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NO. 51911-9-II
NO 52375-2-II Consolidated

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

IN RE THE DETENTION OF:
V.S.
Appellant.

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

The Honorable Barbara McInville, Commissioner

AMENDED BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. INTRODUCTION.....	1
B. ASSIGNMENTS OF ERROR.....	2
Issues Presented on Appeal.....	4
C. STATEMENT OF THE CASE.....	5
a. December 28, 2018 Hearing/Order.....	8
b. January 26, 2018 Hearing/Order.....	12
c. March 1, 2018 Hearing/Order.....	13
D. ARGUMENT.....	18
1. IN VIOLATION OF THE DUE PROCESS CLAUSE AND THE FIRST AMENDMENT, THE TRIAL COURT AUTHORIZED THE STATE TO FORCIBLY DRUG V.S. WITHOUT FINDING A CONSTITUTIONALLY COMPELLING STATE INTEREST	18
a. An individual has significant liberty, privacy, and First Amendment interests in being free from the forced administration of drugs.....	18
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.....	20
c. The trial court did not provide sufficient evidence of a constitutionally compelling interest in forcibly drugging V.S.....	23

TABLE OF CONTENTS

	Page
i. The first finding is not supported by the record: The State presented insufficient evidence for the court’s findings that V.S. threatened self-harm.....	25
ii. Second finding insufficient to establish “compelling State interests”	28
iii. The third factor: increased expense to the public is not sufficiently compelling to drug an individual without his consent.....	32
d. The State failed to prove the forced administration of drugs was both necessary and effective.....	33
e. The trial court applied the wrong legal standard when it granted the State’s petition.....	34
f. The court’s order was invalid because it failed to direct the maximum dosages that may be administered by the State.....	35
g. Reversal Is Required.....	37
E. CONCLUSION.....	38

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<i>Davis v. Cox</i> , 183 Wn.2d 269, 351 P.3d 862 (2015)	32
<i>In re Coyler</i> , 99 Wn.2d 114, 660 P.2d 738 (1983)	20
<i>In re Detention of LaBelle</i> , 107 Wn.2d 196, 728 P.2d 138 (1986)	12
<i>In re Detention of Schuoler</i> , 106 Wn.2d 500, 723 P.2d 1103 (1986)	21, 24, 25, 30, 34, 35, 37
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997)	34
<i>In re Welfare of Sego</i> , 82 Wn.2d 736, 513 P.2d 831 (1973)	35
<i>Macias v. Department of Labor and Indust.</i> , 100 Wn.2d 263, 668 P.2d 1278 (1983)	32
<i>Maytown Sand and Gravel, LLC v Thurston County</i> , ___ Wn.2d ___, 423 P.3d 223 (2018)	32
<i>Muns v. Martin</i> , 131 Wn.2d 192, 930 P.2d 318 (1997)	24
<i>Robinson v. City of Seattle</i> , 102 Wn. App. 795, 10 P.3d 452 (2000)	24, 30, 32
<i>State v. Adams</i> , 77 Wn. App. 50, 888 P.2d 1207 (1995)	19
<i>State v. Dobbs</i> , 180 Wn.2d 1, 320 P.3d 705 (2014)	35

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010)	29
<i>State v. Farmer</i> , 116 Wn.2d 414, 805 P.2d 200 (1991)	20
<i>State v. Hernandez</i> , 129 Wn. App. 504, 119 P.3d 880 (2005).....	19
<i>State v. Larson</i> , 184 Wn.2d 843, 365 P.3d 740 (2015)	29
FEDERAL CASES	
<i>Clark v. Martinez</i> , 543 U.S. 371, 125 S.Ct.716, 160 L.Ed.2d 734 (2005)	32
<i>Griswold v. Connecticut</i> , 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 501 (1965)	20
<i>Riggins v. Nevada</i> , 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992)	19
<i>Sell v. United States</i> , 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003)	31, 36
<i>Stanley v. Illinois</i> , 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)	32
<i>United States v. Brooks</i> , 750 F.3d 1090 (9 th Cir. 2014).....	31
<i>United States v. Hernandez-Vasquez</i> , 513 F.3d 908 (9 th Cir. 2007).....	36, 37
<i>United States v. Williams</i> , 356 F.3d 1045 (9 th Cir. 2004).....	19, 36, 37

TABLE OF AUTHORITIES

	Page
FEDERAL CASES, continued	
<i>Veronia School Dist. 47J v. Acton</i> , 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)	23
<i>Washington v. Harper</i> , 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) ...	18, 20, 31
RULES, STATUTES, AND OTHERS	
Laws of 1973	21
Laws of 1989	22
RCW 71.05	5, 12, 17, 20, 36
RCW 71.05.020	28
RCW 71.05.215	22, 28, 29
RCW 71.05.217	20, 22, 23, 27, 29, 34, 35, 37
RCW 71.05.240	28
RCW 71.05.320	18, 20, 21, 22
U.S. Const. Amend. I	4, 18, 19
U.S. Const. Amend. XIV	2, 18, 19, 25
Wash. Const. art. I, § 3	2, 18, 25
Wash. Const. art. I, § 5	2, 19
Wash. Const. art. I, § 7	2, 19

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.

V.S., an elderly, obese, diabetic was admitted to Western State after being released from Saint Clare Hospital on grounds that she was gravely disabled and unable to meet her own health and safety needs. Six months after her admittance to Western State the hospital petitioned for forced antipsychotic medication. V.S. was diagnosed with dementia and symptoms of unspecified psychotic disorder, rule out minor cognitive disorder, delusional disorder by history. Antipsychotic medications increase mortality in geriatric patients with dementia and can exacerbate diabetes.

The State claimed that it was justified in drugging V.S. because she refused to submit to blood sugar level testing, refused insulin, which could be life threatening. V.S. explained she did not want to take insulin and antipsychotic medications for health reasons. The “compelling” interests found by the trial court were

neither sufficiently important to justify the extraordinary intrusion on V.S.'s rights nor supported by the State's evidence.

The court's order authorizing the administration of antipsychotic drugs over V.S.'s objection violated her constitutional rights and this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. In violation of V.S.'s due process rights under the Fourteenth Amendment and Wash. Const. art. I, § 3, the trial court erroneously authorized the State to forcibly drug V.S. in the absence of sufficient evidence of a compelling State interest.

2. In violation of V.S.'s due process rights under the Fourteenth Amendment and Wash. Const. art. I, §§ 3, 5, and 7, the trial court erroneously authorized the State to forcibly drug V.S. in the absence of sufficient evidence that it was both necessary and effective to further the State's interest.

3. The trial court's December 28, 2017 order was invalid because it failed to adequately limit the State's discretion. CP 72-75.

4. The trial court's March 1, 2018 order was invalid because it failed to adequately limit the State's discretion. CP 198-

201.

5. The trial court erred in entering Finding of Fact 4 following the December 28, 2017 hearing. CP 72-75.

6. The trial court erred in entering Finding of Fact 4 following the March 1, 2018 hearing. CP 198-201.

7. The trial court erred in entering Finding of Fact 5 following the December 28, 2017 hearing. CP 72-75.

8. The trial court erred in entering Finding of Fact 5 following the March 1, 2018 hearing. CP 198-201.

9. The trial court erred in failing to limit the State's discretion in Conclusion of Law 10 following the December 28, 2017 hearing CP 72-75.

10. The trial court erred in failing to limit the State's discretion in Conclusion of Law 10 following the March 1, 2018 hearing CP 198-201.

11. The trial court erred in failing to limit the State's discretion in the Order under section "11" following the December 28, 2017 hearing. CP 72-75.

12. The trial court erred in failing to limit the State's discretion in the Order under section "11" following the March 1,

2018 hearing. CP 198-201.

13. The trial court erred in denying V.S.'s motion to revise the order forcing medication where the state failed to prove that forced medication was necessary and effective, the least restrictive alternative and where the court did not limit the state's ability to use any dosage it chose.

Issues Presented on Appeal

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) V.S. refuses to take insulin which may create self-harm; (2) there exists a risk of severe deterioration in V.S.'s routine functioning, and (3) V.S. will likely be detained longer and at increased public expense without treatment. Should this Court reverse because these interests were not important enough to justify the extraordinary infringement of V.S.'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 V.S. and that the administration of antipsychotic drugs was both necessary and effective to further those interests. Where V.S. had been committed under RCW 71.05, and the State's only evidence in support of its petition was that V.S. continued to suffer from delusions, grandiosity, maintains that she has never taken antipsychotic medications, believes she has superior intelligence, and refuses diabetic medication in favor a dietary restrictions, is reversal required because the State failed to satisfy its burden?

3. 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?

C. STATEMENT OF THE CASE

V.S. does not challenge her commitment; she only challenges the state's forcibly drugging her against her will. RP 42. V.S. was committed under the provision for grave disability on grounds that she could not meet her health and safety needs. CP 13; RP 56. In April 18, 2017, V.S. began refusing some medications

for blood pressure, but asked for diabetic medications she was not provided. CP 32-36; RP 43-44.

In April 2017, Dr. Deborah Sanchez, a psychologist, testified that V.S. has a neurocognitive disorder (dementia), and that V.S. requested anti-depressants, but declined diabetic medications. RP 53, 55, 128.

In September 2017, Dr. Noor petitioned to force V.S. to take antipsychotic medications based on:

Patient has been demonstrating grandiose delusion, elevated and expansive mood, increased irritability, threatening and accusing staffs and providers, verbally and at times physically aggressive behavior towards staff during care, patient is in wheel chair and Patient requires 3-4 staff care for ADL's, peri-anal care to prevent infection/bed-sore/skin break down, patient has poorly controlled DM-II. 2. Respondent has been suffering from; Neurocognitive. Disorder, Unspecified; Delusional disorder-grandiose_ type, a mental disorder, (Provisional Diagnosis at WSH). This patient received diagnosis of psychosis, with mixed delusional and bizarre content of thought, grandiose, and disjointed, History of conversion disorder, anxiety, depression, posttraumatic stress disorder (PTSD), opiate use disorder, panic disorder from _Saint Claire (Transferring Facility) diagnosed by Cora Krouse, PA-C and cosigned by Bhavana Bhanot, MD dated 4/14/17.

...

d.[.x] Respondent has recently threatened, attempted or caused serious harm to others. Treatment with antipsychotic medication will reduce the likelihood that she will cause serious harm to others; failure to treat the Respondent with antipsychotic medication may result in the likelihood of serious harm or substantial (further) deterioration. According to administrative report of incident dated 8/7 /17, Patient " scratched right forearm of male staff and also postured to hit the other arm. She attempted to scratch and kick the other female staff when changing her attends. Male staff sustained superficial scratch on his dorsal side of right forearm".

Patient stopped taking Antipsychotic-Olanzapine on her own account, persistently threatening this petitioner for "Lawsuit", patient stated she would hire best malpractice attorney. Patient is cursing and yelling at other staffs/peers.

c. [[.8J] Respondent has suffered or will suffer a severe deterioration in routine functioning resulting in serious harm if she does not receive such treatment. Failure to treat the Respondent with antipsychotic medication may result in (further) substantial deterioration.

CP 51-56; RP 120-21. The trial court denied the September motion because the State failed to meet its burden of proof by clear cogent and convincing evidence. CP 64.

In December 2017 the State again petitioned for forced medication and Dr. Jamie Stevens, a psychiatrist testified that V.S. has a diagnosis of "unspecified psychotic disorder, rule out minor

cognitive disorder, delusional disorder by history “. RP 113. She further explained that V.S. has “borderline traits, and major depressive disorder by history,” but is not diagnosed with schizophrenia. RP 112-13. The court granted the motion. CP 72-75. The State again petitioned for forced medication in April 2018, and the court granted the motion in March 2018. CP 198-201.

a. December 28, 2018 Hearing/Order

After a number of several minute meetings where V.S. was not cooperative, Dr. Steven’s identified V.S. as suffering from the same ailments: “unspecified psychotic disorder, delusional disorder by history, rule out minor cognitive impairment, borderline traits, major depression by history, all mental disorders”. CP 65-70. Dr. Steven’s determined that forcing antipsychotic medications was the “lesser of evils”. RP 133.

V.S. presented as clean and appropriately dressed, and was not combative with peers. RP 134-35. Based on the multiple few minute interactions with V.S., Dr. Steven’s opined that “the psychosis has become more acute than the neurocognitive disorder at this point in that it is what is more likely to cause death at this time.” RP 137.

Dr. Stevens stated that V.S. had become more aggressive and she refuses medications which can be harmful to V.S. health due to her diabetes. CP 65-70. Dr. Stevens indicated that V.S.'s delusions and illogical thought processes are long standing and require medication to organize her thoughts. Id.

V.S. clearly expressed her desire not to take antipsychotic medications. RP 142. Consistent with the doctors explanations of the dangers of antipsychotic medications, V.S. explained that the antipsychotic medications are too dangerous for elderly patients with dementia and diabetes because of the heightened risk of gastrointestinal bleeding, hyperglycemia and escalated risk of death. CP 77-85.

Dr. Stevens believed that antipsychotic medication would be effective in addressing V.S.'s refusal to take diabetic medications. RP 114, 123-24. Dr. Steven's also agreed that antipsychotic medications exacerbate diabetes, cause sedation, low blood pressure, and increase the risk of mortality. RP 115, 129. Dr. Steven's believed that psychotherapy would also be a beneficial treatment for V.S. RP 119.

Dr. Steven's opined that generally:

Untreated diabetes can lead to an elevated hemoglobin A1C, cause glycosylated proteins in her blood, which she already has. Those are -- those can directly result in, like I said, loss of vision, loss of limb, worsening neuropathy, kidney (inaudible).

RP 118. Dr. Stevens also testified that without forced drugging, V.S. would substantially prolong her stay at Western State. Id.

The court ordered forced medication:

the refusal of both the finger sticks and the insulin is likely to be life threatening, and that is reason, I believe, that -- I will order the antipsychotic medications as requested in the petition; however, I will not require olanzapine without a further hearing.

RP 151-52. The court also based the order on the possibility that V.S. "will suffer a severe deterioration in routine functioning that endangers respondent's health...", "Respondent will likely be detained for a substantially longer period of time, at increased public expense..." CP 72-75, 198-201.

The court's December 28, 2017 order provides in relevant part:

- 4. Reasons for the Use of Antipsychotic Medication.** The Petitioner has a compelling interest in administering antipsychotic medication to the Respondent for the following reasons:

- [X] 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; (ISSUES WITH PHYSICAL HEALTH INCLUDING DIABETES WHICH IS ALREADY GETTING SEVERE). Respondent believes that she has a special condition because she is from the British Isles that will cause her to break out in boils from having certain diabetes treatment(s). Is refusing her glucose shots (refused 24 of 28 doses of insulin). Refuses finger sticks for blood glucose. Mostly caused by delusion(s).
- [X] Respondent has suffered or will suffer a severe deterioration in routine functioning that endangers Respondent's health or safety if he/she does not retrieve such treatment, as evidenced by Respondent's past behavior and mental condition while he/she was receiving such treatment;
- [X] Respondent will likely be detained for a substantially longer period of time, at increased public expense, without such treatment.
5. [X] Other: If medication is administered then she is likely to make more rational decisions, particularly about her medical situations. If not administered she is likely to have serious health concerns, including death. Physical health has already deteriorated to point of starting to affect her.
- [x] They are more likely to prolong the length of commitment for involuntary treatment;

CP 72-75.

b. January 26, 2018 Hearing/Order

V.S. petitioned for reversal of this order. CP 77-94. V.S. explained she would treat her diabetes with diet rather than medications if the hospital provided appropriate food choices. RP 143-44.

V.S. argued that the medication override was not in her best interest because of the increased risk in mortality in elderly patients with her medical issues. RP 6 (1-26-18). V.S. also argued that the state failed to meet its burden of proof under RCW 71.05 and "*LaBelle*, 107 Wn.2d 196, 207"¹ because the State did not establish that a change in behavior to support the change in diagnosis because the symptoms of psychosis remained the same. RP 9-12 (1-26-18). Counsel reminded the court of the standard:

This is referring to the Prong B, "escalating loss of cognitive or volitional control," and a person is unable to care for her essential safety and health needs. "Because RCW 71.05 incorporates medical terminology, a decision to commit under this standard may involve more a medical decision than a legal one. Consequently, there is a danger that excessive judicial deference will be given to the opinions of mental health professionals, thereby effectively insulating the commitment recommendations from

¹ *In re Detention of LaBelle*, 107 Wn.2d 196, 728 P.2d 138 (1986).

judicial review. Accordingly, it is particularly important that the evidence provide a factual basis for concluding that an individual manifests severe deterioration in routine functioning. Such evidence must include recent proof of significant loss of cognitive or volitional control."

RP 11-12 (1-26-18).

The court denied the motion for revision to stop the forced drugging and suggested that if V.S. did not take the antipsychotic medications it would be her demise. However counsel pointed out that V.S. had not taken those medications for 7 months and she was still quite alive. CP 163, 198-201; RP 10, 13 (1-26-18). In ruling for forced drugging, the court provided: "I agree that the constellation of symptoms is pretty much consistent. I don't agree that they're not getting greater. I have not been provided sufficient documentation to make that determination." RP 8 (1-26-18).

The court also ordered side-effect medication, which V.S. challenged as not authorized by statute, as well as a lack of jurisdiction to force diabetic treatment. RP 4-5 (1-26-18).

c. March 1, 2018 Hearing/Order

In February 2018, for the third time, the State again petitioned for an additional 180 days of forced drugging of V.S. CP

183-88. The petition alleged that V.S. suffered from schizoaffective disorder NOS. Id. Dr. Maya Kumar who had only meet V.S. two weeks earlier testified that in general:

high blood sugar is detrimental to their physical health. And if it continues even, I suppose, go into coma or something like that. But persistent high blood sugar is detrimental, and that's why treatment is indicated. You can get, what is it, infections that may proceed -- cause more complications. There may be other issues that may arise.

RP 198-201. Dr. Maya Kumar testified that the court should require forced antipsychotic medications because V.S. would stop taking the medications and

If it's not administered, her condition would revert back to what it was before where she would be totally uncooperative; she was not allowing the nurses to draw her blood, administer insulin. She was throwing things, many times the food tray because she didn't like the food.

RP 199. Dr. Kumar also testified that V.S.'s blood sugar had stabilized since the forced medication order but also that V.S. was voluntarily taking her medication. RP 201, 205-06.

V.S. indicated that she wants to live independently, can obtain SSI and Medicaid, and both wants and needs assistance on discharge. RP 179-81. V.S. is also able to hire someone to drive

her car to take her necessary appointments. RP 182. V.S. agreed that she would continue to take her thyroid and blood pressure medicine and that she was able to self-test for blood sugar and understands the proper diet to manage her diabetes. RP 183. V.S. explained that she does not want to take antipsychotic medications because they make her feel dull and sedated. RP 185. V.S. is also capable of managing her own finances. RP 183.

Following this hearing, the court again entered a finding that V.S. is gravely disabled and again ordered forced antipsychotic medications. CP 198-201; RP 192-93.

I find that not only is [V.S.] psychiatric health, but also her medical health is critical, and I find that her compliance with her diabetic care improved consistent with when she began taking the antipsychotic medication. And based on the evidence, I find that it's more likely than not that [V.S.] will decompensate if she does not continue to take the risperidone, and that her detention at Western State will likely be much longer than it ordinarily will be, and I am going to approve this petition.

RP 207.

The March findings and order provide in relevant part:

4. **Reasons for the Use of Antipsychotic Medication.** The Petitioner has a compelling interest in administering antipsychotic medication to the Respondent for the

following reasons:

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;

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.

5. Less Effective Alternatives. Antipsychotic medication is a necessary and effective course of treatment for the Respondent, as evidence by Respondent's prognosis with and without this treatment and the lack of effective alternative courses of treatment. The alternatives are less effective than medication for the following reasons:

x They are more likely to prolong the length of commitment for involuntary treatment;

Conclusions of Law

The Court makes the following:

9. Jurisdiction. The Court has jurisdiction over the person and subject matter of this Petition.

The Respondent may be involuntarily treated with antipsychotic medication and side effect, medication at clinically appropriate levels over his/her objections and over his/her express refusal for the period of the current involuntary treatment order, and any interim period during which he/she is awaiting trial or hearing on a new petition for involuntary treatment or involuntary medication.

Order

The Court orders that:

Antipsychotic Medication. The petitioner, and Western State Hospital are hereby authorized to administer:

Antipsychotic medications as requested in the Petition RISPERSIDONE (oral) and RISPERSIDONE CONSTJ\ (IM) and side effect medications at clinically appropriate levels to the Respondent over his/her objections and over his/her express refusal.

12. Duration:

Respondent is detained pursuant to RCW 71.05. Petitioners are authorized to administer antipsychotic medications to the Respondent for the period of the current involuntary

treatment order, and any interim period during which the Respondent is awaiting trial or hearing on a new Petition for Involuntary Treatment or Involuntary Medication. If a succeeding involuntary treatment order is entered pursuant to RCW 71.05.320(1), a person who refuses to consent to the administration of antipsychotic medication shall be entitled to a new evidentiary.

CP 198-201. This timely appeal follows. CP 167-68.

D. ARGUMENT

1. IN VIOLATION OF THE DUE PROCESS CLAUSE AND THE FIRST AMENDMENT, THE TRIAL COURT AUTHORIZED THE STATE TO FORCIBLY DRUG V.S. 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; 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 her right to produce ideas. *State v. Hernandez*, 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; 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). 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 of the Washington Constitution.” *State v. Farmer*, 116 Wn2d 414, 429, 805 P.2d 200 (1991) (analogizing forced HIV testing to forced electroconvulsive) (citing *In re Coyler*, 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 501 (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, as V.S. seems to have been here (record silent-notes “71.05”), she 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 71.05.217 (originally codified as

RCW 71.05.320) 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. *9 Sess., ch. 142, § 42; see also *In re Detention 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.” *Schuoler*, 106 Wn.2d at 508. The State was required to satisfy its burden by clear, cogent, and convincing evidence. *Schuoler*, 106 Wn.2d at 510. The court also held the trial court must consider the patient’s desires before ordering treatment. *Schuoler*, 106 Wn.2d 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:

7) Not to consent to the administration of antipsychotic medications beyond the hearing conducted pursuant to RCW 71.05.320(4) or the performance of electroconvulsant therapy or surgery, except emergency lifesaving surgery, unless ordered by a court of competent jurisdiction pursuant to the following standards and procedures:

(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.

The balance of RCW 71.05.217(7) provides in relevant part:

(f) Antipsychotic medication may be administered to a nonconsenting person detained or committed pursuant to this chapter without a court order pursuant to RCW 71.05.215(2) or under the following circumstances:

(i) A person presents an imminent likelihood of serious harm;

(ii) Medically acceptable alternatives to administration of antipsychotic medications are not available, have not been successful, or are not likely to be effective; and

(iii) In the opinion of the physician, physician assistant, or psychiatric advanced registered nurse practitioner with responsibility for treatment of the person, or his or her designee, the person's condition constitutes an emergency requiring the treatment be instituted before a judicial hearing as authorized pursuant to this section can be held. Id.

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).

c. The trial court did not provide sufficient evidence of a constitutionally compelling interest in forcibly drugging V.S.

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. *Veronia 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 *Muns 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.” *Schuoler*, 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.

Schuoler, 106 Wn.2d 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”. The first finding is not supported by substantial evidence in the record and two other findings do not

satisfy the constitutional standard.

[x] 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.

[x] 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;

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

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

- i. The first finding is not supported by the record: The State presented insufficient evidence for the court's findings that V.S. threatened self-harm.

Even if the interests found by the trial court were important enough to justify forcibly drugging V.S., the burden was on the State to prove by clear, cogent, and convincing evidence that the interests were present in V.S.'s case. *Schuoler*, 106 Wn.2d at 510; U.S. Const. Amend. XIV; art. I, § 3. An evaluation of the evidence demonstrates that by April 2017, V.S. stopped taking her insulin,

yet continued to function without suffering any life-threatening incidents. CP 20, 32-36. The court recognized this fact when it denied the State's first motion to forcibly drug V.S., finding and concluding that the State failed to meet its burden of proof. CP 32-36.

V.S.'s behavior did not worsen from the first petition for medication that was denied. By the time of the motion to reverse the order for forcibly drugging V.S., she was not combative, and she was well presented in dress. RP 134-35 During that hearing, for the first time, Dr. Steven's opined in a vacuum that V.S. "psychosis has become more acute than the neurocognitive disorder at this point in that it is what is more likely to cause death at this time." RP 137. However, V.S. was never diagnosed with psychosis and the court specifically agreed that V.S. behavior had not changed or deteriorated since the earlier petitions and "there was a rule out diagnosis of psychosis even when the primary diagnosis was dementia" RP 14 (1-26-18).

The court denied the motion to reverse the forced drugging despite its awareness of the serious life-threatening risks the antipsychotic medication could pose to V.S., believing that it was

the lesser of evils and necessary to protect V.S.'s health even though there was insufficient testimony that her life was in danger from the refusal to take insulin. RP 6, 14-15 (1-26-18).

Under RCW 71.05.217(7)(b), the State did not meet its burden of proof on the first finding because the evidence demonstrated that while generically taking diabetic medicine was the doctor's choice, there was insufficient evidence that V.S. would suffer self-harm by abstaining. Dr. Kumar, who had only encountered V.S. two weeks earlier, testified that generically high blood sugar is detrimental to a person's health and can result in "infections", "complications", "or other issues may arise". RP 201. These generic possibilities do not rise to the level of clear cogent and convincing evidence of a "compelling state interest" that without the medication V.S. will suffer harm.

The extremely limited evidence presented by the State does not support the court's finding that V.S. "has suffered or will suffer a severe deterioration in routine functioning that endangers [her] health or safety." CP 72-75, 198-201. The evidence showed only that V.S. blood sugar was elevated. RP 118. The evidence did not show by clear, cogent and convincing evidence that V.S. is at

serious risk of self-harm.

ii. Second finding insufficient to establish “compelling State interests”.

The second finding was provided as boilerplate language in the order. CP 72-75, 198-201. 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. RCW 71.05.240(3)(a).

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).

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)).

The state must prove that V.S. is incapable of self-care if released, a fact it could not establish by clear, cogent and convincing evidence where V.S.’s uncontroverted testimony provided that she had resources, the concern, desire and wherewithal to attend to her basic health and welfare. RP 143-44, 179-85.

V.S. specifically explained: she would treat her diabetes with diet rather than medication; she wants to live independently; she can obtain SSI and Medicaid; and both wants and needs assistance on discharge. RP 179-81. V.S. is also able to hire someone to drive her car to take her necessary appointments, she would continue to take her thyroid and blood pressure medicine and she is able to self-test for blood sugar and understands the

proper diet to manage her diabetes. RP 183. V.S. explained that she does not want to take antipsychotic medications because they make her feel dull and sedated. RP 143-44, 179-85.

The finding that V.S. deteriorating behavior presented a risk of serious harm to herself or other was not supported by clear, cogent and convincing evidence and the remaining factors did not constitute an interest sufficiently compelling to forcibly drug her. *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. *Schuoler*, 105 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. *Robinson*, 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 224-25; *Sell v. United States*, 539 U.S. 166, 179-81, 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. *Harper*, 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." *Harper*, 494 U.S. at 227. Where the State seeks to forcibly drug an individual like V.S., 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. *Id.*

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

In addition, because this interest does not 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. 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) (*abrogated on other grounds in Maytown Sand and Gravel, LLC v Thurston County*, ___ Wn.2d ___, 423 P.3d 223, 249 (2018)).

- iii. The third factor: 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); (*additional citations omitted*)). As the United States Supreme Court explained, “the Constitution recognizes higher values than speed and efficiency.” *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S.Ct. 1208, 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.

Finding that V.S. 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 her with antipsychotic drugs. This Court should reject the trial court’s finding that continued detainment at increased costs constitutes a compelling State interest. CP 72-75, 198-201.

- d. 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. CP 72-75, 198-201. This was not supported by the State’s limited evidence at the hearing. The testifying psychiatrist offered nothing other than her opinion that the drugs were “necessary and effective” but V.S. remained physically and mentally unaltered during her year-long involuntary commitment. RP 14 (1-26-18). The State did not demonstrate V.S.. had previously responded well to antipsychotics, nor did it show such an extraordinary measure was necessary. 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)

- e. 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:

the refusal of both the finger sticks and the insulin is **likely** to be life threatening, and that is reason, I believe, that – I will order the antipsychotic medications as requested in the petition; however, I will not require olanzapine without a further hearing.

(Emphasis added) RP 151-52.

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, 11-12, 320 P.3d 705 (2014) (citing *In re Welfare of Sego*, 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 that forced drugging was only “likely” rather certain to further a compelling state interest. CP 72-75, 198-201. V.S. 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 based on only the possibility that drugging would further a compelling state interest, it erred by using a standard less than clear, cogent, convincing evidence.

- f. 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 72-75, 198-201. 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.

(Emphasis added) *Hernandez-Vasquez*, 513 F.3d 908, 916-17 (9th Cir. 2007).

The trial court's order authorized the State to administer "antipsychotic medications" for the "period of the current involuntary treatment order". CP 72-75, 198-201. The court's order identified Risperidone (oral) and Risperidone CONSTA (IM) but did not identify the maximum dosage. CP 72-75, 198-201.

Hernandez-Vasquez involved a *Sell* order, which permits the forcible drugging of an individual in order to restore the person's competency, but the same requirements should apply in the RCW 71.05 context. *Sell*, 539 U.S. at 181; *Williams*, 356 F.3d at 1056. The Ninth Circuit in *Williams*, ordered an individual to take an

antipsychotic drug as a condition of sentencing, but required specific “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 not to be forced to take any dosage of antipsychotic medications without limitation. This Court should require the trial court to meaningfully limit the State’s discretion to a maximum dosage delegated pursuant to *Hernandez-Vasquez*, and *Williams*. *Hernandez-Vasquez*, 513 F.3d at 916-17; *Williams*, 356 F.3d at 1056. Because the trial court failed to adequately circumscribe the psychiatrist’s discretion regarding dosages, the order should be vacated.

g. 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.

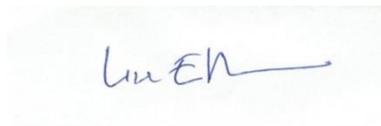
This Court should reverse.

E. CONCLUSION

This Court should reverse the order forcing medication and vacate the supporting findings because the State did not present sufficient evidence to support a compelling State interest to forcibly drug V.S. In addition, the Court should reverse because the State failed to meet its burden to prove a compelling interest 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.

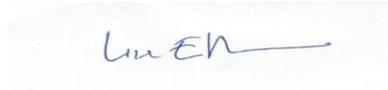
DATED this 4th day of September 2018.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Office of the Attorney General at shsappealnotification@atg.wa.gov and V.S., c/o Western State Hospital, 9601 Steilacoom Blvd. S.W., Lakewood, WA 98498 a true copy of the document to which this certificate is affixed on August September 4, 2018. Service was made by electronically to the AAG and V.S. by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

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