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STATE OF WASHINGTON

Supreme Court No. _____
161 Wn. App. 66, __ P.3d __, 2011 WL 1394592
Court of Appeals No. 38337-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF MORGAN

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent,

v.

CLINTON MORGAN,

Petitioner.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL -1 PM 4:50

PETITION FOR REVIEW

1 JUL -6 AM 11:43
STATE OF WASHINGTON
BY [Signature] DEPUTY

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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A. INTRODUCTION

Clinton Morgan is a severely schizophrenic young man who was committed in Grays Harbor County as a sexually violent predator (“SVP”). The court proceeded with his commitment trial even though he was incompetent, and, following an in-chambers hearing at which Morgan was not permitted to be present, ordered the forcible administration of medication in order to control Morgan’s behavior and appearance before the jury, not to restore his competency.

In its published opinion affirming the commitment order, Division Two found no constitutional impediment to proceeding with the SVP commitment trial of an incompetent person. Despite abundant evidence establishing that Morgan was medicated against his will the court created a legal fiction in order to avoid reaching the issue. The court further found the in-chambers hearing regarding forcible medications did not violate Morgan’s right to a public trial. The troubling erosion of due process rights sanctioned by Division Two in its published decision presents important constitutional issues that are likely to recur in other commitment proceedings. Morgan requests this Court grant review.

B. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Clinton Morgan, the appellant below, asks this Court to review the Court of Appeals opinion affirming the order committing him

as an SVP issued April 8, 2011. A motion to reconsider was denied on June 1, 2011. The published opinion, amended on denial of reconsideration, is attached as an Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Does the commitment trial pursuant to Chapter 71.09 RCW of a person who lacks a rational understanding of the proceedings or the ability to assist his counsel violate the Fourteenth Amendment and article I, section 3 guarantee of due process and present an important constitutional issue that should be reviewed by this Court? RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Does a court order for the forcible medication of an incompetent person in order to control his behavior, rather than to restore his competency, violate the substantive due process right to liberty and present an important constitutional issue that should be reviewed by this Court? RAP 13.4(b)(3); RAP 13.4(b)(4).

3. The record established (1) a hearing on the question of whether Morgan should be forcibly medicated; (2) a record of Morgan's strenuous objection to the medication order, showing that administration of anti-psychotic medication was against his will; (3) a submission from a Special Commitment Center ("SCC") expert opining that Morgan did not meet constitutional or SCC internal administrative standards for administration

of forcible medication, and indicating that Morgan did not wish to be medicated against his will; (4) historical evidence that in the past anti-psychotic medications had to be administered involuntarily; (5) a written order from the court requiring the forcible administration of anti-psychotic medication, which was neither rescinded nor modified, and (6) a reference from the court during the trial to the need to assure Morgan was still taking the medications that had been court-ordered. Is Division Two's decision finding the record inadequate for appellate review unsupported by the evidence and contrary to this Court's holdings that an appellant need lodge no further objection to appeal from an adverse final order? RAP 13.4(b)(1); RAP 13.4(b)(4).

4. Should this Court review Division Two's holding that the in-chambers hearing regarding the substantive issue whether Morgan should be forcibly medicated, from which Morgan was excluded, did not violate the right to a public trial and his right to be present, in conflict with a decision from Division One? RAP 13.4(b)(2); RAP 13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

1. Morgan's incompetency. Clinton Morgan suffers from chronic undifferentiated schizophrenia, which is manifested by persistent

delusions and disordered thinking. RP 62, 71.¹ As a child, Morgan 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. 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 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 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.

¹ 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.

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.

2. Forcible medication order. 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. A second hearing was held in the judge's chambers. 8/30/06 RP 26. The assistant attorney general, Morgan's GAL, and Morgan's counsel (by telephone) all 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 because of the possibility that Morgan might be disruptive. 8/30/06 RP 28-29. Morgan's attorney asked the court to take expert testimony in order 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 guardian ad litem stated that Morgan was "violently and vehemently" opposed to any sort of involuntary medication. 8/30/06 RP 28, 31.

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. Sziebert also stated that Morgan was opposed to the forcible administration of anti-psychotic drugs. CP 72.

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 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). By written ruling, he court granted the motion to forcibly medicate Morgan, finding that the

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.

A jury granted the State’s commitment decision, and in a published opinion Division Two rejected Morgan’s challenges to the commitment order. As set forth below, this Court should grant review.

E. ARGUMENT

1. COMMITTING A PERSON WHO IS INCOMPETENT DENIES HIM THE FUNDAMENTAL RIGHT TO ASSIST COUNSEL AND RELEGATES HIM TO THE ROLE OF A “MERE SPECTATOR” IN THE PROCEEDINGS, IN VIOLATION OF DUE PROCESS.

“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); U.S. Const. amend. XIV. Because of the fundamental liberty interest at stake, “the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (quoting Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)).

The fundamental right of the criminal defendant to be competent during his trial – to understand the proceedings and assist his counsel – originates from this guarantee of substantive due process. “The mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.” Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). Proceeding with the trial of an incompetent person diminishes the reliability of the outcome, as the incompetent defendant lacks the ability to participate in the proceedings. Cooper v. Oklahoma, 517 U.S. 348, 366, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996).

In the context of a SVP proceeding, “[i]f critical information . . . is questionable, ‘a significant portion of the foundation of the resulting [sexually violent predator] finding is suspect.’” People v. Allen, 44 Cal. 4th 843, 865-66, 80 Cal. Rptr. 3d 183, 187 P.3d 1018 (Cal. 2008) (quoting People v. Otto, 26 Cal.4th 200, 210-11, 26 P.3d 1061 (2001)). The concern that the outcome be reliable is magnified by the nature of the commitment, which for many offenders amounts to a life sentence.

. The right to be competent ensures that the defendant is not tried “in absentia,” Drope, 420 U.S. at 171, or relegated “to the role of a mere spectator, with no power to attempt to affect the outcome.” Allen, 187 P.3d at 1037. The fact that an incompetent defendant is assisted by

counsel does not mitigate the risk of an erroneous deprivation of liberty.

By definition, a mentally incompetent defendant, lacks a rational and factual understanding of the proceedings against him, as well as the ability to assist counsel in any meaningful way. The trial of an incompetent person is thus de facto unfair. This Court should review Division Two's opinion reaching a contrary result.

2. 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.

a. The forcible administration of medications is not constitutionally permissible except where medically appropriate and necessary to further a compelling government interest.

[T]he 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 v. United States, 539 U.S. 166, 179, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003).

The Court in Sell 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).

The trial court failed to correctly apply the Sell factors before approving the forcible administration of medications to Morgan. The court also did not acknowledge Morgan’s “liberty interest in freedom from unwanted antipsychotic drugs.” *Cf. Riggins v. Nevada*, 504 U.S. 127, 137, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). Division Two nevertheless did not reach the issue, finding that the record was not sufficiently developed for appeal. This was a fiction, and contrary to this Court’s precedent.

b. Division Two’s refusal to review the question was based on a false construction of the record before the Court. In declining to address the issue on appeal, Division Two first wrongly opined that the record did not “clearly establish that Morgan was forcibly medicated

during his SVP trial.” 2011 WL 1344592 at 8 (emphasis in original).²

The Court asserted that the record does not establish that Morgan was “forcibly” medicated, despite all evidence to the contrary. Morgan’s guardian ad litem told the court at the hearing on August 30, 2006, that Morgan was “violently and vehemently” opposed to the administration of any medication. 8/30/06 RP 26, 31. Morgan’s guardian ad litem also acknowledged in writing that historically when anti-psychotic medications had been administered to Morgan, Morgan had been forced to take the drugs against his will.³ CP 79. Sziebert, Morgan’s treating psychiatrist at SCC, told the court in a letter submitted at the court’s express direction that Morgan was opposed to the administration of medications and that any treatment would be involuntary. CP 72. In fact, Sziebert corroborated that the reason why Morgan was no longer taking medication was because the SCC did not require him to do so.⁴ *Id.*; CP 76. During the trial itself, the proceedings had to be adjourned because Morgan was becoming increasingly agitated in court. Upon adjourning, the trial court directed,

²² References to the Court’s opinion are to the version published on Westlaw, which reflects the Court’s amendments on reconsideration.

³ The guardian ad litem relied on treatment notes from Morgan’s psychiatrist at the Special Offender Unit in Twin Rivers and the report of the State’s trial expert, Brian Judd. CP 79.

⁴ Morgan had discontinued taking his medications 17 months before Sziebert drafted his report.

“there will be contact with the commitment center and medical people to make certain that Mr. Morgan has taken his medications that have been court ordered.” RP 512.

In clinging to its claim⁵ that the record did not support that Morgan was “forcibly” medicated the Court pointed to a single notation in the State’s expert’s report suggesting that Morgan on one occasion may have taken medications voluntarily to try to forestall the filing of an SVP petition. Opinion at 9. But agreeing to take medications so as to avoid being strapped to a gurney and have them forcibly administered does not equate to voluntarily taking the medications. Contrary to the Court’s assertion, the record clearly establishes that Morgan was “forcibly medicated.”

The Court alternately speculates that Morgan “may have realized the benefits of the medications in the intervening time and voluntarily taken them in August 2008.” Opinion at 9. Morgan also may have sprouted wings and flown around the courtroom, but there is no basis whatsoever to conclude from the record that this occurred. Morgan’s guardian ad litem told the trial court that Morgan “violently and vehemently” opposed medication. 8/30/06 RP 29, 31. He reiterated in writing that Morgan remained adamant about not taking anti-psychotic

⁵ Morgan moved for reconsideration of this portion of the Court’s opinion.

drugs. CP 79. When Morgan was at the Special Offender Unit at Twin Rivers, medications were administered involuntarily by prison authorities. CP 79. Because Morgan was so averse to taking medication, he had not taken any in the 17 months preceding the August 30, 2006 hearing. In short, there is absolutely nothing to support even the inference that Morgan had a change of heart with regard to the medications.⁶ The Court's comment is wholly speculative and contrary to the overwhelming evidence in the record.

c. Division Two's determination that the record is insufficient conflicts with decisions of the Washington Supreme Court.

This Court has held that “[i]f the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial.” State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (quoting State v. Kolokoske, 100 Wn.2d 889, 896, 676 P.2d 476 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)).

Morgan objected “violently and vehemently” to the forcible administration of anti-psychotic medications, but the court ruled by written order that the medication should be administered against his will.

⁶ If any inference can be drawn from the record, it is the opposite one: that Morgan was medicated against his will during the trial, as his lawyer had requested and the court had ordered, had been told that the judge had ordered him to take medications, and believed it would be fruitless to protest the order.

Given the trial court's statement during the trial proceedings that "there will be contact with the commitment center and medical people to make certain that Mr. Morgan has taken his medications that have been court ordered," RP 512, certainly the trial court still believed its order was in full force and effect.

As discussed infra, there was abundant evidence that Morgan had never authorized the administration of medication and that in the past when he was medicated, it was against his will. CP 72, 79. Sziebert stated that the medication had done little to affect Morgan's delusions and was only likely to control his impulsive and erratic behavior. CP 72. The State and Morgan's counsel conceded that the medication would not restore Morgan's competency. 8/30/06 RP 28-29; CP 69-70 (State argues that it would be "inappropriate" to use medication for this purpose). Thus there was no basis to speculate that despite his history of resisting medications and the medication's inefficacy in addressing the underlying psychosis, Morgan could have had a change of heart.

This Court has specifically stated that it does not require additional objections preserve review of an error arising from a final order. Powell, 126 Wn.2d at 256. Thus, in addition to imposing an unnecessary and unduly onerous burden on Morgan to "perfect" an already complete record, Division Two's refusal to consider his claim of error is contrary to

the precedent of this Court.

3. THIS COURT SHOULD REVIEW DIVISION TWO'S
OPINION FINDING THE IN-CHAMBERS HEARING
REGARDING THE FORCIBLE MEDICATION ORDER DID
NOT VIOLATE THE PUBLIC TRIAL GUARANTEE AND
MORGAN'S RIGHT TO PRESENT.

a. Morgan's exclusion from the hearing violated his right to be present. 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.

Division Two found that the in-chambers hearing did not violate Morgan's right to be present, asserting, "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." Missing from the Court's discussion is any acknowledgment that the "forced medication motion" concerned an effort to violate Morgan's bodily integrity by forcibly medicating him. Further, the Court's

characterization of the hearing is inaccurate: at the hearing, the trial court initially ruled on the matter, but agreed to take further evidence on the State's motion. Morgan's own lawyer did not represent Morgan's interest in avoiding such a substantial intrusion into his liberty. Division Two's pat resolution of the question slights Morgan's rights, warranting review by this Court.

b. The hearing violated the public trial right. 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).

Division Two found that the in-chambers hearing did not violate Morgan's right to a public trial because it concerned "ministerial matters."

Opinion at 3. The Court's broad construction of "ministerial matters" is not supported by the narrow rule enunciated in the cases cited by the Court.

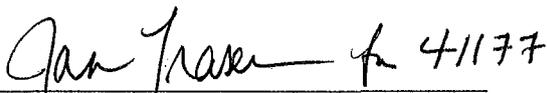
In In re Detention of D.F.F., 144 Wn. App. 214, 183 P.3d 302, rev. granted, 164 Wn.2d 1034 (2008), Division One held the closure of a mental health commitment hearing violated article I, section 10, and that the violation was "not subject to 'triviality' or harmless error analysis." 144 Wn. App. at 226. Division Two's opinion conflicts with D.F.F., meriting review.

F. CONCLUSION

For the foregoing reasons, Clinton Morgan respects this Court grant his petition for review.

DATED this 30th day of June, 2011.

Respectfully submitted:



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APPENDIX

--- P.3d ---, 161 Wash.App. 66, 2011 WL 1344592 (Wash.App. Div. 2)
 (Cite as: 2011 WL 1344592 (Wash.App. Div. 2))

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
257Ak462 k. Hearing. Most Cited Cases

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

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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 assistance 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

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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 liberty, 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 context. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 92 ↪3875

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92 Constitutional Law

92XXXVII Due Process

92XXXVII(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 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 ¶ 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

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(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 children, 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.^{ENL} 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.

*2 ¶ 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.

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¶ 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.

*3 ¶ 8 SCC psychiatrist Dr. Leslie Sziebert's subsequent report detailed Morgan's medication history over the years. Sziebert 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 Sziebert'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.

¶ 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 (non-consent); (2) pedophilia, sexually attracted to females, non-exclusive type; (3) antisocial personality disorder; and (4) schizophrenia. Morgan's expert, Dr. Woltert, 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.

ANALYSIS

RIGHT TO ATTEND THE 2006 CHAMBERS MEETING

[1] ¶ 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

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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.

*4 [6] ¶ 13 Morgan also asserts that former RCW 71.09.050(1) includes an implicit right 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}

[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. *Dreiling v. Jain*, 151 Wash.2d 900, 908, 93 P.3d 861 (2004); *D.F.F.*, 144 Wash.App. at 218, 183 P.3d 302.

[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. *In re Det. of Ticeson*, 159 Wash.App. 374, 383–87, 246 P.3d 550 (2011).

*5 ¶ 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.

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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) (citing *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).

¶ 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 *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.

*6 ¶ 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 addi-

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tional 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}

*7 ¶ 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 recommitment 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

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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}

*8 ¶ 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. Dep't of Labor & Indus.*, 72 Wash.App. 522, 525, 864 P.2d 996 (1994) (citing *State v. Vazquez*, 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).

*9 ¶ 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 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

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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.

¶ 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}

*10 ¶ 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.

FN1. Morgan was charged as an adult for first degree child molestation after the juvenile court declined jurisdiction.

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

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.*

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Doric Co., 62 Wash.2d 561, 566–67, 383 P.2d 900 (1963) (emphasis added); see also 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.

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 violation 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).

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.

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.

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 de-

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cisions 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.

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.

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.

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

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).

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 38337-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Joshua Choate, Assistant Attorney General-CJD
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 1, 2011