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

BRYAN M. WINDMEYER,

Respondent,

v.

STATE OF WASHINGTON,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

When there is reason to doubt a criminal defendant's competence to stand trial, a court must order a competency evaluation. The court can either request the Department of Social and Health Services (DSHS) to designate an expert to conduct the evaluation, or it can appoint a non-DSHS expert to conduct the evaluation.

The superior court in this case appointed a non-DSHS expert to conduct a competency evaluation of a criminal defendant, Bryan Windmeyer. The non-DSHS evaluator was appointed because the county prosecutor refused to approve the qualified DSHS-designated evaluator.

The superior court subsequently entered an order which erroneously required DSHS to pay for the cost of the non-DSHS, court-appointed evaluator. The order requiring DSHS to pay for the evaluator was based on a statute that had no application in this case. The statute which should have controlled this issue, RCW 10.77.060, does not assign this cost to DSHS, and related statutes establish that this cost was the county's financial responsibility. The superior court order should be reversed and this Court should order Pierce County to pay for the cost of the competency evaluation.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering an order on April 2, 2013, which assessed against DSHS the cost of a competency evaluation performed by a court-appointed, non-DSHS evaluator.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. In the absence of any statutory directive, is DSHS required to pay for a competency evaluation performed by a court-appointed, non-DSHS evaluator when the county prosecutor refused to approve the qualified DSHS-designated competency evaluator?

IV. STATEMENT OF THE CASE

Bryan Windmeyer was charged in Pierce County Superior Court with committing five crimes. Clerk's Papers (CP) at 1-3. The superior court subsequently ordered that Mr. Windmeyer undergo a competency evaluation at Western State Hospital pursuant to RCW 10.77.060. CP at 4-7. The evaluation was to be completed by an expert at Western State Hospital who was designated by DSHS. CP at 4. Because the defendant was potentially developmentally disabled, the superior court further ordered that the DSHS-designated evaluator was to be qualified as a developmental disabilities professional (DDP), a designation which requires specialized training and experience. CP at 5.

DSHS designated Dr. Ray Hendrickson to conduct the evaluation. Report of Proceedings dated March 1, 2013 (1 RP) at 4, Report of Proceedings dated March 29, 2013 (2 RP) at 3. Dr. Hendrickson was the only forensic evaluator at Western State Hospital qualified as a DDP. 1 RP at 4.

The prosecutor, however, refused to approve Dr. Hendrickson as the evaluator. 1 RP at 3-4, 2 RP at 3. Nothing in the record explains the basis for this rejection. The superior court then appointed a DDP psychiatrist in private practice, Dr. Brent O'Neal, who was approved by the prosecutor, to conduct the evaluation. CP at 10-14, 1 RP at 3, 2 RP at 3. Dr. O'Neal concluded that Mr. Windmeyer was competent to proceed to trial and forwarded an invoice to the court for \$2,750. CP at 18.

The prosecutor and defense counsel contended DSHS was responsible to pay for Dr. O'Neal's evaluation. 1 RP at 3-4. DSHS appeared for the limited purpose of objecting to the assessment of costs against it. CP at 17-23. Without any briefing from the prosecutor or defense counsel, the superior court ordered DSHS to pay Dr. O'Neal the fair and reasonable value of his evaluation services pursuant to RCW 10.77.020(2), which requires DSHS to pay experts obtained by indigent defendants "in an amount determined by the secretary [of DSHS]

to be fair and reasonable.” CP at 27. In the order, the superior court characterized the evaluation as “Defendant Windmeyer’s competency evaluation” and stated that Dr. O’Neal was appointed “at the Defendant’s request after the Pierce County Prosecutor rejected the state designated expert.” CP at 26, 27. The order to pay was stayed pending an anticipated appeal. CP at 27. This appeal by DSHS followed. CP at 28-31.

V. ARGUMENT

This Court must determine whether the Legislature intended DSHS to pay for a competency evaluation performed by a court-appointed, non-DSHS evaluator when the county prosecutor refused to approve the designated qualified evaluator employed by DSHS at Western State Hospital. The issue in this case is not whether a defendant is entitled to a competency evaluation at public expense, but rather, who pays for the evaluation under these circumstances—DSHS or the county?

This Court should reverse the superior court order because, as evidenced by RCW 10.77.060(1)(a) and related statutes, the Legislature did not intend DSHS to pay for the competency evaluation under these circumstances.

A. DSHS Is an Aggrieved Party and the Superior Court’s Order Warrants Review by This Court

Rules of Appellate Procedure (RAP) Rule 3.1 states that “[o]nly an aggrieved party may seek review by the appellate court.” An aggrieved party means “one whose proprietary, pecuniary, or personal rights are substantially affected.” *State v. G.A.H.*, 133 Wn. App. 567, 575, 137 P.3d 66 (2006) (holding that DSHS was an aggrieved party, even though it was not a named party in the trial court, and could appeal the court’s order as a matter of right). It is well established that appellants “who were not formal parties to trial court proceedings, but who are aggrieved by orders entered in the course of those proceedings, may appeal as aggrieved parties.” *Id.* at 574 (internal quotations omitted). DSHS was not a named party in this criminal proceeding, but it is nevertheless an aggrieved party. Its pecuniary rights are substantially affected by the superior court’s order, which not only improperly assigned to DSHS the cost of the competency evaluation in this case, but could potentially lead to more improper assignments in the future.

For similar reasons, discretionary review¹ is warranted. Pursuant to RAP 2.3(b), review is appropriate in circumstances, like this case, where the superior court (1) committed obvious error rendering further

¹ DSHS filed a notice of appeal in this case, which should be given the same effect as a notice for discretionary review. RAP 5.1(c); *In re Welfare of Watson*, 23 Wn. App. 21, 23, 594 P.2d 947 (1979).

proceedings useless, (2) committed probable error and the decision alters the status quo or limits the freedom of a party to act, or (3) has so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court. In addition to the wide-ranging financial implications of this case, the superior court order was clearly erroneous, assigning the cost against DSHS based on a statute which had no application and contrary to the Legislature's intent. This error rendered further proceedings on the matter useless because it was effectively the final decision on the only issue in which DSHS was involved; further proceedings in this case are irrelevant insofar as DSHS's interests are implicated. The error also substantially alters the status quo by shifting to DSHS the cost of court-appointed, non-DSHS competency evaluators. And, finally, this is a departure from the usual course of proceedings that has a potentially significant impact on DSHS's costs, necessitating review by this Court.

B. Statutory Procedure for Competency Evaluations

Chapter 10.77 RCW sets out the procedures for the evaluation and treatment of those alleged to be incompetent to stand trial. Washington law provides that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050; *In re Fleming*, 142 Wn.2d 853, 862,

16 P.3d 610 (2001); *see also Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (Due Process clause of the United States Constitution prohibits the conviction of a person who is not competent to stand trial). A criminal defendant is incompetent to stand trial if he or she “lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(15).

Whenever there is reason to doubt a defendant’s competency, the court—on its own motion or on the motion of any party—must order a competency evaluation. RCW 10.77.060(1)(a). To initiate the evaluation, the court “shall either appoint or request the secretary² to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney” *Id.* If any party advises the court that the defendant may have a developmental disability, then “the evaluation must be performed by a [DDP].” RCW 10.77.060(1)(b). A DDP must be a psychiatrist, psychologist, or social worker “who has specialized training and three years of experience in directly treating or working with persons with developmental disabilities” RCW 10.77.010(8). The secretary may choose to designate more than one expert to conduct the evaluation, but is not required to do so. RCW 10.77.060(4).

² “[S]ecretary” in this statute refers to “the secretary of [DSHS] or his or her designee.” RCW 10.77.010(21).

A defendant who is subjected to a competency evaluation is entitled to retain an additional “expert or professional person to perform an examination in his or her behalf.” RCW 10.77.020(2). This is a separate expert examination, distinct from the competency evaluation ordered pursuant to RCW 10.77.060(1)(a). If the defendant is indigent, then the court must, upon the defendant’s request, assist the defendant “in obtaining an expert or professional person to perform an examination or participate in the hearing on his or her behalf.” RCW 10.77.020(2). DSHS is required to pay for the expert obtained by an indigent defendant: “An expert or professional person obtained by an indigent person pursuant to the provisions of this chapter shall be compensated for his or her services out of funds of the department, in an amount determined by the secretary to be fair and reasonable.” *Id.* The fair and reasonable amount is determined under the parameters of WAC 388-875-0040. In contrast to the expert appointed to conduct the competency evaluation, the expert obtained for the defendant is not subject to the prosecutor’s approval. RCW 10.77.060(1)(a); RCW 10.77.020(2).

C. The Superior Court Had No Authority to Order DSHS to Pay the Cost of a Non-DSHS, Court-Appointed Competency Evaluator

This Court must be guided by the rules of statutory construction to ascertain whether the Legislature intended DSHS to pay for the competency evaluation in this case.

The legislature's intent can be discovered from the plain meaning of the statute, which is determined 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.' *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11, 43 P.3d 4 (2002). The court must not add words where the legislature has chosen not to include them, and the statute must be construed so that all language is given effect. *Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003). If the statute remains susceptible to more than one reasonable meaning, it is ambiguous and the legislative history and circumstances surrounding its enactment may be considered. *Id.* Constructions that yield unlikely, absurd, or strained consequences must be avoided. *Kilian v. Atkinson*, 147 Wash.2d 16, 21, 50 P.3d 638 (2002).

City of Seattle v. Fuller, 177 Wn.2d 263, 269-70, 300 P.3d 340 (2013).

Statutory interpretation is an issue of law that appellate courts review de novo. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013).

Here is the pertinent statute in its entirety:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be

approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a).

1. RCW 10.77.060(1)(a) Does Not Authorize the Superior Court to Assess Against DSHS the Cost of a Court-Appointed Competency Evaluator

There is simply no language in the statute that explicitly requires DSHS to pay for a competency evaluation performed by a non-DSHS, court-appointed expert. Silence on this issue is important because courts “must not add words where the legislature has chosen not to include them” *Fuller*, 177 Wn.2d at 269. Courts cannot add words to a statute even if the omission was seemingly inadvertent, “unless it is required to make the statute rational or to effectuate the clear intent of the legislature.” *Anthis v. Copland*, 173 Wn.2d 752, 765, 270 P.3d 574 (2012). In plain terms, the statute gives the superior court a choice: it can request that DSHS designate an evaluator or it can appoint an evaluator itself from outside DSHS. The statute does not say, “and DSHS shall pay for the court-appointed expert.”

In the absence of any directive on costs, DSHS should not be responsible to bear the cost of an evaluation performed by a non-DSHS evaluator, upon the appointment of the superior court. It is the duty of the county prosecutor to prosecute all criminal actions in which the state or

county is a party. RCW 36.27.020(4). Pursuant to this duty, “the general rule is that counties are burdened with the cost of administering the criminal laws within their boundaries” *State v. Agren*, 32 Wn. App. 827, 828, 650 P.2d 238 (1982), *modified*, 660 P.2d 1145 (1983). Importantly, “in the absence of statutory authority, [counties] are not entitled to reimbursement from the state.” *Agren*, 32 Wn. App. at 828.

Competency evaluations are part of the cost of administering the criminal laws in a county. *See* RCW 10.01.160(5). Under RCW 10.01.160(5), the “direct costs relating to” a competency evaluation are recoverable against a defendant who is determined competent and subsequently convicted. The cost is recoverable by either DSHS or an other governmental unit, like a county, because the evaluation is deemed a “cost of prosecution”. *Id.*; RCW 10.01.160(2). Absent recovery against the convicted defendant, RCW 10.01.160(5) reveals that counties—and not DSHS only—are responsible for the cost of competency evaluations.

This case was brought pursuant to the county prosecutor’s duty to prosecute criminal actions in Pierce County. The county prosecutor elected to have the competency evaluation performed by a non-DSHS evaluator. The evaluation was part of the cost of administering the criminal laws in Pierce County, and there is nothing in

RCW 10.77.060(1)(a) authorizing reimbursement from the state. The cost is therefore the county's responsibility.

Correspondingly, it makes textual, logical, and practical sense for DSHS to bear the cost of an evaluation performed by its own designated experts pursuant to RCW 10.77.060(1)(a). Such evaluations utilize DSHS employees, resources, and, in some cases, facilities. This is why DSHS is referenced along with other governmental units in RCW 10.01.160(5), the statute which authorizes recovery against a defendant who is ultimately deemed competent and then convicted. This is also reflected in RCW 10.77.250, which explains that DSHS is "responsible for all costs relating to the evaluation and treatment of persons committed to it pursuant to any provisions of this chapter, and the logistical and supportive services pertaining thereto." Therefore, there are only two options for the competency evaluation: a DSHS-designated evaluator at DSHS expense or a court-appointed evaluator at county expense.

The only way to justify the superior court's order in this case is to insert words into RCW 10.77.060(1)(a), forcing DSHS to pay for a competency evaluation with which it had no involvement and over which it had no responsibility, or means to control its costs. That is impermissible because the statute, on its face, cannot be characterized as irrational, nor is there "clear intent" that the Legislature intended DSHS to

be financially responsible for non-DSHS, court-appointed evaluators—to the contrary, related statutes indicate the Legislature intended the county, and not DSHS, to be financially responsible. The superior court’s interpretation was precluded under this basic principle of statutory construction.

2. The Superior Court Interpreted RCW 10.77.060(1)(a) in a Manner That Results in Unlikely, Absurd, and Strained Consequences

Requiring DSHS to pay for non-DSHS, court-appointed evaluators under this statute would yield an unlikely, absurd, and strained consequence. The Legislature permitted the county prosecutor to approve the evaluator. RCW 10.77.060(1)(a). This is a significant factor in determining the Legislature’s intent with regard to the cost because, in effect, the prosecutor has the ultimate authority to determine who the evaluator will be. The prosecutor’s authority should not come without responsibility. Yet, based on the superior court’s flawed reasoning in this case, prosecutors can now decide with impunity not to approve any evaluators employed by DSHS in favor of evaluators in the community whom they prefer *at DSHS expense*. This implication is absurd and cannot possibly be what the Legislature intended.

In this case, DSHS designated Dr. Hendrickson, a qualified DDP, to conduct the competency evaluation. Despite the doctor's qualification as a DDP, there is nothing in the record explaining the prosecutor's basis for the rejection. DSHS did everything it was required to do under RCW 10.77.060(1)(a), as well as RCW 10.77.060(4), which provides that DSHS "*may choose* to designate more than one evaluator." RCW 10.77.060(4) (emphasis added). The Legislature did not require DSHS to designate any more than one qualified evaluator. Nor did the Legislature penalize DSHS in the event that the prosecutor rejected any or all of the DSHS-designated experts. Without some cost to the prosecutor's unchecked authority to reject qualified DSHS-designated experts, county prosecutors can simply cultivate their own preferred registry of private practice evaluators at DSHS expense, without any means for DSHS to control that expense. This Court should reject this unlikely, absurd, and strained interpretation. If DSHS designates a qualified evaluator and the county prosecutor refuses to approve of that evaluator, then the county is responsible to pay for the cost of the court-appointed expert. That is the only reasonable interpretation of RCW 10.77.060(1)(a).

3. The Superior Court Erroneously Based Its Order on RCW 10.77.020(2), Which Did Not Apply to This Case

The statute which the superior court's order relied upon, RCW 10.77.020(2), does not apply in this case. That statute provides that DSHS is required to pay for an indigent defendant's expert when the defendant has been "subjected to an examination pursuant to any provision of this chapter." RCW 10.77.020(2). In its entirety, the statute reads:

Whenever any person is subjected to an examination pursuant to any provision of this chapter, he or she may retain an expert or professional person to perform an examination in his or her behalf. In the case of a person who is indigent, the court shall upon his or her request assist the person in obtaining an expert or professional person to perform an examination or participate in the hearing on his or her behalf. An expert or professional person obtained by an indigent person pursuant to the provisions of this chapter shall be compensated for his or her services out of funds of the department, in an amount determined by the secretary to be fair and reasonable.

Id.

The expert referred to in this statute is commonly referred to as the "defense expert". *See, e.g., State v. Griffith*, 91 Wn.2d 572, 579, 589 P.2d 799 (1979) (where defendant was subject to a competency evaluation, it was not prejudicial error to deny indigent defendant's request for a separate "defense expert" at the time of arraignment). This is a different expert than the expert appointed to evaluate the defendant's competency under RCW 10.77.060(1)(a). The purpose of this expert and

examination is not to report to the court on the defendant's competency. The purpose of this expert and examination is rather "to provide expert psychiatric assistance for defendants in the preparation of their defenses" *Griffith*, 91 Wn.2d at 579. This is indicated by the statute's language which emphasizes twice that the defendant's examination is performed in and on "his or her behalf." RCW 10.77.020(2). In contrast, the competency evaluator is tasked in party neutral terms "to evaluate and report upon the mental condition of the defendant." RCW 10.77.060(1)(a).

The distinction between these two experts is also evident in RCW 10.77.060(2), which provides that the "qualified expert or professional person retained by or appointed for the defendant [is] permitted to witness the evaluation authorized by [RCW 10.77.060(1)]." The statute goes on to state that "[t]he defendant's expert or professional person shall have the right to file his or her own report" in addition to the competency evaluation ordered by the court. RCW 10.77.060(2). In other words, the statute explicitly demonstrates there are two separate experts: the competency evaluator and the defense expert who is permitted to witness the competency evaluation and file his or her own, separate report.

Dr. O’Neal was not appointed by the superior court as Mr. Windmeyer’s defense expert in this case, as authorized by RCW 10.77.020(2). CP at 10-14. Rather, he was appointed as the competency evaluator, as authorized by RCW 10.77.060(1)(a). CP at 10-14.

A court may require DSHS to reimburse the defense expert described in RCW 10.77.020(2), but even this requirement further reveals why the statute is inapplicable in this case. Under the statute, DSHS reimbursement is subject to important limiting language—DSHS is only required to pay for an outside expert when the expert is “*obtained by an indigent person . . .*” RCW 10.77.020(2) (emphasis added). In other words, DSHS must compensate a defense expert who is obtained by or for an indigent defendant to provide expert assistance in the preparation for a defense. The evaluator in this case was not “obtained by” or for the defendant; the evaluator was appointed by the court, subject to the prosecutor’s approval, to conduct an evaluation for the benefit of the court’s determination on competency. The statute does not broadly declare that DSHS is to pay for all experts in all circumstances related to chapter 10.77 RCW. The only way to find statutory authority in RCW 10.77.020(2) for DSHS reimbursement for the competency evaluator in this case is to ignore important qualifying language in the

statute. As with inserting language into RCW 10.77.060(1)(a), this contradicts fundamental principles of statutory construction.

Although the statute does not apply in this case, RCW 10.77.020(2) evidences that the Legislature plainly knows how to assign against DSHS the cost of an expert when it intends to do so. It further evidences that the Legislature chooses to do so only under limited, carefully described circumstances. This is demonstrated by an additional distinction: RCW 10.77.020(2) does not provide for prosecutor approval of the defense expert. This makes obvious sense, given the expert's role as an aide for the defense. Yet it is an important difference from RCW 10.77.060(1)(a) that further signals the Legislature's intent because, in this context, DSHS is not subject to the county prosecutor's unrestricted authority to reject its designated experts in favor of selected non-DSHS evaluators. The Legislature even gave DSHS the statutory authority in RCW 10.77.020(2) to limit its costs to a "fair and reasonable" amount—an amount that cannot exceed \$800. WAC 388-875-0040. This demonstrates that when DSHS is tasked with paying for outside expert examinations, the Legislature does so in plain, explicit terms and also provides an appropriate means for DSHS to control its costs. In stark contrast to RCW 10.77.020(2), RCW 10.77.060(1)(a) is conspicuously silent on this issue.

The superior court in this case specifically based its order on RCW 10.77.020(2) and erroneously ordered DSHS to pay for the cost of Dr. O’Neal’s competency evaluation. CP at 27. The order misapprehends and conflates these two different statutes which authorize the appointment of two different experts for two different purposes. Dr. O’Neal was appointed pursuant to RCW 10.77.060(1)(a), not RCW 10.77.020(2). RCW 10.77.060(1)(a) does not authorize the court to order DSHS to pay for the evaluation in this case, and RCW 10.77.020(2) does not apply.

The Legislature’s intent is unambiguous: there is no authority to order DSHS to pay the cost of a competency evaluation performed by a court-appointed, non-DSHS evaluator when the county prosecutor rejects the qualified DSHS-designated evaluator.

4. Recently Passed Legislation Establishes the Legislature Intended for Counties to Pay the Cost of a Court-Appointed Evaluator Unless Specific Conditions, Not Applicable in This Case, Are Established

Even if RCW 10.77.060(1)(a) was ambiguous, recently passed legislation regarding competency evaluations unequivocally confirms the Legislature did not intend for DSHS to pay for the competency evaluation in this case. Courts “may refer to a statute’s subsequent history to clarify an ambiguous statute’s original intent.” *State v. Bunker*, 169 Wn.2d 571, 581, 238 P.3d 487 (2010). If a statute is “ambiguous to the point that it

generated dispute as to what the Legislature intended a subsequent amendment can enlighten courts as to a statute's original meaning." *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 150-51, 736 P.2d 265 (1987).

Shortly after the order was entered in this case, the Legislature amended chapter 10.77 RCW³ to specifically address when DSHS is required to pay for a court-appointed competency evaluator. Laws of 2013, ch. 284, § 1 (attached hereto as Exhibit 1). The new law provides that the county is responsible to pay for court-appointed evaluators, and that DSHS must reimburse the county *only in specific circumstances*. *Id.* The only circumstance in which DSHS must reimburse the county is when DSHS does not meet a certain "performance target" as outlined in RCW 10.77.068. Laws of 2013, ch. 284, § 1(1).

Specifically, RCW 10.77.068(1)(a)(ii) establishes a performance target of seven days for the completion of a competency evaluation for a

³ The law creates a new section within chapter 10.77 RCW, so it does not *directly* amend RCW 10.77.060. It nevertheless directly addresses the identical subject matter, and is a necessary supplement to the statute. Accordingly, the statute and subsequent amendment should be read together as courts must "interpret statutes in *pari materia*, considering all statutes on the same subject, taking into account all that the legislature has said on the subject, and attempting to create a unified whole." *Diaz v. State*, 175 Wn.2d 457, 466, 285 P.3d 873, 878 (2012); *see* 2B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 51:2 (7th ed. Nov. 2012) ("The doctrine of *in pari materia* applies also to . . . statutory amendments" and amendments are "presumed to accord with the legislative policy embodied in those prior statutes, and they all should be construed together.").

defendant in jail.⁴ *Only if* DSHS does not meet its performance target for the timely completion of competency evaluations for at least 50 percent of defendants in the county during the most recent quarter, is the county entitled to reimbursement from DSHS for the reasonable cost of the court-appointed evaluator. Laws of 2013, ch. 284, § 1. The evaluator must be appointed from a list of qualified persons assembled with the participation of prosecutors and the defense bar in the county. *Id.* at § 1(2).

The section which details DSHS's reimbursement provides in its entirety:

A qualified expert or professional person appointed by a court under this section must be compensated for competency evaluations in an amount that will encourage in-depth evaluation reports. Subject to the availability of amounts appropriated for this specific purpose, the department shall reimburse the county in an amount determined by the department to be fair and reasonable with the county paying any excess costs. The amount of reimbursement established by the department must at least meet the equivalent amount for evaluations conducted by the department.

⁴ When these performance targets were established, the Legislature also recognized a non-exclusive list of circumstances "that may place achievement of targets for completion of competency services . . . out of the department's reach in an individual case without aspersion to the efforts of the department." RCW 10.77.068(1)(c). The Legislature also asserted that nonachievement of the targets could not create any "entitlement or cause of action" nor "form the basis for contempt sanctions under chapter 7.21 RCW . . ." RCW 10.77.068(5).

Id. at § 1(4). In addition to the conditional nature of this requirement, there are two further limitations. First, as with the defense expert, DSHS is only required to pay an amount it determines to be “fair and reasonable”. Second, the fair and reasonable amount is also “[s]ubject to the availability of amounts appropriated for this specific purpose” *Id.* The county has the responsibility to pay any amount in excess of these limitations. *Id.*

The new law went into effect on July 28, 2013, so it does not apply to this case, as the order in this case was entered on April 2, 2013. CP at 27. Nevertheless, it affords yet another example of how the Legislature provides explicit directives and limitations when it intends for DSHS to pay for an appointed expert. It also further evidences that the default responsibility for the cost of a court-appointed expert lies with the county. Even if and when DSHS’s responsibility to pay is triggered, it is subject to certain limitations, amounts over which the county remains responsible.

When the new law is read in conjunction with RCW 10.77.060(1)(a), it establishes that DSHS is responsible to pay for a competency evaluation under two scenarios only: (1) when the court requests that DSHS designate a qualified DSHS competency evaluator who is then approved by the county prosecutor, or (2) when the court

appoints a qualified non-DSHS evaluator *and* DSHS has not met the RCW 10.77.068 performance target for over 50 percent of the defendants in the county during the most recent quarter. If the superior court appoints a competency evaluator outside of these limited scenarios, then the county must be responsible for that cost.

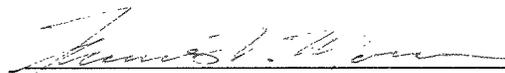
The superior court's order in this case should be reversed. The order grants counties a license to ignore or circumvent the new law which directs when and how much to assess costs against DSHS for a court-appointed competency evaluator. It erroneously saddles DSHS with the cost of every evaluation in the state, including those performed by non-DSHS evaluators selected and approved by the county prosecutor without any means for DSHS to control that cost. This is in contradiction to the plain, unambiguous intent of the Legislature. The county is responsible for the cost of a court-appointed evaluator unless and until certain conditions are established which trigger DSHS's limited obligation to reimburse the county. Those conditions were not and could not be established in this case. Pierce County is thus responsible under RCW 10.77.060(1)(a) to pay the cost of Dr. O'Neal's evaluation of Mr. Windmeyer.

VI. CONCLUSION

This Court should reverse the superior court's order and order Pierce County to pay the cost of Dr. O'Neal's competency evaluation of Mr. Windmeyer. That is the only reasonable interpretation of RCW 10.77.060(1)(a) and its related statutes.

RESPECTFULLY SUBMITTED this 6TH day of September, 2013.

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CERTIFICATE OF SERVICE

Jeffrey S. Nelson, 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 September 6, 2013, I served a true and correct copy of this **BRIEF OF APPELLANT** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

Counsel for Respondent

Mary Katherine Young High
Attorney at Law
Department of Assigned Counsel
949 Market Street, Suite 334
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- By United States Mail**
- By Legal Messenger
- By Facsimile
- By E-mail PDF: (MHigh@co.pierce.wa.us)**
- By Hand Delivery by: _____

Pierce County Prosecutor

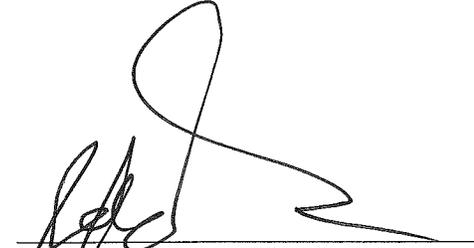
Stephen Michael Penner
Deputy Prosecuting Attorney
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930 Tacoma Avenue South, Suite 946
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- By United States Mail**
- By Legal Messenger
- By Facsimile
- By E-mail PDF: (SPenner@co.pierce.wa.us)**
- By Hand Delivery by: _____

//

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

DATED this 6th day of September 2013, at Tumwater, Washington.



JEFFREY S. NELSON
Legal Assistant

EXHIBIT 1

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 5551

Chapter 284, Laws of 2013

63rd Legislature
2013 Regular Session

COMPETENCY TO STAND TRIAL EVALUATIONS

EFFECTIVE DATE: 07/28/13 - Except for section 2, which becomes effective 05/16/13.

Passed by the Senate April 24, 2013
YEAS 46 NAYS 1

BRAD OWEN

President of the Senate

Passed by the House April 16, 2013
YEAS 96 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved May 16, 2013, 2:44 p.m.

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 5551** as passed by the Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

Secretary

FILED

May 17, 2013

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE SENATE BILL 5551

AS AMENDED BY THE HOUSE

Passed Legislature - 2013 Regular Session

State of Washington 63rd Legislature 2013 Regular Session

By Senate Ways & Means (originally sponsored by Senators Conway, Carrell, and Shin)

READ FIRST TIME 03/01/13.

1 AN ACT Relating to competency to stand trial evaluations; adding a
2 new section to chapter 10.77 RCW; creating a new section; providing an
3 expiration date; and declaring an emergency.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 10.77 RCW
6 to read as follows:

7 (1) If, at the time of a referral for an evaluation of competency
8 to stand trial in a jail for an in-custody defendant, the department
9 has not met the performance target for timely completion of competency
10 evaluations under RCW 10.77.068(1)(a)(ii) during the most recent
11 quarter in fifty percent of cases submitted by the referring county, as
12 documented in the most recent quarterly report under RCW 10.77.068(3)
13 or confirmed by records maintained by the department, the department
14 shall reimburse the county for the cost of appointing a qualified
15 expert or professional person under RCW 10.77.060(1)(a) subject to
16 subsections (2) and (3) of this section.

17 (2) Appointment of a qualified expert or professional person under
18 this section must be from a list of qualified experts or professional
19 persons assembled with participation by representatives of the

1 prosecuting attorney and the defense bar of the county. The qualified
2 expert or professional person shall complete an evaluation and report
3 that includes the components specified in RCW 10.77.060(3).

4 (3) The county shall provide a copy of the evaluation report to the
5 applicable state hospital upon referral of the defendant for admission
6 to the state hospital. The county shall maintain data on the
7 timeliness of competency evaluations completed under this section.

8 (4) A qualified expert or professional person appointed by a court
9 under this section must be compensated for competency evaluations in an
10 amount that will encourage in-depth evaluation reports. Subject to the
11 availability of amounts appropriated for this specific purpose, the
12 department shall reimburse the county in an amount determined by the
13 department to be fair and reasonable with the county paying any excess
14 costs. The amount of reimbursement established by the department must
15 at least meet the equivalent amount for evaluations conducted by the
16 department.

17 (4) Nothing in this section precludes either party from objecting
18 to the appointment of an evaluator on the basis that an inpatient
19 evaluation is appropriate under RCW 10.77.060(1)(d).

20 (5) This section expires June 30, 2016.

21 NEW SECTION. **Sec. 2.** Within current resources, the office of the
22 state human resources director shall gather market salary data related
23 to psychologists and psychiatrists employed by the department of social
24 and health services and department of corrections and report to the
25 governor and relevant committees of the legislature by June 30, 2013.

26 NEW SECTION. **Sec. 3.** Section 2 of this act is necessary for the
27 immediate preservation of the public peace, health, or safety, or
28 support of the state government and its existing public institutions,
29 and takes effect immediately.

Passed by the Senate April 24, 2013.

Passed by the House April 16, 2013.

Approved by the Governor May 16, 2013.

Filed in Office of Secretary of State May 17, 2013.

WASHINGTON STATE ATTORNEY GENERAL

September 06, 2013 - 10:11 AM

Transmittal Letter

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Court of Appeals Case Number: 44826-2

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Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

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Comments:

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