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63791-6

NO. 63791-6-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Plaintiff / Appellant,

v.

LENORA CARLSTROM,

Defendant / Respondent.

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STATE OF WASHINGTON  
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**REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT  
LENORA CARLSTROM**

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## I. INTRODUCTION

The Department of Social and Health Services (Department) filed a petition seeking a court order authorizing the involuntary treatment with antipsychotic medication for Lenora Carlstrom, a patient committed to the Department's care after being found not guilty by reason of insanity (NGRI). The trial court dismissed the petition on the basis that it did not have the statutory authority to grant the Department's petition. The trial court erred because superior courts do not need specific statutory authorization to exercise their inherent authority under Article IV, § 6 of the Washington Constitution. Additionally, statutory authority exists under RCW 10.77.120 because the Department is required to treat patients found NGRI similar to patients civilly committed under RCW 71.05, and RCW 71.05.217(7) authorizes involuntary treatment with antipsychotic medication under a superior court order. Therefore, this Court should reverse the trial court and hold that superior courts have the power to authorize involuntary treatment with antipsychotic medication for patients found NGRI.

## II. ARGUMENT

### A. The Superior Court Has Jurisdiction To Order Involuntary Treatment With Antipsychotic Medication For Patients Found NGRI Pursuant To Article IV, § 6 Of The Washington Constitution

Article IV, § 6 of the Washington Constitution states that “The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” Thus, superior courts have the “power to hear and determine all matters legal and equitable . . . except in so far as these powers have been *expressly* denied.” *In re the Marriage of Major*, 71 Wn. App. 531, 533, 859 P.2d 1262 (1993) (quoting *State ex rel. Martin v. Superior Court*, 101 Wn. 81, 94 P. 257 (1918)) (emphasis added). Exceptions to this constitutionally broad grant of jurisdiction will be narrowly read. *Id.* “In the absence of any limiting legislative enactment, the Superior Court has full power to take action to provide for the needs of a mentally incompetent person.” *In re the Guardianship of Hayes*, 93 Wn.2d 228, 233, 608 P.2d 635 (1980).

Ms. Carlstrom concedes that the statutes are silent on whether a superior court may authorize the involuntary administration of antipsychotic medication to patients found NGRI. Brief of Respondent Lenora Carlstrom (Br. Resp.) at 2, 10. Because the legislature has not

enacted a statute expressly limiting the superior court's power in this context, the trial court has the authority to order this treatment. *Hayes*, 93 Wn.2d at 233; *Major*, 71 Wn. App. at 533.

**1. Article IV, § 6 Confers Both Jurisdiction And Authority To Resolve Legal Claims That Are Not Specifically Limited By The Legislature**

Ms. Carlstrom argues that the jurisdiction and powers conferred on superior courts through Article IV, § 6 do not “obviate procedural requirements established by the legislature” and that these powers “are strictly procedural in nature and do not confer any substantive authority nor increase the jurisdiction of the court.” Br. Resp. at 20. For these propositions, Ms. Carlstrom cites to *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005); *State v. Gilkinson*, 57 Wn. App. 861, 790 P.2d 1247 (1990); and *Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990). None of these cases support Ms. Carlstrom's argument.

In *Ladenburg v. Campbell*, a district court appointed the appellant, Thomas Campbell, as a special prosecuting attorney to prosecute a misdemeanor. *Ladenburg*, 56 Wn. App. at 702-03. Campbell argued the district court had the inherent authority to appoint a special prosecuting

attorney, claiming that RCW 2.28.150<sup>1</sup> provided that power. *Ladenburg*, 56 Wn. App. at 703-04. The Court of Appeals disagreed, stating that RCW 2.28.150 “is strictly procedural in nature and does not confer upon district courts the substantive authority to appoint a prosecuting attorney.” *Ladenburg*, 56 Wn. App. at 704.

*Ladenburg* does not apply to the case at bar for two reasons. First, Article IV, § 6 applies only to superior courts. *Ladenburg* involved a challenge to a district court order, not a superior court order. Second, while *Ladenburg* held that RCW 2.28.150 does not confer substantive authority on district courts; it did not mention Article IV, § 6 at all. Hence, *Ladenburg* provides no support to Ms. Carlstrom’s argument that Article IV, § 6 does not confer substantive authority on superior courts.

Likewise, *State v. Gilkinson* does not support Ms. Carlstrom’s argument. In *Gilkinson*, a criminal defendant pled guilty to a felony, the sentence was deferred upon satisfactory completion of probation, and once probation was completed, the criminal charges were dismissed. *Gilkinson*, 57 Wn. App. at 862-63. The defendant then filed a motion in superior court pursuant to RCW 10.97.060, asking the court to order

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<sup>1</sup> RCW 2.28.150 states: “When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.”

various law enforcement agencies to expunge their records showing the defendant's arrest and conviction. *Gilkinson*, 57 Wn. App. at 863. RCW 10.97.060 provides in pertinent part that "criminal history record information which consists of nonconviction data only" shall be deleted from the files of criminal justice agencies upon the defendant's request. The term "nonconviction data" is expressly defined in statute, and specifically excludes from the definition a dismissal entered after a deferral of sentence, which is what happened in the defendant's case. RCW 10.97.030(2), (4)(c); *Gilkinson*, 57 Wn. App. at 863-64. The defendant attempted to avoid this express statutory provision by arguing that the superior court had the inherent judicial power to order the expungement. *Gilkinson*, 57 Wn. App. at 865. The Court of Appeals, citing to *Ladenburg*, disagreed, saying that the court's inherent powers "are strictly procedural in nature and do not confer any substantive authority nor increase the jurisdiction of the court." *Gilkinson*, 57 Wn. App. at 865; *Ladenburg*, 56 Wn. App. at 784.

Again, *Gilkinson* is inapplicable to the case at bar. To support the claim that the court's inherent powers are strictly procedural and not substantive, the Court of Appeals cites to the portion in *Ladenburg* discussing RCW 2.28.150; not Article IV, § 6. *Gilkinson*, 57 Wn. App. at 865; *Ladenburg*, 56 Wn. App. at 784. Again,

Article IV, § 6 was not mentioned in the opinion. Additionally, the defendant in *Gilkinson* was claiming that the superior court's inherent powers could be used as a means of avoiding specific legislation defining what relief is available and to whom that relief is available. Here there is no specific legislation either allowing or prohibiting a superior court to authorize involuntary administration of antipsychotic medication to patients found NGRI.

*James v. County of Kitsap*, 154 Wn.2d 574, 115 P.2d 286 (2005) is likewise distinguishable. In *James*, the Washington Supreme Court held that a land developer's challenge to a County's land use decision was time barred under the Land Use Petition Act because the challenge was filed after the strict 21-day statute of limitations had passed. *James*, 154 Wn.2d at 577, 584, 586. The developers then argued that they were not subject to the 21-day statute of limitations because the superior court had original jurisdiction under Article IV, § 6. *James*, 154 Wn.2d at 587. The Court rebuffed the developers, stating that "where statutes prescribe procedures for the resolution of a particular type of dispute" the parties must substantially comply or satisfy the spirit of those procedural requirements before the superior court can exercise Article IV, § 6 jurisdiction. *James*, 154 Wn.2d at 587-88.

Under Ms. Carlstrom's view, RCW 10.77.120 is silent on the issue of involuntary administration of antipsychotic medication for patients found NGRI. Br. Resp. at 2. In other words, there is no statute prescribing procedures to resolve this particular type of dispute. Because *James*, just as in *Gilkinson*, involved a legal challenge in an area where the legislature had already spoken, it is inapplicable to the case at bar.

Also, Ms. Carlstrom's argument that the broad grant of jurisdiction under Article IV, § 6 does not confer substantive authority on superior courts makes little practical sense. In order for superior courts to exercise jurisdiction in all cases and proceedings pursuant to Article IV, § 6, they must also have the substantive authority to make enforceable orders associated with the case at hand. See *Hayes*, 93 Wn.2d at 234 (holding that Article IV, § 6 gives superior courts the power to enter an order authorizing sterilization of an incapacitated person); *In re Sall*, 59 Wn. 539, 546, 548, 110 P. 32 (1910) (holding that Article IV, § 6 gives superior courts the power to appoint a guardian over the Washington property of a non-Washington resident). Without this substantive authority, the exercise of jurisdiction to hear legal claims and resolve legal disputes would be rendered meaningless. Superior courts would simply become places where parties could have academic discussions with no

consequences in the real world. Therefore, Ms. Carlstrom's argument that such substantive authority does not exist must be rejected.

Ms. Carlstrom expresses a concern that if superior courts could act procedurally and substantively without legislative authorization, the legislature would be rendered meaningless and the checks and balances of the democratic system would be upended. Br. Resp. at 21. What this argument ignores is that the legislature can check the judiciary by writing statutes setting limits on the jurisdiction of superior courts. *Major*, 71 Wn. App. at 533-34 (stating that the superior court's broad grant of jurisdiction can be limited or denied via statute). Therefore, Ms. Carlstrom's fears of an unchecked judiciary are unwarranted.

**2. The Opinion Of Six Justices In *In Re The Guardianship Of Hayes* Provides A Clear Analogy To This Case**

In *In re the Guardianship of Hayes*, 93 Wn.2d 228, 608 P.2d 635 (1980), the guardian of a severely mentally retarded teenager petitioned the court for an order authorizing the ward's sterilization. *Hayes* 93 Wn.2d at 229-30. The superior court dismissed the petition on the ground that there was no statutory authority specifically authorizing a superior court to order the sterilization of an incapacitated person. *Id.* at 229. Justice Horowitz, with whom Chief Justice Utter and Justices Dolliver and Williams concurred, wrote that no statutory authorization was required,

and that the broad grant of jurisdiction under Article IV, § 6 permitted the superior court to take action to provide for the needs of mentally incapacitated persons. *Hayes* 93 Wn.2d at 232-33. In an opinion specially concurring in part, Justice Stafford, with whom Justice Hicks concurred, agreed with the other four justices that the superior court had jurisdiction over the subject matter, and therefore, the judiciary had the power to act and resolve the dispute. *Hayes*, 93 Wn.2d at 240 (Stafford and Hicks, JJ., concurring specially in part in the majority and dissenting in part).<sup>2</sup>

The decision of these six justices should be recognized and applied in this case. Here, just as in *Hayes*, the statute does not specifically mention the type of relief the petitioner seeks. Here, just as in *Hayes*, the superior court dismissed a petition to care for a mentally incapacitated person based on statutory silence. Here, just as in *Hayes*, the appellate court should reverse the trial court because statutory silence is insufficient to limit the broad grant of jurisdiction given to superior courts under Article IV, § 6.

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<sup>2</sup> The four justice plurality, having found that the superior court had the jurisdiction and power to authorize sterilization, then set forth a list of heavy evidentiary burdens the petitioners must meet before the court could authorize the sterilization of the incapacitated person. *Hayes*, 93 Wn.2d at 238 (Horowitz, J., Utter, C.J., Dolliver and Williams, JJ. plurality). These evidentiary burdens were put in place in recognition of the serious Constitutional and medical issues such a procedure raised. *Id.* at 234. Justices Stafford and Hicks dissented from this portion of the opinion, arguing that the plurality made the evidentiary burdens so heavy that no petitioner could meet them. *Id.* at 242 (Stafford, J. and Hicks, J., concurring specially in part in the majority and dissenting in part).

**3. Superior Courts Have The Inherent Power To Act *In Parens Patriae* In Order To Care For The Mentally Ill**

In her brief, Ms. Carlstrom does not rebut that superior courts have the inherent power to act *in parens patriae* in order to provide for the needs of the mentally ill. *Weber v. Doust*, 84 Wn. 330, 333, 146 P. 623 (1915); *In re Sall*, 59 Wn. 539, 542, 110 P. 32 (1910). A statute is not necessary for the courts to exercise this power. *Weber*, 84 Wn. at 333-34. Because providing Ms. Carlstrom with antipsychotic medication would provide for her needs, the trial court erred in finding it did not have the power to act *in parens patriae* and authorize its administration.

**B. RCW 10.77.120 Authorizes Superior Courts To Order Involuntary Administration Of Antipsychotic Medication For NGRI Patients By Mandating That NGRI Patients Be Treated “To The Same Extent” As Persons Civilly Committed**

**1. The Plain Meaning Of RCW 10.77.120 Permits Involuntary Treatment With Antipsychotic Medication For Patients Found NGRI**

Courts must give effect to the plain meaning of a statute. *State v. Riofta*, 166 Wn.2d 358, 365, 209 P.3d 467 (2009). RCW 10.77.120 provides that patients found NGRI “shall be under the custody and control of the secretary *to the same extent* as are other persons who are committed to the secretary’s custody” (emphasis added). The plain meaning of this language requires patients committed after a finding of NGRI to be treated similarly to other persons committed to the Department’s custody, including those civilly committed pursuant to

RCW Chapter 71.05. Therefore, the involuntary medication procedures that are utilized in the treatment of civilly committed patients ought to also be utilized in the treatment of patients found NGRI. *See* RCW 71.05.217(7).

Ms. Carlstrom asserts that “RCW 10.77.120 is unambiguous in excluding forcible medication as an option” for patients found NGRI. *See* Br. Resp. at 10. This is not true. Nothing in the language of RCW 10.77.120 specifically prohibits or excludes the Department from involuntarily medicating patients found NGRI. Therefore, this Court should apply the plain meaning of RCW 10.77.120 by treating patients found NGRI to the same extent as patients civilly committed. Ms. Carlstrom concedes as much when she writes: “all that that portion of RCW 10.77.120 does is ensure that those committed as criminally insane are not treated as criminal inmates as if they were confined in prison, but are *treated the same as those under civil commitment* and housed at WSH [Western State Hospital].” Br. Resp. at 12 (emphasis added).

**2. If RCW 10.77.120 Is Ambiguous, Canons Of Statutory Construction Support Involuntary Treatment With Antipsychotic Medication For Patients Found NGRI**

Ms. Carlstrom argues that, to the extent that RCW 10.77.120 could be read as ambiguous, canons of statutory construction should be read so that a superior court does not have the statutory authority to grant the Department’s petition. *See* Br. Resp. at 13. To the contrary, the rules of

statutory construction dictate that superior courts have the authority to authorize involuntary treatment with antipsychotic medications for patients found NGRI.

The fundamental purpose of statutory construction is to discover and carry out the intent of the Legislature. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 164, 208 P.3d 557 (2009). The meaning of a statute is construed by reading it in its entirety and considering it in relation to other statutes. *Id.* at 164-65. "The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency. Statutes are to be read together, whenever possible, to achieve a harmonious statutory scheme . . . which maintains the integrity of the respective statutes." *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transportation*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000). Courts must avoid construing statutes in ways that would produce an absurd or unjust result and would clearly be inconsistent with the purposes or policies of the act in question. *State v. McDougal*, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992).

The Department seeks an order from this Court that would authorize the Department to involuntarily treat Ms. Carlstrom with antipsychotic medication, but only after a judicial hearing is held with all of the substantive and procedural protections of RCW 71.05.217(7).

Ms. Carlstrom argues that RCW 10.77 forecloses the trial court from making such an order. However, Ms. Carlstrom's interpretation would create inconsistencies between RCW 10.77 and RCW 71.05, would create unjust results and would be contrary to the statutes' legislative intent.

Patients found NGRI under RCW 10.77 and patients civilly committed under RCW 71.05 both suffer from serious mental illnesses. *See* RCW 10.77.110(1); 71.05.010. The Legislature charges the Department with providing adequate care and treatment to both sets of patients. RCW 10.77.120; 10.77.210; RCW 71.05.360(2). One of the most effective treatment tools for treating persons with mental illness is with antipsychotic medication, which, due to a person's mental illness, must sometimes be given involuntarily. *See Washington v. Harper*, 494 U.S. 210, 225, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990). Under Ms. Carlstrom's interpretation of these statutes, the Department may provide this necessary treatment to only one set of patients—those civilly committed—in a manner that gives those patients a high level of due process rights. The other set of patients either cannot receive this treatment or receive the treatment, but without the same level of due process. Such an inconsistency is not intended by the Legislature. *McDougal*, 120 Wn.2d at 351. This Court should avoid this inconsistency

and interpret the statutes so that both sets of patients are treated “to the same extent.” RCW 10.77.120.

**3. Ms. Carlstrom’s Reliance On *Expressio Unius Est Exclusio Alterius* Is Misplaced**

In her brief, Ms. Carlstrom refers to the canon of statutory construction *expressio unius est exclusio alterius*—expression of one is the exclusion of the other. *See* Br. Resp. at 15. Ms. Carlstrom cites to *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002) and *State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003) to argue that because the Legislature included a detailed forcible medication process in RCW 71.05 but did not include a similar provision in RCW 10.77, the Legislature did not intend for there to be a forcible medication process for patients found NGRI. *See* Br. Resp. at 15-16. However, neither case cited by Ms. Carlstrom includes the language in dispute here, where one set of patients must be treated “to the same extent” as another set of patients. RCW 10.77.120. Therefore, neither case is dispositive. Also, because the Legislature specifically intended both civilly committed patients and patients found NGRI to be treated similarly, *expressio unius est exclusio altruis* is inapplicable and should not be used to defeat this clear legislative intent. *See State ex rel. Spokane United Rys. v. Dep’t of Public Svc.*, 191 Wn. 595, 598, 71 P.2d 661 (1937); *Boise Cascade Corp. v. Wash. Toxics Coalition*, 68 Wn. App. 447, 455, 843 P.2d 1092 (1993) (holding that the rule that the expression of one

thing implies the exclusion of others should not be used to defeat the plainly indicated purpose of the Legislature).

Ms. Carlstrom also refers to RCW 10.77.092-.093 as further evidence of a legislative intent to prohibit the involuntary treatment with antipsychotic medication of patients found NGRI. *See* Br. Resp. at 10. However, a look at the codified intent of the Legislature shows this to be false. Both statutes were originally part of Engrossed Substitute S.B. 6274 (2004), codified in Laws 2004, chapter 157. The purpose of the bill was to “clarify state statutes with regard . . . to involuntary medication ordered in the context of competency restoration” as a result of the United States Supreme Court’s decision in *U.S. v. Sell*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed.2d. 197 (2003). Laws 2004, chapter 157, § 1. *Sell* set forth a four-part test establishing when it is appropriate for the government to involuntarily medicate defendants who are incompetent to stand trial. *Sell*, 539 U.S. at 180-82. One of those parts was that the government must have an “important interest.” *Id.* at 180. Generally, the government has an “important interest” if a “serious offense” is charged. *Id.* However, that important interest may be undermined if the defendant is civilly committed. *Id.* RCW 10.77.092 is simply intended to codify what is a “serious offense” for the purpose of *Sell* while RCW 10.77.093 is intended to permit courts to inquire into the defendant’s civil commitment status. Laws 2004, chapter 157, § 1. Hence, the Legislature in passing RCW 10.77.092-.093 intended to account for *Sell*, not to exclude involuntary medication as an option for patients found NGRI.

What is particularly telling about RCW 10.77.092-.093 is that neither statute has language specifically authorizing superior courts to order involuntary medication for defendants found incompetent to stand trial. That is because superior courts had been holding hearings and ordering involuntary treatment with antipsychotic medication for defendants incompetent to stand trial years before the advent of RCW 10.77.092-.093; a practice routinely condoned by appellate courts. *See State v. Hernandez-Ramirez*, 129 Wn. App. 504, 119 P.3d 880 (2005); *State v. Adams*, 77 Wn. App. 50, 888 P.2d 1207 (1995); *State v. Lover*, 41 Wn. App. 685, 707 P.2d 1351 (1985). Washington courts recognized long ago that involuntary medication hearings were necessary in order to treat mentally ill defendants incompetent to stand trial. This Court should likewise recognize that an involuntary medication hearing is necessary in order to treat patients found NGRI.

**C. Ms. Carlstrom's Attempts To Distinguish *Pierce* And *Dydasco* Are Unavailing**

In *Matter of Detention of Dydasco*, 135 Wn.2d 943, 959 P.2d 1111 (1998), the Washington Supreme Court was faced with whether RCW 71.05 required giving 3-days notice of an involuntary commitment hearing to both 90-day and 180-day hearings, even though the statute only provided this notice to patients facing 90-day hearings. *Dydasco*, 135 Wn.2d at 949. In resolving this issue, the court reasoned that since the statute states that a 90-day hearing is the same as a 180-day hearing, and that the legislature has consistently provided additional and increasing

procedural rights for those facing longer periods of involuntary commitment, the same 3-days notice should be granted to those facing either 90 or 180 days of civil commitment. *Id.* at 950.

Ms. Carlstrom characterizes *Dydasco* as the Washington Supreme Court simply avoiding an equal protection problem. Br. Resp. at 18. But such a characterization ignores the portion of the Court's reasoning that its interpretation was also consistent with the legislative scheme as a whole. *Dydasco*, 135 Wn.2d at 950. As previously argued, interpreting RCW 10.77 to also include a judicial hearing on the Department's petition to involuntarily administer antipsychotic drugs to patients found NGRI would be consistent with the statutory scheme as a whole. Br. Resp. at 11-13.

In *Pierce v. State, Dep't of Social and Health Services*, 97 Wn.2d 552, 646 P.2d 1382 (1982), the Washington Supreme Court confronted the issue of what due process rights ought to be afforded to an incompetent parolee, when, at the time, there were neither statutes nor cases defining their rights in parole revocation proceedings. After finding that due process requires the Board of Parole to consider a parolee's incompetence in order to reach an appropriate decision, the Court found that the "procedures set down by the legislature in RCW 10.77.060 are as appropriate to a parole revocation proceeding as to a criminal trial, and may therefore guide the Board in ordering such an evaluation." *Pierce*, 97 Wn.2d at 560.

Ms. Carlstrom characterizes *Pierce* as a decision where the Washington Supreme Court was simply looking to another statute for guidance on how to fulfill a constitutional mandate. Br. Resp. at 18. This is exactly what the Department is asking this Court to do. The Department is asking this Court see that RCW 10.77 is silent on the process afforded to patients found NGRI when the Department seeks to have them involuntarily treated with antipsychotic medication, and then look to RCW 71.05.217(7) as a guide to help protect the rights of these patients. *Pierce* is indistinguishable.

Both *Pierce* and *Dydasco* support looking to other statutes in order to uphold the overall statutory scheme and to protect constitutional rights. RCW 71.05.217(7), which provides for a judicial hearing for civilly committed patients, can guide the superior courts when dealing with patients found NGRI. This Court should reverse the trial court and uphold this approach.

**D. The Superior Court's Order Dismissing The Department's Petition Is A Final Judgment Dismissing A Cause Of Action Independent Of The Underlying Commitment And Appealable As Of Right Under RAP 2.2(a)(1).**

The Department and Ms. Carlstrom agree that this appeal is governed by the rules for non-criminal proceedings under RAP 2.2(a). RAP 2.2(a)(1) provides parties a right to appeal "the final judgment entered in any action or proceeding." The trial court's order dismissing the Department's petition is such a final judgment because it conclusively

terminated the individual action. *See* Henry Campbell Black, 1 *Black on Judgments*, 32, § 21 (2d Ed. 1902).

Ms. Carlstrom claims that the Department does not have the right to appeal the order of dismissal because the trial court has continuing jurisdiction over the defendant. Br. Resp. at 6. To support this proposition, Ms. Carlstrom analogizes to *In re Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999) and *In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). Neither case supports the analogy.

In *In re Detention of Petersen*, a person committed as a sexually violent predator claimed he had a right to appeal a trial court's probable cause decision under RCW 71.09.090(2). *Petersen*, 138 Wn.2d at 77, 83. Under RCW 71.09.090(2), persons committed as sexually violent predators have the right to petition the superior courts for their release only once a year. *Petersen*, 138 Wn.2d at 81; RCW 71.09.090(2). Once a petition is received, the superior court will then hold a show cause hearing to determine if there is probable cause to believe the committed person is ready for conditional or full release from confinement. *Petersen*, 138 Wn.2d at 82-83. If the superior court finds no probable cause, the sexually violent predator's commitment continues. *Id* at 85. The Washington Supreme Court held that there was no right to appeal,

primarily because the superior court retained jurisdiction over the sexually violent predator until his unconditional release. *Id.* at 86-88.

In *In re Dependency of Chubb*, a mother whose two children were found dependent claimed she had the right to appeal the subsequent dependency review hearings held pursuant to Former RCW 13.34.130(3)<sup>3</sup>. *Chubb*, 117 Wn.2d 720-21, 773 P.2d 851 (1989). Former RCW 13.34.130(3) provided that the status of all children found to be dependent should be reviewed by the court every six months in order to determine whether court supervision should continue. *Chubb*, 117 Wn. 2d at 722, 724. The Washington Supreme Court held that the orders from these dependency review hearings were not appealable as of right, in part, because the orders are made as part of an ongoing process and are subject to revision at the next review hearing. *Id.* at 724.

What distinguishes the order of the trial court in the case at bar from the orders in *Petersen* and *Chubb* is the substance of the order and the practical effect the order has on future proceedings. In *Petersen*, if the sexually violent predator did not prevail at a show cause hearing, the sexually violent predator would get another opportunity to receive conditional or full release in another year. In *Chubb*, if the parent of the dependent child did not prevail at the dependency review hearing, another

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<sup>3</sup> RCW 13.34.130(3) has since been recodified as RCW 13.34.138(1) (2003).

review hearing would be held six months later. In this case, under the trial court's order of dismissal, there is no possibility that the Department can obtain an order authorizing the involuntary administration of antipsychotic medication because the trial court ruled it did not have the authority to grant the relief requested. Under the doctrine of collateral estoppel, no matter how many involuntary medication petitions the Department files, no matter how overwhelming the evidence the Department presents, the Department will always be foreclosed from obtaining court authorization to administer antipsychotic medications involuntarily. Such an order is a final judgment.

Another distinguishing characteristic is that the Department's petition is a separate and distinct action from the underlying commitment. A patient found NGRI will remain committed to the Department's custody until the patient no longer poses a substantial danger to others or a substantial likelihood of committing criminal acts jeopardizing public safety or security. RCW 10.77.150(2); RCW 10.77.200(2). But the question to be determined at an involuntary medication hearing is whether there is a compelling state interest that justifies overriding the patient's rejection of antipsychotic medication, whether the treatment is necessary and effective and whether there are any available and effective less restrictive alternative forms of treatment. RCW 71.05.217(7)(a). Two

separate and distinct legal issues are involved. Ms. Carlstrom's analogy to *Petersen* and *Chubb* would be closer if she were appealing an order denying her release from involuntary confinement. That is not this case. Therefore, this Court should hold that the trial court's order dismissing the petition is appealable as of right pursuant to RAP 2.2.

### III. CONCLUSION

A superior court has the jurisdiction and authority pursuant to Article IV, § 6 unless that power has been specifically limited by the legislature. That has not happened in this case. In fact, the legislature has demanded that patients found NGRI be treated "to the same extent" as patients who have been civilly committed. For the foregoing reasons, the Department respectfully requests that this Court reverse the trial court and hold that superior courts have the power to authorize involuntary treatment with antipsychotic medication for patients found NGRI.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of January 2010.

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**CERTIFICATE OF SERVICE**

*Beverly Cox*, states and declares 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. On January 15, 2010, I served a true and correct copy of this **REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT LENORA CARLSTROM** on the following parties to this action, as indicated below:

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

DATED this 15 day of January 2010, at Tumwater, Washington.

*Beverly Cox*  
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BEVERLY COX  
Legal Assistant