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No. 66653-3-I

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

STATE OF WASHINGTON,
Respondent,

v.

KYLE WARREN DAVIS,
Appellant.

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

The Honorable Steven J. Mura

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 6

 1. CONTRARY TO THE TRIAL COURT'S
 CONCLUSION, RCW 10.77 DOES NOT
 SPECIFICALLY OR INHERENTLY
 AUTHORIZE INVOLUNTARY MEDICATION
 OF A PERSON COMMITTED UNDER RCW
 10.77 6

 a. RCW 10.77 does not provide statutory authority to
 involuntary medicate persons committed under that
 statutory scheme. 6

 b. This Court cannot add terms to RCW 10.77.120
 where the Legislature did not intend those terms to be
 included in the statute..... 10

 c. In the absence of statutory authority, RCW 10.77
 does not provide “inherent” authority to forcibly
 medicate Mr. Davis. 15

 2. ARTICLE IV, SECTION 6 DOES NOT
 PROVIDE INHERENT AUTHORITY FOR THE
 COURT TO ACT IN THE ABSENCE OF
 STATUTORY AUTHORITY 21

F. CONCLUSION 26

TABLE OF AUTHORITIES

WASHINGTON CONSTITUTIONAL PROVISIONS

Article IV, section 6 1, 2, 21, 22

FEDERAL CASES

Davis v. Hubbard, 506 F.Supp. 915 (N.D.Ohio 1980) 17, 18

Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349
(1972) 24

Hickey v. Morris, 772 F.2d 543 (9th Cir. 1984)..... 9

Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435
(1972) 15

Rennie v. Klein, 462 F.Supp. 1131 (D.N.J.1978) 19

Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479
(1992) 6

Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d
178 (1990) 6, 20

WASHINGTON CASES

American Continental Insurance Co. v. Steen, 151 Wn.2d 512, 91
P.3d 864 (2004)..... 8

City of Seattle v. Department of Labor & Industry, 136 Wn.2d 693,
965 P.2d 619 (1998)..... 12

*Clallam County Deputy Sheriff's Guild v. Board of Clallam County
Commissioners*, 92 Wn.2d 844, 601 P.2d 943 (1979) 12

Cockle v. Department of Labor & Industry, 142 Wn.2d 801, 16 P.3d
583 (2001) 11

Department of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1,
43 P.3d 4 (2002)..... 10, 11

<i>In re Detention of Williams</i> , 147 Wn.2d 476, 55 P.3d 597 (2002) ..	13
<i>In re Juvenile Director</i> , 87 Wn.2d 232, 552 P.2d 163 (1976).....	22
<i>In re the Guardianship of Hayes</i> , 93 Wn.2d. 228, 608 P.2d 635 (1980)	22, 24
<i>James v. County of Kitsap</i> , 154 Wn.2d 574, 115 P.3d 286 (2005)	21, 22
<i>Jenkins v. Bellingham Municipal Court</i> , 95 Wn.2d 574, 627 P.2d 1316 (1981)	12
<i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wn.App. 706, 846 P.2d 550 (1993)	15
<i>Ladenburg v. Campbell</i> , 56 Wn.App. 701, 784 P.2d 1306 (1990)	21
<i>State v. Adams</i> , 77 Wn.App. 50, 888 P.2d 1207, <i>review denied</i> , 126 Wn.2d 1016 (1995)	6
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	10, 13, 14
<i>State v. Dodd</i> , 70 Wn.2d 513, 424 P.2d 302 (1967).....	16
<i>State v. Gilkinson</i> , 57 Wn.App. 861, 790 P.2d 1247 (1990)	21
<i>State v. Groom</i> , 133 Wn.2d 679, 947 P.2d 240 (1997)	14
<i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	22
<i>State v. Jackson</i> , 137 Wn.2d 712, 976 P.2d 1229 (1999).....	11
<i>State v. Johnston</i> , 84 Wn.2d 572, 527 P.2d 1310 (1974).....	16
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001)	12
<i>State v. McGee</i> , 122 Wn.2d 783, 864 P.2d 912 (1993).....	10
<i>State v. Peterson</i> , 90 Wn. 479, 156 P. 542 (1916).....	16

<i>State v. Taylor</i> , 97 Wn.2d 724, 649 P.2d 633 (1982)	12
<i>State v. Thomas</i> , 75 Wn.2d 516, 452 P.2d 256 (1969)	16
<i>State v. Thompson</i> , 151 Wn.2d 793, 92 P.3d 228 (2004)	10
<i>State v. Wadsworth</i> , 139 Wn.2d 724, 991 P.2d 80 (2000)	10
<i>State v. Wicklund</i> , 96 Wn.2d 798, 638 P.2d 1241 (1982).....	16
OTHER STATE CASES	
<i>Guardianship of Boyle</i> , 674 A.2d 912 (Me., 1996)	18
<i>In re Boyd</i> , 403 A.2d 744 (D.C. 1979)	18
<i>In re C.E.</i> , 161 Ill.2d 200 Ill.Dec. 121, 641 N.E.2d 345 (1994), <i>cert. denied</i> , 514 U.S. 1107 (1995).....	18
STATUTES	
RCW 10.77.092.....	7
RCW 10.77.093.....	7
RCW 10.77.110.....	6, 8, 9
RCW 10.77.120.....	passim
RCW 71.05.217.....	8, 14
RCW 71.05.320.....	8
TREATISES	
2A C. Sands, <i>Statutes And Statutory Construction</i> § 51.02 (4th ed. 1973)	12
<i>Involuntary Sterilization Of Mentally Disabled Women</i> , 8 Berkeley Women's L.J. 122 (1993).....	24

Michael J. Finkle, *Washington's Criminal Competency Laws: Getting From Where We Are To Where We Should Be*, 5 Seattle J. for Soc. Just. 201 (2006)..... 16

Van Putten, *Why do Schizophrenic Patients Refuse to Take Their Drugs?* 31 Arch. Gen. Psychiatry 67 (1974) 17

LAW REVIEW

Dora Klein, *Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment*, 46 San Diego L. Rev. 161 (Winter 2009)..... 20

A. SUMMARY OF ARGUMENT

Kyle Davis was committed to Western State Hospital (WSH) after being found in 2004 to be not guilty by reason of insanity (NGRI) on a charge of second degree assault. In light of Mr. Davis' recent refusal to take his antipsychotic medication, the Department of Social and Human Services (the Department), on behalf of WSH, petitioned the superior court for an order to involuntarily medicate Mr. Davis. The superior court, while agreeing that there was no statutory authorization for such an order, granted the petition after finding RCW 10.77 and Article IV, § 6 of the Washington Constitution provided inherent authority for an order to involuntarily medicate an individual committed after an NGRI finding.

Mr. Davis submits this Court should reverse the superior court's decision, since there is no statutory authority for forcibly medicating persons committed under the NGRI statute, nor any inherent authority to do so. 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 Mr. Davis in the absence of statutory authority.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in entering an order authorizing DSHS to forcibly medicate Mr. Davis in the absence of statutory authority.

2. The trial court erred in finding it had inherent authority to order the involuntary medication of Mr. Davis

3. The trial court erred in entering Finding of Fact No. 2.6 in the absence of substantial evidence.

4. To the extent this Court determines it to be a finding of fact, the trial court erred in entering Conclusion of Law 3.8 which states:

This Court has inherent authority under Article IV, § 6 and RCW 10.77, to authorize involuntary administration of antipsychotic medications to the Defendant.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

RCW 10.77.120 provides for the care and treatment of persons committed as NGRI but does not specifically address forcible medication. On the contrary, RCW 71.05, dealing with those persons involuntarily committed under the civil process, has a specific authorization and procedure for forcible medication. Mr. Davis has been committed as NGRI under RCW 10.77 and has

refused to take his antipsychotic medication. In light of RCW 10.77's specific omission of forcible medication, and in light of the statutory authorization in RCW 71.05, is there inherent authority in the absence of statutory authority where the Legislature enacted the statutory scheme to remove the previous inherent authority of the courts regarding the treatment of those involuntarily committed?

D. STATEMENT OF THE CASE

On December 9, 2004, Kyle Davis pleaded not guilty by reason of insanity (NGRI) to one count of second degree assault. CP 59-60. The trial court subsequently entered an order acquitting Mr. Davis of the offense, finding him legally insane, that he was a substantial danger to others, and that he presented a substantial likelihood of committing future criminal acts unless he was committed. CP 57. As a result, the trial court committed Mr. Davis to Western State Hospital for the statutory maximum sentence. CP 57-58.

On December 21, 2010, Western State Hospital petitioned the trial court for an order authorizing forcibly medicating Mr. Davis because of his refusal to take antipsychotic medication. CP 33-39.¹

¹ Since DSHS was not an original party in this criminal action, DSHS sought an order allowing limited intervention for the purposes of petitioning the

Mr. Davis moved to dismiss the petition on the grounds that there was no statutory basis for involuntarily medicating a person committed under RCW 10.77. CP 17-19. The trial court agreed that RCW 10.77 does not empower the trial court to authorize involuntary medication:

I agree with Mr. Komorowski's argument in his motion to dismiss that 10.77 does not contain any direct provisions as do the competency statutes which would permit this court to order that involuntary psychotropic drugs be administered to Mr. Davis if the evidence was found to justify that.

But I think I tend to agree with Mr. Komorowski that the provisions of 10.77 do not directly apply, or I can't put my finger on anything that would let me make a decision that I'm being asked to make here because at this point in time I don't know if Mr. Davis is competent. If he is competent he is entitled to adequate treatment. And if he is competent to make that decision, he makes it on his own. If he is incompetent, then a guardian needs to make that decision for him.

RP 3, 5.² Ultimately, the trial court found:

Were the hospital or the administrator of the hospital to be formally appointed a guardian for Mr. Davis for his person, that would be res judicata finding by this court that he is in need of a guardian for his person, and that the administrator, presumably administrator, or any other person, could be appointed guardian of his person. And were there to be a de jure guardian of Mr. Davis' person, that guardian would have the

trial court for the involuntary medication authorization. CP 20-23. The trial court granted DSHS the limited intervention it sought. CP 14.

² Only the transcript of the January 20, 2011, hearing will be cited.

authority under the guardian statutes to petition this court for authority to consent to the administration, involuntary administration of antipsychotic medication.

The facts contained in Dr. Harris' affidavit would justify this court finding that those medications should be administered involuntarily.

The question for this court to resolve is whether or not the court should require that the guardianship steps be taken which are a foregone conclusion as long as Mr. Davis is criminally insane. And since this court would have the authority under the guardianship statutes, and since the hospital is a de facto guardian, and since they have, as Mr. Komorowski argues, a constitutional obligation to protect Mr. Davis, and Mr. Davis has a constitutional right to adequate treatment in this case involves the administration of antipsychotic medications for two purposes, first to protect Mr. Davis against danger to himself or others, and for purposes of restoring him to competency so that he can again obtain his liberty interests, this court finds that I do have the inherent authority under the statute, the 10.77 statutes, to authorize the remedy that's being sought by the State in these proceedings.

And so, having said that, I will make those findings, the same findings as are necessary within Chapter 71.05 and the State can put those in written form.

RP 31-32.

This Court granted review on May 11, 2011.³

³ This same issue was argued before Division Two of this Court on May 9, 2011; in *State v. Bergman*, No. 40558-0-II. A decision is pending.

E. ARGUMENT

1. CONTRARY TO THE TRIAL COURT'S CONCLUSION, RCW 10.77 DOES NOT SPECIFICALLY OR INHERENTLY AUTHORIZE INVOLUNTARY MEDICATION OF A PERSON COMMITTED UNDER RCW 10.77

a. RCW 10.77 does not provide statutory authority to involuntarily medicate persons committed under that statutory scheme. 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.⁴

The trial court was correct that 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, only for the limited purpose of restoring competency to stand trial. *Compare* RCW 10.77.092-.093 and

⁴ 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.

RCW 10.77.120. RCW 10.77.120 does not contain any mention of involuntary medication. This Court is barred from engaging in statutory construction since RCW 10.77.120 is unambiguous. *American Continental Insurance Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004) (courts do not construe an unambiguous statute).

The Department contended RCW 10.77.120 grants the courts authority to order 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 contended that a portion of RCW 71.05.217⁵ which allows for forced

⁵ 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:

medication 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 (9th Cir. 1984) (no equal protection violation where State of Washington treats civil committees differently from those committed as criminally insane in light of the differing governmental objectives). Contrary to the Department's reading of RCW 10.77.120, all that the cited portion of RCW 10.77.120 does is to ensure that those committed as criminally insane are not treated as if they were inmates 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 provide statutory authority to forcibly medicate those persons committed as criminally insane.

(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 . . .

b. 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 meaning of a statute is a question of law reviewed *de novo*. *Department 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). This Court cannot ignore clear statutory language and must not strain to find an ambiguity where the language of the statute is clear. *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

Under clear and well-settled tenets of statutory construction, assuming this Court finds RCW 10.77.120 is an ambiguous statute, this Court is barred from adding any procedure 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. 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. Department of Labor & Industry*, 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. Department of Labor & Industry*, 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. Board 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. But the statute governing precommitment did not include a similar provision. The Supreme Court therefore refused to add such a provision into the precommitment statute under the canon of statutory construction, *expressio unius est exclusio alterius*, which 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 Department is seeking here. 148 Wn.2d 723, 63 P.3d 792 (2003). The “three strikes” persistent offender sentencing statute there at issue 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 71.05.217 were enacted during the same legislative session. Laws 1973 1st ex.s. c 142 § 142 (RCW 71.05.217); Laws 1973 1st 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, this 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)).⁶

The trial court was correct that the plain language of RCW 10.77.120 bars forcible medication of Mr. Davis. The Department has not sought discretionary review of that finding and conclusion is the law of the case. See *King Aircraft Sales, Inc. v. Lane*, 68 Wn.App. 706, 716, 846 P.2d 550 (1993) (unchallenged conclusions of law become the law of the case). This Court cannot add in language to the statute so that it authorizes forcible medication of Mr. Davis.

c. In the absence of statutory authority, RCW 10.77 does not provide “inherent” authority to forcibly medicate Mr. Davis. The trial court ruled that RCW 10.77 provides *inherent* authority for WSH to involuntarily medicate Mr. Davis. This ruling must be reversed as it conflicts with the statutory scheme which superseded the previous inherent authority of the trial courts regarding criminal defendants and their mental illness.

⁶Even if this Court were to look at the Legislative history of these statutes, the Court would find it scarce at best. The bill (Engrossed Substitute Senate Bill 2319) was proposed because the previous statutory scheme was unconstitutional under the United States Supreme Court decision in *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). The bill was passed without comment or controversy by both houses of the Legislature and signed by the Governor without comment as well.

Prior to 1973, Washington courts relied exclusively on their inherent judicial powers to make determinations regarding competency. See *State v. Johnston*, 84 Wn.2d 572, 576, 527 P.2d 1310 (1974); *State v. Thomas*, 75 Wn.2d 516, 517-18, 452 P.2d 256 (1969); *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967); *State v. Peterson*, 90 Wn. 479, 482, 156 P. 542 (1916). In 1973, the legislature created a new chapter, RCW 10.77, relating to procedures, treatment, and care of the criminally insane and those incompetent to stand trial. Laws of 1973, 1st Ex.Sess., ch. 117, p. 795.

State v. Wicklund, 96 Wn.2d 798, 801, 638 P.2d 1241 (1982).

Thus, since the Legislature enacted RCW 10.77, it necessarily abolished the court's inherent authority to authorize any procedure not designated in the statutory scheme. See Michael J. Finkle, *Washington's Criminal Competency Laws: Getting From Where We Are To Where We Should Be*, 5 Seattle J. for Soc. Just. 201, 246 (2006) ("It seems illogical to think that a court has broader inherent authority to order treatment in a post-judgment case than it has statutory authority to do so in a pre-judgment case. Otherwise, there would be no need for the statutory authority.").

The Department may argue that the portion of RCW 10.77.120(1) giving the Department the duty to "provide adequate care and individualized treatment" necessarily includes forcible medication. This argument should be rejected because initially it

treats those committed under RCW 10.77 differently than those civilly committed under RCW 71.05, which would deny Mr. Davis equal protection.

Next, the Department's argument ignores the difference in the statutory scheme between RCW 10.77 and RCW 71.05 regarding the forcible medication of persons committed, which as argued *supra*, evidences proof the Legislature necessarily considered and rejected the forcible medication for those committed under RCW 10.77.

Finally, there is a substantial difference between care and treatment of an individual and forcible medication. Forcible medication of antipsychotic drugs has many dangerous side effects which frequently cause the individual to refuse to continue to take their medication. *Davis v. Hubbard*, 506 F.Supp. 915, 936 n. 28 (N.D.Ohio 1980), *citing* Van Putten, *Why do Schizophrenic Patients Refuse to Take Their Drugs?* 31 Arch. Gen. Psychiatry 67, 70-71 (1974).

Although psychotropic drugs are effective in reducing thought disorder and may benefit the patient by allowing her to participate in other types of treatment, the drugs also may have serious short term side-effects, including blurred vision, dry mouth and throat, constipation, diarrhea, dizziness, slowing of the thought processes, weight gain, loss of sexual desire,

akathesia (inability to stay still), and Parkinsonisms (drooling, muscle stiffness, rigidity, shuffling gait, tremors). *In re Boyd*, 403 A.2d 744, 752 n. 13 (D.C.1979). Neuroleptic malignant syndrome also may develop as a side effect, in the form of fever, skeletal rigidity, tachycardia, and alterations in consciousness including delirium, mutism, stupor and coma. *In re C.E.*, 161 Ill.2d 200, 204 Ill.Dec. 121, 128, 641 N.E.2d 345, 352 (1994), *cert. denied*, 514 U.S. 1107, 115 S.Ct. 1956, 131 L.Ed.2d 848 (1995).

Tardive dyskinesia is a potentially permanent side effect of antipsychotic medication. It is a syndrome characterized by "involuntary movements of the tongue, face, mouth, lips, or jaw. Additionally, ulcerations of the mouth may occur, speech may become incomprehensible, and, in extreme situations, swallowing and breathing may become difficult." *Boyd*, 403 A.2d at 752.

These side-effects, especially tardive dyskinesia, are serious, as is the degree of bodily invasion involved in forcible medication. "[Psychotropic drugs] quite often cause pain and serious, long-term, if not permanent, side effects. They deaden the patient's ability to think and their forced administration is an affront to basic concepts of human dignity." *Davis v. Hubbard*, 506 F.Supp. 915, 936 (N.D. Ohio 1980).

Guardianship of Boyle, 674 A.2d 912, 917-18 (Me.,1996). Further, the forcible administration of psychotropic drugs diminishes their effectiveness. "[P]sychotropic drugs are less efficacious in a hostile or negative environment. As a corollary to this, even if the best drug is prescribed, if the patient is unwilling to accept it, the positive effects are greatly lessened, especially in terms of long range

benefits.” *Davis*, 506 F.Supp. at 936, *citing Rennie v. Klein*, 462 F.Supp. 1131, 1141 (D.N.J.1978).

In addition:

While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified by the trial court is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes. The trial court found that it may be treated and reversed within a few minutes through use of the medication Cogentin. Other side effects include akathisia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face.

Harper, 494 U.S. at 229-30 (internal citations omitted). See also Dora Klein, *Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment*, 46 San Diego L. Rev. 161, 184-88 (Winter 2009) (describing in greater detail the side effects of antipsychotic medications).

Given these very real and debilitating side effects, involuntary use of these medications should be authorized only where the Legislature has authorized it, for instance, in RCW 71.05. The Department's argument would be better made to the Legislature which, in light of RCW 71.05, no doubt would enact

such authorization. Absent that, the trial court's ruling that it had inherent authority to involuntarily medicate Mr. Davis is simply wrong and must be reversed.

2. ARTICLE IV, SECTION 6 DOES NOT PROVIDE INHERENT AUTHORITY FOR THE COURT TO ACT IN THE ABSENCE OF STATUTORY 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).

Courts of this state have been recognized as possessing the power to: compel funding of their own functions; punish for contempt; insure a fair criminal trial; appoint counsel for a criminal defendant; grant bail; review actions of public officials; compel attendance of witnesses and the production of evidence; regulate practice of law; control photography in court; and correct errors in the records. *In re Juvenile Director*, 87 Wn.2d 232, 246, 552 P.2d 163 (1976); 20 Am.Jur.2d *Courts* § 79 (1965).

Gilkinson, 57 Wn.App. at 865.

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 Mr. Davis, the court heard the petition, and denied the Department's petition. That is all the jurisdiction under Article IV, § 6 of the Constitution authorized.

"To create . . . a procedure out of whole cloth would be to usurp the power of the legislature." *State v. Hughes*, 154 Wn.2d 118, 151-52, 110 P.3d 192 (2005). 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). The Court refrained from serious inquiry into the state's interest in intruding on the child's fundamental rights, choosing instead to remand the petitions to the trial court for determination of the respondent's best interests. *Id.* at 239-40. Thus, the traditional implications of the fundamental right to procreate were not fully

addressed. See *Involuntary Sterilization Of Mentally Disabled Women*, 8 Berkeley Women's L.J. 122, 134 (1993). See also *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

The *Hayes* decision consists of the four justices in the "majority" and the two justices concurring in part and dissenting in part.⁷ Thus the decision has limited applicability and has never been extended, essentially only applying to that case.

The dissent in *Hayes* decried the Court's actions and noted that 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, thus there was no statutory authority for the Court's action. *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

⁷ Three justices dissented, agreeing with the superior court that no statutory authority existed for granting such a 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, and the need for action of the Legislature in this controversial area, this Court should reject any invitation to use Article IV, section 6 to act in the absence of legislative authority.

Once again, the specific omission of the authorization for forced medication in light of the clear authority under RCW 71.05 should give this Court pause. The Department's pleading is targeted at the wrong body: the Department should stop attempting to use the courts to gain authorization for forcible medication and instead, make its case to the Legislature. Absent statutory authorization, there is no inherent authority for the involuntary treatment of persons committed under 10.77 with antipsychotic drugs. This Court should reject the Department's arguments and reverse the trial court's order authorizing the involuntary medication of Mr. Davis.

F. CONCLUSION

For the reasons stated, Mr. Davis requests this Court reverse the trial court order authorizing DSHS to forcibly medicate him.

DATED this 26th day of September 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 66653-3-I
)	
KYLE DAVIS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** 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:

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