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NO. 86234-6

86234-6

SUPREME COURT OF THE STATE OF WASHINGTON

Clinton Morgan,

Appellant,

v.

State of Washington,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. DECISION BELOW

Petitioner Morgan seeks review of the Court of Appeals' June 1, 2011, decision affirming his commitment as a Sexually Violent Predator under RCW 71.09. *In re Detention of Morgan*, 161 Wn. App. 66, 253 P.3d 394 (2011). A copy is attached as Attachment A.

II. COUNTERSTATEMENT OF ISSUES

As explained below, this Court should deny review because this case presents no issues that warrant review under RAP 13.4(b). However, if the Court were to accept review, the following issues would be presented:

- A. **Were Morgan's due process rights violated by appointing a guardian ad litem and proceeding with his SVP civil commitment hearing after a finding that he was incompetent?**
- B. **Did an order authorizing Morgan's involuntary medication, jointly requested by Morgan's attorney and guardian ad litem, violate due process?**
- C. **Is reversal of a jury verdict required where, two years prior to trial, a status conference at which no substantive decision was reached was held in chambers?**

III. STANDARD OF REVIEW

Acceptance of review of a decision of the Court of Appeals is governed by RAP 13.4(b). Although Morgan alleges that the decision below is in conflict with a decision of this Court (RAP 13.4(b)(1)), involves significant questions of law under the Constitution

(RAP 13.4(b)(3)) and presents issues of substantial public interest that should be determined by this Court (RAP 13.4(b)(4)), (Petition at 2-3) he does not demonstrate that this is in fact the case. This case involves well-settled issues of law and does not conflict with any decisions of this Court or any other appellate court. Because the issues presented in his Petition do not meet any of the specified criteria for review, this Court should deny review.

IV. COUNTERSTATEMENT OF THE CASE

Clinton Morgan is a severely schizophrenic pedophile whose history of offending against children began when he was 13 years old. *Morgan*, 253 P.3d at 396. On August 31, 2004, shortly before he was about to be released after serving a sentence for first degree child molestation, his second sexual offense, the State filed a petition seeking his commitment as a sexually violent predator pursuant to RCW 71.09. In December 2005 and January 2006, the Court held status conferences at which Morgan's counsel told the trial court that Morgan was experiencing psychotic symptoms. CP at 76. On February 23, 2006, in response to the State's motion (CP at 58) the trial court held a hearing to determine Morgan's competency for his SVP trial. Morgan's expert witness, Dr. Richard Wollert, had apparently submitted a letter indicating that he

did not believe that Morgan was competent.¹ The State's attorney indicated that the parties had agreed to set the hearing "to make sure that all protections available are afforded to Mr. Morgan" and suggested, in the event that the trial court determined that Morgan was not competent, that a guardian ad litem (GAL) be provided for Morgan "to make sure his interests are protected in this case." RP 2/23/06 at 7-8. Morgan's counsel agreed that this course of action was appropriate. The trial court, having reviewed Dr. Wollert's letter, determined that a threshold showing of incompetence had been made and expressed "very great concerns regarding the ability of Mr. Morgan to assist in [his] representation in these matters." RP 2/23/06 at 9. Morgan, speaking for himself, indicated that he had fired his attorney, who, he asserted, had been both paid off and blackmailed. The trial court explained the proceedings to Morgan at length, including the function of a GAL, RP 2/23/06 at 14. Morgan did not object to the appointment of a GAL, either through counsel or personally. Findings, Conclusions and an Order regarding Morgan's competency and providing for the appointment of a GAL pursuant to RCW 4.08.060 were entered on March 10, 2006, CP at 62-64.

¹ This fact is referenced in the State's Memorandum of Law on Competency (CP at 59-61) and at various points in the February 23 hearing (RP 2/23/2006 at 7, 8, 9, 10). The actual letter, however, does not appear to have been made part of the record.

At a status conference in June of 2006, Morgan's attorney asked that Morgan be forcibly medicated to control his behavior during the SVP proceedings. CP at 67-68. The request appears to have been made "on the basis of interactions with Mr. Morgan by counsel, the GAL, and Mr. Morgan's expert witness." CP at 68. Following that status conference, the court orally ordered that trial was continued "until Mr. Morgan has been stabilized on medication." CP at 284.

Before a written order was entered, the State brought a further motion, asking that the Court consider additional information in order to determine the propriety of involuntarily medicating Morgan. CP at 69. The matter was discussed in chambers on August 30, 2006. The trial judge, a court reporter, and the GAL were physically present; attorneys for the State and Morgan attended telephonically. Morgan was not present. The State indicated that the purpose of the motion was to determine "whether medication is the least intrusive way to protect Mr. Morgan's rights and is the most medically appropriate option at this point in time." RP 8/30/06 at 29. Counsel for Morgan indicated that if Morgan was not medicated for trial, he would be "not necessarily angry and hostile but just ranting and raving. ...It's simply not going to be a fair trial" and that, without medication, "a jury is going go to think, Well, he's so crazy, he should be locked up." RP 8/30/06 at 30. The GAL

agreed, noting that Morgan's behavior, in addition to being "disruptive," was "completely delusional." RP 8/30/06 at 31. While conceding that Morgan was "violently vehemently against any kind of involuntary medication," he explained to the court,

All I can know is that by my observations, that we have clients all the time in court that are disruptive, Your Honor, and they're not necessarily having delusional problems, but this one here is beyond disruptive. It's delusional of [sic] having just the basic sense of identity and what year and time and place in space, and I think that [Morgan's attorney] is right, is that if the jury heard that, if he was testifying and he went into that beyond disruption, they would think he's crazy and a violent predator.

RP 8/30/06 at 32. Ultimately, the trial court decided to delay ruling on the merits of the motion until it had received additional information, including a report from Morgan's psychiatrist and an update from the GAL. RP 8/30/06 at 32.

In September, the State submitted a report from SCC psychiatrist Dr. Leslie Sziebert. The report detailed Morgan's medication history over the years, noted that Morgan was not currently taking any antipsychotic medication and had not done so since April of 2005. CP at 72. The report indicated that, in the past, "[i]nvoluntary medications...appear to have helped [Morgan] with some of his aggression and florid delusional content," and that such medications "may benefit Mr. Morgan at his civil commitment trial from the standpoint of helping him curb his impulses

and inappropriate behavior.” CP at 72. The GAL also submitted a report, indicating that, when he had met with Morgan in June and August, “a significant amount of Mr. Morgan’s communication with me was delusional.” CP at 78. He noted that others had observed that treatment with a combination of antipsychotics “achieved ‘relatively good control’ of positive symptoms (hallucinations, delusions) of schizophrenia” and that, during a period at which Morgan had apparently been on antipsychotics, “Mr. Morgan’s thought form is terse and generally logical...[and] expresses no delusional content...” CP at 79. On the basis of this investigation, the GAL stated that, although aware that Morgan was opposed to involuntary medication, such medication “would be in Mr. Morgan’s best interest.” CP at 79. On December 6, 2006, the trial court entered a written order, determining that “the administration of involuntary medication will control Mr. Morgan’s psychotic symptoms, stabilize him, and render him able to function properly and assist his attorney during his trial.” CP at 82; Conclusion of Law No. 2. The court further concluded that “[t]here are no viable alternatives to involuntarily medicating Mr. Morgan” and that “[w]ithout anti psychotic medication, it is probable that Mr. Morgan would exhibit violent and problematic behavior that would be detrimental to himself and these proceedings.” CP at 82; Conclusion of Law No. 3.

On appeal, Morgan argued that commitment of a person determined to be incompetent and his “exclusion” from the August 30, 2006 in camera proceedings violated his rights to due process. In addition, he argued that the August 30 proceedings violated his right to a public hearing under Article 1, section 10 of the Washington State Constitution.² The Court of Appeals rejected these arguments and affirmed Morgan’s commitment.³ Morgan timely filed for review by this Court.

V. REASONS REVIEW SHOULD BE DENIED

This Court should deny review because Morgan has not identified any criteria meriting review. There is no conflict between the decision below and another decision of this Court that would warrant review pursuant to RAP 13.4(b)(1). Nor does this case raise any significant constitutional question or an issue of substantial public interest under RAP 13.4(b)(3) or (4). The Court of Appeals correctly determined that Morgan’s commitment while incompetent did not violate due process, and the in-chambers meeting at which the parties discussed purely legal

² An additional challenge relating to the diagnosis of Paraphilia Not Otherwise Specified was raised, but is not raised in Morgan’s Petition, and as such will not be discussed here.

³ Morgan actually filed a motion for reconsideration, resulting in minor changes to the original April 8, 2011, opinion.

matters did not violate his right to an open and public trial. This Court should deny review.

A. Civilly Committing An Incompetent Person Pursuant To RCW 71.09 Does Not Violate Due Process

Morgan argues that civilly committing an incompetent person as an SVP violates due process. The Court of Appeals correctly determined that “a respondent’s due process rights are not violated when he or she is incompetent during SVP proceedings,” *Morgan*, 253 P.3d 394 at 400. Morgan has not demonstrated that review is warranted.

In analyzing Morgan’s claimed right to competency during his SVP proceedings, the Court of Appeals began with the premise that civil commitment, because it involves a significant deprivation of liberty, implicates due process. *Morgan* at 400. The court properly determined that, given the nature of his claim, principles of procedural due process should be applied. *Id.* at 400, FN 6.⁴ In order to determine what process is due in the context of the SVP trial, the court followed this Court in *In re Stout*, 159 Wn.2d 357, 150 P.3d 86 (2007) and applied the *Mathews* test. The *Mathews* test requires the balancing of three factors: “(1) the private interest affected; 2) the risk of erroneous deprivation of that interest

⁴ Although Morgan had alternately argued both violations of substantive and procedural process below, the court noted that Morgan “couches his due process claim as a violation of his ‘opportunity to be heard’ (i.e. his incompetency prevented him from participating and being heard during his commitment hearing because of his inability to help his attorney) and we apply procedural due process principles.”

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.” *Stout*, 159 Wn.2d at 370 (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)). *Morgan* at 400. Applying these factors to Morgan’s claimed right to competency, the court concluded that, because “the *Mathews* factors weigh in favor of the State...due process does not require that a respondent be competent during any SVP proceedings.” *Id.* at 402.

The court then turned to a recent decision on this issue, *Moore v. Superior Court*, 50 Cal.4th 802, 237 P.3d 530 (2010). After quoting at length from the California State Supreme Court’s decision in *Moore*, the Court of Appeals noted that,

[t]he *Moore* court’s reasoning highlights the tension between Morgan’s claim to competency and the SVP civil commitment requirements. Namely, SVP civil commitment requires the existence of a mental illness, but is there a point where an individual becomes *too* mentally ill that he is incompetent and cannot be civilly committed? Indeed, there are likely some situations in which a person who is convicted of a sexually violent offense, and then becomes incompetent, might never regain competency for a civil commitment proceeding. We resolve this tension in a similar manner as the *Moore* court discerning no due process violations when a respondent is not competent during SVP proceedings.

Id. at 402 (emphasis in original).

Rather than identify any particular weakness in the Court of Appeals' opinion, Morgan simply cites to a variety of cases that stand for the proposition that a civil committee's loss of liberty gives rise to protections under the due process clause, a proposition that the State does not dispute. In support of his argument that due process requires he be competent during his SVP trial, for example, Morgan relies upon *People v. Allen*, 44 Cal.4th 843, 187 P.3d 1018 (2008). *Allen*, however, does not address this issue at all and as such is not helpful.

Allen concerned the right of a respondent in an SVP proceeding to testify over the objection of his attorney. The California Supreme Court, while making clear that Allen did not have the same fundamental right as a criminal defendant to testify over counsel's objection (*Allen*, 187 P.3d at 1031-32) determined that, "because commitment under the Act involves significant restrictions on liberty," (*Id.* at 1032), the claimed right to testify should be assessed in due process terms applying a four-part balancing test set forth in *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484, (1972). Applying these factors, the court determined that the respondent was entitled to testify in his SVP case over objection of counsel. *Allen* at 1037.

The question of whether an alleged SVP has a right to testify during his commitment hearing is, however, not before this Court.

Moreover, our courts have long recognized that those facing SVP commitment are entitled to due process protections because civil commitment is a significant deprivation of liberty. See e.g. *In re the Detention of Young*, 122 Wn.2d 1, 50, 857 P.2d 989 (1993). As such, there is nothing to be taken from *Allen* that is of assistance to this Court.

Far more instructive are a variety of cases from other jurisdictions, in addition to *Moore*, which both directly address the issue Morgan raises and are completely consistent with the decision of the Court of Appeals. In 2003, the Missouri State Supreme Court, in *State ex rel. Nixon v. Kinder*, 129 S.W.3d 5 (Mo. App. W.D.2003), rejected an identical claim, holding that “[s]ubjecting a suspected sexually violent predator to a statutory sexually violent predator determination, regardless of competency, is not an unconstitutional deprivation of liberty.” 129 S.W.3d at 10. Shortly thereafter, the Iowa State Supreme Court declined to extend the right to competency to SVP proceedings in *Iowa v. Cabbage*, 671 N.W.2d 442, 447 (Iowa, 2003). Citing *Kansas v. Hendricks*, 521 U.S. 346, 361-71, 117 S. Ct. 2072, 2082-86, 138 L.Ed.2d 501, 515-21 (1997), the Iowa Supreme Court noted that, “[a]s prior cases have established and this case affirms, the same concerns and concomitant protections that arise in a criminal case do not necessarily arise in the SVPA area,” and concluded “that [the

SVP] does not have a fundamental right to be competent during his SVPA proceedings.” 671 N.W.2d at 447. *See also Iowa v. Garrett*, 671 N.W.2d 497 (Iowa, 2003). More recently, the Massachusetts State Supreme Court, in *Commonwealth v. Nieves*, 446 Mass. 583, 385-86, 846 N.E.2d 379 (2006), squarely held that civil commitment of an incompetent SVP does not violate due process. Noting that “[m]inimum due process varies with context,” the court stated that, while the SVP respondent’s interest is “weighty,” that interest “must, with appropriate safeguards, yield to the Commonwealth’s paramount interest in protecting its citizens. We see 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.” *Id.*, 446 Mass. at 590. The “robust, adversary character” of the process minimizes the risk of erroneous commitment, and where the person’s condition would render the right to notice and an opportunity to be heard ineffective, “the requirements of due process may be satisfied by the appointment of counsel...” *Id.*

Morgan’s due process rights during these civil commitment proceedings were protected both by appointment of counsel, and by the appointment of a GAL pursuant to RCW 4.08.060. His GAL had “complete statutory power to represent [his] interests.” *In re Dill*,

60 Wn.2d 148, 150, 372 P.2d 541 (1962) (citing *Rupe v. Robinson*, 139 Wn. 592, 595, 247 P. 954 (1926)). Beyond citing to a variety of cases from the criminal arena and asserting that “the trial of an incompetent person is...*de facto* unfair,” (Pet. at 11), Morgan fails to explain why the court’s conclusion or analysis merits review pursuant to RAP 13.4(b). This Court should deny review.

B. The Order For Involuntary Medication Came At Morgan’s Request, Was Never Challenged, And Cannot Be Shown To Have Had An Effect On The Proceedings

Morgan next argues that this Court should “review whether the forcible medication of an incompetent person not done for the compelling reason of restoring competency violates the due process right to liberty.” Pet. at 11. Agreeing that Division II did not reach this issue, he argues that this was based “on a false construction of the record” before the court, and argues that the evidence was clear that Morgan was forcibly medicated at trial. Pet. at 12-13. He further argues that this argument was sufficiently preserved because the trial court made a “definite, final ruling” regarding forcible medication and, as such, he was entitled to rely on that ruling without again raising objections during trial. Pet. at 15. Morgan’s various arguments are without merit and should be rejected.

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1. Morgan Failed To Preserve Any Alleged Error Regarding Forcible Medication

In response to Morgan's argument that the forced medication of antipsychotic drugs during his civil commitment trial violated his due process rights, the Court of Appeals correctly determined that Morgan failed to preserve this error. *Morgan* at 403. Morgan argues that this holding conflicts with this Court's holding in *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995), and as such merits review. Pet. at 15. *Powell*, however, is inapposite. In *Powell*, the defendant, in motions in limine, objected unsuccessfully to the admission of certain evidence. 126 Wn.2d at 253-54. On appeal, in response to Powell's argument that the trial court had erroneously admitted the evidence in question, the State argued that Powell, having not objected at the time of trial, had not preserved these objections. This Court rejected that argument, holding that, because the trial court's ruling was a "definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial." *Id.* at 256.

Powell is factually distinguishable from this case and does not absolve Morgan of the need to both preserve his objection and create a record in this case. First, in stark contrast to the facts of *Powell*, the order authorizing Morgan's involuntary medication was entered at the express

and explicit request of both his attorney and his GAL, both of whom forcefully urged that such an order was essential to preserve Morgan's right to a fair trial. CP at 66-70; RP 8/30/06 at 31. By proposing, through his legal representatives, the order authorizing his involuntary medication, Morgan invited the error of which he now complains. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

While Morgan appears to believe that, by virtue of his legal representatives' having communicated his opposition to involuntary medication to the trial court, he lodged a standing objection akin to that raised by *Powell*, this argument lacks merit. First, beyond having (apparently) told his GAL and attorney that he objected to being involuntarily medicated, Morgan never objected, before, during or after trial, to the entry or enforcement of the trial court's order. Below, both his attorney and his GAL made clear that administration of involuntary medications was essential to ensure a fair trial. Morgan, who presumably knew whether he was being involuntarily medicated or not and who was present throughout his trial, never objected. Now, on appeal, and through yet another representative, Morgan argues that he should never have been medicated. At some point, in order to ensure the orderly administration of the law, the parties must be able to identify who speaks for a party, and to assume that that party will not be permitted to change his mind when the

theory he adopted at trial fails to yield the desired results. The Court of Appeals correctly determined that he had failed to preserve this error.

Likewise, the court below correctly determined that Morgan had failed to perfect the record below. *Morgan* at 403. Morgan, as the party seeking review, “has the burden to perfect the record so that, as the reviewing court, we have all the evidence relevant to the issues presented before us.” *Morgan* at 403. That record, the court noted, “does not clearly establish that Morgan was **forcibly** medicated during his SVP trial.” *Id.* (emphasis in original). While it may be true that different inferences may conceivably be drawn from the facts available, Morgan cites to no authority for the proposition that the court below was required, where no objection was lodged at the trial court and indeed where his own representatives proposed the order to which he now objects, to agree with him as to which inferences are most reasonable. After reviewing the available facts, the Court of Appeals properly determined that it would “not engage in a speculative analysis” as to this issue and denied further review. *Morgan* at 404. Morgan has not demonstrated that this determination is appropriate for review.

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C. Holding An In-Chambers Status Conference That Did Not Result In Any Substantive Decision By The Trial Court Two Years Before Trial Does Not Require Reversal Of Morgan's Civil Commitment

Morgan argues that this Court should grant review on the question of whether the August 30, 2006 chambers status conference violated his right to be present and/or his right to a public hearing pursuant to Article I, section 10 of the Washington State Constitution. Pet. at 17-18. The Court of Appeals correctly determined that Morgan had no right to attend⁵ the chambers meeting “where purely legal questions about the process of deciding a forced medication motion were discussed.” *Morgan* at 398. Beyond criticizing Division II’s conclusion as a “pat resolution” that “slights Morgan’s rights,” Morgan does not explain how the court’s analysis is flawed or why review is warranted under RAP 13.4(b). His request for review of this issue fails.

Nor did the August 30, 2006 chambers meeting violate Morgan’s public trial right. Division II correctly held that, while the right to public trial under Article I, section 10 applies to evidentiary phases of the trial as well as other “adversary proceedings,” that right “does not extend to purely ministerial and procedural matters because ‘[a] defendant does not

⁵ Morgan refers to his failure to attend this meeting as having been “excluded” from the conference. Pet. at 17. He points to nothing in the record, however, to show that he was “excluded;” rather, for whatever reason, he was simply not present.

have a right to a public hearing on purely ministerial or legal matters that do not require the resolution of disputed facts.” *Morgan* at 399. Although *Morgan* asserts that Division II’s “broad construction of ‘ministerial matters’ is not supported by the narrow rule enunciated in the cases cited by the Court,” (Pet. at 18-19) he at no point elaborates on this purportedly “narrow rule”⁶ or how it renders the court’s conclusion incorrect. *Morgan* also asserts that the Court of Appeals’ decision conflicts with Division I’s decision in *In re D.F.F.*, 144 Wn. App. 214, 183 P.3d 302 (2008).⁷ He appears to argue that this conflict lies in Division I’s comment that a violation of Article I, section 10 was “not subject to ‘triviality’ or harmless error analysis.” 144 Wn. App. at 226; Pet. at 19. It is unclear how this remark constitutes a conflict with Division II’s decision in *Morgan*, in that the *Morgan* court’s decision was not based on a harmless error/triviality analysis and, indeed, those terms appear nowhere in the opinion. Nor does *D.F.F.* deal with consideration of a ministerial or purely legal matter, as does this case. Rather, *D.F.F.* concerned an adversarial hearing at which

⁶ The cases cited by the court below are: *State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001), *review denied*, 146 Wn.2d 1006, 45 P.3d 551 (2002); *State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008); *State v. Sublett*, 156 Wn. App. 160, 231 P.3d 231, *State v. Castro*, 159 Wn. App. 340, 246 P.3d 228 (2011); and *In re Det. of Ticeson*, 159 Wn. App. 374, 246 P.3d 550 (2011).

⁷ The Court of Appeals’ decision in *D.F.F.* has since been affirmed by this Court, *In the Matter of the Detention of D.F.F.*, 256 P.3d 357(Wash. 2011).

evidence was presented and after which an order civilly committing *D.F.F.* was entered. *D.F.F.* has no bearing on this case.

Nor does Morgan point to anything that suggests that his personal attendance at this status conference would have made any difference whatsoever, whether to the outcome of the status conference or his trial two years later. No decision was reached regarding whether Morgan would or would not be involuntarily medicated, and indeed the only tangible result of the meeting was to provide a framework and timeline to provide additional information upon which the trial court could reach a reasoned decision: After hearing from the parties, the court instructed the GAL to meet with Morgan's psychiatrist and indicated that the court also wanted a written report from the psychiatrist. RP 8/30/2006 at 32. No decision was reached and no order was entered. While the August 30, 2006 status conference was held in chambers, it is clear that hearing was not "the hearing" at which the trial court ordered involuntary medication. *Id.* at 26-33. At most, it was ultimately a request from the court for more information – information that was supplied months later and that is a matter of public record. CP at 61-80. The first written order regarding involuntary medication was not entered until December 2006, and the manner of its entry is not challenged here.

VI. CONCLUSION

Morgan has not established a basis for review by this Court. The State respectfully requests that the Court deny his Petition for Review.

RESPECTFULLY SUBMITTED this 25th day of August, 2011.

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ATTACHMENT A

H257Ak462 k. Hearing. Most Cited Cases

Court of Appeals of Washington,
 Division 2.
 In re the DETENTION OF Clinton MORGAN, Ap-
 pellant.

No. 38337-3-II.
 April 8, 2011.

As Amended on Denial of Reconsideration June 1,
 2011.

Background: State filed petition to have convicted sex offender civilly committed as sexually violent predator. Following jury trial, the Superior Court, Grays Harbor County, Gordon L. Godfrey, J., declared sex offender as sexually violent predator and ordered his commitment. Sex offender appealed.

Holdings: The Court of Appeals, Quinn-Brintnall, J., held that:

- (1) sex offender did not have right to be present at chambers meeting to consider whether he should be forcibly medicated during jury trial;
- (2) sex offender's presence at chambers meeting to consider issue of forcibly medicating him during jury trial was not necessary to protect his right to assistance of counsel;
- (3) sex offender's absence from chambers meeting did not violate his state constitutional right to public trial; and
- (4) as matter of first impression, proceedings to have convicted sex offender adjudicated sexually violent predator while sex offender was incompetent did not violate due process.

Affirmed.

West Headnotes

[1] Mental Health 257A  462

257A Mental Health
257AIV Disabilities and Privileges of Mentally
 Disordered Persons
257AIV(E) Crimes
257Ak452 Sex Offenders

Convicted sex offender did not have right to be present at chambers meeting to consider whether he should be forcibly medicated during jury trial on petition to have him adjudicated as sexually violent predator; matter of concern was purely legal question, no ruling was made during meeting, sex offender's presence would not have influenced ultimate outcome of matter discussed, and sex offender's rights were fully represented by counsel and guardian ad litem.

[2] Criminal Law 110  636(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
 General
110k636 Presence of Accused
110k636(1) k. In general. Most Cited
 Cases

A defendant has the right to be present at proceedings where his or her presence has a reasonably substantial relation to the fullness of his opportunity to defend against the charge.

[3] Criminal Law 110  636(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in
 General
110k636 Presence of Accused
110k636(3) k. During preliminary pro-
 ceedings and on hearing of motions. Most Cited
 Cases

A defendant does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters.

[4] Motions 267  39

267 Motions
267k39 k. Reargument or rehearing. Most Cited
 Cases

Motions 267 ⤴️58

267 Motions

267k58 k. Amendment of orders. Most Cited Cases

Trial 388 ⤴️387(1)

388 Trial

388X Trial by Court

388X(A) Hearing and Determination of Cause
388k387 Decision

388k387(1) k. In general. Most Cited Cases

A trial judge's oral decision is no more than a verbal expression of its informal opinion at that time; it is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.

[5] Trial 388 ⤴️387(1)

388 Trial

388X Trial by Court

388X(A) Hearing and Determination of Cause
388k387 Decision

388k387(1) k. In general. Most Cited Cases

A trial judge's oral decision has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.

[6] Mental Health 257A ⤴️463

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak463 k. Counsel or guardian ad litem. Most Cited Cases

Convicted sex offender's presence at chambers meeting to consider issue of forcibly medicating him during jury trial to adjudicate him sexually violent predator was not necessary to protect his right to as-

sistance of counsel, where issue involved purely legal question, and sex offender received assistance of counsel on legal question at hand, despite sex offender's absence. U.S.C.A. Const.Amend. 6; West's RCWA 71.09.050(1).

[7] Constitutional Law 92 ⤴️2311

92 Constitutional Law

92XIX Rights to Open Courts, Remedies, and Justice

92k2311 k. Right of access to the courts and a remedy for injuries in general. Most Cited Cases

Mental Health 257A ⤴️462

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak462 k. Hearing. Most Cited Cases

Convicted sex offender's absence from chambers meeting to consider whether he should be forcibly medicated during jury trial on petition to have him adjudicated sexually violent predator did not violate his state constitutional right to public trial; meeting addressed ministerial matters regarding legal questions related to process of deciding forced-medication motion. West's RCWA Const. Art. 1, § 10.

[8] Appeal and Error 30 ⤴️893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate Court

30k893(1) k. In general. Most Cited Cases

Criminal Law 110 ⤴️1139

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In general. Most Cited

Cases

Whether a trial court procedure violates the right to a public trial is a question of law the appellate court reviews de novo; this standard applies to civil as well as criminal appeals. West's RCWA Const. Art. 1, § 10.

[9] Criminal Law 110 ↻ 635.7(1)

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k635 Public Trial

110k635.7 Nature of Proceeding Affecting Propriety of Closure

110k635.7(1) k. In general. Most Cited Cases

A defendant does not have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts. West's RCWA Const. Art. 1, § 10.

[10] Constitutional Law 92 ↻ 4344

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)15 Mental Health

92k4341 Sexually Dangerous Persons; Sex Offenders

92k4344 k. Commitment and confinement. Most Cited Cases

Mental Health 257A ↻ 455

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak455 k. Jurisdiction and proceedings in general. Most Cited Cases

Proceedings to have convicted sex offender adjudicated sexually violent predator while sex offender was incompetent did not violate due process; although sex offender faced significant deprivation of his li-

berty, there were no additional procedural safeguards that could have been put into place to minimize or prevent erroneous deprivation of rights, in that sex offender was present during proceedings and represented by counsel, and State had strong interest in detaining mentally unstable sex offender who presented danger to public. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ↻ 4041

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)1 In General

92k4041 k. Restraint, commitment, and detention. Most Cited Cases

Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 ↻ 3867

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3867 k. Procedural due process in general. Most Cited Cases

Procedural due process prohibits the State from depriving an individual of protected liberty interests without appropriate procedural safeguards. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ↻ 3879

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3878 Notice and Hearing

92k3879 k. In general. Most Cited Cases

Procedural due process, at its core, is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular text. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 92 ↻ 3875

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3875 k. Factors considered; flexibility and balancing. Most Cited Cases

To determine what procedural due process requires in a particular context, the court employs the *Mathews* test, balancing three factors: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest 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. U.S.C.A. Const.Amend. 14.

[15] Mental Health 257A ↻ 495

257A Mental Health

257AV Actions

257Ak485 Guardian Ad Litem or Next Friend

257Ak495 k. Powers, duties, and liabilities. Most Cited Cases

A guardian ad litem has complete statutory authority to represent an incapacitated party's interests. West's RCWA 4.08.060.

[16] Mental Health 257A ↻ 467

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak467 k. Appeal. Most Cited Cases

Convicted sex offender failed to preserve for appellate review claim that forced medication during jury trial on petition to have him adjudicated as sexually violent predator violated due process; although forcible medication order was issued in December 2006, trial did not begin until August 2008, and record did not clearly establish that sex offender was, in fact, forcibly medicated, other than single statement by trial court at end of trial to "make certain that [sex offender] has taken his medications that have been court

ordered." U.S.C.A. Const.Amend. 14; RAP 9.2(b).

[17] Appeal and Error 30 ↻ 671(1)

30 Appeal and Error

30X Record

30X(M) Questions Presented for Review

30k671 Limitation by Scope of Record in General

30k671(1) k. In general. Most Cited Cases

An insufficient appellate record precludes review of the alleged errors. RAP 9.2(b).

[18] Mental Health 257A ↻ 467

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak467 k. Appeal. Most Cited Cases

Convicted sex offender failed to preserve for appellate review claim that diagnosis of paraphilia NOS (nonconsent) had not gained general acceptance among relevant scientific community, and thus, evidence of his diagnosis for same should not have been admitted in proceedings to have him adjudicated as sexually violent predator, where sex offender did not request *Frye* hearing or otherwise challenge admissibility of diagnosis at trial.

West Codenotes

Recognized as Unconstitutional MPR 1.3 *396 Nancy P. Collins, Washington Appellate Project, Seattle, WA, for Appellant.

Joshua Choate, Office of the Washington State Attorney, Seattle, WA, for Respondent.

QUINN-BRINTNALL, J.

¶ 1 Clinton Morgan appeals a 2008 jury determination that he is a sexually violent predator (SVP), under ch. 71.09 RCW, and his resulting civil commitment. Morgan asserts that a 2006 chambers meeting, which he did not attend, discussing the possibility of forcibly medicating him during the commitment proceedings, violated (1) his right to personally attend

all proceedings to assist his counsel and (2) his Washington constitutional right to open proceedings. In addition, he argues that the trial court violated his due process rights when it (1) held his SVP civil commitment jury trial despite his incompetence and (2) forcibly medicated him during the proceedings. Finally, Morgan claims that paraphilia not otherwise specified (NOS) (nonconsent) is an invalid diagnosis that could not form the basis for his civil commitment. We hold that the 2006 chambers meeting concerned purely ministerial and legal matters and did not violate any of Morgan's rights, Morgan's procedural due process rights were not violated by holding SVP proceedings despite his incompetence, the record is not adequately developed to consider the alleged forced medication error, and Morgan failed to preserve for review his challenge to an expert's diagnosis. We affirm.

FACTS

¶ 2 Morgan, who was born on February 25, 1980, pleaded guilty to indecent liberties in 1993. This juvenile adjudication stemmed from a school incident in which Morgan prevented 15-year-old J.W., a stranger to him at the time, from leaving a classroom while he forcibly kissed her, grabbed her breasts, and rubbed her other private parts. The juvenile court sentenced Morgan to 65 weeks in a Juvenile Rehabilitation Administration program. As part of his rehabilitation program, Morgan participated in sexual deviancy treatment during which he disclosed problems distinguishing between fantasy and reality; masturbating to rape fantasies; and having sadistic sexual fantasies involving murder, humiliation, and disfigurement. After his release in 1994, Morgan continued receiving community based sex offender treatment until early 1997.

¶ 3 In 1997, approximately two weeks after completing a sex offender treatment program, Morgan molested two girls at a hotel swimming pool while pretending to be a lifeguard. Six-year-old K.S. told her parents that Morgan had touched her chest area and between her legs. Five-year-old R.B. told her parents that Morgan had been "tickling her on her 'peepee' on the outside of her swimming suit." Clerk's Papers (CP) at 5. An adult at the pool witnessed Morgan touching R.B. on her back and buttocks and observed that Morgan had an erection when he got out of the pool after touching R.B. Morgan later stated that he just wanted to see if he could handle being around child-

ren, but things "got out of hand" once he touched the girls and that he "had no control over the situation, period." 2 Report of Proceedings (RP) at 255.

¶ 4 Morgan pleaded guilty to one count of first degree child molestation for the swimming pool incident and received an 89-month sentence.^{FNI} During his incarceration, Morgan was moved to the Special Offender Unit at the Monroe Correctional Complex after he developed psychotic symptoms. While at Monroe, he completed a sex offender treatment program making limited rehabilitative progress. Even after completing treatment, the program considered Morgan as having a high risk of reoffending.

^{FNI} Morgan was charged as an adult for first degree child molestation after the juvenile court declined jurisdiction.

*397 ¶ 5 On August 31, 2004, the day before his scheduled release into the community, the State filed a petition seeking Morgan's involuntary commitment as an SVP. The petition alleged in pertinent part as follows:

1. [Morgan] has been convicted of the following sexually violent offense(s), as that term is defined in [former] RCW 71.09.020(15) [(2003)]: On or about May 30, 1997, in Grays Harbor County Superior Court, Grays Harbor, Washington, [Morgan] was convicted of Child Molestation in the First Degree.

2. [Morgan] currently suffers from:

a) A mental abnormality, as that term is defined in [former] RCW 71.09.020(8) [(2003)], specifically: Paraphilia NOS (Non-Consent); Pedophilia, Sexually Attracted to Females, Nonexclusive Type; and provisionally Sexual Sadism; and

b) A personality disorder, specifically: Antisocial Personality Disorder.

3. [Morgan's] mental abnormality and personality disorder cause him to have serious difficulty in controlling his dangerous behavior and make him likely to engage in predatory acts of sexual violence unless confined to a secure facility.

CP at 1–2. Over the next four years, the parties requested various continuances and addressed a variety of issues not relevant to this appeal. During this time, Morgan lived at the Special Commitment Center (SCC) on McNeil Island.

¶ 6 In February 2006, at Morgan's counsel's request, the trial court held a hearing to determine Morgan's competency for his SVP trial. Morgan's expert witness opined that he was not competent. The trial court determined that Morgan was not competent and expressed "very great concerns regarding the ability of Mr. Morgan to assist in [his] representation in these matters." RP (Feb. 23, 2006) at 9. Primarily based on their understanding of *In re Detention of Greenwood*, 130 Wash.App. 277, 122 P.3d 747 (2005), review denied, 158 Wash.2d 1010, 143 P.3d 830 (2006), Morgan's attorney, the State, and the trial court agreed that, in civil commitment hearings, a person does not have to be competent for a matter to proceed. But the parties and trial court agreed that a guardian ad litem (GAL) should be appointed to represent Morgan's interests. On April 19, 2006, the trial court entered its final order appointing Morgan a GAL under RCW 4.08.060.

¶ 7 In June 2006, Morgan's attorney asked that Morgan be forcibly medicated to control his behavior during the SVP proceedings. The trial court initially granted the motion in an oral ruling, but then accepted the State's request to take more evidence and weigh different interests before entering a final ruling. On August 30, the trial court discussed the forced medication motion process in chambers. The trial judge, a court reporter, and the GAL were physically present in the trial court's chambers. The State's and Morgan's attorneys were present via phone. Morgan was not present. The State reviewed the trial court's standard for ruling on the medication motion. Morgan's attorney asserted that, without medication, Morgan's behavior would prejudice the jury. The GAL recommended learning whether medication might help control Morgan's disruptive and delusional outbursts and noted that "Morgan himself is violently [and] vehemently against any kind of involuntary medication." RP (Aug. 30, 2006) at 31. Ultimately, the trial court decided to delay ruling on the merits of the motion until after receiving more information, including a report from Morgan's psychiatrist and an update from the GAL.

¶ 8 SCC psychiatrist Dr. Leslie Szlebert's subsequent report detailed Morgan's medication history over the years. Szlebert noted that Morgan presently was not taking any medication and had not taken antipsychotic medication for the past 17 months (since April 2005). She opined about the efficacy of involuntary medication in Morgan's case and indicated that Morgan did not meet the SCC's requirements for being involuntarily medicated because he did not have a grave disability or present a danger to himself or others. After reviewing Szlebert's report, the GAL recommended to the trial court, over Morgan's acknowledged objections, that it forcibly medicate Morgan during his civil commitment hearing. On December 6, 2006, the trial court entered a written order to involuntarily medicate Morgan.

*398 ¶ 9 Morgan's civil commitment trial did not begin until August 4, 2008.^{FN2} At the trial, the State's expert, Dr. Brian Judd, explained his diagnosis of Morgan as presently suffering from (1) paraphilia NOS (nonconsent); (2) pedophilia, sexually attracted to females, non-exclusive type; (3) antisocial personality disorder; and (4) schizophrenia. Morgan's expert, Dr. Wollert, disagreed with several of Judd's diagnoses and testified that Morgan's brain had likely matured since his offenses, lowering his recidivism risk. The jury entered a verdict finding that Morgan met the definition of an SVP. Morgan timely appeals.

FN2. On August 6, 2008, Morgan formally withdrew his objection to moving forward with his commitment proceedings despite his incompetency.

ANALYSIS

RIGHT TO ATTEND THE 2006 CHAMBERS MEETING

¶ 10 Morgan asserts that he had a right to attend the 2006 chambers meeting where the trial court considered issues related to forcibly medicating him. Specifically, he argues that former RCW 71.09.050(1) (1995) includes an implicit right to attend the meeting to assist his counsel and that failing to include him violated his due process rights. The State argues that Morgan's counsel's and GAL's presence at the meeting adequately protected his due process rights. We discern no error.

[2][3] ¶ 11 "A defendant has the right to be present at proceedings where his or her presence has a

reasonably substantial relation 'to the fullness of his opportunity to defend against the charge.' " *In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 483, 965 P.2d 593 (1998) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Lord*, 123 Wash.2d 296, 306, 868 P.2d 835, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994)). But a defendant "does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters." *Pirtle*, 136 Wash.2d at 484, 965 P.2d 593 (quoting *Lord*, 123 Wash.2d at 306, 868 P.2d 835); see also *Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (a defendant does not need to be present "when presence would be useless, or the benefit but a shadow"), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

[4][5] ¶ 12 Morgan did not have a right to personally attend the chambers meeting where purely legal questions about the process of deciding a forced medication motion were discussed. As the transcript of the chambers meeting evinces, the meeting included a discussion of the legal standard that the trial court should apply when ruling on the involuntary medication motion and whether the trial court had adequate information to rule on the motion. No ruling was made during the meeting, and Morgan's presence would not have influenced the ultimate outcome of the matters discussed at the meeting.^{FN3} Accordingly, Morgan's rights were represented fully and not violated by his lack of attendance at the meeting.

^{FN3}. At the meeting, the trial court did say, "[I]t sounds that [sic] basically all we're simply doing here is making sure we have the background or balancing in to order the medication. *Almost like* it's a foregone conclusion but I would like some medical matters taken care of first, okay?" RP (Aug. 30, 2006) at 32 (emphasis added). Although the trial court's statement implied that it would likely grant the forced medication motion after receiving all the necessary information, importantly, the trial court did not render a final written decision on this issue until December 6, 2006. As our Supreme Court previously noted, "[A] trial judge's oral decision is no more than a verbal expression of [its] informal opinion at that time. It is necessarily subject to further study and consideration,

and may be altered, modified, or completely abandoned. *It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.*" *Ferree v. Doric Co.*, 62 Wash.2d 561, 566-67, 383 P.2d 900 (1963) (emphasis added); see so *State v. Dailey*, 93 Wash.2d 454, 458-59, 610 P.2d 357 (1980) (discussing *Ferree* and concluding that it is the "written decision of a trial court [that] is considered the court's 'ultimate understanding' of the issue presented."). Accordingly, to the extent the trial court's statement constituted an oral ruling on the forced medication motion, which we do not believe it does, it was a nonbinding informal ruling that the trial court explicitly stated was subject to further consideration.

[6] ¶ 13 Morgan also asserts that former RCW 71.09.050(1) includes an implicit right *399 for him to attend this meeting. In relevant part, former RCW 71.09.050(1) provides that "[a]t all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel." Morgan claims that he must be present at all proceedings in order to receive assistance of counsel. This argument fails because when a purely legal matter is under consideration, Morgan's presence is irrelevant to the proceedings. *Pirtle*, 136 Wash.2d at 484, 965 P.2d 593; see *State v. Sadler*, 147 Wash.App. 97, 114, 193 P.3d 1108 (2008). Morgan received the assistance of his counsel on the legal questions at hand despite his physical absence from the meeting.

PUBLIC TRIAL RIGHTS

[7] ¶ 14 Morgan next contends that the trial court's 2006 chambers meeting also violated his right to open proceedings under the Washington Constitution, article I, section 10. Specifically, he argues that the trial court failed to consider and apply the five courtroom closure steps in *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 37-39, 640 P.2d 716 (1982). Assuming without deciding that Morgan has standing to raise this issue and may do so for the first time on appeal, we discern no error.^{FN4}

^{FN4} In *State v. Wise*, 148 Wash.App. 425, 442-43, 200 P.3d 266 (2009), review granted, 170 Wash.2d 1009, 236 P.3d 207 (2010), we held that a criminal defendant lacked third party standing to assert a viola-

tion of article I, section 10 on behalf of the public. Division One of this court recently declined to follow our third party standing analysis on this issue in *In re Det. of Ticeson*, 159 Wash.App. 374, 381–82, 246 P.3d 550 (2011). We note only that if the *Ticeson* court is correct that criminal defendants and/or SVP committees have standing to raise article I, section 10 violations on behalf of the public, then they must also have the ability to waive the public's open trial rights. But our Supreme Court appears to have ruled that defendants do not have the right to waive the public's open trial rights. *State v. Strode*, 167 Wash.2d 222, 229–30, 217 P.3d 310 (2009) (Alexander, C. J., with three justices concurring and two justices concurring in result).

[8] ¶ 15 Article I, section 10 of the Washington Constitution requires that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” “Whether a trial court procedure violates the right to a public trial is a question of law we review de novo.” *In re Det. of D.F.F.*, 144 Wash.App. 214, 218, 183 P.3d 302 (quoting *State v. Duckett*, 141 Wash.App. 797, 802, 173 P.3d 948 (2007)), review granted, 164 Wash.2d 1034, 197 P.3d 1185 (2008).^{FN5} Accordingly, this standard applies to civil as well as criminal appeals. *Drelling v. Jain*, 151 Wash.2d 900, 908, 93 P.3d 861 (2004); *D.F.F.*, 144 Wash.App. at 218, 183 P.3d 302.

^{FN5} *D.F.F.* concerned the closure of mental health proceedings under ch. 71.05 RCW. Division One of this court declared Mental Proceedings Rule (MPR) 1.3 unconstitutional because it categorically precluded court closures based on an analysis previously articulated by our Supreme Court. *D.F.F.*, 144 Wash.App. at 225–26, 183 P.3d 302. Our Supreme Court heard oral argument in *D.F.F.* (No. 81687–5) on September 15, 2009, and has not issued its decision as of the date of this opinion.

[9] ¶ 16 We have previously held that the right to a public trial applies to evidentiary phases of the trial as well as other “adversary proceedings,” including suppression hearings, voir dire, and the jury selection process. *Sadler*, 147 Wash.App. at 114, 193 P.3d 1108 (emphasis omitted) (quoting *State v. Rivera*, 108

Wash.App. 645, 652–53, 32 P.3d 292 (2001), review denied, 146 Wash.2d 1006, 45 P.3d 551 (2002)). But that right does not extend to purely ministerial and procedural matters because “[a] defendant does not have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.” *Sadler*, 147 Wash.App. at 114, 193 P.3d 1108. We affirmed this proposition recently in *State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, review granted, 170 Wash.2d 1016, 245 P.3d 775 (2010). Division Three of this court agreed that public trial rights were not violated in a pretrial hearing addressing only legal matters, specifically the exclusion of a witness and whether the State could impeach the defendant. *State v. Castro*, 159 Wash.App. 340, 344, 246 P.3d 228 (2011). And recently, Division One discussed the deep-rooted history of the in-chambers ministerial and legal matter exception to constitutional public trial rights and applied it in the SVP civil commitment setting. ⁴⁰⁰*In re Det. of Ticeson*, 159 Wash.App. 374, 383–87, 246 P.3d 550 (2011).

¶ 17 Here, the chambers meeting about the standard for the trial court to apply when deciding whether to forcibly medicate Morgan concerned purely legal and procedural matters. Because the chambers meeting here solely addressed ministerial matters regarding legal questions related to the process of deciding the defendant's counsel's forced medication motion, it did not implicate Morgan's public trial rights.

RIGHT TO COMPETENCY DURING SVP PROCEEDINGS

[10] ¶ 18 Morgan argues that the State cannot seek to commit him as an SVP under ch. 71.09 RCW while he is incompetent because it violates his due process rights. Specifically, he asserts a general right to competency during SVP proceedings to ensure that he understands them and has the ability to assist his attorney. We hold that a respondent's due process rights are not violated when he or she is incompetent during SVP proceedings.

[11] ¶ 19 We review questions of law, including the guaranty of constitutional due process, de novo. *In re Det. of Fair*, 167 Wash.2d 357, 362, 219 P.3d 89 (2009) (citing *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wash.2d 17, 24, 65 P.3d 319 (2003)). “[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*,

441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); see also *In re Harris*, 98 Wash.2d 276, 279, 654 P.2d 109 (1982) (“[D]ue process guaranties must accompany involuntary commitment for mental disorders.”).

[12][13][14] ¶ 20 Procedural due process prohibits the State from depriving an individual of protected liberty interests without appropriate procedural safeguards.^{FN6} *In re Pers. Restraint of Bush*, 164 Wash.2d 697, 704, 193 P.3d 103 (2008). Procedural due process “[a]t its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context.” *In re Det. of Stout*, 159 Wash.2d 357, 370, 150 P.3d 86 (2007) *ing Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). To determine what procedural due process requires in a particular context, we employ the *Mathews* test, balancing three factors: “(1) the private interest affected, (2) the risk of erroneous deprivation of that interest 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.” *Stout*, 159 Wash.2d at 370, 150 P.3d 86 (citing *Mathews*, 424 U.S. at 335, 96 S.Ct. 893).

FN6. In *In re Det. of McCuiston*, 169 Wash.2d 633, 238 P.3d 1147 (2010), *recons.* granted by order of the Supreme Court, No. 81644-1, Feb. 9, 2011, our Supreme Court vigorously debated the appropriate due process analysis for questions involving SVP constitutional right claims. The *McCuiston* majority stated that

[t]he “procedure” required under a constitutionally valid SVP statute reflects substantive limits on the power of the legislature to restrict an individual’s fundamental rights.... [T]he question is not what procedures are required under a balance of competing interests, but rather whether the procedures set forth in the statute are *narrowly tailored* to meet the State’s compelling interest in continuing to confine mentally ill and dangerous persons. This is and always has been a question of substantive due process.

169 Wash.2d at 638 n. 1, 238 P.3d 1147 (citation omitted). But the *McCuiston* dissent asserted that a procedural due process analysis applies in SVP challenges where the question involves the adequacy of procedural safeguards and distinguished substantive due process violations as those prohibiting government actions “ ‘regardless of the fairness of the procedures used to implement them.’ ” 169 Wash.2d at 657, 238 P.3d 1147 (Owens, J., dissenting) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Bush*, 164 Wash.2d 697, 706, 193 P.3d 103 (2008)).

Here, Morgan couches his due process claim as a violation of his “opportunity to be heard” (i.e., his incompetency prevented him from participating and being heard during his commitment hearing because of his inability to help his attorney), and we apply procedural due process principles.

¶ 21 Whether a respondent in civil SVP commitment proceedings must be competent to satisfy procedural due process requirements is a matter of first impression. As an initial matter, we note that the parties’ arguments do not persuade us that our analysis in *401 *Greenwood* controls. In *Greenwood*, we considered whether RCW 10.77.050’s prohibition on trying and convicting incompetent criminal defendants applied to RCW 71.09.060(2) SVP commitment proceedings. 130 Wash.App. at 286, 122 P.3d 747. We held that RCW 10.77.050 did not apply to the RCW 71.09.060(2) SVP hearing because SVP proceedings are civil and not criminal in nature. *Greenwood*, 130 Wash.App. at 286. The State insists that the *Greenwood* analysis controls here, believing that we held that incompetency during *any* SVP proceeding does not violate due process. But the State overlooks our statement in *Greenwood* that “*Greenwood* does not argue that an individual has a general right to competency at his or her civil commitment trial, *we need not address that issue.*” 130 Wash.App. at 286 (emphasis added). Accordingly, *Greenwood* is not dispositive of the issues raised in the present case.

¶ 22 The State also suggests that the plain language of former RCW 71.09.060(2) (2001) indicates that a respondent does not have a general competency

right in SVP civil commitment hearings. Former RCW 71.09.060(2) relates to an SVP bench hearing where the trial court must determine whether the respondent committed the predicate sexually violent offense when he or she was incompetent to stand trial in a criminal proceeding. Accordingly, former RCW 71.09.060(2) explicitly relates only to whether the requisite predicate offense to qualify as an SVP exists. This statutory provision does not address a respondent's right to competency during any other SVP proceedings.

¶ 23 Here, a review and weighing of the Mathews factors indicates that there is no right to competency during SVP civil commitment proceedings. The first factor, regarding Morgan's private interests at stake, clearly weighs in favor of Morgan as his civil commitment deprives him of significant liberty interests. Addington, 441 U.S. at 425, 99 S.Ct. 1804. But the remaining Mathews factors weigh in favor of the State.

¶ 24 For the second factor, "the risk of erroneous deprivation of [private] interest[s] through existing procedures and the probable value, if any, of additional procedural safeguards," there were no additional safeguards that could have been put into place that would have minimized or prevented an erroneous deprivation of Morgan's rights. Stout, 159 Wash.2d at 370, 150 P.3d 86. Here, Morgan attended the civil commitment trial and had counsel vehemently defending his rights.

[15] ¶ 25 We previously addressed an argument similar to Morgan's that his right to assist his counsel at his civil commitment hearing implies a right to competency. In In re Det. of Ransleben, 135 Wash.App. 535, 540, 144 P.3d 397 (2006), review denied, 161 Wash.2d 1021, 172 P.3d 360 (2007), we considered whether a respondent's statutory right to assistance of counsel in an SVP RCW 71.09.060(2) bench trial, which is held to determine the respondent's culpability for the necessary predicate sexually violent offense when the respondent was incompetent to stand trial in a criminal proceeding, included an implied right to competency. See also Stout, 159 Wash.2d at 376, 150 P.3d 86 (citing RCW 71.09.060(2) and stating, "An incompetent SVP detainee has not yet stood trial for the underlying criminal offense that predicates the SVP petition against him."). Ransleben argued that his right to counsel was meaningless if he was not competent and able to assist

his counsel. Ransleben, 135 Wash.App. at 540, 144 P.3d 397. We held that RCW 71.09.060(2)'s plain language shows there is not a competency right at an RCW 71.09.060(2) hearing. Ransleben, 135 Wash.App. at 540, 144 P.3d 397. Even though the Ransleben court's decision concerned an RCW 71.09.060(2) hearing and a statutory analysis, the reasoning analogizes well to other aspects of the SVP civil commitment process. Accordingly, we extend the reasoning in Ransleben to other SVP proceedings.^{FN7}

FN7. Related to the second Mathews factor, we note an additional procedural safeguard that the trial court put into place in this case. The trial court appointed a GAL to represent Morgan's "best interests" and to "make decisions in this matter related to trial strategy." CP at 63–64. And pursuant to RCW 4.08.060, a GAL has complete statutory authority to represent an incapacitated party's interests. In re Dill, 60 Wash.2d 148, 150, 372 P.2d 541 (1962). Although our holding that a respondent does not have a competency right during SVP proceedings suggests the appointment of a GAL is not necessary, we approve of the trial court's decision to appoint a GAL in this case, where the relevant issue was involuntary medication, as the trial court sought to use all available tools at its disposal to ensure the protection of Morgan's rights.

*402 ¶ 26 The third Mathews factor, "the governmental interest, including costs and administrative burdens of additional procedures," also weighs heavily in the State's favor. Stout, 159 Wash.2d at 370, 150 P.3d 86. The State has a strong interest in detaining "mentally unstable individuals who present a danger to the public." United States v. Salerno, 481 U.S. 739, 748–49, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Moreover, our Supreme Court has held that "it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions." In re Pers. Restraint of Young, 122 Wash.2d 1, 26, 857 P.2d 989 (1993).

¶ 27 Accordingly, the Mathews factors weigh in favor of the State. We hold that due process does not require that a respondent be competent during any SVP proceedings, and Morgan's procedural due process argument fails.

¶ 28 Our analysis and holding mirrors that of the California Supreme Court in Moore v. Superior Court, 50 Cal.4th 802, 114 Cal.Rptr.3d 199, 237 P.3d 530 (2010). In Moore, the California Supreme Court applied its four-factor procedural due process test, including the three Mathews factors, and held that “due process does not require mental competence on the part of someone undergoing a commitment or re-commitment trial under the [Sexually Violent Predator Act (SVPA), Cal. Welf. & Inst.Code § 6600].” Moore, 50 Cal.4th at 819, 829, 114 Cal.Rptr.3d 199, 237 P.3d 530. In particular, the court reasoned 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. Indeed, as the exhibits supporting defendant's writ petition suggest, we can reasonably assume that significant potential overlap exists between those mental disorders that qualify someone for commitment as an SVP, on the one hand, and those that produce an inability to comprehend the proceedings or assist in one's defense on the other.... To allow anyone and everyone in this situation to seek a competence determination could require unknown numbers, possibly scores, of SVP commitment trials to be stayed indefinitely, and perhaps permanently, unless and until competence was restored under circumstances not involving confinement and treatment under the SVPA. Such concerns weigh heavily, and in fact dispositively, against recognition of a due process right of this kind.

Moore, 50 Cal.4th at 825–26, 114 Cal.Rptr.3d 199, 237 P.3d 530.

¶ 29 The Moore court's reasoning highlights the tension between Morgan's claim to competency and the SVP civil commitment requirements. Namely, SVP civil commitment requires the existence of a mental illness, but is there a point where an individual becomes *too* mentally ill that he is incompetent and cannot be civilly committed? Indeed, there are likely some situations in which a person who is convicted of a sexually violent offense, and then becomes incompetent, might never regain competency for a civil commitment proceeding. We resolve this tension in a

similar manner as the Moore court discerning no due process violations when a respondent is not competent during SVP proceedings.^{FN8}

^{FN8}. We note a distinction between an individual's rights during criminal trials that precede SVP petitions and the civil SVP proceedings. In Washington, defendants have a statutory right to be competent during *criminal* proceedings. RCW 10.77.050. Morgan does not allege a violation of his competency rights in the criminal proceedings underlying this case where he pleaded guilty to child molestation, a serious violent offense that later formed the basis for the State to file a petition for involuntary SVP civil commitment. That a defendant has a right to competency in criminal proceedings does not control whether such a right exists in a civil proceeding.

*403 ¶ 30 Finally, of the other foreign jurisdiction cases the parties discussed, only one warrants further analysis. In re Commitment of Branch, 890 So.2d 322 (Fla. Dist. Ct. App. 2004), concerns a related legal question, but the case is factually distinguishable. Branch, who also had a court-appointed GAL, raised the same challenge as Morgan. Branch, 890 So.2d, at 324. The Branch court held that Branch's due process rights were violated because the State's evidence of his prior bad acts was rooted in hearsay and not based on prior convictions. 890 So.2d at 327–28. The Branch court specifically stated that it did *not* hold that every person in a civil commitment proceeding had a general competency right during SVP proceedings. 890 So.2d at 329. Instead, the Branch court held only that there is a right to competency in civil commitment hearings when the state is relying on hearsay evidence to prove requisite prior bad acts. 890 So.2d at 329. Here, proof of Morgan's predicate offense is a judgment and sentence based on a guilty plea he entered when presumably he was competent. Unlike in Branch, the question before Morgan's civil commitment jury was not whether he performed the predicate offense. Instead, Morgan's civil commitment jury evaluated his then current mental state to decide whether treatment or confinement was appropriate and whether he is a danger to the community unless so confined. Accordingly, Branch is not instructive in resolving the issue.

INVOLUNTARY MEDICATION DURING THE PROCEEDINGS

[16] ¶ 31 Next, Morgan argues that the forced medication of antipsychotic drugs during his civil commitment hearing violated his due process rights. Specifically, he challenges the trial court's decision to force medication without identifying a medical necessity or a compelling government interest and in spite of a psychiatric evaluation stating the medication may not be in his best interests. See *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992); *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). But Morgan has failed to preserve this error for review in this direct appeal.

[17] ¶ 32 As the party seeking review, Morgan has the burden to perfect the record so that, as the reviewing court, we have all the evidence relevant to the issues presented before us. RAP 9.2(b); *Bulzomi v. Dept of Labor & Indus.*, 72 Wash.App. 522, 525, 864 P.2d 996 (1994) (citing *State v. Yaquez*, 66 Wash.App. 573, 583, 832 P.2d 883 (1992)). An insufficient appellate record precludes review of the alleged errors. *Bulzomi*, 72 Wash.App. at 525, 864 P.2d 996 (citing *Allemeier v. Univ. of Wash.*, 42 Wash.App. 465, 472-73, 712 P.2d 306 (1985), review denied, 105 Wash.2d 1014, 1986 WL 421070 (1986)).

¶ 33 Here, the record does not clearly establish that Morgan was *forcibly* medicated during his SVP trial. The trial court entered a forcible medication order in December 2006. Morgan's SVP trial did not begin until August 2008. The only evidence in the record that Morgan took any medication during his SVP proceedings is the trial court's statement, near the end of trial, to check and "make certain that Mr. Morgan has taken his medications that have been court ordered." 4 RP at 582. At oral argument, the parties discussed incorrect inferences from trial testimony and the existence of several documents, which are not in the record on review, that allegedly support Morgan's allegations that these trial medications were *forcibly* taken.^{FN9} We cannot consider matters or evidence outside the record in a direct appeal. RAP 9.2(b); *State v. McFarland*, 127 Wash.2d 322, 338 n. 5, 899 P.2d 1251 (1995).

FN9. The State referenced SCC documents from 2006 to 2008 that outlined Morgan's

medication history during that time period. These documents are not in the record on review. Morgan's counsel discussed Dr. Wollert's trial testimony, asserting that he met with Morgan a month prior to the SVP jury trial and that Morgan was *forcibly* taking medication at that time. Our review of Wollert's references to a July 2008 meeting revealed that Wollert said Morgan was on medications but Wollert did not indicate whether the medications were forcibly or voluntarily taken.

¶ 34 Morgan suggests that we can presume that he was forcibly medicated during his SVP trial because of the plain language of the trial court's December 2006 order, which *404 it never rescinded. We disagree. Even if Morgan forcibly took medication in December 2006, this fact alone does not establish that he still *forcibly* took medication in August 2008. Morgan may have realized the benefits of the medications in the intervening time and voluntarily taken them in August 2008. Dr. Judd's July 22, 2004 report included language suggesting that, in 2004, Morgan willingly complied with his medication treatment to "minimize the probability of [an SVP petition] filing" despite believing that he did not need to take antipsychotic medications and that they were not helping him. CP at 31. Thus, evidence exists in the record that Morgan has previously voluntarily, if reluctantly, taken ordered medications to improve his legal position. We will not engage in a speculative analysis and deny further review of this issue in this direct appeal.

PARAPHILIA NOS (NONCONSENT) DIAGNOSIS VALIDITY

[18] ¶ 35 Last, Morgan argues that the trial court erred by admitting a paraphilia NOS (nonconsent) diagnosis because that diagnosis has not gained general acceptance among the relevant scientific community as a basis for involuntary civil commitment. The State argues that Morgan has waived this argument because he failed to raise a *Frye*^{FN10} objection below. In addition, the State points out that Washington courts frequently recognize paraphilia NOS (nonconsent) as a valid diagnosis eligible for use in civil commitment proceedings. We agree with the State.

FN10. *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

¶ 36 We do not consider an issue raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Division One of this court rejected an argument identical to Morgan's in In re Detention of Post, 145 Wash.App. 728, 754–56, 187 P.3d 803 (2008), *aff'd on other grounds*, 170 Wash.2d 302, 241 P.3d 1234 (2010). Post argued for the first time on appeal that the “paraphilia NOS, nonconsent or rape” diagnosis resulting in his SVP civil commitment was “not based on sound scientific principles and, thus, ... admission of evidence of such a diagnosis violated his right to substantive due process as addressed in Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).” Post, 145 Wash.App. at 754–55, 187 P.3d 803. Division One rejected Post's argument, holding that, “Post improperly attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal.” Post, 145 Wash.App. at 755, 187 P.3d 803. The court noted that Post attempted to “sidestep the fact that he did not seek a Frye hearing in the trial court,” and held that he “thus, has not preserved an evidentiary challenge for review.” Post, 145 Wash.App. at 755–56, 187 P.3d 803 (footnote omitted).

¶ 37 Similarly, Morgan never objected to the testimony about the paraphilia NOS (nonconsent) diagnosis or challenged its admissibility at trial. He also never sought a Frye evidentiary hearing on the diagnosis. Like Post, Morgan is improperly attempting to recast his failure to raise an evidentiary challenge at trial as a manifest constitutional issue that he can challenge for the first time on appeal. We hold that Morgan did not preserve his Frye challenge for appeal.^{FN11}

FN11. We note that even if we did consider the merits of Morgan's Frye challenge, Washington courts have consistently upheld the use of paraphilia NOS in numerous civil commitment proceedings. *See, e.g., Post*, 145 Wash.App. at 757 n. 18, 187 P.3d 803 (listing 10 Washington Supreme Court and Court of Appeals decisions upholding civil commitments based on a diagnosis of paraphilia NOS rape or nonconsent).

¶ 38 Our opinion resolves the issues in this case

with two primary holdings. First, an individual's right to assist counsel and right to a public trial are not violated when a trial court holds a chambers meeting addressing purely legal and ministerial matters. Second, due process does not require that a respondent be competent during any SVP proceeding. In accordance with this opinion, we affirm.

We concur: WORSWICK, A.C.J., and WILLIAMS, J.P.T.

Wash.App. Div. 2, 2011.
In re Detention of Morgan
161 Wash.App. 66, 253 P.3d 394

END OF DOCUMENT

NO. 86234-6

WASHINGTON STATE SUPREME COURT

In re the Detention of:

CLINTON MORGAN,

Appellant.

DECLARATION OF
SERVICE

I, Allison Martin, declare as follows:

On August 25, 2011, I sent via e-mail and deposited in the United States mail true and correct cop(ies) of Respondent's Answer to Petition for Reveiw and Declaration of Service, postage affixed, addressed as follows:

Susan Wilk
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle WA 98101
Susan@washapp.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25 day of August, 2011, at Seattle, Washington.


ALLISON MARTIN

OFFICE RECEPTIONIST, CLERK

To: Martin, Allison (ATG)
Cc: Sappington, Sarah (ATG); susan@washapp.org
Subject: RE: In re Morgan 86234-6

Rec. 8-25-11

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From: Martin, Allison (ATG) [<mailto:AllisonM1@ATG.WA.GOV>]
Sent: Thursday, August 25, 2011 3:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Sappington, Sarah (ATG); susan@washapp.org
Subject: In re Morgan 86234-6

Attached for filing for case #86234-6 In re the Detention of Clinton Morgan v. State of Washington

*Respondent's Answer to Petition for Review

*Declaration of Service

On behalf of:

Sarah Sappington, WSBA# 14514

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