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R/S

NO. 86234-6

SUPREME COURT OF THE STATE OF WASHINGTON

CLINTON MORGAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

**RESPONSE TO BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON**

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I. ARGUMENT

A. Article I, Section 10 Was Not Implicated By The Procedural Discussion In Chambers

This Court has held that “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). To determine whether a closure that triggers the public trial right occurred, the Court applies the experience and logic test. *Id.* at 72; Const. art. I, § 10.

Morgan cannot meet his burden to show that the procedural discussion at issue in this case meets both parts of the test. *In re Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013). Historically, discussions between the judge and counsel addressing only the framework for a later public proceeding have not necessarily been open to the public. In addition, the goal of enhancing fairness by allowing public scrutiny would not be served by requiring procedural discussions that are not akin to any aspect of trial to be opened.

1. The type of discussion at issue has not traditionally been in open court

The amicus American Civil Liberties Union of Washington (ACLU) contends that because sexually violent predator (SVP) trials have traditionally been open to the public, Morgan satisfied the first element of

the experience and logic test. Amicus Br. at 7. This oversimplification of the experience factor conflicts with this Court's enunciation of the test in *Sublett*. In *Sublett*, the Court considered whether the right to public trial was violated in a criminal case when the trial judge responded to a jury question in chambers, with only counsel present. *Sublett*, 176 Wn.2d at 77. The extensive history of open criminal trials was not determinative. Rather, the Court examined this specific aspect of the proceedings, and considered "whether the place and process have historically been open to the press and general public." *Id.* at 73 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The Court held that proceedings involving juror questions or instructions in criminal trials "have not necessarily been conducted in an open courtroom." *Sublett*, 176 Wn.2d at 75. Therefore, the Court concluded that the discussion in chambers did not satisfy the experience factor. *Id.* at 77.

As in *Sublett*, the fact that SVP commitment trials are open to the public is not determinative. The question is whether procedural discussions in chambers, with only counsel and a guardian ad litem present, have traditionally been open to the public. The ACLU and Morgan provide no historical information or citations to show that such discussions, or comparable procedural discussions, have traditionally been

open. To the contrary, there is no history of restricting judges in conducting conferences in chambers, if the conferences are distinct from the trial proceedings. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Brennan, J., concurring). The discussion in chambers only established a framework for the later taking of evidence, adversarial argument, and decision. Like comparable side bar discussions, status updates, and procedural disputes regarding depositions, this type of procedural discussion has not necessarily been held in open court.

2. The logic factor is not satisfied because the public would not have enhanced the fairness of the discussion

The logic element of the experience and logic test is satisfied if “public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enter. Co. v. Sup. Ct.*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). A meeting in chambers to discuss procedure does not offer a significant positive role for the public.

Contrary to the ACLU’s contention, the procedural discussion at issue in this case did not offer the public the ability to “[ensure] that forcible medication was not abused” or oversee deprivation of liberty in the sexually violent predator commitment process. Amicus Br. at 8. The discussion in chambers did not address any substantive issues. The trial

court discussed only the procedure to be used in addressing the request for involuntary medication. The State did not take a position on involuntary medication, provide any testimony, or offer evidence. It simply asked the court to allow the parties to submit, at a later date, a declaration or testimony addressing whether involuntary medication would be appropriate. RP (Aug. 30, 2006) at 28-29. The guardian ad litem did not offer an opinion of whether involuntary medication should be ordered either, and asked for the opportunity to meet with Morgan and Morgan's treating psychiatrist to determine whether medication would be in Morgan's best interest. RP (Aug. 30, 2006) at 31-32. There simply is nothing a member of the public could have added to this discussion.

Like the discussion at issue in *Sublett*, the procedural meeting at issue in this case was "not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." *Sublett*, 176 Wn.2d at 77. The appearance of fairness was satisfied because the testimony, adversarial argument, and court decision were all part of the open court proceedings. Therefore, the testimony, adversarial argument, and decision were all "part of the public record and subject to public scrutiny and appellate review." *Id.*

The discussion at issue is readily distinguishable from the action taken in *State v. Jones*, 175 Wn. App. 87, 303 P.3d 1084 (2013).¹ In *Jones*, alternate jurors were selected by the court clerk, off the record, during a court recess. *Id.* at 95. The Court of Appeals determined that historically, selection of alternate jurors has occurred in open court “at the same time and in the same way as voir dire.” *Id.* at 97. Therefore, it concluded that the closure met the experience element of the test. In addition, the Court of Appeals held that the logic element was satisfied. Although the trial court repeatedly stated that it would randomly draw the alternate jurors, the drawing was held by a staff member during a court recess. *Id.* at 102. The court held that closure of this aspect of the jury selection process caused “serious questions regarding the overall fairness of the trial.” *Id.*

In sharp contrast to the alternate juror decision in *Jones*, the discussion at issue in this case did not impact the trial in any way. The procedural discussion occurred years prior to the trial. More importantly, unlike the juror decision made in *Jones*, the discussion in chambers addressed only the procedure for allowing more testimony. The ACLU is incorrect in contending that the in-chambers meeting “involved the

¹ The State believes *Jones* was not correctly decided and will be filing a petition for review. Even if correctly decided, the *Jones* opinion supports neither amicus ACLU nor Morgan because it is readily distinguishable from the present case.

presentation, if not the ‘resolution,’ of disputed facts.” Amicus Br. at 12. When factual and opinion testimony was provided and a decision was made resolving the issue, it was done on the open record, subject to public oversight. CP 71, 78, 81. Since holding the procedural discussion in open court would not have furthered the values served by public trial, Morgan has not met the logic element of the experience and logic test. The public trial right was not implicated and a closure did not occur.

3. Even if article I, section 10 applied, Morgan waived his ability to raise it and cannot show a manifest error

The ACLU contends that if a closure occurred in violation of article I, section 10, Morgan’s right to be present as a member of the public was violated and the Court is required to order a new trial.² Amicus Br. at 11. In support of this contention, the ACLU cites *State v. Wise*, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012). *Wise* is not applicable to this case. In *Wise*, the Court held that a failure to object will not waive a criminal defendant’s right to public trial under article I, section 22. *Id.* at 15. The Court explained that closure of a criminal trial is a structural error, and “[w]here there is a structural error ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence’” *Id.* at 14. Sexually violent predator trials are not

² There is no contention that Morgan had a right to be present other than his general right under article I, section 10, as a member of the public.

criminal cases. Therefore, the rights provided to criminal defendants by article I, section 22 are not applicable. *E.g.*, *In re Det. of Strand*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009); *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007).

Application of structural error analysis outside the criminal context was “explicitly rejected” by five Supreme Court justices in *In re Det. of D.F.F.*, 172 Wn.2d 37, 256 P.3d 357 (2011). *Saleemi v. Doctor’s Assoc., Inc.*, 176 Wn.2d 368, 385-86, 292 P.3d 108 (2013) (citing *In re D.F.F.*, 172 Wn.2d at 48). In *D.F.F.*, the lead opinion, signed by four justices, stated that Superior Court Mental Proceedings Rule 1.3 created an unconstitutional presumption that the entire civil commitment trial is closed to the public. *In re D.F.F.*, 172 Wn.2d at 47. Five justices rejected the application of structural error analysis to a civil commitment trial. Justice J.M. Johnson concurred with the result, but stated that it is improper to invoke “*criminal* cases discussing the rights of *criminal defendants*” under article I, section 22, and apply structural error analysis in a case involving a civil defendant, under article I, section 10. *Id.* at 48 (J.M. Johnson, J., concurring in result); *see also id.* at 49 (Chambers, J., concurring in result only).³ As Chief Justice Madsen explained, a civil

³ Justice Chambers’ concurrence did not specifically address the structural error analysis. Any ambiguity regarding his opinion was removed by the decision in *Saleemi*, which Justice Chambers authored. *Saleemi*, 176 Wn.2d 368.

litigant cannot “have it both ways” by failing to object to a closure and then raising it on appeal “in hopes of obtaining a more favorable result.” *In re D.F.F.*, 172 Wn.2d at 50 (Madsen, C.J., Fairhurst, J., and C. Johnson, J., dissenting). Such a result “departs from longstanding principles of fairness and finality by permitting a litigant two bites of the proverbial apple.” *Id.*

Although structural error is not applicable outside the criminal context, the courts are still able to provide relief on appeal if there is a manifest error affecting a constitutional right. Pursuant to RAP 2.5, a new issue may be raised if there was a manifest error that constituted “actual prejudice” and had “practical and identifiable consequences in the case.” *State v. Schaler*, 169 Wn.2d 274, 282-84, 236 P.3d 858 (2010). Since the discussion involved only the procedure for taking evidence at a later date, Morgan cannot show that the in-chambers discussion had any consequences in the outcome of his trial.

B. Due Process Does Not Require Restoration Of Competency Before Committing Sexually Violent Predators

Due process does not require that mentally incompetent persons be restored to competency before being civilly committed under RCW 71.09 or RCW 71.05. The applicable test for determining what process is due is found in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d

18 (1976). The Court considers three distinct factors: (1) the private interest affected; (2) the risk of erroneous deprivation through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Mathews*, 424 U.S. at 335. Although the first factor weighs in Morgan's favor, the second and third factors weigh heavily in the State's favor.

1. There is no due process value in swapping the tighter procedural safeguards under RCW 71.09 for the lesser safeguards for civil commitment under RCW 71.05

The ACLU loosely relies on the second *Mathews* factor to argue that additional procedural safeguards can be provided by holding another trial and committing Morgan under RCW 71.05, the Involuntary Commitment Act. This argument is flawed for two reasons. First, a second trial would not address the alleged procedural deprivation. Morgan contends that his procedural due process rights were violated because he could not adequately assist his counsel in his SVP trial. Ordering a trial pursuant to RCW 71.05 will not change that. Since there is no right to restoration of competency prior to a commitment trial under RCW 71.05, Morgan would not have any increased ability to assist counsel in such a proceeding and would still be subject to a trial while incompetent.

Second, a commitment trial under RCW 71.05 would significantly *decrease* the procedural safeguards Morgan was afforded under RCW 71.09. In Morgan's SVP trial, the State had the burden of establishing beyond a reasonable doubt that Morgan is a sexually violent predator. RCW 71.09.060(1). A unanimous jury decision was required. *Id.* In contrast, under RCW 71.05, the State's burden is lowered to a clear, cogent, and convincing standard, and there is no requirement of a unanimous verdict. RCW 71.05.310. "Due process does not require that the absurd be done before a compelling state interest may be vindicated." *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003).

Instead of addressing the second *Mathews* factor and showing the probable value of additional procedural safeguards, the ACLU is asking the Court to alter the statutory scheme and require that if a sexually violent predator has an additional mental illness, he must be sent to a mental hospital rather than the Special Commitment Center. In making this argument, the ACLU improperly relies on *In re Detention of McGary*, 128 Wn. App. 467, 116 P.3d 415 (2005). In *McGary*, the State dismissed an SVP petition without prejudice, to allow treatment of McGary's florid psychosis at Western State Hospital. *Id.* at 471. After McGary's condition was stabilized, his commitment under RCW 71.05 was

dismissed and he was committed as a sexually violent predator under RCW 71.09. *McGary*, 128 Wn. App. at 473.

The Court of Appeals ruled that a recent overt act was not required to be shown prior to McGary's commitment as a sexually violent predator. *Id.* at 474. In upholding McGary's commitment under RCW 71.09, the court did not express any concern with committing McGary as a sexually violent predator, despite his history of severe psychosis. On the contrary, the court emphasized the importance of civil commitment under RCW 71.09 "for the small and dangerous group of offenders" who are deemed to be sexually violent offenders. Since a jury unanimously determined that Morgan is currently a sexually violent predator, his commitment under RCW 71.09 was appropriate. Neither *McGary* nor any other legal authority supports the contention that the State must seek commitment under RCW 71.05 if other mental illnesses are present.

2. The State has an overwhelming interest in protecting the public by committing Morgan as a sexually violent predator

The third *Mathews* factor considers the governmental interest, including costs and administrative burdens of additional procedures. As this Court repeatedly has held, "it is irrefutable that the State has a *compelling interest* both in treating sex predators and protecting society from their actions." *E.g., In re Det. of Turay*, 139 Wn.2d 379, 410, 986

P.2d 790 (1999) (citations omitted); *In re Det. of Thorell*, 149 Wn.2d 724, 750, 72 P.3d 708 (2003). The State's interests in protecting the public cannot be satisfied by using the commitment process under RCW 71.05.

The purpose and function of commitment under RCW 71.05 and RCW 71.09 is significantly different. When an individual is committed under RCW 71.05, one of the legislature's primary goals is "[t]o encourage, whenever appropriate, that service be provided within the community." RCW 71.05.010(6). This is consistent with the United States Supreme Court's ruling that the Americans With Disabilities Act requires that persons with mental disabilities be provided care in the most integrated community setting appropriate to their needs. *Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999).

Those committed under RCW 71.09 require a different form of care and a greater need for protection of the public. The legislature established the commitment process under RCW 71.09 because sexually violent predators are an extremely dangerous subset of the mentally ill who are highly likely to engage in repeated acts of sexual violence. RCW 71.09.010. "[T]he prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment

under the involuntary treatment act.” RCW 71.09.010. Because mental health hospitals “are insufficiently secure for this population,” the legislature has forbidden sexual predators from being housed, even temporarily, on the grounds of any state mental facility. RCW 71.09.060(3).

Courts across the country have held that “[t]he state’s interest in enforcing these procedures, and in protecting the public, would be substantially impaired if an alleged SVP could claim, based on his diagnosed mental disorders, that he was too incompetent to undergo a trial leading to such targeted confinement and treatment.” *Moore v. Superior Court*, 50 Cal. 4th 802, 825, 237 P.3d 530 (2010); *see also In re Commitment of Weekly*, 956 N.E.2d 634, 648 (Ill. 2011). As the Supreme Court of Massachusetts held, there is “no reason why the public interest in committing sexually dangerous persons to the care of the treatment center must be thwarted by the fact that one who is sexually dangerous also happens to be incompetent.” *Commonwealth v. Nieves*, 446 Mass. 583, 591, 846 N.E.2d 379 (2006).

In addition to the need to secure Morgan from the public, the State has a strong interest in securing sexually violent predators in a manner that protects the highly vulnerable persons committed to mental hospitals. *In re Det. of Gordon*, 102 Wn. App. 912, 920, 10 P.3d 500 (2000). Morgan’s

record demonstrates that his ongoing struggle with paraphilia and pedophilia would pose a risk to the patients at the state's mental hospitals. Morgan was convicted of multiple sexual crimes, including molestation just fifteen days after he was placed on parole for a prior offense. He has an ongoing history of violent sexual fantasies involving pedophilia, rape, sadism, and bondage. RP Vol. 2 (Aug. 07, 2008) at 174. Even during incarceration, he has engaged in sexually assaultive behavior toward his peers. *Id.* at 181.

The State has an additional public safety interest at the time a sexual predator is released from confinement. If a sexual predator is committed under RCW 71.09, the State must protect the public by providing advance notice of release to the police and to victims, witnesses, and members of the public who requested notice. RCW 71.09.140. If a sexual predator with additional mental illness was committed under RCW 71.05.020(17), patient confidentiality would prevent the hospital from providing any notice of release. RCW 71.05.630; RCW 71.05.390.⁴

⁴ State hospitals are permitted to provide notice of patient release or transfer to a less restrictive setting only if there is a decision not to file a petition for civil commitment after criminal charges are dismissed due to incompetency, or if the patient committed a felony and was civilly committed after criminal charges were dismissed due to incompetency. Laws of 2013, ch. 214; RCW 71.05.325-.340. None of these statutes would apply if Morgan were civilly committed under RCW 71.05.

Given the State's compelling public safety interests, due process is not violated by enacting a separate means of civil commitment for sexual predators.

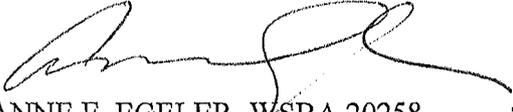
II. CONCLUSION

This case does not implicate article 1, section 10 because a closure did not occur. Even if a closure had occurred, it would not be a structural error mandating a new trial.

As courts across the country have held, there is no due process right to restoration of competency prior to the civil commitment trial of a sexual predator. Requiring a second trial under RCW 71.05 would negate the legislature's goal of protecting the public through a separate system under RCW 71.09 for committing and treating sexual predators. Since competency is not restored prior to trial under RCW 71.05, a second trial would do nothing to address the perceived deprivation of process.

RESPECTFULLY SUBMITTED this 5th day of September 2013.

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Dear Clerk:

Please find attached for filing, the State's Response to Brief of *Amicus Curiae* American Civil Liberties Union of Washington.

<<86234-6 State Response to Amicus.pdf>>

Respectfully,

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