

SUPREME COURT NO. _____

Court of Appeals No. 48481-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ANTHONY G. HAND, Petitioner

PETITION FOR REVIEW

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253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Anthony Hand, through his attorney, Marie Trombley, requests the relief designated in Part II.

II. COURT OF APPEALS DECISION

Mr. Hand seeks review of the July 25, 2017, published decision of Division Two of the Court of Appeals. Mr. Hand asks this Court to review the conclusion there is no remedy for violating substantive due process rights of an indigent incompetent defendant in a criminal case held in the jail for 76 days without court-ordered restoration treatment. A copy of the Court's opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

An incompetent criminal defendant has a liberty interest in receiving timely competency restoration treatment. An extended delay in admission for treatment violates an individual's substantive due process right. Where the trial court declines to follow the statutory remedy of dismissal without prejudice, is the remedy dismissal with prejudice?

IV. STATEMENT OF THE CASE

On August 26, 2014, the Pierce County Superior Court sentenced Anthony Hand to nine months of confinement with a portion to be served at the Alternative to Confinement program. (ATC). CP 2;266. On September 5, 2014, Mr. Hand allegedly violated the program requirements and Pierce County prosecutors charged him with escape in the first degree. CP 1-2. He was arrested on warrant October 1, 2014. CP 3; 274.

At his arrest, officers found methamphetamines and he was charged with unlawful possession of a controlled substance. CP 274;275. He could not post the \$30,000 bail bond for the escape from custody charge or the \$20,000 bail bond for the unlawful possession charge. He remained confined at the jail. CP 4-5; 276-277.

Seventy-one days later, defense counsel requested and received an order for a competency evaluation for Mr. Hand. 12/11/14 RP 3-4; CP11-17. The court ordered him to be held in custody without bail. CP 11. An evaluator met with him at the Pierce County Jail (PCJ). CP 291-299. The evaluator concluded Mr. Hand had a long history of mental illness symptoms, substance abuse disorder, and lacked the capacity to reasonably assist in his own defense. CP 26; 298. The court found Mr. Hand not competent to stand trial on December 24, 2014. CP 18-27; 12/24/14 RP 4. It ordered a 45-day commitment to Western State Hospital (WSH) within 15 days, “pursuant to the Trueblood¹ decision.” 12/24/14 RP 6; CP 30-32; 302-304².

Twenty-six days later, on January 19, 2015, Mr. Hand sent a letter to the court. CP 34-38. He remained held in the jail, awaiting his court-ordered restoration treatment. CP 34. Mr. Hand asked the court to consider whether the *Trueblood* decision did more than allow financial sanction of Department of Social and Health Services for noncompliance, specifically whether it was also to protect the due process rights of individuals with

¹ *Trueblood, et al., v. Washington State Dept. of Social and Health Services*, 73 F. Supp.3d 1311 (W.D. WA 2014).

² In a separate order for the unlawful possession charge, the court issued an amended order on December 29, 2014, for a 45 -day period rather than a 90-day time. (CP 305-307).

mental disabilities. CP 35. He reminded the court he was being held on a no bail hold, without having been convicted of a crime, and without the ability to obtain needed mental health services either at WSH or somewhere else. CP 36-37. He asked the court to dismiss based on a violation of his right to due process or to transfer his case to the mental health court. CP 38.

On February 11, 2015, defense counsel submitted a motion to dismiss, or to order WSH to show cause why it should not be held in contempt of the court's December 24, 2014. The motion sought dismissal because of the "extended and inexcusable incarceration in the county jail, in direct contradiction to the prior order of the court; the abrogation of Mr. Hand's right to a speedy trial by a State agency (DSHS, of which Western State Hospital is a part), and punishment by means of extended incarceration in violation of the clear directives set forth in Chapter 10.77 RCW, the court rules, due process, and the Eighth Amendment to the United States Constitution." CP 39-40. The court denied the motion to dismiss without prejudice. 2/18/2015 RP 2.

The court held a Show Cause hearing the following week, and set the motion to dismiss or be released to the next week. 2/25/2015 RP 5. In its briefing for the Show Cause hearing, the attorney general's office (AGO) acknowledged that Mr. Hand was a class member in the federal

court class action brought in *Trueblood v. DSHS*. *Trueblood* held the DSHS delay in providing court ordered competency services violated the plaintiffs' Fourteenth Amendment due process rights. CP 58. The AGO's briefing conceded that Mr. Hand had a due process right to avoid unreasonable delays in admission while detained and urged the court to order a temporary release of Mr. Hand to correct any constitutional deficiencies. CP 50.

Arguing against imposition of a sanction, the AGO contended that the initial two orders for treatment issued on December 24, 2014 gave a 15-day time frame for admission. At the hearing, the trial court did not hear oral argument from the attorney general. Rather, the court said it had heard argument previously on the same issue in numerous other cases and unless there was a new issue, it did not need argument. 2/25/16 RP 6. The court imposed sanctions of \$500 per day, beginning February 26, 2015. CP 83. Mr. Hand was not released to correct the constitutional violation.

On March 4, 2015, the court heard the defense motion to dismiss the charges or to release Mr. Hand. CP 98. Mr. Hand was still waiting for restoration services. The prosecutor argued *Trueblood* was a federal case, and had "no bearing" on the superior court. 3/4/15 RP 8. The state also argued Mr. Hand's Fourteenth Amendment right to due process "is a very distinct right versus having his case thrown out down here because of the

violation of the --- ride up in the clouds. What he is looking at down here is, well, how has this Court or the State here violated some type of right?" 3/4/15 RP 8.

Despite the over two-month delay in restoration services by WSH, the State argued there was no governmental mismanagement under CrR 8.3. 3/4/2015 RP 8-9. The court denied the motion to dismiss and specifically found there was no due process violation. 3/4/2015 RP 11. Mr. Hand continued in confinement.

On March 10, 2015 was admitted to WSH for his treatment. CP 111. In June 2015, the trial court signed an order holding DSHS in contempt for its failure to comply with the court order of December 24, 2014. The court ordered DSHS to pay a \$6,000 sanction for failure to obey a court order. CP 195-196.

The court found Mr. Hand competent to stand trial on April 29 2015, 209 days after his arrest and 50 days after his admission to the hospital. 4/29/15 RP 2. His bail was reset to 20,000 dollars. 4/29/15 RP 3. He could not post bail and remained confined.

Mr. Hand entered the felony mental health court program. CP 197-199. Six months later he was terminated from the program for noncompliance. CP 502-503. The matter proceeded to a stipulated facts trial and he was found guilty on both counts. CP 265-268; 497-499. He

was sentenced to 63 months of confinement. CP 250-262; 12/4/15 RP 51.

He made a timely appeal. CP 269;524.

On review, the Court of Appeals held the delay in admission for competency restoration treatment violated Mr. Hand's substantive due process rights. Opinion at 2. The Court also held dismissal was not required for a due process violation or under CrR 8.3(b). Opinion at 2.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes this Court should accept review because the decision of the Court of Appeals is a significant question of law under the Constitution of the State of Washington and of the United States is involved and the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3)(4).

It is a basic principle of federal and state law that an incompetent criminal defendant may not stand trial. *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 896, L.Ed.2d 103 (1975); *State v. Wicklund*, 96 Wn.2d 798, 799, 638 P.2d 1241 (1982); RCW 10.77.050. Where there is reason to doubt the defendant's competency, the court is authorized to order an evaluation and a report of the mental condition of the defendant. RCW

10.77.060(1)(a). If the defendant determined to be incompetent has been charged with a Class C or nonviolent Class B felony, the court must commit the defendant to a facility for competency restoration for up to forty-five days. RCW 10.77.086 (1)(a)(i)(ii)(b).(Emphasis added). Washington State Department of Social and Health Services (DSHS), not city or county jails, is tasked with overseeing both the competency evaluations and the restoration services. RCW 10.77 et.seq.

The Ninth Circuit has determined that pretrial detainees needing competency restoration treatment have a substantive due process right to restoration services. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003). Mr. Hand asserts that as an incompetent criminal defendant, who had not been convicted of the alleged crimes, he had a liberty interest in being free from incarceration. Art.1 §3; U.S. Const. amend 14. As an incompetent defendant, he had a liberty interest in receiving timely competency restoration treatment. *Trueblood v. D.S.H.S.*, 822 F.3d 1037 (9th Cir. 2016).

Here, WSH did not offer admission to Mr. Hand until 61 days after the fifteen-day window in which the court ordered him to be transported. As he waited in the jail, there was no reasonable relation between the nature and duration of his confinement and the purpose for which he was being held, competency restoration. *Jackson v. Indiana*, 406 U.S. 715,

733, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). Mr. Hand sought relief from the trial court nine days after the fifteen-day window for admission had passed, asking for dismissal based on a violation of his right to due process. CP 36-38. Sixteen days later defense counsel also submitted a motion to dismiss or hold a show cause hearing, as the extended incarceration clearly violated the directives in RCW 10.77. CP 39-47. The court denied those motions and Mr. Hand remained in custody at the jail. Even the attorney general acknowledged that Mr. Hand ought to be released to cure the constitutional violation of the unreasonable delay. CP 50. The court denied any relief.

The Washington Supreme Court has been clear: “Anyone detained by the State due to incompetency has a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.” *Det. of D.W.*, 181 Wn.2d 201, 207, 332 P.3d 423 (2014)(internal citations omitted). Where this clear constitutional right has been violated, there must be a remedy of consequence. Financial sanctions on the state hospital for failure to comply with a court order provides no relief for Mr. Hand. Dismissal without prejudice, the statutory relief, provides no remedy for Mr. Hand, as he has been convicted and is serving his sentence.

It is incumbent on this Court to determine whether the violation of violating Mr. Hand's due process rights warrants a dismissal of charges with prejudice. The Due Process Clause guarantees more than fair process: it "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

By analogy, Washington Courts have long held that "a speedy trial in criminal cases is not only a personal right protected by the state and federal constitutions (Const. art. 1§22), it is also an objective in which the public has an important interest." *State v. Striker*, 87 Wn.2d 870, 876, 557 P.2d 847 (1976). In *Striker*, the Court noted the *statute* governing speedy trial did *not* require dismissal with prejudice. *Id.* at 875. However, the Court held

In order to protect the right of the accused, and in accordance with the manifest policy expressed in the rules, to discourage prosecutorial delays which are not approved by the judicial process, cannot be effectively precourt, we hold that in such circumstances a prosecution must be dismissed *with prejudice* on timely motion of the defendant if it is not brought to trial within the time specified in [CrR 3.3](#), after the information or indictment is filed. This holding is in harmony with the intent and spirit of the rules which are designed to afford a speedy trial.

Similarly, here, RCW 10.77 provides only a partial remedy. It authorizes the court to dismiss the proceedings without prejudice if competency has not been restored within the 45 or 90-day treatment period. RCW 10.77.084(1)(c). The question here, as in *Mink* and *Trueblood*, is “what happens when the state mental hospital . . . which is charged with evaluating and treating mentally incapacitated defendants, refuses to accept such defendants on a timely basis?” *Mink*, 322 F.3d at 1105.

The justification by the AGO here for the significant delay in services was a lack of funding and staffing. CP 51. In a concurrence opinion, Justice Sanders wrote:

The judiciary should accept no shortcuts when it comes to discharging its constitutional obligation to appoint effective attorneys to represent indigent criminal defendants. If no such attorney is to be found because adequate funding is not available, then no attorney should be appointed and the case dismissed. It is not up to the judiciary to tax or appropriate funds; these are legislative decisions. However, *it is up to the judiciary to facilitate a fair proceeding* with effective appointed counsel if there is to be one.

State v. A.N.J., 168 Wn.2d 91, 121, 225 P.3d 956 (2010).

The Washington Supreme Court and the Ninth Circuit have clarified that a legislative failure to provide adequate funding does not relieve the court of discharging its obligations to protect the constitutionally guaranteed substantive due process rights of criminal

defendants. “Anyone detained by the State due to incompetence has a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.” Detention of D.W., 181 Wn.2d at 207.

Despite repeated orders from the trial court, and imposition of a financial sanction to coerce compliance, Mr. Hand was not even transported to WSH for restoration treatment until after the commitment order had expired. Infringement on an accused’s constitutional right to due process demands a remedy.

VI. CONCLUSION

Based on the foregoing facts and authority, Mr. Hand respectfully asks this Court to accept review of his petition.

Submitted this 24th day of August 2017.

Marie Trombley

Marie J. Trombley, WSBA 41410
Attorney for Petitioner

APPENDIX

July 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY GENE HAND,

Appellant.

No. 48481-1-II
consolidated with
No. 48491-9-II

PUBLISHED OPINION

MAXA, A.C.J. – Anthony Gene Hand appeals his convictions of first degree escape and unlawful possession of a controlled substance. The trial court initially found Hand incompetent to stand trial and ordered that Hand be committed to Western State Hospital (WSH) within 15 days for treatment to restore his competency. However, Hand remained in jail for 61 days after the court’s deadline before being admitted to WSH. He then received restorative treatment and eventually regained competency. He subsequently was convicted of both charges in a bench trial on stipulated facts.

Hand argues that (1) the excessive time he spent in jail waiting to receive restorative treatment violated his substantive due process rights, (2) the violation of his substantive due process rights constituted government misconduct that required the trial court to dismiss the charges against him under CrR 8.3(b), and (3) the violation of his substantive due process rights

required the trial court to dismiss the charges against him even apart from CrR 8.3(b). Hand also submitted a statement of additional grounds (SAG) alleging ineffective assistance of counsel.

We hold that although WSH's delay in admitting Hand for competency restoration treatment violated his substantive due process rights, dismissal was not required under CrR 8.3(b) because Hand cannot show that the delay in receiving restorative treatment prejudiced his right to a fair trial, and dismissal was not required for the due process violation apart from CrR 8.3(b). We also hold that Hand's SAG claims are too vague to consider.

Accordingly, we affirm the trial court's denial of Hand's motion to dismiss, and we affirm his convictions.

FACTS

In September 2014, the State charged Hand with first degree escape. Hand was arrested pursuant to an arrest warrant on October 1. At the time of his booking, police found a baggie of methamphetamine in his waistband. The State then charged Hand with unlawful possession of a controlled substance.

The trial court set Hand's bail at \$30,000 for the first degree escape charge and at \$20,000 for the unlawful possession of a controlled substance charge. Hand did not post bail and therefore remained confined in the county jail.

On December 11, defense counsel requested a competency evaluation for Hand under RCW 10.77.060. The trial court granted the request and ordered that Hand be held in custody without bail pending the competency determination.

An evaluation report dated December 18 concluded that Hand's symptoms interfered with his ability to communicate with his attorney and meaningfully assist in preparing his

defense. Based on this report, the trial court on December 24 entered an order that Hand be committed to WSH for a maximum of 45 days to undergo evaluation and treatment to restore competency to proceed to trial. The order included instructions that “Western State Hospital shall admit Mr. Hand within 15 days of this order per Trueblood v. DSHS.” Clerk’s Papers (CP) at 32.

Hand drafted a letter to the trial court dated January 19, 2015, 11 days after the court’s commitment deadline. He pointed out that he was still in jail despite the deadline and suggested that his charges should be dismissed because of a due process violation or that the case be transferred to mental health court.

On February 11, 34 days after the trial court’s commitment deadline, Hand filed a motion to dismiss based on the violation of his substantive due process rights. The motion also sought, in the alternative, an order for WSH to show cause why it should not be held in contempt of the trial court’s order. The court denied the motion to dismiss without prejudice. But the court ordered a show cause hearing for WSH to appear and show cause why it should not be held in contempt.

In opposition to Hand’s motion for contempt sanctions, WSH submitted a lengthy declaration from Dr. Barry Ward, the psychology services supervisor at WSH. Ward stated that when WSH received the trial court’s commitment order, Hand was placed on a waiting list for admission because WSH did not have the ability to admit him for restorative treatment. He further stated that the unit handling restoration treatment services had been operating at near 100 percent occupancy for several years, and the current waiting list had approximately 113 defendants. The average waiting time for 45-day restoration cases was 71 days. Ward

emphasized that the delay for forensic admissions was due to factors beyond WSH's control, including a significant increase in orders for inpatient evaluation or restoration and a decrease in the number of available beds.

On February 18, Hand filed a new motion to dismiss that was substantially similar to his previous motion. And on February 25, Hand filed another motion to dismiss or in the alternative to release him from custody. That motion was substantially similar to his February 18 motion to dismiss, but added an alternative request that the trial court consider releasing Hand from custody so he could obtain his own treatment.

At the show cause hearing on February 25, the trial court found the Department of Social and Health Services (DSHS)¹ in contempt of the court's December 24, 2014 order, imposed sanctions of \$500 per day starting on February 26 to be paid to the county jail, and ordered that Hand be transported to WSH by February 26. Hand was not transferred to WSH by February 26.

On March 4, the trial court heard arguments on the February 25 motion to dismiss or alternatively to release from custody. The court ruled that there was no due process violation and denied the motion to dismiss or to release from custody.

WSH finally admitted Hand on March 10, 61 days after the 15-day deadline in the trial court's original commitment order. The trial court subsequently ordered DSHS to pay the county jail \$6,000 in sanctions (\$500 per day for 12 days) for the delay in admitting Hand to WSH following the court's February 25 contempt order.

WSH submitted a forensic mental health report regarding Hand to the trial court on April 28. The report stated that Hand was able to understand the nature of the proceedings against him

¹ DSHS is the agency responsible for WSH.

and could assist in his defense with a reasonable degree of rational understanding. On April 29, the trial court found Hand competent to stand trial.

On November 20, a bench trial was held on stipulated facts. The trial court found Hand guilty of first degree escape and unlawful possession of a controlled substance.

Hand appeals his convictions.

ANALYSIS

A. COMMITMENT FOR COMPETENCY RESTORATION TREATMENT

Under RCW 10.77.050, “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” A person is incompetent if he or she “lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(15).²

Whenever there is reason to doubt a defendant’s competency, the trial court shall order an evaluation and report of the defendant’s mental condition. RCW 10.77.060. If based on the report the court finds that the defendant is not competent, the court shall stay the proceedings against the defendant. Former RCW 10.77.084(1)(a) (2012). The court then shall commit the defendant to the custody of the secretary of DSHS, who shall place the defendant in treatment for competency restoration. Former RCW 10.77.086 (2013). The maximum commitment period for restorative treatment is 45 days for a defendant whose highest charge is a class C felony or nonviolent class B felony. Former RCW 10.77.086(1)(b).

² RCW 10.77.010 has been amended since the events of this case transpired. However, these amendments do not impact the statutory language relied on by this court. Accordingly, we do not include the word “former” before RCW 10.77.010.

If at or before the end of the ordered term of commitment for restorative treatment the defendant regains competency, the trial court shall lift the stay and continue the criminal proceedings. Former RCW 10.77.084(1)(b). If competency has not been restored and the court finds that the defendant is not likely to regain competency, then the court shall dismiss the criminal proceedings without prejudice. Former RCW 10.77.084(1)(c).

The legislature established “performance targets and maximum time limits for the timeliness” of competency evaluations and admissions for restorative treatment. Former RCW 10.77.068(1)(a) (2012). The legislature assigned a performance target of seven days or less for extending an offer of admission to a defendant in pretrial custody awaiting authorized restorative treatment. Former RCW 10.77.068(1)(a)(i)(A). But the legislature also recognized that the performance targets would not always be achievable and explicitly provided that the performance targets do not “create any new entitlement or cause of action related to the timeliness of competency evaluations or admission for inpatient restoration services related to competency to proceed or stand trial, nor can it form the basis for . . . a motion to dismiss criminal charges.” Former RCW 10.77.068(1)(a), (5).

B. DISMISSAL BASED ON SUBSTANTIVE DUE PROCESS VIOLATION

Hand argues that he had a substantive due process right to restorative treatment that was violated by the delay in receiving treatment while he remained in custody, and that dismissal was the appropriate remedy.³ We agree that Hand’s substantive due process rights were violated, but

³ The State initially argues that Hand’s arguments are more correctly characterized as speedy trial complaints that should be raised under the Sixth Amendment to the United States Constitution. However, Hand emphasizes in his reply brief that he did not intend to raise a speedy trial claim and notes that the due process clause of the Fourteenth Amendment is the proper authority for the issue of delayed competency services.

we hold that dismissal of the charges against him was not an appropriate remedy for that violation.

1. Due Process Violation

The due process clause of the Fourteenth Amendment to the United States Constitution governs issues regarding pretrial detention of defendants who have been evaluated and found incompetent, but are awaiting competency restoration treatment. *Trueblood v. Wash. State Dep't of Social & Health Servs. (Trueblood III)*, 822 F.3d 1037, 1042-43 (9th Cir. 2016). Because incompetent criminal defendants have not been convicted of the charged crimes, they have liberty interests in freedom from incarceration and in receiving restorative treatment. *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003). To determine whether the substantive due process rights of an incompetent criminal defendant have been violated, we must balance these liberty interests against the legitimate interests of the State. *Id.*; *see also Trueblood III*, 822 F.3d at 1043.

In *Mink*, the Ninth Circuit held that the Oregon State Hospital – the equivalent of WSH – “violates the substantive due process rights of incapacitated criminal defendants when it refuses to admit them in a timely manner.”⁴ 322 F.3d at 1121-22. The court stated that “[h]olding incapacitated criminal defendants in jail for weeks or months violates their due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals.” *Id.* at 1122. In

⁴ Under Oregon law a criminal defendant is incapacitated if as a result of mental disease or defect, the defendant is unable to understand the nature of the proceedings, or assist and cooperate with defense counsel, or participate in the defense. 322 F.3d at 1105 & n.1. Accordingly, the term “incapacitated” has an equivalent meaning to “incompetent.”

applying the balancing test, the court in *Mink* stated that there was no “legitimate state interest in keeping mentally incapacitated criminal defendants locked up in county jails for weeks or months” and that the delay in giving restorative treatment “undermines the state’s fundamental interest in bringing the accused to trial.” *Id.* at 1121.

Relying on *Mink*, a Washington federal district court ruled that DSHS, WSH, and Eastern State Hospital violated the substantive due process rights of incompetent criminal defendants by not providing timely court-ordered competency restoration services. *Trueblood v. Wash. State Dep’t of Soc. & Health Servs. (Trueblood I)*, 73 F. Supp. 3d 1311, 1315-17 (W.D. Wash. 2014). The court concluded that the criminal defendants’ liberty interests outweighed countervailing state interests. *Id.* at 1317. The same court subsequently found that, absent an individualized finding of good cause, seven days was the maximum justifiable period of incarceration for criminal defendants waiting for in-jail competency evaluations and competency restoration services. *Trueblood v. Wash. State Dep’t of Social & Health Servs. (Trueblood II)*, 101 F. Supp. 3d 1010, 1022-23 (W.D. Wash. 2015), *rev’d in part*, 822 F.3d 1037 (9th Cir. 2016).⁵

More recently, another Washington federal district court ruled for purposes of an immunity defense in a 42 U.S.C. § 1983 damages action that it was “clearly established” that “indefinitely incarcerating incompetent defendants while they awaited competency restoration, because there was not room in the state hospital, violated their constitutional due process rights.”

⁵ The State appealed only the seven day limit for in-jail competency evaluations, not the limit for competency restoration services. *Trueblood III*, 822 F.3d at 1040. The Ninth Circuit reversed the seven day mandate for competency evaluations. *Id.* at 1046. *See generally State v. Kidder*, 197 Wn. App. 292, 307 & n.7, 389 P.3d 664 (2016).

Willis v. Wash. State Dep't of Soc. & Health Servs., No. C16-5113, 2017 WL 1064390, at *6 (W.D. Wash. Mar. 21, 2017) (court order).

Significantly, these cases recognize that the liberty interests of incompetent criminal defendants are not limited to their confinement. The court in *Mink* stated that in addition to their liberty interest in freedom from incarceration, incompetent criminal defendants “also have a liberty interest in receiving restorative treatment.” 322 F.3d at 1121. The district court in *Trueblood I* quoted the same language. 73 F. Supp. 3d at 1314.

We agree with the reasoning in these federal cases. Accordingly, we hold that (1) an incompetent criminal defendant has liberty interests in freedom from incarceration and in receiving restorative treatment, and (2) DSHS and WSH violate an incompetent criminal defendant’s substantive due process rights by unreasonably delaying court-ordered restorative treatment while the defendant remains in custody.⁶

The State argues that the *Mink* analysis is inapplicable here because Hand was not confined solely because of his incompetency; he was confined because he could not post the bail established by the trial court. The State argues that this fact changes the balancing analysis because Hand’s liberty interest in freedom from incarceration was not affected by the delay in his transfer to WSH – he would have been confined anyway. And the State argues that it had a strong interest in confining Hand apart from his incompetency.

⁶ We do not address the extent to which an unreasonable delay in court-ordered restorative treatment violates the defendant’s substantive due process rights if the defendant is not in custody.

But the State fails to recognize, as we hold above, that an incompetent criminal defendant also has a liberty interest in receiving restorative treatment. The State's argument does not address that liberty interest.

We hold that WSH's 61-day delay in admitting Hand for competency restoration treatment was unreasonable and violated his substantive due process rights.

2. Dismissal Under CrR 8.3(b)

Hand argues that WSH's delay in providing him with competency restoration treatment in violation of his substantive due process rights required the trial court to dismiss the charges against him under CrR 8.3(b). We disagree.

a. Legal Principles

CrR 8.3(b) states that the trial court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Dismissal is appropriate under CrR 8.3(b) if the defendant shows by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *State v. Kone*, 165 Wn. App. 420, 432-33, 266 P.3d 916 (2011). The government's misconduct does not need to be evil or dishonest in order to meet the first element – simple mismanagement can be sufficient. *Id.* at 433. To meet the second element, the defendant must show actual prejudice, rather than speculative prejudice, that affected his right to a fair trial. *Id.*

But dismissal under CrR 8.3(b) is an extraordinary remedy, and should be limited to egregious cases of mismanagement or misconduct. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). The trial court should order dismissal under CrR 8.3(b) only as a last resort. *Id.* at 12.

We review a trial court’s decision on a CrR 8.3(b) motion to dismiss for an abuse of discretion. *Kone*, 165 Wn. App. at 433. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.*

b. Governmental Misconduct

Hand argues that the first element of CrR 8.3(b) is met here because the State violated his substantive due process rights by delaying his restorative treatment. The State argues that (1) CrR 8.3(b) applies only to the conduct of law enforcement, the prosecutor, or the trial court and not to an independent government entity like WSH; and (2) WSH’s delay in admitting Hand for competency restoration treatment due to factors beyond its control did not constitute the type of misconduct warranting dismissal under CrR 8.3(b). We decline to address these issues in light of our holding below that Hand cannot show the necessary prejudice to invoke CrR 8.3.

c. Prejudice Affecting Right to a Fair Trial

Hand argues that he suffered irreparable injury when he was confined to jail while waiting for competency restoration treatment. But CrR 8.3(b) requires that the misconduct “materially affect the accused’s right to a fair trial.” Hand does not explain how the two month delay in receiving treatment had any effect on the fairness of his trial.

Accordingly, we hold that the trial court did not err by denying dismissal under CrR 8.3(b).⁷

⁷ Hand also claims for the first time on appeal and only in his reply brief that dismissal was required under former RCW 10.77.084(1)(b). He relies on *State v. Kidder*, where the appellate court affirmed a trial court’s dismissal of criminal charges based on former RCW 10.77.084(1)(b) and (c) when the defendant did not receive competency restoration treatment before expiration of the 90-day commitment period. 197 Wn. App. 292, 315-17, 389 P.3d 664 (2016). However, we do not consider that argument because it was not raised in the trial court. RAP 2.5(a). And it was not raised in the opening brief. *Cowiche Canyon Conservancy v.*

3. Dismissal for Constitutional Violation

Hand appears to argue that dismissal of the charges against him is an appropriate remedy for the due process violation even apart from CrR 8.3(b). However, he does not cite any authority to support this argument. In *Trueblood III* and *Mink*, the criminal defendants sought and received injunctive relief, not dismissal, to remedy the delay in receiving competency services. *Trueblood III*, 822 F.3d at 1046; *Mink*, 322 F.3d at 1123. *Willis* involved a claim for damages under 42 U.S.C. § 1983. 2017 WL 1064390, at *2.

A trial court can dismiss a criminal action when the conduct of law enforcement officers is “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973); *see also State v. Lively*, 130 Wn.2d 1, 19-22, 921 P.2d 1035 (1996); *State v. Markwart*, 182 Wn. App. 335, 348-50, 329 P.3d 108 (2014). Such conduct must “shock the universal sense of fairness” and dismissal based on outrageous conduct must be “reserved for only the most egregious circumstances.” *Lively*, 130 Wn.2d at 19, 20.

However, dismissal based on outrageous conduct seems to be limited to the acts of law enforcement officers and informants. *Id.* at 19; *Markwart*, 182 Wn. App. at 348-49. And Hand cannot show that WSH’s conduct in delaying his admittance because there were no available beds is so shocking or outrageous that due process principles require dismissal.

Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

In the absence of any applicable authority, we reject Hand's argument that the violation of his substantive due process rights regarding his detention awaiting competency restoration treatment requires dismissal of the charges against him.

C. SAG CLAIMS

Hand asserts in a SAG that he received ineffective assistance of counsel in the trial court. We do not review these claims because they are impermissibly vague.

Hand states that his assigned defense counsel at trial did not provide adequate representation and was not ethically committed to present and defend Hand's rights. However, Hand does not explain how his defense counsel was ineffective. He does not complain of specific actions taken by defense counsel or argue that defense counsel should have done something differently. Although RAP 10.10(c) does not require that a SAG refer to the record or cite authority, the rule does require an appellant to inform this court of the "nature and occurrence of the alleged errors." We cannot review a SAG claim if it is too vague to properly inform us of the claimed error. *State v. Bluehorse*, 159 Wn. App. 410, 436, 248 P.3d 537 (2011). This rule applies here.

Hand also attached four emails/letters to his SAG as exhibits and stated that those exhibits contain other additional grounds not raised by appellate counsel. However, the emails/letters were provided as exhibits, not additional grounds. And they do not contain argument or a clear statement of any alleged error. We do not make arguments for the parties. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 138, 267 P.3d 324 (2011).

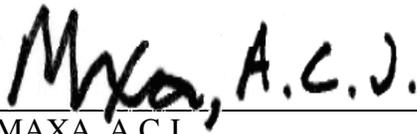
Accordingly, we cannot consider Hand's SAG claims or any other additional grounds contained in the attached exhibits.

D. APPELLATE COSTS

Hand requests that we refrain from imposing appellate costs if the State is the prevailing party. We decline to address this issue. A commissioner of this court will determine whether to award appellate costs under RAP 14.2 if the State files a cost bill and if Hand objects to that cost bill.

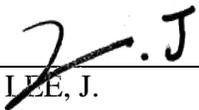
CONCLUSION

We affirm the trial court's denial of Hand's motion to dismiss, and we affirm Hand's convictions.



MAXA, A.C.J.

We concur:



LEE, J.



SUTTON, J.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Anthony Hand, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid on

August 24, 2017 to:

Anthony G. Hand (# 705628)
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

And by electronic service by prior agreement between the parties to:

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August 24, 2017 - 2:06 PM

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