

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Jul 24, 2013, 3:56 pm  
BY RONALD R. CARPENTER  
CLERK

RECEIVED BY E-MAIL

Supreme Court No. 86234-6

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.

SUPPLEMENTAL BRIEF OF PETITIONER

SUSAN F. WILK  
Law Office of Michael Iaria, PLLC  
1111 3<sup>rd</sup> Avenue, Suite 2220  
Seattle, WA 98101  
Special Counsel for Petitioner

WASHINGTON APPELLATE PROJECT  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
(206) 587-2711

ORIGINAL

**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ISSUES PRESENTED FOR REVIEW ..... 2

C. STATEMENT OF THE CASE..... 3

    1. Morgan’s incompetency..... 3

    2. Closed hearing at which the court ordered Morgan’s forcible medication..... 6

D. ARGUMENT..... 8

    1. **Requiring a person who is not competent to stand trial under Chapter 71.09 RCW violates values implicit in the concept of ordered liberty, denies him the fundamental right to assist counsel, and amounts to trial *in absentia*, in violation of due process** ..... 8

        a. The right not to be tried while incompetent is intimately linked to the right to counsel, and the indefinite civil commitment of a person who lacks the ability to assist his lawyer violates substantive due process..... 8

            i. *The trial of an incompetent person is fundamentally unfair*..... 8

            ii. *Given the liberty interests at stake in sexually violent predator commitment proceedings, a commitment trial of an incompetent person violates substantive due process*..... 11

        b. Under *Mathews v. Eldridge*, the civil commitment trial of an incompetent person violates procedural due process because it eviscerates the right to counsel and denies the accused the opportunity to be heard in a meaningful manner ..... 14

    3. **Under *Sublett* and *D.F.F.*, the in-chambers hearing regarding whether Morgan would be forcibly medicated during his trial, from which Morgan and the public were excluded, violated the public trial right and Morgan’s right to be present**..... 18

a. <u>The hearing violated the public trial right</u> .....	18
b. <u>Morgan's exclusion from the hearing violated his right to be present</u> .....	22
E. <u>CONCLUSION</u> .....	24

— —

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980) 18  
In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011) ..... 18-22  
In re Detention of Turay, 139 Wn.2d 379, 986 P.2d 790 (1999)..... 16  
In re the Detention of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007)..... 16  
In re the Detention of Young, 122 Wn.2d 1, 857 P.2d 989 (1993)..... 12  
Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982)..... 18  
State v Sublett, 175 Wn.2d 58, 292 P.3d 715 (2012)..... 18, 19  
State v. McCuiston, 174 Wn.2d 369, 275 P.3d 1092 (2012)..... 12  
State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) ..... 21

**Washington Court of Appeals Decisions**

State v. Berrysmith, 87 Wn. App. 268, 944 P.2d 397 (1997)..... 22  
State v. Morgan, 161 Wn. App. 66, 253 P.3d 394 (2011) ..... 15, 19, 23

**Washington Constitutional Provisions**

Const. art. I, § 3 ..... 2  
Const. art. I, § 10..... 18  
Const. art. I, § 22..... 18

**United States Supreme Court Decisions**

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)  
..... 11  
Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498  
(1996)..... 9, 10  
Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)... 8,  
14, 16  
Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437  
(1992)..... 12  
Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) .. 15  
Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73  
L.Ed.2d 248 (1982) ..... 18  
Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578

(2004) .....	14
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)	
.....	14, 15, 17
<u>McDonald v. City of Chicago, Ill.</u> , ___ U.S. ___, 130 S.Ct. 3020, 177	
L.Ed.2d 894 (2010) .....	13
<u>Palko v. State of Connecticut</u> , 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed.2d 288	
(1937) .....	13
<u>Pate v. Robinson</u> , 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).....	8
<u>Press-Enterprise Co. v. Superior Court</u> , 478 U.S. 1, 106 S.Ct. 2735, 92	
L.Ed.2d 1 (1986) .....	19
<u>Richmond Newspapers, Inc. v. Virginia</u> , 448 U.S. 555, 100 S.Ct. 2814, 65	
L.Ed.2d 973 (1980) .....	18
<u>Riggins v. Nevada</u> , 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992)	
.....	10, 20
<u>Ryan v. Gonzales</u> , ___ U.S. ___, 133 S.Ct. 696, 184 L.Ed.2d 528 (2013).....	9
<u>Sell v. United States</u> , 539 U.S. 166, 183, 123 S.Ct. 2174, 156 L.Ed.2d 197	
(2003) .....	20, 21
<u>United States v. Gagnon</u> , 570 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486	
(1986) .....	22
<u>Youngberg v. Romeo</u> , 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28	
(1982) .....	13
<u>Zinermon v. Burch</u> , 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990)	
.....	12

### Federal Court of Appeals Decisions

<u>United States v. Chisholm</u> , 149 F. 284 (C.C. Ala. 1906).....	10
---	----

### United States Constitutional Provisions

U.S. Const. amend. XIV .....	2, 13
------------------------------	-------

### Other State Cases

<u>In re Commitment of Branch</u> , 890 So.2d 322 (Fla. App. 2005) .....	17
<u>People v. Allen</u> , 44 Cal.4th 843, 187 P.3d 1018, 1037 (2008) .....	14

### Statutes

Chapter 71.05 RCW.....	17
Chapter 71.09 RCW.....	1, 2, 5, 8, 13, 14, 17, 18, 20, 24
Laws of 2005, ch. 344, § 1.....	12
RCW 71.09.050 .....	13
RCW 71.09.060 .....	13
RCW 71.09.070 .....	12
RCW 71.09.090 .....	12

### Journals and Treatises

Corey Rayburn Yung, <u>The Emerging Criminal War on Sex Offenders</u> , 45 Harv. C.R.-C.L. L. Rev. 435 (2010) .....	11
John L. Schwab, <u>Due Process and “The Worst of the Worst”: Mental Competence in Sexually Violent Predator Civil Commitment Proceedings</u> , 112 Colum. L. Rev. 912 (2012).....	11, 17

### Other Authorities

Henry Richards, <u>Special Commitment Center Strategic Plan 2009-2013</u> , Washington State Department of Social and Health Services (2008) ..	12
--	----

A. INTRODUCTION

*"[I]t is an essential part of the justice dispensed here that you should be condemned not only in innocence but also in ignorance."*

*Franz Kafka, The Trial (1925)*

The right to substantive due process bars arbitrary or wrongful government actions that violate values implicit to the concept of ordered liberty, regardless of the fairness of the procedures used to implement them. At the core of the right to procedural due process are notice and an opportunity to be heard, which necessarily means an opportunity to be heard in a meaningful manner. These are personal guarantees, intrinsic to the rights that we as citizens hold to be self-evident.

Persons who are legally incompetent cannot understand the nature of the proceedings and lack the ability to assist counsel. The trial of an incompetent person is, in essence, trial *in absentia*, because although they may be physically present, they can neither assist their lawyer nor be heard in a meaningful manner. The trial of an incompetent person thus violates due process.

Involuntary commitment under the provisions of Chapter 71.09 RCW, Washington's "Sexually Violent Predator" law, is for many tantamount to a life sentence. Clinton Morgan is a severely schizophrenic young man whom the State sought to commit under Chapter 71.09 RCW.

All parties agreed that Morgan was not competent to stand trial, but this did not deter the State from going forward with the commitment trial. And, because of concerns that Morgan would be “disruptive” at his own trial, the court held an in-chambers hearing, which neither Morgan nor the public were permitted to attend, at which the court ordered that Morgan be forcibly medicated to control his behavior.

Although Morgan was putatively granted the constitutional rights afforded criminal defendants, including the right to counsel, these were sham rights, because by virtue of his incompetence, Morgan could not exercise them. This Court should hold that due process demands that a person subject to indefinite involuntary commitment proceedings under Chapter 71.09 RCW be afforded the right to be competent at their own trial, and further hold that the closed-chambers hearing violated the public trial right and Morgan’s right to be present.

#### B. 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?

2. Did the in-chambers hearing regarding the substantive issue whether Morgan should be forcibly medicated, from which Morgan was

excluded, violate the right to a public trial and his right to be present?

C. 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.<sup>1</sup> 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

---

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

juvenile rehabilitation counselor from 1993-94, even in adolescence Morgan exhibited problems distinguishing fantasy from reality. RP 39-40, 43, 174. When confronted, Morgan sometimes would invent additional details; at other times, Morgan would become very angry and confused that he was not believed. RP 40.

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

Morgan was transferred to the Special Offender Unit (“SOU”) at Monroe Correctional Complex. RP 62. On his arrival, he was “quite psychotic,” and at that time was diagnosed with schizophrenia. RP 62. Morgan again entered sex offender treatment, this time at the Twin Rivers facility in Monroe. RP 68-71. This time, his active mental health disease was factored into his treatment. A condition of treatment was that Morgan take antipsychotic medications and not talk about a magical persona he had invented called Moregain. 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. Morgan was nevertheless 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 Chapter 71.09 RCW. 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. Closed hearing at which the court ordered Morgan's forcible medication.

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 during the proceedings. 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 concurred in the motion to forcibly medicate Morgan, but advised the court that Morgan himself was "violently and vehemently" opposed to any sort of involuntary medication. CP 78-80; 8/30/06 RP 28, 31. The court recessed the proceedings so the State could obtain a report from Morgan's psychiatrist and 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. Sziebert stated that Morgan stopped taking prescribed medications seventeen 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

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, the court granted the motion to forcibly medicate Morgan, and ruled there were “no viable alternatives to involuntarily medicating Morgan.” CP 82.

#### D. ARGUMENT

1. **Requiring a person who is not competent to stand trial under Chapter 71.09 RCW violates values implicit in the concept of ordered liberty, denies him the fundamental right to assist counsel, and amounts to trial *in absentia*, in violation of due process.**

a. The right not to be tried while incompetent is intimately linked to the right to counsel, and the indefinite civil commitment of a person who lacks the ability to assist his lawyer violates substantive due process.

*i. The trial of an incompetent person is fundamentally unfair.*

The Supreme Court recognizes that the due process right to be competent at trial is inextricably linked to the right to a fair trial. Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

Proceeding with the trial of an incompetent person diminishes the reliability of the outcome, as an 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). “The mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.” Drope, 420 U.S. at 171.

A fair process entails an understanding of the proceeding, and it requires an ability to assist counsel in presenting a defense. The Supreme Court has held, therefore, that although the right to be competent at trial does not derive from the right to counsel, it is connected to that right:

It stands to reason that the benefits flowing from the right to counsel *at trial* could be affected if an incompetent defendant is unable to communicate with his attorney. For example, an incompetent defendant would be unable to assist counsel in identifying witnesses and deciding on a trial strategy. For this reason, “[a] defendant may not be put to trial unless he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... [and] a rational as well as factual understanding of the proceedings against him.”

Ryan v. Gonzales, \_\_\_ U.S. \_\_\_, 133 S.Ct. 696, 703, 184 L.Ed.2d 528 (2013)

(emphasis in original, citation omitted).

Indeed, competence to stand trial is “rudimentary”: “for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing

so.” Riggins v. Nevada, 504 U.S. 127, 139-140, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring in judgment); see also id. at 140 (opining that for the same reason, a rule permitting waiver of the right to be tried while incompetent would violate due process).

The Court has made it clear that trying a person who lacks the mental competence to understand the nature of the proceedings and assist his lawyer is a violation of substantive due process:

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

Cooper, 517 U.S. at 366 (quoting United States v. Chisholm, 149 F. 284, 288 (C.C. Ala. 1906)).

With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a “fundamental component of our criminal justice system”--the basic fairness of the trial itself.

Id. at 364 (internal citation omitted).

*ii. Given the liberty interests at stake in sexually violent predator commitment proceedings, a commitment trial of an incompetent person violates substantive 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. Where commitment is sought under sexually violent predator schemes, the liberty interests are substantial and the potential deprivation serious. “In particular, individuals designated as SVPs are rarely released, ‘and placement within [SVP programs] typically amounts to a lifetime sentence.’” John L. Schwab, Due Process and “The Worst of the Worst”: Mental Competence in Sexually Violent Predator Civil Commitment Proceedings, 112 Colum. L. Rev. 912, 914 (2012) (quoting Corey Rayburn Yung, The Emerging Criminal War on Sex Offenders, 45 Harv. C.R.-C.L. L. Rev. 435, 448 (2010)).

Washington’s commitment scheme for persons alleged to be sexually violent predators offers little reassurance that release is possible or likely for many, if not most, of the persons confined under the scheme. The Washington Legislature has found “that the mental abnormalities and personality disorders that make a person subject to commitment under Chapter 71.09 RCW are severe and chronic and do not remit due solely to

advancing age or changes in other demographic factors.” Laws of 2005, ch. 344, § 1; see State v. McCuiston, 174 Wn.2d 369, 275 P.3d 1092 (2012) (deferring to Legislature’s finding of fact); see also Henry Richards, Special Commitment Center Strategic Plan 2009-2013, Washington State Department of Social and Health Services 23 (2008)<sup>2</sup> (noting, “SCC residents are an increasingly aging population with a variety of significant acute and chronic illnesses. The median age of the SCC resident population is 48”). Reviews of a committed person’s status occur only annually, RCW 71.09.070, and participation in treatment is “the only viable avenue to a release trial.” McCuiston, 174 Wn.2d at 394; RCW 71.09.090(4)(b).

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)).<sup>3</sup> Justice Cardozo framed the constitutional question

---

<sup>2</sup> Available at: <http://www.dshs.wa.gov/pdf/ppa/SCC.pdf>, last visited July 22, 2013.

<sup>3</sup> This Court has upheld the sexually violent predator statute generally against a substantive due process challenge, In re the Detention of Young, 122 Wn.2d 1, 59, 857 P.2d 989 (1993), but has never addressed whether the provision denying persons undergoing commitment proceedings the right to be competent at trial is constitutional.

over 75 years ago as whether the government action violates values “implicit in the concept of ordered liberty.” Palko v. State of Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed.2d 288 (1937).

Implicit in Justice Cardozo’s test is a recognition that the postulates of liberty have a universal character ... Whether conceptualized as a “rational continuum” of legal precepts ... or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular.

McDonald v. City of Chicago, Ill., \_\_\_ U.S. \_\_\_, 130 S.Ct. 3020, 3096, 177 L.Ed.2d 894 (2010) (Stevens, J., dissenting) (internal citation omitted).

Washington explicitly affords persons subject to indefinite civil commitment pursuant to Chapter 71.09 RCW the right to counsel. RCW 71.09.050(1). In addition, the statute stipulates that the rules of evidence applicable in criminal cases shall apply, and mandates that a person subject to proceedings under Chapter 71.09 RCW shall be afforded “all constitutional rights available to defendants at criminal trial.” But the statute excludes “the right not to be tried while incompetent” from this panoply of integral trial rights. RCW 71.09.060(2).

The mere fact that commitment takes place “under proper procedures” does not deprive a person of all substantive liberty interests under the Fourteenth Amendment. Youngberg v. Romeo, 457 U.S. 307, 315, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). The right to be competent is

necessary to permit the exercise of other fundamental trial rights, including the right to testify, the right to a defense, and, most critically, the right to counsel. Thus, for a person who is not competent to stand trial, the promise of these rights is bogus. He can neither exercise, enjoy, nor understand them. A person who is tried while incompetent is tried “in absentia,” Drope, 420 U.S. at 171, or, at best, relegated “to the role of a mere spectator, with no power to attempt to affect the outcome.” People v. Allen, 44 Cal.4th 843, 187 P.3d 1018, 1037 (2008).

Given the substantial liberty interest at stake in commitment proceedings pursuant to Chapter 71.09 RCW, this Court should conclude that the commitment trial of an incompetent person is contrary to values “implicit in the concept of ordered liberty,” and violates substantive due process.

b. Under *Mathews v. Eldridge*, the civil commitment trial of an incompetent person violates procedural due process because it eviscerates the right to counsel and denies the accused the opportunity to be heard in a meaningful manner.

The core of the right to procedural due process is notice and an opportunity to be heard. Hamdi v. Rumsfeld, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). It is equally fundamental “that these rights “be granted at a meaningful time and in a meaningful manner.” Id. (quoting Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d

556 (1972)). “These essential constitutional promises may not be eroded.”

Hamdi, 542 U.S. at 533.

A court determining what due process safeguards are constitutionally required at a non-criminal proceeding applies the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Under the Mathews test,

[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

The Court of Appeals applied the Mathews factors, but found that they weighed against a right to be competent for commitment trials. State v. Morgan, 161 Wn. App. 66, 79-81, 253 P.3d 394 (2011). The court’s decision was incorrect.

The court conceded that the first Mathews factor “clearly weigh[ed]” in Morgan’s favor. Id. at 79. With respect to the second factor, however, the court found that “there were no additional safeguards that could have been put into place that would have minimized or

prevented an erroneous deprivation of Morgan's rights. Id. at 80. The Court noted that Morgan "attended his commitment trial" and "had counsel vehemently defending his rights." Id. As noted, although Morgan was physically present at his trial, he may as well have been absent, as he lacked an understanding of the proceeding and the ability to participate. Drope, 420 U.S. at 171.

In support of its analysis, the court relied upon this Court's opinion in In re the Detention of Stout, 159 Wn.2d 357, 150 P.3d 86 (2007), but in finding no procedural due process violation occasioned by the denial of confrontation at the commitment trial, this Court listed the many other trial rights afforded civil commitment detainees that operate as checks against the unbridled exercise of government power. Stout, 159 Wn.2d at 370-71. These rights, which this Court has held include the right to self-representation,<sup>4</sup> are deprived of force and purpose if an individual lacks competency to exercise them.

As to the emphasis the court placed on counsel's "vehement" advocacy, 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 the ability to assist

---

<sup>4</sup> In re Detention of Turay, 139 Wn.2d 379, 396-99, 986 P.2d 790 (1999).

counsel in any meaningful way. An incompetent person is thus *de facto* denied the assistance of counsel.

The Court of Appeals last determined that the third Mathews factor also weighed in the State's favor, but the court did not consider the availability of other, less intrusive procedures available for the confinement and treatment of the dangerous mentally ill, specifically, the detention and commitment procedures afforded under Chapter 71.05 RCW.<sup>5</sup>

At bottom, in applying the Mathews factors, the court lost sight of the central concern underpinning the analysis: that the litigant be afforded the opportunity to be heard. As the Florida Court of Appeals held in evaluating its own sexual violent predator commitment laws, a person who is incompetent to stand trial "is denied the opportunity to be heard in a meaningful manner." In re Commitment of Branch, 890 So.2d 322, 326 (Fla. App. 2005) (citing Mathews, 424 U.S. at 333). This Court should

---

<sup>5</sup> As Schwab observes, the administrative cost of competency hearings would not be consequential. Schwab, supra, 112 Colum. L. Rev. at 947-48. Schwab also disputes that the State has a strong interest in denying persons subject to proceedings under Chapter 71.09 RCW the right to be competent:

[The interest] is not, as courts and prosecutors would have it, an interest in protecting the public from sexually violent individuals. The largest government interest affected would be the time and money required to provide competency determinations, and that should not be enough of a concern to overcome the serious liberty interests at stake for the accused.

Id. at 948.

hold due process demands that persons subject to indefinite involuntary commitment proceedings under Chapter 71.09 RCW have the right to be competent at their own trial.

3. **Under *Sublett* and *D.F.F.*, the in-chambers hearing regarding whether Morgan would be forcibly medicated during his trial, from which Morgan and the public were excluded, violated the public trial right and Morgan's right to be present.**

a. The hearing violated the public trial right.

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); Const. art. I, §§ 10, 22. "The open administration of justice assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary." In re Detention of D.F.F., 172 Wn.2d 37, 42, 256 P.3d 357 (2011). 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).

The Court of Appeals found that the closed hearing in this case did not violate Morgan's right to a public trial because it concerned

“ministerial matters.” Morgan, 161 Wn. App. at 77.<sup>6</sup> But this Court expressly disapproved the Court of Appeals’ approach in State v Sublett, 175 Wn.2d 58, 76, 292 P.3d 715 (2012). This Court noted that “[t]he resolution of legal issues is quite often accomplished during an adversarial proceeding, and disputed facts are sometimes resolved by stipulation following informal conferencing between counsel,” and concluded that a distinction which places “legal and ministerial issues on one side” and “the resolution of disputed facts and other adversarial proceedings on the other ... will not adequately serve to protect defendants’ and the public’s right to an open trial.” Sublett, 176 Wn.2d at 72.

Instead, courts should apply the “experience and logic” test.

The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.”

Id. at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)).

Historically, proceedings under Chapter 71.09 have been open to the public, as in Washington, “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10. Pretrial

---

<sup>6</sup> The court also questioned, but did not resolve, whether Morgan had standing to raise a violation of the public trial right. Morgan, 166 Wn. App. at 75-76; see also id. at 76 n. 4. According to this Court’s opinion in D.F.F., 172 Wn.2d at 39-40, it is clear that Morgan has standing to raise the violation.

hearings in commitment proceedings under Chapter 71.09 RCW are also presumptively open.<sup>7</sup> Finally, proceedings in which a court determines whether a person may be medicated against his will for purposes of trial are proceedings to which the public and press have a historic right of access.<sup>8</sup> See Sell v. United States, 539 U.S. 166, 176-77, 183, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Riggins, 504 U.S. at 135. The “experience” prong weighs in favor of a public trial right.

The “logic” prong also must be answered in the affirmative. A public proceeding would have enabled “family, friends, and other interested individuals to be present.” D.F.F., 172 Wn.2d at 40. “Not only can those individuals monitor the case and publicly disseminate information about it, but also they may possess specialized or personal knowledge that they can provide to assist [Morgan].” Id. at 41.

In evaluating the logic prong, it is important to keep in mind that the forced medication order was plainly unconstitutional. For such an order to be proper, the court had to find that important government interests were at stake, that involuntary medication would significantly further those interests, that it was necessary to further those interests, and

---

<sup>7</sup> None of the provisions of Chapter 71.09 direct that either trial or pretrial proceedings shall be closed, nor do the civil rules for superior court provide for closed pretrial proceedings.

<sup>8</sup> This Court did not accept Morgan’s petition for review of the propriety of the forced medication order itself.

that administration of the drugs was medically appropriate. Sell, 539 U.S. at 180-83. There can be no compelling government interest in forcibly medicating an individual to prevent him from being “disruptive” at his own trial where the medication will not restore the individual’s competency, and where other, less intrusive measures – such as recessing the proceedings – could accomplish the same end.

A public proceeding would also have played a significant positive role in the functioning of the process at question:

[T]he requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of the responsibility and to the importance of their functions.

D.F.F., 172 Wn.2d at 41 n. 3 (quoting State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009)). Had there been a public right of access to the hearing at which the court decided to order Morgan be medicated against his will, the court may not have so cavalierly sanctioned a violation of his fundamental right to be free from bodily intrusion.

In short, open proceedings would have helped to “maintain public confidence in the fairness and honesty of the judicial branch of government,” Momah, 167 Wn.2d at 148, an essential function of the

judiciary. This Court should conclude that the closed proceeding violated the public trial right.

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

If this Court determines that the right to a public trial was violated by the closure, this Court need not reach the issue of whether Morgan's right to be present was also violated. But if the public trial right was violated, then Morgan had the right to be present. Like D.F.F., Morgan was "a member of the public and the target of a civil action to involuntarily confine [him]." D.F.F., 172 Wn.2d at 37. A guardian ad litem could not fully vindicate his interests, and in fact this guardian ad litem did not do so, as he ultimately agreed that Morgan should be forcibly medicated (although he acknowledged Morgan's vehement opposition). CP 78-80.

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 a defendant does not have an unqualified right to attend an in-chambers

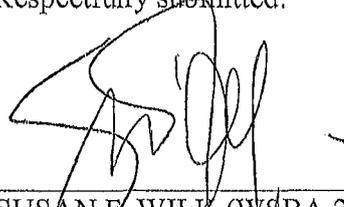
conference, his exclusion will violate his right to be present if presence is “required to ensure fundamental fairness.” Gagnon, 570 U.S. at 526.

The Court of Appeals held that “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.” Morgan, 161 Wn. App. at 74. Missing from the Court’s discussion was 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 made an initial ruling, but then 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. This Court should conclude that Morgan had the right to be physically present at the hearing at which the court would decide to forcibly medicate him.

E. CONCLUSION

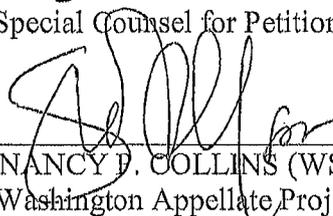
This Court should hold that persons subject to involuntary commitment proceedings under Chapter 71.09 RCW have the due process right to be competent at the proceedings. This Court should further hold that the closed hearing held by the trial court to determine whether Morgan should be medicated against his will should have been open to the public. Both violations require reversal of the commitment order.

Respectfully submitted:



---

SUSAN F. WILK (WSBA 28250)  
Law Office of Michael Iaria, PLLC  
Special Counsel for Petitioner



---

NANCY F. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

IN RE THE DETENTION OF )

CLINTON MORGAN, )

APPELLANT. )

NO. 86234-6

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 24<sup>TH</sup> DAY OF JULY, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

ANNE EGELER, AAG  
OFFICE OF THE ATTORNEY GENERAL  
PO BOX 40100  
OLYMPIA, WA 98504-0100

U.S. MAIL  
 HAND DELIVERY  
 \_\_\_\_\_

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JULY, 2013.

X \_\_\_\_\_ 

Washington Appellate Project  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711

## OFFICE RECEPTIONIST, CLERK

---

**To:** Maria Riley  
**Cc:** AnneE1@atg.wa.gov; Susan Wilk  
**Subject:** RE: 862346-MORGAN-BRIEF

Rec'd 7-24-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

---

**From:** Maria Riley [<mailto:maria@washapp.org>]  
**Sent:** Wednesday, July 24, 2013 3:55 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** [AnneE1@atg.wa.gov](mailto:AnneE1@atg.wa.gov); Susan Wilk  
**Subject:** 862346-MORGAN-BRIEF

In re The Detention of Clinton Morgan

**No. 86234-6**

Please accept the attached documents for filing in the above-subject case:

**Supplemental Brief of Petitioner**

Susan F. Wilk - WSBA #28250  
Attorney for Petitioner  
Phone: (206) 587-2711  
E-mail: [susan@washapp.org](mailto:susan@washapp.org)

By

*Maria Arranza Riley*

**Staff Paralegal**  
**Washington Appellate Project**  
**Phone: (206) 587-2711**  
**Fax: (206) 587-2710**  
**E-mail: [maria@washapp.org](mailto:maria@washapp.org)**  
**Website: [www.washapp.org](http://www.washapp.org)**

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.