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No. 50699-8-II

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

In re the Detention of:

B.M.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

An individual possesses a fundamental constitutional right to refuse to take antipsychotic drugs. The State may infringe on this right only where it proves it has a sufficiently compelling interest in doing so and the drugs are necessary and effective to further that interest.

Here the State failed to satisfy this burden. It claimed only that, after a mere 17 days of a 180-day commitment period, B.M. continued to suffer from delusions, was verbally aggressive toward staff, and encouraged his peers to fight. The “compelling” interests found by the trial court were neither sufficiently important to justify the extraordinary intrusion on B.M.’s rights nor supported by the State’s evidence.

The trial court applied the wrong legal standard when it reached its decision, finding that it was not “sure one way or the other” and therefore would allow “the order to stand.” The court’s order authorizing the administration of antipsychotic drugs over B.M.’s objection violated his constitutional rights and this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The trial court violated B.M.'s constitutional rights under the First and Fourteenth Amendments and article I, sections 3, 5, and 7 when it authorized the State to forcibly drug him without first finding a sufficiently compelling State interest.

2. In violation of B.M.'s due process rights under the Fourteenth Amendment and article I, section 3, the trial court erroneously authorized the State to forcibly drug B.M. in the absence of sufficient evidence of a compelling State interest.

3. In violation of B.M.'s due process rights under the Fourteenth Amendment and article I, section 3, the trial court erroneously authorized the State to forcibly drug B.M. in the absence of sufficient evidence that it was both necessary and effective to further the State's interest.

4. The trial court applied the wrong legal standard when it decided to grant the State's petition to forcibly drug B.M.

5. The trial court's order was invalid because it failed to adequately limit the State's discretion.

6. The trial court erred in entering Finding of Fact 4. CP 20-21.

7. The trial court erred in entering Finding of Fact 5. CP 21.

8. The trial court erred in failing to limit the State's discretion in Conclusion of Law 11. CP 21.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person possesses liberty, privacy, and First Amendment interests in refusing the unwanted administration of antipsychotic drugs. As a result, the State must demonstrate a sufficiently compelling interest in forcibly drugging an individual. Here, the trial court identified three interests it deemed "compelling": (1) increased expense to the public without the drugs, (2) the risk of severe deterioration in B.M.'s routine functioning, and (3) B.M.'s aggression and encouraging of his peers to fight. Should this Court reverse because these interests were not important enough to justify the extraordinary infringement of B.M.'s fundamental right to avoid the unwanted administration of antipsychotic drugs?

2. The burden was on the State to prove, by clear, cogent, and convincing evidence, that it had a compelling interest in forcibly drugging B.M. and that the administration of antipsychotic drugs was both necessary and effective to further those interests. Where B.M. had been committed for only 17 days under RCW 71.05, and the State's only evidence in support of its petition was that B.M. continued to

suffer from delusions, had been verbally aggressive with staff, and had goaded others into fighting, is reversal required because the State failed to satisfy its burden?

3. The trial court is required to find the State satisfied its burden by clear, cogent, and convincing evidence before authorizing the State to forcibly drug an individual. Is reversal required where the trial court, at the time it made its decision, did not hold the State to this burden of proof but instead stated it was unsure “one way or the other” and would therefore “allow the order to stand”?

4. Courts are required to limit the State’s discretion when authorizing an order to forcibly drug an individual. This includes mandating the maximum dosage of each drug that may be administered. Was the trial court’s order invalid where it failed to direct the maximum dosages permitted?

D. STATEMENT OF THE CASE

B.M. was employed with The Seattle Times for 14 years. 6/13/17 RP 36. One day when he was out jogging, his hip locked up and he felt excruciating pain. 6/13/17 RP 38. Frightened and in physical distress, he came to the conclusion that his next door neighbor, whom he had known much of his life, was responsible for the injury.

6/13/17 RP 16, 38. Believing the neighbor had used a “Wi-Fi weapon” against him, he unhooked his neighbor’s internet cable and vandalized the neighbor’s car. 6/13/17 RP 9, 14, 16, 38.

The State charged B.M. with malicious mischief in the second degree, but this charge was later dismissed because B.M. lacked the competency to stand trial. CP 2. On the State’s petition, B.M. was involuntarily committed to Western State Hospital for up to 180 days. CP 10.

Nine days into the 180-day commitment period, the State petitioned to forcibly drug B.M. CP 12. At the subsequent hearing, B.M. testified the antipsychotic drugs proposed by the State made him feel mentally and physically awful. 6/30/17 RP 22-23. One drug in particular made him feel like he was “going to die.” 6/30/17 RP 22-23.

A psychiatrist testified on behalf of the State that the drugs were necessary because B.M. continued to suffer from delusions and that, *after* the petition was filed, B.M. had become “very verbally aggressive towards staff” and encouraged his peers to fight. 6/30/17 RP 11.

After the presentation of evidence, the trial court ruled it was not “sure one way or the other” but that it would “allow the order to stand.” 6/30/17 RP 36-37. The court signed a largely boilerplate order

that authorized the State to forcibly drug B.M. without his consent. CP

19. B.M. did not request to stay the court's order.

E. ARGUMENT

1. In violation of the Due Process Clause and the First Amendment, the trial court authorized the State to forcibly drug B.M. without finding a constitutionally compelling State interest.

- a. An individual has significant liberty, privacy, and First Amendment interests in being free from the forced administration of drugs.

An individual “possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.” *Washington v. Harper*, 494 U.S. 210, 221-22, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990); U.S. Const. amend. XIV; Const. art. I, § 3. The administration of such drugs against an individual's will represents both an interference with a person's right to privacy and his right to produce ideas. *State v. Hernandez-Ramirez*, 129 Wn. App. 504, 510, 119 P.3d 880 (2005) (citing *Riggins v. Nevada*, 504 U.S. 127, 134, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992)); U.S. Const. amends. I, XIV; Const. art. I, §§ 5, 7.

The forced administration of antipsychotic drugs is a “particularly severe” invasion of a person's liberty both because the

drugs are designed to literally alter the mind and because the side effects can be extremely serious, even fatal. *United States v. Williams*, 356 F.3d 1045, 1054 (9th Cir. 2004) (quoting *Riggins*, 504 U.S. at 134); *see also Harper v. State*, 110 Wn.2d 873, 877, 759 P.2d 358 (1988) (“[a]ntipsychotic drugs are by intention mild altering”). Forced drugging by the State implicates First Amendment protection because injecting a person with mind-altering drugs may affect his ability to think and communicate. *State v. Adams*, 77 Wn. App. 50, 55-56, 888 P.2d 1207 (1995).

Finally, the forced administration of drugs infringes on the fundamental right to privacy related to the “freedom of choice regarding one’s personal life,” which emanates “from the specific guaranties of the Bill of Rights, from the language of the First, Fourth, Fifth, Ninth and Fourteenth Amendments, as well as from article 1, section 7 of the Washington Constitution.” *State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200 (1991) (analogizing forced HIV testing to forced electroconvulsive therapy) (citing *In re Colyer*, 99 Wn.2d 114, 119-20, 660 P.2d 738 (1983); *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965)).

- b. Given the fundamental interests at stake, the State must demonstrate it has a compelling interest in forcibly drugging an individual and that the antipsychotic drugs are both necessary and effective for furthering that interest.

An individual's fundamental right to refuse antipsychotic drugs is not absolute. *See Harper*, 110 Wn.2d at 878 (overruled on other grounds by *Harper*, 494 U.S. at 221-22). Where an individual has been detained pursuant to RCW 71.05.320(4),¹ as B.M. was here, he is entitled to refuse the administration of antipsychotic drugs unless a court finds the State has satisfied specific conditions pursuant to RCW 71.05.217(7).

As originally drafted, RCW 71.05.217² only permitted a detained individual to refuse the “the performance of shock treatment or surgery.” Laws of 1973, 1st Ex. Sess., ch. 142, § 42. The statute entitled the individual to a judicial hearing and the representation of counsel, but otherwise provided little guidance. Laws of 1973, 1st Ex.

¹ B.M. was committed under RCW 71.05.320(4)(c)(i), which states, in relevant part, “[t]he person shall be released from involuntary treatment at the expiration of the period of commitment... unless the superintendent or professional person in charge of the facility... files a new petition for involuntary treatment on the grounds that the committed person: Is in custody pursuant to RCW 71.05.280(3) and as a result of mental disorder or developmental disability continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior, when considering the person’s life history, progress in treatment, and the public safety.”

² RCW 71.05.217 was originally codified as RCW 71.05.320.

Sess., ch. 142, § 42; *see also In re Det. of Schuoler*, 106 Wn.2d 500, 503-04, 723 P.2d 1103 (1986).

In *Schuoler*, the supreme court recognized that an individual “involuntarily committed due to a mental disorder retains a fundamental liberty interest in refusing [electroconvulsive therapy],” and determined that interest could be limited only where the trial court found (1) a compelling state interest and (2) the forced therapy was “both necessary and effective for furthering that interest.” 106 Wn.2d at 508. The State was required to satisfy its burden by clear, cogent, and convincing evidence. *Id.* at 510.

The court also held the trial court must consider the patient’s desires before ordering treatment and, “if the patient appears unable to understand fully the nature of the ECT hearing – as severely mentally ill patients often are – the court should make a ‘substituted judgment’ for the patient that is analogous to the medical treatment decision made for an incompetent person.” *Id.* at 507.

Following the court’s decision in *Schuoler*, the legislature added language to the statute permitting a detained individual to refuse the administration of antipsychotic drugs, and mandating the constitutional requirements outlined by the court. Laws of 1989, ch. 120, § 8.

RCW 71.05.217(7)(a) now states:

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.

The statute further directs the court to “make specific findings of fact concerning: (i) The existence of one or more compelling state interests; (ii) the necessity and effectiveness of the treatment; and (iii) the person's desires regarding the proposed treatment.” RCW 71.05.217(7)(b). It also requires the court to “make a substituted judgment” as to whether to consent to the drugs if the court finds the individual is “unable to make a rational and informed decision.” RCW 71.05.217(7)(b).

c. The trial court did not identify a constitutionally compelling interest in forcibly drugging B.M.

The phrase “compelling state interest” does not describe a “fixed, minimum quantum of governmental concern” but instead “an interest that appears *important enough*” to justify the intrusion on an

individual's constitutional rights. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 661, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (emphasis in original); *see also Robinson v. City of Seattle*, 102 Wn. App. 795, 823, 10 P.3d 452 (2000). An interest is compelling when it is fundamental and "based in the necessities of national or community life such as clear threats to public health, peace, and welfare." *Robinson*, 102 Wn. App. at 823 (quoting *Munns v. Martin*, 131 Wn.2d 192, 200, 930 P.2d 318 (1997)).

In *Schuoler*, the court identified four interests it had previously found were "sufficiently compelling to justify overriding a patient's objection to medical treatment." 106 Wn.2d at 508. These interests are:

(1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) maintenance of the ethical integrity of the medical profession.

Id. at 508. It directed trial courts to consider whether the State had presented "a countervailing state interest as compelling" as those listed when evaluating a request for forced medical treatment. *Id.*

Here, the court failed to identify a sufficiently compelling State interest. It checked three findings on a boilerplate order labeled a

“compelling interest,” but none of these findings satisfied the constitutional standard:

Respondent has suffered or will suffer a severe deterioration in routine functioning that endangers Respondent’s health or safety if he/she does not receive such treatment, as evidenced by Respondent’s past behavior and mental condition while he/she was receiving such treatment;

Respondent will likely be detained for a substantially longer period of time, at increased public expense, without such treatment.

Other: _Has been aggressive and goading others into trying to fight and without medication it is likely to continue or worsen.

CP 20-21.

The first two findings were provided as boilerplate language in the order. CP 20. The third finding, labeled “other” and specifically written into the order, provided the sole support for the State’s claim that B.M. was at risk for “deterioration.” CP 20-21. Although the pro forma order offered the court a fourth “compelling interest” option, namely that B.M. posed a risk of serious harm to himself or others, the court declined to make this finding. CP 20.

The language used in the boilerplate order appears to come from RCW 71.05.215, which states, in part, that an individual involuntarily committed under the statute maintains his right to refuse antipsychotic

drugs “unless it is determined that the failure to medicate may result in a likelihood of serious harm or substantial deterioration or substantially prolong the length of involuntary commitment.” To a large extent, the language simply mirrors the statutory requirements for the involuntary commitment of an individual, which permits confinement to a facility where the individual is found to present a likelihood of serious harm or be gravely disabled.³ RCW 71.05.240(3)(a).

The legislature did not identify these factors as a list of “compelling interests” and RCW 71.05.215 must be evaluated in light of the specific rights granted in RCW 71.05.217. *See State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015) (citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (the plain language of a statute should be determined by examining the larger statutory scheme as a whole)). In addition, because neither of these interests satisfy the constitutional “compelling” standard, this Court should resolve any ambiguity by finding that was not the legislature’s intention. *See Clark v. Martinez*, 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005); *Davis v.*

³ One definition of gravely disabled is that the individual “manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.” RCW 71.05.020(17)(b).

Cox, 183 Wn.2d 269, 280, 351 P.3d 862 (2015) (when there are two plausible readings of a statute, the Court should select the interpretation that avoids constitutional concerns).

- i. *Increased expense to the public is not sufficiently compelling to drug an individual without his consent.*

Concerns about cost or efficiency “has never been held to be a compelling interest justifying governmental intrusion upon a fundamental right.” *Robinson*, 102 Wn. App. at 826 (citing *Macias v. Department of Labor and Indust.*, 100 Wn.2d 263, 668 P.2d 1278 (1983); *Olympic Forest Prod., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 433, 511 P.2d 1002 (1973) (additional citations omitted)). As the United States Supreme Court has explained, “the Constitution recognizes higher values than speed and efficiency.” *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S. Ct. 1208, 1215, 31 L. Ed. 2d 551 (1972). Indeed, the Due Process Clause was “designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.” *Id.*

Thus, that B.M. might be “detained for a substantially longer period of time, at increased public expense, without such treatment”

does not constitute a compelling interest that justifies forcibly injecting him with antipsychotic drugs. This Court should reject the trial court's finding that continued detainment at increased costs constitutes a compelling State interest. CP 20.

- ii. *Absent a finding of serious harm, an individual's deterioration in routine functioning is not sufficiently compelling to justify the forcible drugging of an individual.*

B.M.'s severe deterioration, or potential for severe deterioration, does not constitute a compelling State interest without a showing of harm. The first "compelling interest" listed as a possibility on the pro forma order stated:

[] Respondent has recently threatened, attempted or caused serious harm to self or others and treatment with antipsychotic medication will reduce the likelihood that Respondent will commit serious harm to self or others.

CP 20. The trial court did not check this box, instead finding that B.M. "has suffered or will suffer a severe deterioration in routine functioning that endangers [his] health or safety" without the forced drugs. CP 20. Under "other," the court also found B.M. had "been aggressive and goading others into trying to fight" and this behavior was "likely to continue or worsen" in the absence of the forced administration of antipsychotics. CP 21.

Absent a finding that B.M.'s deteriorating behavior presented a risk of serious harm to himself or others, it did not constitute an interest sufficiently compelling to forcibly drug him. *See Schuoler*, 105 Wn.2d at 508. It is not similar to the compelling interests cited in *Schuoler*, which focus on deadly harm, the protection of others, or ethical concerns. 106 Wn.2d at 508. It also does not rise to the level described in *Robinson*, because deteriorating behavior, without the risk of serious harm, presents no clear threat to the public. 102 Wn. App. at 823.

The United States Supreme Court has identified two circumstances in which the government may forcibly medicate an individual: (1) where the individual is a danger to himself or others and medication is in his medical interest and (2) where the medication is necessary to restore an individual's competency to stand trial. *United States v. Brooks*, 750 F.3d 1090, 1093-94 (9th Cir. 2014) (citing *Harper*, 494 U.S. at 747; *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003)).

In *Harper*, the Court examined the government's ability to forcibly medicate a prison inmate. 494 U.S. at 220. It held due process permits the State "to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is

dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.* at 227 (emphasis added). Where the State seeks to forcibly drug an individual like B.M., who has not been convicted of a crime and is detained at a hospital rather than a prison, the State's interest must be at least as compelling.

This Court should hold that, in the absence of a finding of a risk of serious harm, a risk of severe deterioration in routine functioning, aggressiveness, or "goading others into trying to fight" is not sufficiently compelling to forcibly drug a committed individual.

d. This Court should reverse.

As our courts have repeatedly recognized, the importance of identifying a sufficiently compelling interest when the State seeks to forcibly drug an individual cannot be overstated, given the extraordinary liberty and privacy interests at stake. *Harper*, 494 U.S. at 225; *Sell*, 539 U.S. at 180; *Schuoler*, 106 Wn.2d at 508. Because the trial court did not find a State interest important enough to justify the intrusion on B.M.'s fundamental rights, this Court should reverse. RCW 71.05.217(7)(a); *Schuoler*, 106 Wn.2d at 508.

2. In violation of B.M.'s constitutional due process rights, the State presented insufficient evidence in support of its petition to forcibly drug B.M.

- a. The State presented insufficient evidence for the court's findings that B.M. risked severe deterioration or would be detained at increased public expense unless he was forcibly drugged.

Even if the interests found by the trial court were important enough to justify forcibly drugging B.M., the burden was on the State to prove by clear, cogent, and convincing evidence that the interests were present in B.M.'s case. *Schuoler*, 106 Wn.2d at 510; U.S. Const. amend. XIV; Const. art. I, § 3. An evaluation of the evidence demonstrates they were not.

The court involuntarily committed B.M. for 180 days on June 13, 2017. CP 11. The State moved to forcibly drug him only nine days later, on June 22, 2017. CP 12. The hearing was held on June 30, 2017. CP 19.

At the time of the hearing, the psychiatrist treating B.M. diagnosed him with schizoaffective disorder, bipolar type, based on the fact he continued to believe his neighbors were trying to hurt him. 6/30/17 RP 4-5. B.M. did not accept this diagnosis. 6/30/17 RP 6.

When asked what behavioral concerns B.M. exhibited, the doctor testified:

There have been multiple incidents when he's been very verbally aggressive towards staff and also peers trying to instigate fights with peer and staff, and so there was one incident where he tried – he tried to go to⁴ a couple of his peers to fight with another peer to join him in fighting and attacking another peer, and there was another instance where he was just trying to instigate a fight with a staff person.

6/30/17 RP 11.

The doctor testified this behavior had occurred “within the past week or so,” *after* the State filed the petition to forcibly drug B.M..

6/30/17 RP 11. The psychiatrist indicated he feared B.M.'s behavior would continue or worsen without antipsychotics, but offered no other specific concerns. 6/30/17 RP 11. He also did not explain why the petition had been filed if the only evidence of deterioration in B.M.'s behavior had occurred later.⁵

The psychiatrist acknowledged B.M. was not placed in seclusion or restraints for his behavior and had not assaulted anyone.

6/30/17 RP 15.

⁴ Based on the trial court's findings, the psychiatrist likely said “goad” rather than “go to.” *See* CP 21.

⁵ The petition only cites to a concern that B.M. would “continue to have persecutory delusions” if not drugged, relying on a psychiatric assessment dated May 9, 2017, which in turn relied on a forensic report dated January 31, 2017. CP 13-16.

The extremely limited evidence presented by the State does not support the court's finding that B.M. "has suffered or will suffer a severe deterioration in routine functioning that endangers [his] health or safety." CP 20. The evidence showed only that B.M. encouraged his peers to engage in bad behavior, and was "verbally aggressive" with the staff. 6/30/17 RP 11. The evidence did not show what B.M. said that was supposedly "aggressive" or how often this had occurred in the week prior to the hearing.

In addition, the court found B.M. had suffered or would suffer this deterioration "as evidenced by [his] past behavior and mental condition while [he] was receiving such treatment." CP 20. But the State only presented evidence that B.M. had taken one of the proposed drugs before. 6/30/17 RP 10. The psychiatrist did not explain whether B.M.'s behavior and mental condition had improved as a result. The State did not meet its burden to show it had a compelling interest in forcibly drugging B.M. based on a claim of potential deterioration.

The State also did not meet its burden to prove B.M. would be detained for a substantially longer period of time if not forcibly drugged. CP 20. B.M. had been involuntarily committed for a mere 17 days at the time the court issued the order. CP 11, 22. The court had

authorized a 180-day commitment period. CP 10. Incidents of verbal aggression, or encouraging others to act aggressively, during that brief period of time did not demonstrate B.M. would be held for a substantially longer period of time if not drugged against his will. The State failed to satisfy its burden under RCW 71.05.217.

- b. The State failed to prove the forced administration of drugs was both necessary and effective.

The trial court found, according to the boilerplate language of the order, that administering antipsychotic drugs was both necessary and effective because of B.M.'s "prognosis with and without this treatment and the lack of effective alternative courses of treatment." CP 21. It further found that any alternatives to the drugs were "more likely" to prolong B.M.'s involuntary treatment and that seclusion or restraint would not address B.M.'s symptoms. CP 21.

This was not supported by the State's limited evidence at the hearing. The testifying psychiatrist offered nothing other than his opinion that the drugs were "necessary and effective" in response to the State's leading question. 6/30/17 RP 12. The State did not demonstrate B.M. had previously responded well to antipsychotics, nor did it show such an extraordinary measure was necessary only 17 days after B.M.'s commitment. The State did not meet its burden to show

the antipsychotics were both necessary and effective for furthering its compelling interests. *Schuoler*, 106 Wn.2d at 508; RCW 71.05.217(7)(a).

- c. The trial court applied the wrong legal standard when it granted the State's petition.

Despite signing an order granting the State's petition, the record demonstrates the trial court was not convinced the State satisfied its burden at the hearing. At the conclusion of the hearing, the court stated:

As you gathered from my pauses, I am not exactly 100 percent sure one way or the other. I am going to allow the order to stand.

6/30/17 RP 36-37.

A court's decision is manifestly unreasonable if it is based on an incorrect legal standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997). Here the court's oral ruling indicates it did not apply the correct legal standard in order to reach its decision.

The clear, cogent, and convincing standard of proof is one of several procedural due process protections that allows RCW 71.05.217 to survive constitutional scrutiny. *Schuoler*, 106 Wn.2d at 510. "When the standard of proof is clear, cogent, and convincing evidence, the fact at issue must be shown to be 'highly probable.'" *State v. Dobbs*, 180

Wn.2d 1, 320 P.3d 705 (2014) (citing *In re Welfare of Seago*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)).

After hearing all of the evidence, the court did not find the State had satisfied this burden. Instead, it indicated it was unsure and, given its inability to make a decision, it would “allow the order to stand.” 6/30/17 RP 36-37. The State’s petition, however, was not an “order” and not the status quo to which the court was obliged to afford deference. B.M. had a fundamental right to refuse to be drugged by the State and the State’s petition was a request to infringe upon that right. When the trial court granted the State’s petition by allowing it “to stand,” without finding the State had satisfied its burden by clear, cogent, convincing evidence, it applied the wrong legal standard.

d. Reversal is required.

An individual may not be drugged against his will unless the State proves by clear, cogent, and convincing evidence that it has a compelling interest that justifies overriding his lack of consent and that the antipsychotics are both necessary and effective for furthering that interest. RCW 71.05.217(7)(a); *Schuoler*, 106 Wn.2d at 508. The State failed to meet its burden in both respects and the trial court applied the

wrong legal standard when it ruled otherwise. This Court should reverse.

3. The court's order was invalid because it failed to direct the maximum dosages that may be administered by the State.

When the trial court issued its written order, it failed to adequately limit the psychiatrist's discretion. CP 21. In *United States v. Hernandez-Vasquez*, the Ninth Circuit held that an order authorizing the forcible administration of drugs must identify, at minimum:

(1) the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant, (2) the maximum dosages that may be administered, and (3) the duration of the time that involuntary treatment of the defendant may continue before the treating physicians are required to report back to the court on the defendant's mental condition and progress.

513 F.3d 908, 916-17 (9th Cir. 2007).

The trial court's order authorized the State to administer "antipsychotic medications as requested in the Petition" with the additional restrictions that only one drug be administered at a time, B.M. be permitted to veto one of the selected options, and judicial review be completed in 60 days. CP 21. The State's petition identified seven different drugs, but did not identify the maximum dosage. CP 14. The trial court's order did not correct for this omission. CP 21.

While *Hernandez-Vasquez* involved a *Sell* order, which permits the forcible drugging of an individual in order to restore the person's competency, the same requirements should apply in the RCW 71.05 context. See *Sell*, 539 U.S. at 181. As the Court found in *Sell*: "The specific kinds of drugs at issue may matter here **as elsewhere**.

Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." *Id.* (emphasis added).

Indeed, the Ninth Circuit reached the same conclusion outside the context of a competency inquiry in *Williams*, 356 F.3d at 1056. Where a court ordered an individual to take an antipsychotic drug as a condition of sentencing, the Ninth Circuit concluded "the unique nature of involuntary antipsychotic medication and the attendant liberty interest require that imposition of such a condition occur only on a medically informed record," including "attention to the type of drugs proposed, their dosage, and the expected duration of a person's exposure." *Id.*

Regardless of whether the State's request to forcibly drug an individual is based on harm or the restoration of competency, the individual has the same fundamental right to refuse antipsychotic medications. This Court should require the trial court to meaningfully

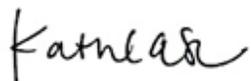
limit the discretion delegated to the State pursuant to *Hernandez-Vasquez*. Because the trial court failed to adequately circumscribe the psychiatrist's discretion regarding dosages, the order should be vacated.

F. CONCLUSION

This Court should reverse because the trial court's order did not find a sufficiently compelling interest to forcibly drug B.M. In addition, the Court should reverse because the State failed to meet its burden to prove a compelling interest or that the drugs were necessary and effective to further its interest. Finally, reversal is required because the trial court applied the wrong legal standard and failed to adequately limit the State's discretion.

DATED this 22nd day of November, 2017.

Respectfully submitted,



Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Appellant

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

IN RE THE DETENTION OF)	
)	
)	
B.M.,)	NO. 50699-8-II
)	
)	
APPELLANT.)	

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