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I. ISSUES PRESENTED

- A. Were Morgan's due process rights violated by appointing a guardian ad litem and proceeding with his SVP civil commitment hearing after a finding that he was incompetent?
- B. Did an order jointly requested by Morgan's attorney and guardian to authorize Morgan's involuntary medication violate due process?
- C. Is reversal of a jury verdict is required where, two years prior to trial, a status conference was held in chambers?
- D. Did the admission of expert opinion testimony that Morgan suffered from Paraphilia Not Otherwise Specified – Nonconsent violate due process?

II. STATEMENT OF THE CASE

A. Procedural History

The Respondent, State of Washington, filed a petition on August 31, 2004, seeking the involuntary civil commitment of Clinton Morgan (Morgan) as a sexually violent predator (SVP) pursuant to RCW 71.09, Washington's Sexually Violent Predator Act. CP at 1-2. On April 19, 2006, the trial court found Morgan, a chronic schizophrenic who suffers from persistent delusional and disordered thinking, to be incapacitated and appointed Harold Karlsvik as his guardian ad litem (GAL). RP at 73, 79, 607; CP at 74-77.¹ Mr. Karlsvik served as

¹ Citations to the record are of the same format used by Morgan in his briefing. Citations to pretrial hearings will be by date of the hearing followed by transcript page

Morgan's GAL throughout the proceedings below. CP at 236.

Prior to trial, three hearings were held regarding whether Morgan should be involuntarily medicated due to the perceived likelihood that, without medication, he would be disruptive during his trial. CP at 67. The first hearing was held on June 9, 2006, at which time Morgan's trial counsel requested the court order involuntary medication. *Id.*; Supp. CP at 284. The motion was granted, but before an order reflecting that ruling was entered, the State requested further proceedings on the issue. CP at 66-70. That request was granted, and a second hearing was held on August 30, 2006. 8/30/06 RP at 28-29. For reasons not apparent from the record, that hearing was held in chambers. *Id.* at 26. The hearing resulted in the court asking the parties to gather more information to be submitted to the court before it ruled. *Id.* at 32. A third hearing on the issue was held on November 13, 2006 at which the court considered the requested information, and again ordered the involuntary medication. Supp. CP at 285. This ruling was memorialized in an order dated December 6, 2006. CP at 81-83.

A jury trial on the issue of whether Morgan meets the SVP definition was held in August 2008. A jury verdict finding that he did

number, and citations to the trial transcript are referenced as "RP" followed by the page number.

meet that definition was received on August 14, 2008. CP at 279.

B. Substantive History

On February 19, 1993, fifteen-year-old J.W. was serving in house suspension at her high school in Lewis County, Washington. While there, J.W. walked passed a room that Morgan, age 13, was in and heard a noise. RP at 169. J.W. opened the door to see what was going on. When she opened the door, Mr. Morgan asked her what she wanted. J.W. said she had just heard and noise and was checking to see what it was. Mr. Morgan then got up from where he was sitting, walked over to J.W., put his arm around her shoulder and shut the door. *Id.* J.W. walked over to where Mr. Morgan had been sitting. Mr. Morgan followed her, put his arm around her again and forced J.W. to kiss him. J.W. tried to pull away from Mr. Morgan, but he grabbed her crotch, lifted her up and rubbed her against his privates. RP at 169-70. J.W. again tried to get away, but Mr. Morgan grabbed her sweatshirt, reached down it and grabbed her breasts. RP at 170; 178. Each time J.W. would try to leave the room, Mr. Morgan would prevent her from leaving by holding the door closed. J.W. was finally able to get away by fighting Mr. Morgan off. RP at 170. J.W. did not know Mr. Morgan prior to this offense. RP at 179.

As a result of this offense, pleaded guilty to a charge of Indecent

Liberties. Morgan was sentenced to serve to sixty-five weeks at Echo Glen Children's Center, a juvenile detention facility. Ex. 3. While there, Morgan participated in sexual deviancy treatment during which he disclosed markedly sadistic sexual fantasies including murder, humiliation, and disfigurement. RP at 171-73. After his release from Echo Glen, Mr. Morgan participated in treatment in the community. RP at 182-84. In 1997, and approximately fifteen days after completing that treatment, Morgan was arrested for child molestation. RP at 184.

That offense resulted in Morgan being convicted of Child Molestation in the First Degree in Grays Harbor County, Washington. Morgan was seventeen years old at this time. The offense consisted of molesting six-year-old K.S and five-year-old R.B at a hotel swimming pool. RP at 184. While at the pool, K.S.'s mother noticed Morgan paying especially close attention to K.S. Morgan repeatedly approached K.S. and offered to teach her how to swim stating that he was a lifeguard. RP at 185. K.S.'s mother was unable to get Morgan to leave K. S. alone, so she took both kids back to the hotel room where K.S. reported to her mother and father that Morgan had touched her chest area and between her legs. RP at 184-87 R.B. also disclosed that Morgan fondled her genitals in the pool, and this was later confirmed by an other adult who had witnessed the molestation. The adult had also seen

Morgan with an erection as he got out of the pool. RP at 186. Morgan ultimately pleaded guilty to one count of Child Molestation in the First Degree that referenced both of the girls. While later discussing this offense, Morgan said he "had no control over the situation, period." RP at 255. Mr. Morgan he received an eighty-nine month prison sentence. Ex. 8.

While incarcerated, Mr. Morgan enrolled in and completed the Sex Offender Treatment Program (SOTP) at Twin Rivers Corrections Center in Monroe, Washington. RP at 68-71. His progress was limited, but he was given credit for completion of the program. RP at 71-72; 80-81. His treatment provider noted that he continued to lack victim empathy and his relapse prevention knowledge. RP at 73-76. While in the program, Mr. Morgan was phallogometrically assessed by a plethysmograph examination. The results of this examination showed that Mr. Morgan exhibited "absolutely deviant" paraphilic arousal that included arousal to children and forced sex. RP at 216-20. At the conclusion of his time in SOTP, Morgan continued to be regarded as a high risk to reoffend. RP at 322.

C. Expert Testimony at Trial

In 2004, Dr. Brian Judd evaluated Morgan, pursuant to RCW 71.09.040, to determine whether, in his opinion, Morgan met the

criteria for civil commitment under RCW 71.09. RP at 158. Dr. Judd reviewed approximately 2,600 pages of documents, and interviewed Morgan for a period of five hours. RP at 158-63 Dr. Judd ultimately concluded that Morgan meets the criteria for civil commitment under RCW 71.09.

After considering all of the available information, Dr. Judd offered the following diagnostic impression of Morgan:

- Pedophilia, Sexually attracted to females, Non-exclusive type (RP at 214-15)
- Paraphilia Not Otherwise Specified (Nonconsent) (RP at 227)
- Sexual Sadism (provisional) (RP at 234)
- Schizophrenia, Paranoid Type, Continuous, With Prominent Negative Symptoms (RP at 242)
- Antisocial Personality Disorder (RP at 238)

Dr. Judd explained that, in Morgan's case, the Paraphilia Not otherwise Specified (NOS) diagnosis reflects his on-going pattern of experiencing intense sexually arousing fantasies, urges or behaviors involving non-consenting persons. RP at 213-16. Dr. Judd stated that the disorder was evidenced by Morgan's previous offenses, as well as Morgan's reported sexual fantasies and the results of his PPG examination. RP at 215-21. Morgan has a documented history of sexual fantasies that involve the suffering of his intended victim. RP at 171-73.

Similarly, Dr. Judd testified that Morgan's Pedophilia includes

fantasies, urges, or behaviors involving sexual contact with children. *Id.* For Morgan, the diagnosis is based on his molestation of two young children in 1997, his PPG result, and Morgan's repeated reports of experiencing sexual arousal to children. RP at 227. These two sexual disorders were at the heart of Dr. Judd's opinion that Morgan is likely to commit additional sexual crimes if not confined. Dr. Judd also conducted a formal risk assessment in which he utilized actuarial risk prediction instruments, a test that measures psychopathy, and other researched risk factors associated with recidivism. RP at 276-330. All of the tools Dr. Judd used indicated that Morgan presented a significant risk of reoffense.

In his defense, Morgan presented the testimony of Dr. Richard Wollert. Dr. Wollert testified, without the benefit of any neurological testing, that Morgan's brain had likely fully matured since his last offense, and that a relatively small proportion of people who offend as juveniles go on to reoffend as adults. RP at 458-460; 470.

III. ARGUMENT

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

Morgan argues that civilly committing an incompetent person as a SVP violates due process. His argument that he has an implied right to

be competent during an SVP hearing directly conflicts with RCW 71.09.060(2), this Court's decision in *In re the Detention of Ranselben*, 135 Wn. App. 535, 540, 144 P.3d 397 (2006), *rev. denied* 161 Wn.2d 1021, 172 P.3d 360 (2007), and Division One's holding in *In re the Detention of Greenwood*, 130 Wn. App. 277, 122 P.3d 747 (2005), *rev. denied*, 158 Wn.2d 1010, 143 P.3d 830 (2006). In addition, once it was determined that Morgan was incompetent, the trial court in this civil commitment proceeding ensured due process by appointing a guardian ad litem (GAL) to represent his interests. The GAL was present at every proceeding following appointment. For all of these reasons, his argument is without merit.

1. The right to competency in criminal cases does not extend to SVP cases under RCW 71.09

The Supreme Court has consistently recognized a criminal defendant's right to be competent. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Medina v. California*, 505 U.S. 437, 453 (1992); *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); *Pate v. Robinson*, 383 U.S. 375, 378 (1966). This right finds its source in the Due Process Clauses of the 5th and 14th Amendments of the Federal Constitution. U.S. Const. Amend. V; Amend. XIV §1. *See Dusky v. United States*, 362 U.S. 402, 402 (1960). However, neither the Federal or State

constitution, RCW 71.09, nor the general statutory provisions regarding civil procedure, provide a respondent with a right to be competent during his SVP civil commitment proceeding.

In *In re the Detention of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), our Supreme Court held that SVP civil commitment proceedings satisfied substantive due process because the State had a compelling interest "both in treating sex predators and protecting society from their actions" and because the statute required proof prior to civil commitment that the individual was both mentally ill and dangerous. *Young*, 122 Wn.2d at 26-27, 857 P.2d 989. In *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the U.S. Supreme Court concluded that Kansas' SVP Act, which is similar to chapter 71.09 RCW, that the Act was civil, rather than criminal, in nature because "[n]othing on the face of the statute suggest[ed] that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm" and the Act's purpose was neither retributive nor to function as a deterrent. *Hendricks*, 521 U.S. at 361-62, 117 S.Ct. 2072. Likewise, the *Young* court concluded that Washington's "sexually violent predator Statute is civil, not criminal, in nature." *Young*, 122 Wn.2d at 23, 857 P.2d 989.

Since issuing *Young*, the Court has continued to reiterate this

distinction, and explain its relevance. See e.g. *In re the Detention of Petersen*, 138 Wn.2d 70, 91, 980 P.2d 1204, 1215-16 (1999) ("Petersen has no Fifth Amendment constitutional right to counsel during annual psychological evaluations because proceedings under chapter 71.09 RCW are civil, not criminal, *Young*, 122 Wn.2d at 23, 857 P.2d 989, and he is in no danger of incriminating himself. He has no Sixth Amendment right to 'assistance of counsel' because the personal interview by a psychologist is not a 'criminal prosecution.'").

Not surprisingly, the plain language of RCW 71.09 provides that there is no such right competency during a SVP proceeding. Rather, a clear legislative intent requires that incompetent persons may be dealt with under that statute. For instance, RCW 71.09.030(3), in discussing the filing of an SVP petition, provides that such filing may occur "when it appears that . . . a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released[.]"

More importantly, RCW 71.09.060(2) provides that, in pursuing commitment of a person who has been found incompetent to stand trial on the predicate criminal offense, and additional hearing is required regarding that past offense. During such a hearing "all constitutional rights available to defendants at criminal trials, *other than the right not*

to *be tried while incompetent*, shall apply." RCW 71.09.060(2) (emphasis added). The language of the statute therefore demonstrates that the Legislature has determined that the security interests of the community outweigh the liberty interests of incompetent SVPs.

RCW 71.09.060(2) has been the subject of two appellate decisions and, in each case, the provision was upheld. In *In re the Detention of Greenwood*, 130 Wn. App. 277, 283-84, 122 P.3d 747, 750-51 (2005), Division One held that civilly trying an alleged SVP on a criminal charge in which he was found incompetent to stand trial does not violate due process. Similarly, In *In re the Detention of Ranselben*, 135 Wn. App. 535, 144 P.3d 397 (2006), this Court rejected an argument that there is an implied right to be competent during an SVP hearing because to find such a right would directly conflict with RCW 71.09.060(2).

Other jurisdictions that have addressed the issue have also declined to extend the right to competency to SVP proceedings.

[T]he SVPA involves the potential *civil commitment* of a *respondent* alleged to be a sexually violent predator. As prior cases have established and this case affirms, the same concerns and concomitant protections that arise in a criminal case do not necessarily arise in the SVPA area. *See Kansas v. Hendricks*, 521 U.S. 346, 361-71, 117 S.Ct. 2072, 2082-86, 138 L.Ed.2d 501, 515-21 (1997); *In re Detention of Garren*, 620 N.W.2d, 278, 283-84 (2000). We believe this principle is key to the determination of

whether Cubbage holds a fundamental right to be competent during the SVPA proceedings. Although such a right may be recognized in the criminal case context, the same cannot be said in the civil commitment context. This is confirmed by the fact that the Supreme Court has not recognized a fundamental right to competency in the civil commitment context. *See State ex rel. Nixon v. Kinder*, 129 S.W.3d 5 (2003) (considering and rejecting a due process challenge to Missouri's sexually violent predator act); *see also Gilleland v. Armstrong*, 524 N.W.2d 404, 407 (1994); *Bennett v. City of Redfield*, 446 N.W.2d 467, 473 (1989); *Stracke v. City of Council Bluffs*, 341 N.W.2d 341, 733 (1983). Thus, we conclude that [the SVP] does not have a fundamental right to be competent during his SVPA proceedings.

Iowa v. Cubbage, 671 N.W.2d 442, 447 (2003); *See also Iowa v. Garrett*, 671 N.W.2d 497 (2003).

In Washington, by including RCW 71.09 in the mental health section, the legislature indicated that SVP proceedings are most analogous to civil commitment proceedings under RCW 71.05. Viewed together with the statute's plain language about the process for commitment of persons previously found incompetent to stand trial for a sexually violent offense, the location of RCW 71.09 within the mental health sections of the RCW confirms that the statute is not to be treated as the equivalent of a criminal statute.

2. The Out Of State Case Law Upon Which Morgan Relies Is Inapposite

In support of his argument that des process requires he be

competent during his SVP trial, Morgan relies heavily upon *In re Commitment of Branch*, 890 So.2d 322 (Fla. App. 2005) and *People v. Allen*, 44 Cal.4th 843 (2008). However, when viewed in the context of the Washington case law regarding the level of due process afforded alleged SVPs, neither case supports his argument.

For example, the *Allen* court did not address whether an alleged SVP has a due process right to competency. Instead, the court held that although a defendant in a *criminal* proceeding has a federal and state Constitutional right to testify over the objection of counsel, because a proceeding to commit an individual as a sexually violent predator is civil in nature, the right of a criminal defendant to testify over the objection of counsel does not extend to an individual who is the subject of a *civil* commitment proceeding in California. *Allen* at 862, 80 Cal.Rptr.3d 183, 187 P.3d 1018.

Although the *Allen* court recognized that civil commitment involves a significant deprivation of liberty, and due process protections are required, "**the question remains what process is due.**" *Id.* at 862. It then concluded, after reviewing the factors applicable to a due process analysis, that "the defendant in a sexually violent predator proceeding has a right under the due process clauses of the federal and state Constitutions to testify, in accordance with the rules of evidence and

procedure, over the objection of counsel." *Id.* at. 870.

Here, whether an alleged SVP has a right to testify during his commitment hearing is not before this Court. In addition, our courts have long recognized that those facing SVP commitment are entitled to due process protections because civil commitment is a significant deprivation of liberty. See e.g. *In re the Detention of Young*, 122 Wn.2d 1, 50, 857 P.2d 989 (1993); *In re the Detention of Law*, 146 Wn. App. 28, 43, 204 P.3d 230, 237 (2008). Thus, there is nothing to be taken from *Allen* that is of assistance to this Court.

Branch is equally uninformative. There, the court did *not* hold that a SVP civil commitment proceeding violates due process *per se*. Rather, it held that alleged SVPs "have no due process right to be competent when the State's evidence supporting commitment is entirely of record." *Branch* at 328. The Court described matters that were "of record" as those "admitted through a plea," "or tested at trial." *Id.* at 327. Here, even if this Court felt it necessary to adopt a similar system of review, Morgan has not alleged that any of the evidence at his trial was not "of record." More importantly, he 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. For all of these reasons, Morgan's reliance on *Branch* is misplaced.

A far more relevant and persuasive analysis of the implications of competency upon SVP proceedings is found in *Commonwealth v. Nieves*, 446 Mass. 583, 846 N.E.2d 379 (Mass. 2006). There, the Court squarely held that civil commitment of an incompetent SVP does not violate due process. *Nieves* at 385-86. Noting that "[m]inimum due process varies with context," and using the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the court opined,

The defendant's interest is weighty. If committed, his loss of liberty would be total. Commitment is for an indeterminate period, and he has a strong interest in avoiding such commitment. However, the defendant's interest must, with appropriate safeguards, yield to the Commonwealth's paramount interest in protecting its citizens. We see no reason why the public interest in committing sexually dangerous persons to the care of the treatment center must be thwarted by the fact that one who is sexually dangerous also happens to be incompetent.

The robust, adversary character of the procedure minimizes the risk of the erroneous commitment of a person who is not sexually dangerous. The defendant has, among other things, the right to counsel, and to the appointment of counsel if necessary. "Where, because of the condition of the [incompetent] person[,] ... notice and hearing would not be effective [because the defendant is incompetent], ... the requirements of due process may be satisfied by the appointment of counsel ... to act for the ... person."

Nieves at 590-91 (citations omitted).

RCW 71.09 necessarily presumes the personas who fall under its jurisdiction are mentally ill. The type of mental illness, as well as the way the illness manifests itself will vary greatly from person to person. But the Legislature has clearly directed that, due to the unique status as dangerous sex offenders that these individuals share, they are not appropriate for the traditional forms of civil commitment usually reserved for incompetent criminal defendants. RCW 71.09.010. Because mental illness is a prerequisite to SVP civil commitment, it simply makes no sense to conclude that SVP an commitment proceeding should not be held if the person is "too mentally ill." As is the case in Massachusetts, there are sufficient procedural protections that mitigate any risk of erroneous deprivation of an inmate's liberty in SVP commitment proceedings. These protections include the requirement that the State show probable cause to maintain a SVP petition, the right to a jury trial, the requirement of proof beyond a reasonable doubt, the right to cross-examine witnesses, and the right to periodic review upon civil commitment as a SVP. See RCW 71.09.060; *In re the Detention of Stout*, 159 Wn.2d 357, 370-71, 150 P.3d 86 (2007); *Young*, 122 Wn.2d at 39. Consequently, Morgan's argument fails and should be denied.

3. A GAL Serves The Interests Of An Incompetent Respondent In A SVP Commitment Trial

Morgan's right due process during these civil commitment proceedings were protected when the trial court appointed him a GAL pursuant to RCW 4.08.060. His GAL had "complete statutory power to represent [his] interests." *In re Dill*, 60 Wn.2d 148, 150, 372 P.2d 541 (1962) (citing *Rupe v. Robinson*, 139 Wn. 592, 595, 247 P. 954 (1926)).

Appointment of a GAL is the generally accepted means of protecting the interests of incompetent persons involved in civil actions in Washington's courts. RCW 4.08.060. It also has been recognized, by at least one other jurisdiction, as an appropriate means to protect an incompetent respondent's rights during his SVP commitment proceeding. *See Missouri ex rel. Nixon v. Kinder*, 129 S.W.3d 5, 8 (Mo. Ct. App.), *cert. denied*, 125 S.Ct. 490 (2004); *see also Branch, supra*, 890 So.2d 322, 330 (Canday, J., dissenting) ("The ability of counsel and a guardian ad litem to defend the interests of an incompetent respondent in a Ryce Act proceeding by challenging the evidence relied on by the State and introducing contradictory evidence provides a meaningful opportunity to be heard.").

Washington law provides a right to be competent exclusively in the context of criminal proceedings. Specifically, RCW 10.77.050

provides that "No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." No similar right to competency exists in the civil context. Instead, RCW 4.08.060 provides that an incompetent person involved in a civil action "shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem."

Conversely, RCW 71.09 is unquestionably civil in nature. *Young* at 23, 857 P.3d 989. The appointment of a GAL to assist Morgan at his SVP commitment proceeding complies with the full extent of protections afforded him as an incompetent person under Washington statutory law. Unlike in criminal proceedings, SVP civil commitment necessarily deals with persons with mental defects or illness, and results in commitment to a facility that serves the dual purpose of treatment and public safety. As discussed by the court in *Nixon*,

To rule that the [State] must pursue civil commitment under the general civil commitment statutes rather than the sexually violent predator statutes would defeat the purpose of the sexually violent predator determination that a person determined to be a sexually violent predator needs specialized sexually violent predator treatment. To adopt the rationale that [the Respondent] does not possess the competency to proceed to trial to determine whether he is a violent sexual predator, and if so determined, to subject him to the specific treatment contemplated for the condition by the statute would thwart the proper exercise

of legislative authority for the health and welfare of the state's citizens but it would also jeopardize [the Respondent's] receipt of proper rehabilitative treatment.

Nixon at 10.

Likewise, to abandon utilization of GAL procedures in favor of the mostly hypothetical theory that a "more competent" Morgan could aid in the defense of his SVP case is contrary to the civil nature of the proceeding. SVP civil commitment serves different purposes, and addresses different issues than criminal proceedings. Because the available remedy of appointment of a GAL ensured Morgan's due process in this case, his commitment as a sexually violent predator should be affirmed.

B. The Order for Involuntary Medication Came at Morgan's Request, was Never Challenged, and Cannot Be Shown To Have Had An Effect on the Proceedings.

Morgan next argues that his commitment should be reversed because, nearly two years before his trial and at the request of his attorney and GAL, the trial court authorized his involuntary medication. Morgan's suggestion that the jury verdict in this case should be reversed fails because, regardless of the propriety of the trial court's order, he cannot establish that it was ever enforced, let alone had any effect on the proceedings. Moreover, Morgan failed to preserve the alleged pretrial error he invited, and as such, it is not properly before the Court.

Consequently, his claim should be denied.

1. Morgan Failed to Preserve Any Alleged Error

The current case demonstrates the wisdom of policies that underlie the preservation of error doctrine.² Morgan never once objected, at trial or otherwise, to the entry or enforcement of the trial court's order for involuntary medication. Rather, his own attorney and GAL recommended that course of action, and it was the State that encouraged the trial court to proceed with caution. CP at 66-70. The State submitted briefing and the trial court held multiple hearings on the issue, and Morgan never once questioned the propriety of the court's order. Indeed, the very first time Morgan ever raised the issue was on appeal to this Court. The error preservation doctrine has real meaning in this case and Morgan should not be allowed to challenge an order that was entered nearly two years prior to trial, and may not have even been in effect at trial.

Despite the lack of an objection or record, and the passage of time, Morgan now argues his commitment should be reversed due to entry of an unchallenged pretrial order. The State should not be required

² A litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct 1208, 89 L.Ed.2d 321 (1986). Failure to object at trial will operate as a waiver of the right to assert that error on appeal. *State v. Fagalde*, 85 Wn.2d 730, 731, 530 P.2d 86 (1975).

to "assume" which issues will later be appealed, particularly when Morgan's trial counsel and GAL requested that the order be entered, telling the trial court that entry of the order would be in Morgan's "best interests." CP at 78-80. Under the error preservation doctrine, it was Morgan's duty to object prior to, or at trial and thus fairly place the State and the court on notice of his issue. A decision by this Court that the trial court erred, in the absence of a single objection or showing of prejudice, is unfair because it would reward the practice of precluding the State the opportunity to make a record regarding the need for the allegedly inappropriate medication.

One reason that parties are required to lodge objections at appropriate times below is so that parties and trial courts can operate to protect the record and correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983), *citing Estate of Ryder v. Kelly-Springfield Tire, Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978). If Morgan had come to the trial court with any objection or change in factual circumstance that warranted a reconsideration of the issue, it is highly likely that the trial court would have reviewed or modified its decision. But it appears that the issue was literally never mentioned or brought up

again.³

In the face of a timely objection, the State also could have sought to protect the record in numerous other ways. For example, the State could have obtained a declaration from SCC staff psychiatrist Leslie Sziebert containing information regarding Morgan's medication, and the manner in which it was administered. The State could have made it clearer for appellate review whether involuntary medications were ever administered, and if so, for how long and with what results. Because there was no objection below, the State was never afforded an opportunity to protect the record.⁴ The lack of an objection should bar Morgan's untimely efforts to readdress the trial court's order authorizing involuntary medication.

2. Morgan Invited The Error Of Which He Now Complains

Morgan argues that the trial court erred on December 6, 2006 when, at the request of his attorney and GAL, it entered an order authorizing Morgan's involuntary medication. CP at 81-83. After its

³ There is some mention during the trial testimony that Morgan was on medication from time to time at the SCC, and that the medication had a positive effect. But the manner in which the medication was administered does not appear to have been discussed. *See e.g.* VRP at 326; 416-17.

⁴ The lack of a record would normally operate against the State, but consideration of the issue in the absence of an objection (and outright encouragement by trial counsel) should alter the equation. The preservation rule normally accomplishes this purpose by refusing to consider the non-preserved error.

entry, the order was never the subject of an objection or even further discussion. Nearly two years after the order was signed, on August 4, 2008, Morgan's civil commitment trial began. RP at 5. Thus, by never objecting to the order or otherwise challenging it in any way during the interim, he invited the error of which he now complains. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. *In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, 611 (2003). Where, as here, there is no allegation that counsel below was ineffective, there is no basis for this Court to take review of this issue. *State v. Carter*, 127 Wn. App. 713, 716, 112 P.3d 561 (2005); *See also* RAP 2.5(a) (Appellate court may refuse to review any claim of error which was not raised in the trial court.). *Henderson* involved erroneous WPIC instructions proposed by a defendant and later complained of, and the Court held there that "even if error was committed, *of whatever kind*, it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error." *Henderson*, 114 Wn.2d at 870, 792 P.2d 514 (emphasis added) (*citing State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049, 1055 (1999)).

In addition, "[a] party seeking review has the burden of

perfecting the record so that the court has before it all evidence relevant to the issue on appeal." RAP 9.2(b); *State ex rel. Dean by Mottet v. Dean*, 56 Wn. App. 377, 382, 783 P.2d 1099, 1101-02 (1989); *State v. Rienks*, 46 Wn. App. 537, 544, 731 P.2d 1116 (1987); *Allemeier v. University of Washington*, 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985). Matters not in the record are not be considered by the appellate court. *State v. Blight*, 89 Wn.2d 38, 46-47, 569 P.2d 1129 (1977). Here, although it is clear an order for involuntary medication was entered, there is nothing in the record that indicates whether the order was enforced, or if it was enforced, for how long. Given that the order was entered some twenty months prior to trial, there must be some showing that it had any effect on the trial before reversal should be considered. Because no such showing can be made, Morgan's argument fails.

3. Reversal of Morgan's Commitment Would be an Inappropriate Remedy Given the Passage of time Since the Order Was Entered

In his brief, Morgan extensively weighs the propriety of the trial court's order against the standards set forth in cases such as *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). However, the legal analysis within those cases is far less relevant here than is their procedural posture at the time of the appeals, and the remedies imposed by the Court. For example, in *Sell*, the pretrial

involuntary medication order at issue was deemed an appealable "collateral order" within the exceptions to the rule that only final judgments are appealable. *Sell* at 177. Thus, the matter was addressed prior to trial, a problem was identified, and the case was remanded to the trial court so the problem could be corrected prior to trial. In addressing whether the pretrial order was appealable, the Court noted an important distinction between addressing the order prior to trial, instead of after the trial had been held:

We add that the question presented here, whether Sell has a legal right to avoid forced medication, perhaps in part because medication may make a trial unfair, differs from the question whether forced medication *did* make a trial unfair. The first question focuses upon the right to avoid administration of the drugs. What may happen at trial is relevant, but only as a prediction. See *infra*, at 2184-2185. The second question focuses upon the right to a fair trial. It asks what *did* happen as a result of having administered the medication. An ordinary appeal comes too late for a defendant to enforce the first right; an ordinary appeal permits vindication of the second.

Id. at 177, 123 S.Ct. 2174, 2182 – 2183.

Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), the other U.S. Supreme Court opinion heavily relied upon by Morgan, is clearly distinguishable from the case at bar. In *Riggins*, the Court held that it was error to order the defendant be administered antipsychotic drugs *during the course of trial and over his objection*.

The holding came after Riggins made a motion to his trial court to be taken off of medication, and the motion was denied. Here, the record contains no evidence regarding whether or not Morgan was receiving medication during his trial, or whether the medication (if any) was being taken voluntarily. Other than trial counsel's initial request for the order requiring medication, there was also no objection or request made to the trial court concerning the issue. Thus, *Riggins* in inapposite.

Moreover, Morgan is not claiming that he did not receive a fair trial. Thus, the relevant question according to the Supreme Court has been answered in favor of affirming Morgan's civil commitment. The record reveals that Morgan received a fair trial in this case, and provides no information suggesting the trial court's order adversely affected his participation or the ultimate outcome. Consequently, in accord with federal case law on the subject, the issue is moot because the medication (to the extent it actually occurred) cannot be undone, and no colorable claim that the medication (to the extent it actually occurred) affected the trial can be made. Therefore, Morgan's appeal should be denied.

C. Holding a Status Conference in Chambers Two Years Before Trial That Did not Include any Substantive Decision Making By The Trial Court Does Not Require Reversal Of Morgan's Civil Commitment

Morgan argues that the trial court violated the right to a public

trial when it held "the hearing" on involuntary medication in chambers. App. Brf. at 46. However, it appears that, upon motion of Morgan's attorney, the trial court first ordered that Morgan be involuntarily medicated on June 12, 2006, after a hearing in open court and upon the motion of Morgan's trial counsel. Supp. CP at 284-285; 8/30/06 RP 26-33. At the State's request, further proceedings intended to ensure Morgan's rights were protected were held regarding the issuance of that order on August 30, 2006. CP at 66-70. Morgan asserts that the decision to hold an August 30, 2006 pretrial status conference in chambers warrants reversal of the jury verdict in this case.

This status conference occurred nearly two years before his jury trial began. Although the conference was held in chambers, no substantive decision regarding Morgan's involuntary medication was made. Rather, the trial court listened to the information provided by counsel and Morgan's GAL, and then asked the GAL to meet with Morgan's treating psychiatrist at the SCC, Dr. Sziebert, and obtain a written report from him. 8/30/06 RP at 32. The court stated that it wanted to make sure it had all the necessary information prior to ordering Morgan's medication. In the weeks following the status conference, the GAL filed a declaration containing his recommendation that the medications be ordered, and the trial court also received a report

from Dr. Sziebert. CP at 71-80. It was not until December 12, 2006 that the order to involuntarily medicate Mr. Morgan was entered. CP at 81-83.

"A party seeking review has the burden of perfecting the record so that the court has before it all evidence relevant to the issue on appeal." RAP 9.2(b). Here, the record reflects that the August 30, 2006 status conference was held in chambers. However, it is also clear that hearing was not "the hearing" at which the trial court ordered involuntary medication. 8/30/06 RP at 26-33. At most, it was ultimately a request from the court for more information – information that was supplied months later and that is a matter of public record. CP at 61-80. The first written order regarding involuntary medication was not entered until December 2006, and the manner of its entry is not challenged here.

Article 1, § 10 of the Washington Constitution guarantees that civil proceedings will be open to the public unless the factors set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) are present. *See also Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004). Because the civil Section 10 cases since *Dreiling* mandated the *Ishikawa* application almost invariably involve sealing, there is little information regarding the courts' remedies regarding closure. In sealing cases, courts generally remand to the trial court for an *Ishikawa* analysis regarding the

validity of the sealing. See e.g. *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 215 P.3d 977 (2009); *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 551, 114 P.3d 1182, 1192 (2005).

In this case, the reasons why the August 30, 2006 status conference was held in chambers are not in the record. Given that the hearing occurred nearly two years prior to Morgan's trial, reversal of the trial is not warranted. A much less draconian remedy is available because a transcript of the hearing is available to be made part of the Superior Court file. Further, no objection to the hearing being held in chambers was made at the time, or at trial, and Morgan's entire jury trial was open to the public. Reversal of his commitment is therefore unwarranted. If this Court finds that the trial court erred in holding the August 2006 status conference in chambers, the proper remedy, if any, is remand to the trial court for clarification and *Ishikawa* analysis.

D. Morgan did not have a right to be present at the August 30, 2006 status conference

Noting that RCW 71.09 contains no explicit right to be present at pretrial hearings, Morgan analogizes to criminal cases to argue that his rights were somehow violated because he was not present for the August 30, 2006 status conference. App. Brf. at 50-51. Since SVP proceedings are civil and not criminal in nature, the analogy to criminal law is

misplaced. *Young, supra* at 23, 857 P.2d 989. Although all alleged SVP is entitled to due process, the Court has recognized that there are significant procedural and substantive differences between SVP proceedings, and those followed in criminal cases. For example, "the rights afforded under the Fifth and Sixth Amendments do not attach to SVP petitioners." *Id.* at 191, 217 P.3d 1159, 1165. Thus, in support of his claim of error here, Morgan must rely solely on the guaranty of "fundamental fairness" provided by the due process clause. *Id.*

Here, as in *Strand*, any concerns that Morgan's due process rights were violated by his exclusion from a status conference that occurred two years prior to his trial are "wholly cured" by his statutory rights to court-appointed counsel at "all stages of the proceedings," the right to an expert of his choosing at public expense, the right a unanimous jury verdict, and others. *Id.* (citing *In re the Detention of Petersen*, 138 Wn.2d 70, 92, 980 P.2d 1204 (1999)). Also, in this case, Morgan's GAL was present at the status conference to represent his interests. 8/30/06 RP at 28. His GAL had "complete statutory power to represent [his] interests." *In re Dill*, 60 Wn.2d 148, 150, 372 P.2d 541 (1962) (citing *Rupe v. Robinson*, 139 Wn. 592, 595, 247 P. 954 (1926)).

E. That Morgan Suffers From the Mental Disorder Paraphilia NOS (Nonconsent) was Appropriate for Consideration by the Jury in this Case

Finally, Morgan argues that one of the several mental disorders assigned to him by the State's expert was "invalid." At best, the argument that his arousal to forced sexual contact is not a "real" mental illness is the opinion of a minority. In reality, Morgan's argument is unsupported by either the evidence below, or by the psychological community. Because the jury verdict in this case reflected the fact that Morgan is mentally ill and dangerous, his argument fails.

1. Appellant Failed to Preserve Any Perceived Error Regarding the Jury's Consideration of the Paraphilia NOS Diagnosis

For the first time on appeal, Morgan asserts that the diagnosis of paraphilia NOS (non-consent or rape) is not a "valid" diagnosis. He has not properly preserved any error because he failed to raise this argument below. RAP 2.5(a) provides that "the appellate court may refuse to review any claim of error not raised in the trial court." A litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986). Objections must be made at the time the evidence is offered. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000).

The Washington Supreme Court recently applied the preservation of error doctrine to sexually violent predator cases because, among other reasons:

[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

In re the Detention of Audett, 158 Wn.2d 712, 725, 147 P.3d 982 (2006) (citing 2A Karl B. Tegland, *Washington Practice: Rules Practice* RAP 2.5(1), at 192 (6th ed. 2004).

Here, although the State's expert witness laid the proper testimonial foundation pursuant to ER 703, (*see below*) the State was not afforded the opportunity to address the specific challenge. Yet now, for the first time, appellant claims his diagnosis is not valid. Because appellant never challenged this diagnosis under ER 703, *Frye* or in any other manner at trial, he is precluded from raising this argument now. The State could easily have established that the diagnosis meets such a challenge, but appellant waited for the appeal in the absence of a perfected record. This tactic was specifically rejected by Division One in a recent SVP case,

Post rests his substantive due process argument on his contention that the evidence he now challenges "fails to satisfy fundamental principles of sound science." By

doing so, 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. In point of fact, Post attempts to sidestep the fact that he did not seek a *Frye* hearing in the trial court, and, thus, has not preserved an evidentiary challenge for review. *In re Det. of Taylor*, 132 Wash.App. 827, 836, 134 P.3d 254 (2006), *rev. denied*, 159 Wash.2d 1006, 153 P.3d 196 (2007).

In re the Detention of Post, 145 Wn. App. 728, 755-56, 187 P.3d 803, 817-818 (2008) (footnotes omitted).⁵

This court must reject this effort to circumvent the rules of appellate procedure and refuse to consider the claim.

2. The Diagnosis of "Paraphilia NOS" is Valid, and Withstands Morgan's Challenge

If the court does decide to consider the issue, it need only look to the multitude of cases in Washington that have upheld a diagnosis of paraphilia NOS based on qualified, expert testimony that the diagnosis is valid. States retain considerable leeway in defining the mental abnormalities and disorders that make an individual eligible for SVP commitment. *In re the Detention of Thorell*, 149 Wn.2d 724, 735, 72 P.3d 708 (2003) (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct.

⁵ Insofar as Morgan may challenge the admissibility of the diagnosis under ER 702 and 703, his failure to object to Dr. Judd's testimony that Morgan suffered from Paraphilia NOS means that he also has not preserved that possible evidentiary issue for review. *Post* at 756 (citing *In re the Detention of Audett*, 158 Wn.2d at 725-26, 147 P.3d 982; *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004)).

867, 151 L. Ed. 2d 857 (2002). As long ago as 1993, the Washington Supreme Court upheld the diagnosis of paraphilia NOS against a constitutional challenge. "The specific diagnosis offered by the State's experts at each commitment trial was 'paraphilia not otherwise specified'." *In re the Detention of Young*, 122 Wn.2d 1, 29-30, 857 P.2d 989, 1002 (1993). It was as clear 17 years ago as it is today that the "[t]he weight of scientific evidence, therefore, supports rape of adults as a specific category of paraphilia." *Id.*

In using the concept of "mental abnormality" the legislature has invoked a more generalized terminology that can cover a much larger variety of disorders. Some, such as the paraphilias, are covered in the *DSM-III-R*; others are not. **The fact that pathologically driven rape, for example, is not yet listed in the *DSM-III-R* does not invalidate such a diagnosis. *Id.***

Since that time, the Court has upheld numerous commitments based on diagnoses of paraphilia NOS by countless qualified professionals. (*See e.g. In re the Detention of Morgan*, 156 Wn.2d 795, 132 P.3d 714 (2006) (Dr. Robert Wheeler testified that Morgan suffered from at least one mental abnormality (paraphilia not otherwise specified (n.o.s.) nonconsent). 156 Wn.2d at 800-01. Dr. Wheeler described "paraphilia" as the "definitional word for a type of sexual deviance which involves repetitive, intense sexual urges, fantasies, or behaviors involving children, objects, or nonconsenting persons." *Id.* n.3.); *In re*

the Detention of Stout, 159 Wn.2d 357, 363, 150 P.3d 86, 90 (2007) (Dr. Richard Packard opined that Stout suffered from the mental disorder "paraphilia not otherwise specified (NOS), non-consent."); *In re the Detention of Marshall*, 156 Wn.2d 150, 155, 125 P.3d 111, 113 (2005) (Dr. Amy Phenix determined that Mr. Marshall suffers from multiple mental abnormalities described in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000) (DSM-IV-TR), a reference relied on by experts. Specifically, she found he suffers from pedophilia, sexual sadism, and paraphilia not otherwise specified (nonconsenting adults or rape-like behavior.); *In re Detention of Campbell*, 139 Wn.2d 341, 357, 986 P.2d 771, 779 (1999) (Dr. Roger Wolfe diagnosed Campbell as suffering from the condition of "paraphilia").⁶

⁶ The court of appeals has also upheld commitments predicated on paraphilia not otherwise specified numerous times. See *In re Detention of Paschke*, 136 Wn. App. 517, 520, 150 P.3d 586, 587 (2007) (Dr. Les Rawlings, a psychologist, testified Mr. Paschke suffered from a mental abnormality known as "[r]ape, paraphilia not otherwise specified rape."); *In re Detention of Taylor*, 132 Wn. App. 827, 832, 134 P.3d 254, 257 (2006) (Dr. Richard Packard diagnosed a mental abnormality paraphilia not otherwise specified (non-consenting persons); *In re Detention of Broten*, 130 Wn. App. 326, 332, 122 P.3d 942, 945 (2005) (Dr. Brian Judd testified that he diagnosed Broten, among other things, paraphilia (not otherwise specified.); *In re Detention of Skinner*, 122 Wn. App. 620, 633, 94 P.3d 981, 987 (2004) (The evidence adduced at trial shows that Skinner was diagnosed with the mental abnormality of paraphilia (non-consent/rape); *In re the Detention of Hoisington*, 123 Wn. App. 138, 143, 94 P.3d 318, 320 (2004) (Dr. Dennis Doren testified that in his professional opinion Mr. Hoisington suffered from a mental abnormality, paraphilia.) *In re Detention of Strauss*, 106 Wn. App. 1, 6, 20 P.3d 1022, 1024 (2001) (Dr. Dennis Doren testified that Strauss suffers from paraphilia (not otherwise specified) non-consent.); *In re the Detention of Mathers*, 100 Wn. App. 336, 336, 998 P.2d 336, 337 (2000) (Roger Wolfe, diagnosed Paraphilia

Here, Dr. Judd testified that he keeps up to date with literature in the field of sex offender evaluation. RP at 145. He has been evaluating and treating sex offenders since 1993 or 1994 and has evaluated several hundred sex offenders. RP at 154. Dr. Judd relied on numerous records, documents and interviews which are commonly relied on by professionals in the field who conduct these types of evaluations. RP at 160-61; 163-64. Dr. Judd also testified that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR") is standard manual for use by mental health professionals when diagnosing mental disorders. RP at 198 He testified that it is generally relied on by experts when diagnosing and evaluating sexually violent predators. RP at 199. He further testified that not all disorders are contained in the DSM, nor does the lack of inclusion of specific disorders mean that individuals don't suffer from it. RP at 201. Dr. Judd discussed at length the process through which the editors determine which disorders will be included. RP at 198-202.

Dr. Judd went through the diagnostic criteria of a paraphilia and testified that Morgan suffered from Paraphilia Not Otherwise Specified.

Not Otherwise Specified: Rape, and an Antisocial Personality Disorder. And these disorders, according to Wolfe, made Mathers likely to engage in future acts of sexual violence.); *In re the Detention of Aqui*, 84 Wash. App. 88, 94, 929 P.2d 436, 441 (1996) (Dr. Irwin Dreiblatt testified that Aqui suffered from paraphilia disorder, that he was likely to re-offend.)

RP at 206-08; 212-13.⁷ Judd agreed that there is some controversy about the diagnosis of paraphilia not otherwise specified, and testified that "there's some individuals that say because it is not specifically identified in the DSM-IV TR that it doesn't constitute a valid diagnosis, but that *tends to be more of a minority opinion that's not widely held.*"⁸ RP at 223. Because Morgan's failed to raise this argument below, and the record contradicts his claim that the diagnosis is not valid, his appeal should be denied.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Morgan's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 31st day of March 2010.

ROBERT M. MCKENNA
Attorney General



JOSHUA CHOATE, WSBA #30867
Assistant Attorney General

⁷ Dr. Judd also diagnosed Morgan with pedophilia, a qualifying mental abnormality. RP at 227. Morgan does not challenge this diagnosis on appeal.

⁸ In fact, the diagnosis is currently under consideration for inclusion in the forthcoming DSM V. See <http://www.dsm5.org/ProposedRevisions/Pages/SexualandGenderIdentityDisorders.aspx> (last visited March 11, 2010).

NO. 38337-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

CLINTON MORGAN,

Respondent.

DECLARATION OF
SERVICE

I, Jennifer Dugar, declare as follows:

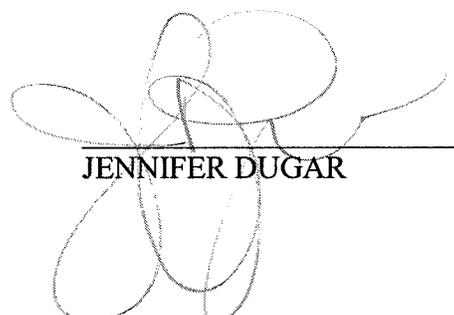
On this 31st day of March, 2010, I sent via email and deposited in the United States mail true and correct cop(ies) of Corrected Brief Of Respondent and Declaration of Service, postage affixed, addressed as follows:

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DIVISION II
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STATE OF WASHINGTON
BY 
DAVID DONNAN

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

DATED this 31st day of March, 2010, at Seattle, Washington.



JENNIFER DUGAR