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.

# RESPONDENT'S BRIEF

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## I. INTRODUCTION

This Court should deny the writ of mandamus. The Secretary of the Department of Social and Health Services shares the frustrations of county prosecutors and all of the many other members of the community similarly concerned with providing timely competency services to defendants facing criminal charges. For this reason, the Secretary has actively sought to alleviate this problem. But while Prosecutor Haskell's frustrations at slow progress may be understandable, a mandamus petition in this Court is not. None of the requirements for the rare and extraordinary remedy of a mandamus are met here, and the reasons for denying the writ are almost too numerous to adequately address in one brief: the Secretary is not a state officer subject to a mandamus petition directly to this Court; the existing federal court action addressing nearly identical issues limits the issuance of a writ; Prosecutor Haskell is not beneficially interested; there are plain, speedy and adequate alternative remedies; and the nature of the Secretary's

obligations under the statutory scheme is discretionary rather than ministerial.

Even if Prosecutor Haskell could overcome some or even all of these obstacles to mandamus, the Court should exercise its discretion to decline to issue the mandamus here. Unlike the typical mandamus case, there is no dispute regarding controlling law nor a refusal to comply with an obligation. Rather, the Secretary acknowledges her obligation to provide timely competency services and is making good faith efforts to provide them, considering the resources available to her and the many competing obligations within the mental health system. Although the Department and other State actors have made great strides in increasing the level of competency services over the last decade, an unexpected and dramatic rise in the demand for such services has outpaced the State's efforts. The State continues to devote significant resources to addressing the issue and has seen encouraging signs. In the meantime, a federal district court judge is actively supervising the State's efforts and

enforcing its orders to provide timely competency services statewide with significant contempt sanctions and injunctive relief.

Under these circumstances, the Secretary respectfully submits that even if the Court finds that the elements for issuing a writ of mandamus are met, that it decline to do so.

## II. STATEMENT OF ISSUES

1. This Court has original jurisdiction for mandamus petitions against "state officers." Wash. Const. art. IV, § 4. Is the non-elected position of Secretary of the Department of Social and Health Services, who may be removed at will by the Governor and is not a position listed in the state constitution, a "state officer" subject to the original jurisdiction of this court?

2. Should the Court grant the mandamus petition where an existing federal lawsuit addresses many of the same issues as those presented here, and even for the non-identical issues any efforts to enforce a writ of mandamus could conflict with federal court orders?

3. Among the required showings to obtain a writ of mandamus is that the petitioner has no other plain, speedy, and adequate remedy. Should the Court issue the writ of mandamus where the county prosecutor has potential remedies under individual criminal cases, the Administrative Procedures Act, and intervention in the ongoing federal district court litigation?

4. A writ of mandamus 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). Did the Legislature intend to create a nondiscretionary, ministerial duty to complete competency services within a certain time where the relevant statute sets forth targets and maximum time limits to complete competency services, but also recognizes that the targets may not be achievable, provides exceptions to those time limits, and explicitly states that the law setting the time limits "does not create any new entitlement or cause of action related to the timeliness of competency to stand

trial services, nor can it form the basis for contempt sanctions . . . or a motion to dismiss criminal charges." RCW 10.77.068(9)?

5. Among the required showings to obtain a writ of mandamus is that the petitioner must be beneficially interested, which must be particular to the petitioner. Is a county prosecutor beneficially interested in protecting the rights of criminal defendants to timely competency services?

6. Assuming arguendo that the requirements for a writ of mandamus are met, should the Court issue the writ where a federal court has already ordered the Department to provide timely competency services for in-custody defendants and is actively supervising the Department, any efforts by this Court to enforce the writ of mandamus could conflict with federal court orders, and the Department is not contesting its obligation to provide timely competency services nor intentionally refusing to provide them.

## III. STATEMENT OF THE CASE

### A. The Department of Social and Health Services Administers State Mental Health Services

The Department of Social and Health Services is the largest state agency in Washington, with responsibilities over a wide range of social services. Agreed Statement of Facts (Agreed Facts) at 2. One of the Department's divisions, the Behavioral Health Administration (BHA), provides behavioral health intervention, treatment, and education to the state. *Id.* at 4. BHA currently operates seven institutions that house and treat patients who have been involuntarily committed, with the largest by far being the two state hospitals, Western State and Eastern State. Although the number of beds in each of the state hospitals can change based on configurations, additions, and closures, as of March 2023, Western State had a total bed capacity of 747 beds, with 370 allocated for forensic services, and Eastern State had a total bed capacity of 367 beds, with 175 allocated as forensic beds. *Id.* at 5. "Forensic beds" are those devoted specifically for competency evaluation, competency treatment, or for patients

committed after a finding of not guilty by reason of insanity. Forensic beds do not include patients whose criminal charges have been dismissed with a referral for civil commitment instead (called "felony conversions"). *Id.* at 5, 8-9.

In general, there are four types of patients who may be involuntarily committed to state facilities. Only the first category of patients is the explicit subject of this lawsuit, although the other categories of patients play a significant role in determining the number of beds available for competency services. And for each category of patient, statutes and court orders obligate the Department to admit the patient to state facilities for treatment.

**1. Inpatient competency evaluation and restoration**

A court may order a person facing criminal charges who has been found incompetent to stand trial to undergo competency restoration treatment at a Department facility. RCW 10.77.084, .086, .088. A court may also order an evaluation for persons facing criminal charges whose competency has been questioned. RCW 10.77.060. A small portion of those evaluations are

conducted inside a Department facility; most occur in a jail, and some occur in the community when a defendant is out-of-custody. Agreed Facts at 7-8.

Persons ordered for inpatient competency evaluations may only be committed for 15 days. RCW 10.77.060(1)(c). Persons committed for competency restoration on non-felony charges may be committed for up to 29 days in an inpatient facility and 90 days in an outpatient program. Agreed Facts at 11. For felony defendants, an initial commitment of 45 days or 90 days (depending on the class of felony) may be followed by additional commitments of 90 days and 180 days, for a total potential commitment of 315-360 days.[1] RCW 10.77.086. At the end of this period, defendants who remain incompetent to stand trial will have their charges dismissed, with an order that the

[1] There are some exceptions to these time periods, such as the statutory directive that no extension beyond the initial commitment period may be ordered if the defendant's incompetence has been determined to be solely the result of a developmental disability such that competence is not reasonably likely to be regained during an extension. RCW 10.77.086(4).

Department commit the person for an additional period of time to evaluate whether they should be committed under the Involuntary Treatment Act (ITA). RCW 10.77.086(5).

To give an idea of the scope of competency services provided by the Department, in fiscal year 2022, the Department received and processed a total of 8,596 competency orders among people who were waiting in jail for services at some point. Agreed Facts at 6. Among those, 6,199 were for competency evaluation orders performed in the jail, 292 were inpatient competency evaluation orders, and 2,105 were inpatient restoration orders. *Id.*

**2. Not guilty by reason of insanity**

When a superior court finds a defendant not guilty by reason of insanity and a risk to public safety, the court may commit a person to a state hospital. RCW 10.77.010. These patients are considered "forensic" patients by the Department and are typically treated in the more secure units at Western State or Eastern State. Agreed Facts at 8. These patients may be

detained for a period not to exceed the maximum penal sentence for the crime for which they were acquitted. RCW 10.77.025(1). Thus, these patients are typically detained for long periods of time, often years. Agreed Facts at 12.

**3. Felony conversion**

After a court dismisses felony charges for reasons of incompetency, the court "shall" order the defendant to be committed to a state hospital for evaluation for possible commitment under the ITA. RCW 10.77.086(5). Legislation enacted in 2023 now requires a defendant to be committed to "the department for placement in a facility operated or contracted by the department" rather than just to state hospitals. Laws of 2023, ch. 453, § 7. The Secretary refers to this category of patients as "felony conversions" in this brief, but some of the supporting documents may also use the equivalent terms of "civil conversions" or "felony flips." Agreed Facts at 9. Felony conversions usually involve serious and violent criminal charges, with over 50 percent of such patients detained at Western State

involving felony homicides and felony assaults. Agreed Facts at 13.

Felony conversion patients may be committed for up to 180 days, and successive 180 day commitments may be ordered by a court upon certain findings. RCW 71.05.280, .320(1)-(4). Because these patients are committed through the ITA, the Department considers these patients "civil" rather than "forensic." And the increase of felony conversion referrals over the last several years is reflected in the fact that as of January 2023, 75 percent of the population of civil patients committed to state hospitals are felony conversions. Agreed Facts at 9-10; Declaration of Kevin Bovenkamp (Exhibit B to Agreed Facts) at ¶¶ 12, 16. Planning safe discharges for patients who had been charged with such offenses as homicide and felony assault requires extensive treatment and planning, necessitating long lengths of stay inside of Department facilities. Agreed Facts at 13-14.

#### 4. Civil patients

Patients may be civilly committed for 90 or 180 days under the ITA if a court finds that they are a danger to themselves or others, through legal standards like grave disability or other standards related to dangerousness. RCW 71.05.280(1)-(4); Agreed Facts at 10. Subsequent 180-day commitments may also be ordered if the person continues to meet these criteria. RCW 71.05.280, .320. These patients tend to have long-term commitments and thus a bed allocated for a civil patient will remain unavailable for long periods of time. Agreed Facts at 10. This long-term civil population is increasingly being served in community facilities rather than the state hospitals, but the state hospitals continue to provide services for those who cannot be served by community facilities or whose condition is too clinically acute for transfer. *Id.* at 10-11.

### B. Competency Evaluations May Occur in the Community, Jails, or State Facilities

The Department oversees competency evaluations for people who have been charged with a crime but there is a doubt

as to whether they are competent to stand trial. At any point in a criminal proceeding when "there is reason to doubt [a defendant's] competency" or a defendant has pleaded not guilty by reason of insanity, the prosecutor, defense counsel, or the court *sua sponte* may request a competency evaluation. RCW 10.77.060. The court shall either appoint or request the Department to designate "a qualified expert or professional person . . . to evaluate and report upon the mental condition of the defendant." RCW 10.77.060(1)(a).

Evaluations can occur in the jail where a defendant is being held, in the community if a person has been released on bail, or at a state hospital. Agreed Facts at 15. The Legislature has set forth performance targets for completing competency evaluations of 14 days for in-jail evaluations, 21 days for evaluations in the community, and seven days for an offer of admission to a state facility for evaluations. RCW 10.77.068(1). In addition, the Legislature set a maximum time limit of seven days from receiving a court order, or 14 days from when

the order is signed (whichever is shorter), for extending an offer of admission to a Department facility to a defendant in pretrial custody for inpatient competency evaluations. RCW 10.77.068(2). Similarly, the Legislature set a maximum time limit of 14 days from receiving a court order, or 21 days from the date the order is signed (whichever is shorter), for completing a competency evaluation in jail. *Id.*

The statute also recognizes that the "targets may not be achievable in all cases, but intends for the department to manage, allocate, and request appropriations for resources in order to meet these targets whenever possible without sacrificing the accuracy and quality of the competency services." RCW 10.77.068. And the Legislature also specified a defense for the Department not meeting the maximum time limits if the reason for exceeding the maximums was "outside of the department's control," including certain specified circumstances.[2] RCW 10.77.068(4).

[2] As discussed below, the statutory defense for failing to meet the statutory minimums has been found unconstitutional by

Criminal defendants in pre-trial custody in the Spokane County Jail are generally receiving court-ordered competency evaluations within the statutory performance targets for defendants in jail set forth in RCW 10.77.068. Agreed Facts at 18. On the other hand, out-of-custody defendants and those ordered admitted to state hospitals are not receiving competency services within the statutory timelines. As of January 2023, there were approximately 1,000 out-of-custody defendants awaiting competency evaluations, which were generally occurring within 11-13 months of a court-ordered evaluation. *Id.* Criminal defendants in pre-trial custody ordered to undergo 15-day evaluations at a Department facility, such as Eastern State, generally faced wait times of five to six months at the time the Agreed Statement of Facts was finalized. *Id.* at 18, 21-22. More recent data shows wait times of three to four months. BHA Office of Forensic Mental Health Services, *Trueblood, et al. v. Dep't of*

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the federal district court in *Trueblood v. Dep't of Soc. & Health Servs.*, No. C14-1178 MJP (W.D. Wash.).

*Soc. & Health Servs.*, *Case No. C14-1178 MJP, Monthly Progress Report to the Court Appointed Monitor*, at 23 (Table 9) (June 30, 2023), https://www.dshs.wa.gov/sites/default/files/BHSIA/FMHS/Trueblood/2023Trueblood/Trueblood-Report-2023-06.pdf.[3]

### C. Competency Restoration Services Are Typically Conducted in State Hospitals

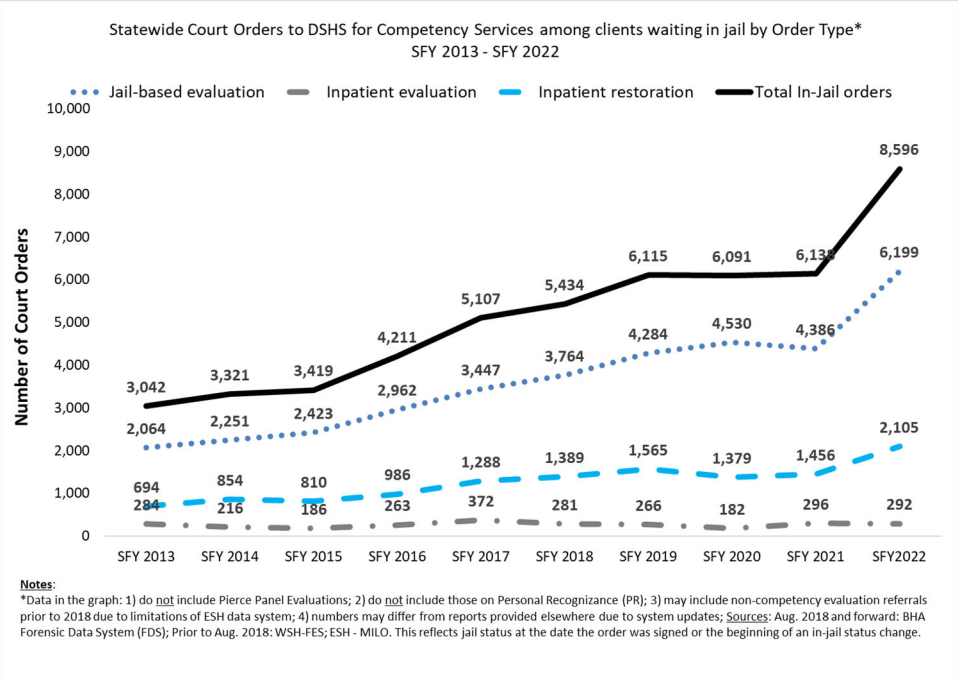
When a court in a criminal case finds a defendant incompetent, the case is stayed. RCW 10.77.084(1)(a). In non-serious misdemeanor cases, the charges are dismissed, but the defendants may be considered for civil commitment. RCW 10.77.088(6).[4] In felony or serious misdemeanor cases, the court may order the defendant committed to the Department for competency restoration treatment. RCW 10.77.086, .088. Although most restoration services are conducted in state

[3] Additional monthly reports may be found at https://www.dshs.wa.gov/bha/court-monitor-reports.

[4] If defendants with dismissed misdemeanor charges are committed under the ITA, those commitments would be placed in the general "civil patients" category; i.e., there is no "misdemeanor flip" category.

hospitals, under certain circumstances the court may order outpatient restoration treatment. Agreed Facts at 21. Nevertheless, with few exceptions, competency restoration takes place on an inpatient basis and is performed at Western State, Eastern State, or the recently opened residential treatment facilities at Maple Lane and Fort Steilacoom. Agreed Facts at 23.

Inpatient competency restoration orders have been steadily increasing over the last 10 years, for reasons that have not been identified despite intensive research by the Department and independent, court-appointed researchers. Agreed Facts at 24-26. As the chart below demonstrates, from 2013 to 2022, inpatient competency restoration orders tripled from 694 to 2,105, with a sharp spike in orders since 2021.




Excerpted from Agreed Facts at 23-24.

A court-appointed, independent researcher determined in 2018 that the most likely explanation was simply increased referrals from county and city jurisdictions, with increases in substance use and homelessness being a contributing factor. *Id.* at 26. This difficulty in discerning causal factors of the increasing demand for restoration services makes it difficult for the Department to predict and plan for future growth. *Id.* at 27.

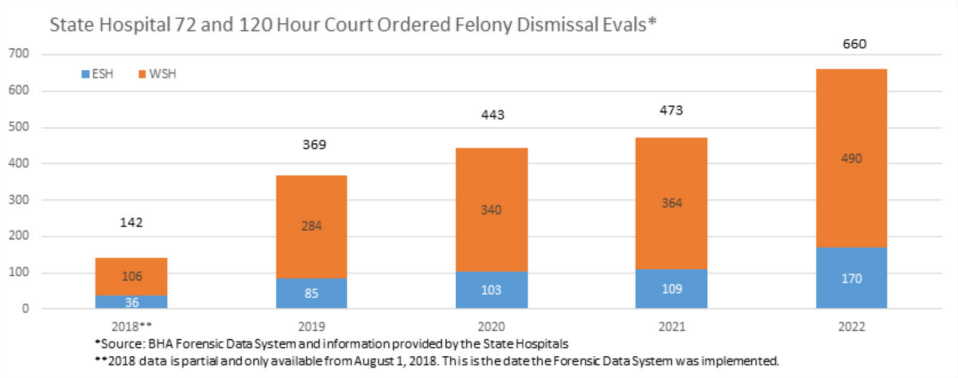
Like competency evaluations, the Legislature has set performance targets, maximum time limits, and a defense to those maximum time limits for competency restoration services. RCW 10.77.068. The performance target for offering admission to a state hospital for an in-custody defendant for competency restoration services is seven days, the maximum time limit is seven days from receipt of the court order or 14 days from when the order is signed (whichever is shorter), and the statute provides the same recognition that the targets may not be achievable and the same defense for exceeding the time limits for circumstances outside of the department's control. RCW 10.77.068(1)-(4).

As of the time Prosecutor Haskell filed his petition for mandamus, criminal defendants in pre-trial custody ordered to undergo inpatient restoration services generally faced wait times exceeding the statutory targets and maximums. Agreed Facts at 20. The Department had projected that defendants in pre-trial custody may wait approximately five to six months before

receiving inpatient restoration treatment. *Id.* at 21-22. More recent data specific to Eastern State show average wait times for competency restoration services, measured in days from when the court order was signed, of 44.4 days. BHA Office of Forensic Mental Health Services, *Trueblood, et al. v. Dep't of Soc. & Health Servs.*, *Case No. C14-1178 MJP, Monthly Report to the Court Appointed Monitor*, at 21 (Table 7) (June 30, 2023), https://www.dshs.wa.gov/sites/default/files/BHSIA/FMHS/Trueblood/2023Trueblood/Trueblood-Report-2023-06.pdf.

### D. Increases in Felony Conversions Affect Availability of Beds for Competency Services

Along with the increased demand for restoration services, felony conversions also impact the Department's ability to provide competency services when ordered to do so. The following chart depicts the growth in demand for felony conversion commitments, from 142 in 2018 to 660 in 2022.




Excerpted from Agreed Facts at 27. And because the felony conversion patients are typically more long-term commitments than those for competency evaluation and restoration services, they will occupy a state-hospital bed for far longer. Agreed Facts at 12-13.

The Department has historically prioritized admitting defendants whose criminal cases are dismissed and referred for civil commitment, resulting in much shorter wait times than defendants with pending criminal charges awaiting competency restoration. Agreed Facts at 67. Over 50 percent of felony conversions involve dismissed homicide or felony assault criminal charges, and defendants would be released from custody if not committed. *Id.* at 12-13. Nevertheless, dwindling bed

availability due to increased demand led the Department in late 2022 to begin triaging felony conversion referrals, and Department facilities began not admitting all defendants whose criminal cases were dismissed and referred for evaluation for potential civil commitment. *Id.* at 67.

### E. The *Trueblood* Class Action in Federal District Court

In 2014, a class action was filed against the Department in the U.S. District Court for the Western District of Washington by a group of criminal defendants being held in jail and awaiting competency evaluations and competency restoration treatment. Agreed Facts at 38-39. The lawsuit challenged as unconstitutional the delays in competency evaluation and restoration services for people detained in jails. *Id.* at 39-40. The class includes the exact populations that are the subject of Prosecutor Haskell's mandamus petition with respect to in-custody defendants, but does not include defendants released into the community who are awaiting competency services. *Id.* at 39.

In 2015, Judge Marsha Pechman held a bench trial and ultimately issued a permanent injunction regarding the State's failure to provide timely competency evaluation and restoration services to in-custody criminal defendants. *Id.* at 39. The injunction imposed strict time limits for providing competency services, which led to the Legislature codifying the time limits discussed above. Since that time, Judge Pechman has actively and energetically sought to enforce the injunction, including appointing a special master, requiring quarterly reports to the court, issuing subsequent injunctions, and imposing over $100 million in sanctions against the Department. *Id.* at 40.

In 2018, after consultation with hundreds of system partners, including class members and their families, state legislators, mental health provider agencies, law enforcement, local jails, judges, and prosecuting attorneys (including invites to the Spokane County prosecutor), defense attorneys, and many others, the Department and *Trueblood* plaintiffs entered into a settlement agreement that included a plan to address the delays

in providing competency services for in-custody defendants. *Id.* at 40-41. Recognizing the long-term nature of any attempts to remedy the delays, the plan required the Department to seek funding for a range of new efforts to be implemented in phases over a number of years. *Id.* at 42. These efforts have included seeking and obtaining legislative funding in both operating and capital budgets over numerous fiscal years, and the initiation of several new programs and capital projects to increase bed capacity. *Id.* at 43. Services arising from the agreement 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. *Id.*

While the settlement agreement provided an agreed plan to bring the Department into compliance with the federal injunction, the district court remains actively engaged in the oversight and enforcement of the injunction. *Id.* The federal court continues to hold quarterly status hearings and requires monthly

reports to the court-appointed monitor by the Department. *Id.* at 44. The monitor also conducts regular on-site visits to Department treatment facilities and issues reports to the court. *Id.* at 44-45.

Most recently, the *Trueblood* court held a hearing and found the State in breach of the settlement agreement. *A.B. ex rel. Trueblood v. Dep't of Soc. & Health Servs.*, No. C14-01178, 2023 WL 4407539 (W.D. Wash. July 7, 2023) (Findings of Fact and Conclusions of Law on Plaintiff's Motion for Material Breach of Contempt Settlement Agreement). Although recognizing that the Department had carried out many of the goals for programming and organization that the settlement agreement contemplated, the court nevertheless concluded that the Department had failed to provide certain bed space at state hospitals from September 2022 to May 2023 and ultimately failed to provide timely competency services. *Id.* at *2. The court imposed significant monetary and injunctive sanctions, including imposing previously stayed sanctions of over $100 million;

ordering the Department to immediately cease admitting felony conversion patients to state hospitals, with an exception for violent felonies; ordering the discharge or transfer from state hospitals of all civil patients other than felony conversions with special findings of a violent felony; and imposing additional, ongoing daily contempt fines for failure to timely transfer felony conversion patients out of beds that could otherwise serve *Trueblood* class members. *Id.* at *20-21. The parties have jointly requested modifications to the court's order that would, inter alia, limit its scope to forensic beds and would not require the discharge of patients admitted after having been found not guilty by reason of insanity. Implementation Plan and Joint Proposal for Amendments Pursuant to Dkt. No. 1009, *A.B. ex rel Trueblood v. Dep't of Soc. & Health Servc.*, No. 2:14-cv-01178-MJP (W.D. Wash. July 21, 2023), Dkt. No. 1019. As of the date of filing this brief, the district court had not ruled on the requested modifications.

## F. State Efforts to Provide Timely Competency Services

In response to the *Trueblood* injunction and more generally in an effort to provide timely competency services, the State has invested significant resources to increase capacity. *See generally* Agreed Facts at 29-38; 51-57. Since 2015, the Legislature has appropriated and the Department has invested hundreds of millions of dollars into renovating, constructing, and operating new bed capacity, at both state hospitals and at new facilities. *Id.* at 29. Since 2016, capacity for forensic services has more than doubled through new construction and renovation, with over 200 beds added to the pre-existing 141 beds for forensic services. *Id.* Additional capacity is planned in the coming years. *See id.* at 31 (chart summarizing past and future projects to add capacity, including planned construction of new forensic hospital with 350 beds).

These projects are the result of years of planning, construction, and funding. *Id.* at 32. The process of planning, obtaining funding, construction, hiring and training staff, and

then "ramping up" patient populations by safely admitting small groups until full capacity is reached necessarily takes years. *Id.* at 32.

In addition to construction and renovation projects, the Department and the State generally have obtained funding for and instituted numerous programs to increase treatment capacity or lessen the demand: it repurposed existing spaces to increase treatment capacity; hired additional psychologists and support staff to conduct in-jail or community evaluations; established "outstations" to locate evaluators around the state, closer to jails and communities; invested in new technologies including data systems to track court orders and the work of evaluators; developed intensive behavioral health facilities to treat patients that would otherwise need state hospital level of care; provided funding for improving the housing and homeless system; and more. *Id.* at 36-38, 52-56.

## G. Spokane County Proceedings

On numerous occasions, Spokane County Superior Court judges have ordered the Department to show cause for its delays for in-custody defendants awaiting inpatient competency restoration treatment. *Id.* at 66. The Spokane County Superior Court has also found the Department in contempt and imposed sanctions in specific criminal cases for failing to admit patients for competency restoration treatment. *Id.* In some cases, the Spokane County Superior Court has also dismissed criminal charges because of the delay in providing competency restoration services. *Id.* at 70.

In each of these cases, the Department has explained that the failure to admit patients for competency services was due to lack of bed space, competing obligations, and continuing obstacles posed by the COVID-19 pandemic. *Id.* at 66-68. Among the competing obligations cited by the Department are the patients involuntarily committed, and court-ordered to be admitted for inpatient treatment, for 90 or 180 days pursuant to

RCW 71.05.320(1)(a), (6)(b). *Id.* at 68. Among the factors considered by the Department when faced with competing obligations and insufficient bed space are public safety, welfare of the patients, welfare of the facility staff, compliance with federal and state court orders, and efficient allocation of resources. Agreed Facts at 62-64 (discussing considerations when admitting or transferring patients among wards); Declaration of Kevin Bovenkamp, Agreed Facts at Exhibit B, at Exhibit A, page 2 of 3 (Bates No. 773) (discussing prioritization of patients with highest levels of risk to community); RCW 10.77.068(3) (directing the Department to manage, allocate, and request appropriations to meet target timelines); RCW 71.05.010(1)(a) (stating legislative intent to protect the health and safety of persons suffering from behavioral health disorders and to protect public safety).

In addition, the Department has historically prioritized admitting defendants whose cases are dismissed and referred for civil commitment. Agreed Facts at 67. Beginning in late 2022,

the Department began triaging felony conversion referrals and began to not admit all defendants whose cases were dismissed and referred for evaluation for potential civil commitment. *Id.* The *Trueblood* order from July 21, 2023, discussed above, will also likely substantially decrease the number of felony conversion patients admitted, with a corresponding increase in the availability of beds for competency services.

## IV. ARGUMENT

### A. A Writ of Mandamus is a Rare and Extraordinary Remedy

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) (citing *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 589, 243 P.3d 919 (2010)). To obtain a writ of mandamus, a petitioner must show 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. *Serko*, 170 Wn.2d at 588-89 (citing RCW 7.16.160, .170).

In order to invoke the original jurisdiction of this Court, the writ must be directed to a "state officer" as that term is understood under article IV, section 4 of the state constitution. *Ladenburg v. Henke*, 197 Wn.2d 645, 650, 486 P.3d 866 (2021).

The Court will dismiss a petition for a writ where it lacks original jurisdiction. *Id.* And even if a petitioner establishes all of the elements for a writ of mandamus, the remedy remains discretionary and the Court may decline to grant the writ. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 601, 229 P.3d 774 (2010).

### B. The Secretary Is Not a State Officer Subject to a Writ Filed Directly in the Washington Supreme Court

A writ filed directly in the Washington Supreme Court must invoke the original jurisdiction of the Court as expressed in article IV, section 4 of the state constitution: "The supreme court shall have original jurisdiction in . . . mandamus as to all *state*

*officers* . . . ." (emphasis added); *see also Ladenburg*, 197 Wn.2d at 650. The Court's original jurisdiction is "'fixed by constitutional limitations, and is derived from the constitution, and not in pursuance of any legislative enactment.'" *Ladenburg*, 197 Wn.2d at 650 (quoting *Windsor v. Bridges*, 24 Wash. 540, 547, 64 P. 780 (1901)). As this Court recently held, "state officers" for purposes of article IV, section 4 refers to "a narrow set of elected officials who exercise state-level authority and are in turn controlled by constitutional provisions directly governing their appointment, salary, and impeachment." *Id.* at 650.

Because "state officer" is not defined in the state constitution, the *Ladenburg* Court interpreted the words in accordance with their ordinary meaning "'at the time they were drafted.'" *Id.* at 650 (quoting *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004)). The Court relied on "state officers" appearing in other parts of the state constitution to conclude that at the time of enacting the constitution, "at a minimum," state officers were elected and

subject to impeachment. *Id.* at 651 (discussing the original article IV, sections 3 and 8 referring to the election of state officers and article V, section 2 noting that the governor and "'state and judicial officers . . . shall be liable to impeachment.'") *See also State ex rel. Stearns v. Smith*, 6 Wash. 496, 497-98, 33 P. 974 (1893) (concluding that when referring to "state officers" in article IV, section 4, the framers "had in mind only the officers for which article 3 [of the state constitution] provided.").

In *Ladenburg*, the Court ultimately determined that municipal court judges were not state officers for purposes of article IV, section 4. *Ladenburg*, 197 Wn.2d at 653. Perhaps because municipal court judges satisfied the "minimum" of being elected and subject to impeachment, the Court went on to address four factors that make a public official a "state officer": the manner of appointment, whether their salary came from the State or local sources, whether they were subject to

impeachment, and whether they exercised state-wide jurisdiction. *Id.* at 653-59.

In addition, this Court has held that "[a] state office exists where there is reposed some part of the state's sovereign power[.]" *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 437, 249 P. 996 (1926) (cited approvingly in *Ladenburg*, 197 Wn.2d at 652). Thus, the members of the State Board of Equalization were "state officers" because they had been granted the sovereign authority to levy taxes. *Id.* at 437-38.

The Secretary acknowledges that several of the factors considered by the Court in *Ladenburg* support that she may be considered a "state officer." She exercises state-wide authority and her salary is paid by the state. *E.g.*, RCW 43.20A.040, .050.

On the other hand, the other two factors do not support this conclusion. First, the Secretary is not subject to impeachment. Rather, she may be removed without cause as she serves "at the pleasure of the governor." RCW 43.20A.040. Second, while the Secretary is appointed by the governor with the consent of the

senate, RCW 43.20A.040, the manner of her appointment is nevertheless inconsistent with the original understanding of "state officer" as being an elected official. *See Ladenburg*, 197 Wn.2d at 651.

The overwhelming majority of original-jurisdiction mandamus actions approved by this Court involve state-wide elected officials. *E.g.*, *Freeman v. Gregoire*, 171 Wn.2d 316, 256 P.3d 264 (2011) (governor); *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) (secretary of state); *State ex rel. O'Connell v. Yelle*, 51 Wn.2d 620, 320 P.2d 1086 (1958) (state auditor); *State ex rel. Garber v. Savidge*, 132 Wash. 631, 233 P. 946 (1925) (commissioner of public lands); *State ex rel. La Follette v. Hinkle*, 131 Wash. 86, 229 P. 317 (1924) (secretary of state). Cases to the contrary generally involve public officers exercising a sovereign power of the state such as levying taxes or appear to conflate the more general category of "public officer" with the Court's modern and more specific constitutional analysis of

"state officer."[5] *E.g.*, *State ex rel. Dunbar*, 140 Wash. at 437-38 (state's sovereign power of levying taxes reposed in the state board of equalization); *State ex rel. Pac. Bridge Co. v. Wash. Toll Bridge Auth.*, 8 Wn.2d 337, 340-41, 112 P.2d 135 (1941) (concluding officers of Toll Bridge Authority are state officers because they are acting on behalf of a state agency in an official capacity).

Applying the original understanding of a "state officer" as discussed in *Ladenburg*, the Court should dismiss the petition for mandamus as not satisfying constitutional requirements for the Court's original jurisdiction. This would not leave Prosecutor Haskell without a remedy, as he could file a petition for writ of mandamus in superior court pursuant to RCW 7.16.060. *See*

[5] Several cases involve original-jurisdiction writs of mandamus against both a statewide elected official and state agency heads, but the Court did not address the "state officer" issue. *See Freeman v. Gregoire*, 171 Wn.2d 316, 256 P.3d 264 (2011) (Governor and Secretary of Transportation); *State ex rel. Ottesen v. Clausen*, 124 Wash. 389, 214 P. 635 (1923) (State Auditor, Director of Public Works, and Supervisor of Highways).

*Kanekoa v. Dep't of Soc. & Health Servs.*, 95 Wn.2d 445, 450, 626 P.2d 6 (1981) (affirming mandamus issued by superior court to compel superintendent of correctional institution to accept defendants convicted of felony).

### C. The *Trueblood* Litigation Limits the Court from Granting the Petition

Under the supremacy clause of the United States Constitution, federal law preempts state law and federal court orders enforcing federal law control over conflicting state law. *E.g.*, *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 950-51, 603 P.2d 819 (1979); *State v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) ("State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution.").

Prosecutor Haskell correctly observes that while some of the issues in *Trueblood* are identical to those in the mandamus petition, the petition also addresses competency evaluations for

out-of-custody defendants. Prosecutor Haskell also complains that the *Trueblood* litigation may result in admission for restoration treatment for certain felonies being prioritized over others. Opening Br. at 44-45. Prosecutor Haskell's concerns reflect the truism that in a system with insufficient resources, certain discretionary decisions must be made to allocate resources and prioritize the provision of competency services and mental health services in general. In attempting to enforce its injunction, the federal district court has not hesitated to issue such specific prioritizations. Most recently, the court ordered civil and certain felony conversion patients released, and prohibited admission of civil and certain felony conversion patients. *Trueblood*, 2023 WL 4407539, at *20-21. Similarly, in an effort to comply with the injunction, the Department first admits class members (i.e., in-custody defendants awaiting competency services) 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. Agreed Facts at 35-36.

Even if the district court had not ordered specific actions and prioritizations, its order to provide in-custody competency services necessarily impacts the Department's ability to devote resources to community-based competency evaluations given finite resources. For example, among the Department's efforts to provide timely competency services for both in-custody and out-of-custody defendants was hiring additional evaluators in 2016 through 2021. Agreed Facts at 35-36. Originally envisioned as staff who could provide evaluations in the community but be available for in-custody evaluations in periods of peak demand, the steep increase in demand for in-custody evaluations soon required the evaluators' services to focus only on those defendants waiting in jail for an evaluation. *Id.* at 35. Prioritizing the in-custody evaluations was "because the Department understands that to be consistent with the requirements of the [*Trueblood*] permanent injunction[.]" *Id.* at 35-36.

The inter-connectedness of the Department's ability to provide timely competency services for in-custody and out-of-custody defendants, coupled with the complex and varied methods for addressing the delay in services, means that issuing the writ requested by Prosecutor Haskell would lead to untenable results. With respect to a mandamus that required the Department to act contrary to the federal injunction, the mandamus would be invalid due to the Supremacy Clause. And with respect to a mandamus that did not conflict with the demands of the federal injunction, it would be merely duplicative. In either instance, the Secretary respectfully submits that the Court should deny the writ of mandamus.

### D. The Obligation to Provide Competency Services Within a Certain Timeline Is Not Ministerial But Instead Involves Many Discretionary Decisions

Due to the extraordinary nature of a mandamus remedy, it is appropriate "only where a state official is under a mandatory ministerial duty to perform an act required by law . . . ." *Freeman*, 171 Wn.2d at 323. The mandate "must specify the

precise thing to be done or prohibited[]" and "define the duty with such particularity 'as to leave nothing to the exercise of discretion or judgment.'" *Id.* (citing *Walker*, 124 Wn.2d at 407) (quoting *SEIU Healthcare 775NW*, 168 Wn.2d at 599). In contrast, the Court should not issue a mandamus in "cases calling for continuous action, varying according to circumstances, inasmuch as a command to act according to circumstances would be futile." *Kanekoa*, 95 Wn.2d at 450. Among other reasons, this Court has explained that it will not compel a general course of conduct "'as it is impossible for a court to oversee the performance of such duties.'" *Freeman*, 171 Wn.2d at 332 (quoting *State ex rel. Pac. Am. Fisheries v. Darwin*, 81 Wash. 1, 12, 142 P. 441 (1914)).

The Secretary agrees with Prosecutor Haskell that in assessing the nature of the statutory duty, the Court should determine legislative intent through a close examination of statutory language. Opening Br. at 15 (citing *Pierce Cnty. Off. of Involuntary Commitment v. W. State Hosp.*, 97 Wn.2d 264, 272,

644 P.2d 131 (1982)). But unlike the statutes in the cases that Prosecutor Haskell relies on, the statute here explicitly recognizes that the precise duty to act is contingent on circumstances and involves discretionary judgment calls by the Department.

First, with respect to providing evaluations for out-of-custody defendants, there is no strict timeline for when the Department must provide evaluations and restoration services, and thus no "precise thing to be done" that can be ordered by the Court. *See, e.g.*, Opening Br. at 46-47 (requesting the Court compel the Secretary to conduct evaluations using RCW 10.77.068 "as a guide for reasonable timelines[ ]"). To the contrary, the statutory scheme as a whole demonstrates that while providing competency evaluations for out-of-custody defendants is certainly a statutory duty, the precise timelines for when those evaluations are performed depends on discretionary decisions by the Department.

The statute establishes a "performance target" of 21 days to complete an out-of-custody competency evaluation. RCW 10.77.068(1)(c). Unlike competency services for in-custody defendants, there is no corresponding "maximum time limit." *See generally* RCW 10.77.068(1)(c). Instead, the Legislature "recognizes that these targets may not be achievable in all cases, but intends for the department 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) (emphasis added).

The statute thus provides for discretionary, rather than ministerial, duties in at least three respects. First, the statute does not contemplate any specific deadline for providing out-of-custody competency evaluations and specifically recognizes that the target may not be achievable, thus leaving the timing of any specific evaluation to the discretion of the Department. Second, the Department must exercise discretion to manage, allocate, and

request appropriations in its best judgment to attempt to meet the targets. Third, the Department must exercise discretion in balancing the effort to meet the target against any decline in the accuracy and quality of competency services. In short, the statute provides a goal of completing out-of-custody evaluations within 21 days, but leaves the precise timing of any particular evaluation to the discretion of the Department. Ordering the Department to comply with the statutory directive would thus be more like orders to "follow the constitution" that this Court has rejected rather than a ministerial duty. *Cf. Walker*, 124 Wn.2d at 407.

With respect to in-custody competency evaluations and restoration services, the statute similarly has hallmarks of establishing a non-ministerial duty. Like the out-of-custody evaluations, the statute provides performance targets for such services, and includes the same language suggesting the exercise of discretion in attempting to meet these potentially unachievable targets. RCW 10.77.068(1), (3). In addition to providing performance targets for such services, the statute

establishes "maximum time limits," as described above. These maximum time limits apply to in-jail evaluations and the offer of admission to Department facilities for in-custody defendants ordered to undergo competency restoration or evaluation. RCW 10.77.068(1). But the statute also establishes a defense to the maximum time limits if the Department can establish that the reason for exceeding the time limits was outside of the Department's control. RCW 10.77.068(4). Among the specific, non-exclusive reasons listed for a delay outside the Department's control is "an unusual spike" in the number of referrals for competency evaluation or restoration services, causing "temporary delays until the unexpected excess demand for competency services can be resolved." RCW 10.77.068(4)(g). Further evidence of legislative intent not to establish a ministerial duty is the proviso that "[t]his section does not create any new entitlement or cause of action related to the timeliness of competency to stand trial services, nor can it form the basis for contempt sanctions . . . ." RCW 10.77.068(9).

The federal district court in *Trueblood* has found these statutory exceptions to the maximum time limits to be unconstitutional. *Trueblood v. Dep't of Soc. & Health Servc.*, No. C1401178-MJP, 2016 WL 4268933, at *14-15 (W.D. Wash. Aug. 15, 2016) (Order Modifying Permanent Injunction as to In Jail Competency Evaluations). And to be clear, the Department does not rely on those statutory exceptions in seeking to excuse any delays in providing competency services. Nevertheless, the statutory exceptions to the maximum time limit, combined with the legislative recognition that the target timelines may not be achievable and the reliance on discretionary judgments of the Department in attempting to meet the deadlines, demonstrate a legislative intent to create a non-ministerial duty. Prosecutor Haskell relies solely on statutory claims for his mandamus petition, and the statute as a whole reveals a duty that relies on discretionary decisions of the Department. *See State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012) (looking to the text of the statute, the context, related provisions, and the statutory

scheme as a whole when determining the plain meaning of a provision).

This statutory scheme stands in stark contrast to those addressed in the cases relied on by Prosecutor Haskell. Prosecutor Haskell relies on *Kanekoa* to argue that a statutory directive to perform a recurring duty, absent a definite timeline, becomes effective immediately and that the lack of a specific timeline does not allow indefinite delay or refusal to act. Opening Br. at 20 (citing *Kanekoa*, 95 Wn.2d at 448-49). In *Kanekoa*, the Court considered a statute that required correctional institutions to receive all persons convicted of a felony. 95 Wn.2d at 448. The statute included one exception for delay of 30-40 days for defendants appealing their conviction who had not obtained bond. *Id*. (citing RCW 36.63.255). Moreover, the Court found that upon conviction, the Department of Social and Health Services obtained legal authority over the accused by operation of law. *Id.* Nothing in the statute suggested any exercise of discretion in determining whether and when a convicted person

could be accepted — no performance targets that were legislatively recognized as potentially unachievable, no direction to manage, allocate, and request funding to provide services, no balancing of timeliness with the accuracy and quality of competency services, and no exceptions for circumstances beyond the Department's control. Similarly, in *Pierce County Office of Involuntary Commitment v. Western State Hospital*, the Court considered a statute stating the relevant mental health facility "must immediately accept on a provisional basis the petition and the person." 97 Wn.2d at 266 (citing RCW 71.05.170). The Court found no relevant exceptions or other indications of legislative intent that would allow anything other than "immediate" acceptance of the patients, so it affirmed the order that Western State Hospital comply with this non-discretionary duty. *Id.*

In arguing that the Department may not simply refuse to perform its statutory obligations, and instead must "'manage, allocate, and request appropriations for resources,'" to meet the

timelines proposed by the Legislature, Prosecutor Haskell misunderstands the requirements of a mandamus petition. Opening Br. at 21-22 (quoting RCW 10.77.068(3)). There is no question that the Department has an obligation to provide the competency services required by statute, and must strive to meet the target timelines and maximum time limits. The question is whether the statutory scheme presents that obligation as merely ministerial or instead as one involving discretionary decisions by the Department. For the reasons discussed above, there is no ministerial duty in the statutes specifying when particular competency services must be offered; the Court should therefore deny the petition.

### E. Prosecutor Haskell Cannot Meet His Burden of Showing He Has No Other Remedy

This Court will not grant the extraordinary remedy of mandamus unless the applicant has "no plain, speedy, and adequate remedy in the ordinary course of law." *Serko*, 170 Wn.2d at 588-89 (citing RCW 7.16.160, .170). In determining whether a plain, speedy, or adequate remedy exists, the court

relies on the facts of the particular case. *Am. Prop. Cas. Ins. Ass'n ex rel. Wash.-Licensed Members v. Kreidler*, 200 Wn.2d 654, 659, 520 P.3d 979 (2022) (citing *State ex rel. O'Brien v. Police Ct. of Seattle*, 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).

Here, there are at least three potential avenues for Prosecutor Haskell to obtain a plain, speedy, and adequate remedy: seeking court orders enforced by contempt sanctions in individual criminal cases; an action under the Administrative Procedures Act (APA); and intervention in the *Trueblood* litigation.

Prosecutor Haskell is a participant in each of the criminal cases for which he complains the Department is not providing timely competency services. In each of those cases, Prosecutor Haskell can and has sought court orders for defendants to be provided competency evaluations or restoration treatments.

Agreed Facts at 67-69. And those courts can, and sometimes do, impose contempt sanctions if the Department does not comply within the timeframes set by the court. *Id.* Prosecutor Haskell suggests that this remedy is not adequate because it has not resulted in defendants being offered competency services within the statutory timelines. Opening Br. at 23. But he fails to explain how a mandamus from this Court would alter these circumstances, especially where this Court does not grant mandamus for a general course of conduct that would require a court to oversee the performance of statutory duties. *Freeman*, 171 Wn.2d at 332.

A second avenue for Prosecutor Haskell to seek a remedy is the Administrative Procedures Act, which authorizes judicial review to seek an order requiring performance by a person "whose rights are violated by an agency's failure to perform a duty that is required by law to be performed[.]" RCW 34.05.570(4)(b).

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 County Office of Involuntary Commitment v. Western State Hospital*, 97 Wn.2d 264. Opening Br. at 32. But the *Pierce County* opinion does not discuss the issue of alternative remedies, and thus should not be considered precedent on the issue. *In re Swagerty*, 186 Wn.2d 801, 810 n.1, 383 P.3d 454 (2016). Also, the *Pierce County* 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 7.16.360; *see also* William R. Andersen, *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 the '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.").

Prosecutor Haskell has suggested that he likely would not have standing to bring an action under the APA because he does not have any statutory right to have the timelines for competency services to be enforced. Opening Br. at 30. Under the APA, a person has standing to obtain judicial review of agency action "if that person is aggrieved or adversely affected by the agency action." RCW 34.05.530. In turn, "aggrieved or adversely affected" means that the agency action has prejudiced or is likely to prejudice that person, the person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged, and a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. *Id.*

In addition to the provision allowing persons to seek judicial review for the failure to perform a duty, judicial review may be sought by persons aggrieved by "the performance of an agency action, including the exercise of discretion." RCW 34.05.570(4)(c).

It may well be that Prosecutor Haskell would have to litigate standing to bring an action under the APA. But the uncertainty of outcome if Prosecutor Haskell were to seek review under the APA, in and of itself, does not establish that the APA is not an adequate remedy. *Cf. Kreidler*, 200 Wn.2d at 662 (denying mandamus despite possibility that party would have improper tribunal make initial decision).

Finally, Prosecutor Haskell could seek to intervene in the *Trueblood* litigation. Federal Rule of Civil Procedure 24(b) allows parties to seek intervention if they have "a claim or defense that shares with the main action a common question of law or fact." Here, Prosecutor Haskell alleges a claim that shares a common question of law or fact with the *Trueblood* litigants —

namely, whether the Department is satisfying its obligations to provide competency services within the statutory timelines and whether the Department's efforts are sufficient to achieve that goal.[6]

The Secretary also notes that, although not a remedy he could seek by filing a lawsuit, with respect to competency evaluations, Prosecutor Haskell has the ability to present his own experts to the criminal court to complete the evaluation, 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 has chosen to rely on Department-designated experts despite the delays, but is

[6] Among the requirements for intervention is that the request must be timely. Fed. R. Civ. P. 24(b)(1). But the loss of an adequate remedy through failure to timely seek it is not grounds to issue a mandamus. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 650-51, 310 P.3d 804 (2013).

free to seek appointment of qualified experts of his own choosing.

### F. The Spokane County Prosecutor Is Not Beneficially Interested

The third element that Prosecutor Haskell must establish in requesting mandamus is that he is "beneficially interested." RCW 7.16.170; *Kreidler*, 200 Wn.2d at 659. Individuals are beneficially interested if they have "an interest in the action beyond that shared in common with other citizens." *Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 615, 62 P.3d 470 (2003). Nevertheless, this Court has denied standing for purposes of mandamus when it determined that a petitioner did not have a protected interest under the statute sought to be enforced. *Steilacoom Hist. Sch. Dist. No. 1 v. Winter*, 111 Wn.2d 721, 724, 763 P.2d 1223 (1988).

As Prosecutor Haskell admits, he has no statutory rights to timely competency services. Opening Br. at 30. Instead, the statute plainly provides a protected interest for criminal defendants who are awaiting competency services. The Secretary

agrees that as a county prosecutor, delayed competency services affect Prosecutor Haskell's role in prosecuting crimes. Opening Br. at 34 (citing RCW 36.27.020(4)). But many of the other arguments advanced by Prosecutor Haskell, including the impact of the delayed services on victims, the community, and the constitutional rights of defendants, are interests shared in common with other members of the community and do not establish a beneficial interest.

The Secretary leaves to the discretion of the Court whether the impact on prosecutions is a sufficient beneficial interest in light of the uncontested fact that the statute the Petition seeks to enforce does not provide Prosecutor Haskell any protected interest.

### G. Even if the Court Finds That Prosecutor Haskell Can Establish All Necessary Elements for a Writ, the Court Should Deny the Writ as a Matter of Discretion

Mandamus is an extraordinary remedy and even if the Court finds that Prosecutor Haskell has met the "demanding" elements justifying mandamus, it should exercise its discretion

to decline the petition. *Kreidler*, 200 Wn.2d at 658-59. Here, several reasons counsel in favor of dismissal.

First, the Court should dismiss the Petition to avoid any conflict with the existing injunction and ongoing litigation in federal court.[7] Both the Petition and the *Trueblood* injunction address the Department's obligation to provide competency evaluations and restoration services to defendants being detained in jails within the timeframes set forth in RCW 10.77.068. And the one issue the Petition raises that is not shared by the *Trueblood* litigation–competency evaluations for out-of-custody defendants–is inextricably intertwined with the issues that are identical. *See supra* at section IV.C. The federal district court

[7] Because the two cases are not identical as to parties and at least some of the issues, the Secretary agrees that the priority jurisdiction doctrine would not necessarily preclude the Court from granting the petition. But many of the same policies underlying the priority jurisdiction doctrine support the Court's denial of the petition as a matter of discretion: promoting comity between courts, avoiding conflicting outcomes, and preventing additional expense of litigation. *See, e.g.*, *State v. Stevens Cnty. Dist. Ct. Judge*, 194 Wn.2d 898, 903, 453 P.3d 984 (2019).

actively monitors and regularly modifies its orders to enforce the injunction. *Id.* Therefore, granting the Petition would at once create a substantial risk of conflict with the federal injunction and be of limited effectiveness because to the extent it did not conflict with the *Trueblood* injunction, it would be duplicative.

Second, granting the Petition would have limited effectiveness because this is not a case in which the Secretary disputes her obligation nor intentionally refuses to comply. Rather, the Secretary and the State as a whole have exerted tremendous efforts to address the complicated and deep-seated problem of providing timely competency services in the face of steep increases in demand. And the Secretary faces finite resources and multiple, competing statutory obligations and court orders with respect to providing in-patient mental health services. The Secretary and the State have every incentive to continue efforts to provide timely competency services. In addition to the good faith desire to comply with statutory obligations and uphold the constitutional rights of criminal

defendants, the Department is subject to numerous court orders and hundreds of millions of dollars in contempt fines. Although Prosecutor Haskell suggests that the Petition should be granted because the *Trueblood* injunction and state court contempt orders have not achieved the desired outcome, he fails to explain how granting his Petition will advance this goal.

Courts in other jurisdictions have recognized that mandamus should be rejected when performance is impossible or the order would not be effective. *E.g.*, *State ex rel. W. Va. Dep't of Health & Hum. Res. v. Bloom*, 880 S.E.2d 899, 911 (W. Va. 2022) (mandamus to address staffing issues rejected because Department had not refused to perform but made good faith efforts); *In re Smith County*, 521 S.W.3d 447, 452 (Tex. App. 2017) ("'A court will not grant a writ of mandamus unless it is convinced that the issuance of such a writ will effectively achieve the purpose sought . . . .'" (quoting *Econ. Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266, 276 (Tex. App. 1978))); *Asper v. Nelson*, 896 N.W.2d 665, 668 (S.D.

2017) (rejecting mandamus to repair and maintain two roads because township could not comply due to lack of funding). *See also Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 390-91, 932 P.2d 139 (1997) (rejecting mandamus ordering Department of Ecology to process water rights application because it was not arbitrary or capricious for it to prioritize certain applications given the lack of funding appropriated for that purpose).

The Department respectfully submits that the federal district court, which has retained jurisdiction and appointed a court monitor, regularly receives status reports and holds hearings that include testimony, and regularly adjusts its orders to enforce the injunction, is a forum better suited to achieve timely competency services than the blunt instrument of mandamus.

## V. CONCLUSION

Because the Secretary is not a state officer subject to a mandamus petition directly to this Court and Prosecutor Haskell has failed to establish the elements for mandamus, the Court

should deny the Petition. In the alternative, even if the Court determines that the elements of mandamus have been met, it should exercise its discretion under the particular circumstances of this case and deny the Petition.

This document contains 9,884 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 27th day of July, 2023.

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## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

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*s/ Kelsi Zweifel*
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*Confidential Secretary*

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