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No. 38337-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE THE DETENTION OF:

CLINTON MORGAN

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

The Honorable Gordon Godfrey

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF ARGUMENT IN REPLY

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. Holding Morgan’s commitment trial while he was incompetent violated due process. Ordering his forcible medication where it was not necessary to advance a compelling government interest, but rather to subdue him for his trial, was a further due process violation.

In response, the State attempts to distinguish the cases cited in support of Morgan’s first argument, but the State’s claims are based on a misapprehension of their holdings and so are unpersuasive. With respect to the forcible medication order, the State offers little substantive response, instead choosing to raise contrived procedural bars founded on mischaracterizations of the record. Last, with regard to the violation of the right to a public trial and Morgan’s right to be present, the State avoids application of controlling authority.

The State's contentions must be rejected, and the unconstitutional commitment order reversed.

B. ARGUMENT IN REPLY

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.

a. The right to competency comprehends the right to assist counsel, and denial of this right at SVP commitment trials violates 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 fact that an incompetent defendant is assisted by counsel does not mitigate the risk of an erroneous deprivation of

liberty. “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.” Therefore, proceeding to trial with an incompetent defendant poses an unacceptable risk of an “erroneous deprivation of rights.” Cf., Allen, 44 Cal.4th at 866.

b. The State's efforts to distinguish *Allen* and *Branch* are unpersuasive. Because Allen dealt with the different, but analogous, question whether fundamental due process requires a SVP detainee be permitted to testify at his commitment trial over his counsel's objection, the State claims that “there is nothing to be taken from Allen that is of assistance to this Court.” Br. Resp. at 14. At the same time, the State acknowledges that “those facing SVP commitment are entitled to due process protections because civil commitment is a significant deprivation of liberty.” Id. The State either does not recognize or chooses not to see the contradiction in its implicit claim that only “some” due process protections are needed to ensure this “significant deprivation” does not occur in violation of the Fourteenth Amendment's fundamental guaranty.

Since Morgan's opening brief was filed, the California Court of Appeals issued a decision applying Allen to the trial of an incompetent SVP. Wilson v. Superior Court, 107 Cal. App. 4th 1457, 107 Cal. Rptr. 3d 122, ___ P.3d ___ (March 22, 2010).¹ The Court concluded that going forward with the commitment trial of an alleged SVP who lacks the ability to understand the nature of the proceedings or to assist counsel in his defense violates state and federal guarantees of due process. The Court recognized that Allen "does not itself compel the conclusion that the trial in an initial SVPA commitment proceeding cannot be held while the defendant is incompetent," but held, "its analytic framework--the balancing of the four factors relevant to a determination of the due process protections required in a particular civil proceeding--necessarily leads to that result." Id. at 1467.

The Court reasoned:

The private interests at stake are high: a substantial limitation on the defendant's liberty, the stigma of being classified as a sexually violent predator and subjection to unwanted treatment. The dignitary interest of the defendant subject to the SVPA commitment proceeding--his or her ability to be an active participant, rather than being relegated to the role of a mere spectator--is strong. And the risk of an erroneous finding that the defendant is a sexually

¹ Although Wilson was decided before the State filed its response as well, the State either failed to locate this decision or chose not to address it.

violent predator and the probable value in reducing this risk by proceeding on an SVPA petition only against a competent defendant are at least as great as in Allen, in which the defendant sought to testify on his own behalf over the objection of his counsel in an SVPA extension proceeding. On the other hand, the state's compelling interest in both protecting the public and providing appropriate treatment to those individuals found to be sexually violent predators will not be significantly burdened by a threshold requirement that defendants in initial SVPA proceedings be mentally competent.

108 Cal. App. 4th at 1461-62.

Important here, the Court rejected the claim that the statutory right to be represented by counsel ameliorates the risks of going forward with the SVP commitment of an incompetent person:

Because a mentally incompetent defendant, by definition, lacks a rational and factual understanding of the proceedings against him, as well as the “sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding” . . . he or she is unable to discuss the case or assist counsel in any meaningful way, severely hampering counsel's ability to effectively challenge the People's evidence, whether it be directed to the circumstances surrounding the defendant's predicate offenses . . . or the factual assumptions used by expert witnesses to classify him or her as a sexually violent predator.

Id. at 1468 (internal citations omitted).

The State also attempts to distinguish In re Commitment of Branch, 890 So.2d 322 (Fla. App. 2005), in which the Florida Court

of Appeals held that unless the State's evidence supporting commitment is "entirely of record", proceeding with the commitment trial of an incompetent person violates due process. 890 So.2d at 327. The "of record" standard is strictly construed: "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 in Branch appropriately imposed the burden of an erroneous deprivation of liberty upon the State, holding that the State, by its trial strategy, determines the due process rights of the detainee. Id. at 329. "If the State chooses to proceed against a Ryce Act respondent based on hearsay reports of prior bad acts that did not result in prosecution or conviction to establish an element of its case, the State may do so only when the respondent is competent to challenge that evidence." Id.

In response to Branch, the State makes two equally disingenuous claims. First, the State remarks that "Morgan has not alleged that any of the evidence at his trial was not 'of record.'" Br. Resp. at 14. In fact, Morgan provided a detailed recitation of the

evidence relied upon to commit him, Br. App. at 5-9, and the State has done so as well. There were conflicting accounts of the events giving rise to both Morgan's 1993 and 1997 guilty pleas, some of which were plainly the product of Morgan's delusional mental framework caused by his mental illness. See e.g. RP 37, 60, 168-70.

To "prove" its version of the events underlying the charges, the State relied heavily on hearsay. Additionally, the State introduced factual allegations, diagnoses, and claimed admissions stemming from Morgan's years of treatment at the Juvenile Rehabilitation Administration ("JRA") and the Sexual Offender Unit at Monroe Correctional Complex, nearly all of which were founded on multiple levels of hearsay.

A Florida decision applying Branch is instructive. In In re Commitment of Camper, 933 So.2d 1271 (Fla. App. 2006), the State sought to commit an incompetent man suffering from severe schizoaffective disorder. As in this case, the State relied both on prior convictions and untested, hearsay allegations as evidence that Camper should be committed. Id. at 1272. On review, the Court held that because the evidence fell into both categories, "Camper had a procedural due process right to be competent in

order to consult with counsel and testify on his own behalf.” Id. at 1275. If this Court does not conclude that fundamental due process confers an absolute right to be competent during SVP commitment proceedings, this Court should hold that the State’s evidence here necessitated Morgan be competent in order for the State to proceed.

The State alternatively advances the extraordinary contention that “[Morgan] has made no allegation that he did not receive a fair trial, and it is unclear whether or not he was actually incompetent during the trial.” Br. Resp. at 14. The first part of this claim evinces an astonishing misunderstanding of the import of the substantive due process right to competency. It is the risk of the erroneous deprivation of liberty that engenders the constitutional problem. 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 trial of an incompetent person is thus de facto unfair. There is no way to ‘extract’ the fact of incompetency and otherwise examine the fairness of the proceedings, and the State has cited no authority that suggests this Court may do so.

The State's secondary insinuation that Morgan had to reiterate the fact of his incompetency when trial actually occurred is both spurious and dishonest. The experts retained by the State and the defense concurred that Morgan lacked the competency to be tried. 2/23/06 RP 7. Far from expressing concern about any potential due process problem with proceeding with Morgan's trial in this circumstance, the State urged the court to go forward, advising the court that it acted well within its authority to try Morgan despite his incompetency. *Id.* at 7. The State did not at any time advise the court that Morgan's condition had improved. Morgan had no additional burden to reestablish his incompetency to raise the issue on appeal.

Last, the State urges this Court to follow the decisions of the Iowa, Massachusetts and Missouri courts in holding the "civil" nature of the proceedings rules out any requirement that a SVP detainee be competent before the State may seek to deprive him of his liberty. Br. Resp. at 16-18. The cases cited by the State were discussed at length in Morgan's opening brief, Br. App. at 22-24, so no lengthy reply is needed here. It is worth noting, however, that the California court of appeals found these decisions unpersuasive. Wilson, 182 Cal. App. 4th at 1475 ("recognizing the civil nature of

the SVPA commitment proceedings marks the beginning of the necessary due process analysis, not the end”).

Finally, like the dissent in Branch, the State contends that the appointment of a guardian ad litem sufficed to ensure Morgan received due process during his commitment trial. The Branch majority persuasively answered this contention:

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.

890 So.2d at 327-28 (emphasis in original).

c. The issue raised is a question of first impression in Washington. The State claims Morgan’s argument “directly conflicts” with RCW 71.09.060(2), this Court’s decision in In re Detention of Ransleben, 135 Wn. App. 535, 144 P.3d 397 (2006), and In re Detention of Greenwood, 130 Wn. App. 277, 122 P.3d 747 (2005), rev. denied, 158 Wn.2d 1010 (2006). Br. Resp. at 8,

11-12. Curiously, even though these contentions were anticipated and addressed in Morgan's opening brief, Br. App. at 12-13, the State chooses to ignore rather than respond to Morgan's analysis of these decisions.

Contrary to the State's claims on appeal, although the Legislature may have contemplated that courts could proceed with the commitment trials of alleged SVPs despite their incompetency, the Legislature does not decide questions of constitutional law; these are exclusively the province of the courts. Windust v. Department of Labor and Industries, 52 Wn.2d 33, 37, 323 P.2d 241 (1958) (the duty of the courts to "invalidate a statute if it contravenes the constitution . . . has as its purpose the implementation of the supremacy of the constitution"). Consequently, the Legislature's pronouncement that at a hearing under RCW 71.09.060(2) "all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply" does not, and cannot, settle the question of whether the commitment trial of an incompetent person violates constitutional guaranties of due process.

With respect to Greenwood and Ransleben, neither decision addressed the constitutional question presented here. Rather, both

decisions expressly avoided this question. See Greenwood, 130 Wn. App. at 286 (“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”); Ransleben, 135 Wn. App. at 539-40 (considering only statutory right to competency). The State’s claim that this important constitutional issue has been decided in Washington is simply incorrect, and should be rejected.

Given the “substantial deprivation” occasioned by the involuntary commitment of an individual under Chap. 71.09 RCW – for many, indefinite commitment, tantamount to a life sentence – this Court should conclude an SVP detainee has the due process right to be competent during the proceedings. The commitment order should be reversed.

2. THE FORCIBLE ADMINISTRATION OF ANTI-PSYCHOTIC MEDICATIONS TO MORGAN TO CONTROL HIS BEHAVIOR DURING THE TRIAL WAS NOT NECESSARY TO FURTHER A COMPELLING GOVERNMENT INTEREST NOR THE LEAST RESTRICTIVE MEANS OF ACHIEVING THAT INTEREST.

Over Morgan’s strenuous objection, the trial court granted his attorney’s request for the forcible administration of anti-psychotic medications. The State now contends this error was

waived or invited. Br. Resp. at 19-24. Although every person who addressed the court on the subject acknowledged that Morgan himself was “violently and vehemently” opposed to taking medications, the State repeatedly claims there was no objection to the entry of the order. The State avers that if it had known of an objection to the order, it would have taken steps to “protect the record.” Br. Resp. at 22.

The State’s assertions fundamentally mischaracterize the record. There is no constitutionally sound basis to conclude Morgan “invited” a violation of his due process rights. And the State’s attorney well understood the pertinent standard and the findings that must be made to support entry of a forcible medications order.

a. Defense counsel cannot “invite” a violation of his client’s due process rights or waive his client’s liberty interest in refusing unwanted medical treatment. The “objection” which the State seeks is the notice – which the State does not, and cannot, dispute receiving – that Morgan objected to being medicated against his will. In its lengthy discussion in response, the State does not once reference Morgan’s objections, but rather implies they should be disregarded because they were not reinforced by

Morgan's appointed counsel. However, Morgan's attorney could no more have "invited" the intrusion into Morgan's constitutionally-protected liberty interest than he could have consented to entry of the SVP commitment order over Morgan's objection.

The key fact that the State's appellate attorney fails to grasp, or would have this Court ignore, is that the duty to ensure the propriety of a forcible medication order rests solely with the trial court. This is because the liberty interest in rejecting unwanted medical treatment belongs to the individual facing the intrusion, not to his attorney. Sell v. United States, 539 U.S. 166, 177-78, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) (identifying the "basic question presented" as whether the "forced administration of antipsychotic drugs to render Sell competent to stand trial unconstitutionally deprive[s] him of his 'liberty' to reject medical treatment").

Where forcible administration of medications is sought to restore competency, Sell imposes on the court the obligation to ensure "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." Id. at 179.

The State cites to no authority for the proposition that a defense attorney can waive his client's right to refuse unwanted medical treatment, or invite the violation of that right. Instead, the State cites generally to cases applying the "invited error" rule. Br. Resp. at 20-24. This is not sufficient to preserve the argument for appellate review. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Even if this Court decides to consider the State's unsupported claims, the position that the State advocates is untenable. A defense attorney cannot waive his client's substantive due process rights. See People v. Fisher, 172 Cal. App. 4th 1006, 1013-14, 91 Cal.Rptr.3d 609 (2009) ("An attorney's authority to control procedural matters in a civil case . . . does not authorize the relinquishment of substantial rights . . . without the client's consent") (internal citations omitted). This Court should decline the State's request to find that despite Morgan's persistent and vociferous objections to the forcible administration of unwanted medication, the error cannot be reviewed by this Court.

b. The attorney who represented the State at trial well understood her obligations regarding the record that should be made. The State complains that if a "single objection" had been

advanced (presumably, other than Morgan's own objection to the administration of medications), it would have taken actions to "protect the record." Br. Resp. at 22. The State concedes that the absence of a record "would normally operate against the State," but contends that because Morgan's attorney favored the forcible administration of medications to Morgan during his trial, application of this rule to the State is unfair. The State is shedding crocodile tears.

The record establishes that the attorney who represented the State at trial plainly understood her obligations with respect to the evidence that must be adduced to support a forcible medication order. That attorney filed a written motion in which she outlined both the pertinent legal standard and the findings the court had to make before the order could be entered. CP 66-70. Even though the court had already granted defense counsel's request to medicate Morgan, she advised the court that further evidence was necessary, presumably to "protect" the appellate record. Id.

Further, she was well aware of the Sell holding. In fact, because Sell permits forcible administration of medications only to restore competency to stand trial, the State's attorney contended Sell was merely instructive. CP 69. She even argued that

involuntary medication to restore competency would be “inappropriate.” Id.

Upon reviewing the authority that the State submitted, Morgan’s defense counsel concurred that the court should take expert testimony to determine whether the medication was medically appropriate and the least intrusive means of protecting Morgan’s rights. 8/30/06 RP 28-30. At both parties’ request, the proceedings were recessed so additional evidence could be presented.

It was because the State understood its obligation to “protect the record” that Dr. Leslie Sziebert, Morgan’s treating psychiatrist, submitted a letter for the court’s review. CP 71-77. Sziebert detailed the drugs that Morgan had been prescribed before he voluntarily stopped taking them, their dosages, and the drugs that would be forcibly administered to control Morgan during the trial. Sziebert believed that Morgan would not necessarily benefit from the medications, and, in fact, that involuntary treatment might not be in Morgan’s “long-term interest.” CP 72. Sziebert stated that it was “hard to characterize involuntary medications as being nonintrusive.” Id. He emphasized that Morgan did not meet the

Special Commitment Center's internal standards for involuntary medication. Id.

The State's appellate attorney contends, however, that if Morgan's counsel had objected, "the State could have obtained a declaration from . . . Sziebert containing information regarding Morgan's medication, and the manner in which it was administered."² Br. Resp. at 22. The State's appellate attorney also asserts that it "could have made it clearer for appellate review whether involuntary medications were ever administered, and if so, for how long and with what results."³ Id. It is worth noting that even though the State has conceded that ordinarily the absence of a sufficient record should be construed against the State, the State has not requested remand so additional evidence can be taken, pursuant to RAP 9.11.

The import of the State's argument is that Morgan's liberty interest in being free from unwanted medical treatment only matters if that interest is defended by an attorney. The State would have this Court conclude that Morgan's own expressly-stated wish not to

² As Sziebert opposed the forcible administration of medication to Morgan, it is unclear what additional "information" the State would hope to gain from such a declaration.

³ In light of the trial court's order, which was never rescinded, this Court has every reason to conclude involuntary medications were administered, pursuant to the order's plain terms.

be medicated, which was known to the State, should carry no weight. The State, in effect, asks this Court to hold that Morgan should bear the burden of the trial court's inadequate findings because the State's attorney at trial took the risky position of asking the court not to follow Sell.

The State's argument is both disingenuous and breathtakingly cynical. The State well understood and had every opportunity to make the necessary record. There is no basis to decide that if the "objection" the State complains of had been made, the trial court would have changed its ruling. Essentially, the State concedes that the record is insufficient, but pleads with this Court to excuse the State's dereliction. This Court should conclude the State had ample notice and ability to intervene to protect Morgan's due process rights, and reject the State's false claim that it lacked adequate notice.

c. That Sell concerned an interlocutory appeal in no way bars this Court's decision on the merits in an appeal following the entry of a final judgment. The State alternatively argues that Morgan is not entitled to a remedy because Morgan did not raise this issue in an interlocutory appeal, as in Sell. Br. Resp. at 24-25.

In stressing the importance of Sell's "procedural posture", Br. Resp. at 24, the State misunderstands that aspect of the Court's decision.

It is true that Charles Sell raised the issue of his forcible medication in an interlocutory appeal. In holding that the Court nonetheless properly had jurisdiction over the case, the Court evaluated the criteria for interlocutory review by the federal courts. 539 U.S. at 176. The portion of the Court's opinion quoted in the State's brief explained why interlocutory review was proper. See Br. Resp. at 25 (quoting Sell, 539 U.S. at 177).

The Court did not hold that a forced medications order was only reviewable as an interlocutory order, as the State seems to suggest. Indeed, such a holding would conflict with the Court's general interest in protecting the finality of judgments. See id. at 176 (discussing 28 U.S.C. § 1291).

The Court explained: "By the time of trial Sell will have undergone forced medication—the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted. Indeed, if he is acquitted, there will be no appeal through which he might obtain review." Id. at 176-77. This rationale does not signal a determination that the forced medication order is unreviewable after final judgment as a matter of law. Rather, it demonstrates the

Court's recognition of the injury to Sell's liberty occasioned by the forcible administration of medication—"the very harm that he seeks to avoid." Id.

Closely tied to the State's erroneous analysis of the question when the error may be raised is its incorrect apprehension of the remedy. As a preliminary matter, the State wrongly discounts the fact that the medication would not restore Morgan's competency. CP 72. But Sell requires this finding be made before any involuntary medication order may be entered. Sell, 539 U.S. at 180 ("[t]his standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances")

Second, Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), makes clear that the defendant need not show prejudice when he has improperly been forced to take antipsychotic drugs during his trial.

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.

504 U.S. at 137.

The State tries to distinguish Riggins because Riggins was “administered antipsychotic drugs during the course of trial and over his objection.” Br. Resp. at 25 (State’s emphasis). Morgan, too, objected to being drugged against his will. Yet the court ordered medications be administered and entered factual findings in support of its order. No order was entered rescinding or abridging this requirement. The State’s suggestion that somehow the order nonetheless may not have been enforced during is entirely without support. The due process violation requires reversal of the commitment order.

3. THE IN-CHAMBERS HEARING VIOLATED THE RIGHT TO A PUBLIC TRIAL AND MORGAN’S RIGHT TO BE PRESENT.

The State’s final contentions – that the in-chambers proceeding violated neither the right to a public trial nor Morgan’s right to be present – are equally unpersuasive. The State wholly fails to address In re Detention of D.F.F., 144 Wn. App. 214, 183 P.3d 302, rev. granted, 164 Wn.2d 1034 (2008), even though this decision was the principal authority cited in Morgan’s opening brief. Br. App. at 47-49. The Court in D.F.F. 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. The State has not offered any reason to question this holding. Morgan’s commitment order must be reversed.

Similarly, the State suggests that Morgan had no right to be present at the hearing when the court heard argument on whether he should be medicated against his will. The State’s argument depends on the flawed premise that a respondent in a SVP commitment proceeding lacks the fundamental right to be present. The argument is made without citation to authority and should not be considered.

Even assuming the argument properly before this Court, an attorney cannot waive his client’s substantive due process rights. Fisher, 172 Cal. App. 4th at 1013-14 (holding that Fisher’s personal right to be present was violated at civil hearing where psychiatrist testified in favor of forcible medications). In Fisher, the Court concluded that the constitutional violation was harmless. Id. at 1014-15. The Court noted that Fisher’s lawyer “thoroughly cross-examined” the psychiatrist and that the testimony was “compelling.” Id.

The same cannot be said here. Morgan’s lawyer wholly failed to advocate for his client’s rights. He did not understand the

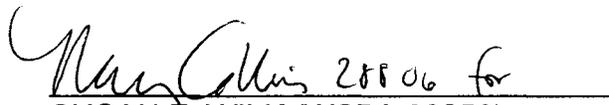
relevant legal standard, and turned a blind eye to his own constitutional obligations. This Court should conclude the violation of Morgan's right to be present denied him a fair trial.

C. CONCLUSION

This Court should hold that proceeding with the civil commitment pursuant to RCW Chap. 71.09 of an individual who is incompetent to stand trial violates due process. This Court should further conclude that the forcible administration of antipsychotic drugs to Morgan, where they were not necessary to restore his competency, were not shown to further a compelling State interest, and were not the least intrusive means of effectuating the desired purpose, also violated due process. Morgan's commitment order should be reversed.

DATED this 19th day of May, 2010.

Respectfully submitted:



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Washington Appellate Project (91052)
Attorneys for Appellant

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

| | | |
|------------------------|---|----------------|
| IN RE THE DETENTION OF |) | |
| |) | |
| CLINTON MORGAN, |) | NO. 38337-3-II |
| |) | |
| APPELLANT. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 19TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] JOSHUA CHOATE | (X) | U.S. MAIL |
| ATTORNEY AT LAW | () | HAND DELIVERY |
| OFFICE OF THE ATTORNEY GENERAL | () | _____ |
| 800 FIFTH AVENUE, SUITE 2000 | | |
| SEATTLE, WA 98104-3188 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF MAY, 2010.

X _____ 

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