No. 101520-8

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

SPOKANE COUNTY, PETITIONER

v.

JILMA MENESES, IN HER OFFICAL CAPACITY AS SECRETARY OF THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, RESPONDENT

PETITIONER'S BRIEF IN SUPPORT OF A WRIT OF MANDAMUS

Lawrence H. Haskell
Prosecuting Attorney

Nathan S. McKorkle
Deputy Prosecuting Attorney
Attorneys for Petitioner

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

State Rules

I. INTRODUCTION

In-custody defendants regularly spend over 100 days for admission into court-ordered competency restoration services. Out-of-custody defendants wait even longer, with indefinite delays for admission to competency related services. The Department of Social and Health Services (the Department) is ordered by statute to provide these services and has been given target deadlines to fulfill this duty. For in-custody defendants, the deadline is 7 to 14 days; for out-of-custody defendants, evaluations are to occur within 21 days.

The Department has a clear duty to provide these services and at some point, delays of the length that are now typical in Spokane County amount to a failure by the Department to carry out its statutory duties.

Though the pandemic caused some delays, those issues are resolved, and the wait times have not improved. Trial courts are

beginning to dismiss cases for delays that violate defendants' right to substantive due process. Cases are going stale, victims are left without justice, and incompetent defendants lack access to necessary mental health treatment.

Neither the federal *Trueblood* litigation, nor dismissal of criminal actions, nor sanctions against the Department have remedied this issue. The Prosecutor has no other recourse but to ask this Court to issue a writ of mandamus, commanding the Department to carry out its obligations to provide competency services in a timely fashion.

II. ISSUES PRESENTED

1. Is a writ of mandamus an appropriate remedy when the Department has a clear statutory obligation to conduct competency evaluations and admit defendants for competency restoration treatment when ordered by a court

when it lacks any statutory basis to deny or indefinitely defer these repetitive, nondiscretionary obligations?

2. Is a writ of mandamus an appropriate remedy to compel the Department to perform its statutory obligations when Petitioner lacks adequate remedies when contempt proceedings are not addressing the Department's ongoing nonfeasance, the federal injunction does not address all issues experienced by Petitioner, and Petitioner has no reasonably viable legal remedies?
3. Is a writ of mandamus an appropriate remedy to compel the Department to perform its statutory obligations when the Department's nonfeasance impedes or directly prohibits Petitioner's ability to perform his statutory obligations as the Spokane County Prosecuting Attorney, in addition to ongoing issues of systemic injustice from unwarranted delays?

4. Is the presence of an ongoing federally supervised injunction reason to deny a writ of mandamus when the ongoing, systemic delays presented are occurring regardless of the federal injunction, the Petitioner in this action is uniquely distinct and has different objectives than the class members of the federal injunction, and Petitioner addresses statutory obligations of the Department that are excluded from the injunction?

III. STATEMENT OF THE CASE

Spokane County is facing severe repercussions for the Department's delays in fulfilling its statutory obligations. For example, Barton—charged with first degree robbery, and second and third degree assault—spent over 150 days in jail waiting for admission to competency restoration treatment following entry of the court's order referring him to treatment. Agreed Fact 22; Exhibit (Ex.) 2 p. 405-19. Hemen—charged with first and third

degree assault and first degree malicious mischief—waited 147 days for admission into inpatient treatment after the Department was ordered to provide it in September 2022. Agreed Fact 21; Ex. 2 p. 420-27; Agreed Fact 70. Despite the superior court finding the Department in contempt on October 28, 2022 for failing to timely admit Hemen (along with several other defendants) into treatment, Hemen was not admitted to Eastern State Hospital until February 10, 2023, nearly four months later. Agreed Fact 21, Ex. 2 p. 420-27; Agreed Fact 70, Ex. 7, p. 14-19. Unfortunately, these cases are not exceptions, but merely reflect delays that are currently typical in the provision of mental health services in Spokane County.

Criminal defendants charged with felony offenses in Spokane County who await competency related services fall within three distinct classes relevant to the issues presented here. The first class is those criminal defendants detained in-custody

awaiting inpatient treatment from the Department to restore them to competency.[1] Second, there are those defendants not in pre-trial custody who have previously been found incompetent and await out-of-custody inpatient restoration treatment from the Department. Third, there are out-of-custody defendants who await competency evaluations by the Department. Not at issue in this petition is the timeliness of in-custody competency evaluations conducted by the Department in the jail; the Petitioner concedes that in-custody criminal defendants from Spokane County ordered to undergo competency evaluations in the jail generally receive their court-ordered evaluations within a reasonable period of time. Agreed Fact 18.

[1] As discussed below, criminal defendants ordered to undergo a 15-day inpatient evaluation at a Department facility, rather than being evaluated in the Spokane County Jail, experience similarly lengthy delays for competency evaluations.

1. Defendants in pre-trial custody awaiting competency restoration.

Criminal defendants charged with felonies who are found incompetent are to be committed to the Secretary of the Department for inpatient competency restoration treatment. RCW 10.77.084; RCW 10.77.086; Agreed Fact 20. While the competency restoration orders of the Spokane County Superior Court direct the Department to admit such defendants to inpatient treatment at a Department facility within 7 to 14 days of entry of the court order, between 2022 and 2023 such criminal defendants have waited in excess of 100 to 150 days for admission to competency restoration treatment. Agreed Facts 21-22; Ex. 2. According to the most recent information provided by the Department, the Department now projects continued delays for admission to competency restoration for in-custody criminal defendants of 5 to 6 months. Agreed Fact 25.

Agreed Facts 21 and 22, supported by the corresponding charts and documents in Exhibit 2, set forth the delays for in-custody defendants awaiting competency restoration services after the trial court ordered competency restoration services. They demonstrate that defendants awaiting restoration services are charged with multiple felonies or violent offenses, to include arson, attempted murder, second degree assault, first degree robbery, second degree murder, kidnapping, and first degree assault. As recently as March 2023, a defendant waited 124 days for admission to inpatient competency restoration treatment despite the Spokane County Superior Court finding the Department in contempt earlier in the proceedings for its ongoing delays. Agreed Fact 71.

The Department's primary justification for these recurring delays, based on the notices provided to the Spokane County Superior Court and parties, is that it lacks adequate bed space to

provide timely admission. Agreed Fact 23. While the Department highlights the increase in demand for inpatient competency restoration services as one of the reasons for delays, Agreed Fact 29 reflects a reasonably consistent increase in inpatient restoration services. While Spokane County's felony filing numbers gradually increased going into 2019, these numbers decreased after 2020. Supplemental Agreed Fact; Ex. 20[2]. The consequences of these ongoing delays are that some cases have been dismissed by the Spokane County Superior Court for untimely admission into competency restoration treatment. Agreed Fact 72. For instance, Myrick's case demonstrates the problems with delays for out-of-custody competency evaluations and inpatient restorations and how these

[2] On April 24, 2023, the Petitioner filed an agreed motion for a supplementation of the agreed facts due to an inadvertent omission. If this Court does not grant the motion, it should not consider this fact. However, Exhibit 20 was previously filed.

problems compound. While Myrick waited out-of-custody for a competency evaluation for a second degree assault, she was charged with robbery, found incompetent, and ordered into inpatient restoration treatment. Agreed Fact 72; Ex. 10 p. 1-62. Following a motion by the defendant to dismiss and the Department being ordered to show cause for the delay, the trial court dismissed both cases because of the untenable wait times for admission to a Department facility. Agreed Fact 72; Ex. 10 p. 51, 57-62.

Cases like Myrick's that are dismissed without prejudice are referred for civil commitment, known as a civil conversion. Agreed Fact 9(c), Agreed Fact 72. The Department has historically prioritized admitting these civil conversion cases, where they may be admitted faster than competency restoration cases. Agreed Fact 68. However, the Department indicated it is not able to comply with all orders for civil conversion and began

to triage orders to admit defendants whose felonies are dismissed for civil commitment. Agreed Fact 68; Ex. 7, Ex. 8.

Petitioner also includes within this category those defendants who are ordered to undergo a lengthier competency evaluation at a Department facility, as opposed to the county jail. Those criminal defendants ordered to undergo a 15 day inpatient evaluation[3] at a Department facility generally face the same wait times and delays as those defendants who are ordered to competency restoration at a Department facility. Agreed Fact 19. For instance, Knippling, charged with first degree murder, waited 178 days for admission for a 15 day inpatient evaluation. Agreed Fact 19; Ex. 4. Lopez-Gutierrez, charged with second

[3] A defendant may undergo a 15 day competency evaluation in a Department facility when facing murder charges or when special, statutorily enumerated circumstances mean an evaluation in the jail is inadequate. RCW 10.77.060(1)(c). Agreed Fact 10.

degree murder and unlawful possession of a firearm, waited 132 days for an inpatient evaluation. Agreed Fact 19; Ex. 4

2. Out-of-custody defendants awaiting inpatient restoration treatment from the Department

"Under current circumstances, Spokane County criminal defendants who are not waiting in jail and are found incompetent and ordered into inpatient competency restoration treatment inside a Department facility are not prioritized over defendants waiting in jail, and currently face unknown waits for admission into inpatient treatment." Agreed Fact 26. For example, as contained in Exhibit 15, supporting Agreed Fact 26, Hodneland—charged with unlawful imprisonment—has been waiting in the community since July 2021 for admission to inpatient restoration and Arevalo—charged with first degree robbery and theft of a motor vehicle—has waited since February 2022 for admission, with neither defendant admitted as of January 31, 2023.

3. Out-of-custody defendants awaiting competency evaluations by the Department

When ordered by the trial court, the Department appoints a qualified professional person to evaluate the competency of a defendant to stand trial. Agreed Fact 13-14. A defendant who is not in pre-trial custody is evaluated in the community. Agreed Fact 14. Out-of-custody criminal defendants in Spokane County have waited, in many cases, well in excess of a year for the Department to perform court ordered evaluations of their competency. Agreed Fact 16; Ex. 16. The Department reported an initial wait time of 6 to 8 months for such evaluations and now reports estimated delays of 11 to 13 months. Agreed Fact 17.

The Department indicates over 1,000 out-of-custody defendants across Washington State are awaiting competency evaluations. Agreed Fact 17. Meanwhile, the pending criminal cases of out-of-custody defendants in Spokane County are stayed for years pending their competency evaluations, effectively

inhibiting prosecution of the case until a defendant is arrested and brought into custody for an evaluation, as detailed in Exhibit 16, or until the case becomes so old that dismissal is the only viable option, leaving the victims of these crimes without justice. Agreed Fact 17; Ex. 16, Ex. 17.

IV. ARGUMENT

This Court may issue a writ of mandamus to address an ongoing violation of duty when (1) the party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the petitioner has no "plain, speedy, and adequate remedy in the ordinary course of law," RCW 7.16.170; and (3) the petitioner is "beneficially interested." RCW 7.16.170; *Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994); *see also Eugster v. City of Spokane*, 118 Wn. App. 383, 403, 76 P.3d 741 (2003).

A. The Department has clear statutory duties to timely evaluate and provide competency restoration services for criminal defendants in Spokane County.

The first element for a writ of mandamus to issue requires the government official or entity have a clear duty to act on the particular issue, and the circumstances triggering the government official's duty to act must have occurred. *Eugster*, 118 Wn. App. at 404. In addition to statutory language, this Court may look to legislative intent to interpret an obligation to act. *See Pierce Cnty. Office of Involuntary Commitment v. W. State Hosp.*, 97 Wn.2d 264, 272, 644 P.2d 131 (1982).

The Secretary of the Department is obligated to provide competency evaluations as ordered by the court. RCW 10.77.060 specifies the Secretary's obligation to appoint a qualified competency evaluator when ordered by a court, which is also reflected in the orders for competency evaluation. To reflect the obligation as laid out in the superior court's competency

evaluation orders, see Agreed Fact 13, Ex. B at ¶ 10; Agreed Fact 16, Ex. 16 p. 3, 37, 58, 76, 103, 117, 136, 148, 164, 181, 196, 207, 222, 235, 253, 264, 284, 304, 325, 331, 340, 356, 367, 378, 394, 408, 421. RCW 10.77.060(c) further expresses the obligation of the appointed evaluator:

> The evaluator **shall** assess the defendant in a jail, detention facility, in the community, or in court to determine whether a period of inpatient commitment will be necessary to complete an accurate evaluation. If inpatient commitment is needed, the signed order of the court shall serve as authority for the evaluator to request the jail or detention facility to transport the defendant to a hospital or secure mental health facility for a period of commitment not to exceed fifteen days from the time of admission to the facility. Otherwise, the evaluator **shall** complete the evaluation.

(Emphasis added).

The legislature has established a performance target for the Department to complete evaluations for out-of-custody defendants within 21 days. RCW 10.77.068(1)(c). RCW 10.77.060(1)(a) allows the court to either "request" the

Department designate a qualified expert or to appoint a qualified expert or professional person to do so. Unless an exception is provided in statute, the availability of a potential provider apart from the Department does not alleviate the Department's duty to appoint such a person to evaluate a defendant when ordered. *See Pierce Cnty.*, 97 Wn.2d at 267-68.

A similar issue to that currently before this Court was raised in *Pierce Cnty.*, where civil commitment evaluators had discretion to commit individuals to Department facilities or county facilities. *Id*. at 267. This Court reasoned the statute gave discretion to the referring evaluators, who are presumed to act in good faith, but did not confer discretion on the Department to refuse to provide care when the evaluator chose its facilities. *Id.* at 268, 270-72.

No statute, including RCW 10.77.068, confers discretion on the Department to refuse to appoint a qualified expert to

conduct an evaluation and provide it to a court when so ordered. This Court's reasoning in *Pierce Cnty.* should be applied to the Department's obligations to perform competency evaluations when ordered.

Regarding inpatient competency restoration, the trial court is required to order incompetent defendants into the custody of the Secretary for inpatient competency restoration. RCW 10.77.086(1). Once ordered by the court, "the [D]epartment **shall** place the defendant in an appropriate facility of the [D]epartment for competency restoration." RCW 10.77.086(1)(b) (emphasis added). RCW 10.77.068 provides timelines for completion of these services. It allows the Department a performance target of seven days to admit a defendant in pre-trial custody into inpatient competency restoration treatment. RCW 10.77.068(1)(a). The Department has a maximum of seven days from receipt of the order or fourteen days from the date an order for competency

restoration was signed by a judge to admit a defendant into treatment. RCW 10.77.068(2)(a).

A writ of mandamus may be issued to direct an individual perform their legal duty in recurring situations where the same specific duty repeatedly arises, although it may not be used to direct a general course of conduct. *Munro*, 124 Wn.2d at 409. A statutory requirement that the Department "shall" perform a given action when the relevant legal criteria is met, such as receive a defendant for admission, creates a duty. *See Kanekoa v. Wash. State Dept. of Soc. & Health Servs.*, 95 Wn.2d 445, 448, 626 P.2d 6 (1981). Statutory provisions may specify or modify when that duty takes effect, and this Court should consider legislative intent when interpreting when the duty is to take effect. *Id*. at 448-449.

Pursuant to RCW 10.77.060 and RCW 10.77.086, the Secretary of the Department has a nondiscretionary, recurring

obligation to—when ordered by a court—appoint a qualified professional person to conduct an evaluation or admit a defendant into inpatient treatment. *Kanekoa* indicates such a statutory directive to perform a recurring, nondiscretionary act becomes effective immediately, unless otherwise specified by statute. *Kanekoa*, 95 Wn.2d at 448. While statutory authority may authorize specific delays to carry out a duty in certain circumstances, that authority cannot permit indefinite deferral or outright refusal to act if there is no authority supporting such conduct. *Id*. at 448-49. This Court in *Kanekoa* rejected the Department's claim that absence of a definite timeline to perform an act specified in statute enables the Department to indefinitely defer its obligations by claiming it will "eventually" act. *Id*.

Chapter 10.77 RCW does not include authority for the Department to refuse to appoint evaluators or accept defendants into inpatient treatment when ordered. RCW 10.77.068 does

provide some timelines to perform these obligations that the legislature considers reasonable, including circumstances where the Department may have good cause to delay performing its obligations. However, neither RCW 10.77.068, nor any comparable statute, gives the Department authority to not perform its obligations. To the contrary, RCW 10.77.060(4) confers upon the Secretary the authority to enter necessary agreements and designate evaluators as required to fulfill the Department's obligations under RCW 10.77.060. RCW 10.77.068(3) specifies the legislature "intends for the department to manage, allocate, and request appropriations for resources" to meet the timelines it proposes in RCW 10.77.068.

Appointing an evaluator or admitting an individual for inpatient treatment are duties established by statute and order of the trial court, and the Department lacks authority to refuse to perform these obligations, even if it lacks capacity. These are

recurring, nondiscretionary duties that may be properly compelled by a writ of mandamus.

B. There exists no plain, speedy, or adequate remedy at law for the Department's failure to act.

No plain, speedy, adequate remedies in the course of law are available under the statutory scheme or case law to ensure the Department timely provides competency services. RCW 10.77.068(9) specifies that violations of the time limits created by the legislature do not give any cause of action, including contempt.

Remedial sanctions for defendants awaiting competency restoration services may compensate the individual defendants and compel the Department to perform in an individual case. *See State v. Luvert*, 20 Wn. App. 2d 133, 499 P.3d 211 (2021). But even if the superior court holds the Department in contempt in individual cases as suggested by *Luvert*, the contempt does not address the State's interests in having the appropriate services

performed in a timely manner before the Department is out of compliance. Similarly, such sanctions cannot address the ever-increasing delays that impede the State's and defendants' legitimate interests in bringing criminal cases to trial or work to further the State's interest in an effective, organized competency evaluation and restoration system.

While the Spokane County Superior Court has used its contempt authority to order sanctions against the Department for its failure to admit defendants in pre-trial custody awaiting competency restoration treatment, these defendants still waited 120 to 140 days for admission (for instance, Hemen was admitted on February 10, 2023 following the October 28, 2022 oral finding of contempt, meaning admission took 105 days regardless of contempt finding). Agreed Fact 70-71; Ex. 2. Sanctions may penalize the Department and indirectly influence some changes, but the mere imposition of sanctions cannot force

the Department to change its procedures, appoint new evaluators, retain new facilities, and perform other necessary acts to address recurring, problematic violations of the Department's statutory obligations.

While the federal court established a permanent injunction against the Department to ensure timely competency restoration services, the injunction is demonstrably insufficient to prevent the ongoing delays as evidenced in the Department's competency evaluation and restoration system. *Trueblood v. Wash. State Dept. of Soc. & Health Servs.*, 101 F. Supp. 3d 1010, (W.D. Wn. 2015), *partially remanded and vacated by Trueblood v. Wash. State Dep't of Soc. & Health Servs*., 822 F.3d 1037, 1043 (9th Cir. 2016). *Trueblood* also applies only to defendants in pre-trial custody. *Trueblood* does not protect the interests of out-of-custody defendants to receive timely evaluation and competency restoration as they are not class members to the

lawsuit. Agreed Fact 44. The ongoing, recurring, and potentially incurable delays in services from the Department for out-of-custody defendants reflects the inapplicability of any conceivable remedy under *Trueblood* to this class of defendants awaiting services.

Though prosecuting authorities in other counties have filed amicus curiae briefs in the ongoing *Trueblood* litigation, that action does not provide an adequate remedy. The purpose of an amicus brief is to help the court with points of law. *Ochoa Ag Unlimited, L.L.C. v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005). As amici brief writers are not parties to the action, arguments raised by amici briefing need not be considered by the court. *Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007); *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984); *Washington State Bar Ass'n v. Great Western Union Federal Sav. and Loan Ass'n*, 91 Wn.2d 48, 59-60, 586 P.2d 870

(1978); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). As the amicus briefing was filed in federal court, relevant case law indicates the federal district courts may consider amicus briefing from nonparties to provide unique information or perspectives on issues that can be helpful to the court and not currently provided by the actual parties to the case. *Macareno v. Thomas*, 378 F. Supp. 3d 933, 940 (W.D. Wash. 2019).

Nonetheless, amicus brief authors are not litigants in the active case and lack authority to frame arguments before the court or gain any status as an actual party to the case to raise new issues. *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404, (10th Cir. 1997); *Morales v. Turman*, 820 F.2d 728, 732, (5th Cir. 1987). Though worthwhile for other counties to provide input to the *Trueblood* court and raise important perspectives, amicus briefing is solely advisory, and the court has broad discretion to disregard its contents. The ability to provide nonbinding,

advisory briefing can hardly be considered an adequate remedy. It is undisputed that the Prosecutor is not a *Trueblood* class member. This Court should not accept the Prosecutor's ability to file amicus briefing in federal court as an adequate remedy to the Department's failure to act.

While the Department previously surmised that the Administrative Procedures Act (APA) is a theoretical remedy at law, the APA is also not an adequate alternative to mandamus. Department's Response to Petition for Writ of Mandamus 101520-8 (Department's Response) at 23-25. The APA may provide a remedy for agency inaction when the statutory criteria is met under RCW 34.05.570(4)(b). *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 381-383, 932 P.2d 139 (1997). Under RCW 34.05.570(4)(b), "[a] person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review…" A petition may

only be filed in limited circumstances where an agency's decision is unconstitutional, outside of the statutory authority conferred by law, arbitrary or capricious, or taken by persons not authorized to act pursuant to the agency's rules. RCW 34.05.570(4)(c)(i)-(iv).

Judicial action under the APA also generally requires administrative remedies be exhausted before an appeal to judicial authority may be made. *American Property Casualty Insurance Assoc.n v. Kreidler*, 200 Wn.2d 654, 660, 520 P.3d 979 (2022); RCW 34.05.534. The mere presence of possible remedies under the APA does not necessarily preclude granting of extraordinary remedies, such as mandamus, under RCW 7.16.260, particularly when such actions would be futile or if the matter will be directly submitted for judicial review. *See Spokane Cnty. v. State*, 136 Wn.2d 644, 651-652, 966 P.2d 305 (1998).

Regarding competency evaluation and restoration concerns, there are no feasible administrative remedies that could be exhausted, which is a prerequisite under RCW 34.05.534 before one may seek judicial review under chapter RCW 34.05. The purpose of the APA is to attempt to resolve issues in the appropriate agency forum before turning to the courts. If no such forum is available, there is no reasonable way to exhaust remedies, if these were to exist.

The Department has also suggested judicial review under RCW 34.05.570(4) is an adequate remedy to address the Department's inaction. Department's Response at 23-25. However, only a "person whose rights are violated by an agency's failure to perform a duty" can bring an action under RCW 34.05.570(4)(b). While our law does not clearly define what right must be violated to establish standing under RCW 34.05.570(4)(b), case law encompassing RCW 34.05.570 and its

predecessor statute indicates that a petitioner must establish they have a clear statutory or fundamental right that is being violated to seek relief. *See Shoreline Cmty. College Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 401-403, 842 P.2d 938 (1992); *Qwest Corp. v. Wash. Utilities and Transp. Com'n*, 140 Wn. App. 255, 260, 166 P.3d 732 (2007). Petitioner Haskell does not have a statutory right to competency evaluations or restoration services, which means he cannot establish his rights are being violated. On the other hand, the Department has a statutory obligation to perform these evaluations, and as explained in the following section, the Prosecutor is beneficially interested in the Department's performance of its legal obligations. The likelihood that Mr. Haskell lacks standing to bring a claim under RCW 34.05.570 only further confirms this is not an available remedy.

This Court's recent decision in *Kriedler* is distinct from the current case and circumstances. *Kriedler* involved a petitioner seeking mandamus following a decision in a contested agency hearing where the agency sought review of that decision and attempted to use mandamus to compel such review. 520 P.3d at 982-83. This Court concluded the APA, under RCW 5.34.570, was the appropriate vehicle to ensure judicial review of the administrative hearing decision instead of mandamus. *Id*. There is no clear administrative hearing decision to appeal in this case. Petitioner should not need to attempt a remedy that is apparently unavailable, and the absence of a realistic administrative remedy only confirms that the Prosecutor lacks a "plain, speedy, and adequate remedy" at law. RCW 7.16.170.

In situations analogous to the current issue, where no alternative remedies have existed at law, this Court has issued or affirmed writs of mandamus to address the Department's

nonfeasance. For example, this Court upheld a superior court writ of mandamus when the Department did not fulfill its statutory duties to accept inmates sentenced to prison into its reception and classification center. *Kanekoa,* 95 Wn.2d at 450. In doing so, this Court recognized the legislature creates a duty for the Department to act when the statutory language specifies the Department "shall" perform a given action, and the conditions to act are met. *Id.* at 448. Mandamus is appropriate to compel a state actor to perform ongoing actions in recurring cases, so long as the commanded actions are precisely defined. *Id*. at 450.

This Court also upheld a writ of mandamus against the Department and Western State Hospital to compel the Department to accept patients under chapter 71.05 RCW, the Involuntary Treatment Act. *Pierce Cnty.*, 97 Wn.2d at 272. In that case, the Department contended it could not accept patients

when its facilities were full. *Id*. at 265. This Court rejected the Department's excuse, noting the statute required patients to be evaluated and accepted when the statutory conditions were met. *Id*. at 270-71. The court reasoned the statutory scheme and article 13, section 1 of the Washington State Constitution placed the burden on the State to provide the appropriate treatment, and the Department could not turn away patients simply because it lacked capacity. *Id*. at 268-69, 271. The court struggled with the issues of overcrowding faced by treatment facilities but concluded a state hospital was the most appropriate place for a patient (rather than jail or unsupervised release) and recognized "[t]reatment delayed and inadequate must surely be better than no treatment at all." *Id*. at 268-70.

The *Pierce Cnty.* decision demonstrates mandamus is an appropriate remedy when the Department fails to perform its statutory obligations to provide treatment when required. The

Department cannot simply cite lack of bed space or resources to avoid its obligations.

C. The Prosecutor is beneficially interested in the Department's timely exercise of its statutory duties.

The Spokane County Prosecutor is beneficially interested in ensuring an effective and efficient competency restoration process. One of the Prosecutor's fundamental roles is prosecution of crime. RCW 36.27.020(4). The Prosecutor also has an obligation to seek to improve and reform criminal justice, along with addressing inadequacies or injustice. RCW 36.27.020(11). Cases are coming to a virtual standstill for months, and cases are actively being dismissed by the trial court due to the Department's delays on the basis that such delays infringe on defendants' substantive due process rights. These delays also have disastrous consequences for the community and crime victims, which represents the people on whose behalf the Prosecutor is legally obligated to prosecute cases.

"For purposes of standing under the mandamus statute, all that must be shown is that the party has an interest in the matter beyond that of other citizens." *Retired Public Employees Council of Washington v. Charles*, 148 Wn.2d 602, 620, 62 P.3d 470 (2003). While it is true that criminal prosecution results in curtailing defendants' liberty interests, the Prosecutor acts in a quasi-judicial role and has a compelling interest in ensuring defendants receive fair and speedy trials on the merits without due process violations caused by the Department:

> A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) […] At the same time, a prosecutor "functions as the representative of the people in a quasijudicial capacity in a search for justice." *Id*.

State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015) (some internal quotation marks omitted). Comment 1 to Washington's Rule of Professional Conduct 3.8 further directs that "a

prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."

Even *Trueblood* recognizes that the prosecuting authority

> has a legitimate interest in evaluating a potentially incompetent defendant's competency so as to determine whether he or she may stand trial, and in restoring the competency of those found incompetent so that they may be brought to trial. The state has a corresponding interest in an efficient and organized competency evaluation and restoration system, the administration of which uses public resources appropriately.

101 F. Supp. 3d at 1022. As this Court has observed, substantial delay affects the State's ability to prosecute:

> A defendant in a criminal case can achieve definite advantages through delay. Once trial starts, stale cases are more easily challenged by defense attorneys on cross examination. Juries are often disenchanted with offenses that have occurred in the remote past. If prosecution witnesses become

> unavailable over long periods of time or prosecutorial ardor should wane, the guilty benefits at society's expense.
>
> Aside from affecting the probabilities of obtaining a conviction, the speedy trial right has significant impacts upon the quality of judicial action and the possibilities of future criminal conduct. The tendency to postpone trials adds to court congestion and the backlog of cases.

State v. Striker, 87 Wn.2d 870, 876, 557 P.2d 847 (1976).

Because due process and Washington law protect incompetent defendants from trial, conviction, or sentencing so long as the incompetency continues, the Prosecutor cannot fulfill his statutory obligations while defendants are awaiting competency evaluations or restoration services indefinitely. RCW 10.77.050; *State v. Coley*, 180 Wn.2d 543, 551, 326 P.3d 702 (2014). Incompetent defendants also have a liberty interest in receiving restorative treatment. *Trueblood*, 101 F. Supp. 3d at 1020-21. As this Court found, unreasonable delays in receipt of competency restoration services can violate criminal defendants'

due process rights. *State v. Hand*, 192 Wn.2d 289, 429 P.3d 502 (2018).

The Spokane County Superior Court has found, in certain cases, even involving violent felonies, that the unreasonably long delays in competency evaluations and restorative treatment, are due process violations. Agreed Finding 72. While the Prosecutor does not support such dismissal motions and contests that dismissal is an appropriate remedy, case law has indicated dismissal due to delays in competency services can be available in certain circumstances. *See Hand*, 192 Wn.2d at 300; *State v. Kidder*, 197 Wn. App. 292, 389 P.3d 664 (2016).

Additionally, Washington places a high premium on crime victims' rights, which are not well-served by significant delays and, potentially, dismissal of charges. *See* WA. CONST. art. I, § 35; chapter 7.69 RCW.

Other considerations also impact the Spokane County Prosecutor's Office. While competency restoration may stall the time for trial pursuant to CrR 3.3(e)(1), a defendant's constitutional speedy trial rights may be implicated by the lengthy delays for services, which may lead to dismissal with prejudice if the reviewing court assigns blame for the delay to the government. *See State v. Ollivier*, 178 Wn.2d 813, 827-833, 312 P.3d 1 (2013). As *Striker* explains in detail, pre-trial delays may impede the prosecution's ability to effectively take a case to trial. 87 Wn.2d at 876. Waiting for years to tunnel through a backlogged competency restoration system means the prosecution cannot promptly resolve cases. Even if a defendant is eventually found competent, the extraordinary delays could result in various complications ranging from missing witnesses to faded memories.

While this petition is brought by Mr. Haskell in his official capacity as the Spokane County Prosecutor, this Court can and should consider the overwhelming impact the Department's inaction has on the community the Prosecutor serves, in addition to Prosecutor's uniquely important interests. Criminal defendants, who are also members of the population the prosecutor's office serves, are denied treatment to address ongoing mental health issues often closely tied to their crimes. Those awaiting evaluation and restoration in the community most likely lack the mental health services they need to stabilize, which may result in the commission of additional crimes. County correctional facilities must take on the additional obligation of caring for incompetent defendants waiting to enter appropriate Department facilities.

The effects of these delays directly impact victims of crime and the ability of the State to take their cases to trial. Crime

victims must also wait for prolonged periods of time to resolve cases, causing increased stress and an inability to fully move on from what may have been a traumatic experience. And those whose cases are dismissed by a court because of the Department's delays are not afforded any justice, as they lose the opportunity to be heard about the impact of the crime or see the alleged offender be held accountable. *See* RCW 7.69.030(13), (14).

Mandating the Department to perform its competency services as required by law is essential for a functioning criminal justice system. While community-based competency and mental health services are important and may need expansion, it is ultimately the Department's responsibility under RCW 10.77.060, RCW 10.77.084, and RCW 10.77.086 to ensure criminal defendants whose competency is questioned or who have been found incompetent receive the services to which they

are entitled. Individuals involved in the criminal justice competency system are often those with the greatest needs and who, without appropriate care, risk harm to themselves and others. If those individuals' competency is not evaluated, there is no way to ascertain their needs or whether criminal charges can proceed. If adequate inpatient treatment is not provided, then those who require the most intensive mental health treatment (and those who do not qualify for outpatient treatment) cannot receive the appropriate care not only to address their criminal charges, but also to address often severely problematic mental health issues.

The legislature placed the burden and responsibility on the Department alone to provide this care. The Department has the responsibility to allocate its resources appropriately and advocate for its needs so that it can timely fulfill its statutory obligations.

This Court has previously held the Department cannot shirk its statutory obligations by merely citing lack of resources. Despite this Court's previous holdings, however, the Department's failure to discharge its duties has resulted in an untenable situation, for both criminal defendants who are entitled to those services, and to the Prosecutor, whose duties encompass not only the prosecution of criminal offenses, but also ensuring the fair treatment of those individuals charged with crimes. This Court must intervene to ensure a functioning competency restoration system that protects defendants' due process rights and the public's overarching interests in a prompt, fair, and effective criminal justice system.

D. The Court should issue this writ regardless of the *Trueblood* litigation and injunction.

The *Trueblood* permanent injunction, and associated ongoing litigation does not prevent this Court from taking action to ensure the Department performs its legal obligations. The

priority of action doctrine should not apply to this writ. The priority of action doctrine generally prohibits another court from exercising its jurisdiction over the same action when the actions share identity of subject matter, parties, and relief. *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 41, 321 P.3d 266 (2014). This concept largely parallels the concept of res judicata. *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981). However, this rule does not bar similar cases occurring in comparable jurisdictions. *American Mobile Homes of Washington, Inc. v. Seattle-First Nat. Bank*, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990).

There are a number of reasons the priority of action doctrine does not apply to this action. The plaintiffs in *Trueblood* were in-custody criminal defendants awaiting competency services from the Department. 73 F. Supp. 3d at 1312. As reflected in Agreed Fact 53, the *Trueblood* plaintiffs moved to

bar admission of certain felonies from restoration treatment, which would effectively prohibit prosecution of certain offenses by the Prosecutor if restoration could not be sought. The Prosecutor is not and never was a party to *Trueblood* and the roles, motivations, and interests of the parties are clearly distinct.

Though some issues in this petition may overlap with the issues raised in *Trueblood*, such as competency restoration services for in-custody pre-trial defendants, the instant petition also addresses the Department's duty to evaluate out-of-custody defendants. The Department now suggests it can legally avoid complying with court orders directing evaluations for out-of-custody defendants by indefinitely delaying services until some unknown point in the future. *Trueblood* does not address that issue.

This Court should not accept that the Department cannot be held to account by the courts of this state—particularly this

state's highest court—on a compelling issue of state law and the legal obligations of a state agency.

V. RELIEF REQUESTED

Criminal defendants, the Prosecutor, the community at large, and victims of crime alike are in the proverbial "rock and a hard place" due to the Department's inaction regarding its statutory and constitutional mandate to timely evaluate and, where possible, restore incompetent defendants to competency. The longer a defendant awaits services from the Department, the greater the risk that he or she will harm himself, herself, or others, or suffer harm from other inmates or those in the community.

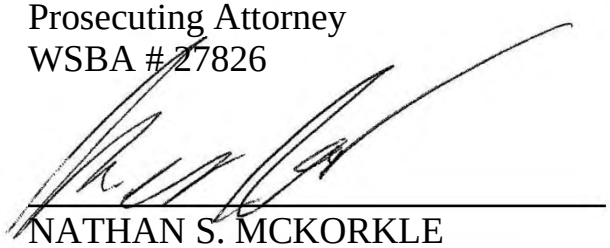
The Spokane County Prosecutor respectfully requests this Court grant a writ of mandamus to compel the Secretary to perform her statutory obligations to: (i) conduct competency evaluations for out-of-custody defendants when appropriately ordered by a trial court, using RCW 10.77.068 as a guide for

reasonable timelines; (ii) accept in-custody defendants into inpatient competency restoration within the timeframes set out in RCW 10.77.068 and *Trueblood*; and (iii) accept out-of-custody defendants into inpatient competency restoration when appropriately ordered by a trial court, using RCW 10.77.068 as a guide for reasonable timelines. The Prosecutor also asks this Court to issue such other orders as are necessary and proper for complete enforcement of the writ, to include any orders necessary to ensure the Department is providing the necessary services in a reasonable timeframe. The Department's nonfeasance with statutory and court-ordered obligations has grown to untenable proportions, and it is critical this State's highest Court intervene to ensure that the people of this state have a speedy, fair, and just criminal justice system.

This document contains 6,778 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24 day of April 2023.

LAWRENCE H. HASKELL
Prosecuting Attorney
WSBA # 27826



NATHAN S. MCKORKLE
Deputy Prosecuting Attorney
WSBA # 55438

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

SPOKANE COUNTY, Petitioner, v. JILMA MENESES, Respondent,	NO. 101520-8 CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 24, 2023, I e-mailed a copy of the Petitioner's Brief in Support of Writ of Mandamus in this matter, pursuant to the parties' agreement, to:

Craig Mingay
Craig.mingay@atg.wa.gov

Nicholas Williamson
Nicholas.williamson@atg.wa.gov

4/24/2023	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

April 24, 2023 - 4:27 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,520-8
Appellate Court Case Title:	Spokane County v. Jilma Meneses

The following documents have been uploaded:

- 1015208_Briefs_20230424162400SC004481_9786.pdf
  This File Contains:
  Briefs - Petitioners
  The Original File Name was Petitioner Brief - 042423 - 1015208.pdf
- 1015208_Motion_20230424162400SC004481_0185.pdf
  This File Contains:
  Motion 1 - Supplement Clerks Papers
  The Original File Name was Mtn to Supp Facts - 042423 - 1015208.pdf

A copy of the uploaded files will be sent to:

- craig.mingay@atg.wa.gov
- nicholas.williamson@atg.wa.gov
- shsappealnotification@atg.wa.gov

Comments:

Sender Name: Hailee Meyers - Email: hmeyers@spokanecounty.org
Filing on Behalf of: Nathan Scott Mckorkle - Email: nmckorkle@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-3662

Note: The Filing Id is 20230424162400SC004481