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SCOTT G. WEBER, CLERK
CLARK COUNTY

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

DAYBREAK YOUTH SERVICES, a
Washington Public Benefit Company,

Plaintiff,

v.

CLARK COUNTY SHERIFF'S OFFICE,

Defendant.

NO. 18-2-05488-9

**PLAINTIFF'S MOTION FOR
RETURN OF PROPERTY OR, IN THE
ALTERNATIVE, ORDER TO SHOW
CAUSE**

[Clerk's Action Required]

I. Introduction and Relief Requested

Plaintiff Daybreak Youth Services ("Daybreak") is Washington State's oldest and largest youth treatment program for adolescents with the dual diagnosis of substance use disorder ("SUD") and mental health disorders. Daybreak operates inpatient and outpatient treatment facilities for such adolescents in Spokane and Clark County, Washington. Daybreak currently is one of the only adolescent behavioral health organizations in the state that offers the entire continuum of care services for co-occurring SUD and psychiatric illness.

Records of the youth treated at Daybreak's facilities are subject to strict confidentiality rules and disclosure limitations pursuant to state and federal law, including 42 U.S.C. 290dd-2 and 42 C.F.R. Part 2 ("Part 2"). On September 11, 2018, the Clark County Sheriff's Office ("CCSO") executed at least five search warrants at Daybreak's treatment facility in Brush

MOTION FOR RETURN OF PROPERTY OR, IN THE
ALTERNATIVE, ORDER TO SHOW CAUSE - 1

GSB: 10363248v5

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1 Prairie, Washington, and seized highly sensitive, privileged, and confidential information
2 including minor patients' medical, psychiatric, and therapy records in violation of Part 2.

3 Since commencing this lawsuit in September 2018, counsel for Daybreak have reached
4 out to CCSO and the Clark County Prosecuting Attorney's office multiple times in good faith
5 to explain that the execution of the search warrants violated federal confidentiality laws
6 specifically designed to protect drug treatment records from disclosure, and that every day that
7 Clark County continues to hold patient records in violation of Part 2, Daybreak and its
8 vulnerable minor patients are harmed by the ongoing violations and attendant risks of further
9 unauthorized disclosure of patient records. CCSO has nonetheless persisted in using and re-
10 disclosing the contents of protected SUD records, including in public court filings, and has
11 publicly announced their intention to continue to do so.

12 After ignoring Daybreak's repeated entreaties to address CCSO's violations of federal
13 law over the past nine months, CCSO now attempts to retroactively excuse its violations of
14 federal law by seeking a ruling that CCSO had good cause (as defined in Part 2) to seize
15 Daybreak's protected records in September 2018. While implicitly acknowledging that
16 Daybreak's records were seized unlawfully in violation of Part 2, the CCSO's Motion for Order
17 of Good Cause makes clear that CCSO has no intention of working with Daybreak to
18 voluntarily return the records. Therefore, Daybreak is forced to file this application to seek
19 return of its illegally seized property through the Court.

20 **III. Factual and Procedural Background**

21 In September 2018, CCSO applied for and received 8 search warrants. Smith Decl.,
22 Exs. 1-8. The warrants and underlying affidavits disclose the full, unredacted names of no
23 fewer than 14 minor SUD patients of Daybreak. *Id.* CCSO did not obtain consent from a
24 single patient for release of his or her federally-protected SUD treatment information, nor did
25 they first obtain the required court order or issue a subpoena to Daybreak seeking the
26 information. *Id.*

1 On September 11, 2018, a *dozen or more* CCSO deputies descended upon Daybreak’s
2 Brush Prairie facility armed with their search warrants and guns. In an obvious show of force
3 they surrounded the building with their branded vehicles and a “military styled truck.”
4 Amended Complaint, App. H, ¶ 7. CCSO deputies herded Daybreak staff into a boardroom
5 where they were detained under guard armed deputies. *Id.*, Ex. 9. at ¶¶ 7-8. While Daybreak
6 staff were being detained, other CCSO deputies seized reams of patient records, video footage
7 of patients, four external drives and five computers. *Id.*, at ¶ 10. The seized materials include
8 treatment records and communications between minor clients and Daybreak counselors. *Id.*
9 The seized materials also revealed the identities, diagnosis, prognosis and treatment relating to
10 hundreds, if not thousands, of Daybreak’s current and former clients. *Id.*

11 Daybreak, through predecessor counsel, filed its original complaint for injunctive relief
12 on September 12, 2018.¹ Daybreak sought to enjoin CCSO from reviewing, using, or re-
13 disclosing privileged and highly sensitive and confidential SUD and mental health treatment
14 records it seized from Daybreak or its service providers in September 2018. Daybreak filed a
15 Motion for Temporary Restraining Order which the Court denied without prejudice on
16 September 21, 2018, expressly ruling that “[n]othing in this Order shall limit or restrain
17 Daybreak or any other party from challenging the search warrant or the evidence seized by
18 Defendant.” Although the Court ruled that the scope of the search warrants was not overbroad
19 based on the pleadings and evidence before the Court at that time, it does not appear from the
20 record that CCSO’s violations of Part 2 were among the issues presented to the Court by CCSO
21 or Daybreak’s then counsel.

22 Daybreak’s current counsel has reached out to the Clark County Prosecutor’s office
23 multiple times to inform them of the ongoing violations of federal law in an effort to seek a
24 resolution and prevent further unauthorized disclosures. Smith Decl., ¶ 6. In a letter dated
25 November 30, 2018, Daybreak’s counsel informed Deputy Prosecuting Attorney Colin Hayes

26 _____
¹ On June 21, 2019, Garvey Schubert Barer, P.C. took over as counsel of record in this action.

1 that the search and seizure violated 42 U.S.C. 290dd-2 and 42 C.F.R. Part 2. Smith Decl., Ex.
2 E. Counsel asked that the Criminal Division refrain from any further review of information
3 received from CCSO. *Id.* Mr. Hayes did not respond. *Id.*

4 Given the lack of response from Mr. Hayes, Daybreak's counsel reached out to United
5 States Attorney Brian T. Moran on February 13, 2019, to inform him of CCSO's serious
6 violations of federal law and ask him to initiate an investigation to help safeguard the privacy
7 rights of Daybreak's minor patients. Smith Decl., Ex. 13. The next day, Daybreak's counsel
8 reached out to Deputy Prosecuting Attorney Leslie A. Lopez in an attempt to start a productive
9 dialogue. Smith Decl., Ex. 12. Daybreak invited Lopez to agree to a protective order regarding
10 the use and re-disclosure of the highly confidential patient information seized by CCSO. *Id.*
11 However, Ms. Lopez did not respond. *Id.*

12 On June 7, 2019, Daybreak filed an Emergency motion for Temporary Restraining
13 Order ("TRO Motion") in federal court. *See*, Amended Complaint, App. D. CCSO opposed
14 the TRO Motion, and on June 19, 2019, hours before a scheduled hearing in federal court, filed
15 a Motion for Order of Good Cause ("Good Cause Motion") in this Court. [Dkt #13]. In the
16 Good Cause Motion, CCSO acknowledges for the first time that Part 2 applies to the records
17 seized from Daybreak, and implicitly agrees that CCSO violated federal law by seizing the
18 records without first complying with Part 2's stringent requirements.

19 On June 25, 2019, Ms. Lopez from the Clark County Prosecuting Attorney's Office
20 called counsel for Daybreak and represented that CCSO intends to return certain electronically
21 stored information to Daybreak. However, to date, CCSO has yet to return any of the seized
22 property or information. Smith Decl. ¶ 9. CCSO continues to use the seized patient records
23 and patient identifying information to threaten to prosecute Daybreak patients and employees
24 for conduct that is either not criminal or a symptom of patients' underlying SUD, mental health
25 or behavioral disorder.

1 **II. Issues Presented**

2 1. Whether the Court should order an evidentiary hearing on Defendant’s Motion
3 for Return of Property Under CrR 2.3(e) or, in alternative, issue an Order to Show Cause to
4 CCSO to explain why all records seized from Daybreak’s Brush Prairie facility and its service
5 providers should not be returned immediately to Daybreak, its lawful owner.

6 2. Whether CCSO’s seizure of Daybreak property violated 42 C.F.R. Part 2.

7 3. Whether the search warrants were invalid for lack of probable cause and
8 particularity.

9 **IV. Evidence Relied Upon**

10 This Motion relies upon the authorities cited herein, the Declaration of David H. Smith
11 in Support of Motion for Return of Property or, in the alternative, Order to Show Cause,
12 exhibits thereto and the pleadings on file herein.

13 **V. Authority and Argument**

14 **A. CCSO Failed To Comply With 42 C.F.R. Part 2, Which Requires A Narrowly**
15 **Tailored “Good Cause” Order Specifically Authorizing The Disclosure And Use**
16 **Of Substance Use Disorder Treatment Records For A Specific Purpose.**

17 **1. Use and Disclosure of Daybreak’s Patient Records Requires an Order**
18 **Issued Under Part 2.**

19 42 U.S.C. 290dd-2, and its implementing regulations at 42 C.F.R. Part 2, safeguard
20 substance use disorder (“SUD”) treatment records from unauthorized disclosure. Congress
21 intended with Part 2 to ensure strict confidentiality of patient records for the critical, lifesaving
22 purpose of preventing people from seeking treatment:

23 The conferees wish to stress their conviction that the strictest adherence to the provision
24 of this section is absolutely essential to the success of all drug abuse prevention
25 programs. Every patient and former patient must be assured that his right to privacy
26 will be protected. Without that assurance, fear of public disclosure of drug abuse or of
records that will attach for life will discourage thousands from seeking the treatment
they must have if this tragic national problem is to be overcome.

1 H. Conf. Rep. No. 92-920, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Congr. & Admin.
2 News, 2072.

3 The protections codified in Part 2 extend to all federally assisted substance use disorder
4 treatment programs. 42 C.F.R. §§ 2.11-2.12. Daybreak is a federally assisted SUD treatment
5 provider. Most of its minor patients have their cost of treatment reimbursed through Medicare
6 (Amended Complaint, App. E, ¶ 6). Daybreak also is a charitable organization under IRS Code
7 501(c)(3) (Amended Complaint, App. G, Ex. D). Part 2's protections broadly extend to "**any**
8 **information**, whether or not recorded" that would, directly or indirectly, "identify a patient as
9 having or having had a substance use disorder." 42 C.F.R. § 2.12(a)(1). That is, any record
10 identifying an individual as having been treated at Daybreak is covered by Part 2 and subject to
11 its protections.

12 Part 2 imposes significant restrictions on law enforcement's use and disclosure of SUD
13 treatment records. By its express terms, SUD records "**may be disclosed or used only as**
14 **permitted by the regulations in this part and may not otherwise be disclosed or used in any**
15 **civil, criminal, administrative, or legislative proceedings conducted by any federal, state, or**
16 **local authority.**" 42 C.F.R. § 2.13(a) (emphasis supplied). Further, Part 2 expressly provides
17 that its restrictions apply whether or not the provider "believes that the person seeking the
18 information . . . is a law enforcement agency or official or other government official" 42
19 C.F.R. § 2.13(b). Consistent with the statute's plain terms, numerous courts have recognized
20 that law enforcement officers unquestionably are subject to Part 2. *See, e.g., Doe v. Broderick*,
21 225 F.3d 440, 447 (4th Cir. 2000) (detective failed to satisfy confidentiality and disclosure
22 provisions in seizing SUD records pursuant to a grand jury subpoena without a Part 2 court
23 order); *State v. Ctr. For Drug Free Living, Inc.*, 842 So. 2d 177, 178 (Fla. Dist. Ct. App. 2003)
24 (prosecutor could not compel a witness, a treatment center employee, to testify about an
25 incident at the center involving a patient without a Part 2 court order); *State v. Wheat*, 118
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1 Wash. App. 435, 436, 76 P.3d 280 (2003) (drug court investigator must comply with Part 2);
2 *United States v. Eide*, 875 F.2d 1429 (9th Cir. 1989) (suppressing evidence).

3 Disclosure of protected SUD records is proper only if a court of competent jurisdiction
4 has entered an order pursuant to Part 2 specifically authorizing the use or disclosure of patient
5 information for a specific purpose. *See* 42 C.F.R. § 2.61 (Order under Part 2 “is a unique kind
6 of court order.”) Part 2 contains detailed procedures that must be strictly followed by law
7 enforcement officials seeking records and by Courts adjudicating such applications. *See* 42
8 C.F.R. §§ 2.65, 2.66(a). As further discussed below, these procedures were not followed in this
9 case.

10 **2. Part 2 Sets Forth Detailed, Exacting Requirements For Adjudication Of**
11 **An Application To Use or Disclose SUD Records.**

12 Part 2 requires that providers and patients be given an opportunity to be heard on an
13 application. If the purpose of the disclosure is the criminal investigation of a patient, the Court
14 cannot grant the order without first giving notice and an opportunity to be heard to both the
15 affected patient(s) and the provider. 42 C.F.R. § 2.65(b). Where the criminal investigation
16 targets the Part 2 program or record holder, advanced notice is not required; however, the
17 provider and all SUD patients whose records were seized “must be afforded an opportunity to
18 seek revocation or amendment of that order, limited to the presentation of evidence on the
19 statutory and regulatory criteria for the issuance of the court order. . . .” 42 C.F.R. § 2.66(b).

20 Part 2 intentionally set a high bar for disclosure to law enforcement officials, and the
21 specific standard varies depending on the purpose of the law enforcement investigation. When
22 the purpose of the requested disclosure is the criminal investigation or prosecution of an SUD
23 patient, as was the case here, a court may authorize law enforcement or prosecutorial officials
24 to review and use patient records only if the court finds that *all* of the following criteria are
25 met: (1) the crime involved is “extremely serious,” such as one which causes or directly
26 threatens loss of life or serious bodily injury; (2) there is a reasonable likelihood that the
records will disclose information of substantial value in the investigation or prosecution; (3)

1 other ways of obtaining the information are not available or would not be effective; (4) the
2 potential injury to the patient, to the physician-patient relationship and to the ability of the Part
3 2 program to provide services to other patients is outweighed by the public interest and the
4 need for the disclosure; and (5) if the applicant is a law enforcement agency or official, that: (i)
5 the person holding the records has been afforded the opportunity to be represented by
6 independent counsel; and (ii) any person holding the records which is an entity within federal,
7 state, or local government has in fact been represented by counsel independent of the applicant.
8 42 C.F.R. § 2.65(d). *None of the requisite findings was made in this case.*

9 When the purpose of the request for disclosure is the criminal investigation or
10 prosecution of the Part 2 program or record holder, a court may authorize disclosure and use of
11 patient records only if the court finds "good cause" exists. To make this determination, the
12 court must find that: "(1) [o]ther ways of obtaining the information are not available or would
13 not be effective; and (2) [t]he public interest and need for the disclosure outweigh the potential
14 injury to the patient, the physician-patient relationship and the treatment services." 42 C.F.R.
15 §§ 2.66(c), 2.64(d). Any patient information disclosed under an order for purposes of
16 investigating a Part 2 program may not be used to conduct an investigation or prosecution of a
17 patient in connection with a criminal matter, or be used as the basis for an application for an
18 order for disclosure of records for the purpose of criminal investigation or prosecution of a
19 patient. 42 C.F.R. 2.66(d)(2). *Again, no court made any of these requisite findings prior to the*
20 *execution of the search warrants.*

21 Part 2 also requires applicants and Courts to take extra measures to protect patient
22 confidentiality. First, the application itself must use fictitious names to refer to patients. 42
23 C.F.R. §§ 2.65(a), 2.66(a). Further, to in every proceeding seeking disclosure without patient
24 consent, regardless of the purpose of the requested disclosure of patient records, the court is
25 required to (1) "limit disclosure and use to those parts of the patient's record which are essential
26 to fulfill the objective of the order," (2) "limit disclosure to those persons whose need for

1 information is the basis for the order,” and (3) “include such other measures as are necessary to
2 limit disclosure for the protection of the patient, the physician-patient relationship and the
3 treatment services.” 42 C.F.R. §§ 2.64(e), 2.65(e), 2.66(c). Finally, the order must require
4 deletion of patient identity information from any document made available to the public. 42
5 C.F.R. § 2.66(d)(1).

6 Even more stringent restrictions apply to the disclosure of patient communications with
7 a Part 2 program in the course of diagnosis or treatment. Such communications, which were
8 seized by CCSO in this case, may be disclosed only if necessary to protect against “an existing
9 threat to life or serious bodily injury,” when necessary in connection with “investigation or
10 prosecution of an extremely serious crime allegedly committed by the patient,” or in a court or
11 administrative proceeding in which “the patient offers testimony or other evidence pertaining to
12 the content of the confidential communications.” 42 C.F.R. § 2.63.

13 **3. CCSO Did Not Comply With Part 2.**

14 Here, CCSO failed to comply with any of the above requirements by requesting the
15 issuance of search warrants under CrRLJ 2.3 and CrR 2.3, and now belatedly acknowledges
16 these violations in its motion for a retroactive order of good cause. The methods by which
17 CCSO obtained these search warrants violated Part 2 in a myriad of ways, including: (1)
18 publically disclosing the names and birthdates of Daybreak’s minor patients in the search
19 warrant affidavits; (2) failing to request a “Good Cause” hearing; (3) failing to make a showing
20 that other ways of obtaining the information were not available or would not be effective; (4)
21 failing to show that the public interest and the need for disclosure of patient information
22 outweighed the potential injury to the physician–patient relationship and treatment services; (5)
23 failing to request a disclosure of just those parts of patient records that would be essential to
24 fulfill the objective of the request for information; (6) failing to request that the disclosure be
25 limited to persons on a need-to-know basis; (7) failing to seek or agree to the terms of a
26 protective order under 42 C.F.R. Part 2 or request that the search warrants and their affidavits

1 be sealed; and (8) most importantly, failing to issue a subpoena or other compulsory process to
2 Daybreak, thereby failing to provide Daybreak and its patients with adequate notice of the
3 request for protected patient information and an opportunity to respond. *See* 42 C.F.R. §§ 2.65,
4 2.66.

5 **B. The Court Should Order Defendant To Return Daybreak’s Records Pursuant To**
6 **CrR 2.3(e).**

7 **1. Daybreak Has Standing To Require Return Of Its Property Under CrR**
8 **2.3(e).**

9 CrR 2.3(e) provides that “[a] person aggrieved by an unlawful search and seizure may
10 move the court for the return of the property on the ground that the property was illegally
11 seized and that the person is lawfully entitled to possession thereof.” CrR 2.3(e). “If the
12 motion is granted the property shall be returned.” *Id.* This rule permits a motion for return of
13 property to be made at any time. *State v. Card*, 48 Wn. App. 781, 78, 741 P.2d 65 (1987). It
14 requires the Court to hold an evidentiary hearing at which CCSO would bear the burden of
15 showing by a preponderance of the evidence that Daybreak has no right to the property because
16 it is the fruits of a crime. *Id.* at 790. This procedural rule governs the disposition of both
17 lawfully and unlawfully seized property. *Id.* Based on the facts of this case CCSO must
18 concede at the evidentiary hearing that the seized property is owned by Daybreak. This fact is
19 key as “the seizure of property from someone is prima facie evidence of that person’s
20 entitlement” to the property. *Matter of 13811 Highway 99, Lynnwood, Washington*, 194 Wn.
21 App. 365, 381, 378 P.3d 568 (2016) (affirming order for return of property seized pursuant to
22 an invalid warrant). A motion under CrR 2.3(e) is in the nature of a replevin action where
23 CCSO must prove it has a greater right of possession than Daybreak. *Id.* As explained in
24 section V.A. above, CCSO’s non-compliance with the requirements of 42 C.F.R Part 2 is fatal
25 to any claim it has a greater right of possession than Daybreak, even if the Court deems the
26 search warrants property issued under CrRLJ 2.3(b)–(d) and CrR 2.3(b)–(d). As explained

1 below, the search warrants were constitutionally defective.

2 **2. The Search Warrants Were Invalid.**

3 The search warrants issued to CCSO were invalid because: (1) Sgt. Luque's affidavits
4 fail to establish probable cause to believe that a criminal offense has been committed by
5 Daybreak employees or Daybreak patients; and (2) that evidence of a criminal offense was
6 located in a particular place. *See*, also 12 Wash. PRAC., CRIMINAL PRACTICE &
7 PROCEDURE § 3002 (3d ed.2018). CrR 2.3; *see also* RCW 10.79.035. A search or seizure is
8 only reasonable if it is based upon probable. *Id*

9 Probable cause is established only if the affidavit in support of the warrant puts forth
10 facts sufficient for a reasonable person to conclude that the defendant is probably involved in
11 criminal activity and that evidence of the crime can be found at the place that is to be searched.
12 *State v. Klinger*, 96 Wn. App. 619, 624, 980 P.2d 282 (1999). The affidavit "must adequately
13 show circumstances that extend beyond suspicion and mere personal belief that evidence of a
14 crime will be found on the premises to be searched." *Id*.

15 The warrant must describe "the things to be seized with reasonable particularity under
16 the circumstances." *State v. Dodson*, 110 Wn. App. 112, 120, 39 P.3d 324, (2002). Greater
17 care and particularity are required when property sought is inherently innocuous as opposed to
18 property that is inherently illegal. *State v. Wible*, 113 Wn. App. 18, 28, 51 P.3d 830 (2002). If
19 the warrant uses "generic classifications such as lists," the search "must be circumscribed by
20 reference to the crime under investigation; otherwise, the warrant will fail for lack of
21 particularity." *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). In *Riley*, a warrant
22 was overbroad and invalid because it permitted the seizure of broad categories of material,
23 including telephone equipment and records, and was not limited by reference to any specific
24 criminal activity. *Id*.

25 Here, Sgt. Luque's search warrants describe lists of things he wished to seize, such as
26 video footage, the "CareLogic" software program and "ESI" stored on hard drives, without

1 linking the searches to the potential offenses he claimed to be investigating. Smith Decl., Ex 1
2 (p. 1-3, 12-15), Ex. 2. (1-3, 34-38), Ex. 3 (p. 1-3), Ex. 4 (p. 1-3), Ex. 5 (p. 1-4), Ex. 6 (p. 1-3),
3 Ex. 7 (p. 1-3), Ex. 8 (p. 1-3). In each search warrant affidavit Sgt. Luque sought permission to
4 search “any and all client records, shift notes, and incident reports as stored or entered into
5 “CareLogic’ or other reporting systems” looking for documents that mention or things that
6 pertain to a named patient or patients. This overly broad request allowed CCSO to search
7 every patient file protected under 42 C.F.R. Part 2 without any temporal or geographic
8 limitations. This broad language transformed the warrants into unconstitutional general
9 searches.

10 The offenses Sgt. Luque claimed to be investigating were equally nebulous. For
11 example, while Sgt. Luque claims he is investigating violations of RCW 26.44.030,
12 Washington’s mandatory reporter statute, he ignores the fact that this reporting obligation
13 applies only to certain professionals in narrowly defined circumstances. His search warrant
14 affidavits fail to explain how RCW 26.44.030 would apply to Cecilia Hubert, Michael Trotter,
15 Angela Ball or Annette Klinefelter, or why they had reasonable cause to believe “abuse or
16 neglect” had occurred at the time they allegedly failed to make a report to CPS or law
17 enforcement. Sgt. Luque's search warrant affidavit instead requests permission to conduct
18 searches to see if CCSO can find evidence a violation of RCW 26.44.030 had occurred.

19 Likewise, Sgt. Luque’s affidavits are vague as to the alleged criminal violations
20 committed by Daybreak patients. The eight search warrant affidavits reference RCW
21 9A.44.050 (2nd degree rape), RCW 9A.44.100.2A (indecent liberties) and RCW 9A.36.041 (4th
22 degree assault). The 2nd degree rape incident involved an alleged sexual assault in April 2016
23 that was never reported by Daybreak. Smith Decl., Ex. 2 (P 6-8). Sgt. Luque was aware that
24 Daybreak staff had previously reviewed the available video recordings and had found nothing
25 to corroborate the complaint made by the former patient’s relative months after the alleged
26 event. Smith Decl., Ex. 2 (p. 10-11). Thus Sgt. Luque lacked probable cause to believe

1 evidence related to the alleged offense would be found in Daybreak's files, recordings or ESI.
2 Another alleged offense was based on a video that Daybreak had previously provided to CCSO
3 which showed one male resident standing beside the bed of another male resident on April 10,
4 2018 and placing his "groin and/or penis at the area" of the sleeping boy's face. Smith Decl.,
5 Ex. 2 (p. 16-17). There is no indication that the sexual organ of the standing boy touched the
6 sleeping one or that the sleeping boy was even aware of the other boy's presence. While
7 clearly inappropriate conduct, such behavior is not a criminal offense, let alone 2nd degree rape.

8 The third alleged offense involved a 14-year-old female resident receiving an unwanted
9 kiss on the mouth from another 14-year-old female resident. Smith Decl., Ex. 6 (p. 5-10).
10 Youthful sexual exploration can lead to unwanted advances but such behavior is within the
11 expected range of conduct from young teens, whether the attraction is to a person of the same
12 or opposite sex. Nothing in the search warrant affidavit suggests the conduct was criminal, nor
13 that evidence of unwanted sexual advances still existed at the time the search warrants were
14 executed. The lack of probable cause for the first six warrants render the last two invalid as the
15 fruit of the poisonous tree.

16 Most of Daybreak's employees, including Trotter and Klinefelter, clearly are not
17 mandatory reporters as defined under RCW 26.44.030(1)(a). Thus, they are obligated only to
18 report credible allegations of child abuse or neglect that are "severe," *i.e.*, acts of physical abuse
19 that could cause death if untreated, or an act of sexual or pattern of physical abuse causing
20 significant bleeding, deep bruising, etc. RCW 26.44.030(1)(d). Although Sgt. Luque's search
21 warrant affidavits state CCSO needed the documents to investigate potential noncompliance
22 with mandatory reporting, they do not identify any specific knowledge that would trigger a
23 reporting obligation under RCW 26.44.030 by a person clearly identified as a mandatory
24 reporter. Smith Decl., Ex. B. Therefore, the affidavits fail to provide sufficient facts for a
25 reasonable person to conclude that any specific Daybreak employee violated the mandatory
26 reporting law. At most, the affidavits reflect "suspicion and mere personal belief" that the

1 search would yield evidence of a crime, and therefore probable cause is lacking. *See Klinger*,
2 *supra*, 96 Wn. App. at 624.

3 In addition to the lack of probable cause, the warrants are also overbroad because they
4 fail to identify the property to be searched and seized with reasonable particularity under the
5 circumstances. CCSO deputies seized federally protected information for all of Daybreak's
6 current and former minor SUD patients, even those who obtained treatment in Spokane County
7 or as an outpatient. CCSO seized patient records, video footage of patients, four external
8 drives, and five computers containing information protected by Part 2 without complying with
9 its requirements. The seized documents, drives and computers contained protected records of
10 current and former patient identities, as well as diagnosis, prognosis, and treatment information
11 relating to substance abuse education, prevention, training, treatment, or rehabilitation for
12 hundreds or thousands of minors, many of whom were treated in Spokane or had no contact
13 with Daybreak's Brush Prairie facility in 2018.

14 Here, as in *Riley*, the warrants are invalid because they authorize seizure of broad
15 categories of information without limitation by reference to any specific criminal activity. The
16 warrants indicate they were intended to be limited to evidence of various crimes such as rape,
17 indecent liberties, and sexual misconduct. Smith Decl., Ex. A. However, CCSO has since
18 asserted in court filings that the real purpose was to investigate potential violations of
19 Washington's mandatory reporting law and that CCSO never intended to use the seized records
20 to investigate or prosecute Daybreak's patients. Smith Decl., Ex. H at p. 15, Ex. I. at ¶¶ 29-30.
21 The warrants and the underlying affidavits fail to reference any specific activity that could be
22 construed as a violation of mandatory reporting requirements, yet they resulted in the seizure
23 of the broad categories of information listed above in violation of Part 2.

24 The warrants fail to identify the things to be seized with sufficient particularity to avoid
25 unauthorized disclosure of patient SUD records in violation of Part 2. Daybreak is a federally
26 assisted facility that provides mental health and SUD treatment services to minors. Under these

1 circumstances, it was abundantly clear that the materials seized by CCSO – including reams of
2 documents, video footage, four external drives, and five computers – would contain patient
3 information protected by Part 2, including highly sensitive SUD treatment records and
4 privileged patient-provider communications. Yet CCSO now acknowledges that the SUD
5 treatment records it seized are neither the focus of the investigation nor “at all relevant to the
6 investigation of Daybreak.” Smith Decl., Ex. H at 15:2-8. Given that CCSO had no intention
7 of using the SUD treatment records for its investigation and that it failed to comply with Part
8 2’s strict requirements for obtaining the records, the search warrants permitting broad seizure of
9 those records were vastly overbroad and invalid. Therefore, CCSO should be required to return
10 the seized property to Daybreak. Here, Daybreak has been aggrieved by CCSO’s unlawful
11 seizure of patient SUD treatment records and other highly sensitive and protected patient
12 information pursuant to invalid search warrants, and the Court should order CCSO to return
13 Daybreak’s property and ESI. The warrants are invalid because the underlying affidavits fail to
14 demonstrate probable cause and to describe the items to be seized with sufficient particularity.

15 Therefore, CCSO should be required to return the seized property to Daybreak.

16 **C. Alternatively, the Court Should Issue an Order to Show Cause Why Daybreak**
17 **Should Not Be Put in Immediate Possession of the Unlawfully Seized Records**

18 “Replevin is an ancient remedy for an ancient problem that can be phrased as ‘that’s
19 mine, give it back.’” *SEIU Healthcare Nw. Training P’ship v. Evergreen Freedom Found.*, 5
20 Wn. App. 2d 496, 503, 427 P.3d 688 (2018) (hereafter “*SEIU Healthcare*”), review denied sub
21 nom. *SEIU Healthcare N.W. Training P’ship v. Evergreen Freedom Found.*, 192 Wn.2d 1025,
22 435 P.3d 275 (2019). Chapter 7.64 RCW creates a cause of action for replevin, allowing “[t]he
23 plaintiff in an action to recover the possession of personal property [to] claim and obtain the
24 immediate delivery of such property, after a hearing, as provided in this chapter.” RCW §
25 7.64.010. The statute expressly provides that “[t]he remedies provided under this chapter are in
26 addition to any other remedy available to the plaintiff.” *Id.*

1 To obtain return of property by replevin, a plaintiff move for an order to show cause
2 pursuant to RCW § 7.64.020. To prevail, the plaintiff must show: (a) “[t]hat the plaintiff is the
3 owner of the property or is lawfully entitled to the possession of the property by virtue of a
4 special property interest . . . ,” (b) “[t]hat the property is wrongfully detained by defendant,” (c)
5 “[t]hat the property has not been taken for a tax, assessment, or fine pursuant to a statute and
6 has not been seized under an execution or attachment against the property of the plaintiff, or if
7 so seized, that it is by law exempt from such seizure,” and (d) “[t]he approximate value of the
8 property.” *Id.* Washington’s replevin statute applies not only to tangible property, but also to
9 electronic data. *SEIU Healthcare*, 5 Wn. App. 2d at 511-12.

10 Here, CCSO currently is in possession of Daybreak’s property that it unlawfully seized;
11 thus, the Court should issue an Order to Show Cause. Daybreak is the owner of the seized
12 property. Smith Decl., ¶ 2. CCSO is wrongfully detaining the property. *Id.*, ¶¶ 5-7. The
13 seizure was unlawful because CCSO failed to comply with Part 2’s prerequisites for obtaining
14 protected SUD treatment information and because the search warrants were invalid for lack of
15 probable cause and lack of particularity, as discussed above. Moreover, Daybreak’s counsel
16 has reached out to the Clark County Prosecuting Attorney’s office and the United States
17 Attorney for the Western District of Washington to inform them of the violations and seek a
18 resolution. Although the Prosecutor’s Office recently represented that CCSO intends to return
19 certain ESI to Daybreak; CCSO has yet to return any of the seized property or information. *Id.*,
20 ¶ 7.

21 The property has not been taken for a tax, assessment, or fine pursuant to a statute and
22 has not been seized under an execution or attachment against Daybreak’s property. Smith
23 Decl., ¶ 8. The value of the property is difficult to quantify, but is estimated to be in the
24 millions of dollars, based in part of the potential amount of Daybreak’s exposure for privacy
25 violations in the event Daybreak were to permit CCSO to continue its ongoing unauthorized
26 use and disclosure of protected patient information. *Id.*, ¶ 9. Any measure of the value of the

1 property should also consider the value of the confidence that Daybreak's patients have lost in
2 the mental health system as a result of CCSO's breach of their privacy and trust. *Id.*

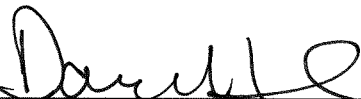
3 In sum, all of the elements of replevin are satisfied here. In the event the court does not
4 issue an order requiring CCSO to immediately return all of Daybreak's property and ESI, it
5 should issue an Order to Show Cause.

6 **VI. Conclusion**

7 For all of the foregoing reasons, Daybreak respectfully requests that the Court hold an
8 evidentiary hearing under CrR 2.3(e) at which it can issue an Order requiring CCSO to
9 immediately return all property and information seized from Daybreak and other holders of
10 Daybreak's ESI in September 2018 or, in the alternative, issue an Order to Show Cause.
11 Proposed orders are submitted herewith.

12
13
14
15 DATED this 26th day of June, 2019.

16 GARVEY SCHUBERT BARER, P.C.

17
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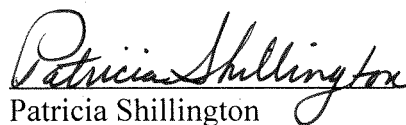
CERTIFICATE OF SERVICE

I, Patricia Shillington, certify under penalty of perjury under the laws of the State of Washington that, on June 26, 2019, I caused to be served on the person(s) listed below the foregoing Motion for Return of Property Or, In the Alternative, Order to Show Cause.

Leslie Lopez
Clark County Deputy Prosecutor
1300 Franklin Street, Third Floor
PO Box 5000
Vancouver WA 98666-5000

United States Mail, First Class
 By Legal Messenger
 By Facsimile
 By Federal Express
 By Email

DATED this 26th day of June, 2019.


Patricia Shillington

GSB:10363248.5 [41094.00500]