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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CLINTON MORGAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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 ORIGINAL

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## I. INTRODUCTION

Petitioner Clinton Morgan claims a constitutional right to avoid treatment as a sexually violent predator (SVP) because he was incompetent during his SVP proceedings. Accepting his argument would mean that “[t]he State could not confine and treat some of its most dangerous sex offenders,” which is why “courts in other states with similar statutes have uniformly held that due process does not prevent the trial and commitment of SVP’s while mentally incompetent.” *Moore v. Superior Court*, 50 Cal. 4th 802, 237 P.3d 530, 532 (2010). The Court of Appeals here reached the same conclusion, properly applying the factors under *Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). While Morgan has a significant liberty interest, the State has a compelling interest in public safety and in treating sex offenders, and the heightened protections SVPs receive, together with criminal conviction on the underlying acts, ensures minimal risk of erroneous deprivation of liberty.

Morgan’s open courts claim is similarly meritless and is waived. He did not object to the in-chambers procedural discussion he now challenges. Because Morgan cannot show prejudice, review is foreclosed. Even if the Court reaches the merits, Morgan cannot meet his burden of proving that experience and logic require that such discussions be open to the public.

## II. ISSUES PRESENTED

1. Were Morgan's due process rights violated by appointing an attorney and a guardian ad litem and proceeding with his civil commitment hearing after a finding that he was incompetent?
2. Is article I, section 10 of the Washington Constitution violated by a non-adversarial in-chambers discussion two years prior to trial that did not involve any testimony or result in an order?
3. Should the Court review Morgan's article I, section 10 claim where Morgan never raised it in the trial court?

## III. STATEMENT OF THE CASE

Clinton Morgan is a schizophrenic pedophile. He began offending against children when he was 13 years old. *In re Det. of Morgan*, 161 Wn. App. 66, 70, 253 P.3d 394 (2011). In 2004, shortly before he was released from prison for his second sexual offense, the State filed a petition seeking his commitment as a sexually violent predator pursuant to Ch. 71.09 RCW.

After Morgan's counsel stated that Morgan was experiencing psychotic symptoms, the trial court held a competency hearing and concluded that Morgan was incompetent, but that the SVP proceedings could continue. CP 62-64. The court appointed a guardian ad litem to represent Morgan's interests. CP 63. Morgan's counsel did not object to

going forward with the trial and later stated to the court that the law does not require that an SVP respondent be competent. RP 2/23/2006 at 8.

During a June 2006 status conference, Morgan's attorney asked that Morgan be involuntarily medicated to control his behavior during the SVP proceedings. CP 67-68. The court orally ruled that the trial would be continued "until Mr. Morgan has been stabilized on medication." CP 284. Before a written order was entered, the State filed a motion asking the court to consider additional information before determining whether to involuntarily medicate Morgan. The matter was discussed in chambers on August 30, 2006. The trial judge, a court reporter, and the guardian ad litem were physically present. RP 8/30/06 at 26-28. Morgan's attorney and the attorney for the State participated by phone. *Id.* at 28.

During the discussion, Morgan's attorney expressed concern that without medication, Morgan would be "ranting and raving" and that a jury would think "well, he's so crazy, he should be locked up." *Id.* at 30. Morgan's guardian ad litem stated that Morgan was vehemently opposed to medication, but did not offer an opinion about whether medication would be helpful, stating instead that he wanted to talk to Morgan's treating psychiatrist to determine whether medication would be helpful. *Id.* at 31-32. The trial court concluded the discussion by asking the guardian ad litem to meet with the psychiatrist so that the court could get

the necessary information before making a decision. The court also confirmed a prior continuance decision and reminded the parties to disclose their witness lists. RP 8/30/06 at 33. No order was entered or requested.

A month later, in September 2006, the State filed a report from Sexual Commitment Center psychiatrist Dr. Leslie Sziebert. CP 71. The report indicated that involuntary medication might help Morgan curb his inappropriate behavior during the commitment trial. CP 72. In October 2006, the guardian ad litem filed his report with the court. CP 78-79. The guardian ad litem reviewed records related to Morgan's psychiatric history and noted that, in the past, medication achieved "relatively good control" of Morgan's schizophrenia symptoms. CP 79. Based on these observations, and his reading of Dr. Sziebert's report, the guardian ad litem expressed his opinion that involuntary medication would be in Mr. Morgan's best interest. On December 6, 2006, the trial court entered an order requiring Morgan to be medicated. CP 81-83.

At trial, a unanimous jury found that Morgan is a sexually violent predator, and the court committed him for control, care, and treatment at the Special Commitment Center. CP 279-80.

Morgan raised five issues on appeal. *Morgan*, 161 Wn. App. 66. The Court of Appeals unanimously upheld the trial court order. *Id.* at 86.

#### IV. ARGUMENT

##### A. Due Process Does Not Require Respondents To Be Competent During SVP Proceedings

Morgan's due process claim focuses on "substantive due process," but he does not cite a single case holding that commitment of an incompetent SVP violates substantive due process. Pet. for Rev. at 10. On the contrary, courts repeatedly have held that the SVP Act satisfies substantive due process even though a condition of SVP designation is that the offender be mentally ill. *See, e.g., State v. McCulstion*, 174 Wn.2d 369, 385-86, 275 P.3d 1092 (2012); *Kansas v. Hendricks*, 521 U.S. 346, 360-369, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

To the extent Morgan raises a procedural due process claim here, it fails. Procedural due process certainly must be afforded SVPs because civil commitment constitutes a significant liberty restraint. *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Because the proceedings are civil, however, the full array of rights applicable in criminal trials is not applicable to SVP commitment. *See, e.g., Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986) (protection against compulsory self-incrimination inapplicable in SVP cases); *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007) (right to confrontation inapplicable in SVP cases).

In the SVP context, the process due is determined by balancing the three *Matthews* factors: (1) the private interest affected; (2) the risk of erroneous deprivation through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Stout*, 159 Wn.2d at 370 (citing *Matthews*, 424 U.S. at 335). The Court of Appeals correctly weighed the *Matthews* factors in holding that there is no procedural due process right to restoration of competency prior to a civil commitment proceeding. Indeed, “courts in other states with similar statutes have uniformly held that due process does not prevent the trial and commitment of SVP’s while mentally incompetent.” *Moore*, 237 P.3d at 532.

**1. Because civil commitment implicates a liberty interest, the first *Matthews* factor weighs in favor of Morgan**

The first *Matthews* factor, the private interest affected by the proceeding, weighs in Morgan’s favor. Civil commitment involves a significant deprivation of physical liberty. *Stout*, 159 Wn.2d at 370.

**2. Robust procedural protections ensure a minimal risk of erroneous deprivation of liberty**

The second *Matthews* factor weighs in the State’s favor because there is minimal risk of erroneous deprivation of liberty through existing procedures. Washington provides extensive rights to SVP respondents.

*Stout*, 159 Wn.2d at 370. Before the State may begin commitment proceedings, it must show probable cause that the person is an SVP. RCW 71.09.040. At all stages of SVP proceedings, the respondent has a right to counsel. RCW 71.09.050(1). If the respondent is indigent, an attorney is appointed, as well as an expert to conduct an evaluation on the individual's behalf. *Id.*; RCW 71.09.050(2), .055(1). At trial, the State carries the burden of proof beyond a reasonable doubt. RCW 71.09.060. The SVP respondent has the right to a jury trial and a jury decision to commit must be unanimous. RCW 71.09.050; .060(1).

In addition to the procedural protections every SVP receives, a guardian ad litem was appointed for Morgan under RCW 4.08.060. As the Court of Appeals stated, "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." *Morgan*, 161 Wn. App. at 80. The combination of extensive procedural protections and the ability to appoint a guardian ad litem "demonstrate[s] sufficient due process protection in a sexually violent predator determination trial." *State ex rel. Nixon v. Kinder*, 129 S.W.3d 5, 9 (Mo. Ct. App. 2003).

Courts across the country have rejected a threshold mental competency requirement in SVP trials. In addressing the procedural protections due to SVPs, the California Supreme Court explained that

“[o]ther heightened statutory requirements, like jury unanimity and the reasonable doubt standard of proof, help mitigate the risk that an incompetent person would be erroneously adjudicated as an SVP in the first place.” *Moore*, 237 P.3d at 543. Similarly, the Massachusetts Supreme Court held that the “robust, adversarial character” of SVP proceedings reduces the risk of erroneous commitment, and noted that when the respondent is incompetent, the requirements of due process may be satisfied by the appointment of counsel without need for a guardian ad litem. *Commonwealth v. Nieves*, 446 Mass. 583, 846 N.E.2d 379, 385-86 (2006); *see also, e.g., Nixon*, 129 S.W.3d at 10 (an SVP “determination, regardless of competency, is not an unconstitutional deprivation of liberty”); *Iowa v. Cabbage*, 671 N.W.2d 442 (Iowa 2003) (lack of pre-trial evaluation of competency causes no deprivation of due process rights); *In re Commitment of Weekly*, 2011 IL App (1st) 102,276, 353 Ill. Dec. 772, 956 N.E.2d 634, 647 (fitness evaluation does not impact ability to receive a fair commitment trial).

In arguing that an attorney and a guardian ad litem are insufficient protection against an erroneous deprivation of liberty, Morgan relies on selective excerpts from *In re Commitment of Branch*, 890 So. 2d 322 (Fla. Dist. Ct. App. 2004). Morgan Ct. of App. Br. at 17. But *Branch* does not hold that civil commitment of sexually violent predators requires the

respondent to be competent. Rather, *Branch* limited its holding to those cases in which the State sought to prove past acts of sexual deviance through hearsay.

The *Branch* Court considered a Florida law requiring the State to show a pattern of sexual deviancy. Branch had not been convicted of any of the alleged acts the State was relying on to commit him as an SVP. *Branch*, 890 So. 2d at 324. The expert opinion offered to satisfy this requirement was based exclusively on hearsay records the State provided. *Id.* The court held that “[i]f the State chooses to proceed . . . based on hearsay reports of prior bad acts *that did not result in prosecution or conviction* to establish an element of its case, the State may do so only when the respondent is competent to challenge that evidence.” *Id.* at 329 (emphasis added). The court pointedly limited its holding by stating that “we do not hold” that all SVP respondents are entitled to competence: “[R]espondents have a due process right to be competent only when the State intends to present hearsay evidence of alleged facts that have neither been admitted by way of a plea nor subjected to adversarial testing at trial.” *Id.*

Unlike Branch, Morgan was convicted of the crimes upon which his SVP petition was based. Morgan had an opportunity to meaningfully contest those facts in a criminal trial. As the California Supreme Court

stated, when an SVP finding is based on a prior criminal conviction, “any chance that an SVP’s mental incompetence would significantly impair his contribution to his defense seems relatively attenuated.” *Moore*, 237 P.3d at 543; *see also Weekly*, 956 N.E.2d at 647 (fitness evaluation would add minimal value given prior convictions).

Morgan’s petition also incorrectly relies on a California decision addressing an entirely different topic: whether a civil committee has a due process right to testify over the objection of counsel. Pet. for Rev. at 10-11 (citing *People v. Allen*, 44 Cal. 4th 843, 187 P.3d 1018 (2008)). In its more recent decision in *Moore*, the California Supreme Court stated that *Allen* “was carefully tailored to the substance of the right being asserted” and is “distinguishable in material respects” from the question of whether there is a right to competence. *Moore*, 237 P.3d at 541, 543. Morgan does not cite *Moore*, but it is the controlling California case on this issue.

**3. The State has a compelling interest in treating and protecting the public from sexually violent predators**

The final *Matthews* factor—“the governmental interest, including costs and administrative burdens of additional procedures”—also weighs heavily in the State’s favor. *Stout*, 159 Wn.2d at 370; *Matthews*, 424 U.S. at 335. The State has a compelling interest in protecting citizens from SVPs and in treating persons with mental disorders. *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). This interest would be significantly

impaired if SVP commitment trials were “‘stayed indefinitely, and perhaps permanently, unless and until competence was restored under circumstances not involving confinement and treatment’” under RCW 71.09. *Morgan*, 161 Wn. App. at 81-82 (quoting *Moore*, 237 P.3d at 544). It is illogical to hold that an individual may be too mentally ill to be civilly committed. *See Morgan*, 161 Wn. App. at 82. As the California and Texas Supreme Courts noted, the very nature of SVP cases is to commit for treatment persons who have a mental disease. *Moore*, 237 P.3d at 544; *In re Commitment of Fisher*, 164 S.W.3d 637, 653-54 (Tex. 2005).

In addition, the State has an interest in protecting patients in the State’s mental health hospitals. SVPs cannot be placed even temporarily in a state mental health facility “because these institutions are insufficiently secure for this population.” RCW 71.09.060(3). “It is reasonable for the Legislature to conclude that this population needs to be secured not only from the public but also from other patients in mental institutions that are more informal than the Special Commitment Center (SCC).” *In re Det. of Gordon*, 102 Wn. App. 912, 920, 10 P.3d 500 (2000). A finding that competency must be restored prior to civil commitment could result in housing these individuals “indefinitely, and

perhaps permanently, in places not designed and staffed to deal with the particular risks they pose.” *Moore*, 237 P.3d at 546.

The Court of Appeals properly held that due process does not require restoration of competency prior to an SVP commitment trial.

**B. The Procedural Discussion In Chambers Was Not A Closure**

A procedural discussion in the trial judge’s chambers does not implicate the right to a public trial under article I, section 10 of the Washington Constitution. Article I, section 10 provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.”<sup>1</sup>

The chambers discussion at issue did not implicate article I, section 10. Two years before trial, the court held an in-chambers conference to discuss the procedure for hearing additional evidence regarding the need for involuntary medication. RP 8/30/06 at 26. Counsel for Morgan and the State, and the guardian ad litem, participated in the meeting. *Id.* at 27-28. Counsel for Morgan did not contend that the procedural discussion constituted a court closure and made no objection to it. The trial judge stated that he wanted more information and asked the guardian ad litem to meet with Morgan’s treating psychiatrist and obtain a written report. *Id.*

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<sup>1</sup> Morgan did not ask the Court to apply the Sixth Amendment to the United States Constitution or article I, section 22 of the Washington Constitution. Since SVP cases are civil, the Sixth Amendment is not applicable. *E.g., In re Det. of Strand*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). Similarly, the rights provided to criminal defendants by article I, section 22 are not applicable to SVP trials. *In re Det. of Ticeson*, 159 Wn. App. 374, 381, 246 P.3d 550 (2011), *abrogated on other grounds by State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012).

at 32. The trial judge also discussed a continuance and reminded counsel to list the witnesses they anticipated calling at trial. RP 8/30/06 at 33. No substantive decisions were made and no order was entered.

This discussion did not violate article I, section 10. As this Court has held, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). To determine whether the right to public trial is implicated, the Court applies the “experience and logic test.” *Id.* at 73 (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press II*)). The burden is on the party claiming a public trial violation to show that both elements require a public hearing. *In re Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013) (“It is Yates’s burden to satisfy the experience and logic test.”); *Sublett*, 176 Wn.2d at 73.

Here, Morgan cannot show that the public trial right attaches, because neither element of the test supports his challenge. The discussion at issue is not the type of court proceeding historically open to the public, and openness would not have enhanced the fairness of the proceeding.

**1. Historically, procedural discussions have not always occurred in open court**

The first element of the experience and logic test asks “whether the place and process have historically been open to the press and general

public.’” *Sublett*, 176 Wn.2d at 73 (quoting *Press II*, 478 U.S. at 8). In applying this element of the test in *Press II*, the United States Supreme Court held that preliminary evidentiary proceedings, involving admission of evidence, testimony, and cross-examination, are akin to trial and have traditionally been open to the public. *Press II*, 478 U.S. 1.

This case is not comparable to the adversarial evidentiary hearing addressed in *Press II*. As a general matter, there is no history of restricting judges “in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Brennan, J., concurring). Status and procedural discussions, disputes during depositions, and sidebar discussions are commonly held without public access.

Morgan presents no contrary cases or evidence suggesting that procedural discussions like this one have historically been open to the public, and he thus cannot meet his burden. In fact, this discussion was much like many others that this Court has found were not historically open, as it involved no witnesses, testimony, orders, or even requested orders. *See, e.g., Sublett*, 176 Wn.2d at 77 (“No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists.”). When evidence regarding involuntary medication was eventually received,

written reports were filed in the record and were accessible to the public. CP 71-80. Months later, when the trial judge entered an order requiring involuntary medication, it was also part of the open record and subject to appeal. CP 81-83. Thus, the chambers discussion provided at most “a framework” for future taking of evidence, and therefore does not meet the first element of the experience and logic test. *See, e.g., State v. Beskurt*, 176 Wn.2d 441, 447, 293 P.3d 1159 (2013) (attorneys’ private review of juror questionnaires did not constitute courtroom closure because “[a]t most, the questionnaires provided the attorneys and court with a framework for” later public questioning).

**2. Public access would not have furthered the values served by public trial**

The second element of the experience and logic test asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Sublett*, 176 Wn.2d at 73 (quoting *Press II*, 478 U.S. at 8). Meetings to discuss procedural matters like this one do not involve a significant role for the public.

The values served by a public trial include ensuring that the judge and the State carry out their duties responsibly, encouraging witnesses to come forward, and discouraging perjury. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). To protect these values, certain proceedings “plainly require public access.” *Press II*, 478 U.S.

at 8. For example, in *Press II*, the Court found that preliminary hearings conducted in California involve the rights afforded at trial, such as a right to cross-examine hostile witnesses, present exculpatory evidence, and exclude evidence. *Id.* at 11-12; *see also State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012) (holding that the right to public trial includes voir dire).

This Court's decision in *Sublett* is dispositive on this issue. During deliberations, the *Sublett* jury submitted a question to the court. *Sublett*, 176 Wn.2d at 67. Counsel met with the judge in chambers to discuss the procedure for addressing the question. The discussion was not included in the verbatim report of proceedings. *Id.* at 67. This Court found that "[n]one of the values served by a public trial right" were violated by the discussion in chambers. *Id.* at 77. There were "no witnesses" involved, there was "no testimony," and "no risk of perjury existed." *Id.* The Court concluded that "[t]his is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." *Id.* Because the proceeding did not implicate the public trial right, a closure did not occur. *Id.*

As in *Sublett*, none of the values served by a public trial right were violated by the discussion in chambers of the procedure for considering

whether Morgan should be involuntarily medicated. The non-adversarial discussion did not involve any witnesses, testimony, or risk of perjury. There simply was nothing of substance for the public to scrutinize during the procedural discussion. The evidence that was eventually admitted and the decision that followed were filed in the open record. CP 71, 78, 81.

In arguing that the procedural discussion had to be open to the public, Morgan relies on *In re Det. of D.F.F.*, 144 Wn. App. 214, 183 P.3d 302 (2008), *aff'd*, 172 Wn.2d 37, 256 P.3d 357 (2011). Pet. for Rev. at 19. But *D.F.F.* involved the complete closure of an entire trial resulting in an order of commitment, not a brief procedural discussion years before trial. It comes nowhere close to satisfying Morgan's burden of showing that logic required the procedural meeting at issue here to be held in open court.

In short, a procedural discussion in chambers that involves no admission of evidence or witness testimony and does not result in an order is not the type of proceeding that has historically been open to the public. In addition, it is not so similar to the trial itself that the same right to public scrutiny attaches. Morgan cannot satisfy either of the two elements required by the experience and logic test. Therefore, the public trial right was not implicated and a closure did not occur.

**C. Morgan Failed To Comply With RAP 2.5(a) By Objecting At The Trial Court Or By Showing Actual Prejudice**

Even if article I, section 10 applied, Morgan waived his ability to raise it. Morgan did not object to the in-chambers discussion, as required by RAP 2.5(a), and cannot show a manifest error.

RAP 2.5(a) allows appellate courts to refuse review of claims not raised below. This Court has held that a criminal defendant's right to public trial under article I, section 22 is not waived by a failure to object to closure. *State v. Wise*, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012); *but see Sublett*, 176 Wn.2d at 115 (Madsen, C.J., concurring) (defendant who fails to object to closure must establish prejudice under RAP 2.5(a)(3)); *Sublett*, 176 Wn.2d at 145 (Wiggins, J., concurring in result) (defendant raising public trial issue on appeal must satisfy RAP 2.5(a)(3) by showing manifest error); *Wise*, 176 Wn.2d at 25 (J.M. Johnson, J., C.W. Johnson, J., and Wiggins, J., dissenting) (defendant raising closure on appeal must satisfy RAP 2.5(a)(3)). There is no justification for extending this rule to a civil commitment hearing that does not implicate article I, section 22.

Indeed, in *D.F.F.* a majority of this Court found that courtroom closure in a civil case is not "structural error," and that a respondent must show prejudice. *D.F.F.*, 172 Wn.2d at 48 (J.M. Johnson, J., and Chambers, J. concurring in result) (holding that "'structural error' analysis does not apply to the civil context" but still granting relief because the

respondent “demonstrate[d] sufficient prejudice to warrant relief”); (Madsen, C.J., C.W. Johnson, J., and Fairhurst, J., dissenting) (“both precedent and common sense suggest that structural error analysis is ill suited for” civil cases). Thus, “[f]ive justices of this court [have] explicitly rejected the proposition that the concept of ‘structural error’ ha[s] a place outside of criminal law.” *Saleemi v. Doctor’s Assoc., Inc.*, 176 Wn.2d 368, 385-86, 292 P.3d 108 (2013) (citing *D.F.F.*, 172 Wn. 2d at 48). This majority position makes eminent sense, for as this Court has previously stated, requiring objections at the time of an alleged violation serves vital purposes, and allowing an appellant to raise a new objection on appeal encourages litigants to invite error by the trial court. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007); *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). Thus, this Court allows new issues to be raised on appeal only in exceptional cases.

Specifically, RAP 2.5(a)(3) provides an exception for manifest error that affects a constitutional right. An error is manifest if it had “practical and identifiable consequences in the case” constituting “actual prejudice.” *State v. Schaler*, 169 Wn.2d 274, 282-83, 236 P.3d 858 (2010); *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Morgan cannot show that the procedural discussion at issue here actually prejudiced him by impacting the outcome of his commitment trial. He has

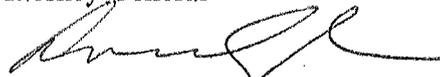
not argued that he suffered any prejudice as a result of this discussion in chambers, and it is hard to imagine what prejudice he could claim. The only result of the meeting was a framework for providing additional information. No decision was reached regarding involuntary medication of Morgan, and he suffered no prejudice. *See State v. McFarland*, 127 Wn.2d 332, 333-34, 899 P.2d 1251 (1995) (when judge did not rule on an issue, affirmative showing of actual prejudice could not be made).

#### V. CONCLUSION

The state Supreme Courts that have considered the issue have held that there is no due process right to competence in SVP proceedings. This Court should not be the first to disagree. Morgan has waived any public trial claim. Even if he had not, his claim fails on the merits because he has not shown that experience or logic supports requiring procedural discussions like the one at issue to be held publicly. The State therefore respectfully asks that the Court of Appeals be affirmed.

RESPECTFULLY SUBMITTED this 24th day of July 2013.

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DATED this 24th day of July 2013, at Olympia, Washington.

  
ROSE SAMPSON  
Legal Assistant

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