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NO. 45111-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

IN RE THE DETENTION OF
DW, GK, SG, ES, MH, SP, LW, JP, DC, MP

Appeal from the Superior Court of Pierce County
The Honorable KATHRYN NELSON

Nos.

13-6-00138-1, 13-6-00145-4

13-6-00155-1, 13-6-00163-2

13-6-00167-5, 13-6-00169-1

13-6-00170-5, 13-6-00177-2

13-6-00214-1, 13-6-00218-3

REPLY BRIEF OF APPELLANT PIERCE COUNTY DMHPs

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I. ARGUMENT

A. THE RCW 71.05 HEARING IS SIMPLY NOT THE PROPER FORUM FOR ADDRESSING QUESTIONS OF ADEQUACY OF MENTAL HEALTH TREATMENT.

A RCW 71.05 mental health case is a streamlined process which is narrowly focused on the symptoms of the patient. Adjudicating adequacy of care in that context is like trying to squeeze a Seahawk linesman's foot into Cinderella's slipper. Because the RCW 71.05 procedure is simply not designed to address questions of adequacy of treatment, there was failure across the spectrum of the litigation process which renders the outcome legally indefensible.

Purpose. The purpose of a RCW 71.05 hearing is solely to determine if a person has a mental health problem significant enough for him or her to be involuntarily detained. This case was improperly stretched beyond that single purpose by adding parties and litigating the adequacy of care issue.

Parties. The only statutorily allowed parties in a RCW 71.05 case are the professionals who are petitioning for additional treatment and the patient. Because the commissioner wrongly permitted an attempt to adjudicate the adequacy of treatment in that forum, parties were added at different times and incompletely. The Regional Support Network—Optum Pierce RSN was never made a party, the hospitals became amicus after the commissioner's ruling and then

parties after the judge's ruling, and DSHS was amicus at the time of the commissioner's hearing and became a party thereafter. *Optum Pierce RSN*. The legislature has drawn a distinct line between long term and short term care. Long term care is essentially Western State and Eastern State Hospitals, and short term care is managed and directed by the various Regional Support Networks. See generally, RCW 71.24, The Community Mental Health Services Act, and specifically RCW 71.24.015 and .016 regarding legislative intent and policy. RCW 71.24.016(2) says in part, "The legislature further intends to explicitly hold regional support networks accountable for serving people with mental disorders..." The organization which is statutorily given the responsibility for the delivery of mental health services should be made a party to this kind of inquiry. Clearly, a separate action with the RSN as a named party is essential. *Hospitals*. The hospitals were not at the evidentiary hearing either as parties or as witnesses, but moved to intervene later. A separate action would have given them their desired input from the outset. *DSHS*. In a separate action, instead of being informally "invited" to a "show cause" hearing, DSHS would have their full range of legal options, motions and strategies.

The resulting procedure which had parties added after the close of the evidentiary hearing (as were DSHS and the hospitals) could not and did not result in a meaningful record. Furthermore, RCW

7.24.110 says in pertinent part, emphasis added, “When declaratory relief is sought, *all persons shall be made parties who have or claim any interest* which would be affected by the declaration ...” When this issue was originally raised, a dismissal of the involuntary treatment case was sought, not a declaratory judgment. Since the switch to RCW 7.24 was made by the judge at the end of the matter, “all persons” having an interest had not been made parties in time to participate in the evidentiary hearing.

Witnesses: No one from the hospitals was a witness at Commissioner Adams’ show cause hearing--a glaring omission if the issue is the adequacy of treatment *at the hospital*.

Insufficient record. Since there were no witnesses from the hospitals to testify as to what level of treatment was given to the patients, the record is insufficient from which to make appropriate findings. Nathan Hinrichs, the DMHP who testified at the “show cause” hearing and whose testimony is being relied upon by the respondents and hospitals, is actually one of the appellants supporting maintaining the current single bed certification process.

Inappropriate Judicial Decision. The Superior Court judge styled her decision as a declaratory judgment. If the court could hear the matter under RCW 71.05, why the need to resort to the Uniform Declaratory Judgments Act, RCW 7.24? That is a tacit finding that

RCW 71.05 was an inadequate and insufficient instrument for the court's ruling.

Inadequate Relief. It would seem that what the Respondents and Hospitals really want as an outcome is injunctive relief—preventing the use of the single bed certification process entirely. However, that apparently was a bridge too far for Judge Nelson, which is another tacit finding that this whole issue was inappropriate for a RCW 71.05 hearing. And since Judge Nelson's ruling is declaratory rather than an injunction, it applies only to these named respondents. That brings up the question as to the future of this issue: What is the effect of Judge Nelson's declaratory judgment with respect to future patients not parties to this ruling and appeal?

Time Frames. The time frames for RCW 71.05 hearings are short: only 72 hours for 14 day petitions. Given that minimal time frame, it should have been clear that the RCW 71.05 hearing was not appropriate for such efforts. Service of process alone on party opponents generally takes longer than those short time limitations.

Attorneys. With all due respect to the dedication and efforts of the Department of Assigned Counsel, their mission is to represent the individuals being detained in those narrowly focused RCW 71.05 hearings. They are not set up to do a general civil litigation practice. However, there is locally the "Northwest Justice Project (NJP), Washington's publicly funded legal aid program," which "provides

critical civil legal assistance and representation to thousands of low-income people in cases affecting basic human needs such as family safety and security, housing preservation, protection of income, access to health care, education and other basic needs.” <http://nwjustice.org/our-vision-justice-all-low-income-people-washington>. Perhaps they should have been asked by the Department of Assigned Counsel to handle the matter.

Future Litigation. If this court affirms the trial court, the precedent and the potential is there for every basic RCW 71.05 hearing to turn into a trial on the issue of adequacy of treatment, rather than simply on the symptoms of the patient. This the court should not countenance.

In light of all these procedural failures in this case touching virtually every aspect of the litigation process, which would not have been problems in a separate civil action, adjudicating adequacy of care under RCW 71.05 was simply inappropriate and necessitates overturning Judge Nelson’s ruling.

B. THE ADMINISTRATIVE PROCEDURE ACT WOULD BE AN OPTIONAL AVENUE FOR THE RESPONDENTS OR THE HOSPITALS TO CHALLENGE THE SINGLE BED CERTIFICATION WAC.

If RCW 71.05 is not appropriate to adjudicate the issue, what is available? As previously suggested, an Administrative Procedure Act action could have been started regarding the use of the WAC in the single bed certification process. Either the hospitals or the NW Justice

Project on behalf of the patients would have the resources to mount a challenge in that venue. That avenue would likely be out of the scope of practice of the Department Of Assigned Counsel's duties to represent patients in RCW 71.05 hearings.

C. A SEPARATE CIVIL ACTION WOULD BE AVAILABLE TO THE RESPONDENTS AND HOSPITALS.

A separately filed civil action, with all the available procedures under the Superior Court Civil Rules for adding parties, conducting discovery and having all necessary witnesses for trial would be the usual method for adjudicating this type of issue.

a. OF THE CITED CASES WHICH RULED ON THE ADEQUACY OF TREATMENT, ALL BUT *IN RE W.* INVOLVED A SEPARATE CIVIL ACTION BEGUN BY PATIENTS AND FOCUSING ON THAT ISSUE.

A survey of the cases provided by the Respondents of the cases where the patients or defendants were alleging insufficient treatment, shows that all (except for *In re Detention of W.*, 70 Wn. App. 279, 852 P.2d 1134 (1993), which will be discussed shortly) were adjudicated in the context of a separate civil action.

Advocacy Center for Elderly & Disabled v. Louisiana Dep't of Health & Hospitals, 731 F. Supp. 2d 603 (E.D. La. 2010). W.B., through his mother and next friend, and a disability advocacy organization brought an action challenging the Louisiana Department of Health and Hospitals' practice of subjecting incompetent criminal defendants to extended delays in parish jails before their transfer to a

mental health facility. The defendants were three Louisiana state officials who are sued in their official capacities.

Cameron v. Tomes, 990 F.2d 14 (1st Cir. 1993). “This case was brought by Robert Cameron, who is currently detained in the Massachusetts Treatment Center for the Sexually Dangerous (“the Treatment Center”). The defendants, whom we refer to as ‘the state,’ are officials who are responsible for the Treatment Center. In substance, Cameron complains that his conditions of confinement violate the Due Process Clause of the Fourteenth Amendment and his asserted constitutional ‘right to treatment.’” *Cameron v. Tomes*, at 15.

Ohlinger v. Watson, 652 F.2d 775 (9th Cir. 1980). “Appellants are two Oregon state prisoners, ... each appellant was sentenced as a “sex offender” to an indeterminate life sentence” ... “Appellants sought from the district court a declaratory judgment that their constitutional rights had been violated and an injunction directing the State to provide them with constitutionally adequate treatment,” *Ohlinger*, at 776. The Defendants-Appellees included Robert J. Watson, the Administrator of the Corrections Division of the State of Oregon.

Oregon Advocacy Center v. Mink, 322 F.3d 1101 (9th Cir. 2003). Here the issue was the time it took criminal defendants to be transferred from county jails to the Oregon State Hospital for competency evaluation and restoration. The plaintiffs were a criminal

defendant and two nonprofit organizations which represent mentally ill and criminal defendants. The defendants were the Director of the Department of Human Services, and Stanley Mazur-Hart, Superintendent of Oregon State Hospital, in his official capacity.

Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975). Frank Stachulak was adjudicated under the Illinois Sexually Dangerous Persons Act, and confined at the Psychiatric Division of an Illinois State Penitentiary. Later he brought an action under the federal habeas corpus statutes and Civil Rights Act challenging both the lawfulness of his detention and the conditions of his confinement. Illinois correctional officials appealed.

Turay v. Seling, 108 F. Supp. 2d 1148 (W.D. Wash. 2000, aff'd in part, dismissed in part sub nom. *Turay v. Anderson*, 12 F. Appx. 618 (9th Cir. 2001) and *Sharp v. Weston*, 233 F.3d 1166 (9th Cir. 2000).

“These cases, consolidated for purposes of injunctive relief, involve conditions of confinement at the Special Commitment Center (“SCC”) at McNeil Island, Washington. The plaintiffs are SCC residents civilly committed for an indefinite time as “sexually violent predators”; the defendants are the institution's superintendent and acting clinical director.” *Turay v. Seling*, at 1150.

Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974, supplemented, 68 F.R.D. 589 (D. Minn. 1975) aff'd, 525 F.2d 987 (8th Cir. 1975). “Six mentally retarded residents of the Minnesota State

Hospitals bring this action seeking declaratory and injunctive relief regarding treatment and conditions in six State-owned hospitals and alternatives to placement in these institutions,” *Welsch v. Likins*, at 489. “The defendants are public officials responsible for the care and conditions of the plaintiffs and the class they seek to represent, *Welsch v. Likins* at 490, *footnote omitted*. “This Court's jurisdiction is based on 28 U.S.C. § 1343(3), relating to actions arising under the Civil Rights statute, 42 U.S.C. § 1983, and 28 U.S.C. §§ 2201, 2202, relating to declaratory judgments,” *Welsch v. Likins*, at 491.

Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971 and 344 F. Supp. 373 (1972), *affd. sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). This was a class action initiated by guardians of patients confined at an Alabama Hospital, and by certain employees of the Alabama Mental Health Board. The defendants were the commissioner and the deputy commissioner of the Department of Mental Health of the State of Alabama among others. The issue was adequacy of treatment.

Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). Paula Romeo, whose mentally retarded son was involuntarily committed to a Pennsylvania state institution, filed a civil rights suit as her son's next friend, against the institution officials, raising safety and training (treatment) concerns.

In each of those cases a civil action was filed which was

separate from the original substantive case--whether a criminal case, sexually violent status case or involuntary mental health case. Attacks upon the level of treatment were not made from the substantive case. That is instructive as to how this issue should have been litigated with respect to these patients here in Pierce County. In the cited cases were issues regarding who were the appropriate parties, what treatment was being given and how that compared to the treatment which was constitutionally (or statutorily) required, and what remedies were appropriate. Jury trials were had in some of the cases. Clearly, with these examples of the appropriate procedure, the procedure used by Commissioner Adams and ratified by Judge Nelson was inadequate to the issues.

Additionally, our two local cases, *Pierce County Office of Involuntary Commitment v. Western State Hospital*, 97 Wn.2d 264, 644 P.2d 131 (1982) and *Pierce v. State*, 144 Wash. App. 783, 185 P.3d 594 (2008), were also separately filed civil actions. *Pierce County Office* was begun by a DMHP, but also done on behalf of persons named in two involuntary commitment cases, Nos. 18-50-60 and 18-50-60A. Note that a separate action was filed as opposed to proceeding in those cases and simply inviting Western State Hospital to a “show cause” hearing. Likewise, in *Pierce v. State*, 144 Wash. App. 783, 185 P.3d 594 (2008), the County, the RSN, the county inpatient facility, and a disability rights advocacy group brought action

alleging the state breached contracts for provision of mental health care services.

b. *IN RE W.*, THE ONLY RULING ON TREATMENT IN A SUBSTANTIVE CASE ITSELF, HELD THAT SUCH INQUIRIES WERE INAPPROPRIATE.

Of the cases cited, the only adequacy of treatment ruling in a mental health case itself was *In re Detention of W.*, 70 Wn. App. 279, 852 P.2d 1134 (1993). That court of appeals ruling held that the trial court was wrong to make that assessment. It noted under RCW 71.05.520, DSHS is given the responsibility to assure adequate treatment is provided.

[DSHS] shall have the responsibility to determine whether all rights of individuals recognized and guaranteed by the provisions of this chapter and the Constitutions of the state of Washington and the United States are in fact protected and effectively secured. To this end, the department shall assign appropriate staff who shall from time to time as may be necessary have authority to examine records, inspect facilities, attend proceedings, and *do whatever is necessary* to monitor, evaluate, and assure adherence to such rights. Such persons shall also recommend such additional safeguards or procedures as may be appropriate to secure individual rights set forth in this chapter and as guaranteed by the state and federal Constitutions. (Emphasis supplied.) RCW 71.05.520.

The court then said that “Only an actual failure to discharge this responsibility would generate grounds for an appeal to the courts; not merely an anticipated failure as urged by *W.*” *In re W.*, at 285. There has been no showing that DSHS has actually failed to discharge that responsibility. Perhaps as part of a civil suit, like tort claims which

have to be first submitted to a risk management office, proof of a previous letter to DSHS asking them to address the issue attached to a complaint would speak to that procedural concern.

The lesson to be drawn from these precedents is that a separate civil suit with all its available procedures is the appropriate mode of adjudicating the treatment issue the respondents and hospitals are raising, rather than the wholly inadequate RCW 71.05 hearing.

D. THE HOSPITALS COULD HAVE HAD THEIR CONCERNS REGARDING BEING FORCED TO CARE FOR PATIENTS, WITHOUT NOTICE AND A HEARING ADDRESSED IN A CIVIL ACTION.

The hospitals set forth the reasons they believe they are aggrieved by the single bed certification process, most specifically at page 22 of their brief, but also at pages 1, 4, 10, 27 and 28. Those arguments and reasons can be condensed into essentially three issues: The hospitals believe they are being made to care for mental health patients 1) by force, 2) without notice and 3) without opportunity for hearing.

Force

No court is ordering hospitals to do anything. The detention applies to a specific individual with a mental health problem. However, there is Federal law, the Emergency Medical Treatment and Active Labor Act (EMTALA), which requires hospitals to provide emergency health care treatment to anyone needing it regardless of

citizenship, legal status, or ability to pay. Participating hospitals may not transfer or discharge patients needing emergency treatment except with the informed consent or stabilization of the patient or when their condition requires transfer to a hospital better equipped to administer the treatment, 42 U.S.C.A § 1395dd. If that is the source of the “force” being complained about, that issue is more appropriately handled by contacting the Washington State congressional delegation. That the federal law implications have not been discussed until this point is further evidence of the poor development of the facts and issues this case’s tortuous procedural history has rendered.

Without Notice

The hospitals can’t claim surprise at the process. Past the 72 hour initial detention, RCW 71.05.230 requires two petitioners. The DMHP practice when filing a 14 day petition is to get a medical professional *at the hospital where the patient is located* to also evaluate and to sign the petition if he or she agrees the patient needs further detention. Attention is directed to the attached exhibit with a table of petitioners for these 10 cases. Along with the designated mental health professionals are doctors or advanced registered nurse practitioners, *eight of ten of which are from MultiCare or Franciscan hospitals*. Those medical professionals are presumably aware that the patient will be staying at the hospitals pursuant to a single bed certification, and consent thereto by signing the petition.

Opportunity for hearing

The hospitals have complained of a lack of opportunity for a hearing to discuss issues such as whether hospital beds are as full as E&T beds, that hospitals are not required for licensing to provide psychiatric services, and a consideration of how “boarding” affects other hospital patients. That those issues have not been addressed demonstrates why the limited scope of a RCW 71.05 hearing is no place to adjudicate the relative merits of the quality of care between hospital emergency rooms and E&T facilities. And that is precisely why the hospitals should have availed themselves of their own action either under RCW 34.05, the Administrative Procedures Act, or a civil action such as under RCW 7.24, the Uniform Declaratory Judgments Act or other theory. That way their issues could have been fully explored. The single bed certification procedure has been in place for years. The hospitals had all those years to file an action under either of those two avenues, and as plaintiffs could have taken affirmative steps to insure that all their concerns were litigated.

E. THE POLICY RATIONALE SET OUT.

The hospitals have criticized the lack of an expressed policy rationale for boarding in hospitals as opposed to exceeding E&T facility capacity. Hospital brief, p.32, footnote 25.

In response, here is a rationale: By statute, RCW 71.05.153(2), police officers may take persons presenting with mental health

symptoms to a crisis stabilization unit, an evaluation and treatment facility, or the emergency department of a local hospital. To rule out any physical causes or alcohol/drug causes, such persons are nearly always taken to a local emergency room first. Once physical causes are ruled out, or determined not to be the sole cause of the symptoms, hospital social workers call a DMHP to come evaluate the patient. Thus, most of the detentions made by DMHPs are completed at local hospitals. If detention is warranted, and the E&Ts are full, having the patient remain at the hospital makes logistical sense.

The E&T facilities risk losing their licenses or federal funding ability if they exceed their 16 bed capacity. Ending up with no functioning E&Ts is hardly a better outcome. Having E&Ts get overcrowded so no one is adequately cared for or so that everyone takes longer to get stabilized doesn't seem to be an appropriate approach either.

In *Oregon Advocacy*, at 1105, “The plaintiffs alleged that OSH was violating mentally incapacitated defendants' due process rights by unreasonably delaying such defendants' transfer from county jails to OSH for treatment.” Just as the *Oregon Advocacy* court found a seven day window of time for a defendant to get from jail to the Oregon Hospital as reasonable, likewise a short single bed certification is a similar reasonable step prior to being transferred to an E&T.

II. CONCLUSION

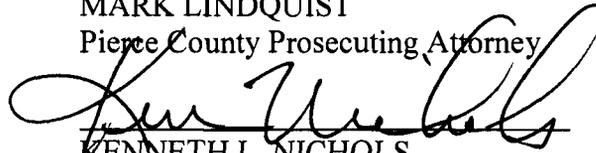
This case has gone awry from the outset--from an overly enthusiastic commissioner attempting to examine system wide levels of treatment in a forum designed to only examine an individual's mental health, to the court upon revision metastasizing the case into a Declaratory Judgment. Because a RCW 71.05 hearing is not the proper forum for full fledged litigation with discovery, depositions, and additional parties, the case proceeded without proper development of the facts and law. As a result, the process was so seriously and extensively flawed that Judge Nelson's ruling should not stand. This court should do what Commissioner Adams should have done at the outset: rule that a RCW 71.05 hearing is not an appropriate forum.

As said in *Pierce County Office*, at 272, this is primarily a legislative issue. The 2013 legislature included in the budget fund to provide for a new E&T facility for Pierce County. <http://www.thenewstribune.com/2013/11/01/2866657/state-to-fund-new-mental-health.html>. That will expand the available beds in Pierce County by 50%: from two 16 bed facilities to three 16 bed facilities. This should greatly reduce if not eliminate our use of hospital beds via single bed certification. It appears that the 2014 legislature is addressing the issue with respect to other counties as well. http://seattletimes.com/html/localnews/2023001181_mentalhealthmon eyxml.html.

This court should overturn the trial court, because 1) the trial court allowed an inappropriate process to take over a RCW 71.05 case, and 2) the appropriate remedy is legislative, and the Washington legislature is actively addressing the issue.

RESPECTFULLY SUBMITTED this 28th day of February 2014.

MARK LINDQUIST
Pierce County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Ken Nichols", written over the printed name of Kenneth L. Nichols.

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APPENDIX

Respondents	Case #	DMHP	2 nd Petitioner	Hospital/facility
D. W.	13-6-00138-1	Kent Nagel	Bernadette Villarerreal MD	Madigan
G. K.	13-6-00145-4	Dane Christensen	Lyne Ouellet MD	Good Samaritan
S. B.	13-6-00155-1	Carlos Alvarez	Laura Luu ARNP	St. Joseph
E. S.	13-6-00163-2	Nathan Hinrichs	Joy Jones MD	St. Anthony
M. H.	13-6-00167-5	Carlos Alvarez	Scott Shinneman MD	Good Samaritan
S. P.	13-6-00169-1	Carlos Alvarez	Larry Woodard MD	Good Samaritan
L. W.	13-6-00170-5	Nathan Hinrichs	Joy Jones MD	St. Joseph
J. P.	13-6-00177-2	Nathan Hinrichs	Aaron Edwards DO	Recovery Response Center
D. C.	13-6-00214-1	Dane Christensen	Jessica Tam MD	St. Joseph
M. P.	13-6-00218-3	Jessica Shook	Arthur Siek, MD	St. Anthony

PROOF OF SERVICE

I, DEBORAH KEATOR, state and declare as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on February 14, 2014, I caused to be served a true and correct copy of this **REPLY BRIEF OF APPELLANT PIERCE COUNTY DMHPS** and this **PROOF OF SERVICE** on the following individuals, in the manner indicated below:

<p>Attorney for Multi-Care Eric Neiman Williams Kastner & Gibbs 888 SW 5th Ave., Suite 600 Portland, OR 97204-2020</p>	<p><input checked="" type="checkbox"/> By U.S. Mail - Postage Prepaid <input type="checkbox"/> By ABC Legal Services <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-mail PDF <u>eneiman@williamskastner.com</u> <input type="checkbox"/> By Federal Express</p>
<p>Counsel for Respondents Eric J. Nielsen and Jennifer J. Sweigert Nielsen Broman & Koch PLLC 1908 E. Madison St. Seattle, WA 98122-2842</p>	<p><input checked="" type="checkbox"/> By U.S. Mail - Postage Prepaid <input type="checkbox"/> By ABC Legal Services <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-mail PDF <u>neielsene@nwattorney.net</u> <input type="checkbox"/> By Federal Express</p>
<p>Assistant Attorney General: Sarah J. Coats WA Attorney General's Office Social and Health Services DIV PO Box 40124 7141 Cleanwater Drive SW Olympia, WA 98504 0124</p>	<p><input checked="" type="checkbox"/> By U.S. Mail - Postage Prepaid <input type="checkbox"/> By ABC Legal Services <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-mail PDF <u>SarahC@ATG.WA.GOV</u> <input type="checkbox"/> By Federal Express</p>

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

DATED this 28TH day of February 2014, at Tacoma, WA.



PIERCE COUNTY PROSECUTOR

February 28, 2014 - 3:50 PM

Transmittal Letter

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Court of Appeals Case Number: 45111-5

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Motion: ____

Answer/Reply to Motion: ____

Brief: Appellants'

Statement of Additional Authorities

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Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

REDACTED APPENDIX

Sender Name: Deborah L Keator - Email: **dkeator@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:

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