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NO. 66653-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KYLE WARREN DAVIS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Kyle Davis was acquitted of assault charges by reason of insanity and committed to the care and custody of Western State Hospital, a state mental health facility operated by the Department of Social and Health Services (Department). When Mr. Davis refused the antipsychotic medication prescribed for him, the Department petitioned the superior court that committed him for authorization to administer the medications involuntarily. The trial court granted the petition, and Mr. Davis now challenges the court's authority to order the use of involuntary medication.

This appeal is moot, however, as the order Mr. Davis challenges has already expired, and the issues presented are not of a continuing and substantial public interest. Because the Department has clear authority under RCW 10.77.120(1) to administer antipsychotic medication involuntarily to persons found not guilty by reason of insanity (NGRI), the trial court committed no error in granting the petition. The decision of the trial court should be affirmed.

II. COUNTER-STATEMENT OF ISSUES

1. Should this Court decline to review the order authorizing involuntary treatment with antipsychotic medication because it has expired and the case is moot?

2. Does a superior court have the authority to authorize the Department, as custodian and treatment provider for an individual committed to a state hospital following a finding of NGRI, to administer antipsychotic medication to the individual without the individual's consent?

3. Did the superior court's process for determining whether to authorize the involuntary administration of medication to the NGRI patient in this case afford the patient adequate due process?

III. COUNTERSTATEMENT OF THE CASE

Kyle Davis suffers from a mental illness. On December 9, 2004, the Whatcom County Superior Court found Mr. Davis not guilty by reason of insanity on a charge of Assault in the Second Degree. CP at 56-58. Because the trial court determined Mr. Davis presented a substantial likelihood of committing criminal acts jeopardizing public safety or security, and that less restrictive alternatives were not in the best interest of Mr. Davis and others in the community, the court ordered Mr. Davis confined to Western State Hospital for involuntary treatment. CP at 57.

As long as Mr. Davis remains hospitalized, the Department is required to provide him with "adequate care and individualized

treatment." RCW 10.77.120(1).[1] In December 2010, Charles Harris, M.D., a psychiatrist employed by Western State Hospital, filed a petition with the Whatcom County Superior Court seeking authorization to treat Mr. Davis involuntarily with antipsychotic medication. CP at 33-39. Concurrent with the petition, the Department filed a motion to intervene in the underlying criminal case for the limited purpose of bringing the petition,[2] along with a legal memorandum asking the trial court to hold a hearing on the petition utilizing the procedural and substantive protections listed in RCW 71.05.217(7), a statute governing the forced medication of civilly committed patients.[3] CP at 20-32.

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[1] RCW 10.77.120(1) provides in full:

> The secretary shall provide adequate care and individualized treatment to persons found criminally insane at one or several of the state institutions or facilities under the direction and control of the secretary. In order that the secretary may adequately determine the nature of the mental illness or developmental disability of the person committed as criminally insane, all persons who are committed to the secretary as criminally insane shall be promptly examined by qualified personnel in order to provide a proper evaluation and diagnosis of such individual. The examinations of all persons with developmental disabilities 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 except by order of a court of competent jurisdiction made after a hearing and judgment of release.

[2] After ordering hospitalization under RCW 10.77.110, the committing court retains jurisdiction over an insanity acquitee. See RCW 10.77.140 (Department required to provide written notice to the court of commitment that NGRI patient received an examination of his or her mental condition at least once every six months), RCW 10.77.150(3) (the court of the county which ordered NGRI patient's commitment determines if conditional release is appropriate).

[3] Some of those protections include: 1) a hearing before a judge or commissioner; 2) the right to representation by counsel; 3) the right to cross-examine witnesses; and 4) the right to present evidence. RCW 71.05.217(7)(a), (c). The court may also, in its discretion, appoint an expert on the patient's behalf.

Dr. Harris alleged in his petition that Mr. Davis posed a significant risk of harm to others, based on multiple threats of harm to hospital staff and one significant event where he hit a female nurse in the head, pulled her to the ground, and tried to force her to drink hot chocolate. CP at 35-37. Mr. Davis also posed a substantial harm to himself, based on his own statements that he might harm himself. CP at 35. Although Mr. Davis was prescribed antipsychotic medication, he refused to take it because he believed he did not have a mental illness, did not need psychiatric medications, and that psychiatric medications caused him multiple medical and dental problems. CP at 34. In Dr. Harris' expert opinion, treating Mr. Davis with antipsychotic medication would reduce the likelihood that Mr. Davis would cause serious harm to himself or others, and that without the medication, Mr. Davis would remain detained for a substantially longer period of time at public expense. CP at 35, 37. Dr. Harris did not believe there were any less intrusive alternative treatments available to treat Mr. Davis' mental illness. CP at 38.

At the hearing on the Department's motion and petition, the trial court found that Mr. Davis had a constitutional right to adequate treatment, and that adequate treatment, in this case, was involuntary treatment with antipsychotic medication. RP at 31-32. The trial court

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RCW 71.05.217(7)(c). Additionally, the Department bears the burden of proof by clear, cogent, and convincing evidence. RCW 71.05.217(7)(a).

then found it had the inherent authority under RCW chapter 10.77 and Const. art. IV, § 6 to grant the Department's petition. RP at 32; CP at 15. Based on the evidence contained in Dr. Harris' petition, the trial court entered an order granting the Department's motion to intervene and authorizing the involuntary treatment. CP at 15. The order was stayed until February 19, 2011, and expired 180 days later. *Id.*

Mr. Davis timely filed a motion for discretionary review of the trial court's order, which this Court granted.

IV. ARGUMENT

Mr. Davis argues that the trial court did not have the authority to authorize the Department to involuntarily treat him with antipsychotic medications. This argument should be rejected as moot because the trial court order has expired and there are no issues of continuing public interest in this case. The issue of whether or not the Department may administer medication involuntarily to NGRI patients was recently addressed by Division Two of the Court of Appeals, which found that RCW 10.77.120(1) provides statutory authority for the Department to administer medication involuntarily to NGRI patients in the custody of the Department.

Even without the grant of statutory authority provided in RCW 10.77.120(1), the trial court's order should be upheld because

Article IV, § 6 of the Washington Constitution gives superior courts broad subject matter jurisdiction and authority to hear cases, unless there is a specific statute limiting the superior court's jurisdiction. With specific reference to the order sought by the Department in this case, RCW chapter 10.77 and the doctrine of *parens patriae* gives the state and superior courts broad authority to care for the mentally ill, unless there is a specific statute limiting that authority. Because there is no statute specifically prohibiting superior courts from authorizing the Department to involuntarily treat NGRI patients with antipsychotic medication, the trial court's decision to do so should be affirmed.

Additionally, Washington Supreme Court precedent permits superior courts to borrow from other statutory schemes in order to fill in procedural gaps and provide the mentally ill with due process. The trial court below borrowed the procedural scheme from RCW 71.05.217(7) in order to afford Mr. Davis due process, while also allowing the Department to meet his treatment needs. This was not in error.

A. The Issue Of Involuntary Treatment With Antipsychotic Medication In This Case Is Moot And Should Be Dismissed Because It Does Not Raise A Matter Of Continuing Public Interest

Washington courts follow a general rule that appeals which involve nonissues or abstract propositions should be dismissed.

Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). A case is considered moot when the court can no longer provide the basic relief that appellant originally sought. *In re the Detention of LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986). The court will thus normally dismiss moot cases.

Mr. Davis has requested that this Court "reverse the trial court order authorizing DSHS to forcibly medicate him." Brief of Appellant (Br. Appellant) at 26. The order authorizing the Department to involuntarily treat Mr. Davis with antipsychotic medication expired on August 18, 2011. This fact makes the appeal moot.

Appellate courts will decide a moot case if it involves ' "matters of continuing and substantial public interest." ' *In re the Detention of Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983). There are three criteria used to measure whether a sufficient public interest exists: (1) "[t]he public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood the question will recur." *Id. See also Harley H. Hoppe & Assoc., Inc, v. King County*, 162 Wn. App 40, 52-53, 255 P.3d 819 (2011).

The only issue Mr. Davis raises on appeal is whether there is authority to involuntarily medicate a NGRI patient committed under

RCW chapter 10.77.[4] Br. Appellant at 3. Although there was no authoritative determination from the courts on this issue at the time of Mr. Davis' trial, this question has now been addressed by Division Two, which found that RCW 10.77.120(1) provides statutory authority for the involuntary medication of criminally insane individuals in the custody of the Department. *State of Washington v. C.B.*, __ Wn. App. __, __ P.3d __, No. 40558-0-II (Div. II, November 22, 2011). Now that there is an authoritative determination from the Court of Appeals that involuntarily treating NGRI patient with antipsychotic medication is permitted under RCW chapter 10.77, this case no longer presents a matter of continuing or substantial public interest that would justify overcoming its mootness.

B. RCW 10.77.120(1) Authorizes The Involuntary Treatment Of NGRI Patients With Antipsychotic Medication

Mr. Davis argues that RCW chapter 10.77 does not provide statutory authority to involuntarily medicate individuals committed under it. Br. Appellant at 6. To support his position, he incorrectly claims that the trial court found that RCW 10.77.120 "bars" the involuntary treatment of NGRI patients with antipsychotic medication. Br. Appellant at 15.

[4] The only assignment of error Mr. Davis alleges that is not directly related to the Department's authority to involuntarily medicate NGRI patients concerns whether or not there was substantial evidence to support Finding of Fact 2.6 (CP at 7). However, Mr. Davis provides no argument for why this finding is erroneous. An assignment of error not argued in the appellant's brief is deemed abandoned. *Brown v. State Dep't of Health, Dental Disciplinary Board*, 94 Wn. App. 7, 13, 972 P.2d 101 (1999) (citing *Pappas v. Hershberger*, 85 Wn.2d 152, 153, 530 P.2d 642 (1975)).

What the trial court actually found was that, although RCW chapter 10.77 does not contain any "direct provisions" which would permit the court to order the involuntary medication of Mr. Davis, the court nonetheless had inherent authority under Const. art. IV, § 6 and RCW chapter 10.77 to authorize it. RP at 3, CP at 9. However, as Division Two recently determined, the trial court did not need to base its decision on its inherent authority under RCW chapter 10.77, as RCW 10.77.120(1) provides the statutory authority necessary for the Department to administer medications involuntarily to NGRI patients.

In *State of Washington v. C.B.*, __ Wn. App. __, __ P.3d __, No. 40558-0-II (Div. II, November 22, 2011), Division Two was faced with the same involuntary medication issue that is at the heart of this case. Like Mr. Davis, C.B. was an insanity acquittee hospitalized at Western State Hospital under RCW chapter 10.77 when a doctor at the hospital petitioned the superior court for an order to allow him to involuntary treat C.B. with antipsychotic medication. The superior court granted the order and, on appeal, C.B. challenged the Department's statutory authority to petition for and provide medication over her objection.

Division Two found that RCW 10.77.120(1) provides statutory authority for the Department to provide "adequate care and individualized treatment" to NGRI patients in state institutions, and that this includes the

authority to administer medication involuntarily to NGRI patients in the custody of the Department. Based on this, the Court affirmed the trial court's order authorizing the involuntary treatment of C.B. with antipsychotic medications.

Just as the trial court in *C.B.* had authority under RCW 10.77.120(1) to authorize the Department to provide involuntary medication to her, so did the trial court in this case with regard to Mr. Davis. The trial court's order was correct and should be affirmed, even though the trial court incorrectly concluded that there was no explicit statutory authority under RCW chapter 10.77 which would permit the court to order the involuntary treatment. *See Pannell v. Thompson*, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979) ("[w]here a judgment or order is correct it will not be reversed merely because the trial court gave wrong or insufficient reason for its rendition.")

C. The Superior Court Also Has Authority To Authorize Involuntary Treatment With Antipsychotic Medication Pursuant To Const. Article IV, Section 6, RCW Chapter 10.77, And The Doctrine of *Parens Patriae*

Even without relying on the statutory authority provided in RCW 10.77.120(1), the trial court properly found that it had jurisdiction in this proceeding based on the constitution and case law.

1. The Superior Court That Found Mr. Davis NGRI Has The Authority To Authorize His Involuntary Treatment With Antipsychotic Medication Under Const. Article IV, Section 6 And The Doctrine Of *Parens Patriae*

Article IV, § 6 of the Washington Constitution 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." Thus, superior courts have the " 'power to hear and determine all matters legal and equitable, . . . except in so far as these powers have been expressly denied.' " *In re the Marriage of Major*, 71 Wn. App. 531, 533, 859 P.2d 1262 (1993) (quoting *State ex rel. Martin v. Superior Court*, 101 Wn. 81, 94, 172 P. 257 (1918)). Courts will only find a lack of subject matter jurisdiction under compelling circumstances, such as when that jurisdiction is specifically limited by the Constitution or statute. *Id.* at 534. Exceptions to this constitutionally broad grant of jurisdiction will be narrowly read. *Id.* If there is no indication the Legislature intended to limit jurisdiction, then a superior court's assertion of jurisdiction will stand. *Id.*

No statute or constitutional provision specifically denies the superior court that committed a NGRI patient under RCW chapter 10.77 jurisdiction to conduct a hearing to determine if the patient ought to be involuntarily treated with antipsychotic medication. As discussed below,

neither does any statute imply that the committing court does not have the authority to consider forced medications for a NGRI patient. Therefore, the trial court had the authority to grant the petition seeking to involuntarily treat Mr. Davis with antipsychotic medication, independent of the statutory authority under RCW 10.77.120(1).

A clear analogy can be drawn to *In re the Guardianship of Hayes*, 93 Wn.2d 228, 608 P.2d 635 (1980). In *Hayes*, the guardian of a severely mentally retarded teenager petitioned the court for an order authorizing the ward's sterilization. *Id.* at 229-30. The superior court dismissed the petition on the ground that there was "no authority to issue an order for sterilization of a retarded person." *Id.* at 229. The Washington Supreme Court reversed, relying on Const. art. IV, § 6:

> Under this broad grant of jurisdiction the superior court may entertain and act upon a petition for the parent or guardian of a mentally incompetent person for a medical procedure such as sterilization. No statutory authorization is required. . . . In the absence of any limiting legislative enactment, the Superior Court has full power to take action to provide for the needs of a mentally incompetent person.

Hayes, 93 Wn. 2d at 232-33.[5]

[5] *Hayes* dramatically illustrates the broad scope of subject matter jurisdiction of Superior Courts. However, as the Court noted, just because there is subject matter jurisdiction to entertain a petition for sterilization, does not mean there are not Constitutional issues that must be addressed, procedural safeguards that must be put in place, and heavy evidentiary burdens the petitioner must meet before a court may order sterilization. *Hayes*, 93 Wn.2d at 238-39. Likewise, the Department–and the trial court here-recognizes the Constitutional issues associated with involuntarily treating persons with antipsychotic medication. That is why the Department asked the trial court to apply

In this case, the broad grant of superior court jurisdiction coincides with and is strengthened by the historically broad scope of power given to the executive branch and courts of equity to act *in parens patriae* to care for those who cannot care for themselves. In England, the King was charged with the care and protection of those who could not protect themselves, such as children or persons suffering from a mental illness. *Weber v. Doust*, 84 Wn. 330, 333, 146 P. 623 (1915), *In re Sall*, 59 Wn. 539, 542, 110 P. 32 (1910). This power was exercised through the Courts of Chancery, the forerunner to American courts of equity. *Weber*, 84 Wn. at 333. Similarly, American courts inherently possess the power to act *in parens patriae*, unless the power is taken away by statute. *Id.*, *Sall*, 59 Wn. at 542-43. In other words, "the right of the state to [act *in parens patriae*] does not depend on a statute asserting that power. Such statutes are only declaratory of the power already and always possessed by courts of chancery." *Weber*, 84 Wn. at 333-34.

Here, the Department, charged with the duty to provide adequate care and individualized treatment to Mr. Davis, brought its petition for involuntary administration of antipsychotic medication under its *parens patriae* power. Mr. Davis suffers from a serious mental illness which, if not adequately treated, will continue to render him a danger to himself and

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the same procedural safeguards and heavy evidentiary burdens found in RCW 71.05.217(7).

others, and prolong his hospitalization. The Department brought its petition not to punish Mr. Davis but to provide treatment to a patient who cannot care for himself.

Mr. Davis' attacks on the applicability of the *Hayes* decision are unwarrented. Br. Appellant at 22-25. In *Hayes*, Justice Horowitz, with whom Chief Justice Utter and Justices Dolliver and Williams concurred, wrote that the broad grant of jurisdiction under Const. art. IV, § 6 permitted the superior court to take action to provide for the needs of mentally incapacitated persons, and that no statutory authorization was required. *Hayes*, 93 Wn.2d at 232-33. In an opinion specially concurring in part, Justice Stafford, with whom Justice Hicks concurred, agreed with the other four justices that the superior court had jurisdiction over the subject matter, and therefore, the judiciary had the power to act and resolve the dispute. *Hayes*, 93 Wn.2d at 240 (Stafford and Hicks, JJ., concurring specially in part in the majority and dissenting in part).[6] The decision of these six justices should be recognized and applied in this case.

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[6] The four justice plurality, having found that the superior court had the jurisdiction and power to authorize sterilization, then set forth a list of heavy evidentiary burdens the petitioners must meet before the court could authorize the sterilization of the incapacitated person. *Hayes*, 93 Wn.2d at 238 (Horowitz, J., Utter, C.J., Dolliver and Williams, JJ. plurality). These evidentiary burdens were put in place in recognition of the serious Constitutional and medical issues such a procedure raised. *Id.* at 234. Justices Stafford and Hicks dissented from this portion of the opinion, arguing that the plurality made the evidentiary burdens so heavy that no petitioner could meet them. *Id.* at 242 (Stafford, J. and Hicks, J., concurring specially in part in the majority and dissenting in part).

Even if, as the trial court concluded, RCW chapter 10.77 does not specifically mention the type of relief sought, statutory silence is insufficient to limit the broad grant of jurisdiction given to superior courts under Const. art. IV, § 6 and the state's *parens patriae* authority. Mr. Davis argues that because RCW chapter 10.77 does not explicitly authorize involuntary treatment with antipsychotic medication for NGRI patients, the superior court erred when it found that it had inherent authority under Const. art. IV, § 6 and RCW chapter 10.77 to authorize the involuntary treatment. Br. Appellant at 15-25. Mr. Davis approaches the question from the wrong direction. Under Const. art. IV, § 6 and the traditional authority of the state in its role as *parens patriae*, a specific authorizing statute is not required. Rather, a court may act except when there is a specific statute limiting the court's jurisdiction and power. *Hayes*, 93 Wn.2d at 232-33; *Sall*, 59 Wn. at 542-43. There is no statute or constitutional provision specifically forbidding a superior court from holding a hearing on the Department's petition. Therefore, under Const. art. IV, § 6, and the courts' inherent power to act *in parens patriae*, the superior court that committed a NGRI patient has the authority to hold a hearing and authorize involuntary treatment with antipsychotic medication.

2. Mr. Davis' Reliance On *Expressio Unius Est Exclusio Alterius* Is Misplaced

Mr. Davis cites to the canon of statutory construction *expressio unius est exclusio alterius*–the expression of one implies the exclusion of the other–to claim the Legislature intended to limit the authority of superior courts to authorize involuntary treatment with antipsychotic medication for NGRI patients. Br. Appellant at 13-15. To support his argument, Mr. Davis cites *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002), and *State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003). Br. Appellant at 13-15. The issue in *Williams* was whether the State could compel a mental health evaluation of a person alleged to be a sexually violent predator when the sexually violent predator commitment statute only authorized evaluations in proceedings following commitment. *Williams*, 147 Wn.2d at 489-91. *Delgado* addressed what types of convictions counted in "two strike" and "three strike" persistent offender sentencing statutes. *Delgado*, 148 Wn.2d at 725, 727-29.

The use of *expressio unius est exclusio alterius* was appropriate in those circumstances because the statutes being analyzed in those cases all related to the same subject matter; sexually violent predator proceedings under RCW chapter 71.09 in *Williams*, and offender sentencing under RCW chapter 9.94A in *Delgado*. However, the two statutes Mr. Davis

wants this Court to compare, RCW 10.77.120 and RCW 71.05.217, deal with two completely different subjects. Mr. Davis is attempting to infer legislative intent regarding the criminally insane under RCW chapter 10.77 by examining a statute that only addresses civilly committed individuals under RCW chapter 71.05. As Mr. Davis points out in his brief, individuals committed under the civil commitment statutes are treated differently than those committed as criminally insane. Br. Appellant at 9. *See also Hickey v. Morris*, 772 F.2d 543, 547-8 (9th Cir. 1984). Therefore, the use of *expressio unius est exclusio alterius* to infer legislative intent in this circumstance would be inappropriate, as this Court would have to presume that the Legislature intended to address both the criminally insane and the civilly committed when it passed the antipsychotic medication provisions of RCW 71.05.217, even though there is no evidence that this is the case. Neither do these cases cite to any circumstance where *expressio unius est exclusio alterius* has been used to limit the jurisdiction and authority of superior courts under Const. art. IV, § 6 and the doctrine of *parens patriae*.

Mr. Davis' analysis of the legislative history of RCW 10.77.120 and RCW 71.05.217 is flawed as well. Br. Appellant at 14. Although Mr. Davis correctly points out that both statutes were initially enacted during the same legislative session in 1973, the provisions in

RCW 71.05.217 relating to antipsychotic medication were not enacted until 1989. Laws 1989 ch. 120 § 8. By that time, the practice of involuntarily medicating individuals committed under RCW chapter 10.77 for competency restoration had been recognized and approved by Washington courts, despite the fact that no statute within RCW chapter 10.77 explicitly authorized it. *See State v. Lover*, 41 Wn. App. 685, 707 P.2d 1351 (1985). Given that the Legislature is presumed to know the existing state of the case law in the areas in which it is legislating, *Woodson v. State*, 95 Wn.2d 257, 262, 623 P.2d 683 (1980), it can be presumed that the Legislature was aware that superior courts were involuntarily medicating individuals committed under RCW chapter 10.77 in 1989, and that if Legislature had wanted to limit the superior court's authority to involuntarily medicate under RCW chapter 10.77, it would have done so.

This interpretation is supported by RCW 10.77.092 and .093, which are more recent additions to RCW chapter 10.77. Although Mr. Davis claims that these statutes provide the authority from which courts may authorize the use of involuntary medication for competency restoration, this is not the case, as neither statute actually contains any language granting authority to involuntarily medicate. Br. Appellant at 7-8. The codified intent of the Legislature when it passed

RCW 10.77.092 and .093 provides further evidence that the Legislature was aware of the superior court's inherent authority to order involuntary medication and that these statutes were not intended to authorize or prohibit the involuntary treatment of patients found NGRI with antipsychotic medication. Both statutes were originally part of Engrossed Substitute S.B. 6274 (2004), codified in Laws 2004, ch. 157. The purpose of the bill was to "clarify state statutes with regard . . . to involuntary medication ordered in the context of competency restoration" as a result of the United States Supreme Court's decision in *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003). Laws 2004, ch. 157, § 1. *Sell* set forth a four-part test establishing when it is appropriate for the government to involuntarily medicate defendants who are incompetent to stand trial. *Sell*, 539 U.S. at 180-82. One of those parts was that the government must have an "important interest." *Id.* at 180. Generally, the government has an "important interest" if a "serious offense" is charged. *Id.* However, that important interest may be undermined if the defendant is civilly committed. *Id.* RCW 10.77.092 is simply intended to codify what is a "serious offense" for the purpose of *Sell* while RCW 10.77.093 is intended to permit courts to inquire into the defendant's civil commitment status. Laws 2004, ch. 157, § 1. Hence, the intent behind passing RCW 10.77.092-.093 was to account for *Sell*, and

not to grant authority to involuntarily medicate. A grant of authority was unnecessary as Washington courts recognized long before the passage of RCW 10.7.092-.093 that involuntary medication hearings were necessary in order to treat mentally ill defendants incompetent to stand trial. The courts also recognized that a grant of authority from the Legislature was not required to authorize holding such hearings. *See State v. Hernandez-Ramirez*, 129 Wn. App. 504, 119 P.3d 880 (2005); *State v. Adams*, 77 Wn. App. 50, 888 P.2d 1207 (1995); *State v. Lover*, 41 Wn. App. 685, 707 P.2d 1351 (1985).

3. The Authority Const. Art. IV, § 6 Confers On Superior Courts Is Not Strictly Procedural

Mr. Davis also argues that the jurisdiction and powers conferred on superior courts through Const. art. IV, § 6 do not "obviate procedural requirements established by the legislature" and that these powers "are strictly procedural in nature and do not confer any substantive authority nor increase the jurisdiction of the court." Br. Appellant at 21. First, this argument is directly contrary to the cases discussed above describing the superior court's jurisdiction as granted by the constitution to be broad and substantive. Second, the cases cited by Mr. Davis do not support his argument. Mr. Davis cites to *James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005); *State v. Gilkinson*, 57 Wn. App. 861, 790 P.2d 1247

(1990); and *Ladenburg v. Campbell*, 56 Wn. App. 701, 784 P.2d 1306 (1990). None of these cases support Mr. Davis' argument.

In *Ladenburg v. Campbell*, a district court appointed the appellant, Thomas Campbell, as a special prosecuting attorney to prosecute a misdemeanor. *Ladenburg*, 56 Wn. App. at 702-03. Campbell argued the district court had the inherent authority to appoint a special prosecuting attorney, claiming that RCW 2.28.150[7] provided that power. *Ladenburg*, 56 Wn. App. at 703-04. The Court of Appeals disagreed, stating that RCW 2.28.150 "is strictly procedural in nature and does not confer upon district courts the substantive authority to appoint a prosecuting attorney." *Ladenburg*, 56 Wn. App. at 704.

Ladenburg does not apply to the case at bar for two reasons. First, Const. art. IV, § 6 applies only to superior courts. *Ladenburg* involved a challenge to a district court order, not a superior court order. Second, while *Ladenburg* held that RCW 2.28.150 does not confer substantive authority on district courts; it did not address Const. art. IV, § 6 at all. Hence, *Ladenburg* provides no support to Mr. Davis' argument that Const. art. IV, § 6 does not confer substantive authority on superior courts.

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[7] RCW 2.28.150 states: "[w]hen jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws."

Likewise, *State v. Gilkinson* does not support Mr. Davis' argument. In *Gilkinson*, a criminal defendant pled guilty to a felony, the sentence was deferred upon satisfactory completion of probation, and once probation was completed, the criminal charges were dismissed. *Gilkinson*, 57 Wn. App. at 862-63. The defendant then filed a motion in superior court pursuant to RCW 10.97.060, asking the court to order various law enforcement agencies to expunge their records showing the defendant's arrest and conviction. *Gilkinson*, 57 Wn. App. at 863. RCW 10.97.060 provides in pertinent part that "criminal history record information which consists of nonconviction data only" shall be deleted from the files of criminal justice agencies upon the defendant's request. The term "nonconviction data" is expressly defined in statute, and specifically excludes from the definition a dismissal entered after a deferral of sentence, which is what happened in the defendant's case. RCW 10.97.030(2), (4)(c); *Gilkinson*, 57 Wn. App. at 863-64. The defendant attempted to avoid this express statutory provision by arguing that the superior court had the inherent judicial power to order the expungement. *Gilkinson*, 57 Wn. App. at 865. The Court of Appeals, citing to *Ladenburg*, disagreed, saying that the court's inherent powers "are strictly procedural in nature and do not confer any substantive

authority nor increase the jurisdiction of the court." *Gilkinson*, 57 Wn. App. at 865; *Ladenburg*, 56 Wn. App. at 784.

Again, *Gilkinson* is inapplicable to the case at bar. To support the claim that the court's inherent powers are strictly procedural and not substantive, the Court of Appeals cites to the portion in *Ladenburg* that discusses RCW 2.28.150. *Gilkinson*, 57 Wn. App. at 865; *Ladenburg*, 56 Wn. App. at 784. Like the *Ladenburg* opinion, there is no mention of Const. art. IV, § 6 in the *Gilkinson* opinion, and therefore it is inapplicable to the question of whether Const. art. IV, § 6 confers substantive authority on superior courts to involuntarily medicate NGRI patients. Additionally, the defendant in *Gilkinson* was claiming that the superior court's inherent powers could be used as a means of avoiding specific legislation defining what relief is available and to whom that relief is available. Here there is no specific legislation prohibiting a superior court to authorize involuntary administration of antipsychotic medication to patients found NGRI. Moreover, in this case, the state, including its courts, has inherent non-statutory authority under its *parens patriae* duty and a statutory duty to provide treatment to committed persons found NGRI.

James v. County of Kitsap, 154 Wn.2d 574, 115 P.2d 286 (2005) is likewise distinguishable. In *James*, the Washington Supreme Court held that a land developer's challenge to a County's land use decision was time

barred under the Land Use Petition Act because the challenge was filed after the strict 21-day statute of limitations had passed. *James,* 154 Wn.2d at 577, 584, 586. The developers then argued that they were not subject to the 21-day statute of limitations because the superior court had original jurisdiction under Const. art. IV, § 6. *James,* 154 Wn.2d at 587. The Court rebuffed the developers, stating that "where statutes prescribe procedures for the resolution of a particular type of dispute" the parties must substantially comply or satisfy the spirit of those procedural requirements before the superior court can exercise Const. art. IV, § 6 jurisdiction. *James*, 154 Wn.2d at 587-88. "Thus, while a superior court may be granted power to hear a case under article IV, section 6, that grant does not obviate procedural requirements established by the legislature." *James*, 154 Wn.2d at 588.

Hence, *James* involved a legal challenge in an area where the Legislature had already set down clear procedural requirements–all challenges to land use decisions must be filed within 21 days. In contrast, the Legislature has not set down any procedural requirements regarding involuntary treatment with antipsychotic medication for patients found NGRI. In other words, there is no statute prescribing procedures to resolve this particular type of dispute. Because *James*, just as *Gilkinson*,

involved a legal challenge in an area where the legislature had already spoken, it is inapplicable to the case at bar.

Mr. Davis' argument that the broad grant of jurisdiction under Const. art. IV, § 6 does not confer substantive authority on superior courts also makes little practical sense. Br. Appellant at 21. In order for superior courts to exercise jurisdiction in all cases and proceedings pursuant to Const. art. IV, § 6, they must also have the substantive authority to make enforceable orders associated with the case at hand. *See Hayes*, 93 Wn.2d at 234 (holding that Const. art. IV, § 6 gives superior courts the power to enter an order authorizing sterilization of an incapacitated person); *Sall*, 59 Wn. at 546 (holding that Const. art. IV, § 6 gives superior courts the power to appoint a guardian over the Washington property of a non-Washington resident). Without this substantive authority, the exercise of jurisdiction to hear legal claims and resolve legal disputes would be rendered meaningless. Superior courts would simply become places where parties could have academic discussions with no consequences in the real world. Therefore, Mr. Davis' argument that such substantive authority does not exist must be rejected.

Mr. Davis also expresses a concern that if superior courts could act procedurally and substantively without legislative authorization, the Legislature would be rendered meaningless, and the checks and balances

of the democratic system would be upended. Br. Appellant at 23. What this argument ignores is that the Legislature can check the judiciary by writing statutes setting limits on the jurisdiction of superior courts. *Major*, 71 Wn. App. at 533-34 (stating that the superior court's broad grant of jurisdiction can be limited or denied via statute). Therefore, Mr. Davis' fears of an unchecked judiciary are unwarranted.

Because the Legislature has not limited a superior court's jurisdiction and authority to authorize involuntary treatment with antipsychotic medication for patients found NGRI, the trial court acted within its jurisdiction and authority in granting the Department's petition. The trial court's ruling should be affirmed.[8]

D. In The Absence Of Specific Legislation, Washington Supreme Court Precedent Permits Use Of Procedural Schemes Based On Other Statutes Dealing With Similar Situations In Order To Protect Constitutional Rights

Although RCW 10.77.120(1) authorizes involuntarily medicating NGRI patients, it does not describe the process by which that can occur.

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[8] Mr. Davis asserts that, in the Department's argument in support of the petition, the Department relied on a clause in RCW 10.77.120 which states that NGRI patients ' "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. . . .*" ' Br. Appellant at 8. This is false. Nowhere in the Department's briefing or argument was reference made to this clause. *See* CP at 24-32. That is because this clause was deleted in the 2010 legislative session. Laws of 2010, ch. 263, § 4. Although this clause was eliminated, the Legislature still retained the clause commanding the Department to provide all NGRI patients "with adequate care and treatment." Laws of 2010. Mr. Davis also incorrectly cites to the old version of RCW.10.77.120 in his brief. Br. Appellant at 7.

In the absence of guidance from the Legislature, there is no barrier to the superior courts applying the procedures found in RCW 71.05.217(7), which sets out a process by which a superior court can balance the Department's statutory and constitutional duty to provide adequate care and treatment and the patient's constitutional right to object.

The Washington Supreme Court has approved the practice of applying statutory procedures created for one subgroup of the mentally ill to other subgroups in order to fill in statutory gaps and provide mentally ill persons with due process. For example, in *Pierce v. State, Dep't of Soc. & Health Servs.*, 97 Wn.2d 552, 646 P.2d 1382 (1982), the Supreme Court confronted the issue of what due process rights ought to be afforded to a mentally incompetent parolee. At the time, there were neither statutes nor cases defining the due process rights of incompetent parolees in parole revocation proceedings. *Id.* at 557. The court held that in such cases, due process requires an initial evaluation of the parolee's competency. *Id.* at 560. To provide a process for the consideration of the parolees' incompetence, the court then held: "[t]he procedures set down by the legislature in RCW 10.77.060 are as appropriate to a parole revocation proceeding as to a criminal trial, and may therefore guide the Board in ordering such an evaluation." *Pierce*, 97 Wn.2d at 560.

In *In re the Detention of Dydasco*, 135 Wn.2d 943, 959 P.2d 1111 (1998), the Court again recognized a process from one statute and applied it to another to protect the rights of mentally ill persons. In *Dydasco*, the court was asked to construe the notification process that should be afforded to patients for 180-day civil commitment hearings. In 1987, the Legislature amended RCW 71.05.300 to provide that notice of a petition for 90 days of civil commitment be given at least three days before the expiration of the 14-day commitment. However, the Legislature did not provide a similar notice provision for 180-day petitions. *Dydasco*, 135 Wn.2d at 949. In resolving this issue, the court reasoned that since the statute states that a 90-day hearing is the same as that for a 180-day hearing, and because the Legislature has consistently provided additional procedural rights for those facing longer periods of involuntary commitment, the same procedural rights should be granted to those facing either 90 or 180 days of civil commitment. *Id.* at 950. The court then affirmed that three days notice, as required under 90-day commitment proceedings, also applies to 180-day commitment proceedings, even in the absence of express legislation to that effect. *Id.* at 952.

Likewise, it is appropriate and permissible for superior courts to utilize the procedures set out in RCW 71.05.217(7) for determining whether the court should authorize the Department to involuntarily treat

NGRI patients with antipsychotic medication. Doing so balances the Department's duty to provide adequate care and treatment to NGRI patients and the patients' right to due process when objecting to unwanted medication.

Once an individual who is found NGRI is committed, the Department is obligated to provide the patient adequate care and treatment. RCW 10.77.120; *Youngberg v. Romeo*, 457 U.S. 307, 318-19, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).[9] These patients, by definition, suffer from serious mental illnesses which cause them to be a substantial danger to others or make them substantially likely to commit crimes that threaten public safety. *See* RCW 10.77.110(1). One of the best tools available for treating these types of patients is antipsychotic medication. *See Washington v. Harper*, 494 U.S. 210, 222, 225, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) ("[t]here is considerable debate over the potential side effects of antipsychotic medications, but there is little dispute in the psychiatric profession that proper use of the drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior.") Hence, the Department often must prescribe antipsychotic medication in order to fulfill its statutory duty to provide mental health care and treatment to NGRI patients.

[9] The Department "also has the unquestioned duty to provide reasonable safety for all residents and personnel within [its state hospitals]." *Youngberg*, 457 U.S. at 324.

Conversely, every person has a constitutional right to reject unwanted medical treatment, including treatment with antipsychotic medication. *Sell*, 539 U.S. at 178, *Hernandez-Ramirez*, 129 Wn. App. at 504. *See also, In re the Detention of Schuoler*, 106 Wn.2d 500, 506-07, 723 P.2d 1103 (1986) (holding same for involuntary treatment with electroconvulsive therapy).

In cases where a patient is civilly committed to the Department's custody, RCW 71.05.217(7) governs the hearing to determine whether the Department should be authorized to involuntarily treat the patient with antipsychotic medication. The statute entitles civilly committed patients to a judicial hearing, at which they have the right to counsel, to cross-examine witnesses, and to present evidence. These procedural protections exceed what due process requires under the United States Constitution. *See Harper*, 494 U.S. at 210 (upholding prison policy that authorized the involuntary administration of antipsychotic medication to prisoners without providing the prisoners with a judicial hearing or the right to counsel). *See also Jurasek v. Utah State Hosp.*, 158 F.3d 506, 511 (10th Cir. 1998) (extending *Harper* to civilly committed patients), *Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir. 1997) (extending *Harper* to criminal defendants found NGRI).

RCW 71.05.217(7) also meets the requirements under Washington's Due Process Clause and constitutional right to privacy. *Schuoler*, 106 Wn.2d at 508-11. Therefore, it necessarily follows that applying the procedures required under RCW 71.05.217(7) to a hearing to approve or disapprove involuntary treatment of NGRI patients with antipsychotic medication also adequately protects NGRI patients' state constitutional rights.

Adopting standards from another statute in order to create a court procedure that provides NGRI patients with meaningful due process is supported by both *Dydasco* and *Pierce*. By applying the protections set forth in RCW 71.05.217(7) to the Department's petition to involuntarily treat Mr. Davis, the trial court ensured that Mr. Davis' rights were fully protected. The decision of the trial court should be upheld.

V. CONCLUSION

The Department respectfully requests this Court dismiss this case as moot. In the alternative, the Department requests this Court affirm the decision of the trial court for the following reasons: 1) RCW 10.77.120(1) authorizes the Department to administer medication involuntarily to NGRI patients in its custody; 2) Article IV, § 6 of the Washington Constitution, RCW chapter 10.77, and the doctrine of *parens patriae* gives superior

courts the inherent jurisdiction and authority to authorize the Department to involuntarily treat NGRI patients with antipsychotic medications; and 3) borrowing statutory schemes in order to fill in procedural gaps is supported by case law and helps courts meet the treatment needs of NGRI patients while giving them due process protections.

RESPECTFULLY SUBMITTED this 12th day of December 2011.

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CERTIFICATE OF SERVICE

Christine Howell, 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 December 12, 2011, I served a true and correct copy of this **BRIEF OF RESPONDENT** on the following parties to this action, as indicated below:

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☒ **By United States Mail**
☐ By Legal Messenger
☐ By Facsimile
☐ By Email:

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

DATED this 12th day of December 2011, at Tumwater, Washington.

Christine Howell
CHRISTINE HOWELL
Legal Assistant