

No. 38337-3-II

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

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IN RE THE DETENTION OF CLINTON MORGAN

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES

Respondent,

v.

CLINTON MORGAN

Appellant.

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STATE OF WASHINGTON  
BY [Signature] Deputy

FILED  
COURT OF APPEALS  
DIVISION II

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey

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BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Clinton Morgan is a severely schizophrenic young man who has spent the majority of his teens and early twenties in juvenile and adult prisons. Before Morgan was scheduled to be released from custody, the State sought to commit him as a sexually violent predator (“SVP”). Due to his diagnosis of chronic undifferentiated schizophrenia, however, Morgan was incompetent to help his attorney prepare his defense. In fact, Morgan’s attorney told the court that it was not in Morgan’s “best interest” (because of his mental illness) for him to testify at the trial on the State’s commitment petition.

The trial court rubberstamped the State’s request to proceed with the commitment trial despite Morgan’s incompetency. It further authorized the forcible administration of antipsychotic medications to Morgan, over his vehement objection -- not to render him competent, but to control his behavior before the jury.

Holding Morgan’s commitment trial despite his incompetency violated the Fourteenth Amendment’s fundamental guaranty of due process. Administering medications to him against his will was an additional violation of due process and of his right to a defense. The commitment order should be reversed and dismissed.

## B. ASSIGNMENTS OF ERROR

1. Holding Morgan's commitment trial pursuant to RCW Chap. 71.09 while he was incompetent to stand trial violated his right to due process of law guaranteed by the Fourteenth Amendment and article I, section 3.

2. The forcible administration of antipsychotic medications to Morgan violated his right to due process of law guaranteed by the Fourteenth Amendment and article I, section 3 and his Sixth Amendment right to present a defense.

3. The closed hearing on the issue of forcible medication violated the constitutional right to a public trial.

4. Morgan's right to be present was violated when the court held a hearing on the issue of forcible medication without affording him the opportunity to be present.

5. Predicating Morgan's commitment on the diagnosis of paraphilia NOS – nonconsent violated due process.

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment precludes the trial of an incompetent person, as a defendant who lacks the ability to communicate effectively with counsel may be unable to exercise other rights deemed essential to a fair trial.

Moreover, the fundamental right of an individual to liberty necessitates that government efforts to involuntarily confine that person be accompanied by adequate due process safeguards. Should this Court hold that principles of due process bar the commitment trial under Chap. 71.09 RCW of an incompetent person? (Assignment of Error 1)

2. An individual's liberty interest under the Due Process Clause includes the right to freedom from unwanted medications. Before a court may approve an order for forcible medication, the court must find either (1) a compelling government interest in the medication, that the medication will significantly further that interest, that the medication is necessary for this purpose, and that the medication is medically appropriate; or, (2) that the person is a danger to himself or others or gravely disabled. Where antipsychotic medications were not medically necessary or appropriate, were not shown to significantly advance the government's interest in a fair trial, and were not warranted on the bases of danger to self or others or grave disability, did the forcible administration of medications to Morgan violate his right to due process? (Assignment of Error 2)

3. Article I, section 10 of the Washington Constitution requires that justice be administered openly, which has been interpreted to unequivocally guarantee the public a right of access to judicial proceedings. A closure order must be narrowly tailored and may only be entered after the court has made an individualized determination that closure is necessary, and afforded persons present an opportunity to object. A violation of article I, section 10 can never be harmless. In chambers, the trial court held a hearing on whether Morgan should be forcibly medicated without determining that closure was necessary to accomplish a compelling interest or giving the public an opportunity to object. Must the ensuing commitment order be reversed? (Assignment of Error 3)

4. Fundamental fairness requires that an individual be present at a hearing where important rights are at stake. Did Morgan's exclusion from the hearing at which the court decided to forcibly medicate him violate his right to be present? (Assignment of Error 4)

5. To satisfy due process, civil commitment must be predicated on a diagnosed mental abnormality that meets scientific standards for reliability and validity. Paraphilia-NOS-nonconsent fails to meet scientific standards for reliability and validity. Did the

use of this diagnosis as a predicate for Morgan's civil commitment violate due process? (Assignment of Error 5)

D. STATEMENT OF THE CASE

Clinton Morgan suffers from chronic undifferentiated schizophrenia, which is manifested by persistent delusions and disordered thinking. RP 62, 71.<sup>1</sup> When Morgan was a child, he was subjected to severe physical and emotional abuse, causing authorities to remove him from his parents' home at the age of six and place him in foster care. RP 73, 79, 607. The family denied the abuse and about a year later Morgan was returned home. RP 73. Not surprisingly, Morgan acted out at school; however, even as a child Morgan's behavior evinced mental disturbance that one psychologist opined was "par for the course" for schizophrenic children. RP 454.

At the age of 12, Morgan groped a 15-year-old schoolmate. He pleaded guilty to indecent liberties, and in 1993 was committed

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<sup>1</sup> The verbatim report of proceedings consists of one volume containing pretrial hearings on July 25, 2005, February 23, 2006, April 21, 2006, and August 30, 2006, and several consecutively paginated volumes containing motions in limine and trial proceedings occurring between August 4, 2008, and August 14, 2008. Citations to the volume containing the pretrial hearings are by date, followed by page number. Citations to the consecutively-paginated trial volumes are referenced as "RP" followed by page number.

to the Juvenile Rehabilitation Administration (“JRA”) for a period of 65 weeks. RP 37.

At JRA Morgan underwent sex offender treatment. At the time, Morgan was not diagnosed as schizophrenic, but according to Lisa Lind, Morgan’s juvenile rehabilitation counselor from 1993-94, even in adolescence Morgan exhibited problems distinguishing fantasy from reality. RP 39-40, 43, 174. When confronted, Morgan sometimes would invent additional details; at other times, Morgan would become very angry and confused that he was not believed. RP 40.

Upon his release into the community in November 1994, Morgan was treated by two sexual offender treatment providers, Terri Weaver and Michael Barsanti. RP 182-83. Morgan managed to avoid reoffense until February 1997, when he touched two little girls in a hotel swimming pool. RP 184-85. He later explained to police that the offense occurred because he wanted to see if he could handle being close to kids, but that once he touched one of the little girls, things “got out of hand.” RP 186. Morgan pleaded guilty to child molestation, and again was imprisoned.

Morgan was transferred to the Special Offender Unit (“SOU”) at Monroe Correctional Complex. RP 62. On his arrival, he was

“quite psychotic,” and at that time was diagnosed with schizophrenia. RP 62. Morgan again entered sex offender treatment, this time at the Twin Rivers facility in Monroe. RP 68-71. This time, his active mental health disease was factored into his treatment. A condition of treatment was that Morgan take antipsychotic medications and not talk about a magical persona he had invented called Moregaine. RP 71. Despite Morgan’s mental illness, a low IQ, and a learning disability, Morgan became a functioning member of group treatment, which he liked. RP 73.

Morgan managed his sexual behavior well in prison, even though he was exposed to women. RP 90. He made good progress in group and was capable of giving meaningful feedback. RP 92. Nonetheless, Morgan was assessed as being a high risk to reoffend sexually. RP 95. Following a referral from the Department of Corrections, the State filed a petition to commit Morgan under RCW Chap. 71.09. CP 3-42.

In February 2006, Morgan’s lawyer informed the court that his expert believed Morgan was incompetent to stand trial, and the State’s expert concurred. 2/23/06 RP 7. Both Morgan’s lawyer and the State believed that Morgan’s incompetency should not delay

the proceedings, however. 2/23/06 RP 8. They requested a guardian ad litem (“GAL”) be appointed. Id.

The court observed, “[T]here obviously are very great concerns regarding the ability of Morgan to assist in representation in these matters.” 2/23/06 RP 9. Morgan also addressed the court. He said, “Fine, I know [my lawyer]’s been paid off, he is been blackmailed and I know it. If you don’t want to see it, your honor.” 2/23/06 RP 10. He told the court, “You think I’m incompetent to know what’s going on here today. I know what’s going on since 1997. Trumped up charges, anyway.” 2/23/06 RP 10-11. The court appointed Morgan a GAL and subsequently granted defense counsel’s motion to forcibly medicate Morgan so he would not have psychotic outbursts during the trial.<sup>2</sup>

At the trial, the State’s expert opined that in addition to being schizophrenic, Morgan suffered from pedophilia and paraphilia-NOS-nonconsent. RP 205. Morgan’s expert disagreed with these diagnoses. RP 419, 438. He noted that schizophrenia has a lengthy prediagnosed period and that Morgan did not meet diagnostic criteria for either pedophilia or paraphilia NOS. RP 413, 419-20, 438. He suggested that Morgan’s sexual fantasizing

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<sup>2</sup> Further facts regarding defense counsel’s motion are set forth prior to argument E2, infra.

stemmed from his desire to participate in treatment and inability to know what was socially inappropriate. RP 425. He noted that Morgan had only offended sexually as a juvenile, and that it was difficult to predict juvenile recidivism rates accurately. RP 464-68. Morgan's expert believed that Morgan did not need further sex offender treatment, but should be treated within the mental health system, and connected to the resources provided by the State to the mentally ill. RP 537.

A jury granted the State's commitment petition. Morgan appeals.

#### E. ARGUMENT

##### 1. MORGAN'S COMMITMENT PURSUANT TO CHAP. 71.09 RCW WHILE HE WAS INCOMPETENT VIOLATED HIS RIGHT TO DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT.

a. The Fourteenth Amendment guarantee of substantive and procedural due process applies to the involuntary commitment of individuals under sexually violent predator statutes.

The Fourteenth Amendment protects a person from the deprivation of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. Freedom from physical restraint "has always been at the core of the liberty protected by the Due

Process Clause from arbitrary governmental action.” Foucha v. Louisiana, 504 U.S. 71, 80, 118 L.Ed.2d 437, 112 S.Ct. 1780 (1992).

“The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.” Foucha, 504 U.S. at 79 (quoting Vitek v. Jones, 445 U.S. 480, 492, 100 S.Ct. 1254, 53 L.Ed.2d 522 (1980)). “Commitment to a mental hospital produces a ‘massive curtailment of liberty’ . . . and in consequence ‘requires due process protection.’” Vitek, 445 U.S. at 491-92. (internal citations omitted); accord In re Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

Laws that impinge on a person’s liberty must therefore (1) further compelling state interests and be narrowly tailored to achieve those interests, In re Detention of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993), and (2) meet fundamental requirements of procedural due process in order to satisfy the Fourteenth Amendment. Wolff v. McDonnell, 418 U.S. 539, 558-60, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

The United States Supreme Court has upheld statutes providing for the forcible civil detainment of individuals alleged to be sexually violent predators against constitutional challenges when

(1) “the confinement takes place pursuant to proper procedures and evidentiary standards,” (2) there is a finding of dangerousness either to one’s self or to others,” and (3) proof of dangerousness is “coupled . . . with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’”

Kansas v. Crane, 534 U.S. 407, 409-10, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (quoting Kansas v. Hendricks, 525 U.S. 346, 357-58, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). The Washington Supreme Court has found that “there is no doubt that commitment [under Chap. 71.09 RCW] is predicated on dangerousness under the statute.” Young, 122 Wn.2d at 32. Yet, given the liberty interest at stake, the commitment proceeding must still satisfy fundamental due process. In re Detention of Fair, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, No. 80498-2, 2009 WL 3384577 at 3 (2009)<sup>3</sup> (citing In re Detention of Henrickson, 140 Wn.2d 686, 694, 2 P.3d 473 (2000)).

b. Whether proceeding with a civil commitment under Chap. 71.09 RCW of an incompetent person violates due process is a question of first impression in Washington. Below, the trial court determined that despite Morgan’s incompetency, it could proceed with Morgan’s commitment as a sexually violent predator

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<sup>3</sup> Because no pin citations for the Washington or Pacific Reporters are yet available for Fair, citations herein are to the Westlaw citation.

under both the civil commitment statute and case law. Specifically, the court concluded:

Morgan's incompetency does not preclude this matter from going forward. Specifically, RCW 71.09.060 and In re Detention of Greenwood, 130 Wn. App. 277, 122 P.3d 747 (2005), hold that sexually violent predator proceedings may occur regardless of whether the Respondent is competent.

CP 65.

With respect to the court's conclusion about the statutory authorization for the proceeding, the fact that RCW 71.09.060 may contemplate the SVP commitment trial of an incompetent person (a fact that Morgan does not concede), this hardly settles the constitutional problem. And, contrary to the trial court's pronouncement, Greenwood did not hold that "sexually violent predator proceedings may occur regardless of whether the Respondent is competent." CP 65. In fact, the Court in Greenwood specifically avoided resolution of this question, noting, "because 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 Wn. App. at 286; see also, id. at

289 n. 9 (Morgan, J., dissenting) (“Like the majority, I do not consider or discuss . . . this question.”).<sup>4</sup>

c. This Court should hold that proceeding with the SVP commitment of an incompetent person violates due process.

“Once it is determined that due process applies, the question remains what process is due.” Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

It is axiomatic that procedural protections must be examined in terms of the substantive rights at stake. But identifying the contours of the substantive right remains a task distinct from deciding what procedural protections are necessary to protect that right. “[T]he substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual’s liberty interest actually is outweighed in a particular instance.”

Washington v. Harper, 494 U.S. 210, 220, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (quoting Mills v. Rogers, 457 U.S. 291, 299, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982)).

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<sup>4</sup> In State v. Ransleben, 135 Wn. App. 535, 144 P.3d 397 (2006), this Court concluded that the statutory rights contained in Chap. 71.09 RCW do not include an implied right to be competent at an SVP commitment trial. 139 Wn. App. at 539-40. Ransleben appears to have made no constitutionally based argument on this point, and this Court did not address the constitutional question. Id.

In a criminal case, principles of due process forbid the trial of a person lacking a rational and factual understanding of the proceedings and sufficient ability to consult with his lawyer and assist in preparing his defense. Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). In Drope, the Court noted the historical antecedents for this rule and its elemental link to the right to a defense: “Some have viewed the common law prohibition ‘as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.’” Id. (citation omitted). For this reason, the standard focuses on the defendant’s “capacity . . . to consult with counsel” and . . . “to assist counsel in preparing his . . . defense.” Indiana v. Edwards, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2379, 2386, 171 L.Ed.2d 345 (2008) (quoting Drope, 420 U.S. at 171).

[I]t would be likewise a reproach to justice and our institutions, if a human being . . . were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal

whose sacred duty it is to uphold the law in all its integrity.

Cooper v. Oklahoma, 517 U.S. 348, 366, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (quoting United States v. Chisholm, 149 F. 284, 288 (C.C. Ala. 1906)).

As noted, “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Addington v. Texas, 441 U.S. 418, 426, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (emphasis added). Moreover, “the function of legal process is to minimize the risk of erroneous decisions.” Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

As the Court explained in Cooper, an incompetent defendant, who “lacks the ability to communicate effectively with counsel . . . may be unable to exercise other ‘rights deemed essential to a fair trial.’” Cooper, 517 U.S. at 363 (quoting Riggins v. Nevada, 504 U.S. 127, 139, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring in judgment)).

With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a

“fundamental component of our criminal justice system”--the basic fairness of the trial itself.

Id. at 364 (internal citation omitted). The Court concluded that “[t]he deep roots and fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection.” Id. at 368.

According to the logic of the trial court in this case, however, a person's mental incompetence only affects the fundamental fairness of the proceeding in a criminal matter. But as the decision in Cooper makes clear, this is an arbitrary distinction when individual liberty is at stake. “[T]he defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system.” Id. at 367. The belief that Morgan had no right to be competent in the proceeding was tantamount to concluding he had no right to defend himself, and violated due process.

The Florida Court of Appeals held that under its own sexually violent predator law, F.S.A. § 394.910 et seq., a defendant has the due process right to be competent unless “the State's

evidence supporting commitment is entirely of record.” In re Commitment of Branch, 890 So.2d 322, 327 (Fla. App. 2005). “However, when the State relies on evidence of prior bad acts supported solely by unchallenged and untested factual allegations to establish any element of its case, the respondent has a due process right to be competent so that he or she may consult with counsel and testify on his or her own behalf.” Id. (emphasis added). The court concluded that because an incompetent person lacks the ability to assist his counsel, under Mathews v. Eldridge he “is denied the opportunity to be heard in a meaningful manner.” Branch, 890 So.2d at 326 (citing Mathews v. Eldridge, 424 U.S. at 333).

The Court rejected the dissent’s argument that “the presence of a guardian ad litem coupled with an attorney somehow afforded Branch due process.” Branch, 890 So.2d at 327. The Court reasoned:

The primary purpose of a guardian ad litem is to advocate for the best interests of the incompetent person in a legal proceeding. Even with these best interests in mind, however, a guardian ad litem cannot stand in the exact shoes of an incompetent defendant. A guardian ad litem lacks the personal, factual knowledge necessary to assist counsel in mounting a defense against factual assertions, adduced through hearsay, that have never been

tested at trial or admitted to. The appointment of a guardian ad litem is neither sufficient nor appropriate for the task of assisting counsel in challenging factual matters and presenting contradictory evidence known only by the inarticulate, incompetent respondent.

Id. at 327-28 (emphasis in original).

The California Supreme Court reached a similar conclusion in the analogous circumstance of a defendant's right to testify at a trial under California's Sexually Violent Predator Act (SVPA).<sup>5</sup> People v. Allen, 44 Cal.4th 843, 187 P.3d 1018, 1032-37 (2008). While the Court held that the Sixth Amendment right of a criminal defendant to testify over his counsel's objection does not extend to a person subject to commitment under the SVPA, this did not end the Court's inquiry, as the Court concluded such a person did have this right under the Due Process Clause. Id. In so holding, the Court evaluated the question under its own procedural due process standard, which requires the Court to weigh:

(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute

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<sup>5</sup> In this case, Morgan's attorney told the court he believed it would not be in Morgan's best interest to testify at the trial, and moved to bar the State from calling him. RP 14-15. The court denied the motion, RP 17, but the State ultimately did not call Morgan to testify.

procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official.

Id. at 1032.

With respect to the first criterion, the Court found “the private interests that will be affected by [a finding that the defendant continues to be a sexually violent predator] are the significant limitations on [the defendant’s] liberty, the stigma of being classified as [a sexually violent predator], and subjection to unwanted treatment.” Id. (quoting People v. Otto, 26 Cal.4th 200, 210, 26 P.3d 1061 (2001) (alterations in original)). The Court observed, “The circumstance that a commitment is civil rather than criminal scarcely mitigates the severity of the restraint upon the defendant’s liberty.” Id. The Court concluded that this first factor weighed heavily in favor of providing all reasonable procedures to prevent erroneous deprivation of liberty interests. Id. at 1033.

Evaluating the second factor, the Court was mindful of the Supreme Court’s admonition in Mathews v. Eldridge that “procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.” Id. at 1034 (quoting Mathews v.

Eldridge, 424 U.S. at 344). The Court thus considered generally whether allowing a defendant in a proceeding under the SVPA to testify over his lawyer's objection would aid him in preventing the erroneous deprivation of his liberty, rather than whether it would help Allen in particular. Id. The Court concluded this factor also should be weighted in favor of granting a defendant this right. Id.

With respect to the third factor, the Court found "the recognition of a right to testify over the objection of counsel may serve the government's interest in securing an accurate factual determination concerning the defendant's status as a sexually violent predator." Id. at 1035. The Court found that any additional burdens – such as the possibility that the government might need to call additional witnesses to rebut the defendant's credible or beneficial testimony – was no different from the government's burden when the defendant and his lawyer are in concord that he should testify, and thus did not justify curtailing the right. Id.

Importantly for this case, the Court also soundly rejected the State's contention that it had a strong interest in "not allowing the defendant to sabotage the proceedings for purposes of his own amusement . . . and thereby degrade the integrity of the process as a whole." Id. at 1036. The Court found such a risk could be easily

mitigated by the trial court, who in all cases “retains authority to manage the proceedings and to prohibit abusive conduct by the parties.” Id.

Finally, evaluating California’s unique criterion of “the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official,” the Court considered California’s other limitations on the rights of defendants in proceedings under the SVPA (no right to self-representation, no privilege against self-incrimination). Id. at 1037. Given these circumstances, the Court concluded that barring a defendant in a proceeding under the SVPA from testifying on his own behalf “might relegate the defendant to the role of a mere spectator, with no power to attempt to affect the outcome.” Id.

Allen’s discussion of the crucial role of a defendant’s testimony in a SVPA commitment proceeding illustrates the need for such a defendant to be competent so he may consult with counsel and assist with his defense:

[T]he defendant’s participation in the proceedings, through pretrial interviews and testimony at trial, generally enhances the reliability of the outcome . . . [If critical information, such as the details surrounding the commission of the predicate offenses, is

questionable, 'a significant portion of the foundation of the resulting [sexually violent predator] finding is suspect.' Because the testimony of a defendant typically will concern his or her conduct, this testimony may relate to information that is critical to the experts' testimony. Attorneys are not infallible in appraising their clients and in assessing the impression a client's testimony may have on a jury, or in evaluating the credibility of other witnesses. In some cases, the defendant's testimony may raise a reasonable doubt concerning the facts underlying the experts' opinions. Accordingly, in every case there exists a risk that allowing counsel to preclude the defendant from testifying will lead to an erroneous deprivation of rights.

Allen, 187 P.3d at 134-35 (internal citation omitted).

Several other jurisdictions have answered the question whether a person subject to commitment as a sexually violent predator has the right to be competent at his trial in the negative. None of these opinions is persuasive. Massachusetts, for example, saw "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." Com. v. Nieves, 846 N.Ed.2d 379, 385 (Mass. 2006). In so concluding, the Court found that the "robust, adversary character of the . . . procedure" coupled with the right to counsel minimize the risk of erroneous deprivation of liberty. Id. at 386-87.

If this logic were correct, then there would be no constitutional impediment to going forward with the criminal trial of an incompetent person, as the “adversary character of the proceeding” and right to counsel would likewise diminish the risk of an erroneous deprivation of liberty. But “[w]ith the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense.” Cooper, 517 U.S. at 364. Impairing this right, therefore, undercuts the “basic fairness of the trial itself.” Id.

The Iowa Supreme Court decided that because of the “specialized, civil nature of the proceedings” there was no fundamental right at stake, and declined to apply the Mathews v. Eldridge factors. In re Detention of Cubbage, 671 N.W.2d 442, 446 (Iowa 2003); see also id. at 448 (“In the absence of a fundamental right, ‘substantive due process demands, at the most, that there be a reasonable fit between the governmental purpose and the means chosen to advance that purpose.’”) (citation omitted).<sup>6</sup> But Iowa’s analysis is not persuasive here, as the Washington Supreme Court has held that commitment proceedings under Chap. 71.09 RCW

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<sup>6</sup> Using like reasoning, the Texas Supreme Court also held that because SVP commitment proceedings are “civil,” there is no due process right to be competent. In re Commitment of Fisher, 164 S.W.3d 637, 645-46 (Tex. 2005).

implicate fundamental rights. Albrecht, 147 Wn.2d at 7; Young, 122 Wn.2d at 26.

The Missouri Court of Appeals similarly held that due process does not require a person subject to sexually violent predator proceedings to understand the nature of the proceedings or be able to assist counsel. State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 9 (Mo. App. 2003).<sup>7</sup> This same reasoning, however, would equally support an argument in favor of excluding an alleged SVP from his trial altogether.

Washington, however, not only guarantees persons subject to involuntary commitment proceedings under Chap. 71.09 RCW the right to counsel, RCW 71.09.050(1), but also the right to self-representation. In re Detention of Turay, 139 Wn.2d 379, 396-99, 986 P.2d 790 (1999). These substantive rights—and the fundamentally fair trial they are intended to safeguard—would be utterly hollow if the right to counsel were abridged by the

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<sup>7</sup> The Missouri Court apparently reached this result by presuming that the State would in every instance be able to prove the allegations supporting commitment:

To adopt the rationale that Mr. Moyer does not possess the competency to proceed to trial to determine whether he is a violent sexual predator, and if so determined, to subject him to the specific treatment contemplated for the condition by the statute would thwart the proper exercise of legislative authority for the health and welfare of the state's citizens but it would also jeopardize Mr. Moyer's receipt of proper rehabilitative treatment.

Nixon, 129 S.W.3d at 10.

defendant's inability to assist his lawyer. In effect, by permitting the State to try Morgan despite his incompetency, the court may as well have allowed the State to try him in absentia. Drope, 420 U.S. at 171. Far from assisting his counsel in preparing his defense, Morgan was relegated "to the role of a mere spectator, with no power to attempt to affect the outcome." Allen, 187 P.3d at 1037. This Court should hold that proceeding with Morgan's commitment trial despite his incompetency violated due process.

2. THE FORCIBLE ADMINISTRATION OF  
ANTIPSYCHOTIC DRUGS TO MORGAN  
DURING HIS TRIAL VIOLATED DUE PROCESS.

Having concluded that Morgan's mental competency to stand trial was irrelevant to whether the State should be permitted to try to commit him as a sexually violent predator, the court sanctioned a further erosion of his due process rights by authorizing him to be forcibly medicated with antipsychotic drugs.

a. Morgan's counsel moved to have Morgan forcibly medicated. Pretrial, Morgan's defense attorney requested that Morgan be medicated against his will to control his behavior during the trial. CP 66; 8/30/06 RP 28. The trial court at first granted the

motion following a brief hearing, but at the State's request agreed to take further evidence on the question. CP 66-70.<sup>8</sup>

That hearing was held in the judge's chambers. 8/30/06 RP 26. Only the State, Morgan's GAL, and Morgan's counsel (by telephone) attended the hearing. Morgan was not present. Id.

Morgan's attorney admitted that medication would not restore Morgan's competency but contended that the medication was necessary to ensure he received a fair trial. 8/30/06 RP 28-29. Morgan's attorney asked the court to take expert testimony so as to determine whether forcibly medicating Morgan was medically appropriate and would be the least intrusive means of protecting his rights. 8/30/06 RP 29. At the same time he noted that Morgan would be "acting out at any trial." 8/30/06 RP 30.

Morgan's GAL initially took no position on defense counsel's request, but ultimately concurred in the motion to forcible medicate Morgan. CP 78-80. He acknowledged, however, that Morgan himself was "violently and vehemently" opposed to any sort of involuntary medication. 8/30/06 RP 28, 31. The GAL explained that Morgan's psychosis was so acute that Morgan was "delusional

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<sup>8</sup> The State argued that the court was required to find forcible medication to be medically appropriate and the least intrusive means of protecting Morgan's rights.

of just having the basic sense of identity and what year and time and place in space.” 8/30/06 RP 32. He opined that without medication, the jury would conclude Morgan was a “crazy and violent predator.” Id. The court recessed the proceedings so the State could obtain a report from Morgan’s psychiatrist and so the GAL could provide further information.

The State submitted a report authored by Dr. Leslie Sziebert, a psychiatrist who had been treating Morgan during the time he was detained pending trial. CP 69, 71-77. According to Sziebert, Morgan initially had been prescribed Risperdal, up to eight milligrams per day, Topomax, an anti-seizure drug, 100 milligrams per day, and Geodon, 160 milligrams at bedtime. CP 72. Sziebert stated that Morgan stopped taking the drugs 17 months prior to Sziebert’s report, without much alteration in his behavior:

Morgan’s unit behavior hasn’t changed very much since being off of medications. There haven’t been any episodes of acute psychosis or agitation. He continues to talk to hallucinated voices at night and pace in his room. He demonstrated those same behaviors while on medication.

Id.

Sziebert indicated that if Morgan were to be medicated against his will, medical personnel would resume treatment with the

Geodon. Id. Sziebert averred that “patients with schizophrenia benefit from taking antipsychotic medications from the standpoint of avoiding the long-term cognitive deterioration that appears to be a consequence of untreated psychosis.” Id. Sziebert acknowledged, however, that “[w]hether treatment on an involuntary basis would be in Morgan’s long-term interest is not certain.” Id. Sziebert admitted that Morgan himself was opposed to the treatment. Id.

Sziebert stated:

Involuntary treatment with antipsychotics may benefit Morgan at his civil commitment trial from the standpoint of helping him curb his impulses and inappropriate behavior. It’s hard to characterize involuntary medications as being nonintrusive.

Id.

Sziebert further emphasized, “The standard[s] that must be met to force medications on a resident [of the Special Commitment Center] are of dangerousness to self or others, or grave disability. He meets none of these standards at this time.” Id. (emphasis added).

The court granted the motion to forcibly medicate Morgan. Absent from the court’s ruling was any consideration of Morgan’s freedom from being forced to take antipsychotic medication against

his will, or whether the order was constitutionally permissible where it would not render him competent to stand trial.

b. The forcible administration of medications is not constitutionally permissible except where medically appropriate and necessary to further a compelling government interest. Whether it is unconstitutional for the State to administer medications to an individual against his will depends on the scope of the individual's right to freedom from government intrusion, and concomitantly upon the nature of the government's interest.

In Washington v. Harper, the Supreme Court considered the constitutionality of a Washington prison regulation that authorized the forcible administration of antipsychotic drugs without a hearing. The Court in Harper commenced with the premise that Harper possessed "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the due process clause of the Fourteenth Amendment. Harper, 494 U.S. at 221-22. The Court held, however, that the extent of Harper's right to avoid the unwanted administration of antipsychotic drugs had to be defined in the context of his confinement. Id. at 222. As Harper's liberty interest had been diminished by his incarceration, the question, therefore, was whether the regulation was "reasonably related to

legitimate penological interests.” Id. (quoting Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)).

The Court found three factors relevant to this question: first, whether there was a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it[;]” second, “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally[;]” and third, the availability of “ready alternatives.” Harper, 494 U.S. at 224-25 (quoting Turner, 482 U.S. at 89-91). Consistent with Vitek, the Washington Department of Corrections policy permitted involuntary administration of medications only upon a showing that the prisoner was (1) mentally ill and (2) gravely disabled or dangerous. Harper, 494 U.S. at 215 (citing RCW 71.05.020 (1987)). Moreover, before a prisoner could be medicated against his will, the State had to make this showing through medical evidence, and the medication first had to be prescribed by a psychiatrist and then approved by a reviewing psychiatrist. 494 U.S. at 222-23. Under these circumstances, and taking into consideration Washington’s legitimate penological interest not only in ensuring the safety of prison staff and administrative personnel, but in taking reasonable

measures for the safety of inmates, the Court found the regulation did not violate substantive due process. Id. at 225-27.

The Court further concluded that allowing the determination whether to forcibly medicate an inmate to be made by the prison superintendent and medical personnel, rather than a judge, did not violate procedural due process. Id. at 230-31. This was in part because medical personnel making the recommendation for medication are better positioned to make a medical treatment decision, and partly because the Court was confident in the ability of internal decision-makers to render a fair and impartial decision. Id. at 232-33.

By contrast, in Riggins v. Nevada, supra, the Court held the forced administration of antipsychotic medications during Riggins' trial for murder and robbery violated due process. Riggins was mentally ill but adjudicated competent to stand trial. 504 U.S. at 130. Prior to trial, Riggins moved to suspend the administration of antipsychotic medication, contending "continued administration of these drugs infringed upon his freedom and that the drugs' effect on his demeanor and mental state during trial would deny him due process." Id.

The trial court had considered a medical report stating that the medication made Riggins calmer and more relaxed but that an excessive dose might cause drowsiness. Id. at 130-31. The court also considered a report in which the doctor predicted that if taken off the medications, Riggins would “regress to a manifest psychosis and become extremely difficult to manage.” Id. at 331. In a terse decision, the court then denied Riggins’ motion to terminate the medications. Id.

On certiorari, the Supreme Court held the forced medication of Riggins violated due process. The Court distinguished Harper, where, under the “unique circumstances of penal confinement,” “due process allows a mentally ill inmate to be treated involuntarily with antipsychotic drugs where there is a determination that ‘the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.’” Riggins, 504 U.S. at 134-35 (quoting Harper, 494 U.S. at 227). Nor had the State shown that involuntary medication was medically appropriate and an adjudication of guilt or innocence could not be obtained by less intrusive means. Id. at 135. The Court concluded that rather than finding safety considerations “or other compelling concerns” outweighed Riggins’ interest freedom from unwanted antipsychotic drugs, “the court

[improperly] simply weighed the risk that the defense would be prejudiced by changes in Riggins' outward appearance against the chance that Riggins would become incompetent if taken off Melaril, and struck the balance in favor of involuntary medication.” Id. at 136-37.

In Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003), the Supreme Court attempted to reconcile these two precedents in determining whether it was constitutionally acceptable to forcibly medicate an affirmatively incompetent criminal defendant facing trial on non-violent offenses. Sell was prosecuted for submitting fictitious insurance claims for payment. Prior to his trial, it was determined that Sell was incompetent to stand trial, and Sell was hospitalized for treatment to see whether his competency could be restored. Id. at 170. While hospitalized, Sell refused to take medication. Id. A psychiatrist authorized the involuntary administration of drugs (1) because Sell was “mentally ill and dangerous, and medication is necessary to treat the mental illness,” and (2) so that Sell would become “competent for trial.” Id. at 171-72. A magistrate judge approved the order on these grounds, but the Eighth Circuit concluded the dangerousness finding was “clearly erroneous,” and affirmed the order as

constitutional only because it was necessary to restore Sell's competency to stand trial. Id. at 184.

In the Supreme Court, Sell contended that “allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent offenses” violated due process by improperly depriving Sell of an important “liberty” that the Constitution guarantees. Id. at 174 (quoting Brief for Petitioner). The Court framed the constitutional question presented thusly: “Does forced administration of antipsychotic drugs to render Sell competent to stand trial unconstitutionally deprive him of his ‘liberty’ to reject medical treatment?” Id. at 177.

The Court concluded that Harper and Riggins

indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

Sell, 539 U.S. at 179.

The Court explained that “[t]his standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances.” Id. at 180 (emphasis added). Further, “those instances may be rare.” Id. And, consistent with this narrow rule, before a court may order the forcible administration of antipsychotic medications the State must show: (1) “that important government interests are at stake”; (2) “that involuntary medication will significantly further those concomitant state interests”; (3) “that involuntary medication is necessary to further those interests”; and (4) that administration of the drugs is medically appropriate.” 539 U.S. at 180-83 (emphases in original).

c. In ordering Morgan’s forcible medication at his trial, the trial court failed to identify the government’s compelling interest or consider Morgan’s right to be free from unwanted antipsychotic medication. The trial court failed to correctly apply the Sell factors before approving the forcible administration of medications to Morgan. As in Riggins, the court also did not acknowledge Morgan’s “liberty interest in freedom from unwanted antipsychotic drugs.” 504 U.S. at 137.

Although the State commendably sought to ensure that the forcible medication order did not violate due process, the State

mistook the pertinent standard. First, the State incorrectly believed that Sell was merely instructive because Sell involved a criminal proceeding. CP 69. Second, based on the erroneous premise that Morgan did not have the right to be competent during his commitment trial, the State contended that “involuntary medication to restore competency would be inappropriate.” Id.<sup>9</sup>

The State was wrong on both counts. Although applicable to criminal proceedings, Sell speaks more broadly to all efforts to infringe upon the liberty of persons whose rights have not been circumscribed by the fact of incarceration for a crime. Compare Harper, 494 U.S. at 222 (“The extent of a prisoner’s right under the [Due Process] Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate’s confinement”) with Sell, 539 U.S. at 166 (the liberty interest of an individual whose rights have not been curtailed in avoiding involuntary administration of antipsychotic drugs may only be overcome by an “essential” or “overriding” state interest or justification) (quoting Riggins, 539 U.S. at 178).

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<sup>9</sup> The State contended, “[i]t may be that if Morgan were to become disruptive during his trial, removing him from the courtroom would be a viable option which would more completely protect his interests in this matter.” CP 69-70.

i. The involuntary medication order was not medically appropriate. In Sell, the Court noted that a forced medication order may be warranted in situations unrelated to a defendant's competency to stand trial, "such as the purposes set out in Harper related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk." 539 U.S. at 182.

Neither of these situations was present here. As Sziebert acknowledged, Morgan did not meet the Special Commitment Center's own standards for forcible medication, as he was neither dangerous nor gravely disabled. CP 72. Moreover, Morgan was almost certainly competent to refuse medications, as he had done so for the past 17 months without treating physicians seeking to override his wishes. Under these circumstances, as was eloquently stated by the Court in Sell, approving Morgan's involuntary medication was manifestly erroneous:

Why is it medically appropriate forcibly to administer antipsychotic drugs to an individual who (1) is not dangerous and (2) is competent to make up his own mind about treatment? Can bringing such an individual to trial alone justify in whole (or at least in significant part) administration of a drug that may have adverse side effects, including side effects that may to some extent impair a defense at trial? We consequently believe that a court, asked to approve

forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other Harper-type grounds; and, if not, why not.

Sell, 539 U.S. at 183 (emphasis in original).

Moreover, anti-psychotic medications can cause severe, sometimes permanent, side effects.

The purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect . . . is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes. . . Other side effects include akathisia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face.... [T]he proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%. According to the American Psychiatric Association, studies of the condition indicate that 60% of tardive dyskinesia is mild or minimal in effect, and about 10% may be characterized as severe.

Riggins, 504 U.S. at 134 (quoting Harper, 494 U.S. at 229-30).

Although Sziebert believed that antipsychotic medications could prevent long-term cognitive deterioration, he conceded that whether such medications “would be in Morgan’s long-term interest is not certain.” CP 72. Further, according to Sziebert, Morgan’s behavior did not alter significantly after he elected to stop taking the medications. Id. Given the side effects of antipsychotic medications and the absence of any medical necessity for the administration of the drugs, the court erred in ruling the drugs were medically appropriate.

ii. Forcible administration of antipsychotic medications was not necessary to ensure that Morgan had a fair trial. The trial court ruled that the administration of antipsychotic medications “will control Morgan’s psychotic symptoms, stabilize him, and render him able to function properly and assist his attorney during trial.” CP 82. The trial court also decided that there were “no viable alternatives to involuntarily medicating Morgan.” Id. But little evidence was offered to support either conclusion.

Certainly there was no evidence that the forcible administration of antipsychotic medications would restore Morgan’s competency, as the trial court’s ruling implies. Sziebert stated only that involuntary medication might curb Morgan’s impulses and

inappropriate behavior. CP 72. Sziebert otherwise believed, based upon his experience as Morgan's treating psychiatrist, that antipsychotic medication was unlikely to interrupt Morgan's delusional thought process.

All that was offered to rebut Sziebert's report was the GAL's recommendation. According to Morgan's GAL, Morgan had been involuntarily medicated while in custody at the Special Offender Unit in Twin Rivers. CP 79. Based on the treatment notes of the prescribing psychiatrist at the SOU as well as the observations of State's expert Brian Judd, Morgan's GAL asserted it was "clear" that "there is a history of positive results from prior involuntary administration of antipsychotic medications." *Id.* In so claiming, the GAL wholly discounted Sziebert's observations. Further, the GAL himself had not personally observed whether the medication regimen affected Morgan's behavior – nor could he have done so, as he was appointed after Morgan voluntarily discontinued taking the medications.<sup>10</sup>

The GAL also presumably was unaware of the differing standards for forcibly medicating a prisoner as opposed to a pretrial

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<sup>10</sup> The GAL was appointed on April 19, 2006. CP 65. Sziebert's report was dated September 21, 2006. CP 71. Morgan had discontinued his medications 17 months before Sziebert drafted his report. CP 72.

detainee. “[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.” Riggins, 539 U.S. at 178 (quoting Bell v. Wolfish, 441 U.S. 520, 546, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). Thus, the fact that Morgan was medicated against his will while at Twin Rivers had little bearing on whether such an order would be appropriate once he was no longer incarcerated for a crime.

With respect to the court’s conclusion that there were “no viable alternatives” to forcibly medicating Morgan, this is suspect as there is no indication the court weighed any less intrusive means. Sell, 539 U.S. at 181 (“[T]he court must consider less intrusive means for administering the drugs, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods.”). Moreover, this conclusion was proven false during the trial itself. Twice during the trial the court recessed the proceedings because of Morgan’s behavior. 4RP 571, 579-81. Following the second recess, the court discharged the jury for the day so that Morgan could have an opportunity to calm down. 4RP 581-84. Both of these recesses apparently had the desired effect. Correspondingly, the State proposed a less intrusive alternative to

the forced administration of medication, namely, removing Morgan from the courtroom should he become disruptive. CP 69-70.

Again, under Sell, before a court may approve an order to medicate an individual against his will, the court must find important government interests are at stake, that involuntary medication will significantly further those interests, that involuntary medication is necessary to further those interests, and that administration of the drugs is medically appropriate. 539 U.S. at 180-83; see also Riggins, 504 U.S. at 135 (“Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others.”). Even assuming that the interest in bringing Morgan to trial on the State’s commitment petition despite his incompetency is an important government interest (and that it is possible for a trial to be fair under this circumstance), none of the other Sell factors has been established.

Setting aside Sziebert’s uncompromising assessment that an involuntary medication regime was neither necessary nor reasonably likely to significantly further the desired purpose, the

loose assertions contained in the GAL's report do not suffice to establish either of these essential predicates. In fact, the conception that the administration of antipsychotic medications to Morgan would make him more complaisant during the trial was almost entirely speculative, and not founded on legitimate medical opinion. See CP 72 ("Morgan's unit behavior hasn't changed very much since being off of medications."). Finally, there was no showing under Harper that the medications were medically appropriate, as Morgan was neither dangerous nor gravely disabled. Harper, 494 U.S. at 215; CP 72. The forced medication order violated Morgan's due process right to liberty.

d. Absent a showing that Morgan was incompetent to refuse treatment, the GAL's concurrence in the forced medication does not waive this issue. The State may try to argue that this issue is somehow waived because the GAL concurred in the administration of forced medications to Morgan. Such an argument is unavailing as there was no showing that (1) Morgan was incompetent to refuse treatment or (2) the treatment was medically necessary.<sup>11</sup> No one at the trial level appeared to have considered

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<sup>11</sup> Nor can it be argued that the fact that Morgan's counsel requested Morgan be medicated extinguished Morgan's personal right to freedom from unwanted medications.

the question of Morgan's competency to refuse medical treatment, but even if this crucial question had been addressed, the record suggests that Morgan was competent for this purpose.<sup>12</sup>

Sziebert's report was silent on this question, noting only that Morgan had refused medications for the past 17 months and he was opposed to reinitiating a medication regime. CP 72. And the GAL did not tell the court that Morgan's competency to refuse medications was in question. To the contrary, the GAL emphasized that Morgan was "violently and vehemently" opposed to taking any medications, and did not comment on Morgan's capacity to make this decision. 8/30/06 RP 28, 31.

e. The constitutional violation requires reversal. An erroneous order for the forcible administration of antipsychotic medication violates not only an individual's Fourteenth Amendment right to liberty but also his right to a defense:

This error may well have impaired the constitutionally protected trial rights Riggins invokes. At the hearing to consider terminating medication, Dr. O'Gorman suggested that the dosage administered to Riggins

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<sup>12</sup> It cannot be inferred from Morgan's incompetency to stand trial that he was incompetent to refuse medications. There was no suggestion that Morgan did not understand the nature of the proceedings; the problem was that due to his delusional beliefs, Morgan was unable to assist his lawyer in preparing his defense. 2/23/06 RP 10 (Morgan tells the court, "I know [defense counsel has] been paid off, he is been blackmailed [sic] and I know it. If you don't want to see it, your honor.")

was within the toxic range . . . and could make him “uptight,” . . . Dr. Master testified that a patient taking 800 milligrams of Mellaril each day might suffer from drowsiness or confusion. . . . “[I]n extreme cases, the sedation-like effect [of antipsychotic medication] may be severe enough (akinesia) to affect thought processes”. It is clearly possible that such side effects had an impact upon not just Riggins’ outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel.

Riggins, 504 U.S. at 137; accord Sell, 539 U.S. at 183.

Where an individual has improperly been drugged against his will so that he may be tried, the constitutional violation is a structural error that requires reversal. Riggins, 504 U.S. at 137. In Riggins, the Court explained why on review, the question how the proceedings would have been different if the defendant had not been medicated is irrelevant:

Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins’ motion had been granted would be purely speculative. We accordingly reject the dissent’s suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril.

Id.

The unconstitutional forcible administration of medication to Morgan requires reversal of the commitment order.

3. THE COURT VIOLATED THE RIGHT TO A PUBLIC TRIAL AND MORGAN'S RIGHT TO BE PRESENT WHEN IT HELD THE FORCIBLE MEDICATION HEARING IN CHAMBERS.

Even assuming arguendo that proceeding with Morgan's trial despite his incompetency did not violate due process, the commitment order still must be reversed as the trial court violated Morgan's right to be present and the right to a public trial when it held the hearing on whether Morgan should be medicated against his will in a presumptively closed hearing in chambers, and without allowing Morgan to attend the hearing.

a. The closed hearing violated the right to a public trial safeguarded by article I, section 10 of the Washington Constitution. Article I, section 10 of the Washington Constitution provides: "Justice in all cases shall be administered openly, and without unnecessary delay." The clear constitutional mandate in article I, section 10 entitles the public and the press to openly administered justice. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic.

Federated Publications, 94 Wn.2d at 58. In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-05, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. Globe Newspaper, 457 U.S. at 606; Richmond Newspapers, 448 U.S. at 572-73 (plurality).

Whether a trial court procedure violates the right to a public trial is a question of law which is reviewed de novo. In re Detention of D.F.F., 144 Wn. App. 214, 218, 183 P.3d 302, rev. granted, 164 Wn.2d 1034 (2008). This standard applies to civil as well as criminal appeals. Id. (citing Dreiling v. Jain, 151 Wn.2d 900, 907-08, 93 P.3d 861 (2004)).

In D.F.F., this Court held that the closure of mental health commitment proceedings pursuant to Chap. 71.05 RCW violated article I, section 10's public trial guaranty. The Court noted that in every instance in which a court seeks to close proceedings to the public, the court must make an individualized determination that closure is appropriate after first weighing five factors:

1. The proponent of closure or sealing must make some showing of the need for doing so, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Id. at 222 (citing Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993) and Ishikawa, 97 Wn.2d at 36-39).

The trial court in D.F.F. had relied upon MPR 1.3 to support the closure order; however, because this rule provided for no

circumstances, “extraordinary or otherwise,” in which the public could challenge the closure of a court proceeding, the Court of Appeals held the rule was unconstitutional. 144 Wn. App. at 224-25. In so holding, the Court overruled its earlier opinion in In re the Detention of D.A.H., 84 Wn. App. 102, 924 P.2d 49 (1996), a proceeding under Chap. 71.09 RCW in which the trial court had closed the probable cause hearing. D.F.F., 144 Wn. App. at 224; see also id. (“D.A.H. does not appear to be consistent with case law from [the Washington Supreme Court]. We, therefore, question its continued validity.”) (quoting Turay, 139 Wn.2d at 414).

The trial court here made no determination that holding the forced medications hearing in chambers was necessary, nor was the public or any party afforded an opportunity to object to the closure. Since the court did not identify any interests that would be threatened if the hearing were public, the court also failed to ensure the closure was the least restrictive means of protecting those interests. And the court did not weigh the competing interests between a public proceeding and a closed hearing.

“[A] violation of article I, section 10 is not subject to ‘triviality’ or harmless error analysis.” D.F.F., 144 Wn. App. at 226. The commitment order must be reversed.

b. Morgan had the right to be present at the hearing where the court decided he should be medicated against his will. It should go without saying that if the public had the right to be present at a hearing at which the trial court would decide whether Morgan should be drugged for his commitment trial, Morgan himself had this same right.

In the criminal context, the Supreme Court has broadly held that “[the] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence[.]” United States v. Gagnon, 570 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1986); accord State v. Berrysmith, 87 Wn. App. 268, 274, 944 P.2d 397 (1997). Although the Supreme Court has found that a defendant does not have an unqualified right to attend an in-chambers conference, his exclusion will violate his right to be present if presence is “required to ensure fundamental fairness.” Gagnon, 570 U.S. at 526. The California Court of Appeals has similarly held that “When the court is receiving evidence or information upon which fundamental or important procedural rights will be determined, the better practice is to have the defendant present.” People v. Ebert, 199 Cal. App. 3d 40, 46 (1988) (emphasis added).

Although the statute contains no explicit right to be present, RCW 71.09.050 provides: “At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel[.]” RCW 71.09.050(1). Moreover, under the Mathews v. Eldridge criteria, due process required that Morgan be present at the hearing.

Because involuntary commitment constitutes a massive curtailment of liberty, the first criterion—the private interest affected--“weighs heavily” in Morgan’s favor. In re Detention of Stout, 159 Wn.2d 357, 370, 150 P.3d 86 (2007). The second Mathews factor requires the Court to consider the risk of erroneous deprivation through existing procedures and the probable value of additional safeguards. 424 U.S. at 335. Barring Morgan from attending the hearing at which the court would decide whether he should be forced to take antipsychotic medications against his will carries a substantial risk of erroneous deprivation. Additional safeguards—i.e., allowing him to attend the hearing and be heard “in a meaningful manner”—would be beneficial both from the standpoint of minimizing the likelihood that Morgan’s freedom from unwanted medications would be unacceptably curtailed and in ensuring a fair proceeding. Finally, the costs and administrative

burdens attendant to transporting Morgan for the hearing are slight. This Court should conclude that Morgan's unnecessary exclusion from the hearing at which the trial court decided whether he should be forcibly medicated violated due process.

4. PREDICATING MORGAN'S COMMITMENT ON THE UNRELIABLE DIAGNOSIS OF PARAPHILIA-NOS-NONCONSENT VIOLATED DUE PROCESS.

The indefinite commitment of sexually violent predators is a restriction on the fundamental right of liberty, and consequently, the State may only commit persons who are both currently dangerous and have a mental abnormality. Hendricks, 521 U.S. at 357-58; In re Detention of Thorell, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Current mental illness is a constitutional requirement of continued detention. O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S. Ct. 2486, 45 L. Ed.2d 396 (1975).

a. To satisfy due process, commitment as a sexually violent predator must be based on a valid diagnosis. Three Supreme Court precedents are directly applicable to this case: Foucha, 504 U.S. 71; Hendricks, 521 U.S. 346; and Crane, 534 U.S. 407. Taken together, these cases establish that involuntary civil commitment may not be based on a diagnosis that is either medically unrecognized or too imprecise to distinguish the truly

mentally ill from typical recidivists who must be dealt with by criminal prosecution alone.

In Foucha, the Court held that a criminal defendant found not guilty by reason of insanity could not be held involuntarily in a state mental hospital solely "on the basis of his antisocial personality which, as evidenced by his conduct at the facility, . . . rendered him a danger to himself or others." 504 U.S. at 78; see also id. at 82 (rejecting the argument that "because [an individual] once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, . . . he may be held indefinitely").

The Court explained that the State's "rationale [for commitment] would permit [it] to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term." Id. at 82-83. The Court reasoned that if a supposedly dangerous person with a personality disorder "commit[s] criminal acts," then "the State [should] vindicate [its interests through] the ordinary criminal processes . . . , the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns

of criminal conduct" -- i.e., "the normal means of dealing with persistent criminal conduct." Id. at 82. In her concurring opinion, Justice O'Connor added that it was "clear that acquittees could not be confined as mental patients absent some medical justification for doing so." Id. at 88 (O'Connor, J., concurring in part and concurring in the judgment).

In Hendricks, the Court reaffirmed that "dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment; " rather, "proof of dangerousness [must be coupled] with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" 521 U.S. at 358. The Court then upheld Hendricks' commitment under the Kansas Sexually Violent Predator Act (KSVPA), noting that "[t]he mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder." Id. at 260 (citing DSM-IV). Thus, "Hendricks' diagnosis as a pedophile . . . suffice[d] for due process purposes" and, further, his admitted inability to control his pedophilic urges "adequately distinguish[ed] [him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." Id.

In his concurrence, Justice Kennedy, who provided the fifth vote in support of the majority opinion, also emphasized that Hendricks' "mental abnormality--pedophilia--is at least described in the DSM-IV." *Id.* at 372 (Kennedy, J., concurring). He therefore concluded that, "[o]n the record before [the Court], [Hendricks' commitment] conform[ed] to [the Court's] precedents." *Id.* at 373. He was quick to add, "however, . . . [that] if it were shown that mental abnormality," as defined by state law, "is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." *Id.*

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, agreed that Hendricks' commitment comported with due process, but did not agree with all of the majority's analysis. *Id.* at 374 (Breyer, J., dissenting). Justice Breyer's opinion thus "set forth three sets of circumstances that, taken together, convince[d]" him that Hendricks' commitment did not violate due process:

First, the psychiatric profession itself classifies the kind of problem from which Hendricks suffers as a serious mental disorder. [Citing the DSM-IV]. . . . The Constitution permits a State to follow one reasonable professional view, while rejecting another. The psychiatric debate, therefore, helps to inform the law by setting the boundaries of what is reasonable. .

Second, Hendricks' abnormality does not

The Epidemiology of Antisocial Personality Disorder, 34 *Social Psychiatry & Psychiatric Epidemiology* 231, 234 (1999)).

In light of these United States Supreme Court cases, the Washington Supreme Court similarly recognizes that in sexually violent predator proceedings, due process requires the State to prove the detainee has a serious, diagnosed, mental disorder that causes him difficulty controlling his sexually violent behavior. Thorell, 149 Wn.2d at 736. "Lack of control" requires proof "sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him [or her] to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." Id. at 723 (quoting Crane, 534 U.S. at 413). Expert testimony is essential to tie a lack of control to a diagnosed mental abnormality or personality disorder. Id. at 740-41. This proof must rise to the level of proof beyond a reasonable doubt. Id. at 744.

Although states have considerable leeway to define when a mental abnormality or personality disorder makes an individual eligible for commitment as a sexually violent person, see Crane, 534 U.S. at 413, the diagnosis must nonetheless be medically justified. See Hendricks, 521 U.S. at 358 (explaining that states

must prove not only dangerousness but also mental illness in order to "limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control"); Thorell, 149 Wn.2d at 732, 740-41 (explaining that the State must present expert testimony and proof beyond a reasonable doubt that offender has serious, diagnosed, mental illness that causes him difficulty controlling his behavior).

b. Dr. Judd's diagnosis of paraphilia-NOS-nonconsent violates due process, because it is an invalid diagnosis that is not accepted by the profession, including the American Psychiatric Association (APA) and the DSM-IV-TR. The State expert's diagnosis of "paraphilia-NOS-nonconsent" is invalid, and its use as a predicate for Morgan's involuntary civil commitment therefore violates due process. The Supreme Court has upheld involuntary civil commitment only in cases in which the diagnosed disorder was one that "the psychiatric profession itself classifies as a serious mental disorder." Hendricks, 521 U.S. at 360; id. at 372 (Kennedy, J., concurring); id. at 375 (Breyer, J., dissenting); Crane, 534 U.S. at 410, 412; see also Foucha, 504 U.S. at 88 (O'Connor, J., concurring in part and concurring in the judgment) (involuntary civil commitment requires "some medical justification"). During oral

argument in Hendricks, Justice Souter drove home precisely why the Due Process Clause requires consensus "medical recognition" before it can justify involuntary civil commitment:

SOUTER: You don't take the position . . . that [a] State could say, we recognize a category of mental abnormality or mental illness. It hasn't been recognized in any medical or psychiatric literature, but we're recognizing it now, and that satisfies [due process?] . . . (emphasis added)

[KANSAS]: That would not be the argument the State would make . . . .

SOUTER: What is the function of this medical recognition . . . under Foucha? . . . Why do we . . . say that in order to satisfy the mental illness element under Foucha there has got to be a medically recognized category within which the particular individual falls?

[KANSAS]: . . . [S]o that the Court doesn't worry that we confine merely for dangerousness or merely for a class of people that we don't want to be around . . . . . . . [T]o be able to civilly commit . . . them it has to be a medically recognized condition . . . .

SOUTER: It's less likely to be abused if there's a categorical approach rather than a purely individual approach.

Transcript of Oral Argument, Hendricks, 521 U.S. 346 (Nos. 95-1649, 95-9075), at [http://www.oyez.org/cases/1990-1999/1996/1996\\_95\\_1649/argument/](http://www.oyez.org/cases/1990-1999/1996/1996_95_1649/argument/).

The disorder referred to by Judd as paraphilia-NOS-nonconsent fails the Court's "medical recognition" or "medical justification" test, because it is not recognized by either the psychiatric profession in general or the APA or the DSM-IV-TR in particular. Put simply, it is a wholly unreliable and invalid diagnosis that fails to distinguish Morgan from any "dangerous but typical recidivist" who cannot be civilly committed under the Due Process Clause. Crane, 534 U.S. at 413.

The DSM-IV-TR does recognize a general diagnosis of "Paraphilia Not Otherwise Specified." American Psychiatric Association, The Diagnostic and Statistical Manual of Mental Disorders, IV-Text Revision 576 (4th ed.-text rev. 2000) ("DSM-IV-TR"); RP 438-41. This category is included for coding paraphilias that do not meet the criteria for any of the specific categories; the "specific categories" include, for example, pedophilia, exhibitionism, and sexual sadism. See DSM-IV-TR at 566-75. The DSM-IV-TR explains that examples of paraphilia-NOS "include, but are not limited to, telephone scatologia (obscene phone calls), necrophilia (corpses), partialism (exclusive focus on part of body), zoophilia (animals), coprophilia (feces), klismaphilia (enemas), and urophilia (urine)." Id. at 576.

While, by its terms, this diagnosis "is not limited to" the variants specifically listed, it would be hard to imagine that the DSM-IV-TR would list such "relatively rare" and "inherently nonviolent" disorders while omitting a valid diagnosis of paraphilia-NOS-nonconsent, which would be "more common and certainly more socially problematic" than the disorders specifically identified. Thomas K. Zander, Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis, 1 *Journal of Sexual Offender Civil Commitment: Science and the Law* 17 (2005) (available at <http://www.soccjournal.org>), at 43; see also, e.g., Marilyn Price, et al., Redefining Telephone Scatologia: Comorbidity and Theories of Etiology, 31 *Psychiatric Annals* 226, 226 (2001) (describing the paraphilia-NOS category as "reserved for sexual disorders that are either so uncommon or have been so inadequately described in the literature that a separate category is not warranted"). Rather, the logical inference is that the modifier "nonconsent" was deliberately omitted.

This inference is supported by the treatment of nonconsensual sexual conduct in other sections of the DSM-IV-TR. For example, sexual abuse of a child is mentioned in the section of the DSM that covers "other conditions or problems" that may merit

"clinical attention" but are not independently diagnosable mental disorders. See DSM-IV-TR at 731, 738-39; Zander, Civil Commitment Without Psychosis, supra, at 43-44.

In addition to the failure of the APA to recognize the disorder, numerous professionals and commentators conclude that it is invalid and diagnostically unreliable. To understand these criticisms, it is necessary to review the diagnostic criteria for paraphilias established by the APA in the DSM. Criterion A of the general diagnostic category of paraphilias in DSM-IV-TR requires that the person demonstrate "recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving (1) nonhuman objects; (2) the suffering or humiliation of oneself or one's partner, or (3) children or other nonconsenting persons that occur over a period of at least six months." DSM-IV-TR at 566. Criterion B requires that the person be distressed or have impaired functioning, except for the diagnoses of pedophilia, voyeurism, and sexual sadism, which can be made based solely on the person having acted on his or her paraphilic urges. Id.

Here, the State's expert, Dr. Brian Judd, testified that he diagnosed Morgan with paraphilia-NOS-nonconsent, based upon Morgan's conduct in the community, his "arousal to children and

rape,” and his deviant arousal during a plethysmograph. RP 208-23. Judd stated Morgan’s history demonstrated specific arousal to the nonconsenting aspects of sexual assaults. RP 215.

Commentators have identified conceptual flaws in Judd’s theories, and even Dr. Dennis Doren, a leading proponent of the paraphilia-NOS-nonconsent diagnosis, acknowledges that “this category probably represents the most controversial among the commonly diagnosed conditions within the sex offender civil commitment realm.” Zander, Civil Commitment Without Psychosis, supra, at 41. For example, it is well-known in the psychological community that the diagnosis of paraphilia-NOS-nonconsent has an interrater reliability factor in the “poor” category. Id. at 49-50. At the trial, defense expert Richard Wollert explained that for a diagnosis to be accepted in the DSM-IV, it needs to meet standards of scientific reliability; i.e., it needs to be defined, the definition needs to be reliable, and the diagnosis must be valid. RP 622. He explained that an evaluator would require “overwhelming evidence” to make a diagnosis of paraphilia-NOS-nonconsent, as evaluators are wrong in their application of the criteria for this “diagnosis” as much as 19 out of 20 times. RP 440.

If there is such lack of clarity as to the criteria for the diagnosis of paraphilia-NOS-nonconsent, and such a low level of confidence in the validity of the diagnosis, then there is insufficient professional consensus in this diagnosis. The paucity of support for the diagnosis in the DSM-IV-TR and in the professional literature, as well as its contextual variability, strongly suggests that it lacks conceptual validity. Zander, Civil Commitment Without Psychosis, supra, at 49. The diagnosis has not even been recognized outside of the SVP commitment context. Id. Further, there are no published studies reporting interrater reliability of the diagnosis in clinical practice, research settings, or in any context other than SVP cases. Id. The psychiatric community is far from recognizing the validity or reliability of the diagnosis of paraphilia-NOS-nonconsent. Id.

In sum, absent a diagnosis that "the psychiatric profession itself classifies as a serious mental disorder," Hendricks, 521 U.S. at 360, involuntary civil commitment violates the Due Process Clause. As Justice Souter said, "medical recognition" is necessary to prevent "abuse" of civil commitment procedures. Transcript of Oral Argument, Hendricks, 521 U.S. 346 (Nos. 95-1649, 95-9075). The convenient but vague diagnosis of paraphilia-NOS-nonconsent

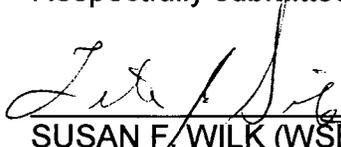
lacks such medical recognition. It is not in the DSM or recognized by the APA. There is no consensus within the psychiatric community of its validity as a diagnosis or its appropriateness in SVP proceedings. Accordingly, due process prohibits its use as a predicate for involuntary civil commitment.

F. CONCLUSION

For the foregoing reasons, Clinton Morgan requests this Court reverse the commitment order. On remand, if he is still incompetent to stand trial, the State's commitment petition should be dismissed. If Morgan is competent and the State proceeds with the commitment trial, the State should be barred from relying on the unreliable diagnosis of paraphilia-NOS-nonconsent as a predicate for commitment.

DATED this 4<sup>th</sup> day of December, 2009.

Respectfully submitted:

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

IN RE THE DETENTION OF )

CLINTON MORGAN, )

APPELLANT. )

NO. 38337-3-II

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
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