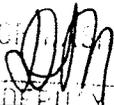


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

NO. 35399-7-II

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

KEITH UTTER,

Respondent,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Appellant.

BRIEF OF RESPONDENT

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I. Introduction

These judicial review proceedings under the State Administrative Procedure Act (“APA”), RCW Chapt. 34.05, squarely present a discrete yet important constitutional question: Whether the state may charge an incompetent criminal defendant for the cost of involuntary mental health treatment to restore his competency to stand trial. This court should rule, as the trial court did in this case, that such charges are impermissible under the relevant provision of our state constitution.

The Washington State Constitution Article I, Section 22 prohibits requiring a criminal defendant to advance money or fees before final judgment to secure the defendant’s right to appear and defend himself in criminal proceedings. This state constitutional pre-conviction costs prohibition necessarily includes a prohibition against requiring payment from an unconvicted incompetent criminal defendant for involuntary state hospital competency restoration treatment.

This court should exercise the reviewing court’s authority under the state APA to invalidate on constitutional grounds the Department of Social and Health Services’ (“DSHS”) regulations governing the determination of state hospital patient financial responsibility as applied against this limited and well-defined group of state hospital patients: Criminal defendants committed to the state hospital pursuant to RCW

Chap. 10.77.090 for the purpose of restoring the defendant's competency to stand trial on pending criminal charges.¹

The court should reject the department's assorted ancillary claims on appeal that the trial court somehow misunderstood the nature and purpose of the competency evaluation and restoration commitment process; that the trial court's Finding of Fact regarding the purpose of Mr. Utter's competency restoration commitments was unsupported in the record; and that the trial court committed an abuse of discretion when it denied the department's post-trial motion to supplement the record with a marginally relevant party declaration.

II. Statement of Issues Pertaining to Appellant's Assignments of Error

1. Whether the prohibition in the Washington State Constitution Article I, Section 22 against compelling a criminal defendant before final judgment to "advance money or fees" to secure his right to appear and defend himself in criminal proceedings includes a prohibition

¹ Counsel for the department in the introduction to briefing to this court make broad factual claims that they are "informed by DSHS" that the affected patient population and the financial impact of the constitutional ruling sought by Mr. Utter would be substantial. Brief of Appellant at 2. Although Mr. Utter strongly disputes these assertions, he has no ability to respond to them, since they are not a part of the factual record developed below in this case. Absent a motion by the department under RAP 9.9 to supplement the record, the court should reject the department's unsupported claims that this case implicates anything more than the state's ability to recoup a minimal percentage of actual commitment costs from the limited group of hospital patients committed under RCW 10.77.090. In Mr. Utter's individual case, the total amount at issue is \$290.40. AR 6.

against requiring payment for compulsory state hospital treatment to assess and restore an incompetent defendant's competency to stand trial.

2. Whether the involuntary mental health treatment provided to a state hospital patient committed by a criminal court for competency restoration pursuant to RCW Chapt. 10.77.090 is for the sole purpose of regaining the competency necessary to understand the proceedings against him or her and assist in his or her own defense, or for some other purpose.

3. Whether in judicial review proceedings under the state APA, a trial court commits an abuse of discretion when it denies the agency's post-trial motion to supplement the certified administrative record in the case with a marginally relevant party declaration.

III. Statement of the Case

1. Facts of the Case

On 1/21/2004, Keith Utter was charged in Clark County Superior Court with one count of felony harassment in violation of RCW 9A.46.020, and one count of fourth degree assault in violation of RCW 9A.36.041. AR 56-57.²

On 3/3/2004, the Clark County Prosecuting Attorney sought and obtained a court order for a psychiatric evaluation of Mr. Utter pursuant to

² Citations in this brief are to the agency's certified administrative record (AR); to the clerk's papers in Superior Court designated for transmittal to the Court of Appeals (CP); and to the transcripts of on-the-record proceedings in Superior Court (TP).

RCW Chapt. 10.77. AR 58-60. The purpose of the court-ordered evaluation was to determine whether Mr. Utter “lacks the capacity to understand the nature of the proceedings against him/her or to assist in his/her defense as a result of mental disease or defect.” AR 58.

The initial competency evaluation was conducted by a psychiatrist, Dr. LaCompte, in the Clark County Jail on March 9, 2004. AR 59, AR 61. Based on that evaluation, the criminal court issued an “Order of Commitment for 90 Days” pursuant to RCW 10.77.090(1)(b) on March 24, 2004. AR 61-62. The relevant portion of the court’s commitment order states:

THIS MATTER coming on in open court upon the motion of the State and there being reason to doubt the defendant’s competency to understand the proceedings against defendant and assist in the defendant’s own defense the court being in all things duly advised now, therefore,

IT IS HEREBY ORDERED that the defendant, KEITH DWANE UTTER, be committed to Western State Hospital for period not to exceed ninety (90) days without further order of the court and there undergo evaluation and treatment to restore defendant’s competency to stand trial.

AR 61. The 90-Day Commitment Order further authorized the forced administration of psychotropic medication, *id.*, and ordered the hospital to prepare and submit a report to the court “as to the defendant’s capacity to understand the proceedings against the defendant and to assist in the

defendant's own defense... .. and as to whether further examination, testing and treatment is required. AR 61-62. The Order concludes:

IT IS FURTHER ORDERED that upon completion of said ninety (90) days period of evaluation and treatment, or when the defendant has regained competency, whichever occurs first, the defendant shall be returned to the custody of the Sherriff of Clark County, to be held pending further proceedings herein... ..”

Id.

On July 2, 2004, the Clark County Superior Court entered an “Order of Commitment for an Additional 90 days” pursuant to RCW 10.77.090(2). AR 63-64. The relevant language in the order describing the purpose of the second 90-day commitment is identical to that in the initial 90-Day Commitment Order described above. See AR 61-64. The second order similarly concludes:

... .. upon completion of said ninety (90) days period of evaluation and treatment, or when the defendant has regained competency, whichever occurs first, the defendant shall be returned to the custody of the Sheriff of Clark County, to be held pending further proceedings herein... ..”

AR 64.

During the course of the second 90-day competency restoration commitment, on September 8, 2004, the DSHS Office of Financial Recovery sent Mr. Utter a Notice and Finding of Responsibility (“NFR”) for state hospital commitment costs. AR 50. The Notice asserts that Mr.

Utter bears financial responsibility for a portion of his Western State Hospital commitment costs “in accordance with WAC 388-855-0065.” Id. The Notice indicates that “unless an appeal has been made, payment to the Department shall commence twenty-eight (28) days after service of the Notice and Finding.” Id.

Using the generally applicable formula in WAC 388-855-0065 for determining patient financial responsibility for state hospital commitment costs, Mr. Utter was ordered to pay \$770.88 for his competency restoration treatment from the date of his admission to Western State Hospital, 4/7/2004, through the end of his second 90-day competency restoration commitment, 10/1/2004. AR 01. The administrative appeal below followed.

2. Administrative Proceedings, and Proceedings in Superior Court

Mr. Utter timely appealed the Department’s NFR. AR 02. An administrative hearing was held in this matter on 4/14/2005. AR 01. Mr. Utter’s counsel argued before the Administrative Law Judge that charging a criminal defendant to restore his competency to stand trial is unconstitutional and violates RCW 10.01.160. AR 20-29. The Final Order issued by the presiding ALJ referenced but declined to rule on Mr. Utter’s constitutional claims:

I cannot consider whether charging criminal defendants committed to restore competency is Constitutional, or not under WAC 388-02-0225(1). I must apply the department's regulations [on computing patient liability for state hospital commitment costs], regardless of their Constitutionality or authorization by statute.

AR 05.

The ALJ applied the Department's regulations, modified the amount to be paid, and concluded that the Department's rules require that Mr. Utter "pay \$290.40 towards the cost of his care for the period from April 7, 2004, through October 1, 2004." AR 05-06.

Mr. Utter timely filed a Petition for Review in Thurston County Superior Court on May 24, 2005, CP 127-28. The Petition asserted that Mr. Utter was committed by the Clark County Superior Court "solely for the determination of his competency to stand trial for criminal charges," CP 127, and claimed that:

[t]he department's actions, charging him for the cost of his care in the competency proceedings, are in essence demanding that the Petitioner pay for part of the costs of his own prosecution. This action violates constitutional and statutory provisions.

CP 128.

During oral argument before the trial court, on May 5, 2006, counsel for DSHS argued that charging Mr. Utter commitment costs did not violate Wa. Const. Art. I. Sec. 22, because his competency restoration commitment was unrelated to the criminal prosecution in his case. TP,

5/5/2006, at 19-15 through 20-2. During the course of this argument, the following exchange took place between the Trial Court and Assistant Attorney General Ian Bauer:

MR. BAUER: The Department is not, itself, actually involved in the petitioner's prosecution. DSHS is not tasked with gathering information as to his guilt or innocence. DSHS will not be appearing at his trial. All of this is left to Clark County prosecutors, law enforcement, and the court system. The department's obligation -- --

THE COURT: But he wouldn't be there unless a charge had been filed against him, right?

Mr. BAUER: There is simply no escaping the fact that he did come to Western State Hospital through the criminal justice system, certainly, but the Department's obligation to Mr. Utter is the same as the obligation to every other person committed to the state psychiatric facility to provide mental health treatment, because without that mental health treatment, the civil patient remains a danger to himself or others and the criminal patient is incapable of understanding the nature of the proceedings against him. So the primary treatment of the commitment, regardless of how you come to Western State Hospital, is mental health treatment. It is not for the prosecution of the individual.

THE COURT: But they only need to treat him enough to make him competent. They don't need to make him well.

MR. BAUER: This is a distinction certainly as to what happens with patients after Western State Hospital when you come through the civil commitment process or for competency restoration.

THE COURT: We see lots of those patients here, and they are competent for a brief period of time only, and we have a window with them, and we process their case, and often that window is gone. So it seems to me that the treatment that is

provided is really only to allow them to be competent in that window of time.

Mr. BAUER: Unfortunately, this is not in the record below, and I don't know if counsel will object to this, but the mental health treatment that is provided to these people for their underlying mental disorder is the same whether you are in the forensic unit or whether you are in the civil unit, because you have to treat that underlying mental disorder in order to regain competency or in order to no longer be a danger to yourself or others.

THE COURT: But the treatment ends as soon as they are competent, and it doesn't continue until they are well. That is my point

MR. BAUER: Yes, you are correct, because the purpose is to restore competency.

THE COURT: So that they can be prosecuted in the criminal justice system, right?

MR. BAUER: That is certainly -- that is certainly true...

TP, 5/5/2006, at 19-21 through 22-1.

In his ruling from the bench, the Trial Court rejected the Department's claims that the competency restoration commitment in Mr. Utter's case was somehow unrelated to the criminal proceedings against him:

The purpose of these evaluations, and they are done regularly in Superior Court, was to determine whether Mr. Utter lacks the capacity to understand the nature of the proceedings and to assist in his defense as a result of a mental disease or defect.

I think it was important to note that this was not an opportunity to obtain free mental healthcare, but it was a necessary step in the process of prosecuting Mr. Utter for the charges that were being filed.

TP, 5/5/2006, at 34-13 through 34-23.

In his ruling from the bench, The Trial Court addressed the relationship between Mr. Utter's statutory claims and constitutional claims as follows:

[I]n challenging the imposition of this charge, Mr. Utter is citing both statutory and constitutional grounds, and although I do not know this for a fact, it appears to me that they are related. The statute which is enumerated as RCW 10.01.160 appears to follow the constitutional provision of Art. I § 22 closely enough that I have to believe the drafters of the statute were looking at the constitutional provision... ..

TP, 5/5/2006, at 35-19 through 36-2. The Court concluded:

... .. I am prepared to invalidate the rules of the Department as they apply to those individuals who have been referred for a determination of competency during a criminal proceeding and specifically as to those for whom the Department attempts to impose costs prior to judgment. It is a narrow group, but it seems to me that as to that group there is a statutory basis and constitutional basis to invalidate the rule as it applies to that group.

TP, 5/5/2006, at 39-7 through 39-16.

The Trial Court issued written Findings of Fact, Conclusions of Law, and Decision and Final Order on Judicial Review of Administrative Decision on June 30, 2006. CP 43-47. The Decision and Order confirmed the Trial Court's ruling from the bench that the:

DSHS rules contained in WAC chapter 388.855 governing the determination of patient financial responsibility for state hospital commitment costs are hereby declared invalid as applied in the case of criminal defendants committed to the state hospital pursuant to RCW Chapter 10.77 for the purpose of restoring the defendant's competency to stand trial on pending criminal charges and not thereafter convicted in said charges.

CP 47.

On August 2, 2006, the Department brought a motion before the Trial Court to Supplement the Record and for Reconsideration of the Court's June 30, 2006 Findings of Fact, Conclusions of Law, and Decision and Final Order. CP 69-84. The motion claimed, among other things, that a declaration from the then Medical Director at Western State Hospital should be admitted post-trial to supplement the record because "during oral arguments and pursuant to comments made by the court, questions arose as to the nature of the services provided by WSH to individuals committed for competency restoration." CP 72.³

³ In its briefing to this court the department claims that it proffered the WSH medical director's declaration in support of its motion for reconsideration to correct the trial court's "misconception as to the nature and quality of treatment at Western State Hospital." Brief of Appellant at 35. The proffered declaration asserts generally that "Western State Hospital's primary purpose is to provide care and treatment for the mentally ill." CP. 50. For individuals committed to the state hospital by criminal courts to restore their competency to stand trial under RCW 10.77.090, the medical director's declaration asserts that [a]lthough the focus of the treatment may be to restore competency, this doesn't mean that treatment of the underlying disorder is fundamentally different [from the treatment provided to other patients]. CP 48-52.

The Court denied the Department's Motion to Supplement the Record without comment. CP 119. The resulting combined Order on Respondent's Motions to Supplement the Record and for Reconsideration & Amended Findings of Fact, Conclusions of Law, and Decision and Final Order on Judicial Review of Administrative Decision was issued on September 7, 2006. CP 119-124. The Amended Final Decision and Order of the Trial Court again invalidated the Department's state hospital cost recovery rules as applied:

DSHS rules contained in WAC chapter 388.855 governing the determination of patient financial responsibility for state hospital commitment costs are hereby declared invalid as applied in the case of criminal defendants committed to the state hospital pursuant to RCW Chapter 10.77 for the purpose of restoring the defendant's competency to stand trial on pending criminal charges and not thereafter convicted in said charges.

CP 124.

IV. Argument

- 1. The Court of Appeals should engage in a full *de novo* review under the APA of Mr. Utter's state constitutional claims.**

Under the state APA, a court engaging in judicial review of an agency adjudication decides constitutional questions, and other questions of law beyond the agency's recognized area of expertise, *de novo*, "... without any stated deference to agency views." Washington

Administrative Law Practice Manual, § 10.05.C.2, p. 10-18 (Matthew Bender, 2000); See also Crescent Convalescent Ctr. v. Department of Social & Health Serv., 87 Wn.App. 353, 357, 942 P.2d 981 (1997)(holding that because constitutional issues are outside the realm of agency expertise, a reviewing court under the APA does not defer to the agency's interpretation or application of constitutional principles).

The Court of Appeals applies the standards in RCW 34.05 directly to the record before the agency, “sitting in the same position as the superior court.” Burnham v. DSHS, 115 Wn.App. 435, 438, 63 P.3d 816 (Div. 2 2003)(citing City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

In the present case, Mr. Utter’s state constitutional claims were not, and could not have been, addressed in the agency adjudication below. AR 5; see also WAC 388-02-0220(1). They are properly before this court, as they were before the trial court, to be determined *de novo*.

The Department asserts in its briefing that the standard in these judicial review proceedings for proving the violation of Wa. Const. Art. I Sec 22 that Mr. Utter alleges in this case is “beyond a reasonable doubt.” Brief of Appellant at 15. The Department cites to Longview Fibre Co. v. Dept. of Ecology, 89 Wn.App. 627, 632-33, 949 P.2d 851 (1998) for this proposition. However, the Longview case holds only that a party claiming

that an agency regulation is unconstitutionally vague must prove unconstitutional vagueness beyond a reasonable doubt. Id.

Since nothing in the APA describes or proscribes use of this standard for constitutional claims, and since the standard announced in the Longview case by its terms only applies to constitutional vagueness claims, the Department's apparent claim that the Longview case should be construed broadly to require that all constitutional claims under the APA be proven "beyond a reasonable doubt" should be rejected by the Court.

2. The identified state constitutional violation in this case is the only clearly applicable basis under the APA for invalidating the agency rule at issue as applied.

The various specific bases under our state APA upon which a reviewing court may invalidate a final agency adjudicative order are set out in RCW 34.05.570(3):

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (a) *The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;*
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

Id (emphasis added).

In Mr. Utter's case, the only clearly applicable listed basis under the APA provision quoted above upon which the court conducting judicial review may invalidate the agency's rules at issue is RCW 34.05.570(3)(a). Specifically, Mr. Utter's only claim that may grant him the relief he seeks under the APA is that the statutory and regulatory scheme on which the

individual adjudicative order at issue in his case is based is invalid because it is in violation of a state constitutional provisions as applied. See id.⁴

Although both parties joined in argument at the trial court level on whether the statutory provision, RCW 10.01.160, also prohibits the agency from imposing on an incompetent criminal defendant the pre-conviction cost of competency restoration commitment, and although the trial court concluded as a matter of law that imposing such costs does indeed violate both RCW 10.01.160 and the parallel state constitutional provision, Art. I Sec. 22, the violation of RCW 10.01.160 does not, under the plain language of the APA, itself alone provide a basis for either setting aside the adjudicative order in Mr. Utter's case, or invalidating agency rules upon which it is based.

Because Mr. Utter's state constitutional claim is the only clearly recognized basis under the APA in this case for the order he seeks invalidating the DSHS rules contained in WAC chapter 388.855 as applied in the case of criminal defendants committed to the state hospital pursuant to RCW 10.77.090, this brief will not respond in detail to the Department's extensive briefing to this court on issues of legislative intent, statutory history and construction, and the apparent conflict

⁴ An agency rule may be reviewed and, if determined unconstitutional, invalidated in course of any judicial review proceeding under RCW 34.05, including proceedings for judicial review of agency adjudications. See RCW 34.05.570(2).

between RCW 10.01.160 and assorted statutes that appear to authorize state hospital cost of care recoupment from all state hospital patients, regardless of their commitment status. See e.g., RCW 43.20B.330; RCW 10.77.250.

Mr. Utter respectfully requests that the court reject the Department's statutory claims as immaterial to the outcome of the case, and rule directly on Mr. Utter's claim under RCW 34.05.570(3)(a) that the revenue statutes and agency regulations on which the adjudicative order in his case is based are in violation of the Washington State Constitution Article I, Section 22 as applied to persons in Mr. Utter's situation.

As the trial court did, the Court of Appeals should exercise its authority under the state APA to both set aside the final agency order in Mr. Utter's case, and invalidate on constitutional grounds the DSHS rules contained in WAC chapter 388-855 governing the determination of patient financial responsibility for state hospital commitment costs as applied in the case of criminal defendants committed to the state hospital pursuant to RCW Chapter 10.77.090 for the purpose of competency restoration on pending criminal charges.

3. The Washington State Constitution Article I Section 22 prohibits imposing pre-conviction competency restoration commitment costs on an incompetent criminal defendant.

Article I, Section 22 of the Washington State Constitution describes the rights of defendants in state court criminal proceedings as follows:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases... ..
In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wa. Const. Art. 1 Sec. 22 (emphasis added).

The right not to be tried while incompetent has long been held to be one aspect of the accused's Article I, Section 22 right to "appear and defend in person, or by counsel." E.g., MacKintosh v. Superior Court, 45 Wn. 248, 253-254, 88 P. 207 (1907). See also RCW 10.77.050 ("No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.").

The statute that protects the criminal defendant's Art. I, Sec. 22 right not to be tried while incompetent, RCW Chapt. 10.77, sets out the specific mandatory procedures used in criminal court for competency evaluations when there is reason to doubt a defendant's competency. See

RCW 10.77.060(1)(a). When incompetency is found in a felony case, the statute mandates that the defendant be transferred into the custody of DSHS for compulsory treatment and evaluation for not more than 90 days or “until he or she has regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense.” RCW 10.77.090(1)(b).⁵

While the Department admits in its briefing that the Art. I Sec. 22 right to “appear and defend” in a criminal case “incorporates a prohibition” against trying an incompetent defendant, the Department asserts that the Art. I Section 22 right, was not “intended to give criminal defendants an affirmative right to receive free mental health treatment at taxpayer expense.” Brief of Respondent at 32.

However, the mandatory competency restoration commitment process described in RCW 10.77.090 cannot reasonably be claimed to be merely “free mental health care.” It is for the specific purpose of effectuating the Art. I Sec. 22 prohibition against trying an incompetent criminal defendant. Although the state could, presumably, simply let incompetent defendants go, it has wisely chosen not to do so. The state

⁵ If, as in Mr. Utter’s case, the defendant is charged with a felony and competency to be tried is not restored during the initial 90-day state hospital commitment, the criminal court may order subsequent 90-day and 180-day commitments. RCW 10.77.090(3) & (4).

has created a regime of compulsory competency restoration treatment for the clear purpose of complying with the state constitutional mandate not to try an incompetent defendant.

In Mr. Utter's case, the mandatory state hospital competency restoration treatment that was ordered by a criminal court is the state's chosen method to effectuate and thus secure his right guaranteed by Art. I Sec. 22 to not be tried while incompetent.

The last clause of Art. I Sec. 22 prohibits requiring a criminal defendant to "advance" "before final judgment" costs or fees "to secure" the rights guaranteed therein. It should be read literally. In Mr. Utter's case this clause prohibits the state from requiring payment before final judgment in his criminal case for the mandatory state hospital competency restoration treatment that is the state's chosen method to secure criminal defendants' Art. I Sec. 22 right not to be tried while incompetent.

A. This court should engage in an assessment of the six Gunwall factors to confirm that Wa. State Const. Art. 1 Sec. 22 offers more protection than its federal counterpart against imposing pre-conviction costs on a criminal defendant, including competency restoration costs.

Although both the state and federal Constitutions similarly prohibit the prosecution of an incompetent criminal defendant, see e.g., Drope v. Missouri, 420 U.S. 162, 171, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975);

MacKintosh, 45 Wn. At 253-254, the parallel provision to Wa. Const. Art. I Sec. 22 in the U.S. Constitution listing the rights of the accused, the Sixth Amendment, does not include language similar to Article I, Section 22's prohibition against compelling the accused before final judgment to advance money or fees to secure any constitutionally-guaranteed right related to his prosecution.⁶

Although case law assessing claims similar to Mr. Utter's under the federal constitution is sparse, counsel for Mr. Utter has been unable to find any cases holding that the Sixth Amendment to the federal constitution prohibits state efforts to compel payment from a criminal defendant for competency restoration treatment. See e.g., State v. Kosiorek, 259 A.2d 151, 154 (Conn. 1969)(concluding without analysis that "it is not a denial of due process... ..we find no provision of the state or federal constitution that prohibits" changing an incompetent defendant for competency assessment and restoration.).

⁶ In total, the Sixth Amendment to the U.S. Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. 6.

Because Mr. Utter claims broader protections arising under the state constitution, this court should analyze the Washington State Constitution Article I Section 22 to determine whether it provides incompetent criminal defendants more protection against pre-conviction competency restoration costs than its federal counterpart. See State v. Gunwall, 106 Wn.2d 54, 61, 720 P.2d 808 (1986).

In Gunwall, our state Supreme Court set out a list of six “non exclusive factors” to consider when ruling on claims that a state constitutional provision extends broader protections than its federal counterpart: (1) the text of the state constitutional provision; (2) significant differences between the state and federal constitutional provisions; (3) state constitutional and common law history; (4) pre-existing state law; (5) differences in structure between the state and federal constitutions; and (6) matters of particular state interest or local concern. Id. Each of these Gunwall factors is discussed below.

- i. **The textual differences between Wa. Const. Art. I, Sec. 22, and the Sixth Amendment support the conclusion that state constitutional provision offers greater protection against imposing on the accused any pre-judgment fee or charge for any constitutionally-required component of his prosecution.**

As discussed above, while the state and federal constitutional provisions contain similar descriptions of the rights of the accused in

criminal proceedings, the state constitution Article I, Section 22 contains an additional explicit prohibition against compelling the accused to pay pre-judgment costs for any constitutionally-required component of his prosecution.

In State v. Silva, 107 Wn.App. 605, 27 P.3d 663 (Div. 1, 2001) the court conducted a full Gunwall analysis of a claim that Article I, Section 22 created a greater duty to provide legal research and litigation assistance to a *pro se* defendant than the Sixth Amendment. In analyzing and comparing the two texts, the court noted that Article I, Section 22 contains explicit language allowing a defendant to “defend in person, or by counsel” that is not in the Sixth Amendment. Id. at 618. The court concluded that the right to self-representation is thus more “clear and explicit” in the Art. 1, Sec. 22 text, and that “the differences in the texts of the [state and federal] constitutional provisions have great significance in determining what is required to effectuate those rights.” Id. at 618-619.

In the present case, the Article I, Section 22 prohibition against compelling the accused to “advance money or fees” “before final judgment” for any constitutionally-required component of his prosecution is both unique to the state constitutional provision, and similarly clear and explicit. This court should effectuate it as written as applied to the facts of Mr. Utter’s case.

ii. Washington’s constitutional and common law history support the conclusion that the state constitution offers greater protection against imposing on the accused the pre-judgment cost of competency restoration treatment.

Although “[s]cant accessible history exists regarding the intentions of the framers of the Washington State Constitution,” Silva, 107 Wn.App. at 619, the Silva court pointed out that at the time Washington adopted its constitution the federal Bill of Rights already existed, yet the framers of the Washington Constitution chose not to adopt its language, and instead took much of the language of the Article 1 Statement of Rights from other existing state constitutions. Id. (citing Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L.Rev. 491, 496-97 (1984)).⁷

The Silva court concluded that the state constitutional framers’ knowledge of but refusal to simply import the federal Bill of Rights language, including the specific language of the Sixth Amendment, into our state Constitution: “indicates that the [Washington] framers did not consider the language of the U.S. Constitution to adequately state the

⁷ See also Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 35 (2002)(indicating that Wash. St. Const. Art. I § 22 was “borrowed from” the Oregon Constitution).

extent of the rights meant to be protected by the Washington Constitution.” Id.

The ancient common law prohibition against trying an incompetent defendant, and the requirement that the court conduct a full assessment when any questions about a defendant’s competency are raised, has long been recognized in our state. See e.g., MacKintosh, 45 Wn. at 253-254. Further, our courts have long recognized that statutes authorizing the imposition of costs against a criminal defendant “are in derogation of the common law and should be strictly construed.” State v. Buchanan, 78 Wn.App. 648, 651, 898 P.2d 862 (Div. 1, 1995)(citing State v. Faulkner, 75 Wyo. 104, 292 P.2d 1045 (1956); 20 Am.Jur.2d *Costs* § 100, at 79 (1965)).

Washington’s constitutional and common law history thus support the conclusion that the state constitution Article I, Section 22 was intended to provide protection beyond that provided by its federal counterpart against imposing on the accused pre-judgment fees or charges for any constitutionally-required component of his prosecution, including the restoration of his competency to stand trial.

- iii. **Pre-existing state law; the different structures of our state and the federal constitutions; and matters of particular local and state concern support the conclusion that the state constitution offers greater protection against imposing on a**

criminal defendant the pre-judgment cost of competency restoration treatment.

1. **Pre-existing state law:** MacKintosh v. Superior Court, 45 Wn at 248 (1907), contains an extended description and analysis of late nineteenth and early twentieth century judicial procedures for assessing whether a defendant in criminal proceedings could not be tried because of insanity. Nothing in this early court opinion addresses or even appears to consider the possibility that an apparently incompetent defendant could be charged for his or her competency assessment or restoration.

2. **Differing structures:** The Silva court concluded without comment that the different structures of the state and federal constitution “inherently support” independent analysis of state constitutional provisions. Silva, 107 Wn.App. at 621 (citing Richmond v. Thompson, 130 Wn.2d 368, 382, 922 P.2d 1343 (1996)).

3. **Matters of particular state interest and local concern:** The type and scope of costs that may be imposed on a criminal defendant before final judgment is rendered in state and local criminal proceedings is clearly a matter that is both related to and of equal importance as other concerns that Washington courts have concluded are of particular state interest and local concern. See e.g., Silva 107 Wn.App. 621 (a criminal

defendant's right to effective self-representation is a matter of particular state interest and local concern).⁸

Based on an assessment of each of the six non-exclusive factors announced in Gunwall, in particular the unique and explicit pre-conviction costs prohibition in the state constitutional provision, this court should conclude that the Washington State Constitution Article I, Section 22 provides greater protection than its federal counterpart against compelling a criminal defendant to pay any pre-judgment fee or cost for any constitutionally-mandated component of his prosecution.

This court should further conclude that when the state mandates compulsory mental health treatment to restore a criminal defendant's competency to stand trial, Article I, Section 22 of our state constitution prohibits imposing the cost of such treatment on the criminal defendant in advance of a final judgment in the criminal proceedings.

4. The Department's claim on appeal that one of the Superior Court's Finding of Fact is not supported by substantial evidence on the record is immaterial and meritless.

⁸ See also State v. Goken, 127 Wn.2d. 95, 105, 896 P.2d. 1267 (1995)(a criminal defendant's right to be protected from double jeopardy is a matter of particular state interest and local concern); Richmond v. Thompson, 130 Wn.2d. 368, 382-83, 922 P.2d 1342 (the state's interest in law enforcement is a matter of particular state interest); State v. Johnson, 128 Wn.2d. 431, 446, 909 P.2d 293 (1996)(the scope of Washington citizens' privacy rights is a matter of particular state interest and local concern).

The Department alleges in its briefing on appeal that the Trial Court's Finding of Fact No. 2.2 in its Amended Findings of Fact, Conclusions of Law, and Decision and Final Order on Judicial Review of Administrative Decision, CP 119-124, was "in error." Brief of Appellant at 35.

The specific complaint is with the court's finding that the "sole stated purpose" in the 3/24/2004 Clark County Superior Court order that committed Mr. Utter to Western State Hospital for an initial 90 days was "to restore defendant's competency to proceed to trial" on the criminal charges against him. See CP 121, Brief of Respondent at 36. The Department's own description of its specific complaint is that:

to the extent that this finding implies that the treatment or purpose of treatment provided by WSH are somehow different because of the criminal court's commitment, it is error and lacks substantial evidence.

Id.

The court should reject both this complaint, and the department's strained related claim that somehow the trial court misunderstood the purpose and nature of the competency assessment and restoration treatment that the Department provides to incompetent criminal defendants. Both of these complaints are meritless and immaterial to the Court of Appeal's review of Mr. Utter's case.

The Department's claims regarding the trial court's Finding of Fact No. 2.2 are immaterial because the Trial Court's fact finding is entitled to no deference in these judicial review proceedings under the state APA, see e.g., Burnham v. DSHS, 115 Wn.App. at 435, and thus has no weight or relevance to the Court of Appeal's review of the record in this matter. The Department's claim is meritless because the Finding of Fact at issue simply quotes the stated purpose of Mr. Utter's commitment directly from the criminal court's commitment order which is readily available in the record. See AR 61-62 (Order committing Mr. Utter to "Western State Hospital for period not to exceed ninety (90) days without further order of the court and there undergo evaluation and treatment **to restore defendant's competency to stand trial.**")(emphasis added).

The Department also asserts that the Trial Court judge somehow suffered from mistake or misperception regarding the nature and purpose of the competency restoration commitment in Mr. Utter's case. Brief of Appellant at 35. This assertion is also without merit. Any fair review of the full colloquy between the judge and the Assistant Attorney General during the 5/5/2006 oral argument at issue reveals that the judge well understood competency assessment and restoration process in criminal proceedings, and simply rejected, as this court should, the Department's specious claim that a competency restoration commitment is somehow

distinct from, and is for some other purpose than, the committing court's specifically stated purpose of restoring a criminal defendant's competency to be tried. See TP, 5/5/2006, at 19-21 through 22-1.

In addition to the unambiguous evidence in the record in the form of criminal court commitment orders stating that the purpose of Mr. Utter's commitment was competency restoration, the statute under which Mr. Utter was committed, RCW 10.77.090(1)(b), itself authorizes the commitment of an incompetent defendant only until he has "regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense." Whatever the nature of the treatment he received at WSH, the purpose of his commitment as a matter of law was none other than that listed in this statute: To regain "the competency necessary to understand the proceedings against him or her and assist in his or her own defense." Id.

The Department's efforts to manufacture a controversy or question in this case about the Trial Court's fact finding and/or understanding of the nature and/or purpose of Mr. Utter's competency restoration commitment under RCW 10.77.090 should be rejected as meritless.

5. The Superior Court properly denied the Department’s post-trial motion to supplement the record with the state hospital medical director’s declaration.

As the final basis for its appeal, the Department cites alleged error in the Superior Court’s denial of its post-trial motion to supplement the record with the declaration of the then medical director of Western State Hospital. The Department claims that because its proffered post-trial declaration was allegedly necessary to “correct” a purported error in the Superior Court’s Finding of Fact 2.2 (“Finding 2.2”), the Superior Court abused its discretion by failing to consider it.⁹ Brief of Appellant at 39.

The claim that the trial court abused its discretion when it denied the Department’s post-trial motion to supplement the record suffers from several fatal flaws. First, as described above, the Department has failed to demonstrate the existence of any underlying error in the Superior Court’s Finding 2.2. Second, the Department had failed to demonstrate that the APA provisions regarding supplementation of the certified agency record permitted, let alone required, the Superior

⁹ The Department concedes that an “abuse of discretion” standard governs the Court of Appeals’ review of this issue. See Brief of Appellant, pp. 38-39 (citing Okamoto v. Emp. Sec. Dep’t, 107 Wn.App. 490, 494-95, 27 P.3d 2303 (2001)). Thus, the Court of Appeals should only overturn the challenged ruling if it determines that the Superior Court’s exercise of discretion was “manifestly unreasonable,” “based upon untenable grounds,” or exercised for “untenable reasons.” Okamoto, 107 Wn.App. at 494-95; Davis v. Globe Mach. Mfg. Co., Inc., 102 Wash.2d 68, 77, 684 P.2d 692 (1984); State ex rel. Carroll v. Junker, 79 Wash.2d 12, 27, 482 P.2d 775 (1971).

Court to consider the proffered declaration. Finally, the Department's arguments on appeal ignore the important fact that its Motion to Supplement the Record was a post-trial motion associated with a Motion for Reconsideration that is governed by the standards of CR 59. Each of these factors provides ample support to uphold the Superior Court's denial of the Department's post-trial motion to supplement the record.

A. The Department's Motion to Supplement the Record did not satisfy the APA standard governing the Superior Court's receipt of new evidence in judicial review proceedings.

Under the APA, a Superior Court sitting in judicial review may receive evidence beyond that contained in the agency record:

only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
(a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
(b) Unlawfulness of procedure or of decision-making process;
or (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1).

In support of its claim that the Trial Court's denial of its motion to supplement the agency record was an abuse of discretion, the Department makes the bald assertion that "Dr. Klein's declaration met the standards under RCW 34.05.562 for supplementing the record

on judicial review — the evidence offered pertained to a disputed issue of material fact, raised only by the superior court, and formed the basis of the superior court’s decision.” Brief of Appellant, at 39. Not only does this assertion clearly misstate the RCW 34.05.562 standard for supplementing the record, but it is also entirely devoid of factual support.

The Department cannot and has not demonstrated that the APA allowed, let alone required, the Superior Court to consider the medical director’s declaration. Absent a clear showing that its proffered declaration should have been admitted to supplement the agency record under the complete standard set out in RCW 34.05.562(1), the Trial Court did not abuse its discretion by refusing to do so.

B. The Department’s post-trial Motion to Supplement the Record did not satisfy the standards of CR 59.

Because the Department sought to add the medical director’s declaration to the record after trial in support of its Motion for Reconsideration of the Trial Court’s Findings of Fact, Conclusions of Law, and Decision and Final Order on Judicial Review of Administrative Decision, see CP 43-47; CP 69-84, the requirements of CR 59 governed the request. Under this rule, only “newly discovered” “material” evidence that the proffering party “could not with reasonable diligence have

discovered and produced at trial” may be admitted in support of a post-trial motion for reconsideration. CR 59(a)(4). In its briefing on appeal, the Department does not at all address its failure to meet any of these requirements. On this basis alone, the Court of Appeals should uphold the Trial Court’s denial of the Department’s post-trial motion to supplement the record.

IV. Conclusion

In these judicial review proceedings under the APA, the Court of Appeals should rule on Mr. Utter’s state constitutional claims, and should conclude, as the Trial Court did, as a matter of law that Article I, Section 22 of the Washington State Constitution prohibits any state effort before final judgment in a criminal case to compel payment from an incompetent defendant for the cost of a state hospital commitment to restore the defendant’s competency to stand trial.

This Court should further conclude that RCW 43.20B.330 and RCW 10.77.250, and the Department’s regulations contained in WAC 388-855 for determining patient financial responsibility for state hospital commitment costs violate the Washington State Constitution Article I, Section 22 as applied in the case of a state hospital patient committed under RCW 10.77.090 for competency restoration in a criminal case.

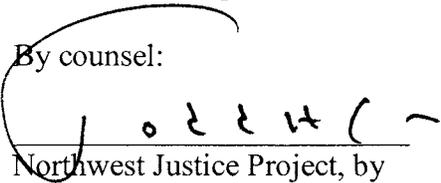
This court should affirm the Trial Court’s order setting aside the agency order that Mr. Utter pay for his competency assessment commitment. It should also invalidate the DSHS rules contained in WAC

chapter 388-855 governing the determination of patient financial responsibility for state hospital commitment costs as applied in the case of criminal defendants committed to the state hospital pursuant to RCW Chapter 10.77 for the purpose of restoring the defendant's competency to stand trial on pending criminal charges.

RESPECTFULLY SUBMITTED this 1st Day of February, 2007.

Keith Utter, Respondent

By counsel:

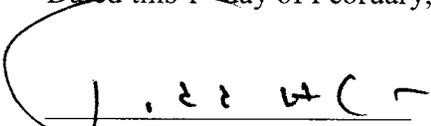


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Certificate of Service

I certify that today, the 1st Day of February, 2007, a true and accurate copy of the foregoing **Brief of Respondent** in the above-entitled matter was sent by legal messenger and first class mail to the attorney for the Appellant in this matter; Ian M. Bauer, Assistant Attorneys General, Attorney for the State of Washington Department of Social and Health Services, 7141 Cleanwater Dr. SW, PO Box 40124, Olympia, WA. 98504-0124.

Dated this 1st day of February, 2007.

A handwritten signature in black ink, appearing to read "T. H. Carlisle", is written over a horizontal line. A large, loopy flourish extends from the left side of the signature back up towards the date line.

Todd H. Carlisle
Attorney for Petitioner