NO. 101184-9

SUPREME COURT OF THE STATE OF WASHINGTON

SHANAREL DEMENT,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL & HEALTH SERVICES,

Respondent.

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

Treated as an Answer to Petition for Review

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I. INTRODUCTION

Though Shanarel Dement knew that vulnerable adult F.G. had serious psychiatric disabilities that rendered him delusional, combative, and assaultive, she let him leave her adult family home unescorted, then waited twelve hours to notify authorities that he was missing. F.G. was only found two months later, intoxicated and in the middle of a road in Oregon. Ms. Dement's lack of supervision and delay in getting assistance to locate F.G. placed him in significant danger to himself and others. Adult Protective Services found that Ms. Dement had neglected F.G. when she let him leave unaccompanied and did not take reasonable steps to find him when he did not return. The Court of Appeals correctly upheld that finding.

Ms. Dement's petition for review is based on fundamental misunderstandings of the Administrative Procedure Act, unsupported constitutional arguments, and a request that this Court reweigh the evidence. The Court of Appeals properly limited its review to the agency action at issue in this litigation,

and Ms. Dement identifies no conflict with precedent. Furthermore, Ms. Dement has not presented a significant question of constitutional law or issue of substantial public interest. This Court should deny review.

II. IDENTITY OF RESPONDENT

The Department of Social and Health Services (Department or DSHS) is the Respondent. The Department asks this Court to deny review of the Court of Appeals decision designated in Part III.

III. COURT OF APPEALS DECISION

Petitioner, Shanarel Dement, seeks discretionary review of the Court of Appeals decision affirming a substantiated finding against her for neglect of vulnerable adult F.G. on April 13, 2019. The appeal was resolved by an unpublished decision issued on June 13, 2022.

IV. ISSUES PRESENTED FOR REVIEW

A. Did DSHS correctly determine that Shanarel Dement neglected a vulnerable adult in her care dealing with serious

psychological impairment when she let him leave her facility with no one observing him, and did not seek help in finding him for twelve hours afterward despite his known desires to leave for Oregon?

B. Did the Final Order in this case correctly limit the decision to the single issue for which Ms. Dement timely and properly sought review?

C. Did Ms. Dement receive due process when she was notified in writing of the substantiated finding and appeal process, was afforded a full evidentiary hearing with witnesses, exhibits, direct and cross examination, and was provided with a written decision with further appeal rights?

D. Is the language of RCW 74.34.020(16)(b) constitutional and not vague as written and as applied to Ms. Dement?

V. COUNTERSTATEMENT OF THE CASE

Shanarel Dement agreed to admit F.G. to her adult family home in December 2018 as a least restrictive alternative to

confinement at Western State Hospital. CP 139[1], 309-13. Ms. Dement knew of F.G.'s schizophrenia diagnosis, for which he often failed to take prescribed psychotropic medications, as well as his illegal drug use and convictions for violent felonies, including attempted murder. CP 135; 309, 382. Ms. Dement also knew from F.G.'s Comprehensive Assessment Reporting Evaluation (CARE) plan that F.G. was "verbally abusive," "intimidating/threatening," that he "breaks, throws items," made "poor decisions/unaware of consequences" and was said to be impulsive. CP 302. The CARE plan warned that when off of his medications, F.G. exhibited agitated and aggressive behavior as well as delusions and hallucinations, referencing, as an example, when he was last off medication, he "threatened to kill others and cut their throats." CP 292, 303.

[1] Ms. Dement does not assign error to any of the findings of fact made below, and therefore the Final Order's findings will be cited as verities on appeal throughout this briefing. *In re J.F.*, 109 Wn. App. 718, 722, 37 P.3d 1227 (2001); *Fuller v. Emp't Sec.*, 52 Wn. App. 603, 762 P.2d 367 (1988).

The CARE plan for F.G. required "supervision" with "Locomotion Outside of Immediate Living Environment to Include Outdoors." CP 141, 300. While Ms. Dement states that the supervision was only for emergency evacuation, the CARE plan uses the phrase "supervision" for the entire category of F.G.'s activities outside of his room and outdoors. CP 300. Consistent with this, the plan assigns the caregiver to the tasks of "Eating, Locomotion Outside Room, Med. Mgmt., Telephone." CP 287-300. Ms. Dement became the provider/caregiver[2] when F.G. was discharged, and was to "Take client to store," and "Drive client to appointments." CP 295-96. Ms. Dement was instructed in the CARE plan she signed that "C.G. [caregiver] will let the provider [Ms. Dement] know if [F.G.] wants to go outside so C.G. can take him. C.G. should

[2] Her facility was the provider, but Ms. Dement was also one of the only available caregivers at her facility. As the business owner and operator, Ms. Dement was responsible for allocating her limited care resources. RCW 70.128.120; WAC 388-76-10200.

ensure that [F.G.] shouldn't go far to prevent wandering." CP 320, 326. Ms. Dement was also required to call F.G.'s case manager if he left without supervision, to decide whether law enforcement should be called. CP 140.

F.G. left Ms. Dement's adult family home many times without supervision and without calls to the case manager. CP 144. Ms. Dement called the case manager on April 10, 2019, when F.G. went to the store without supervision and did not return for more than 90 minutes. CP 145, 338. On April 13, 2019, F.G. left the adult family home again at approximately 10:30 a.m. and did not return at all. CP 147, 338-39. Although Ms. Dement knew by 12:39 pm that F. G. had not returned, she did not notify F. G.'s case manager or local law enforcement of his disappearance for approximately 12 hours, with the police department recording a call at 10:43 p.m. CP 147, 433. Law enforcement did not locate F.G. another two months. CP 149, 151. F.G. turned up in Oregon when he was seen scooting on his bottom in the middle of a road

and taken to a local hospital for mental health treatment. CP 151, 408.

Ms. Dement received a substantiated finding of neglect of a vulnerable adult because she did not ensure that F.G. was supervised when outside of the adult family home, leading to F.G. being missing for over two months. CP 135, 399. This finding was made by DSHS Adult Protective Services . *Id.* Ms. Dement requested review of that finding received a full two-day hearing that included witness testimony on direct and cross-examination, exhibits, and legal argument. CP 134. The Administrative Law Judge (ALJ) issued a written decision upholding the finding on June 29, 2020. *Id.* Ms. Dement sought review of that decision from the DSHS Board of Appeals, which resulted in the Final Order of Review Judge Thomas L. Sturges affirming the neglect finding. CP 167.

Ms. Dement next sought judicial review of the neglect finding under RCW 34.05.570. CP 1-72. The superior court denied Ms. Dement's judicial review request, and she appealed to

the Court of Appeals, Division I. On June 13, 2022, the Court of Appeals affirmed the decision below in an unpublished decision. *Shanarel Dement v. Dep't. of Social & Health Srvcs.*, No. 82859-2-I, (Wash. June 13, 2022) (unpublished).

Ms. Dement now seeks discretionary review from this Court. Her arguments have changed markedly; she now asserts new constitutional claims that lack merit and were not reviewed at any prior stage of the case. *Compare* Petition for Review *with* Petitioner's Opening Brief *and* Petitioner's Reply Brief. Review should be denied.

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals decision comports with existing case law and does not involve a constitutional issue. The alleged errors are fact-specific, lack merit, and do not raise an issue of substantial public interest. Review should be denied under RAP 13.4(b).

A. The Court Of Appeals Decision Correctly Reviewed the Only Decision Appealed

Throughout her appeal process, Ms. Dement has attempted to obtain consideration of other agency actions, such as loss of her Adult Family Home license and potential consequences for her Registered Nursing (RN) credential, arguing that these consequences somehow preclude a substantiated finding from being made. Pet. For Rev. at 8, 12; Petitioner's Opening Brief at 45-47. The only agency action at issue here, however, is the Review Decision and Final Order (Final Order) upholding the substantiated finding of neglect. CP 37-72. No other agency actions were addressed in the Final Order, and so it is inappropriate for Ms. Dement to insert such decisions into this case without a proper administrative hearing request. *See* RCW 34.05.413(2), (3) (permitting time limits for requesting hearings); RCW 34.05.534 (requiring exhaustion of administrative remedies); WAC 388-71-01240(1) (setting time limit for hearing request). The Court of Appeals correctly limited

its review to the Final Order. *Dement*, slip op. at 4-5. Ms. Dement has not demonstrated any basis for this Court to review collateral issues not addressed in the Final Order.

A person must exhaust administrative remedies to obtain judicial review of an agency action, with certain exceptions not applicable here. RCW 34.05.534. New issues and information are seldom allowed. RCW 34.05.554, .558. The proper way to seek review of other agency actions is to request a new administrative hearing. RCW 34.05.413, .534.

Review in this case exclusively concerns Ms. Dement's June 27, 2019 substantiated finding of neglect. CP 38. The hearing on this agency action took place April 28-29, 2020. CP 37. On October 22, 2020, the Board of Appeals issued its Final Order. CP 134-69. After the issuance of the Final Order, Ms. Dement was no longer qualified to work as an adult family home provider per WAC 388-76-10130(10) and -10180(1)(c)(iii). Ms. Dement, however, would have notice and the opportunity to request an administrative hearing to challenge any revocation or

disqualification. RCW 70.128.160(5); WAC 388-76-10995. The record does not show whether Ms. Dement was in fact disqualified or had her adult family home license revoked, much less that she timely sought administrative remedies, and so review of any such actions here is precluded. RCW 34.05.534.

Similarly, the Department of Health has the authority to take action regarding Ms. Dement's RN credential based on the substantiated finding of neglect. RCW 18.30.180. Again, Ms. Dement would have notice of the action and an opportunity to respond. RCW 18.130.090. These administrative processes protect Ms. Dement's property rights in her RN license, not review by this Court of how the neglect finding might have collateral consequences in her life. *Id.*

Ms. Dement's argument that review is merited due to the consequences of the neglect finding is legally incorrect. Those ancillary consequences would be addressed through separate agency actions with full due process provided. RCW 18.130.090; RCW 70.128.160(5); WAC 388-76-10995. *See, e.g. Kraft v.*

Dep't. of Soc. & Health Srvcs., 145 Wn. App 708, 187 P.2d 798 (2008) (in challenging a finding of mental abuse of a vulnerable adult, appellant cannot claim different burden of proof because of collateral impacts from the finding).

The Court of Appeals did not make a legal or constitutional error in limiting review to the substantiated finding of neglect that Ms. Dement properly appealed. *Dement*, slip op. at 4-5. Review by this Court is not warranted.

B. Substantial Evidence Supports the Finding That Ms. Dement Negligently Treated F.G.

Ms. Dement asks this Court to grant review in order to reweigh the evidence and reach a different conclusion. Pet. Rev. at 9-11, 14-16. But under the APA, unchallenged findings of fact are treated as verities on appeal, *Tapper v. Emp. Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993), and reviewing courts must accept "the fact-finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences," *Sunderland Family Treatment Serv. v. City of*

Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Even if reweighing the evidence were appropriate, this would not present an issue of substantial public interest under RAP 13.4(b)(4).

The Court of Appeals appropriately deferred to the fact finder, here the Review Judge, and did not reweigh evidence. *Dement,* slip op. at 6-8. Ms. Dement shows no entitlement to relief on what are largely disagreements with the weight accorded to evidence supporting that decision.[3] *Id*.

Ms. Dement implies that the evidence did not support neglect under RCW 74.34.020(16)(b) because F.G. had been known to walk out alone before, there was "nothing wrong" with him when found in Oregon, and the Department did not fund an extra caregiver to watch F.G. Pet. Rev. at 15-16, 18-22. Ms.

[3] Although Ms. Dement speaks of the Court of Appeals' beliefs in her briefing, the Court of Appeals did not reweigh the evidence, but properly affirmed findings supported by substantial evidence in the record. *Dement,* slip op. at 6-8.

Dement mistakenly assumes that F.G. was not exposed to clear and present danger because that danger did not manifest in a tangible way during the neglect incident. Pet. Rev. at 12-13. But the question here is not whether harm actually befell F.G. while missing for two months, but whether there was a clear and present danger that it could. RCW 74.34.020(16)(b).

The extreme vulnerability of F.G., psychiatrically impaired to the point that he could harm himself or another, is what created a clear and present danger for him while unsupervised and unmedicated for his schizophrenia. CP 302-13, 544-56, 643-44, 693. "Danger" is what is discussed in the statute and so danger, not actual fulfillment of that danger, is what must be analyzed in determining whether the finding of negligent treatment was correctly made. RCW 74.34.020(16)(b).

The Court of Appeals correctly applied this standard, noting:

> Dement was aware of and did create a risk by leaving F.G. in the community unsupervised for such an extended period of time without contacting

> his case manager or law enforcement. Further, he was ultimately missing for two months and found in the middle of a road in a neighboring state. First responders concluded that F.G. was in a sufficiently deteriorated mental state that they detained and transported him for immediate care, which included holding him for a mental health assessment. This was precisely the sort of risk that the supervision requirements contained in the negotiated care plan sought to avoid.

Dement, slip op. at 8.

Here, Ms. Dement disregarded the risk of clear and present danger to F.G., for whom she alone was responsible. CP 302-13, 382, 544-56, 643-44, 693. Ms. Dement claims, for the first time and without citation to the record, that her reason for not calling 911 was to protect F.G. from an encounter with law enforcement that might go badly. Pet. Rev. at 19. But this belated and unsupported excuse should be disregarded, as it was not presented at trial or any prior stage of review. CP 1-835; Petitioner's Opening Brief, Petitioner's Reply Brief.

Ms. Dement also claims that she should not have been expected to call 911 sooner because the neglect statute does not

specify that action. Pet. Rev. at 20. But neglect is a concept based on the needs of the vulnerable adult and the knowledge of the caregiver. RCW 74.34.020(16)(b). Ms. Dement voluntarily undertook to care for F.G. in exchange for compensation, and so agreed to provide him care that was not negligent. RCW 70.128.010(1); CP 544-56, 588-90.

Ms. Dement's claim that lack of payment for another caregiver relieves her of a neglect finding is unavailing. Pet. Rev. at 21-22. The statute does not enquire into care arrangements, but expects any such arrangement to safeguard the vulnerable adult's health, safety, and welfare. RCW 74.34.020(16)(b). Ms. Dement was fully apprised of F.G.'s care needs in advance and was free to reject him as a client. CP 544-56.

Ms. Dement also argues that she did not need to heed the CARE plan because it "mixed the duty of the Western State Hospital and the AFH Assessment for F.G." Pet. Rev. at 11, 13. However, despite some lack of fit with her adult family home

due to the plan being first developed while F.G. was at Western State, the CARE plan identified Ms. Dement as the care provider and indicated he needed supervision outside of the facility. CP 545-56. She was aware of F.G.'s specific vulnerabilities, because the CARE plan stated he should not be alone outside the home. CP 550, 553-54. Furthermore, Ms. Dement knew F.G. wanted to travel to Oregon, and that he had money to do so. CP 607-08, 610, 614-15, 821. "It was her decision, knowing these things, to let F. G. out unsupervised and then delay notifying the authorities that presented the clear and present danger to F.G." CP 604, 606-07, 637-38. Substantial evidence shows Ms. Dement neglected F.G. under RCW 74.34.020(16)(b). Ms. Dement has shown no basis for review under RAP 13.4(b).

C. Ms. Dement Received Full Due Process Protections

Ms. Dement was notified in writing that "on or about April 13, 2019" she neglected F.G. because:

> You allowed the vulnerable adult to leave the AFH without staff supervision to go to the store several blocks away. The vulnerable adult did not return,

> and became a missing person. Your actions placed the vulnerable adult in clear and present danger.

CP 399. Ms. Dement challenged this finding, and received a full evidentiary hearing. CP 252, 400, 558-761. She received a written decision based on the evidence in the record, challenged that decision, and received a final agency decision, the Final Order, on October 22, 2020. CP 134-70, 176-78, 189-222.

Despite all of these procedural steps, Ms. Dement argues she was denied due process because the Court of Appeals considered her failure to call 911, claiming that this fact was not considered at the administrative hearing and was not part of the neglect finding. Pet. Rev. at 1-6, 10, 16. But Ms. Dement is incorrect about the facts and the law. She was given sufficient initial notice as to why she was found to have neglected F.G., and the issues were actually litigated. CP 399, 604, 606-07, 641-42, 685, 694, 770-71. There is no due process claim for this Court to review.

1. Ms. Dement Was fairly Apprised Of The Reason That She Was Found To Have Neglected F.G.

Ms. Dement alleges a conflict between the decision of the Court of Appeals and the U.S. Supreme Court. Pet. Rev. at 7. But there is no such conflict. Ms. Dement appears to argue that due process principles of notice are implicated here because the June 27, 2019 letter did not specify that part of her neglect in failing to supervise F.G. was waiting twelve hours report him missing. Pet. Rev. at 7. However, the notice provided was sufficient to meet constitutional requirements.

Ms. Dement had notice and the opportunity to be heard, the cornerstone of due process. CP 399, 558-761; *In re Hendrickson*, 12 Wn.2d 600, 606, 123 P.2d 322 (1942). Absolute precision of language was not required to give her fair warning of the issues supporting neglect, as illustrated in *Olmstead v. Dep't. of Health*, 61 Wn. App. 888, 812 P.2d 527 (1991). There, a doctor challenged a statement of charges to the Medical Disciplinary Board, arguing he was denied due process

because the statement did not specify he violated a prior agreement by not attending weekly group therapy meetings. *Olmstead*, 61 Wn. App. at 892. The Court disagreed, noting the statement of charges said that Dr. Olmstead had "failed to comply with the requirements of the Washington Monitored Treatment Program and maintain satisfactory status in that program," and one such requirement was the weekly therapy. *Id.* The charges as written "provided sufficient notice for his preparation for the hearing." *Id.*

Similarly, here Ms. Dement was not prejudiced at her hearing or on appeal by the need to explain her actions on April 13, 2019 when F.G. left the facility unaccompanied, despite the lack of specific reference to the delay between first knowing that F.G. was missing and the time she alerted authorities.

Ms. Dement cites *In re Ruffalo*, 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968) in support of her argument, but this case is markedly different. Pet. Review at 7. In *Ruffalo*, the petitioner faced an amended charge of misconduct during a

disbarment proceeding, and was not given the opportunity to respond. *Ruffalo*, 390 U.S. at 546-50. The Court found due process lacking because the charge was unknown when the quasi-criminal proceeding began, and was only revealed through testimony at the hearing. *Ruffalo*, 390 U.S. at 550-52.

Here, unlike *Ruffalo*, there was one allegation of neglect by Ms. Dement allowing F.G. to leave unsupervised and become a missing person, and the hearing fully explored the contours of the event, including Ms. Dement's long delay in reporting F.G. missing to the case manager and law enforcement. CP 399. There was no lack of notice to Ms. Dement before the hearing; her actions of April 13, 2019 were the center of testimony by all witnesses, consistent with the allegations. CP 399, 558-761.

Ms. Dement was not unfairly surprised at trial, and received full due process notice and opportunity to be heard. *Id.* She has not shown that due process concerns require review by this Court under RAP 13.4(b)(3).

2. Ms. Dement's Failure To Report F.G. Missing Was Litigated At The Hearing And Was Found In The Initial And Final Orders

The Final Order determines Ms. Dement did not report F.G. missing to police until 10:45 p.m., around the same time she reported to Valley Cities[4] under F.G.'s CARE plan. CP 156, 163-64. Ms. Dement testified about her calls to Valley Cities and law enforcement, which was evidence showing she delayed far too long at great risk to F.G.'s health, safety, and welfare. CP 74-75, 604, 606-07, 641-42, 685, 694, 770-71.

In deciding that Ms. Dement was neglectful of F.G. under RCW 74.34.020(16)(b), Review Judge Sturges noted that the CARE plan required her to confer with Valley Cities on whether the police should be called for any elopement by F.G. CP 163-64. But because Ms. Dement did not promptly notify either the police or Valley Cities, she effectively ensured no one knew about F.G. being missing and no one was assisting in locating him. The Final Order found that the delay "demonstrated a

[4] This is the agency where the case manager was employed.

serious disregard of F.G.'s safety, and the health and safety of other individuals that happened to encounter F.G." and " allowed F.G. more time in which to make his ultimately successful 'escape.'" CP 164.[5] Ms. Dement has had numerous opportunities to challenge this and other findings, but has not effectively done so through her briefing and argument. *See, e.g.* Petitioner's Opening Brief, Petitioner's Reply Brief; CP 2-4, 177-88. Ms. Dement has not shown a viable due process issue.

Reviewing courts appropriately considered Ms. Dement's twelve-hour delay in alerting authorities that F.G. was missing from the adult family home, implicit in the finding that she was negligent in her supervision of F.G. and addressed at trial and in pleadings following. Slip op. at 7-8; CP 74-75, 604, 606-07, 641-42, 685, 694, 770-71. This Court should deny review under RAP 13.4(b)(3).

[5] The Court of Appeals quoted these findings extensively and with approval in upholding the finding of neglect. Slip. Op at 7.

D. Ms. Dement Presents No Viable Argument That RCW 74.34.020(16)(b) Is Unconstitutionally Vague

Ms. Dement advances two vagueness arguments, but neither warrants review. First, she argues that the use of the term "line of sight" in referring to her duty towards F.G. when out of doors is "unregulated" and vague. Pet. Rev. at 9-10, 14-15. Second, for the first time in her petition for review, Ms. Dement argues that RCW 74.34.020(16)(b) is unconstitutionally vague. Pet. Rev. at 16-24. Both of these vagueness arguments lack merit.

Ms. Dement's attack on terms used to describe her duty of supervision is irrelevant, as the legal inquiry is whether Ms. Dement committed "neglect," as defined in RCW 74.34.020(16)(b); Ms. Dement engaged in neglect even if the challenged term was eliminated from consideration. CP 65-68. And Ms. Dement's argument regarding the constitutionality of RCW 74.34.020(16)(b) is so lacking in substance that it presents no "significant question" under RAP 13.4(b)(3). Pet. Rev. at 16-24. This Court should deny review.

1. Neglect Here Was Based On The Statutory Definition, Not On The Supervision Plan For F.G.

The Court of Appeals correctly observed that Ms. Dement's premise—that the Board of Appeals defined neglect to require constant monitoring—was incorrect:

> The final order utilized the correct definition of negligence under the statute and, as DSHS succinctly puts it in briefing, "The Final Order properly reviews the evidence of the functional limitations for F.G. in determining that what Ms. Dement did in allowing him into the community unsupervised and leaving him there without a law enforcement search for twelve hours was neglectful."

Dement, slip op. at 7-8. This is precisely right. The Final Order found neglect based on the statutory definition in RCW 74.34.020(16)(b), not mere noncompliance with a provision of the CARE plan. The final order was based on Ms. Dement's disregard of serious limitations in the ability of F.G. to function on his own, needing monitoring to prevent dangers that being left alone in the community presented in terms of lack of self-care,

aggression towards or from others, and lack of awareness of surroundings, illustrated by F.G.'s discovery in the middle of traffic. CP 65-68. Ms. Dement was not held to a one-on-one care standard or to constant supervision, just to the standard of refraining from "a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety." RCW 74.34.020(16)(b); CP 64-68. Ms. Dement's constitutional and statutory arguments based on phrases like "line of sight" are not viable.

This Court should not accept review under RAP 13.4(b) to address the unremarkable decision by the Court of Appeals that the findings of neglect here were made by applying the relevant facts to the statute rather than to a CARE plan or other Department regulation.

2. Ms. Dement Has Not Shown That RCW 74.34.020(16)(b) Is Too Vague To Be Understood

Ms. Dement fails to identify any significant issue of constitutional law at issue in this case. Pet. Rev. at 3, 5-8, 16-24. Her arguments here present different constitutional claims than those the Court of Appeals declined to consider because she failed "to engage with the proper constitutional tests for such challenges." *Dement*, slip op. at 3-4, fn. 2. Her new vagueness challenge to RCW 74.34.020(16)(b) similarly lacks supported argument or analysis, and provides no basis for review by this Court. Pet. Rev. at 3, 5-8, 16-24

RCW 74.34.020(16)(b) is presumed constitutional, and it is Ms. Dement's burden to prove vagueness beyond a reasonable doubt. *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). To do so, she must establish "that persons 'of common intelligence must necessarily guess at [the staute's] meaning and differ as to its application." *Id.* But "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions

would be classified as prohibited conduct." *City of Seattle v. Eze*, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988) (citations omitted).

Ms. Dement does not come close to meeting her burden here, and so does not establish a "significant question" under RAP 13.4(b)(3). She cites two U.S. Supreme Court decisions in support of her vagueness challenge, but neither touches on vagueness. Pet. Rev. at 17, 22-23. The first of these is *Skidmore et al. v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944), which involves an action for damages under the Fair Labor Standards Act by employees not being paid for wait time while on call. *Skidmore*, 323 U.S. at 135-36. *Skidmore* does not discuss the concept of constitutional vagueness at all, and the passage cited by Ms. Dement is a test developed by the U.S. Supreme Court to analyze the weight given to an agency's interpretation of its own policies and regulations. Pet. Rev. at 17. Similarly, Ms. Dement's citation to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S. Ct. 2778. 81 L. Ed.2d 694 (1984) is to a well-known legal test for according deference to a federal

agency's interpretation of a statute it administers. Pet. Rev. at 22-23. These cases say nothing about what might be considered unconstitutional vagueness or help explain how RCW 74.34.020(16)(b) is unconstitutionally vague.

Because Ms. Dement has not adequately supported her vagueness theory, this Court need not consider it,[6] but even if the claim is taken at face value, Ms. Dement could not prevail. The words of the statute are not confusing, using ordinary and commonplace phrases to define what behavior constitutes neglect:

> (16) "Neglect" means . . . an act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety . . . .

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[6] *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). "'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *Id*. (internal quotation marks omitted) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

RCW 74.34.020(16)(b). This readily identifies who the statute applies to (those with a duty of care) and narrowly defines the scope of prohibited conduct, limiting it to "a *serious* disregard of consequences" where those consequences "constitute a clear and present danger" to the "health, welfare, or safety" of the vulnerable adult. *Id.* (emphasis added). These are all terms that persons of ordinary intelligence would know and use. Ms. Dement seems to demand in her briefing that the statute spell out every specific act or omission that might fall into the definition of "neglect," but the legislature need not draft the statute to meet such an impossible standard to avoid a vagueness challenge. Pet. Rev. at 16-24.

Regardless, because the statute "clearly applies" to Ms. Dement's conduct, she may not challenge it on vagueness grounds. *See* Haley, 117 Wn.2d at 740. There is no dispute that Ms. Dement had a duty of care with respect to resident F.G. The danger was clear and present because F.G. could not maintain his psychological equilibrium in the community and without

medications, meaning that his two-month journey to Oregon created risks to both him and the public from potential misunderstandings, aggression, and his inability to perceive reality. CP 151, 287-313, 382, 545-56, 576-78, 602-03408. The omission is Ms. Dement's physical absence and lack of supervision over a twelve-hour period, leaving F.G. in a situation that was dangerous in light of his specific vulnerabilities. CP 139-42, 147, 160-65, 433, 545-56, 600-04. Persons of ordinary intelligence can determine that individuals as compromised in their mental health functioning as F.G. would face serious risks when alone in public places.

Review should be denied by this Court because there is no viable vagueness challenge here.

VII. CONCLUSION

The motion for discretionary review does not meet the requirements of RAP 13.4(b), and the Department respectfully requests this Court deny review.

This brief is proportionately spaced using 14-point font

equivalent to Times New Roman and contains 4995 words, excluding those not counted per RAP 18.17(2)(c).

(word count by Microsoft Word).

RESPECTFULLY SUBMITTED this 22nd day of September, 2022.

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s/ PATRICIA L. ALLEN
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800 Fifth Avenue #2000
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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Washington State Supreme Court, under Case No. 101184-9, and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Charles M. Greenberg at cmg@triadlawgroup.com; vberryparalegal@gmail.com.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of September, 2022, at Seattle, WA.

NICK BALUCA
Legal Assistant

ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE

September 22, 2022 - 1:52 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,184-9
Appellate Court Case Title:	Shanarel Dement v. State of WA Dept. of Social and Health Services

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