Supreme Court 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

RESPONSE TO BRIEF OF AMICI CURIAE DISABILITY RIGHTS WASHINGTON, ACLU OF WASHINGTON, AND WASHINGTON DEFENDER ASSOCIATION

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I. INTRODUCTION

Mr. Haskell submits the following response to the amicus brief filed by Disability Rights Washington, the American Civil Liberties Union of Washington, and the Washington Defender Association (hereafter referred to as Amici).

The purpose of an amicus brief is to assist 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).

Amici do not appear to challenge the Secretary's obligations to perform the competency services or the legal foundation for a writ of mandamus and appear to acknowledge that wait times for competency services are far too long. Instead, Amici primarily raise opinions regarding prosecutorial discretion and the role of the competency system within the criminal justice system.

II. ARGUMENT

A. THE PROSECUTOR HAS AN OBLIGATION TO CHARGE CRIMES AND FOLLOW THE LAW, WHICH IS PARTICULARLY RELEVANT IN CASES WITH COMPETENCY ISSUES WHERE EVALUATIONS BY MENTAL HEALTH EXPERTS ARE CRITICAL.

The prosecutor has the ability to choose what crimes to prosecute, but it ultimately falls to the legislature to define what is a crime and the corresponding punishment. *State v. Thomason*, 199 Wn.2d 780, 786, 512 P.3d 882 (2022). It is a key role of the prosecutor to enforce the law and prosecute "those who have

violated the peace and dignity of the state by breaking the law" while also seeing that the rights of a defendant to a fair trial are protected. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). The decision to charge criminal offenses necessitates careful discretion to see that the power is used fairly and uniformly, but this discretion remains a delicate component of the role of the prosecuting authority that cannot be reduced to a formula. *State v. Pettitt*, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980). The legislature has recognized that crime is harmful to victims and has emphasized that prosecutors must take into consideration the rights and wellbeing of crime victims when prosecuting cases. RCW 7.69.010; RCW 7.69.030.

Competency is not a prerequisite to filing criminal charges, as one's competency cannot be ascertained until the case commences. *State v. Carneh*, 149 Wn. App. 402, 410, 203 P.3d 1073 (2009). A defendant's mental health condition and

competency are often fluid and subject to change over the course of proceedings. *State v. Coley*, 180 Wn.2d 543, 555, 326 P.3d 702 (2014); *State v. Lawrence*, 166 Wn. App. 378, 396, 271 P.3d 280 (2012). The order for a competency evaluation is distinct from a legal finding of competency or lack thereof, which would be determined in a subsequent hearing after the evaluation. *State v. Fedoruk*, 5 Wn. App. 2d 317, 335, 426 P.3d 757 (2018).[1] A motion for a competency evaluation "is not of itself sufficient to raise a doubt concerning competency." *City of Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). In short, predicting competency before criminal charges are filed is rarely

[1] Before July 2023, RCW 10.77.060(1)(a) specified a competency evaluation was to be ordered whenever defense met the threshold burden of showing a reason to doubt competency. *Fedoruk*, 5 Wn. App. 2d at 335. This statute was changed by Engrossed Second Substitute Senate Bill 5440, which now requires the trial court determine if sufficient facts have been presented to form a genuine doubt as to competency. RCW 10.77.060(1)(b)(i).

feasible when the issues of competency are often subject to change and variation. This is why an evaluation by a qualified professional person is imperative to assist in determining a defendant's competency to proceed to trial.

Amici claim that prosecutors overcharging "low-level misdemeanor offenses" is exacerbating the problem raised by the petitioner. Amici Brief at 5. Amici fail to define what a "low-level misdemeanor offense" is, which is, of itself, part of the challenge. One's attitudes towards what crimes should be a priority is largely personal opinion. Misdemeanor offenses are often initiated by criminal citations issued by the arresting officer. CrRLJ 2.1(b)(1). Ultimately, it is the legislature that defines particular crimes and penalties. It is also the legislature that has specified defendants charged with these crimes are to undergo evaluation by professional persons, specifically placing

the obligation on the Secretary to designate an evaluator when directed to do so by the court.

A prosecutor cannot simply dismiss every case where competency issues manifest. While Amici highlight criminal defendants who have been repetitively caught up in the competency services and indicate prosecution of those individuals is not appropriate, such cases may be necessary where other attempts at intervention (such as civil treatment or commitment) have failed and the public is paying the price. Amici Brief at 10-11. Evaluating individuals to ascertain if they may face trial or should be directed to another outcome is critical for a well-informed criminal justice system. Professional evaluations are critical to root out malingering individuals or fabricated mental illness, specifically those who may fake or exaggerate mental illness to avoid criminal charges and conviction, a concerning ramification when less scrupulous

individuals recognize the competency system as a path to dismissal. *See Matter of Personal Restraint of Benn*, 134 Wn.2d 868, 932, 952 P.2d 116 (1998). As the legislature appropriately directed by statute, competency evaluations are necessary and appropriate to help the court and parties make appropriate decisions. Dismissal simply because past evaluations have occurred is not always appropriate.

B. PETITIONER HASKELL DID NOT ADDRESS MISDEMEANOR COMPETENCY RESTORATION IN THE PETITION FOR A WRIT OF MANDAMUS BECAUSE THERE IS NO FACTUAL SUPPORT TO IDENTIFY IT AS A PROBLEM OR WASTING RESOURCES IN SPOKANE COUNTY.

The limited resources available for competency restoration effectively and practically limit much of the Prosecutor's discretion. Mr. Haskell did not raise issues surrounding competency restoration for misdemeanor offenses under RCW 10.77.088 within the petition for a writ of mandamus. Neither the Respondent, nor Amici, have provided

any credible statistical documentation demonstrating Spokane County routinely orders individuals only charged with misdemeanor offenses into competency restoration treatment. Absent that information, it is purely speculative that this occurs, much less has any effect on the timelines of felony restoration. Restoration services for individuals charged with misdemeanors are limited based on the nature of the offense and, if eligible, may only net a fifteen-day competency restoration period. RCW 10.77.088; RCW 10.77.092. While RCW 10.77.088 includes obligations for the Department (not specifically the Secretary) to provide services in certain circumstances, the prosecution has to make particular showing to justify the need for restoration and this comes at heightened judicial standard.

Although RCW 10.77.088(2) permits out of custody restoration for misdemeanors, a defendant must be willing to engage in the program and revocation risks reallocating bedspace

to the misdemeanor case per RCW 10.77.088(2)(e), taking space away from defendants with felonies waiting in custody. There is a profound question whether the defense counsel or a defendant would agree to this program if the only feasible alternative is dismissal.

Even if other counties seek such services and cause delays, it does not change that the legislature still tasked the Department to take defendants for misdemeanor restorations when ordered. The Department is still bound by the law and cannot refuse such obligations, even if Amici dislike how some prosecutors use their discretion.

C. WHILE OUT OF CUSTODY COMPETENCY RESTORATION AND DIVERSIONS PROVIDE VALUABLE SERVICES, THESE SERVICES COME WITH IMPORTANT CAVEATS AND ARE NOT AS DEPENDENT ON PROSECUTORIAL DISCRETION AS AMICI INDICATE.

Amici criticize prosecutors for failing to use diversion programs and out of custody competency restoration. Amici Brief at 6-7, 19-24. Amici do not contextualize that these programs are not the quick, easy solutions they seem to imply and also fail to highlight that prosecutors cannot always direct defendants towards these programs even when a prosecutor deems it appropriate.

This is particularly relevant in out of custody competency restoration, which is a program that can be ordered at a court's discretion. RCW 10.77.086(1)(a). However, out of custody competency restoration is only suitable when an incompetent defendant is clinically appropriate and agrees to take medications, abstain from alcohol or unprescribed drugs, and be monitored for substance abuse. RCW 10.77.086(2)(a).[2] A

[2] There is a very legitimate and often troubling question of whether someone who lacks the capacity to assist in their defense

prosecutor may want to refer a defendant for out of custody restoration, but a defendant can refuse or be clinically inappropriate. It is a Department employee, a forensic navigator, who helps make and advise on decisions regarding clinical appropriateness. RCW 10.77.074.

A defendant who is willing and clinically appropriate for out of custody competency restoration can simply move the court to grant this option, even if the prosecutor is not in agreement. RCW 10.77.086(1)(a). Yet, out of custody competency restoration comes with very real challenges. The program oversees defendants with significant mental illness who often require close supervision and experience difficulty with medication management and cooccurring mental health and

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or understand criminal proceedings can appropriately agree to these terms, which raises the uncomfortable quandary of whether the individual is indeed incompetent or if they are making a knowing agreement.

substance abuse issues. These challenges, in addition to risks of new criminal law violations and those who may flee treatment, may cause concern not only for prosecutors, but for defense attorneys who want the client to be in a sober environment with close supervision from treatment staff with limited opportunity to acquire new criminal law violations while stabilizing acute mental illness.

Some of the same problems with out of custody competency restoration are present for diversions. An incompetent defendant cannot be tried, convicted, sentenced, waive trial, or enter a plea. RCW 10.77.050; *In re Fleming*, 142 Wn.2d 853, 864-65, 16 P.3d 610 (2001). Such limitations regarding what an incompetent defendant can legally agree to or perform raises difficult questions of just how much such defendants can agree to or be held accountable in certain diversion programs.

RCW 10.77.072(3)(a) and (b) also provide circumstances in which diversion or civil commitment programs may allow dismissal at defense request with an appropriate showing, assuming those programs are applicable. RCW 10.77.072 and RCW 10.77.086 allow diversion programs for defendants in lieu of competency restoration for some class C felonies. However, a forensic navigator must present an appropriate and available diversion program before the parties can dismiss. If this plan is not presented, the prosecutor does not have a basis to agree to dismiss. Finally, while the legislature has indicated prosecutorial discretion is appropriate to dismiss some cases for referral to alternative treatment, the legislature has indicated this should not be applied in the cases of violent crimes. RCW 10.77.079. Amici do not address what the court or parties should do if diversions fail, when defendants are unwilling to engage in diversions, or when a defendant is engaged in repetitive violent conduct.

D. AMICI EFFECTIVELY DEMONSTRATES WHY THE *TRUEBLOOD*[3] INJUNCTION IS INADEQUATE, FURTHER HIGHLIGHT WHY MR. HASKELL'S REQUESTED WRIT IS NECESSARY.

Amici highlight the increasing demand for competency services. Mr. Haskell concurs it is necessary and appropriate to both fix the competency evaluation and restoration system and institute changes to increase the availability of community treatment services. There is little dispute that mental health resources are lacking at all levels.

The situations that raise the greatest concern for Mr. Haskell are when preventative services are too late and the crime has occurred. While Amici repeatedly discuss the vulnerability and harm caused to those charged with crimes, Amici do not address that, even if someone has competency

[3] *Trueblood v. Wash. State Dep't of Social & Health Services*, 101 F. Supp. 3d 1010 (W.D. Wash. 2015)

issues, the crimes they commit are just as real to the victims. Amici do not address that crime victims too can be vulnerable and be particularly frustrated when the same defendant repeats criminal behavior only to see charges dismissed for lack of competency.

The criminal justice system is not only about holding individuals accountable and addressing public safety, but is also meant to offer defendants the chance for self-improvement and reduce the risk of reoffending in the community. RCW 9.94A.010. It is not simply seeking punishment as Amici contends. Amici Brief at 7. Outcomes including mental health sentencing alternative (RCW 9.94A.695), drug offender sentencing alternative (RCW 9.94A.660), therapeutic courts (RCW 2.30.010), treatment in community custody (RCW 9.94A.703), and misdemeanor probation are all treatment options that also address community safety and accountability.

These resolutions are only available to defendants who are competent. A plea of not guilty by reason of insanity and subsequent civil treatment is only possible for a competent defendant.

Amici highlight the *Trueblood* lawsuit as working to direct funds, including significant sanctions paid by the Department for its noncompliance and resources aimed at reducing the need for forensic criminal competency services. Amici Brief at 16, 18, 21-22. Amici similarly highlight its settlements with the Department. Amici Brief at 22. This does not change legislative mandates to the Secretary and Department requiring they provide services when the specific legal criteria are met. While working to reduce the need for competency services is critical, allowing the current system to collapse or tolerate such extensive delays is not reasonable. This is true even if Amici do not approve of the competency restoration system, believe the alternative

approaches they advocate are better, or are concerned there may be punitive repercussions for those restored to competency. Meanwhile, neither Mr. Haskell nor this Court can permit such delays in the criminal justice system to continue, at the expense of defendants' rights, public safety, and integrity of the criminal justice system.

III. CONCLUSION

Amici do not provide a basis for this Court to deny issuing a writ of mandamus against the Secretary of the Department.

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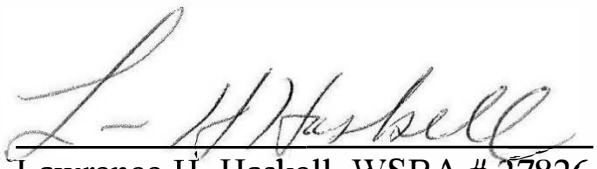
Dated this 27 day of December, 2023.



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IN THE SUPREME COURT OF THE
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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 December 27, 2023, I e-mailed a copy of the Response to Brief of Amici Curiae Disability Rights Washington, ACLU of Washington, and Washington Defender Association in this matter, pursuant to the parties' agreement, to:

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