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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

DAYBREAK YOUTH SERVICES,

Appellant,

v.

CLARK COUNTY SHERIFF'S OFFICE,

Respondent

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
Honorable Jennifer Snider

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
APPENDICES	iii
TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION.....	1
II. APPELLATE REVIEW STANDARD	3
III. ARGUMENT IN REPLY.....	4
A. <u>This case is not moot</u>	4
1. Because a dismissal based on withdrawal of the action would leave the defendant “free to return to his old ways,” courts routinely hold that the voluntary cessation of a challenged practice does <i>not</i> moot a case.....	4
2. There remains a legal controversy that needs to be resolved by the courts. That is what a declaratory judgment is for. Moreover, injunctive relief is warranted because Daybreak has a well-grounded fear that the Sheriff’s Office will employ the same ex parte search warrant procedure in future cases.....	7
3. Even if this case were moot, this Court should decide the questions in dispute because the issues raised are repetitious, capable of evading review, and there is a huge public interest in resolving these questions.....	11
B. The violations of the Fourth Amendment and Wash. Const., art. 1, §7 are manifest and thus are reviewable under RAP 2.5.	12
1. The Fourth Amendment Particularity Clause.	13

	<u>Page</u>
2. Article 1, §7 and the right to notice and a prior opportunity to be heard before records are seized.....	14
C. The Sheriff’s arguments concerning the Superior Court’s “overbreadth” ruling miss the point entirely. Since the warrants allowed the Sheriff’s deputies to seize anything and everything, <i>of course</i> they did not seize anything outside the scope of the warrants.....	15
D. Daybreak has standing to raise these issues and to move for the return of property.	19
E. The Sheriff ignores the violation of 42 C.F.R. §2.61.	20
F. The Sheriff ignores violations of 42 C.F.R. §2.64(d)(1) & (d)(2).....	21
G. The Sheriff ignores the violations of §2.65 by baldly asserting that it was never investigating patients. But the warrants themselves label two patient perpetrators of a sexual assault as “suspects” whom the Detective intends to identify.....	23
IV. CONCLUSION.....	24

APPENDICES

	<u>Page(s)</u>
Appendix A: Excerpt, Trans. of 6/19/19 in <i>Daybreak Youth Services v. Atkins</i> , U.S. Court No. No. 3:19-cv-05521 – BHS (pages 3, 7, 13 & 15),	A-1 to A-5
Appendix B: Stipulation and Order of Dismissal, dated 7/17/19 in <i>Daybreak Youth Services v. Atkins</i> , U.S. Court No. No. 3:19-cv-05521–BHS.....	B-1 to B-2
Appendix C: Order Denying TRO, September 21, 2019,.....	C-1 to C-3

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>Henne v. City of Yakima</i> 182 Wn.2d 447, 341 P.3d 284 (2015)	6
<i>In re Eaton</i> 110 Wn.2d 892, 757 P.2d 961 (1988)	11
<i>Matter of 13811 Highway 99, Lynwood, Washington</i> 194 Wn. App. 365, 378 P.3d 568 (2016).....	20
<i>State v. Besola</i> 184 Wn.2d 605, 359 P.3d 799 (2015)	13
<i>State v. Chamberlain</i> 161 Wn.2d 30, 162 P.3d 389 (2007)	4
<i>State v. Kelly</i> 52 Wn. App. 581, 762 P.2d 20 (1988)	17
<i>State v. Maddox</i> 116 Wn. App. 796, 67 P.3d 1135 (2003).....	17
<i>State v. Niedergang</i> 43 Wn. App. 656, 719 P.2d 576 (1986)	17
<i>State v. Nusbaum</i> 126 Wn. App. 160, 107 P.3d 768 (2005).....	4
<i>State v. Perrone</i> 119 Wn.2d 538, 834 P.2d 611 (1992)	4, 13, 14, 17
<i>State v. Ralph Williams</i> 82 Wn.2d 265, 510 P.2d 233 (1973)	5
<i>State ex rel. Ralph Williams</i> 87 Wn.2d 298, 553 P.2d 423 (1976)	5
<i>State v. Riley</i> 121 Wn.2d 22, 846 P.2d 1365 (1993)	13, 18

	<u>Page(s)</u>
<i>Tyler Pipe Industries v. Department of Revenue</i> 96 Wn.2d 785, 638 P.2d 1213 (1982)	11
Other States' Cases	
<i>In re Attorney General v. Mortiere</i> 327 Mich. App. 136, 933 N.W.2d 351 (2019).....	21
<i>In re Grand Jury Subpoena (Medical Records of Payne),</i> 150 N.H. 436, 839 A.2d 837 (2004)	9
<i>In re Search Warrant for Medical Records of C.T.</i> 160 N.H. 214, 999 A.2d 210 (2010)	8, 9, 10
Federal Cases	
<i>Andresen v. Maryland</i> 427 U.S. 463 (1976).....	14
<i>Bivens v. Six Unknown Agents</i> 403 U.S. 388, 394 (1971)	17
<i>City of Mesquite v. Aladdin's Castle, Inc.</i> 455 U.S. 283 (1982).....	5
<i>Friends of the Earth v. Laidlaw Environmental</i> 528 U.S. 167 (2000).....	5
<i>Knox v. Service Employees Int'l Union</i> 567 U.S. 298 (2012).....	6
<i>Lankford v. Gelston</i> 364 F.2d 197 (4 th Cir. 1966)	7
<i>Lo-Ji Sales, Inc. v. New York</i> 442 U.S. 319 (1979).....	19
<i>Ornelas v. United States,</i> 517 U.S. 690 (1996).....	4
<i>Porter v. Clarke</i> 852 F.3d 358 (4 th Cir. 2017)	6

	<u>Page(s)</u>
<i>Stanford v. Texas</i> 379 U.S. 476 (1965).....	4
<i>U.S. v. Cresta</i> 825 F.2d 538 (1 st Cir. 1987).....	23
<i>U. S. v. W. T. Grant Co.</i> 345 U.S. 629 (1953).....	5
<i>U.S. v. Oregon State Medical Society</i> 343 U.S. 326 (1952).....	5-6

Constitutional Provisions, Statutes and Court Rules

CrR 2.3(e).....	19, 20
RAP 2.5(a).....	12
RCW 7.24.020	8
42 U.S.C. §290dd-2.....	2, 3, 7, 8, 11, 12, 19, 22, 23
42 C.F.R. §2.31.....	12
42 C.F.R. §2.35.....	12
42 C.F.R. §2.61.....	11, 19, 20-21
42 C.F.R. §2.63.....	12
42 C.F.R. §2.64.....	12, 21, 22, 23
42 C.F.R. §2.65.....	12, 23, 24
42 C.F.R. §2.66.....	12, 23-24

Other Authorities

Jade, <i>The Secret Life of 42 CFR Part 2</i> , 30 Champion 34 (April 2006)	12, 25
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I. INTRODUCTION

The Clark County Sheriff's Office broke the law when it executed search warrants and seized patient drug treatment records without even attempting to comply with federal law. When the federal violation was pointed out, the Sheriff sought an order retroactively blessing what it had already done, even though the federal statute explicitly required issuance of a good cause order and a subpoena *before* the seizure of patient treatment records. The Sheriff successfully *opposed* Daybreak's motion for an order compelling it to return the records that it had unlawfully seized. The Sheriff told the Court that it had *already* sent portions of some patients' records to the Department of Health¹ and to the Clark County Prosecuting Attorney's Office. RP 7/5/19, at 16:20-22.² The Sheriff also told the Court that his office had decided to voluntarily return 20 illegally seized pieces of evidence – that it didn't need – and that it was *retaining* possession of all the other evidence items so that it could use them to prosecute one of Daybreak's employees for a gross misdemeanor. The Court denied Daybreak's motion for an order compelling the Sheriff to return everything and ruled that it was simply going to leave it to the county prosecutor to

¹ RP 7/5/19, at 33: "The Department of Health asked the Sheriff's Office for a copy of the video. The Sheriff's office complied. The only other disclosure was the Sheriff's Office had two police reports that ... it gave ... to the Department of Health."

² "Further, as referenced in the Sheriff's Office reply concerning the motion for good cause, the Sheriff's Office has agreed to release 20 evidence items." In that reply brief, the Sheriff's Office acknowledged that it had seized the records "of ten (10) patients, reviewed them, sent portions of records of three (3) patients to the Clark County Prosecuting Attorney's Office, (PA's Office) for referral of charges and is prepared to release the records of the remaining seven (7) patients. In addition, CCSO is prepared to release a total of twenty (20) evidence items, including the electronically stored information." CP 1254.

decide which records were necessary to retain and then “pursuant to the Sheriff’s Office policies” the Sheriff would return whatever records the prosecutor decided were unnecessary to retain. RP 7/5/19, at 40.

Twelve days later, the Sheriff’s Office filed a “Notice of Voluntary Return of Evidence Items” in which it memorialized the fact that at the hearing of July 5, 2019 the Sheriff’s Office “represented that it will voluntarily return the following evidence items seized during the execution of search warrants to Plaintiff Daybreak Youth Services.” CP 1445. The notice listed 20 items (including No. 7 “Healthcare Records”) under the heading “Evidence Items to be Voluntarily Returned.” CP 1446.

Having voluntarily returned *some* of the seized patient records, the Sheriff now argues that the case is moot. The Sheriff never explains why the case should be moot as to the documents that it refused to return and sent on to the county prosecutor’s office.³ Moreover, as noted below, even as to the documents and items that it voluntarily returned, the mootness argument flies in the face of the settled proposition that voluntary cessation of an illegal practice does *not* moot a case. *See* Argument, Section A.

In essence, the Sheriff’s Office seeks to avoid any appellate court decision on the question of whether it violated the law because it wants to be free to violate the law again in the future. If this case is dismissed as moot – without resolving the legal questions raised by Daybreak – the

³ The Sheriff seems to be arguing that since the Superior Court ruled that there was good cause to seize the records under 42 U.S.C. §290dd-2 and its accompanying regulations, the issue of whether those records need to be returned is moot. But Daybreak has appealed that ruling. Since this Court may reverse that ruling, the issue of the return of the records is not moot.

Sheriff's Office can just do the same thing again. It can illegally seize drug patient records again, keep the records that it wants to keep, voluntarily give back the ones it doesn't care about, and continue its unlawful practices which have the effect of destroying the confidentiality of drug treatment records that Congress and the courts have said must be safeguarded.

Finally, the Sheriff's Office argues that (1) since it promised not to disclose the illegally seized records to anyone else (having already disclosed some of them to the county prosecutor and the State Department of Health; and (2) since a protective order has been put into place in the criminal case against Michael Trotter which prohibits anyone except the Prosecutor and defense counsel from seeing the records; there is "no reason" to make the Sheriff give back what it seized in violation of federal law, because there won't be any *more* violations. *See BOR*, at 2 ("These records are being safeguarded ... [h]ence there is no reason to return the records to Daybreak until the prosecution of the Daybreak employee is complete."). In essence the Sheriff says to this Court: "Trust us – we won't do it anymore."

II. APPELLATE REVIEW STANDARD

Without citing to any authority, the Sheriff asserts that "[d]e novo review does not apply to this Court's review of the trial court's finding that CCSO had good cause to seize the records" because "[w]hether there was good cause is inherently a factual issue." *Brief of Respondent (BOR)*, at 19. There does not appear to be a case that specifically holds what the proper appellate review standard is for a "good cause" determination under 42 U.S.C. §290dd-2. Undoubtedly that is because it is so obvious to all courts

that whether “good cause” for the seizure of substance abuse treatment records exists is a mixed question of law and fact that is reviewed *de novo*.

The most obvious analogy to “good cause” determinations for search warrants authorizing the seizure of particularly private or confidential records is to the more ordinary Fourth Amendment determination of probable cause that must be made before any search warrant can be issued. It is settled that “probable cause” determinations are reviewed under the *de novo* standard. *State v. Chamberlain*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).⁴ Warrants for the seizure of books and papers – like medical records – because they are entitled to a heightened degree of protection against search and seizure, must meet a heightened particularity standard, *see Stanford v. Texas*, 379 U.S. 476, 485 (1965), and appellate review of any determination that a warrant met that heightened standard is *de novo*. *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992).

III. ARGUMENT IN REPLY

A. This case is not moot.

1. **Because a dismissal based on withdrawal of the action would leave the defendant “free to return to his old ways,” courts routinely hold that the voluntary cessation of a challenged practice does *not* moot a case.**

Long ago the U.S. Supreme Court held “that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and

⁴ “Appellate courts review *de novo* the legal conclusion of law whether probable cause is established.” *Accord State v. Nusbaum*, 126 Wn. App. 160, 166-67, 107 P.3d 768 (2005). The U.S. Supreme Court follows the same rule. *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (probable cause is a question of law reviewed *de novo*).

determine the case, *i.e.*, *does not make the case moot.*” *U. S. v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (italics added). If there remains “a dispute over the legality of the challenged practices,” there will be no dismissal on mootness grounds because a “controversy may remain to be settled.” *Id.* If dismissal were warranted just because the defendant says he has stopped engaging in the practice that would mean “[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.” *Id.*⁵

The Washington Supreme Court follows the same rule. “Voluntary cessation of allegedly illegal conduct does not moot a case because there is still a likelihood of the illegal conduct recurring.” *State v. Ralph Williams*, 82 Wn.2d 265, 272, 510 P.2d 233 (1973) (*Ralph Williams I*).⁶ The Court noted that the defendant company “did not terminate these practices until after [the State] filed its suit” and that, a mootness dismissal would allow the defendant to “resume the prior illegal practices.” *State ex rel. Ralph Williams*, 87 Wn.2d 298, 312-313, 553 P.2d 423 (1976) (*Ralph Williams II*) (citing *Grant*, 345 U.S. at 632). Finding it particularly inappropriate to dismiss for mootness when the challenged practice was only abandoned after suit was brought, the Court held, “[c]ourts must beware of efforts to

⁵ *Accord City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982) (“It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.”); *Friends of the Earth v. Laidlaw Environmental*, 528 U.S. 167, 189 (2000) (same).

⁶ The trial court dismissed an enforcement action against a corporation on mootness grounds because the company had become inactive, but this Court reversed and reinstated the action because it was not clear that the challenged behavior would not reoccur.

defeat injunctive relief by protestations of reform.” *Id.* at 312, citing *U.S. v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).⁷

More recently, in *Henne v. City of Yakima*, 182 Wn.2d 447, 341 P.3d 284 (2015), the Washington Supreme Court reversed a mootness dismissal order. Even though the plaintiff police officer amended his complaint to *remove* his harassment claim which threatened the defendant city with civil liability for having investigated internal complaints of misconduct made against him, the Court held that the case was *not* moot. By threatening civil liability, Henne’s harassment claim was designed to “deter individuals...from fully exercising their constitutional rights to petition the government and to speak out on public issues.” *Id.* at 455, quoting RCW 4.24.525. Similarly, by voluntarily returning many of the illegally seized patient records, the Sheriff’s Office continues to assert that so long as it voluntarily decided to give them back when it no longer wants them, it can seize patient drug treatment records whenever it wants to *without* having to comply with federal law before the seizure is made. It did not matter in *Henne* that the officer withdrew his harassment claim. Similarly, it does not matter here that the Sheriff has voluntarily given back some of the seized documents. Here, as in *Henne*, the mere existence of the potential power to seize drug treatment records without first receiving judicial permission

⁷ *Accord Knox v. Service Employees Int’l Union*, 567 U.S. 298, 307 (2012) (When a party changes its policy *after* review is granted, such “maneuvers designed to insulate a decision from review by this court must be viewed with a critical eye.”); *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017) (“a party should not be able to evade judicial review...by temporarily altering questionable behavior”; the voluntary cessation rule seeks to prevent “a manipulative litigant [from] immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after.”).

creates a powerful motive for juveniles who need drug treatment to choose not to enroll in substance abuse treatment programs. This is precisely what Congress intended to prevent by enacting 42 U.S.C. §290dd-2.

Even when police assert that they “won’t do it again,” courts routinely reject the contention that a suit challenging police practices has become moot. *See, e.g., Lankford v. Gelston*, 364 F.2d 197, 203 (4th Cir. 1966) (“Police protestations of repentance and reform timed to anticipate or to blunt the force of a lawsuit offer insufficient assurance that similar raids will not ensue when another aggravated crime occurs.”).

- 2. There remains a legal controversy that needs to be resolved by the courts. That is what a declaratory judgment is for. Moreover, injunctive relief is warranted because Daybreak has a well-grounded fear that the Sheriff’s Office will employ the same ex parte search warrant procedure in future cases.**

As the Sheriff’s Office has noted, Daybreak’s complaint included claims for both “injunctive and declaratory relief regarding the seizure of records.” *BOR*, at 7. After the Superior Court denied a TRO without prejudice, Daybreak filed a new lawsuit in federal court. As the Sheriff’s Office acknowledges, “the federal complaint sought the same type of relief” – “declaratory and injunctive relief” – as the complaint filed in Clark County Superior Court” *BOR*, at 8. The federal judge presiding over that matter, however, ruled that he was required to abstain from deciding the questions raised in that suit because there was a case pending in state court – this case – that was already dealing with the same controversy. Daybreak also filed an Amended Complaint in Superior Court in which it

again asked for a declaratory judgment, a writ of replevin, and an order requiring the Sheriff to recover and return to Daybreak all the information it re-disclosed to third parties. CP 581, 592.

Under RCW 7.24.020, a person “whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder.” Daybreak sought a determination of its rights under 42 U.S.C. §290dd-2. It sought a determination that both its procedural and its substantive rights were violated. With respect to its procedural rights, Daybreak sought a ruling that it had the right to prior notice and a prior opportunity to be heard *before* any patient records were seized and that the violation of this procedural right entitled it to a return of all the seized documents.

The Superior Court never directly decided these procedural issues, although it impliedly rejected Daybreak’s assertion that these rights were violated by denying its motion for a return of all the seized documents. The Sheriff’s Office now argues that since it has voluntarily returned some of the seized documents, the case is now moot. But it ignores the fact that the legal controversy regarding Daybreak’s rights to prior notice and an opportunity to be heard have never been explicitly decided. Moreover, to the extent that they have been impliedly and silently decided, the issue is not moot because this Court – like the Court in *In re Search Warrant for Medical Records of C.T.*, 160 N.H. 214, 999 A.2d 210 (2010) – may decide that the trial court decided this legal question incorrectly.

In *Medical Records of C.T.*, the State served a search warrant on a hospital. Although the hospital produced the records the next day, the hospital also brought suit seeking an order declaring that the State could not routinely use search warrants to obtain patient medical records. 999 A.2d at 214. The trial court denied the Hospital’s request and the Hospital appealed. On appeal, the Hospital argued that the use of search warrants to obtain medical records was inappropriate because it “relieves the State of its obligation to demonstrate a lack of alternative sources for the evidence it seeks.” 999 A.2d at 214. The Hospital maintained “that an opportunity to object prior to disclosure is critical because post-disclosure relief, including preclusion of admissibility, is insufficient; the chilling effect on physician-patient communications would already have occurred.” *Id.* Lastly, the Hospital argued “that when the State seeks privileged medical records, the protections we set out in *Payne* [8] should be required.” *Id.*

“The State first counter[ed] that the case is moot.” *Id.* The New Hampshire Supreme Court rejected this argument, holding although C.T.’s medical records had been produced, the legal question of whether they had been unlawfully obtained remained to be decided:

We first reject the State’s suggestion that we should dismiss the Hospital’s appeal as moot because the documents have been produced. The State itself points out that a warrant may be challenged only after its execution. By its pleadings, the Hospital properly preserved its objection to the trial court’s order requiring production of C.T.’s medical records. The Hospital’s compliance

⁸ *In re Grand Jury Subpoena (Medical Records of Payne)*, 150 N.H. 436, 839 A.2d 837 (2004) held that law enforcement must give the records holder prior notice and an opportunity to contest production of such records before the records are produced.

with the search warrant and the subsequent court order does not render this appeal moot.

Medical Records of C.T., 999 A.2d at 215 (citations omitted).

The New Hampshire Supreme Court held that it needed to decide the unresolved legal issues because otherwise the protections of the evidence rule covering medical records would be rendered worthless:

Because we have a continuing obligation to carefully safeguard the statutory protection afforded the confidential relationship between physicians and patients [citation], we will consider what safeguards should be required in the future when the State seeks privileged medical records by a search warrant.

Medical Records of C.T., 999 A.2d at 217 (internal quotation marks and citations omitted). This Court has a similar obligation to safeguard the statutory protection that Congress gave to the relationship between substance abuse treatment providers and their patients. Thus, this Court must decide the legal questions which the Superior Court did not decide.

Similarly, Daybreak's prayer for injunctive relief is also not moot. The behavior of the Sheriff's Office conclusively demonstrates that it believes it acted lawfully and thus it will not hesitate to follow the same procedure again should it have a desire to seize patient substance abuse treatment records. The Sheriff's Office has argued that it needed the information in patient records in order to prosecute a Daybreak employee for the crime of failure to report an instance of sexual assault of a child.⁹ Thus, the next time the Sheriff's Office thinks that a crime of failure to

⁹ Notably, the New Hampshire Supreme Court *rejected* a nearly identical argument that the State was entitled to use *ex parte* procedures to seize doctor/patient records in order to prosecute a physician for failing to report an injury caused by a criminal act. *See In re Medical Records of C.T.*, 999 A.2d at 218-19.

report has been committed, it will have no reason to refrain from using the same procedure it used in this case, because a Superior Court has held that there is “no harm, no foul” so long as the Sheriff’s Office only discloses protected records to the prosecutor’s office and eventually gives the other records back. Daybreak submits that (1) it has clear legal rights under §290dd-2 and its implementing regulations in 42 C.F.R. §2.61 *et seq.*; (2) the record shows that it also has a well-grounded fear that its rights under these laws will be violated again; and (3) that those violations will cause it actual and substantial injury. *Tyler Pipe Industries v. Department of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982). Thus, this case is not moot, because there is a continuing question as to whether Daybreak is entitled to injunctive relief which this Court must resolve.

3. Even if this case were moot, this Court should decide the questions in dispute because the issues raised are repetitious, capable of evading review, and there is a huge public interest in resolving these questions.

Even when a case is moot, courts retain the discretion and authority to decide issues raised by the parties if they are of substantial public interest. Courts consider three criteria: (1) the public or private nature of the question presented; (2) the need for judicial determination for future guidance of public officers, and (3) the likelihood of future recurrences of the issue. *In re Eaton*, 110 Wn.2d 892, 895, 757 P.2d 961 (1988). All three criteria are met here. The issues raised concern the holders of substance abuse treatment providers, people addicted to drugs and alcohol, and law enforcement officers across the State. There is a great need for judicial

guidance on the question of how to interpret and apply the provisions of 42 U.S.C. §290dd-2 and 42 C.F.R. §§ 2.63, 2.64, 2.65 & 2.66. There are no cases in Washington State¹⁰ – and very few anywhere in the nation¹¹ – that involve these regulations. Guidance is badly needed so that judges will realize that they should *not* simply sign off on search warrants authorizing the seizure of drug treatment records without considering the requirements of federal law. And guidance is needed so that the attorneys who advise the police will inform them of what they can and cannot do. Finally, there is a strong likelihood of recurrence of the issues raised here precisely because there is an absence of case law to guide police, and because the Sheriff in this case insists that his office did nothing wrong.

B. The violations of the Fourth Amendment and Wash. Const., art. 1, §7 are manifest and thus are reviewable under RAP 2.5.

The Sheriff argues that Daybreak cannot raise Fourth Amendment and art. 1, §7 issues under RAP 2.5(a) because that rule does not apply “where the facts necessary for its adjudication are not in the records and therefore where the error is not manifest.” *BOR*, at 32. But the Sheriff does not say what “facts necessary for adjudication” are missing from the record.

¹⁰ There is only one reported Washington case involving this statute, but it involves two different regulations (42 C.F.R. 2.31(a)(9) and 2.35(b)(2)) and a different legal issue. The issue in that case was how long a patient’s waiver of his statutory privilege lasts when he is in a monitored treatment program and he has consented to the release of some information. *See State v. Wheat*, 118 Wn. App. 435, 76 P.3d 280 (2003).

¹¹ “Only once in a dozen blue moons does this law make the news, and typically only when muscle is flexed by a specialized civil litigator on behalf of a celebrity patient or client, such as the niece of President George Bush.” Jade, *The Secret Life of 42 CFR Part 2*, 30 *Champion* 34, 34 (April 2006). “As one federal judge lamented as recently as 2006, there is not much published by the courts on 42 CFR Part 2.” *Id.* at 37.

1. The Fourth Amendment Particularity Clause.

“Warrants ‘must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.’” *State v. Besola*, 184 Wn.2d 605, 610, 359 P.3d 799 (2015), citing *Perrone*, 119 Wn.2d at 546. *Accord State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993). Thus, the only thing necessary to decide the question of whether a warrant meets the particularity requirement is the search warrant. In this case, the record contains all the search warrants (and all the affidavits of probable cause submitted in support of the warrant requests). Thus, the record clearly does contain the facts necessary for adjudication of the issue.

The search warrants obtained by the Sheriff’s Office did not meaningfully limit what could be seized. Like the warrants in *Besola*¹² and *Riley*¹³ – which authorized the seizure of “any,” and “any and all” records and devices – the search warrants in this case authorized the seizure of “any and all client records” and sheriff’s deputies did seize healthcare records. CP 19, ¶6; CP 55 (Evid. Item No. 6). The warrants authorized law enforcement to search for and seize:

Any and all client records, shift notes, and incident reports as stored or entered into “CareLogic” or other reporting system used pertaining to, naming, or anyway involving [names redacted] or the combination thereof. These documents to include the complete un-redacted case file with any and all notes, treatments, medical

¹² *Besola*, 184 Wn.2d at 608-09 (“any and all video tapes,” “any photographs,” “any and all computer hard drives or laptop computers and any memory storage devices”).

¹³ *Riley*, 121 Wn.2d at 26 (“any fruits, instrumentalities and/or evidence of a crime, to-wit: notes, records, lists, ledgers, information stored on hard or floppy discs, personal computers, modems, monitors, speed dialers, touchtone telephones, electronic calculator, electronic notebooks or any electronic recording device.”).

records, meetings, and staff contact involving the aforementioned parties.

CP 24. *See also* CP 28, 32, 36, 40, 44, 48.

The purpose of the Fourth Amendment was to prohibit general warrants which allowed officers to conduct “a general, exploratory rummaging” through a person’s private papers “by requiring a ‘particular description’ of the things to be seized.” *Perrone*, 119 Wn.2d at 545, quoting *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). It is hard to imagine a more invasive “rummaging” through a person’s private papers or a greater disturbance of one’s private affairs than sifting through drug counseling records which likely contain treatment discussion of the manifold reasons (e.g., child abuse, bullying, medical problems, peer pressure from other teens, friction with parents over sex, academic problems, household rules) why juveniles often turn to the use of illegal drugs and alcohol.¹⁴

2. Article 1, §7 and the right to notice and a prior opportunity to be heard before records are seized.

As noted in *Daybreak*’s opening brief, some other states have held that their state constitutions require notice and a prior opportunity to be heard in court *before* law enforcement can seize medical records, psychotherapy records, or similar counseling records. *Daybreak* maintains that wholly aside from whether the federal regulations in 42 C.F.R. Part 2

¹⁴ See CP 18, ¶5 (Decl. COO Terjeson: “Due [to] the nature of its services, *Daybreak* acquires extremely sensitive and personal information about its minor clients. This information includes information provided by minor clients in a confidential setting with mental health practitioners, including during individual therapy sessions. . . . *Daybreak*’s mental health providers cannot provide adequate treatment to its clients without a complete understanding of the client’s background, experiences, and symptoms.”

required the Sheriff to provide Daybreak with such notice and a prior opportunity to be heard, art. 1, §7 requires these procedural protections. The Sheriff argues that the record is missing facts that are necessary to decide this state constitutional issue and therefore the issue cannot be raised for the first time on appeal. Once again, the Sheriff does not state what these missing facts are. Instead, the Sheriff just says: “Can’t do it because necessary facts are missing” and proceeds to completely ignore this issue.

C. The Sheriff’s arguments concerning the Superior Court’s “overbreadth” ruling miss the point entirely. Since the warrants allowed the Sheriff’s deputies to seize anything and everything, of course they did not seize anything outside the scope of the warrants.

Citing only to CP 88, the Sheriff argues “the record is clear the Particularity Clause was satisfied in the language of the search warrants as *three* judges reviewed the warrants and all *three* determined that they were not overbroad.” *BOR*, at 33 (italics added).

Presumably the Sheriff means that, besides Judge Lewis, Judge Settle and Judge Snider must have rejected “overbreadth” challenges. But this is simply wrong. Neither Judge Settle nor Judge Snider ever made any ruling about overbreadth (or about the Particularity Clause).

Judge Settle never made any written rulings at all. He orally denied Daybreak’s motion for a TRO because due to the abstention doctrine he doubted he had jurisdiction. He noted that there was a state case pending (this case) where all of Daybreak’s claims could be addressed. *See Daybreak v. Atkins*, U.S. Dist. Ct. No. 3:19-cv-05521–BHS, Trans. Excerpt

CP 1232-1241, 6/19/19 (copy attached as Appendix A).¹⁵ The only thing he said was that he was “not finding there is a basis for temporary restraining order, one, as to the initial problem of jurisdiction,” and because since there was a hearing coming up in state court where Daybreak’s concerns could be addressed he was not satisfied that Daybreak had shown a risk of irreparable harm in the absence of a TRO. CP 1240, *Trans.* at 15:10-16. Judge Settle directed “the parties to propose a briefing schedule” for “briefing [that] relates to the abstention issues” CP 1240, *Trans.* at 15:19-21. But no such schedule was ever proposed and the federal case was eventually dismissed by stipulation of the parties without prejudice. See Appendix B (Stipulation and Order of Dismissal). Thus, for the Sheriff to claim that Judge Settle “determined” that the search warrants were not overbroad is absurd.

Similarly, a reading of Judge Snider’s three orders discloses she never addressed any issue regarding the “overbreadth” of the search warrants. See CP 1375-78; CP 1380-81; CP 1383-84.

The only judge to address any overbreadth issue was Judge Lewis,

¹⁵ CP 1233: “Now Clark County ... is asking the [state] court – whereas the injunctive relief was previously sought [in state court] by plaintiff [Daybreak] . . . now Clark County is seeking to attain an order of the kind contemplated in [42 C.F.R.] Part 2. Even before that was filed [this morning] I had a concern that there may be an abstention issue here under *Rooker-Feldman* or *Younger*. It seems to me this is where this matter should be resolved is in Clark County Superior Court. There is now a pending motion in which the prosecutor’s office is ostensibly as concerned as the plaintiff in this case that the Part 2 be complied with, a qualifying order would be entered protecting the very information that plaintiff seeks to protect and seeking an order. [¶] Where I think we need to begin is: Isn’t that the best place to deal with it?” *Trans.*, at 3:2-24. CP 1236: *Trans.* at 7:11: “[W]hy cannot that court redress any concern that you have?” CP 1238: *Trans.* at 13:9-10 : “I am questioning the court’s jurisdiction.”

and he addressed a *different* “overbreadth” issue (an issue *not* involving the Particularity Clause).¹⁶ CP 88, ¶3. As courts have recognized, the term overbreadth gets used to cover several different types of claims. *See, e.g., State v. Maddox*, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003).¹⁷ Judge Lewis addressed the issue of whether the search warrants were *executed* in an unconstitutional manner because the officers *exceeded the scope* of the warrant by seizing something that the warrant did not authorize them to seize. “Pursuant to the Fourth Amendment of the United States Constitution, an officer must execute a search warrant strictly within the bounds set by the warrant.” *State v. Kelly*, 52 Wn. App. 581, 585, 762 P.2d 20 (1988), citing *Bivens v. Six Unknown Agents*, 403 U.S. 388, 394 (1971). *See State v. Niedergang*, 43 Wn. App. 656, 662, 719 P.2d 576 (1986)(search of automobile exceeded the scope of the search warrant).

In this case, using the term “overbroad,” Judge Lewis ruled that the sheriff’s deputies’ seizures of documents, computers and storage devices did not exceed the scope of the search warrants precisely because the warrants authorized them to seize everything. Judge Lewis ruled:

The scope of the warrants is not overbroad. ***Pursuant to the search warrants, CCSO was allowed to search the entire building and its contents. At this time, there is no evidence CCSO’s search and seizure was outside the scope of the search warrants*** because the Sheriff’s Office has not yet filed a Return with the Court of those items it seized from the search. . . .

¹⁶ Even if he had made a ruling on compliance with the Particularity Clause, this Court would have to review that ruling under the *de novo* standard. *Perrone*, 119 Wn.2d at 549.

¹⁷ “A warrant can be ‘overbroad’ either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist.”

CP 88 (emphasis added) (copy attached as Appendix C).

Judge Lewis called his ruling on whether the officers' execution of the warrants exceeded their "scope" a ruling on overbreadth. At the time of his ruling, as he specifically noted, since the Sheriff's Office had not yet filed a return, there was no way for the court to know what the deputies had seized. CP 88. Thus, he denied Daybreak's motion for a TRO to enjoin the deputies from using what they had seized but he did so "without prejudice" to Daybreak's right to renew its motion. CP 88-89.

On appeal, Daybreak has *not* raised any Claim that the Sheriff's deputies exceeded the scope of the warrants.¹⁸ They claim that the warrants themselves violated the Particularity Clause and that Judge Lewis' ruling conclusively proves their point. He ruled that the officers' seizures didn't and couldn't exceed the scope of the warrants precisely because the warrants authorized the seizure of *everything*. But a warrant that authorizes the seizure of everything is overbroad because it violates the Fourth Amendment rule that "no warrants shall issue" except those "particularly describing ... the persons or things to be seized." U.S. CONST., Amend. IV.

¹⁸ Daybreak is arguing that the warrants were overbroad because they *authorized* the seizure of *every* document, including, for example, the individual therapy session notes for their patients – and thus blatantly violated the requirements of the Particularity Clause. Whether the Sheriff's deputies exceeded the scope of the warrant is irrelevant to this claim. *See Riley*, 121 Wn.2d at 29 ("[T]he State's assertion that the search *was not executed overbroadly is irrelevant*. Because the person whose home is searched has the right to know what items may be seized, *an overbroad warrant is invalid whether or not the executing officer abused his discretion.*") (emphasis added).

D. Daybreak has standing to raise these issues and to move for the return of property.

The Sheriff argues that Daybreak has no standing to make a CrR 2.3(e) motion for return of property due because only an “arrested defendant”¹⁹ can do that. *BOR*, at 30. This ignores the language of CrR 2.3(e) itself which states that “a person aggrieved by an unlawful search and seizure may move the court for the return of the property on the ground that the property was illegally seized and that the person is lawfully entitled to the possession thereof.”

The Sheriff fails to explain why Daybreak cannot move for the return of its own records or why a substance abuse treatment facility is not an “aggrieved person” if its records are seized in violation of 42 U.S.C. §290dd-2 and its supporting regulations in 42 C.F.R. §2.61 *et seq.* Moreover, the Sheriff simply ignores the Superior Court’s express ruling that Daybreak did have standing to raise issues concerning the violation of their patients’ confidentiality rights protected by HIPPA and the attorney client privilege. In the Superior Court the Sheriff argued that only the minor patients had standing to seek a TRO. CP 77-78. The Superior Court *rejected* that argument and explicitly ruled: “Plaintiff has standing to challenge the search warrants served by the Clark County Sheriff’s Office.” CP 87.

The Sheriff argues that “typically” the cases involving motions for the return of seized property are ones where the motion is litigated “after

¹⁹ As *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) demonstrates, even a though a corporation cannot be “arrested” or incarcerated, a corporation is a person that can successfully challenge the seizure of evidence on Fourth Amendment grounds.

the defendant's criminal case is resolved." *BOR*, at 30. It may be true that most CrR 2.3(e) cases meet that procedural profile. But so what? Not all do. *See, e.g., Matter of 13811 Highway 99, Lynwood, Washington*, 194 Wn. App. 365, 378 P.3d 568 (2016) ("Respondents Kum Im Lee and Yong R. Ludeman moved for return of property" even though they had not been charged criminally, and they prevailed).

E. The Sheriff ignores the violation of 42 C.F.R. §2.61.

Daybreak has pointed out that 42 C.F.R. §2.61 requires the issuance of a subpoena or a similar court order which compels a records holder to surrender the patient records and that no such order was obtained here. Daybreak pointed this out to the Sheriff in its federal court complaint and again in its amended complaint for replevin filed in state court. CP 608, ¶27; CP 585, ¶3.18. Section 2.61 unambiguously states that while a good cause order can authorize a disclosure or use of patient information, "[s]uch an order does not compel disclosure."

A subpoena or a similar legal mandate *must* be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order entered under the regulations in this part."

42 C.F.R. §2.61(a) (emphasis added). Under the heading "Examples," subsection (b)(2) explains what should happen when a good cause order is issued but no subpoena is served on the records holder:

An authorizing court order is entered under the regulations in this part, but the person holding the records does not want to make the disclosure. *If there is no subpoena or other compulsory process or a subpoena for the records has expired or been quashed, that person may refuse to make the disclosure. . . .*

42 C.F.R. § 2.61(b)(2) (emphasis added).

In this case no subpoena and no other similar court mandate was issued that compelled Daybreak to disclose the patient records sought by the Sheriff. The Superior Court never addressed this issue. Here, as in *In re Attorney General v. Mortiere*, 327 Mich. App. 136, 933 N.W.2d 351 (2019), this Court should find that § 2.61 was violated. This Court, like the Court in *Mortiere*, should “order the medical records returned . . . and shall not grant a new subpoena ordering the disclosure of the records . . . without first making all the findings required by the statute.” *Id.* at 158. The Sheriff completely ignores the *Mortiere* decision.

F. The Sheriff ignores violations of 42 C.F.R. §2.64(d)(1) & (d)(2).

Subsection (d)(1) of §2.64 requires that before a good cause order can issue, the court must find that “[o]ther ways of obtaining *the information* are not available or would not be effective.” Subsection (d)(2) requires the court to find that “[t]he public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship, and treatment services.” Judge Snider stated on the record that even though no one had mentioned the federal regulations to Judge Lewis, nevertheless he previously made these determinations on September 21, 2018.

[T]his was never brought up at the time that Judge Lewis heard the original TRO. It was not part of the original complaint, thus the need for the amended complaint to include it. ***But the court still conducted an analysis that indicated that there wasn’t any other way to obtain the records other than through a search warrant and that the public interest was outweighing the privacy interests*** in issuing those search warrants to begin with, based on the affidavits of probable cause that went along with those.

RP 7/5/19, at 39-40 (emphasis added).

Judge Snider was wrong. No such determination was ever made by Judge Lewis and the Sheriff has failed to point to anything in the record that would even suggest that Judge Lewis made such a finding.²⁰ Indeed, it would be nothing short of amazing if Judge Lewis had made such a finding because – as the Sheriff points out – at the time of the TRO hearing before Judge Lewis Daybreak’s attorneys had never mentioned either 42 U.S.C. §290dd-2, or any of its regulations, or any privilege for substance abuse treatment records. Moreover, since the federal law requiring a good cause order was never mentioned, Judge Lewis was never asked to issue a good cause order. Thus, it is not surprising that Judge Lewis never made any finding that the requirement of §2.64(d)(1) was met.

The Sheriff ignores these violations. It fails to point to any evidence that other ways of obtaining the information sought were tried, or were determined to be ineffective. Moreover, the Sheriff simply repeats the Superior Court’s error of confusing “the information sought” with “the records sought.” Of course the only way of getting Daybreak’s records was to seize Daybreak’s records or to compel Daybreak to furnish them. But that was not the only way of getting “the information” about the suspected sexual assaults that the detective was investigating. The detective could go and interview the patients and ask them – have you been sexually assaulted? When? Where? By whom? Did you report the assault? There is nothing

²⁰ Judge Lewis entered a written order denying a TRO without prejudice and not surprisingly nothing in this order mentions either of these subjects. CP 87-89.

in the record to show that this was tried or that it would not be effective.

Similarly, there is nothing in the record to show that Judge Lewis ever considered whether the public interest in prosecuting a Daybreak employee for failing to report a sexual assault outweighed the patient's interest in keeping the facts that he or she had a substance abuse problem and was receiving treatment for it confidential and undisclosed. Judge Snider seems to have believed that since the judges who issued the search warrants found probable cause that means that §2.64(d)(2) weighing determinations were made. But that doesn't follow. A finding of probable cause means that the magistrate thinks there are reasonable grounds to believe that a crime was committed and that evidence of that crime is to be found in the place to be searched. But it does not mean that harm to therapeutic treatment relationships or teenage privacy have been weighed against the public interest of investigating a criminal offense. The entire rationale behind 42 U.S.C. §290dd-2 is the recognition that sometimes it is better to let crimes go unprosecuted and unpunished because the alternative is to make people with substance abuse problems afraid to get the treatment they need. *United States v. Cresta*, 825 F.2d 538, 552 (1st Cir. 1987).

G. The Sheriff ignores the violations of §2.65 by baldly asserting that it was never investigating patients. But the warrants themselves label two patient perpetrators of a sexual assault as “suspects” whom the Detective intends to identify.

The Sheriff argues that “because the records were not used to investigate or prosecute Daybreak's patients,” none of the requirements of §2.65 apply and the good cause order need only satisfy the requirements of

§2.66. *BOR*, at 24-25. The Sheriff notes that the only person to be criminally prosecuted was a Daybreak employee. *BOR*, at 14 n.4. But it ignores the fact that §2.65 applies to prosecutions *and investigations* of patients. The Sheriff does not and simply cannot credibly claim that it wasn't "investigating" any patients for any crimes since the warrants themselves identify some of the patients as "suspects." For example, one of the warrants states that the officers are to look for "evidence of the crime of ... Rape in the Second Degree" CP 30 and authorizes the Sheriff to seize "[r]ecords showing the intake and discharge dates of the involved parties, specifically [redacted name] *and the unidentified suspect(s).*" CP 31. This warrant further states the officers are to seize "any and all client records . . . pertaining to, naming, or anyway involving ... *John Doe #1, John Doe #2*, or the combination thereof. . . to include. . . any and all notes, medical records treatments . . . involving the aforementioned parties. *It is the intent of the Affiant to obtain these records after positively identifying the suspect(s) through the service of this warrant.*" CP 32 (emphasis added).

IV. CONCLUSION

The Sheriff argues that since the damage to the confidentiality of substance abuse treatment records has already been done, the courts should just let his office continue to hold on to the illegally seized records. This approach is not likely to reassure the patients of substance abuse treatment facilities in this State. Effectively the Sheriff is saying, since we already have them and have already read them, and we have already given some of them to the local prosecutor, you should just let us continue to keep them

until we don't need them anymore because we won't give them to anyone else and we won't read them anymore. Assuming that this promise will actually be kept – Daybreak's patients – past, present and future – are not likely to feel confident that the Sheriff's office won't continue to read or disseminate the records they already have, or that they won't come and seize more of their patient records in the future. Or that other agencies, like the State Department of Health won't further disseminate them. One Daybreak patient has already learned that a sheriff's deputy told her father that he was investigating an incident where his daughter was assaulted while living in a substance abuse treatment facility. CP 663, ¶7. She should not be asked to trust that such disclosures won't happen again.

One scholar has offered her view of how a prosecutor or a court should act if the federal law regarding substance abuse treatment records is violated by police without the knowledge of the record holder or its patients:

[I]f law enforcement somehow obtained the records, and the facility failed to object, an ethical (or pragmatic) prosecutor or hawk-eyed judge would quickly return the records and disclose the inopportune 'leak'

Jade, *supra*, at 37. In this case, the violation of federal law was conducted openly; the treatment provider and its patients have known about it for years now and yet law enforcement has not quickly returned the records, nor has any judge ordered law enforcement to do so. This Court should do so now.

Respectfully submitted this 23rd day of September, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By s/James E. Lobsenz
James E. Lobsenz, WSBA #8787
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

ESERVICE to the following:

Leslie A. Lopez
CLARK COUNTY PROSECUTING ATTORNEYS OFFICE
PO Box 5000
Vancouver, WA 98666-5000
Email: leslie.lopez@clark.wa.gov

David H. Smith
Summit Law Group
315 5th Avenue S. #1000
Seattle, WA 98104
Email: davids@summitlaw.com

DATED this 23rd day of September, 2020.

s/Deborah A. Groth
Deborah A. Groth, Legal Assistant

APPENDIX A

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

DAYBREAK YOUTH SERVICES,)
) 3:19-cv-05521-BHS
) Plaintiff,)
) TACOMA, WASHINGTON
v.)
) June 19, 2019
CHUCK ATKINS, et al.,)
) 1:30 p.m.
) Defendants.)
) TRO Hearing

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE BENJAMIN H. SETTLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: DAVID H. SMITH
 DIANA S. BREAUX
 Garvey Schubert Barer
 1191 Second Avenue
 Eighteenth Floor
 Seattle, Washington 98101

For the Defendants: LESLIE ANNE LOPEZ
 AMANDA MIGCHELBRINK
 Clark County Prosecutor's Office
 P.O. Box 5000
 Vancouver, Washington 98666

Proceedings stenographically reported and transcript
produced with computer-aided technology

1 2.

2 Now Clark County, apparently, is asking the Court --
3 whereas the injunctive relief was previously sought by
4 plaintiff, now Clark County is seeking to attain an order of
5 the kind that is contemplated in Part 2. Even before that
6 was filed, I had a concern that there may be an abstention
7 issue here under Rooker-Feldman or Younger. Rooker-Feldman
8 is one which says the Court should not be -- a federal court
9 should not be in the position of reviewing an earlier
10 decision. Well, we have an earlier decision of the state
11 court addressing the request for injunctive relief to protect
12 the disclosure of this information. It seems it could
13 qualify thereby denying this Court jurisdiction or, again,
14 under Younger where there is a pending state court action on
15 essentially the same subject matter.

16 It seems to me this is where this matter should be
17 resolved is in Clark County Superior Court. There is now a
18 pending motion in which the prosecutor's office is ostensibly
19 as concerned as the plaintiff in this case that the Part 2 be
20 complied with, a qualifying order would be entered protecting
21 the very information that plaintiff seeks to protect and
22 seeking an order.

23 Where I think we have to begin is: Isn't that the best
24 place to deal with it? Before I hear more, I will
25 communicate that I think that there is -- at this point, I am

1 federal law, I believe, as much as this Court in this
2 instance.

3 MS. BREAUX: Respectfully, the problem we have here,
4 Your Honor, is that because the regulations were not complied
5 with on the front end, there has been a serious injury for
6 which a federal court is in a unique position to redress.

7 THE COURT: Why is it more unique than the Clark
8 County Superior Court judge who declined the injunction in
9 the first instance, but was not presented with, as I
10 understand it, the Part 2 issues here and requirements, and
11 why cannot that court redress any concern that you have?

12 MS. BREAUX: Respectfully, I don't think that is --
13 the reason we are seeking a TRO is because we are dealing
14 with an imminent, irreparable threat. The order they are
15 seeking in state court, you can't actually get a retroactive
16 order blessing the seizure that was done in the first
17 instance here, Your Honor, because it was so overbroad. They
18 seized records for which they would never be entitled to get
19 an order collecting them. We are dealing with a violation
20 and an injury that certainly can't be redressed by the motion
21 that is before the Clark County court, and the reason we
22 brought a TRO in federal court is because we believe that the
23 injury, which is very serious, is best redressed in this
24 forum, and certainly this Court has jurisdiction over this
25 matter, this ripe matter, and Daybreak is in a unique

1 MS. LOPEZ: Yes, Your Honor.

2 THE COURT: I see Mr. Smith wishing to speak.

3 MR. SMITH: I'm sorry to appear to interrupt the
4 Court. I didn't mean to do that. I was going to ask the
5 Court if the Court would consider entering, as part of
6 whatever order is entered in today, a requirement that there
7 be effectively a standstill with regard to redisclosure of
8 any information.

9 THE COURT: Because I am questioning the Court's
10 jurisdiction, I think that is inconsistent. That's why I
11 asked the question of counsel here. The commitment is being
12 made, effectively, for the remedy that you are requesting.
13 As far as I am concerned, it seems to me that that ought to
14 be sufficient. The commitment they are making here is a
15 matter of public record and on the transcript.

16 I am not going to order that. I guess I am expecting
17 counsel to fulfill its representation to the Court, which is
18 what the Court's understanding was prior to coming in here.
19 If that representation is made to the Court, subject to
20 change only by seeking a relief from the Court, in other
21 words, wherein you wish to further disclose that, if you
22 would make a representation that you will do that before the
23 superior court, then I don't know that, again, we have to
24 have this briefing schedule accomplished before July 5th. I
25 think that is the more important date here.

1 video, which was provided by Daybreak to the Clark County
2 Sheriff's Office.

3 THE COURT: You will contact Department of Health and
4 indicate what this Court is expecting, not ordering, but
5 representations you have made that there is not any
6 redisclosures. If there is any different action, then
7 plaintiff can bring that to the Court's attention.

8 MS. LOPEZ: Thank you. I will do that.

9 THE COURT: So what I would say is this: Again,
10 because the Court's not finding there is a basis for
11 temporary restraining order, one, as to the initial problem
12 of jurisdiction, the Court is not satisfied that the
13 plaintiffs will prevail on this while this is pending in
14 superior court, nor do I believe that there is irreparable
15 harm been shown given the representations made by Clark
16 County here.

17 If the Court is going to exercise jurisdiction, it will be
18 after it is satisfied by the briefing that will be submitted.
19 I am going to ask the parties to propose a briefing schedule
20 that will follow the July 5th hearing. The briefing relates
21 to the abstention issues, and the opening brief would be by
22 Clark County, and Daybreak would have an opportunity to
23 respond. Work out the briefing schedule in which by August
24 1st the Court will have complete briefing on it. And in
25 addition to that briefing schedule, the parties can work out,

APPENDIX B

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

DAYBREAK YOUTH SERVICES,
individually and on behalf of its former and
current patients,

Plaintiff,

v.

CHUCK ATKINS, in his official capacity as
Clark County Sheriff, MIKE COOKE, in his
official capacity as Clark County Undersheriff,
CHRISTOPHER LUQUE, in his capacity as
Clark County Sheriff's Office Sergeant, ADAM
BECK, in his official capacity as Clark County
Sheriff's Office Detective, and BRENT
WADDELL, in his official capacity as Clark
County Sheriff's Office Sergeant,

Defendants.

No. 3:19-cv-05521-BHS

**STIPULATION AND ORDER OF
DISMISSAL**

Fed. R. Civ. P. Rule 41(a)(1)(A)(ii)

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1 Pursuant to Fed. R. Civ. P. Rule 41(a)(1)(A)(ii), Plaintiff Daybreak Youth Services, by
2 and through its attorney David H. Smith, and Defendants Chuck Atkins, Mike Cooke,
3 Christopher Luque, Adam Beck, and Brent Waddell, by and through their attorney, Leslie A.
4 Lopez, hereby stipulate that Plaintiff's Complaint and all claims and causes of action against
5 Defendants should be dismissed, without prejudice, and without fees or costs to any parties.
6

7 **ORDER**

8 THIS MATTER, having come before the Court on the foregoing stipulation;

9 IT IS HEREBY ORDERED that Plaintiff's Complaint and all claims and causes of action
10 against Defendants are hereby DISMISSED, without prejudice, and without fees or costs to
11 either party.

12 DATED this 17th day of July, 2019.
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17 BENJAMIN H. SETTLE
18 United States District Judge
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APPENDIX C

2018

FILED

2018 SEP 21 PM 1:09

SCOTT G. WEBER, CLERK
CLARK COUNTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

DAYBREAK YOUTH SERVICES, a
Washington Public Benefit Corporation,

Case No. 18-2-05488-9

Plaintiff,

**ORDER ON PLAINTIFF'S MOTION
FOR TEMPORARY RESTRAINING
ORDER**

v.

CLARK COUNTY SHERIFF'S OFFICE,

Defendant.

ORDER

This matter came before the Court on Plaintiff Daybreak Youth Services' Motion for Temporary Restraining Order. The Court, having heard arguments from counsel for the parties, considered the pleadings and evidence filed with and presented to the Court, and being advised of the relevant facts and circumstances, hereby **ORDERS** that Plaintiff's Motion is **GRANTED** in part and **DENIED** in part as set forth below:

1. Plaintiff has standing to challenge the search warrants served by the Clark County Sheriff's Office ("CCSO").
2. Some of the documents seized by CCSO may contain attorney-client privileged communications. Plaintiff's Motion to assert the attorney-client privilege to these communications is **GRANTED**. The Defendant shall



1 provide a complete copy of all electronic communications obtained during
2 their investigation to Daybreak for its review. Daybreak shall have fourteen
3 days from the date the documents are received by Daybreak to complete its
4 review for privilege. During this period, CCSO shall not review any of the
5 electronic communications in its possession. Daybreak shall provide a
6 privilege log to Defendant's counsel listing those documents it believes to
7 be privileged. The log shall contain information sufficient to allow the
8 Defendant to review and determine whether it agrees with Daybreak's claim
9 of privilege. If Defendant disagrees with the privilege designation as to any
10 document, then Defendant shall notify Plaintiff. If the parties are unable to
11 resolve the dispute, then the parties shall request the Court perform an in
12 camera review of those disputed documents. The Court shall then review
13 those disputed documents and rule on the claim of privilege. The Defendant
14 shall destroy all documents that it agrees are privileged and those
15 documents the Court rules are privileged (if applicable).

16 3. The scope of the search warrants is not overbroad. Pursuant to the search
17 warrants, CCSO was allowed to search the entire building and its contents.
18 At this time, there is no evidence CCSO's search and seizure was outside
19 the scope of the search warrants because the Sheriff's Office has not yet
20 filed a Return with the Court of those items it seized from the search.. Due
21 to the Defendant's clarification during the hearing on September 14, 2018
22 that it would strictly comply with the search warrant and not review all
23 documents for evidence of "other crimes" involving individuals that had not
24 yet been identified, the Court DENIES WITHOUT PREJUDICE
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Daybreak's Motion for a Temporary Restraining Order to limit or narrow the search warrant.

4. Nothing in this Order shall limit or restrain Daybreak or any other party from challenging the search warrant or the evidence seized by Defendant.

5. Since this is a limited matter before the Court, the Court rules this case is exempt from the case scheduling requirements of Clark County LCR 40. Defendant shall not be required to file an Answer to the Complaint unless directed by the Court or upon the Plaintiff giving the Defendant 14 days' notice of its intent to seek a default.

IT IS ORDERED.

ENTERED this 21st day of September, 2018.



Superior Court Judge Robert Lewis

Prepared and Submitted by:

LANDERHOLM, P.S.

/s/ Bradley W. Andersen
BRADLEY W. ANDERSEN, WSBA #20640
PHILLIP J. HABERTHUR, WSBA #38038
Of Attorneys for Plaintiff Daybreak Youth Services

CARNEY BADLEY SPELLMAN

September 23, 2020 - 2:55 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54137-8
Appellate Court Case Title: Daybreak Youth Services, Appellant v. Clark County Sheriff's Office, Respondent
Superior Court Case Number: 18-2-05488-9

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