

63791-6

63791-6

No. 63791-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Appellant,

v.

LENORA K. CARLSTROM,

Respondent.

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2009 FEB 10 PM 4:48  
CLERK OF COURT  
SUPERIOR COURT  
KING COUNTY

ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Gregory Canova

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BRIEF OF RESPONDENT LENORA CARLSTROM

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A. SUMMARY OF ARGUMENT

Lenora Carlstrom is currently civilly committed to Western State Hospital (WSH) after being found in 2001 to be not guilty by reason of insanity (NGRI) to a charge of second degree assault. In light of Ms. Carlstrom's recent desire to refuse nourishment, the Department of Social and Human Services (the Department), on behalf of WSH, petitioned the superior court for an order to forcibly medicate Ms. Carlstrom. The superior court denied the petition finding a lack of statutory authority for involuntarily medicating those committed as NGRI. The Department has now sought discretionary review of that decision.

This Court should reject the Department's arguments and affirm the superior court's decision since there is no statutory authority for forcibly medicating persons committed under the NGRI statute. In addition, there is no authority for "engrafting" the provisions for forcibly medicating those committed under civil commitment statutes onto the criminal commitment statute. Finally, the Washington Constitution does not provide this Court with authority to order the forcible medication of Ms. Carlstrom in the absence of statutory authority.

## B. ISSUES PRESENTED FOR REVIEW

1. A person committed to the care and custody of the Department under RCW 10.77 is considered civilly committed. An interlocutory order denying involuntary medication is not an appealable order but subject to discretionary review. Is the superior court's order denying the involuntary medication of Ms. Carlstrom a final order in light of the continuing nature of jurisdiction of the superior court over Ms. Carlstrom, an appealable order or only subject to discretionary review?

2. Western State Hospital through the Department petitioned the superior court for authorization to involuntarily medicate Lenora Carlstrom, a criminal defendant who had been found NGRI and committed to WSH. Following a hearing, the superior court denied the Department's petition, finding there was no statutory authority for such an order. Where RCW 10.77, the statutory scheme controlling those found to be NGRI and committed to WSH was silent on the issue of involuntary medication, was the superior court correct in finding there was no statutory basis for the involuntary medication of Ms. Carlstrom?

3. Article IV, section 6 of the Washington Constitution grants the superior court subject matter jurisdiction over matters but does

not grant independent substantive authority. Under article IV, section 6, can this Court order Ms. Carlstrom forcibly medicated despite the fact the Legislature has not provided any statutory authority for such an order?

C. STATEMENT OF THE CASE

On March 8, 2001, Lenora Carlstrom was found not guilty by reason of insanity of a charge of second degree assault, and committed pursuant to RCW 10.77.110 to Western State Hospital where she remains to this day. CP 26. In 2009, concerned over Ms. Carlstrom's deteriorating mental health and refusal to eat, the Department petitioned the trial court, on behalf of two of the Western State physicians, requesting to forcibly medicate Ms. Carlstrom with antipsychotic drugs. CP 4-17.

The trial court concluded there was no statutory authority to order forced medication under Chapter RCW 10.77. CP 27.

The final matter is whether there is any legal authority to grant the order being sought. Having reviewed and re-reviewed the statutes upon receiving this matter for consideration for this afternoon's hearing, the Court has concluded that the legislature has had ample opportunity to incorporate under 10.77 what it has incorporated under 71.05 and it has chosen not to. That is, the legislature has made no policy determination to include any method by which the department, acting through Western State Hospital, may involuntarily administer medications.

That is certainly something that one would think logically, given the inclusion in the other civil commitment statutes, that the legislature would have included under 10.77 if they had wanted it to be present. Whether it's because they don't view it as the restoration of competency, which is the lynchpin for the *Sell* factors and for the inclusion of the right to request involuntary medications, I don't know. But the bottom line in the Court's view is that the legislature has not chosen to include it; therefore, in the Court's view, there is no legal authority to grant the motion that's being made here by the department.

6/22/09RP 18-19.<sup>1</sup>

The Department now seeks review of the superior court decision dismissing its petition to involuntarily medicate Ms. Carlstrom.

D. ARGUMENT

1. THE ORDER DENYING THE PETITION TO FORCIBLY MEDICATE MS. CARLSTROM IS NOT AN APPEALABLE ORDER AS IT IS NOT A FINAL ORDER AS DEFINED BY RAP 2.2

Persons committed as criminally insane following an acquittal as not guilty by reason of insanity are considered civil committees. *State v. Reid*, 144 Wn.2d 621, 627-28, 30 P.3d 465 (2001). As such the ability to directly appeal an adverse ruling in a

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<sup>1</sup> The court entered written findings of fact and conclusions of law memorializing its oral decision, which are attached in the appendix. CP 25-28.

proceeding involving one committed under a finding of NGRI is limited. RAP 2.2 states in relevant part.

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

...  
(13) Final Order After Judgment. Any final order made after judgment that affects a substantial right.

The Department claims the order of the superior court denying its petition to involuntarily medicate Ms. Carlstrom is appealable as a “final order” under RAP 2.2(a)(13), in that it “forecloses the Department from obtaining the relief it seeks, namely a court order authorizing involuntary treatment with antipsychotic medication.” Brief of Appellant at 17. The simple fact that the Department did not get the result it sought does not necessarily make the superior court’s order appealable as a matter of right.

A final judgment is a judgment that ends the litigation, leaving nothing for the court to do but execute the judgment.” *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 79 Wn.App. 221, 225, 901 P.2d 1060 (1995), *aff’d*, 130 Wn.2d 862 (1996). “Failure to mention a particular proceeding in RAP 2.2(a)

indicates this court's intent that the matter be reviewable solely under the discretionary review guidelines of RAP 2.3." *In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). RAP 2.2 does not address appeals from proceedings such as presented here.

Ms. Carlstrom's matter is analogous to the decisions in *Chubb*, dealing with dependency review hearings, and *In re the Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999), dealing with annual review hearings in sexually violent predator commitments, where the Supreme Court found orders in those matters to be interlocutory in nature. In both cases, it was the court's continuing jurisdiction over the committed individual that the cases turned on. *See Petersen*, 138 Wn.2d at 88 ("A decision under RCW 71.09.090(2) finding no probable cause is not a final order after judgment in light of the court's continuing jurisdiction over the committed persons until their unconditional release."); *Chubb*, 112 Wn.2d at 724 ("Because [the review hearings] take place in an on-going process, the review hearings and the orders issued from them are interlocutory: they are not final, but await possible revision in the next hearing.").

Here, the court's order rejecting the Department's petition is similar to the orders appealed in *Chubb* and *Petersen*. Ms. Carlstrom's commitment will continue until either the restoration of her sanity or the termination of the statutory maximum sentence. See RCW 10.77.100; *Reid*, 144 Wn.2d at 633-34. The denial of the Department's petition does not resolve all issues in her commitment. As a result, the denial of the petition was merely interlocutory in nature and may only be challenged by discretionary review under RAP 2.3.

The decision in *State v. Gossage*, 138 Wn.App. 298, 302, 156 P.3d 951 (2007), cited by the Department does not alter the analysis. *Gossage* involved an individual convicted of sex offenses whose petition for early discharge, early termination of his duty to register and restoration of his civil rights was denied and he attempted to appeal. This Court, distinguishing *Chubb* and *Petersen*, found the order appealable as of right:

because in contrast to the proceedings in those cases, a court reviewing a petition for restoration of civil rights or relief from the obligation to register as a sex offender does not have continuing jurisdiction over the offender, and there is no set review of an offender's eligibility for restoration of rights or relief from the registration obligation

*Gossage*, 138 Wn.App. at 302. Thus, it is the continuing jurisdiction over Ms. Carlstrom that defeats the Department's attempt at appealing the superior court's order denying its petition. This Court should find the order denying the petition not to be appealable as of right and deny review.

2. THE TRIAL COURT'S CONCLUSION THAT THERE EXISTED NO STATUTORY BASIS FOR THE FORCED MEDICATION OF MS. CARLSTROM WAS CORRECT

a. Courts cannot engage in statutory construction absent a finding the statute is ambiguous. Courts do not construe an unambiguous statute. *American Continental Insurance Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). The meaning of a statute is a question of law reviewed *de novo*. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The plain and unambiguous meaning of a statute derives from its wording. *State v. Thompson*, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). Language is ambiguous only when it is susceptible to two or more reasonable interpretations. *State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003); *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993).

b. RCW 10.99.120 is plain on its face and does not authorize forced medication of persons committed under RCW 10.77.110. An individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs. *Washington v. Harper*, 494 U.S. 210, 221-22, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). The involuntary injection of such drugs represents an interference with a person's right to privacy, right to produce ideas, and ultimately the right to a fair trial. *Riggins v. Nevada*, 504 U.S. 127, 134, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), *quoting Harper*, 494 U.S. at 229; *State v. Adams*, 77 Wn.App. 50, 56, 888 P.2d 1207, *review denied*, 126 Wn.2d 1016 (1995).

A person found to be not guilty by reason of insanity may be committed to the care of the State if the trial court finds the person is a substantial danger or presents a substantial likelihood of committing a criminal act. RCW 10.77.110. The general care and health care treatment for those committed under RCW 10.77.110 is controlled by RCW 10.77.120. RCW 10.77.120 does not contain

any authorization or provide any mechanism for forcibly medicating a committed person.<sup>2</sup>

RCW 10.77.120 is unambiguous in excluding forcible medication as an option for those committed pursuant to RCW 10.77.120. Chapter RCW 10.77 does not contain provisions for involuntary medication for those committed as NGRI but does provide for involuntarily medicating those awaiting trial and only for the purpose of restoring competency to stand trial. *Compare* RCW 10.77.092-.093 and RCW 10.77.120. RCW 10.77.120 does not contain any mention of involuntary medication. This Court is barred

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<sup>2</sup> RCW 10.77.120 states in relevant part:

The secretary shall forthwith provide adequate care and individualized treatment at one or several of the state institutions or facilities under his or her direction and control wherein persons committed as criminally insane may be confined. Such persons 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, but such provision shall be made for their control, care, and treatment as is proper in view of their condition. In order that the secretary may adequately determine the nature of the mental illness or developmental disability of the person committed to him or her as criminally insane, and in order for the secretary to place such individuals in a proper facility, all persons who are committed to the secretary as criminally insane shall be promptly examined by qualified personnel in such a manner as to provide a proper evaluation and diagnosis of such individual. The examinations of all developmentally disabled persons committed under this chapter shall be performed by developmental disabilities professionals. Any person so committed shall not be released from the control of the secretary save upon the order of a court of competent jurisdiction made after a hearing and judgment of release.

from engaging in statutory construction since the RCW 10.77.120 is unambiguous.

The Department contends RCW 10.77.120 grants the courts authority for forced medication because a portion of the statute states:

[persons committed pursuant to RCW 10.77.110] 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). From this clause, the Department contends that portion of RCW 71.05.217<sup>3</sup> which allows for forced medication

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<sup>3</sup> RCW 71.05.217 states in relevant part:

Insofar as danger to the individual or others is not created, each person involuntarily detained, treated in a less restrictive alternative course of treatment, or committed for treatment and evaluation pursuant to this chapter shall have, in addition to other rights not specifically withheld by law, the following rights, a list of which shall be prominently posted in all facilities, institutions, and hospitals providing such services:

. . . .  
(7) Not to consent to the administration of antipsychotic medications beyond the hearing conducted pursuant to RCW 71.05.320(3) or the performance of electroconvulsant therapy or surgery, except emergency life-saving surgery, unless ordered by a court of competent jurisdiction pursuant to the following standards and procedures:

(a) The administration of antipsychotic medication or electroconvulsant therapy shall not be ordered unless the petitioning party proves by clear, cogent, and convincing evidence that there exists a compelling state interest that justifies overriding the patient's lack of consent to the administration of antipsychotic medications or electroconvulsant therapy, that the proposed treatment is necessary and effective, and that medically acceptable alternative forms of treatment are not available, have not been successful, or are not likely to be effective . . .

for those civilly committed applies equally to those committed pursuant to RCW 10.77.110. The Department reads far too much into this clause.

Persons committed under the civil commitment statutes are treated differently than those committed as criminally insane. See *Hickey v. Morris*, 772 F.2d 543, 547-48 (9<sup>th</sup> Cir. 1984) (no equal protection violation for State of Washington treating civil committees differently from those committed as criminally insane in light of the different governmental objectives). Contrary to the Department's reading of RCW 10.77.120, 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. Thus, the provision is unambiguous and does not authorize the forcible medication of those committed as criminally insane.

c. This Court cannot add terms to RCW 10.77.120 where the Legislature did not intend those terms to be included in the statute. The Department argues that this Court can merely "engraft" those portions of RCW 71.05.217 setting forth the procedure for involuntarily medicating civilly committed individuals

onto RCW 10.77.120 in order to allow it to forcibly medicate Ms. Carlstrom. Under clear and well-settled tenets of statutory construction, assuming this Court finds RCW 10.77.120 is an ambiguous statute, this Court should reject the Department's offer and rule it is barred from adding to RCW 10.77.120 in light of the Legislature's clear intent not to include those provisions authorizing involuntary medication when it enacted the statutory scheme. Should this Court not find the statute ambiguous, this Court cannot engage in *any* statutory construction and must simply reject the Department's offer to "engraft" anything.

Drafting a statute is a legislative not a judicial function. *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). The court's role is to interpret the law as it is, or in this case, as it was written-not as it could or even should have been written. *Id.* In construing a statute, this Court's objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face, then the Court must give effect to that plain meaning as an expression of legislative intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10, 43 P.3d 4. Examining the particular provision of a statute, as well as other statutory provisions in the act it is appropriate to decide whether a plain meaning can be ascertained. *Campbell &*

*Gwinn*, 146 Wn.2d at 10-12. If, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to construction aides, including legislative history. *Campbell & Gwinn*, 146 Wn.2d at 1-2; *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). This Court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *City of Seattle v. Dep't of Labor & Indus.*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998).

Appellate courts do not supply omitted language even when the Legislature's omission is clearly inadvertent, unless the omission renders the statute irrational. *State v. Taylor*, 97 Wn.2d 724, 729, 649 P.2d 633 (1982). "To do so would [be] to arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent." *Id.* "This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission." *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981). "Courts should assume the Legislature means exactly what it says"- even if the court disagrees with the result or finds the result distressing. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030

(2001). “The omission of a similar provision from a similar statute usually indicates a different legislative intent.” *Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County Commissioners*, 92 Wn.2d 844, 851, 601 P.2d 943 (1979), *citing* 2A C. Sands, *Statutes And Statutory Construction* § 51.02, at 290-91 (4th ed.1973).

An example of a scenario similar to that presented here can be found in *In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). There the Legislature had expressly provided that evaluations by experts were allowed in the proceeding following commitment as a sexually violent predator. The statute governing precommitment did not include a similar provision. The Supreme Court refused to add such a provision into the precommitment statute under a canon of statutory construction, *expressio unius est exclusio alterius*, that states to express one thing in a statute implies the exclusion of the other. *Williams*, 147 Wn.2d at 491.

Similarly, in *State v. Delgado*, the Court refused to add or borrow a provision from one statute to graft it onto another, as the State is seeking here. 148 Wn.2d 723, 63 P.3d 792 (2003). The “three strikes” persistent offender sentencing statute included a provision which allowed for the inclusion of prior convictions from foreign jurisdictions which were found to be comparable to a

Washington felony offense. *Delgado*, 148 Wn.2d at 726. A subsequent statute for “two strike” persistent offenders did not include a comparability provision. The State urged the Supreme Court to graft the comparability provision of the three strikes statute onto the two strikes statute. The Supreme Court refused the State’s invitation, noting, “the legislature unambiguously did not include a comparability clause in the two-strike statute in effect when Delgado committed his offense.” *Delgado*, 148 Wn.2d at 728. The Court further noted that its inquiry ended with that plain language adopted by the Legislature. *Id.*

RCW 10.77.120 and RCW 71.05.271 were enacted during the same legislative session. Laws 1973 1<sup>st</sup> ex.s. c 142 § 142 (RCW 71.05.217); Laws 1973 1<sup>st</sup> ex.s. c 117 §12 (RCW 10.77.120). Under the doctrine of *expressio unius est exclusio alterius*, since the Legislature chose to include the forcible medication process in one statute and omit it from the other necessarily means the Legislature intended to omit the provision regarding involuntary medication from RCW 10.77.120. As a consequence, this Court’s inquiry must end with the plain language of RCW 10.77.120. This Court cannot engraft the forcible medication provision onto RCW 10.77.120 even if this Court believes the statute should be rewritten

to comply with the Department's request. See *State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240 (1997) (“[H]owever much members of this court may think that a statute should be rewritten, it is imperative that we not rewrite statutes to express what we think the law should be .... even if the results appear unduly harsh.” (citations omitted)). The trial court was correct in following plain language of RCW 10.77.120, and as a result, did not err.

The cases the Department relies upon are inapposite and should be rejected. The Department cites *Pierce v. State Department of Social and Health Services*, 97 Wn.2d 552, 646 P.2d 1382 (1982), for the proposition that this Court may borrow from other statutes to provide the necessary authorization. Brief of Appellant at 12-13. In *Pierce*, the issue was whether a parolee's incompetence was relevant to the disposition portion of the parole revocation proceedings. The Supreme Court ruled that due process under the Fourteenth Amendment required that the parolee's incompetence be considered in determining the appropriate disposition. *Pierce*, 97 Wn.2d at 560. As such, the Court ruled the parole board had the *implicit* duty to consider competency, and looked to the procedure for considering

competency at trial, RCW 10.77.060, for guidance in fulfilling its constitutional mandate. *Id.*

*Pierce* had nothing to do with statutory construction. *Pierce* involved the Court looking for guidance in implementing a constitutional mandate, which is a far cry from a wholesale lifting of a portion of a statute and engrafting it onto another statute in order to read as the Department wishes it to be read. Here there is no comparable constitutional mandate.

Similarly, the decision in *In re the Detention of Dydasco*, 135 Wn.2d 943, 959 P.2d 1111 (1998), cited by the Department also fails to support its argument. *Dydasco* again involved an issue of equal protection under the Fourteenth Amendment. By statute, the 90-day petition for treatment was required to be filed three days prior to the expiration of a 14-day period of intensive treatment. The State filed a 180-day treatment petition *two* days prior to the expiration period. The statute governing 180-day treatment did not contain a similar three day filing deadline. In order to avoid an equal protection violation, the Court held the three day period applied to both the 90 and 180-day treatment commitments.

No such equal protection problem exists here. Treating civil committees and those committed as criminally insane has been

held not to violate equal protection, thus this Court is not facing the same dilemma as in either *Dydasco* or *Pierce*. *Hickey*, 772 F.2d at 547-48.

Finally, the Department cites two potential outcomes that it contends will result should this Court affirm the superior court ruling and refuse to involuntarily medicate Ms. Carlstrom. Brief of Appellant at 16-17. In so doing, the Department attempts to sway this Court with what it perceives as potential dire consequences. Instead of arguing to this Court, the Department has a ready available avenue, and likely receptive audience upon which to make its arguments: the Legislature. The Department could easily make its pitch for an amendment of RCW 10.77.120 to add an involuntary medication provision similar to that in RCW 71.05.217 to the Legislature, which is the body anointed with the power to draft and amend legislation. Given the arguments submitted by the Department here, it should have no problem gaining its sought after amendment from the Legislature.

3. ARTICLE IV, SECTION 6 PROVIDES  
JURISDICTION ON THE COURTS BUT DOES  
NOT CONFER ANY *SUBSTANTIVE*  
AUTHORITY

Article IV, § 6 is the general constitutional grant of jurisdiction to the superior court to hear and decide matters. In relevant part, section 6 states that “[t]he 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.” Wash Const., art. IV, § 6. While a superior court may be granted power to hear a case under article IV, § 6, that grant does not obviate procedural requirements established by the legislature. *James v. County of Kitsap*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005). Such powers are strictly procedural in nature and do not confer any substantive authority nor increase the jurisdiction of the court. *State v. Gilkinson*, 57 Wn.App. 861, 865, 790 P.2d 1247 (1990); *Ladenburg v. Campbell*, 56 Wn.App. 701, 784 P.2d 1306 (1990).

While a superior court may be granted power to hear a case under article IV, § 6, that grant does not obviate procedural requirements established by the legislature. *James v. County of Kitsap*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005). The trial court

did not commit error because it did precisely what the Washington Constitution provides: the Department sought a hearing on forcibly medicating Ms. Carlstrom, the court heard the petition, and denied the Department's petition. That is all jurisdiction under Article IV, § 6 of the Constitution authorized.

Citing *In re the Guardianship of Hayes*, 93 Wn.2d. 228, 608 P.2d 635 (1980), the Department makes an overstated argument that art. IV, § 6 confers the authority for this Court to act not just procedurally but substantively without legislative authorization. Taken to its logical conclusion, the Department's argument would render the Legislature meaningless as this Court could act on its own without any authorization from the legislative branch on any matter, thus upending the checks and balances of the current democratic system.

In *Hayes*, the mother of a severely mentally retarded 16 year-old petitioned the superior court for the authorization to surgically sterilize the child. The trial court dismissed the petition, finding there was no statutory authorization for such an order. In a plurality decision, the Supreme Court ruled:

The judiciary has constitutional jurisdiction over both the subject matter and the persons involved. Having jurisdiction the courts possess inherent power to

define the limits of the conflict between personal rights and the asserted needs of society and thus the power to resolve the instant dispute.

*Hayes*, 93 Wn.2d at 241 (Utter, C.J., concurring and dissenting).

But, the Court did not have a majority to resolve the issue and the matter was returned to the superior court. *Id.* at 239-40.

The Department misstates the holding of *Hayes*, since the “majority” decision it cites to is only the decision of four members of the Court. The actual decision consists of these four justices in the “majority” and the two justices concurring in part and dissenting in part.<sup>4</sup> This decision is far more limited than the Department wishes it to be. Further, *Hayes* has never been extended and essentially only applies to the *Hayes* case.

The dissent in *Hayes* decried the Court’s actions and noted the Legislature had at one time provided for sterilization of mentally incompetent persons, but once that law was struck down as unconstitutional, the Legislature had not enacted another statute.

*Hayes*, 93 Wn.2d at 244.

Obviously, since such legislation lies in the sphere of police power, it is not within the inherent power of the courts, and the legislature, until today, had every right

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<sup>4</sup> Three justices dissented, agreeing with the superior court that no statutory authority existed for granting such an petition for sterilization. *Hayes*, 93 Wn.2d at 243-49 (Rosselini, J., dissenting).

to assume that the courts would not presume to write their own law upon the subject.

The rule of law is not well served by handing unrestricted policymaking power to a shifting majority of as few as five whose judgment, as Justice Jackson would say, is not final because it is infallible, but infallible because it is final.

*Id.* at 245, 249.

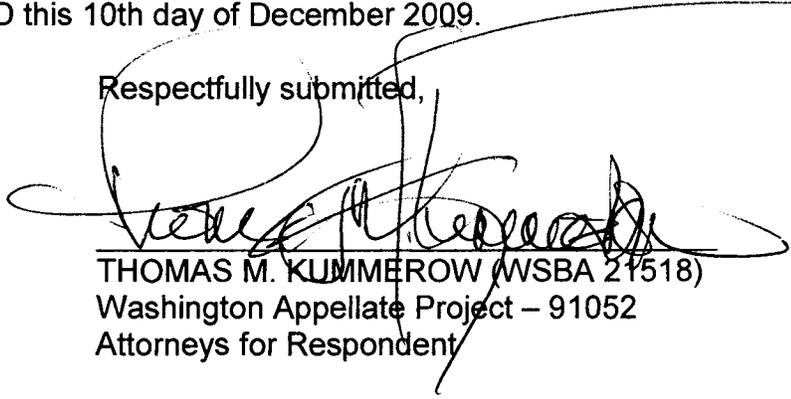
Given the limited nature of the scope of the *Hayes* decision, which is far more limited than the Department realizes, and the need for action of the Legislature in this controversial topic, this Court should reject the Department's invitation to use Article IV, section 6 to act in the absence of legislative authority.

E. CONCLUSION

For the reasons stated, Ms. Carlstrom submits this Court should affirm the superior court's denial of the Department's petition for authority to involuntarily medicate her.

DATED this 10th day of December 2009.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)  
Washington Appellate Project – 91052  
Attorneys for Respondent

## APPENDIX A

**FILED**  
KING COUNTY, WASHINGTON

JUL 01 2009

SUPERIOR COURT CLERK  
BY JANIE SMOTER  
DEPUTY

1 Honorable Judge Greg Canova  
2 Wednesday, July 1, 2009  
3 Room – W817  
4  
5  
6

7 **STATE OF WASHINGTON**  
8 **KING COUNTY SUPERIOR COURT**

9 State of Washington,

10 Plaintiff,

11 v.

12 Lenora Carlstrom,

13 Defendant.

NO. 00-1-04147-7 SEA

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER DISMISSING PETITION  
FOR INVOLUNTARY  
TREATMENT WITH  
ANTIPSYCHOTIC MEDICATION

14 **HEARING**

15 1.1. Date – June 22, 2009

16 1.2. Judge – The Honorable Greg Canova

17 1.3. Appearances – The plaintiff by David Hackett, King County Deputy

18 Prosecuting Attorney; the defendant, in person and by counsel Mike De Felice; and  
19 the Department of Social and Health Services (Department, DSHS), Western State  
20 Hospital, by Scott E. Michael, Assistant Attorney General.

21 1.4. Purpose – To consider the Department's motion to shorten time, a  
22 motion for limited intervention by the Department, and a petition for involuntary  
23 treatment with antipsychotic medication.  
24

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER DISMISSING PETITION  
FOR INVOLUNTARY TREATMENT WITH  
ANTIPSYCHOTIC MEDICATION

1

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ORIGINAL

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1 1.5. Evidence – The court considered the briefs and oral argument from  
2 Mr. Hackett, Mr. De Felice, and Mr. Michael.

### 3 FINDINGS OF FACT

4 The Court finds the following undisputed facts:

5 2.1. The Defendant, Ms. Carlstrom, entered a plea of not guilty by reason of  
6 insanity (NGRI) on the charge of assault in the second degree.

7 2.2. An order by the King County Superior Court entered March 8, 2001  
8 committed Ms. Carlstrom to Western State Hospital in Pierce County under the  
9 authority granted under RCW Chapter 10.77.

10 2.3. Ms. Carlstrom remains committed by court order to Western State  
11 Hospital.

12 2.4. When criminal defendants found NGRI are committed to Western State  
13 Hospital, the Department is legally responsible for providing care and treatment to  
14 those defendants, including Ms. Carlstrom.

15 2.5. Dr. Pasion, M.D., and Dr. Waterland, Ph.D. are both employees of  
16 Western State Hospital. They filed a petition seeking a court order authorizing  
17 involuntary treatment with antipsychotic medication to Ms. Carlstrom.

18 2.6. The motion to shorten time was not opposed.

### 19 CONCLUSIONS OF LAW

20 On the basis of the foregoing Findings of Fact and the record herein, the Court  
21 makes the following Conclusions of Law:

22 3.1. There is good cause to shorten time for the motions.

23 3.2. Under RCW Chapter 10.77, this Court retains personal jurisdiction over  
24 Ms. Carlstrom. The Court also has personal jurisdiction over the other parties.

1 3.3. Venue is proper in King County.

2 3.4. When the Criminal Rules of Procedure are silent, a court may look to  
3 the Civil Rules of Procedure for guidance. There is no Criminal Rule of Procedure  
4 governing intervention in a criminal case by a third party. This Court turned to Civil  
5 Rule of Procedure 24 for guidance.

6 3.5. Because the Department is responsible for providing care and treatment  
7 to Ms. Carlstrom, it has an interest in this case. This interest will be impaired or  
8 impeded unless the Department is permitted to intervene in order to bring the petition  
9 for involuntary treatment with antipsychotic medication. The Department's interests  
10 are not adequately represented by existing parties.

11 3.6. The Department may intervene as of right pursuant to CR 24(a)(2).

12 3.7. There is no statute authorizing a Superior Court to order involuntary  
13 treatment with antipsychotic medication for patients found NGRI and subsequently  
14 committed to Western State Hospital pursuant to RCW 10.77.

15 3.8. The legislature has authorized Superior Courts to order involuntary  
16 treatment with antipsychotic medication to persons civilly committed pursuant to  
17 RCW 71.05. The legislature has had ample opportunity to extend this authority to  
18 persons found NGRI but has chosen not to do so.

19 3.9. This Court does not have the statutory authority to order involuntary  
20 treatment with antipsychotic medication for Ms. Carlstrom. This Court cannot grant  
21 the relief the Department seeks.

22 ///

23 ///

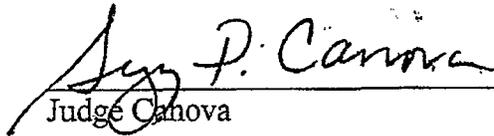
24 ///

1 **ORDER**

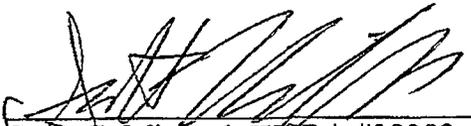
2 Based on the foregoing Findings of Fact and Conclusions of Law, IT IS  
3 ORDERED:

- 4 4.1. The motion to shorten time is granted.  
5 4.2. The Department's motion for limited intervention is granted.  
6 4.3. The Petition for Involuntary Treatment with Antipsychotic Medication  
7 is dismissed.

8 DONE IN COURT this 15<sup>th</sup> day of July 2009.

9  
10   
11 Judge Canova

12 Presented by:

13   
14  
15 Scott E. Michael, WSBA #39383  
16 Assistant Attorney General  
17  
18  
19  
20  
21  
22  
23  
24

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 LENORA CARLSTROM, )  
 )  
 Respondent. )

NO. 63791-6-I

FILED  
STATE OF WASHINGTON  
2009 DEC 10 PM 4:48

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID HACKETT, DPA KING COUNTY PROSECUTOR'S OFFICE SVP UNIT KING COUNTY ADMINISTRATION BLDG. 500 FOURTH AVENUE, 9 <sup>TH</sup> FLR SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SCOTT MICHAEL ATTORNEY AT LAW PO BOX 40124 OLYMPIA, WA 98504-0124	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF DECEMBER, 2009.

X \_\_\_\_\_  


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