

68068-4

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No. 68068-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

P.E.T.,

Appellant.

2014 DEC 11 AM 11:09  
COURT OF APPEALS  
STATE OF WASHINGTON

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

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. ARGUMENT

This Court has directed the filing of supplemental briefs addressing the effect of the *State v. Coley*, 180 Wn.2d 543, 326 P.3d 702 (2014), on P.E.T.'s case. As set forth below, because it requires a trial court to abandon a prior determination of incompetency based solely upon the opinion of a third party, 10.77 RCW usurps the judiciary's authority and violates the Separation of Powers Doctrine.

In *Coley*, the Court interpreted the statutory scheme governing competency determinations. 180 Wn.2d 543. The Court found that where a trial court has previously determined a person is incompetent, 10.77 RCW requires the court set aside its prior finding of incompetency and to nonetheless presume the person is competent once an evaluation opines the person is competent. *Coley*, 180 Wn.2d at 547, 552. Moreover, the statute requires the person previously found incompetent to prove his incompetency continues. *Id* at 552.

*Coley* began its interpretation of the statute noting a presumption of competence exists and thus requires a defendant to prove his incompetence. 180 Wn.2d at 552. The Court continued that 10.77 RCW does not distinguish between an initial hearing on the defendant's competency under RCW 10.77.060 and a subsequent

hearing under RCW 10.77.086 following a finding that defendant was incompetent. 180 Wn.2d at 554. In *Coley* the State asserted a state-wide canvassing of prosecutors revealed that prosecutors too agreed that where a defendant was previously deemed incompetent by a court, he could not be presumed competent and required to prove his incompetency continued. *Id.* at 557, n.3. The Court however, concluded, the statute required otherwise. *Id.* Thus, a presumption of competence continues and the statute required the burden remain on the defendant so long as the defendant was evaluated as competent. *Id.* at 547.

Importantly, *Coley* was not a case in which a court was relying upon common law or overlaying a judicially-created scheme on a separate statutory scheme. Instead the Court made clear it was simply interpreting the statute. 180 Wn.2d at 551 (“The burden of proof at a competency hearing is an issue of statutory construction . . .”). *Coley* explained its result was compelled by the plain language legislative scheme of 10.77 RCW. 180 Wn.2d at 554. That scheme required a trial court that had previously found the defendant incompetent to nonetheless presume the defendant competent once “the individual has been evaluated as competent.” 180 Wn.2d at 547.

[O]nce a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.

*Johnson v. Morris*, 87 Wash.2d 922, 927, 557 P.2d 1299 (1976); *State v. Roggenkamp*, 153 Wn.2d 614, 629, 106 P.3d 196 (2005). *Coley's* interpretation of 10.77 RCW as requiring a trial court to accept as true an expert's opinion of competency means that is what the Legislature intended the statute to say. In crafting such a statute, the Legislature has violated the Separation of Powers Doctrine.

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.

*Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994).

Neither the Washington nor federal constitutions specifically enunciate a separation of powers doctrine, but the notion is universally recognized as deriving from the tripartite system of government established in both constitutions. *See, e.g.*, Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary); U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial branches); *Carrick*, 125 Wn.2d at 134-35.

The Separation of Powers Doctrine is violated when the Legislature oversteps its role and adjudicates facts or makes judicial determinations. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 263-64, 241 P.3d 1220, 1229-30 (2010). Thus, the Legislature cannot enact a statute that asserts a fact in dispute exists. *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 271-72, 534 P.2d 114 (1975). *O'Brien* invalidated a statute relieving government contractors from their contracts based upon the finding that a worldwide increase in the cost of petroleum products rendered performance of the contracts economically impossible. 85 Wn.2d at 270 (citing Laws of 1974, 1st Ex.Sess., ch. 194). The Court concluded a finding of impossibility of performance on a contract was plainly a judicial function, thus the statute violated the Separation of Powers. 85 Wn.2d at 272.

The same is true of the legislative effort in 10.77 RCW directing a trial court to presume a disputed fact as both true and near conclusive. The value the factfinder affords a particular piece of evidence in a contested competency proceeding is undeniably an adjudicatory fact.

The trial judge may make his determination from many things, including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.

*State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). It is because of the wide range of facts a trial judge might consider in reaching decision on competency that such decisions are matters for the trial court's discretion subject to reversal only when manifestly unreasonable. *State v. Sisouvanh*, 175 Wn.2d 607, 622-23, 290 P.3d 942, 949 (2012).

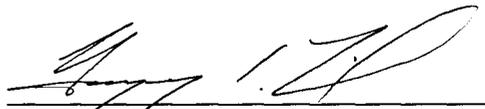
In a contested hearing at which experts disagree as to a person's competency, and the *status quo ante* is the court's prior determination of incompetency, the statute requires the trial court afford greater, if not conclusive, weight to the opinion of one expert. The Legislature does not direct a presumption of competency because the court has deemed the defendant competent. Instead, the Legislature requires a presumption of competency because an executive agency has deemed the defendant competent. Because it does not say otherwise, the statute must require the trial court attach a presumption of correctness to the expert's opinion even where the trial court disagrees with the opinion or deems it not credible. That scheme is particularly problematic where, as here, the opinion to which the trial court must assign the presumption of correctness was premised on standard and techniques normed for adults and not children such as P.E.T.

Where, as here, the status quo is that the defendant is incompetent based on a prior judicial finding, the statutory requirement that the factfinder to accept as credible, reliable and correct the contrary opinion of one expert, the statute usurps the judicial power to adjudicate disputed facts and violates the Separation of Powers Doctrine. *O'Brien*, 85 Wn.2d at 271-72.

B. CONCLUSION

The statutory presumption of competence and corresponding placement of the burden of proof on

Respectfully submitted this 10<sup>th</sup> day of December, 2014.



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68068-4-I
v.	)	
	)	
P.E.T.,	)	
	)	
Juvenile Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **SUPPLEMENTAL 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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**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF DECEMBER, 2014.

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