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NO. 45111-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re Detentions of:

D.W., G.K., S.B., E.S., M.H., S.P., L.W., J.P., D.C., and M.P.

Respondents,

State of Washington, Department of Social and Health Services,
and Pierce County Prosecuting Attorney,

Appellants,

and

MultiCare Health System, and Franciscan Health System,

Intervenors/Respondents.

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STATE OF WASHINGTON
DEPUTY

BRIEF OF INTERVENORS/RESPONDENTS
MULTICARE HEALTH SYSTEM
AND FRANCISCAN HEALTH SYSTEM

Eric J. Neiman, WSBA #14473
John A. Rosendahl, WSBA #09394
WILLIAMS, KASTNER & GIBBS PLLC
1301 A Street, Suite 900
Tacoma, WA 98402
(253) 593-5620

PM 1-12-14

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I. SUMMARY

Expedience has made “psychiatric boarding” an increasingly common practice even though it is unconstitutional, illegal, inhumane, and wrong. “Agency action” is not at issue; what the state may do to individuals by *court* action is at issue. The individual and hospital respondents had no meaningful way to contest the practice’s legality under the APA and DSHS regulations. Thus, the Superior Court had the power, under Wash. Const. art. IV, §6, and under RCW 7.16.040, to review the legality of psychiatric boarding and declare it unlawful.

The Involuntary Treatment Act (“ITA”) guarantees evaluation and intensive individualized treatment at a certified mental health evaluation and treatment facility (“E&T facility”) to any individual whom a court deprives of liberty involuntarily because of a mental disorder. RCW 71.05.360(2). The only instance in which the ITA authorizes hospitalization is when E&T facility staff determine that a detainee needs it for a physical condition. RCW 71.05.210. The intervenor health systems are not required to have, and most of their hospitals do not have, psychiatric units for the confinement of involuntary patients. The hospitals object to being forced, nonetheless, to board ITA detainees just because area E&T facilities are full. Persons detained involuntarily to hospitals do not receive ITA-guaranteed psychiatric evaluation and intensive indi-

vidualized treatment; neither DSHS nor the Pierce County Prosecuting Attorney disputes that. The Superior Court correctly rejected appellants' contention that a DSHS regulation nonetheless legalizes sending ITA detainees to emergency rooms solely because area E&T facilities are full.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did these cases concern "agency action" within the meaning of RCW 34.05.010(3), and not *court* action?

2. Do Wash. Const. art. IV, §6 and RCW 7.16.040 give a Superior Court the power to consider objections to petitions seeking involuntary detention pursuant to RCW 71.05.230 on the ground that the detentions would deny constitutional due process guarantees and the ITA's guarantee of evaluation and individualized treatment at a certified mental health evaluation and treatment facility?

3. Is an individual who does not need treatment for a physical condition deprived of liberty without due process of law and of statutory rights under the ITA when, pursuant to a court order issued pursuant to RCW 71.05.150 or .230, he or she is detained involuntarily to a hospital that is not certified as an E&T facility?

4. May a court, without hearing from the hospital, and solely because area E&T facilities are full, order someone confined involuntarily to a hospital?

III. COUNTERSTATEMENT OF THE CASE

A. These Cases Were Initiated by Civil Petitions for “Short-Term” (72-Hour or 14-Additional-Day) Involuntary Detentions.

It is not a crime or civil infraction to suffer from a mental disorder. Washington law authorizes involuntary civil detention because of a mental disorder only *for treatment*; it is illegal to detain someone involuntarily because of a mental disorder *except* to treat him or her for the disorder. In RCW 71.05.030, the Involuntary Treatment Act (ITA) provides:

Persons suffering from a mental disorder may not be involuntarily committed for treatment of such disorder except pursuant to provisions of this chapter, chapter 10.77 RCW, chapter 71.06 RCW, chapter 71.34 RCW, transfer pursuant to RCW 72.68.031 through 72.68.037, or pursuant to court ordered evaluation and treatment not to exceed ninety days pending a criminal trial or sentencing.¹

The ITA, and the United States and Washington constitutions, govern whether and under what conditions a court may detain involuntarily. The ITA’s specific sections provide substance to its seven declared purposes, which are:

- (1) To prevent inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;
- (2) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders;

¹ RCW ch. 10.77 applies to criminally insane; RCW ch. 71.06 applies to sexual psychopaths; RCW ch. 71.34 applies to minors.

- (3) To safeguard individual rights;
- (4) To provide continuity of care for persons with serious mental disorders;
- (5) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;
- (6) To encourage, whenever appropriate, that services be provided within the community; [and]
- (7) To protect the public safety.

RCW 71.05.010. Specificity is provided to Purposes No. 2 and 3 of the ITA by RCW 71.05.360, entitled “Rights of Involuntarily Detained Persons.” That section provides, among other things, that “[e]ach person involuntarily detained or committed pursuant to this chapter shall have the right to adequate care and individualized treatment.” RCW 71.05.360(2).

As DSHS’s brief explains, the ITA creates two kinds of involuntary detentions: (1) “short-term” detentions, for 72 hours (RCW 71.05.150 and .153) or 14 days of additional detention *after* an initial 72-hour detention (RCW 71.05.230), and (2) long term detentions, for 90 days or longer. Western State Hospital is the only facility in western Washington that is legally authorized to accept and treat persons who are involuntarily committed for 90 days or longer. *Pierce County v. State*, 144 Wn. App. 783, 799, 185 P.3d 594 (2008).

These cases concern short term ITA detentions. The ITA short term detention process is summarized in *Pierce County*, 144 Wn. App. at 797-98:

[T]he . . . involuntary commitment process . . . begins when someone alleges that a person either poses a risk of serious harm or is gravely disabled as a result of a mental disorder. [Citations omitted.] If a county designated mental health professional employed by the regional support network concludes that the allegations are true and the person will not voluntarily seek treatment, the mental health professional seeks an order from the superior court detaining the person for up to 72 hours *of treatment at an evaluation and treatment facility*. [Emphasis supplied; citations omitted.] Following the 72-hour detention, the superior court can order a person detained for up to 14 additional days of involuntary treatment. RCW 71.05.230, .240. The 72-hour and 14-day time frames are referred to as short-term care. Evaluation and treatment facilities take only patients who are detained for 72 hours or committed for up to 14 days.

As the italicized portion of the foregoing quotation reflects, the ITA sections that provide for short-term involuntary detentions allow detention *only* to a mental health “evaluation and treatment facility” certified by DSHS pursuant to RCW 71.04.020(16) and 71.24.035-(5)(c)(iii) and WAC 388-865-0500. Under RCW 71.05.150, .153, .160, .210, .220, and .230, short term involuntary ITA detention is consistently characterized as being to an E&T facility. The ITA defines “evaluation and treatment facility” as:

. . . any facility which can provide directly, or by direct arrangement with other public or private agencies, emergency evaluation and treatment, outpatient care, and timely and appropriate inpatient care to persons suffering from a mental disorder, and which is certified as such by the department. . . No correctional institution or facility, or jail, shall be an evaluation and treatment facility within the meaning of this chapter.

RCW 71.05.020(16).

The ITA does make provision for short-term detention to a hospital, but permits that only when an E&T facility determines that a detainee needs to be hospitalized because of a physical condition:

An evaluation and treatment center admitting or accepting any person pursuant to this chapter whose physical condition reveals the need for hospitalization shall assure that such person is transferred to an appropriate hospital for evaluation or admission for treatment.

RCW 71.05.210 (final paragraph).

In these cases, the individual respondents had been detained involuntarily for up to 72 hours on an emergency basis pursuant to RCW 71.05.153.² All were being held at hospitals because area E&T facilities were full, and solely for that reason. *See* CP 298 (FoF 3). The Superior Court was being asked by petition to involuntarily detain each for 14

² The criteria for detention under RCW 71.05.150(1), RCW 71.05.153(1) and (2)(b), and RCW 71.05.160, as well as under RCW 71.05.210, RCW 71.05.-230(1), and (4)(e) are that the person presents a “likelihood” or “imminent likelihood” of “serious harm” to self or others (terms defined by RCW 71.05.020(20) and (25)) or is “gravely disabled” (defined by RCW 71.05.020(17)).

additional days pursuant to RCW 71.05.230. CP 298 (FoF 1). None needed treatment for a physical condition. *See* CP 298 (FoF 2).

B. MultiCare and Franciscan Health Systems' Hospitals Are Not Mental Health Evaluation and Treatment Facilities.

MultiCare operates four hospitals in Pierce County: Allenmore, Good Samaritan, Mary Bridge Children's, and Tacoma General. CP 217.³ The Franciscan Health System (FHS) operates St. Anthony, St. Clare, and St. Joseph Hospitals in Pierce County. CP 275, 277. Of those seven hospitals, none is an E&T facility.

No Washington hospital is required to provide psychiatric care to be licensed. WAC 246-320-271. Of the seven MultiCare or FHS hospitals in Pierce County, St. Joseph alone has an adult psychiatric-care unit, but only for voluntarily admitted patients. CP 277. Persons admitted voluntarily for mental health treatment have the right to discharge immediately upon request. RCW 71.05.050. Persons detained involuntarily do not.

³ A MultiCare division, Good Samaritan Outreach Services (GSOS), provides a range of services to the community, including significant *outpatient* mental health treatment and support services. GSOS also serves as a contractor to Optum Health, the Regional Support Network (RSN) for Pierce County, and provides to Optum a team of Designated Mental Health Professionals (DMHPs) to evaluate individuals in Pierce County who may meet ITA criteria for involuntary detention. CP 217-18. This brief is being filed by MultiCare and not GSOS or on behalf of any of the GSOS-employed DMHPs.

C. The Individual Respondents Objected that Being Detaining to a Hospital is Unlawful Because the ITA Guarantees Individualized Mental Health Treatment at an Evaluation and Treatment Facility.

Appointed counsel for the ten individuals filed motions objecting to being detained to hospitals and to the petitions for 14 additional days of detention, *see* CP 48, which it is undisputed would be to hospitals because area E&T facilities continued to be full. CP 298 (FoF 3). Counsel for the individual respondents argued that detention to hospitals solely because area E&T facilities are full – a practice referred to as “psychiatric boarding”⁴ – is unlawful. *See* CP 48. The Superior Court Commissioner ruled that boarding works a due process and ITA violation. CP 53. The Commissioner’s ruling was taken before Judge Kathryn J. Nelson on the Pierce County Prosecuting Attorney’s motion for revision. CP 202-03, 297.

D. DSHS Failed to Persuade the Superior Court that It Lacked Authority to Consider the Respondents’ Objections Because They Were Not Proceeding under the Administrative Procedures Act.

DSHS argued that an administrative rule makes it permissible to detain persons involuntarily at hospitals solely because E&T facilities are full. The administrative rule provides that, “at the discretion of the mental health division [of DSHS, *see* WAC 388-865-0150]” provision of “treatment to an adult on a seventy-two hour detention or fourteen-day commit-

⁴ *E.g.*, Editorial: Stop “boarding” mentally ill in emergency rooms, *Seattle Times*, May 29, 2013; bibliography to *A Literature Review: Psychiatric Boarding*, U.S. Department of Health & Human Services, Oct. 2008.

ment” may be to “a facility that is not [an E&T facility].” Under the rule, single bed certification may be requested if a “consumer” (meaning a person whom a court is being asked to detain forcibly and without consent) “requires services that are not available at a facility certified under this chapter [*i.e.*, an E&T facility] or a state psychiatric hospital.” WAC 388-865-0526(3). DSHS argued the rule makes these cases ones concerning “agency action” within the meaning of section 510 of the Administrative Procedures Act.⁵ DSHS argued that, in light of section 510 and section 146 of the Declaratory Judgments Act,⁶ objections to hospital detention could be raised before a court only by filing a judicial review petition pursuant to RCW 34.05.514, in Thurston County, RCW 34.05.570(2)(a). CP 66-70, 261-62.

The Superior Court considered testimony that had been elicited from various witnesses, including DSHS mental health division supervisor David Reed⁷ and Pierce County DMHP supervisor Nathan Hinrichs,⁸ at a February 27, 2013, show-cause hearing before the Superior Court

⁵ RCW 34.05.510, providing that “[t]his chapter establishes the exclusive means of judicial review of agency action,” except under three specific instances.

⁶ RCW 7.24.146, providing that “[t]his chapter does not apply to state agency action reviewable under chapter 34.05 RCW.”

⁷ 2/27/13 RP 67-72.

⁸ *Id.*, 6-23.

Commissioner. 2/27/13 RP.⁹ The testimony established that use of single bed certifications in involuntary ITA detentions had been increasing in Pierce County. *Id.* at 17-19. Detentions to hospitals were occurring without input from the hospitals, CP 228, and that day eleven people were being involuntarily detained in hospitals due solely to lack of available E&T facility beds, 2/27/13 RP 9, 61.¹⁰ DMHP Hinrichs testified that a person detained involuntary to a hospital typically has someone assigned to him or her around the clock as “kind of a guard” to “monitor them for safety,” 2/27/13 RP 14-15, and that:

The hospitals do the best they can and try to provide treatment, but it’s really outside their scope of practice. So individuals who are detained [to hospitals] are getting less care than they would if they were in an evaluation and treatment center. It’s actually a more restrictive environment because . . . in an evaluation and treatment center they have the ability to actually walk around in a common area and where as in the ER or a medical hospital they’re confined generally to a room. They might get medication, but then they’re also missing out on counseling and . . . some of the other therapeutic support that’s probably necessary for them to recover. . . .

⁹ The Commissioner permitted questioning of the witnesses by assigned counsel for the ten individual respondents, by an Assistant Pierce County Prosecuting Attorney, and by Assistant Attorney General Sarah Coats, representing DSHS.

¹⁰ At FHS’s Pierce County hospitals alone, at least 59 individuals had been detained involuntarily during the period December 2012 to March 2013. CP 278.

2/27/13 RP 14.¹¹ Hinrichs testified that, when he sees that someone detained at a hospital is missing out on treatment that would be provided at an E&T facility, there is nobody who can step in and help. *Id. at 16.*

David Reed, the DSHS supervisor, testified, on direct examination by the assistant attorney general, that “the WAC that creates the single bed cert[ification]s” was not developed to address lack of E&T facility capacity. 2/27/13 RP 62.¹²

E. The Superior Court Declared that Boarding at a Hospital Because Area Evaluation and Treatment Facilities Are Full Unlawfully Denies the Right to Individualized Treatment at an Evaluation and Treatment Facility.

Agreeing with the individual respondents, and rejecting DSHS’s “no authority” argument based on the APA, Judge Nelson issued an Order under the Declaratory Judgment Act, RCW 7.24.020,¹³ holding that:

¹¹ Under protocols developed by DSHS pursuant to the directive of RCW 71.05.214, “[a]vailability of a detention bed will not be a factor in [a DMHP’s] determination of detention,” but once a DMHP determines that a person meets the ITA criteria for a 72-hour or 14-day involuntary detention, the DSHS protocols take over. If no E&T facility in the county or a nearby county has a bed available, the DMHP must request, and invariably is granted, a single bed certification from DSHS. 2/27/13 RP 7-9; CP 19 (quoting Protocols).

¹² DSHS has maintained that the phrase “services that are not available” refers not only to services that an E&T facility never provides, but also to services it usually provides but that are “not available” at a given time because its beds are full. 2/27/13 RP 69-71. According to that logic, housekeeping services would be “not available” at a hotel when all its guest rooms are occupied, even though all guests would be receiving such services. No part of DSHS’s rulemaking file for WAC 388-865-0526 was offered in evidence during proceedings below.

¹³ That section of the DJA provides in pertinent part that “[a] person . . . whose rights, status or other legal relations are affected by a statute . . . may have

2. [I]ndividuals detained by a designated mental health professional for the initial 72 hour emergency detention period, or by the court for up to 14 days of evaluation and treatment, have a right pursuant to the statutory provisions of chapter 71.05 to be detained only to a certified evaluation and treatment facility, and . . . their detention to a facility other than a certified evaluation and treatment facility is allowable under the statute only to meet a medical or other collateral need or service that cannot be provided by a certified evaluation and treatment facility; and

3. [I]t is a violation of such a detained person's civil rights under the provisions of chapter RCW 71.05, art. XIII, sec. 1 of the Washington state constitution, and the due process clause of the United States constitution, for such person to be detained on a single bed certification to a facility that is not staffed or otherwise equipped to fully and capably meet their needs for appropriate, adequate, and individualized mental health care, evaluation and treatment.

CP 303-04. Judge Nelson made DSHS, MultiCare, and FHS parties as intervenors in a separate order. CP 290-92. Anticipating appeal, Judge Nelson stayed enforcement of her Declaratory Order. CP 296.

DSHS did appeal. CP 306-18. The Prosecuting Attorney also appealed as counsel for the petitioners, CP 319-29, citing RCW 71.05.130. *Pros. Br. 18.*¹⁴ DSHS joins in none of the arguments that are made only in the Prosecuting Attorney's brief.

determined any question of construction or validity arising under the . . . statute, . . . and obtain a declaration of rights, status or other legal relations thereunder.”

¹⁴ Commissioner Schmidt has ruled that the DMHPs have standing to appeal. Nothing of record indicates that DMHPs support the practice of “psychiatric boarding” and will be unable, or will have to refuse, to perform his or her statutory responsibilities as a DMHP unless courts allow boarding.

IV. STANDARD OF REVIEW

MultiCare and Franciscan Health Systems do not fully agree with the appellants as to what the issues *are*, but agree with DSHS (*DSHS Br. at 17*) and the Prosecuting Attorney (*Pros. Br. at 4*) that this appeal is from a legal ruling and presents issues of law subject to *de novo* review.

V. ARGUMENT.

A. Respondent Hospitals Address the Profound Substantive Issues Last Only Because DSHS Relies Solely on a “No Authority” Argument.

DSHS is the state mental health authority in the executive branch. RCW 71.24.035. DSHS promulgated the administrative regulation, WAC 388-865-0526, and the protocols for DMHPs, *see CP 19* and *Pros. Br. 35-37*, that DSHS and the Prosecuting Attorney contend legalize “psychiatric boarding” to avoid overcrowding E&T facilities. DSHS’s brief relies on an argument that the court lacked authority to hear respondents’ arguments because RCW 34.05.510 and RCW 7.24.146 allow court challenges of such a practice only through an APA judicial review petition proceeding.¹⁵ Much as the respondent health systems would prefer to proceed directly to the merits, they address the “no authority” arguments first.

¹⁵ DSHS also argues that it was a CR 19 indispensable party. *DSHS Br. 24-25*. MultiCare and FHS agree, but see no relevance. DSHS does not assign error to any CR 19-related rulings. DSHS participated in the proceedings below, *see, e.g., 2/27/13 RP; 3/6/13 RP; CP 29-42, 60-81, 242-51, 260-64*, and became a party. *CP 290-92*. DSHS does not claim that the evidentiary record would be different had it been made a party earlier. CR 19 provides no basis for reversal.

B. The Superior Court Had the Power to Review The Legality of “Boarding” ITA Detainees at Hospitals.

1. “Psychiatric boarding” implicates individual liberty rights.

The cases here concerned individuals who already were being deprived of their liberty for 72 hours pursuant to the ITA and whom DMHPS, as petitioners in the lower court, sought to have detained by court order “for not more than an additional fourteen days of involuntary intensive treatment” pursuant to RCW 71.05.230.

Two points cannot be overemphasized. First, the petitions that the individual respondents objected to *sought court orders* authorizing detentions pursuant to RCW 71.05.230. Second, the detentions were ones in which individuals who had not been adjudged incompetent and who were not being accused of crimes were to be deprived of their liberty without their consent. Each time this Court encounters “detention” in DSHS’s or the Pierce County Prosecuting Attorney’s brief without the adjective “*involuntary*,” it needs to add that word. Each time it encounters “detain” or “detained” without the adverb “*involuntarily*,” it needs to add that word. The same is true when the word is “commit” or “committed.”

DSHS and the Prosecuting Attorney argue that the Declaratory Judgments Act did not give the Superior Court authority to issue its Declaratory Order because “agency action” is at issue and is reviewable,

according to RCW 34.05.510, only by way of a petition for review filed pursuant to RCW 34.05.514. They are incorrect for three reasons.

2. The APA does not apply to ITA petitions for *court-ordered involuntary deprivations of individual liberty*.

These cases have never been *about* “agency action.” Involuntary detention under RCW 71.05.230 occurs only pursuant to *court order*. The Superior Court was not undertaking to review an “agency action” or the making of an agency regulation. The APA thus did not provide the exclusive procedure by which the individual respondents could object to being detained involuntarily to hospitals instead of to E&T facilities. Moreover, the Legislature could not plausibly have intended for *deprivations of individual liberty* to be classified as “agency action” remediable solely as matters of administrative procedure or rule-making.

Judge Nelson did not declare that DSHS may not promulgate rules or protocols. She ruled that involuntary detention to a hospital when E&T facilities are full is not something that may result from *a court order* except – as the ITA authorizes in RCW 71.05.210 – when an E&T facility’s staff determines that an individual needs medical treatment for a *physical* condition. CP 301 (CoL 4), CP 303 (CoL 11).

3. The Superior Court had the inherent power to review the legality of “psychiatric boarding” even if “agency action” was at issue.

Superior courts have inherent power under Wash. Const., art IV, § 6 “to review administrative decisions for illegal or manifestly arbitrary acts. . . .” *Saldin Sec. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). A court may grant a constitutional writ of certiorari if no other avenue of appeal is available and a lower tribunal has acted illegally. *Id.* at 294. The exercise of this inherent constitutional power is discretionary, and it “will not ordinarily occur if either a statutory writ or a direct appeal is available, unless the appellant can show good cause for not using those methods.” *Id.* at 293. *Saldin’s* summary of the law of constitutional writs remains valid. *Stafne v. Snohomish County*, 174 Wn.2d 24, 38-39, 271 P.3d 868 (2012).

Even if the proceedings below are characterized as ones reviewing “agency action,” WAC 388-865-0526 not only fails to provide for appeal but provides that no due process rights exist at all: “*Neither consumers nor facilities have fair hearing rights* as defined under chapter 388-02 WAC regarding single bed certification decisions by mental health division staff [italics supplied].” WAC 388-865-0526(6). Moreover, the APA itself provides for no process of appeal that could possibly be completed even during, much less before the inception of, a 72-hour or 14-

day involuntary detention to a hospital. DSHS and the Prosecuting Attorney do not contend that the APA provided an adequate remedy at law. No meaningful right of appeal was available through the APA and, to the extent any right of appeal existed, respondents had “good cause” not to use it, excusing their “failure” to use it. *Saldin Securities*, at 134 Wn.2d at 293; *Stafne*, 174 Wn.2d at 39.¹⁶

4. Requiring an individual to proceed under the APA in order to challenge an involuntary ITA detention would work a deprivation of the constitutional right of access to courts.

The Supreme Court held in 2009 that every individual has a constitutional right of access to courts. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (“a right of access to courts. . . is ‘the bedrock foundation upon which rest all the people’s rights and obligations’”¹⁷). *Putman* held unconstitutional a prefiling-certificate-of-merit statute, RCW 7.70.150, explaining that “[r]equiring plaintiffs to

¹⁶ *Saldin Securities* indicates that the *constitutional* writ of certiorari is unavailable if a “statutory writ” is. RCW 7.16.040 provides for review “when an inferior tribunal, board or officer, exercising judicial functions,” has exceeded its jurisdiction or acted illegally and there is no plain, speedy and adequate remedy at law. DSHS does not claim to have carried out a “judicial function.” If the exercise of a “judicial function” is not at issue, the RCW 7.16.040 statutory writ of review is unavailable, satisfying the condition for use of the constitutional writ procedure. If a “judicial function” *is* at issue, then the Superior Court had authority under RCW 7.16.040 to engage in judicial review of the practice of psychiatric boarding because respondents had no other adequate remedy under the APA or otherwise “at law,” much less a remedy that was “plain” and “speedy.” Either way, the Superior Court had the power of review.

¹⁷ Quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts." *Id.* at 979.

It surely is at least as unconstitutional to require someone, as DSHS would, to file an APA judicial review petition in Thurston County even to object – before, during, or after the fact – to being detained involuntarily to a hospital when the ITA and due process safeguards guarantee evaluation and individualized treatment at a certified E&T facility. An individual subjected to a 72-hour or 14-day involuntary ITA detention is hardly afforded meaningful access to courts to challenge his or her detention if, as DSHS insists, he or she must go through an exercise of administrative law in order even to get *before* a court. An individual who is before a court anyway, as respondent to a petition for an order depriving him or her of his liberty, must be permitted to raise statutory and constitutional objections to involuntary detention in that proceeding.

This Court should reject appellants' APA-based "no authority" arguments

C. The Prosecuting Attorney's Reliance on *Det. of W* for a Separate "No Authority" Argument Is Misplaced.

The Prosecuting Attorney argues, based on *In re Det. of W.*, 70 Wn. App. 279, 852 P.2d 1134 (1993), that courts have an "extremely limited role" in "determining the constitutional rights of mental health

patients,” and lack authority to decide whether the care an individual will receive while detained under the ITA will be adequate because the ITA confers authority to make that kind of decision on DSHS. *Pros. Br.* 6-8. That line of argument fails for at least three reasons.

First, the Prosecuting Attorney offers no authority for the proposition that he may offer arguments that DSHS does not make. DSHS is the state mental health authority for the executive branch. RCW 71.24.035(1). DSHS’s decision not to make or join in an argument based on *Det. of W.* should be deemed a disclaimer of the argument.

Second, *Det. of W.* predates *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003), and *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000). Those decisions (cited to the Superior Court, CP 275-76, and discussed below) recognize that the 14th Amendment’s due process guarantee requires that mentally ill persons who are detained involuntarily receive treatment calculated to end the need for their detentions. That the Prosecuting Attorney ignores those Ninth Circuit decisions suggests he has no answer for them.

Third, *Det. of W.* is based on an ITA provision unique to RCW 71.05.320 and that does not apply to short term ITA detentions. When a person has already been held involuntarily for 14 days and a court finds that the person needs to be held involuntarily even longer and that “the

best interests of the person or others will not be served by a less restrictive treatment which is an alternative to detention,” the court “shall remand him or her to the custody of [DSHS] or to a facility certified for ninety day treatment by [DSHS] for a further period of intensive treatment not to exceed ninety days . . .”

In *Det. of W.*, a superior court commissioner had entered an order committing W, who had been detained involuntarily for 14 days, to 90 more days of detention and to the custody of a specific hospital that was not then certified to provide 90-day treatment. The Court of Appeals agreed with DSHS that the “shall” in ITA section 320 is mandatory and allowed a court to commit W only “to the custody of [DSHS] or to a facility certified for ninety day treatment by [DSHS].” *Det. of W.*, 70 Wn. App. at 284 n.5. The ITA provisions for short term involuntary detentions only permit detention to an E&T facility, which is then authorized by RCW 71.05.210 to have a detainee transferred to a hospital if he or she needs treatment for a physical condition. Applying the reasoning of *Det. of W.* thus leads to the conclusion that a court may order a short term ITA detention to an E&T facility only.¹⁸

¹⁸ If the Prosecuting Attorney’s citation to *Det. of W.* is taken as invoking that court’s declaration, based on RCW 71.05.520, that the superior court commissioner erred in determining, “at least in the first instance,” that W could not get adequate treatment at Western State Hospital, where DSHS was going to send him, *Det. of W.*, 70 Wn. App. at 285, and is arguing that Judge Nelson

Thus, the Court should reject the Prosecuting Attorney's "no authority" argument based on RCW 71.05.520 by way of *Det. of W.*, if the Court considers it at all, just as the Court should reject both appellants' APA-based "no authority" argument.

D. Rather than Affirm Simply Because Appellants' "No Authority" Arguments Fail, This Court Should Address the Merits, Taking into Account the Impact of "Psychiatric Boarding" on Hospitals.

Because appellants' "no authority" arguments lack merit for the reasons explained above, Judge Nelson had the authority she needed to engage in judicial review of psychiatric boarding. That leaves the merits. DSHS does not address the merits. It just raises the specter of helpless or dangerous mentally ill people being left to wander the streets if courts do not allow detention to hospitals when E&T facilities are full. *DSHS Br. 28-29*. That is not a legal argument based on citation to any authority.

lacked the authority to find hospital treatment inadequate, his argument lacks merit because neither he nor DSHS has ever contended that the evaluation and treatment the individual respondents would receive at hospitals is or would be adequate. Since *Det. of W.* was decided in 1993, the Ninth Circuit has held treatment to be a federal due process right of anyone detained involuntarily because of a mental disorder. Because it is undisputed in this case that the individual respondents did not have physical conditions for which any of them needed hospitalization, each of them had the right to evaluation and individualized treatment at an E&T facility. It was undisputed that they were going to be detained, instead, to hospitals, where they would not receive the care that E&T facilities must and do provide. *Det. of W.* does not hold that a court must be complicit in a practice that is unlawful and must assume, despite clear evidence and admissions to the contrary, that DSHS is ensuring that detained individuals will receive, at a hospital, the care to which they have a right under RCW 71.05.360 and the 14th Amendment.

Because DSHS stakes its challenge to the Declaratory Order on its APA-based “no authority” argument, and because that argument fails for the several reasons stated above, this Court could simply affirm.¹⁹ However, because the Superior Court’s Declaratory Order addresses issues of substantial, continuing, urgent, and statewide importance, MultiCare and FHS urge the Court to address the merits in a published decision, unless it elects to certify the appeals to the Supreme Court pursuant to RAP 4.4.

Assuming this Court does address the merits, it should take into account not only the individual detainees’ due process and ITA rights, but also how the type of petitions that were filed and challenged below, and that the court in Pierce County was being asked to grant with increasing frequency, 2/27/13 RP 9, 61, affects hospitals. Such orders force hospitals to board severely mentally ill persons (a) without requirement of prior notice to the hospital or opportunity for hearing, (b) without regard to whether hospital floor beds or emergency room beds are as full as E&T facility beds, (c) despite the fact that hospitals are not required, as a condition of licensing, to even *provide* psychiatric care services, and (d) and without any consideration of how boarding impacts the quality of care a hospital provides to other patients. *See* CP 225, 227-28, 278.

¹⁹ Unless the DMHPs have standing to appeal, as Commissioner Schmidt has ruled they do, then the Prosecuting Attorney’s arguments on the merits are ones this Court need not consider, because DSHS adopts none of them.

That said, the interests of hospitals and their staff pale in comparison to those of individuals who are involuntarily detained and boarded at hospitals and whose acute mental health crises go inadequately addressed and can endanger hospital staff, 2/27/13 RP 14; CP 225, 278, when they are denied appropriate intensive individualized evaluation and treatment from mental health professionals trained and experienced in dealing with involuntary detainees.

E. Expedience and/or Lack of Funds Do Not Justify Depriving Individuals Who Are Detained Involuntarily under the ITA of the Intensive Individualized Mental Health Treatment that the ITA Guarantees Them.

Elaborating on DSHS's suggestion that DMHPs will be forced to let dangerous people wander the streets unless courts allow psychiatric boarding when E&T facilities are full, the Prosecuting Attorney urges approval of psychiatric boarding as the lesser of two evils, better than "releasing" a detainable person, and as a considered legislative solution to overcrowding of E&T facilities. These are lack-of-money arguments for which the law provides no traction.

All individuals have the constitutional right not to be deprived of liberty without due process of law. U.S. Const. amend. XIV; Wash. Const., art. I, § 3.²⁰ Involuntarily detaining a person on grounds of mental

²⁰“State courts, in addition to federal courts, remain competent to adjudicate and remedy challenges to civil confinement schemes arising under the Federal

illness is “a massive curtailment of liberty.” *In re Labelle*, 107 Wn.2d 196, 201, 728 P.2d 138 (1986)) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972)); *Poletti v. Overlake Hosp. Med. Ctr.*, 175 Wn. App. 828, 836, 303 P.3d 1079 (2013). Although the State has a legitimate interest in providing care to individuals who are unable to care for themselves and in protecting the community from the dangerously mentally ill “it is also clear that mental illness alone is not a constitutionally adequate basis for involuntary commitment.” *Id.* “[T]here is no constitutional basis for confining mentally ill persons involuntarily ‘if they are dangerous to no one and can live safely in freedom’.” *Zinerman v. Burch*, 494 U.S. 113, 134, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975)); *Jensen v. Lane County*, 312 F.3d 1145, 1147 (9th Cir. 2002).

Due process also requires that mentally ill persons who *are* detained receive treatment calculated to lead to the end of their involuntary detention. *Or. Advocacy Ctr.*, 322 F.3d at 1121; *Sharp*, 233 F.3d at 1172; *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980).²¹ It is not

Constitution.” *Seling v. Young*, 531 U.S. 250, 265, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001).

²¹ See also *Seling v. Young*, 531 U.S. at 265 (“due process requires that the conditions and duration of confinement under [a state’s civil statute] bear some reasonable relation to the purpose for which persons are committed”) (citing

the detainee's responsibility, that is, to heal himself or herself in order to have liberty restored. In 1997, the Legislature specifically identified "the guidelines stated in *In Re LaBelle*, 107 Wn.2d 196 (1986)" as constraining the ITA's purpose of "encourag[ing] appropriate interventions at a point when there is the best opportunity to restore the person to or maintain satisfactory functioning." RCW 71.05.012. As the *LaBelle* court explained, 107 Wn.2d at 208:

It is not enough to show that care and treatment of an individual's mental illness would be preferred or beneficial or even in his best interests. ***To justify commitment, such care must be shown to be essential*** to an individual's health or safety and the evidence should indicate the harmful consequences likely to follow if involuntary treatment is not ordered. [Emphases added.]

The individual respondents in these cases contended that detaining them involuntarily to hospitals because area E&T facilities are full is unlawful because they do not get the care that justifies their involuntary detention. MultiCare and FHS agree, and add that it likewise is wrong to make hospitals board persons who should, instead, get individualized intensive mental health evaluation and treatment at E&T facilities. Consistent with principles of due process, the Legislature has decreed that the involuntary nature of and reason for their detentions *entitles* them to

Foucha v. Louisiana, 504 U.S. 71, 79, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); *Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); and *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972)).

that. The ITA does not authorize detention because a person is mentally ill; it authorizes detention *for evaluation and adequate, individualized treatment*. The Legislature’s solemn assurance that proper evaluation and adequate individualized treatment will be provided is, in effect, the only thing that makes it lawful to civilly detain a person involuntarily because he or she has a mental disorder.

The ITA’s first three of seven stated purposes are:

- (1) To prevent inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;
- (2) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders; [and]
- (3) To safeguard individual rights[.]

RCW 71.05.010. “To protect the public safety” is the seventh and last stated purpose of the ITA. RCW 71.05.010(7).

RCW 71.05.360(2) provides that “[e]ach person involuntarily detained . . . pursuant to this chapter ***shall have the right to adequate care and individualized treatment*** [emphasis added].” A 14-day involuntary detention must be either for “intensive” treatment, RCW 71.05.230, .260, or must be to a “less restrictive alternative” to an E&T facility, RCW 71.05.230, which a hospital is not. A person is not presumed to be incompetent within the meaning of that term under RCW chs. 10.77 and/or

11.88 because he or she is being evaluated or treated involuntarily under the ITA. RCW 71.05.360(1)(b). A mentally ill individual, even while detained involuntarily for intensive treatment, is thus considered competent and retains substantial rights in addition to the right to the “adequate care and individualized treatment” guaranteed by RCW 71.05.360(2). RCW 71.05.360(10).

“[W]here. . . a significant deprivation of liberty is involved, statutes must be construed strictly.” *LaBelle*, 107 Wn.2d at 205; *Poletti*, 175 Wn. App. at 836. The ITA, strictly construed, authorizes civil involuntary detention only to provide evaluation and individualized treatment calculated to make involuntary detention no longer necessary. Washington law simply does not allow the state to deprive a person, involuntarily, of *both* freedom *and* “adequate care and individualized treatment.” It is legally impermissible to detain someone involuntarily because he or she *needs* mental health evaluation and treatment without ensuring that he or she *gets* adequate evaluation and individualized treatment.²² *See Sharp v. Weston*, 233 F.3d at 1172 (“all too often the ‘promise of treatment has served only to bring an illusion of benevolence to what is essentially a

²² Additionally, MultiCare and FHS operate hospitals that are not staffed and equipped to provide the care that ITA detainees are supposed to be provided, and it is unfair to force the hospitals’ staffs to monitor persons they cannot properly care for and who can disrupt provision of care to other patients.

warehousing operation for social misfits’”).²³ It also is wrong to impose on a hospital the task of holding someone who needs, but does not consent to, intensive mental health treatment that the hospital is not required to offer and cannot provide.

The Prosecuting Attorney’s merits arguments are different ways of saying that the state cannot afford enough bed capacity for 72-hour and 14-day ITA detentions, and that it is less inhumane to board someone in acute mental health crisis at a warm, dry hospital than not detain at all. When the right not to be deprived of liberty without due process of law is at stake, however, lack of funds is not an acceptable excuse for the deprivation. *Ohlinger v. Watson*, 652 F.2d at 779. The Prosecuting Attorney cites no authority for the implicit argument that the state may provide individualized mental health treatment on a “first detained, first served” basis or some other schedule.

Quoting from *Youngberg v. Romeo*, 457 U.S. 307, 322-23, 102 S. Ct. 2452, 73 L. Ed 2d 28 (1982), the Prosecuting Attorney argues courts should not give short shrift to “professional” judgment in the name of due process, and should not impose “expansive obligations” on states caring for involuntarily committed individuals. The Prosecuting Attorney

²³ Quoting *U.S. ex rel. Stachulak v. Coughlin*, 520 F.2d 931, 936 (7th Cir. 1975) (quoting *Cross v. Harris*, 418 F.2d 1095, 1107 (D.C. Cir. 1969)).

invokes *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed 2d 772 (1997), as authority for the proposition that “substantive due process is disfavored” because it places a matter “outside the arena of public debate and legislative action.” *Pros. Br.* 23-24.

Such arguments pointedly ignore the Ninth Circuit decisions cited above, *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, and *Sharp v. Weston*, 233 F.3d 1166, even though both were cited to the Superior Court. CP 275-76. The Prosecuting Attorney’s reference to “professional judgment” is, implicitly, an argument that a qualified nonjudicial officer has decided that, as long as boarded detainees in Pierce County at least are “not out on the street . . . but rather are housed for a few days in a warm and dry facility,” *Pros. Br.* 22-23, due process guarantees are satisfied. The Prosecuting Attorney’s caution against imposing “expansive obligations” on the state and placing rights “outside the arena of public debate and legislative action,” ignores the very existence of the ITA, which is the product of public debate and legislative action. The *Legislature*, not the judiciary, has enacted an ITA that authorizes involuntary detention to a hospital only of a “person . . . whose physical condition reveals the need for hospitalization . . .,” RCW 71.05.210, and that otherwise requires that an involuntarily detained person be evaluated and given individualized, intensive, appropriate mental health treatment at a certified E&T facility.

“Expansive” or not, the rights at issue are the product of 14th Amendment jurisprudence and Washington’s ITA, not of the Superior Court’s failure or refusal to defer to professional judgment.

The ITA makes individualized mental health treatment a *right*, not a fringe benefit of involuntary detention that state actors may withhold based on “professional judgment” that being “housed,” unevaluated and untreated, somewhere “warm and dry” is so much less bad than being left “out on the street” that it must be deemed acceptable and thus lawful. A right is a right, and cannot be rationalized into a favor.

The Prosecuting Attorney argues that affirming the Declaratory Order will “force the DMHPs to violate the statutorily adopted protocols.” *Pros. Br. at 37*. The Superior Court’s Declaratory Order says no such thing. Affirming the Order will confirm that, regardless of whether a DMHP follows a written DSHS protocol in petitioning to have an individual detained involuntarily at a hospital, a court may not lawfully allow that to happen. The court, that is, may order an individual *detained* pursuant to a petition filed under RCW 71.05.150 or .230, but not detained to a hospital, because the law entitles the individual to evaluation and intensive individualized and adequate treatment *at an E&T facility*, and the record leaves it undisputed that hospitals that are not certified as E&T

facilities cannot and do not provide the mental health care that E&T facilities must provide.

This Court also should not be swayed by appellants' veiled threat that DMHPs will "release" individuals who meet ITA criteria for involuntary detention if courts do not order boarding at hospitals when E&T facility beds are full. *DSHS Br. 28-29; Pros. Br. 37*. As the Prosecuting Attorney acknowledges elsewhere in his brief, DMHPs must and do make ITA "detainability" determinations first, without regard to where there may be inpatient mental health care beds. The ITA leaves the system no choice but to have detainees taken to E&T facilities even if that "overcrowds" them – the same conclusion the Supreme Court reached back in 1982. *Pierce County v. Western State Hosp.*, 97 Wn.2d 264, 644 P.2d 131 (1982). That the Legislature has not fixed a broken mental health care system since 1982 explains, but does not excuse, the resort to psychiatric boarding.

F. There Is No Basis for the Prosecuting Attorney's Attempt to Infer from WAC 388-865-0526 an Intent to Address Overcrowding of Evaluation and Treatment Facilities and Keep the ITA's Promise of Mental Health Treatment for Persons Detained Involuntarily.

WAC 388-865-0526 is relevant to this appeal not as a source of controlling substantive law but only to explain how DSHS has sought to justify psychiatric boarding as lawful and not purely expedient. The

Prosecuting Attorney, without DSHS’s joinder or endorsement, argues that WAC 388-865-0526 is a “legislative directive” to solve E&T facility overcrowding that the Supreme Court was “searching for” in its decision in *Pierce County*, 97 Wn.2d 264. *Pros. Br. at 25-29 and 38*. Not so. The DSHS administrative rule obviously is not a *legislative* directive, and the Prosecuting Attorney cites no evidence that the rule was meant to address overcrowding of E&T facilities.²⁴ DSHS’s supervisor, David Reed, testified that the rule was *not* adopted to address *overcrowding* of E&T facilities (2/27/13 RP 62).²⁵

The Prosecuting Attorney also has *Pierce County* wrong. That decision did not hold, or even suggest, that “short-term” involuntary ITA detainees could be detained to some other type of facility, such as a hospital, when E&Ts are full if DSHS were to adopt a rule allowing such a practice. *Pierce County* held that, under the ITA as then worded, the State

²⁴ The record contains nothing from DSHS’s rulemaking file, because DSHS did not offer it. DSHS’s position was that inquiry into rulemaking issues would be appropriate in an APA judicial review proceeding in Thurston County but that the Pierce County Superior Court could not lawfully address the individual respondents’ objections to being involuntarily detained to hospitals solely because E&T facilities were full. That leaves the Prosecuting Attorney without any basis in the record for his assertions about the intent of WAC 388-865-0526, and unable to dispute DSHS supervisor David Reed’s acknowledgement that the regulation was *not* drafted to address overcrowding of E&T facilities. 2/27/13 RP 62.

²⁵ The Prosecuting Attorney offers no policy rationale for *always* boarding at hospitals, and *never* exceeding E&T facility capacity, when E&T facility beds are full, irrespective of a hospital’s inability to provide mental health care to an involuntary detainee in crisis.

had to overcrowd “available facilities” – meaning available *E&T facilities*, including E&T facility beds that Western State Hospital then maintained for short term ITA detainees – when there were more detainees than beds. Since *Pierce County* was decided, the Legislature has made Western State Hospital off-limits for short term ITA detentions.²⁶ However, in the 32 years since *Pierce County* held that ITA detainees must be sent where the ITA says they must be sent, *i.e.*, to E&T facilities, the Legislature has not authorized “boarding” of detainees at hospitals or other facilities that are not E&T facilities when E&T facilities are full.²⁷ Contrary to what the Prosecuting Attorney argues, nothing in *Pierce County* vindicates the practice of psychiatric boarding, and DSHS’s single bed certification rule is not even an administrative solution to E&T facility overcrowding, much less the “legislative solution” for which the Supreme Court was “searching” in *Pierce County*.

²⁶ In recent years, amendments to the ITA also have made it easier for DMHPs to seek, and for courts to order, short-term ITA detentions. *E.g.*, *Laws of 2011, 2d Spec. Sess., ch. 6, §§2 and 4* (amending RCW 71.05.212(2) to expand the definition of “credible witnesses” from whom a DMHP may obtain information in making a decision whether to seek a person’s involuntary detention). Such measures can only exacerbate pressure on E&T facility capacity.

²⁷ Note that RCW 71.05.560, the statute cited as authority for WAC 388-865-0526, provides that DSHS “shall adopt such rules as may be necessary to effectuate the intent and purposes of this chapter, which shall include but not be limited to evaluation of the quality of the program and facilities operating pursuant to this chapter, evaluation of the effectiveness and cost effectiveness of such programs and facilities, and procedures and standards for certification *and other action relevant to evaluation and treatment facilities.*”

VI. CONCLUSION

The Superior Court's Declaratory Order was one it had authority to enter. The Order correctly holds that individual due process and statutory rights are violated when a court orders a person deprived of liberty and detained to a hospital without adequate treatment just because beds in mental health evaluation treatment facilities are full.

RESPECTFULLY SUBMITTED this 13th day of January 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By Eric J. Neiman by DW Ferm #11466 per a with.
Eric J. Neiman, WSBA #14473
John A. Rosendahl, WSBA #09394

Attorneys for Respondents MultiCare Health
System and Franciscan Health System

1301 A Street, Suite 900
Tacoma, WA 98402
(253) 593-5620

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of Washington that, on the 13th day of January, 2014, I caused a true and correct copy of the foregoing document, "Brief of Intervenor Respondents MultiCare Health System and Franciscan Health System," to be delivered in the manner indicated below to the following counsel of record:

Counsel of Record for Respondents
D.W., G.K., S.B., E.S., M.H., S.P.,
L.W., J.P., D.C., and M.P.:
Christopher P. Jennings, WSBA #17194
Pierce County Assigned Counsel
9601 Steilacoom Blvd SW Bldg 25
Lakewood, WA 98498-7212
cjennin@co.pierce.wa.us

SENT VIA:
 Fax
 ABC Legal Services
 Express Mail
 Regular U.S. Mail
 E-file / E-mail

Counsel of Record for Respondents
D.W., G.K., S.B., E.S., M.H., S.P.,
L.W., J.P., D.C., and M.P.:
Jennifer J. Sweigert, WSBA #38068
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA 98122-2842
SweigertJ@nwattorney.net

SENT VIA:
 Fax
 ABC Legal Services
 Express Mail
 Regular U.S. Mail
 E-file / E-mail

Counsel of Record for Appellant State of
Washington/Department of Social and Health
Services
Sarah J. Coats, WSBA #20333
Attorney General of Washington
7141 Cleanwater Drive SW
PO Box 40124
Olympia, WA 98504-0124
sarahc@atg.wa.gov

SENT VIA:
 Fax
 ABC Legal Services
 Express Mail
 Regular U.S. Mail
 E-file / E-mail

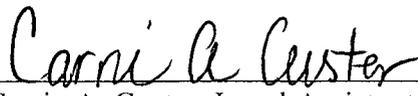
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DEPUTY CLERK

Counsel of Record for Appellant Designated
Mental Health Professionals
Kenneth L. Nichols, WSBA #12053
Pierce County Prosecuting Attorney
955 Tacoma Ave S Ste 301
Tacoma, WA 98402-2160
knichol@co.pierce.wa.us

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

DATED this 13th day of January, 2014, at Seattle, Washington.



Carrie A. Custer, Legal Assistant