federal district court has priority jurisdiction, this Court should dismiss the petition for writ of mandamus.

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IV. CONCLUSION

A writ of mandamus is a rare and extraordinary remedy that should not issue here. Prosecutor Haskell cannot meet the demanding showing that the Secretary is under a mandatory, ministerial duty to perform services for out-of-custody defendants within a specific timeframe; he has no other adequate remedy at law, given the existence of an ongoing injunction against the Department and other potential remedies; and he is beneficially interested in the completion of the act, where it is criminal defendants who are protected by the statutes. Even if Prosecutor Haskell could meet this standard (which he cannot), he is still not entitled to issuance of the writ because of the ongoing injunction in *Trueblood*. For these reasons, the Secretary respectfully requests that the petition be dismissed.

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RESPECTFULLY SUBMITTED this 6th day of January, 2023.

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CERTIFICATE OF SERVICE

I, *Milli Cunningham*, state and declare as follows:

I am over the age of 18 years and I am competent to testify to the matters set forth herein. I certify that on January 6, 2023, I served a true and correct copy of this **ANSWER TO PETITION FOR WRIT OF MANDAMUS** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

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

DATED this 6th day of January 2023, at Olympia, Washington.

MILLI CUNNINGHAM
Legal Assistant

NO. 101520-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SPOKANE COUNTY Petitioner, v. JILMA MENESES, DSHS Respondent.	DECLARATION OF THOMAS J. KINLEN

I, Thomas J. Kinlen, am over the age of 18 years of age, competent to testify to the matters below, and declare based upon personal knowledge:

1. I am the Director of the Office of Forensic Mental Health Services (OFMHS) within the Behavioral Health Administration (BHA) of the Department of Social and Health Services (Department). As the Director, I am also at the level of a Deputy Assistant Secretary and an Appointing Authority who is an authorized representative of the Department.

2. As the Director, I am responsible for the delivery of forensic services in the state of Washington, which includes diversion activities including overall oversight of three prosecutorial diversion programs, workforce development in forensic mental health, competency to stand trial evaluations, competency restoration policy development, treatment and treatment quality assurance, oversight of forensic navigators, collaboration with residential treatment facilities for competency restoration, assignment and completion of re-evaluations for the Not Guilty by Reason of Insanity (NGRI) population, and policy development and quality assurance for NGRI treatment. I am also responsible for the operation of OFMHS, which includes collaborating and assisting in the contracting and administrative management with competency restoration sites, establishing consistent policies, procedures and practices across the competency sites and state hospitals, assisting forensic evaluators and navigators in completing job duties

as assigned, assisting with policy development at the agency and hospital level including preparing and testifying on agency request legislation, oversight of the processing of court orders, and working with the key partners across the state in addressing any issues and concerns related to forensic patients. I am familiar with the process concerning admission to facilities for competency evaluation and restoration treatment services, including the process for determining whether admission to residential treatment facilities is clinically appropriate.

3. The Department provides competency-focused inpatient services across multiple sites in Washington. At Western State Hospital (WSH), the Gage Center is the WSH unit that admits patients awaiting forensic evaluation, restoration and other forensically related matters. At Eastern State Hospital (ESH), a similar forensic population is provided services in the Forensic Services Unit. The Department also operates multiple residential treatment facilities, including the 30-bed Maple Lane Competency Restoration Program in Thurston County, and the

Fort Steilacoom Competency Restoration Program which is a 30-bed facility that opened in August 2019 in Pierce County. As part of the *Trueblood* Contempt Settlement Agreement, the Department agreed to close a residential treatment facility, the Yakima Competency Restoration Program, which was operated by Comprehensive Healthcare. The Yakima Competency Restoration Program closed on August 14, 2021.

A. The *Trueblood* Litigation

4. Attached as Attachment A is a true and correct copy of the Findings of Fact and Conclusions of Law entered by Federal District Court Judge Marsha Pechman following the 2015 bench trial in *Trueblood v. DSHS,* No. 14-cv-01178; U.S. Dist. Ct for Western Dist. Of Washington.

5. Attached as Attachment B is a true and correct copy of the Order of Civil Contempt entered by Federal District Court Judge Marsha Pechman in *Trueblood v. DSHS,* No. 14-cv-01178; U.S. Dist. Ct for Western Dist. Of Washington.

6. Attached as Attachment C is a true and correct copy of the Order on Plaintiffs' Second Motion for Civil Contempt: Jail-Based Evaluations entered by Federal District Court Judge Marsha Pechman in *Trueblood v. DSHS,* No. 14-cv-01178; U.S. Dist. Ct for Western Dist. Of Washington.

7. To date, the Department has paid $101,864,250 into the federal court registry, and continues to pay fines every month. The Federal Court has also levied but suspended $241,521,000 in fines, pending the State's compliance with the elements of the Contempt Settlement Agreement.

8. Attached as Attachment D is a true and correct copy of the Amended Joint Motion for Preliminary Approval of Settlement Agreement approved by Federal District Court Judge Marsha Pechman in *Trueblood v. DSHS,* No. 14-cv-01178; U.S. Dist. Ct for Western Dist. Of Washington.

9. The Federal Court holds status hearings on a quarterly basis to review the Department's efforts to come into compliance with the permanent injunction. Attached as Attachment E is a true and correct copy of a minute entry entered by the Federal District Court following the September 19, 2022 status hearing.

10. Before each quarterly status hearing, the Department works with Plaintiffs' counsel to develop and file a joint status report. A true and correct copy of the most recent joint quarterly status report, filed with the Federal Court on September 15, 2022, is attached as Attachment F.

11. Attached as Attachment G is a true and correct copy of the report prepared by the court monitor appointed by the Federal Court, Dr. Danna Mauch, provided to the court and the parties in advance of the September 19, 2022 *Trueblood v. DSHS* status hearing. These reports detail ongoing efforts, barriers to compliance, and recommended actions.

12. The Department submits reports to the court monitor on a monthly basis, providing data about the Department's compliance with the injunction and efforts to reach compliance. Attached as Attachment H is a true and correct copy of the November 2022 report to the court monitor.

13. The court monitor also conducts regular on-site visits to Department treatment facilities to review treatment and implementation efforts, and issues reports following these visits. Two true and correct examples of these reports are attached as Attachment I and Attachment J.

14. Attached as Attachment K is a true and correct copy of Stipulation And Proposed Order Certifying Class entered by Federal District Court Judge Marsha Pechman in *Trueblood v. DSHS,* No. 14-cv-01178; U.S. Dist. Ct for Western Dist. Of Washington.

15. Litigation of the Department's efforts to improve the timeliness of competency services is ongoing in the Federal District Court. On December 22, 2022, the *Trueblood* plaintiff

class filed a motion with the Federal District Court to impose new restrictions on admissions into Department facilities in order to decrease wait times for class members who are waiting for competency services. The federal court is expected to rule on this request in January of 2023, and possibly enter new injunctive orders following consideration of Plaintiffs' request. The next quarterly status hearing in front of Federal District Court Judge Marsha Pechman is scheduled for January 18, 2023.

16. Pursuant to the Contempt Settlement Agreement, the Department has undertaken significant efforts to reduce forensic wait times. The agreement contemplates a multi-year, multi-phase plan to address the needs of those waiting for competency services. A few of the services being implemented through the agreement include: (1) additional forensic evaluators; (2) the creation of an Outpatient Competency Restoration Program (OCRP);

(3) the creation of a new role in the forensic system—Forensic Navigators; (4) additional crisis intervention training; (5) expansion of residential support opportunities; and (6) other diversion strategies to decrease the number of class member who require forensic services from the Department. The programs outlined in the *Trueblood* Contempt Settlement Agreement come online in phases, which cover specific regions of the state. Phase One (July 1, 2019 through June 30, 2021) includes Pierce, Southwest and Spokane regions. Phase Two (July 1, 2021 through June 30, 2023) covers the King region. Phase Three (July 1, 2023 through June 30, 2025) regions are to be determined. Future phases may be added if the State remains out of compliance with the Federal Court's injunction.

17. One example of efforts to divert criminal defendants away from inpatient competency restoration is the creation of outpatient competency restoration programs. The Phase One Forensic Navigator program became operational on

July 1, 2020, as did the OCRP in the Pierce and Spokane regions. OCRP became operational in the Southwest region in September 2020. The Phase Two Forensic Navigator Program became operational on January 1, 2022. The Phase Two OCRP became operational on October 31, 2022.

18. The parties have prepared a plan for the next phase under the Contempt Settlement Agreement, to be implemented over the 2023-2025 biennium, and the Department has sought the necessary funding in Governor's proposed budget. The plan will be presented to the Federal Court at the upcoming status hearing.

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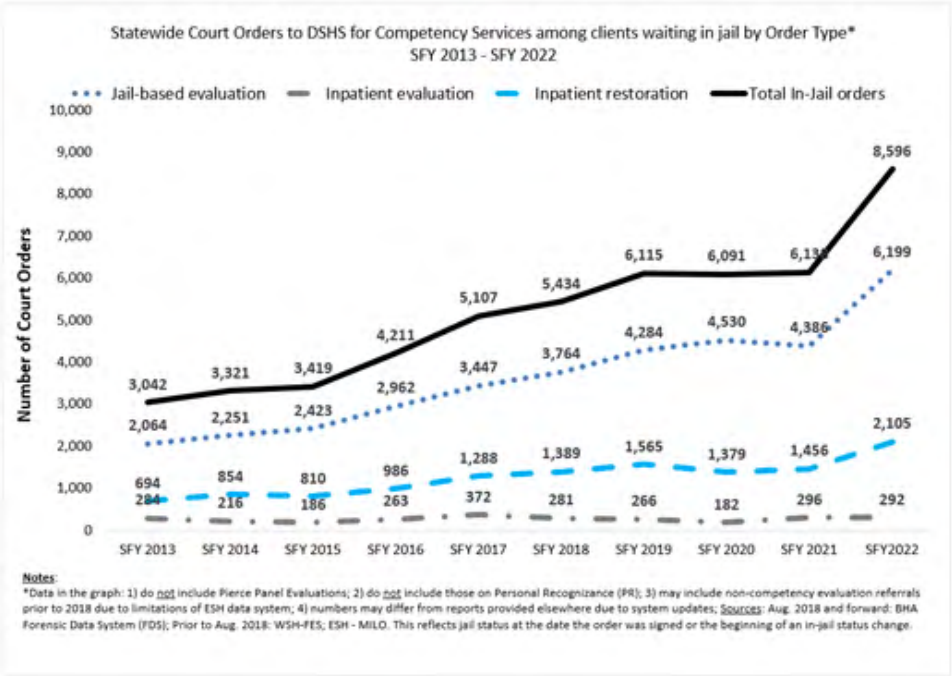
19. One of the significant challenges the Department has faced when attempting to reduce wait times is the significant increase in demand for services. Over the past nine fiscal years, there has been an approximate **145 percent increase** for inpatient evaluations and competency restoration services.



The only reason this number was not higher for the end of SFY 2020 was due to suppression of demand caused by the COVID-19 pandemic (and the reason why there was a 15 percent drop for SFY 19 to SFY 20). Further,

there was a 25 percent increase in inpatient referrals in the course of a single fiscal year to the Department, from 2015 to 2016, another 33 percent increase from fiscal year 2016 to 2017, and another 37 percent increase from fiscal year 2021 to 2022.

20. The Department has experienced a dramatic increase in referrals at the same time it has been adding new capacity (both evaluator and bed capacity). This increase in referrals exceeds any historical peak, and greatly exceeds the previously calculated 5-8 percent expected annual rise in referrals prior to 2012.

21. These large and unpredicted increases in the number of court orders entered by county criminal courts has exceeded the large number of beds added to the forensic system. Adding bed capacity is usually a multi-year process. Adding beds requires obtaining funding from the Legislature, renovating or constructing physical spaces, hiring and training staff, and then "ramping up" patient populations by safely admitting small groups until full capacity

can be reached. Even taking every "short-cut" that could be lawfully and safely taken only shaves months off of these long timelines. Since 2015, as the number of orders signed has grown at unprecedented and unpredicted rates, the State has had to revise its estimates for needed capacity, and then repeatedly seek new funding and begin this long construction process on new projects to be responsive. But the dramatic growth has left the Department continually playing catch-up to the high demand.

22. The Research and Data Analysis group within the Department has, during this period, attempted to correlate this rise in competency court orders to other data points, including population growth, arrest rates, crime rates, and use of Medicaid services, among others. As of the last analysis completed, the number of competency orders being signed by superior, district, and municipal courts has outstripped the rise in all of these other factors. With no discernable link between these other factors, or other causal factors, it remains

very difficult for the Department to predict the future rate of growth. Other entities involved in the planning and litigation of the Trueblood case have also been unable to identify the reasons for such dramatic increases in demand, nor to assist the Department in predicting increases at this level.

23. Compliance with health and safety measures necessitated by the COVID-19 pandemic has also limited the Department's ability to reduce forensic wait times. The COVID-19 pandemic had far reaching impacts on all corners of society. The Department's operation of competency restoration programs—which are similar to long-term congregate care settings—are no exception. While the Department is hopeful that is has moved beyond some of the most severe impacts, the effects of those impacts continue to be felt. And because COVID-19 exposures and outbreaks still occur at the Department's facilities, wait times can still be impacted now and into the future. When positive cases arise at facilities, ward or facility holds must be put in place,

including on forensic admissions, in order to protect patients by guarding against further transmission and spread. Ward and facility holds temporarily pause admissions to, and movement between, certain wards, thus affecting rates of patient admission. These policies and procedures were implemented in accordance with Centers for Disease Control and Prevention (CDC) guidance, as well as guidance from, and consultation with, the Washington State Department of Health. Due to the on-going COVID-19 pandemic, and in an ongoing effort to protect both patients and staff in accord with guidance from federal, state, and local health departments and the Department's incident command center, numerous safety measures for staff and patients have been implemented since March 2020. For example, in order to accommodate social/physical distancing and, at some facilities, create space for a necessary and required quarantine room (if a patient tests positive), wards at the hospitals and the residential treatment facilities may operate at a reduced capacity. Furthermore, if a current facility or hospital ward has a positive

test (for either a patient or staff), admissions and transfers to and from that unit are paused until all staff and patients are tested and contact tracing can be completed. These ward or facility holds temporarily pause admissions to and movement between certain wards, thus affecting rates of admission to the facility. The lifting of ward and facility holds is completely contingent on no additional positive cases arising and no delays in receiving testing results. Estimated admissions dates are contingent on holds being lifted. In addition, as patients are admitted, they can be subject to a 14-day stay on a quarantine ward to ensure they are symptom-free prior to being transferred to other wards.

24. Over the last several years the Department managed over 1054 COVID-19 positive patients within its facilities, and was impacted by over 1688 staff positive infections. Several patients have, unfortunately, died as a result of infection. This number of infections continues to increase, and also underrepresents the impact that COVID-19 has had on Department facilities, because *possible* exposures and infection

require the Department to institute precautions and testing even if the exposure ultimately results in no new infections. These precautions were implemented in order to prevent additional infection and death, and they had an unavoidable impact on the wait times. The number of patients waiting for admission to state facilities greatly increased during times when ward and facility holds have been in place. The more virulent strains of COVID-19, especially Omicron, led to widespread facility and ward holds, which worsened the backlogs.

25. The national staffing shortage of healthcare workers is another challenge faced by the Department. The nation as a whole is facing an acute staffing crisis in healthcare. This crisis was summarized in a press release by the U.S. Surgeon General on May 23, 2022 regarding a recent Surgeon General Advisory on the healthcare worker crisis: "Today, United States Surgeon General Dr. Vivek Murthy issued a new Surgeon General's Advisory highlighting

the urgent need to address the health worker burnout crisis across the country. Health workers, including physicians, nurses, community and public health workers, nurse aides, among others, have long faced systemic challenges in the health care system even before the COVID-19 pandemic, leading to crisis levels of burnout. The pandemic further exacerbated burnout for health workers, with many risking and sacrificing their own lives in the service of others while responding to a public health crisis."

26. Washington State, and the facilities run by the Department, are not immune to these challenges. The facilities providing restoration services continue to face acute staffing shortages. The ability to maintain current restoration capacity is at risk, and staffing new physical capacity is expected to be extremely challenging. As of late summer of 2022, vacancy rates are as high as 73% in some job classes at particular facilities (that number is particular to psychiatric security nurses at ESH), and overall vacancies in the Behavioral Health Administration

for critical job classes at high levels: 31% for licensed practical nurses, 32% for registered nurses, 37% for psychiatrists, and 38% for psychologists. These vacancies endanger bed and ward availability at current facilities and are frustrating efforts to open new capacity, such as the newly constructed 58 beds at WSH. Lack of staffing also impede other efforts, such as patient transfers to ESH because staffing levels at ESH have periodically reached critically low levels that cannot safely accommodate additional patients.

27. In order to address this, the Department is using engaged in several approaches:

a. The Department implemented hiring and retention incentives to keep current staff, and attract new staff. The Department has deployed funds and the incentives are now being offered. While this is an important tool in addressing this crisis, other organizations in the private and public sphere are also using similar tactics, leading to an "arms race"

in competing for the extremely limited pool of available people to hire. Additional pay raises that were previously funded also took effect on July 1, 2022. The Department is using contract staff to fill critical vacancies and keep current capacity operating. While this is a short-term solution, the extreme cost of the contracted staff means that contract staff are not a sustainable long-term solution.

b. The Department is also using contract staff for vacant forensic evaluator positions. This is anticipated to increase capacity for in-jail evaluations, as well as assist with completion of inpatient competency evaluations. The department also plans to request increased evaluation staff in the next legislative session.

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c. The Department has diversified staffing for certain functions, in order to utilize different types of credentials and staff to complete necessary work. For example, at WSH PhDs who are not licensed in Washington are working under a Washington regulatory scheme that allows them to work under supervision as an "agency affiliated counselor" to complete work within the civil center.

28. However, even with these efforts in place, there are simply not enough people in the nationwide employment pool. With healthcare providers across the industry facing critical shortages, those providers are engaged in similar mitigations and attempts to recruit from a limited pool of staff. Attracting new staff to Department facilities often means that these staff are moving from other important mental health programs, which results in a "rob Peter to pay Paul" situation that leaves programs across the mental health system understaffed. This potentially includes and affects staffing for programs designed to divert

persons from the criminal justice system, and programs designed to provide competency restoration services in the community. The Department will continue with these efforts with the goal of ensuring that existing restoration capacity can be operated, and that new capacity can be opened. But the gravity of the current situation cannot be understated: if available staffing does not improve, the Department will not be able to keep existing beds open.

29. The admission algorithm—developed with federal court oversight represents an effort to create a good faith, equitable solution to honor all incoming orders and meet the rising demand for competency services—takes into account factors such as whether the defendant is in jail, the acuity of the defendant's mental illness, and various other modifiers. The federal court is actively monitoring these issues and oversees the prioritization of admissions to Department's facilities.

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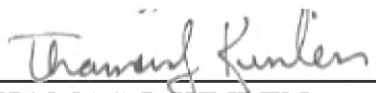
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

Executed this 5th day of January 2023, at Olympia, Washington.



DR. THOMAS J. KINLEN,
Director Office of Forensic Mental Health Services
Behavioral Health Administration
Department of Social and Health Services

CERTIFICATE OF SERVICE

I, *Milli Cunningham*, state and declare as follows:

I am over the age of 18 years and I am competent to testify to the matters set forth herein. I certify that on January 6, 2023, I served a true and correct copy of this **DECLARATION OF THOMAS J. KINLEN** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

Counsel For Petitioner
Lawrence H. Haskell, Prosecuting Attorney
Nathan S. McKorkle, Deputy Prosecuting Attorney

☒ **Via COA E-filing at:** lhaskell@spokanecounty.org**;**
nmckorkle@spokanecounty.org**;**
scpaappeals@spokanecounty.org

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

DATED this 6th day of January 2023, at Olympia, Washington.

MILLI CUNNINGHAM
Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

January 06, 2023 - 1:55 PM

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