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79111-2

NO. 79111-2

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

JOHN C. ANDERSON,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

FILED
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 CLERK OF SUPERIOR COURT
 STATE OF WASHINGTON
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CLERK OF SUPERIOR COURT
 STATE OF WASHINGTON
 10/30/06

ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF ISSUES

Mr. Anderson asks this Court to accept review on the following issue:

Whether evidence of a recent overt act (ROA) was sufficient to commit petitioner as a sexually violent predator under RCW 71.09?

As discussed below, this issue is not worthy of review under RAP 13.4(b). The State as respondent, however, raises an additional issue because the Court of Appeals determined that the trial court abused its discretion by denying Mr. Anderson's request to add an expert witness one week before trial and remanded for further proceedings. The issue appropriate for this Court's review is:

Where the case has been pending for over four years, and where Petitioner had prior access to an expert but repeatedly indicated that he did not intend to call an expert at trial, did the trial court abuse its discretion by denying Petitioner's request to add an expert one week before trial where the last minute addition was demonstrably prejudicial to the State?

II. CRITERIA FOR DISCRETIONARY REVIEW

Acceptance of review of a decision of the Court of Appeals is governed by RAP 13.4, which states that a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of

law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Because the issue presented by the Mr. Anderson does not meet any of the specified criteria for review, this Court should deny the petition. This Court, however, should accept review of Court of Appeals' determination that the trial court abused its discretion in refusing to allow Mr. Anderson to designate an additional expert on the eve of trial. The State's issue is of substantial public interest because the Court of Appeals' decision will allow dilatory practices on the part of parties wishing to avoid—or at least delay—trial, reduce the ability of trial courts to manage their dockets, and ultimately increase the cost of these cases to the taxpayers and citizens of this State.

III. ARGUMENT

A. Whether The State Presented Sufficient Evidence Of The Commission Of A Recent Overt Act Does Not Merit Review Under RAP 13.4

Mr. Anderson identifies only one issue for review: whether the State presented sufficient evidence at trial to find that Mr. Anderson had committed a recent overt act (ROA) or acts. Pet. at 1. He goes on, however, to suggest constitutional deficiencies with the ROA statute and

its application in this case. The arguments do not have merit and the issue is not appropriate for Supreme Court review.

1. The Term “Recent Overt Act” Is Constitutional And Was Applied Constitutionally In This Case

Mr. Anderson argues that the term “recent overt act” should be more strictly construed so that the term refers only to acts that “came close to creating a fear of ‘sexually violent harm’ in minds of the recipients of those behaviors.” Pet. at 14. Although it is not entirely clear, this suggests that Mr. Anderson believes that there must be an identifiable victim who is the subject of an act before it can constitute an ROA. Mr. Anderson goes on to argue that in order to define “reasonable apprehension” of “harm of a sexually violent nature,” this Court should look to the common law definition of assault. Pet. at 16. Mr. Anderson’s arguments have no basis in the language of the statute, do not serve the purposes of the statute, and therefore do not present a significant question requiring resolution by this Court.

The statute provides that an ROA includes an act that creates a “reasonable apprehension of [harm of a sexually violent nature] *in the mind of an objective person* who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(10) (emphasis added). This plain language defeats Mr. Anderson’s premise.

Moreover, Mr. Anderson's arguments relating to the constitutionality and application of the ROA doctrine have been considered and rejected by the appellate courts of this state, most recently in *In re Det. of Froats*, 134 Wn. App. 420, 140 P.3d 622, 631 (2006):

Froats argues that a broad interpretation of recent overt act offends constitutional principles, including substantive due process and the vagueness doctrine. We disagree.

In Albrecht's appeal after remand, Division Three rejected a similar argument, noting that the recent overt act requirement is but one part of the showing the State must make in proof of a person's status as a sexually violent predator. *Albrecht*, 129 Wn. App. [243] at 256-57, 118 P.3d 909 [(2005)]. The recent overt act requirement was added to the existing statutory scheme to ensure an extra layer of proof in support of a finding of current dangerousness. *Albrecht*, 129 Wn. App at 252. In addition to a recent overt act, the State must prove that an individual suffers from a mental abnormality that makes it likely the person will engage in predatory acts of sexual violence if not confined to a secure facility. This requirement satisfies due process. *See Thorell*, 149 Wn.2d [724] at 735-36, 72 P.3d 708 [(2003)].

Mr. Anderson also argues that the constitution requires that an ROA consist of an "effort, attempt, or threat to carry out a dangerous act," or must be behavior which is actually dangerous. Pet. at 11. He asserts that, "to define 'reasonable apprehension' of 'harm of a sexually violent nature,' this court [sic] should look to the common law definition of assault." Pet. at 16. This argument does not merit review of the evidence here for the reasons explained in *Froats*:

Froats urges us to apply a standard of reasonable apprehension of harm from the common law governing assault. Neither the statute nor case law supports his argument that a recent overt act must cause reasonable apprehension of harm in the intended victim. On the contrary, the question is whether an objective person familiar with the person's mental health and offense history would reasonably fear harm. The act or threat itself need not be dangerous. See *In re Det. Of Hovinga*, 132 Wn. App 16, 130 P.3d 830 (2006) (act of masturbating while covertly following girls around a store); *In re Det. Of Broten*, 130 Wn. App 326, 122 P. 3d 942 (2005) (act of being in a part at a children's playground without a chaperone); *In re Det. Of Albrecht*, 129 Wn. App. 243, 252, 118 P. 3d 909 (2005) (act of luring a young boy with 50 cents) *review denied*, 157 Wn.2d 1003, 136 P.3d 758 (2006).

Froats, 140 P.3d at 630-31.

It would thwart the purpose of the SVP law to require a new crime—assault—before the State can act to prevent crime. Keeping in mind that all attempts at sexually violent offenses are themselves sexually violent offenses, see RCW 71.09.020(15)(d), it makes no sense to require a new sexually violent offense or something very close to it before the State can act to protect society from danger.

Mr. Anderson's arguments raise issues well settled in Washington and do not merit review by this Court.

2. Mr. Anderson's Behaviors While at Western State Hospital Qualify as Recent Overt Acts

Mr. Anderson also argues that “[c]onduct that is over thirty years old cannot possibly qualify as ‘recent.’” Pet. at 15. He does not identify the conduct to which he refers, and elsewhere in his brief, states that “the

state's [sic] position it is [sic] possible to look as far back as sixteen years to find conduct that satisfies the statutory criteria." Pet. at 15. Mr. Anderson references behavior from both sixteen and thirty years ago, and it is entirely unclear to what he is referring. The Court should not accept review of the Mr. Anderson's arguments because they have no foundation in—and are indeed contrary to—the record.

The conduct identified by the Court of Appeals as ROAs occurred during Mr. Anderson's 10-year stay at Western State Hospital (WSH) between 1990 and the filing of the SVP petition in 2000:

. . . . Dr. Phenix indicated that several of Anderson's actions qualified as recent overt acts, which created a reasonable apprehension of sexually violent harm in the mind of an objective person who knew Anderson's history and mental condition. *See* RCW 71.09.020(10). For example, she pointed to Anderson's relationships with vulnerable patients, like Rory, at WSH. Although the evidence at trial did not indicate that Anderson had committed an actual rape, he engaged in serial sexual behaviors that exploited vulnerable adults, which acts were closely akin to his assaults on children. And his persistence in that conduct, his ongoing sexual fantasies involving sexual violence of children, his rule breaking behavior, and his inability to avoid high risk situations all indicated that he posed a clear risk to reoffend if released from custody.

In re Det. of Anderson, 134 Wn. App. 309, 323-24, 139 P.3d 396 (2006).

Mr. Anderson offers no legal authority for the proposition that events that occurred some years ago are, as a matter of law, not "recent" enough to constitute ROAs. This argument is also contrary to settled law.

For example, in *In re Det. of Pugh*, the Court of Appeals relied upon acts committed five, eleven, and even thirteen years before. 68 Wn. App 687, 694-95, 845 P.2d 1034 (1993). Likewise, in *In re Det. of Henrickson v. State*, this Court determined that convictions for Attempted Kidnapping and Communicating with a Minor for Immoral Purposes occurring six years before the SVP petition's filing constituted ROAs. 140 Wn.2d 686, 698, 2 P.3d 473 (2000). The key, then, is not some arbitrary time limit, but rather whether the acts alleged are "still probative of the subject's present sense of dangerousness." *Pugh*, 68 Wn. App at 694. Mr. Anderson's arguments to the contrary do not present an issue requiring review by this Court.

Mr. Anderson also argues that the ROAs involved only fantasy - as opposed to actual behavior or consensual sex. Citing Judge Armstrong's dissent Mr. Anderson suggests that finding an ROA where the individual does nothing more than have consensual sex while confined implies that an individual with a history of sex offenses commits an ROA if he engages in sexual behavior of any kind. Pet. at 12-14. This argument mischaracterizes the testimony at trial, as well as the majority's determination that various behaviors, not limited to fantasies or consensual sex, constituted ROAs. Whether there is an ROA remains a fact-dependent question and review of the substantial evidence in this record

does not present any issues appropriate for this Court's review under RAP 13.4(b).

B. Whether The Trial Court Abused Its Discretion In Refusing To Allow The Last-Minute Request By Defense For An Additional Expert Involves A Question Of Substantial Public Interest That Should Be Determined By This Court

The State filed this case in February of 2000. *Anderson*, 134 Wn. App. at 315. The week before trial, Mr. Anderson motioned to add Dr. Richard Wollert as an expert witness. *Id.* The trial court denied this and subsequent motions to the same effect. *Id.* at 316. The Court of Appeals determined that the trial court had abused its discretion and ordered the matter remanded. *Id.* at 321-22. This reflects an erroneous application of the abuse of discretion standard of review that raises the potential for serious costs in this and other cases. Whether in the context of SVP or other cases, this issue is a matter of substantial public interest because the Court of Appeals' opinion rewards dilatory practices by parties seeking to avoid or delay trial.

1. Procedural History

In 2001, the trial court appointed Dr. Brian Judd, a psychologist who specializes in the evaluation and treatment of sex offenders, to assist Mr. Anderson at trial. CP at 77-79, 157, 160-163. On June 5, 2002, in his response to the State's Motion to Compel answers to its interrogatories,

Mr. Anderson acknowledged that Dr. Judd had been serving as his expert and indicated that he no longer wished to use Dr. Judd in this capacity. *Id.* at 157. At that time, Mr. Anderson informed the State that he wished to consult with Dr. Wollert, but had not yet made any formal arrangements with him. *Id.* Approximately three weeks later, Mr. Anderson, through counsel, notified the State that he would not be calling Dr. Judd or any other expert witnesses. *Id.* at 158.

At a status conference on April 12, 2004, Mr. Anderson requested for the first time that the trial court appoint Dr. Wollert to his defense team. *Id.* at 158, 168. He simultaneously asked to delay trial to allow him to seek interlocutory review of the Court of Appeals' 2001 Order Denying Review.¹ *Id.* at 168. The State opposed both motions, arguing prejudice and lack of any good cause for Dr. Wollert's appointment or further delays. *Id.* at 160-163. The trial court denied the motion for stay, found that Mr. Anderson had not shown good cause for Dr. Wollert's appointment, and ruled that Dr. Wollert would not be permitted to testify at trial. *Id.* at 168-70. The court did, however, authorize Mr. Anderson's counsel to consult with Dr. Wollert. *Id.*

¹ In 2000, Mr. Anderson filed a motion for judgment on the pleadings on the question of the State's use of his records form WSH. CP at 41-51. The trial court denied his motion, and he sought review by Division II, which denied review in May 2001. *Anderson*, 134 Wn. App. at 315.

On April 15, 2004, four days before trial, Mr. Anderson filed a motion for discretionary review with Division II, asking for interlocutory review of the WSH records issue on the basis of “new controlling case authority” – that is, a decision issued in September 2003. *See* Motion for Discretionary Review, attached as Attachment A. The State opposed that renewed attempt for interlocutory review, and on April 16, 2004, the Court of Appeals again denied review. CP at 164-66; *Anderson*, 134 Wn. App. at 315-16.

On April 19, 2004, the first morning of trial, Mr. Anderson renewed his motion to have Dr. Wollert appointed as a testifying expert; that motion was denied. VRP at 1-10. After the State’s expert, Dr. Amy Phenix, testified at trial, Mr. Anderson made yet another request to call Dr. Wollert in this matter. *Id.* at 441. The trial court again denied the motion. *Id.* at 442-448.

2. Court of Appeals’ Ruling

The Court of Appeals determined that the trial court had abused its discretion in refusing to allow Mr. Anderson to designate Dr. Wollert as an expert, stating that:

[t]he timing of Anderson’s request for Dr. Wollert’s appointment did not...result in delay or prejudice to the State’s case. Change of trial counsel over the course of four years leading up to the trial, the availability of an expert with knowledge of actuarial instruments’ applicability to

adults convicted of sexually violent crimes as juveniles, notice two years earlier that Dr. Wollert was a possible expert witness, and the lack of actual trial delay all comprised good cause under WAC 388-885-010(3)(c).

Anderson, 134 Wn. App. at 320-21.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, the Court of Appeals cites four reasons for its decision, none of which demonstrates that the trial court behaved unreasonably or otherwise abused its discretion.

a. Abuse of Discretion is Not Established by Changes in Mr. Anderson's Counsel

First, the Court of Appeals cites to “change of counsel over the four years leading up to the trial” as a basis to allow Dr. Wollert’s appointment. *Anderson*, 134 Wn. App. at 321. While there was a change of counsel immediately prior to trial, the record demonstrates that this change of counsel did not provide a reason for Mr. Anderson’s last-minute request.

When this case began in February of 2000, Mr. Anderson was represented by Ms. Ann Stenberg; Mr. Don Lundahl was added as counsel

the following month. Order on Co-Counsel dated March 23, 2000, CP at ____, attached as Attachment B. Four years later, less than three weeks before trial, and over the vigorous objections of the State, Ms. Stenberg was permitted to withdraw as counsel, and Mr. Lundahl's (then) wife and legal partner, Ms. Karen Lundahl, was substituted for Ms. Stenberg. See Order re: Withdrawal and Substitution of Counsel dated April 2, 2004, CP at ____, attached as Attachment C. In opposing this substitution, the State expressed its concern that substitution would lead to a delay in trial, and pointed to numerous conversations with Mr. Lundahl in which the State had sought to clarify who would represent Mr. Anderson at trial and whether Mr. Anderson would be requesting a continuance. See Response in Opposition to Defense Counsel's Motion to Withdraw and Substitute New Counsel dated March 31, 2004, filed April 5, 2005 at 3, CP at ____, attached as Attachment D. In granting Mr. Anderson's request to allow Ms. Lundahl to substitute for Ms. Stenberg, the trial court order provided that the trial date of April 19, 2004 "will be maintained." *Id.*

When Mr. Anderson renewed his motion to add Dr. Wollert as an expert on the first day of trial, State's counsel, Ms. Krista Bush, objected again, noting that the State had not had an opportunity to depose Dr. Wollert and that the State had relied upon the trial court's earlier

ruling that the defense would not be permitted to call Dr. Wollert as a witness. VRP at 3-4. Ms. Bush also pointed out that a tactical decision to discharge Dr. Judd had been made by counsel two years previously and that, had defense counsel believed that a second expert was necessary, “they could have made that request shortly after discharging Dr. Judd; that could have been done six months ago, that could have been done three months ago,” and that making the request one week before trial made it impossible for the State to prepare. *Id.* at 7.

Ms. Lundahl responded that she “[could] not speak fully to tactical decisions or what happened before I was appointed on this case...[but that] *starting in the beginning of March we made concerted efforts to work with Dr. Judd....*” *Id.* at 8-9. She went on to state that, “*I don’t think that counsel for respondent should be held to or penalized for tactical decisions made several years ago.*” *Id.* Ms. Lundahl’s remark about “tactical decisions made several years ago” implies that entirely different counsel had come on board since those decisions. This is not, however, accurate. *Mr.* Lundahl had been counsel of record for all four years and thus presumably made the very tactical decisions that *Ms.* Lundahl was seeking to disavow. Moreover, in late March, 2004, when Mr. Anderson moved to have Ms. Stenberg withdraw and

Ms. Lundahl substituted, Mr. Anderson had submitted a declaration stating:

Following my written request to Ms. Stenberg that she withdraw as co-counsel, I spoke with my other lawyer, Don Lundahl, about a replacement for Ms. Stenberg. He informed that his partner (and spouse) Karen Lundahl, would be interested in representing me *since she was already quite familiar with the facts of my case and the legal issues involved, because of her involvement in assisting Mr. Lundahl with various aspects of my case since 2000. According to Mr. Lundahl, since April of 2000, she has been a full-time partner in Mr. Lundahl's practice.*

Respondent's Motion and Declaration for Withdrawal and Substitution of Defense Counsel, April 1, 2004, at 3. CP at ____, attached as Attachment E (emphasis added).

While the fact that Ms. Lundahl rather than Mr. Lundahl argued this motion allowed her to disavow any prior tactical decision, it is clear that **Mr.** Lundahl had been on the case for four years at the time the motion was made, and presumably had at least something to do with any "tactical decisions made several years ago." VRP at 8-9. It is clear as well that any "tactical decision" not to pursue Dr. Wollert's appointment was not simply something decided several years ago, but was ongoing, based on Mr. Lundahl's failure to have clarified this issue at any point before the April 12, 2004 status conference. Further, it is clear that

Ms. Lundahl had, in her own words, been working with Dr. Judd since “the beginning of March.” *Id.* 8-9.

There was no abuse of discretion by the trial court where counsel for Mr. Anderson argued, via Mr. Anderson’s April 1, 2004 Declaration, that Ms. Lundahl had sufficient long-standing familiarity with Mr. Anderson’s case since 2000 to enable her to come in, fewer than three weeks before trial, and competently represent him with no need for a continuance. To suggest that three weeks later on April 19, 2004, the trial court abused its discretion by rejecting the last-minute request to add Dr. Wollert ignores how familiar the trial court was with this history of counsel. The trial court properly rejected Mr. Anderson’s attempt to benefit from this last minute change of counsel which he himself had requested.

Under these circumstances, it cannot be said that the trial court’s decision to deny this last-minute tactical request was “manifestly unreasonable” because of Ms. Lundahl’s recent official appearance in the case. The trial court’s ruling flowed logically from counsel’s own representations of familiarity with the case.

b. Abuse of Discretion Is Not Established by the Fact that Dr. Wollert Was Mentioned As a Possible Witness in 2002

As its second and third bases for finding that the trial court abused its discretion, the Court of Appeals noted “the availability of an expert with knowledge of actuarial instruments’ applicability to adults convicted of sexually violent crimes as juveniles,” and “notice two years earlier that Dr. Wollert was a possible expert witness.” *Anderson*, 134 Wn. App. at 321. Neither of these grounds supports the Court of Appeals’ decision and in fact demonstrates the unreasonable nature of the request to add this witness at the last minute.

Dr. Wollert’s area of expertise was presumably known to defense counsel at the time they contacted Dr. Wollert in 2002. CP at 157-58. If his expertise was not fully understood at that time, it is not unreasonable to assume that it became known at some point prior to the week before trial.² The only explanation for not having followed up on that initial contact or having designated him as an expert prior to April 12, 2004, however, was described by Ms. Lundahl as a “tactical decision.” VRP at 8-9. In other words, Mr. Anderson’s counsel were making a calculated decision either 1) not to pursue Dr. Wollert as a possible expert or 2) not to tell the State

² This seems particularly likely in view of the fact that Mr. and Ms. Lundahl appear to have both been working with Dr. Wollert in the *Lee* case, which was going on at the same time in Pierce County. VRP at 5, 6; 445-46.

that he was being considered as a possible witness. That the trial court did not allow a last-minute designation of Dr. Wollert under such circumstances is entirely reasonable.

Similarly, the fact that the State had been told, two years earlier, that Dr. Wollert *might* be a trial witness, does not put the State on notice that he will be a witness at trial. This is particularly true where, as was the case here, the State was subsequently affirmatively informed that he would not be called as a witness. CP at 157-58. Under such circumstances, the State could not possibly have conducted any discovery or otherwise prepared for Dr. Wollert's possible testimony. These facts do not show trial court error and instead further illustrate the reasonableness of the trial court's rulings.

c. Mr. Anderson's Last-Minute Addition of Dr. Wollert Would Inevitably Have Delayed Trial

The Court of Appeals determined that, because trial adjourned and Dr. Phenix's testimony was not completed until May 12, 2004, allowing the defense to add Dr. Wollert as a witness at the last minute would not have caused any delay. *Anderson*, 134 Wn. App. at 320-21. This hindsight view of the trial after it unfolded does not fairly evaluate a ruling by the trial judge. It overlooks the overwhelming evidence in this case that to have allowed the defense to add Dr. Wollert on the eve of trial,

with no reports or discovery, would have forced the State to choose between being unprepared for trial and requesting a continuance in an already long-delayed trial. No trial judge should be required to sanction a last-minute expert witness that forces a party to make such a choice, where there is no reasonable showing of diligence or good cause by the party seeking to add the witness.

Ms. Lundahl argued that prejudice would be minimal because Dr. Wollert had been deposed recently in another case, and because “his opinion would be not too much different.”³ VRP at 5. The trial court, however, heard Ms. Bush’s explanation of why there would be prejudice:

As counsel indicates, Dr. Wollert has apparently been deposed fairly recently in a different sexually violent predator case, [but] I don’t know the facts of Mr. Lee’s case, I’m not involved in Mr. Lee’s case. Certainly, had this happened even just several weeks ago, I could have taken steps to prepare for that. Monday morning of trial, when I have another trial scheduled for next week, another trial in May, a Supreme Court argument on a criminal matter, is just simply unreasonable, Your Honor. I’m not prepared to adequately cross-examine Dr. Wollert at this point nor could I become so this week.

VRP at 6.

³ In fact, Ms. Lundahl’s characterization of Dr. Wollert’s testimony in the other case, *In re Det. of Lee*, 134 Wn. App. 1031, 2006 WL 2329469, (unpublished) was incorrect. The *Lee* case involved an adult rapist who committed the vast of majority of his crimes as an adult. Mr. Anderson, in contrast, had committed his last adjudicated sexual crime as a juvenile. It was on this issue that Mr. Anderson urged he required Dr. Wollert’s expertise, and upon which Dr. Phenix was extensively cross-examined. *Anderson*, 134 Wn. App. at 320; VRP 262-307.

Under the circumstances facing the trial judge, it would have been impossible for State's counsel to prepare, thus making a continuance essential despite the State's efforts to resist further delay in the case. *See* Attachment D. The Court of Appeals thus reached an unreasonable result when it held that the trial court abused its discretion when it attempted to require the parties to follow basic rules of notice. Under the circumstances, the trial court's denial of Mr. Anderson's last-minute request for an expert was entirely appropriate.

The Court of Appeals' error raises an issue of considerable interest to the State, to other litigants who might face such tactics, and to the citizens and taxpayers of this state. Delay of trials results in considerable costs to the State: Experts who have prepared to go forward on a set date must put the case away, only to once again gear up for the new date. Plane tickets must be purchased again, schedules must be re-arranged, attorneys are shifted to new cases when delay causes a conflict in their caseload. Nor can one reasonably dispute that Mr. Anderson's last-minute designation of a new expert witness of this type would have delayed trial or prejudiced the State if it had proceeded. Because this dilemma could so easily have been avoided—that is, defense counsel, who had been in contact with Dr. Wollert a full two years before their announcement that they wanted to add him as a witness, could have simply told the trial court

and the parties of their plans—it is difficult to avoid the conclusion that this last-minute designation was anything other than a tactical decision to force a continuance. That the defense desired a delay is evidenced by Mr. Anderson’s simultaneous efforts in both the trial court and the Court of Appeals to stay the trial during the week before trial. CP at 168; Attachment A.

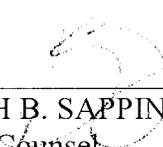
It was not an abuse of discretion to deny Mr. Anderson’s untimely request to add a second expert and to require Mr. Anderson to proceed to trial. Finally, any alleged error was harmless in light of the overwhelming evidence presented by the State, which was subject to extensive cross-examination by Mr. Anderson. *See* VRP 254-421; 423-429.

IV. CONCLUSION

The Court should deny Mr. Anderson’s request for review on the ROA issue, but accept review and reverse the Court of Appeals’ ruling that the trial court abused its discretion in refusing to allow the last-minute designation of Dr. Wollert.

RESPECTFULLY SUBMITTED this 30th day of October, 2006.

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Attachment A

RECEIVED

APR 16 2004

CRIMINAL JUSTICE DIVISION
ATTORNEY GENERAL'S OFFICE

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STATE OF WASHINGTON

FILED
IN COUNTY CLERK'S OFFICE

A.M. APR 15 2004 P.M.

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WASHINGTON STATE
COURT OF APPEALS
DIVISION II

In re the Detention of) No. 00-2-05591-4
JOHN CHARLES ANDERSON,)
Respondent.)
MOTION FOR DISCRETIONARY REVIEW

A. Identity of Petitioner

The Respondent, John C. Anderson, respectfully requests the relief designated in Part B.

B. Decision

Mr. Anderson respectfully requests this court to review its previous denial of Respondent's Motion for Emergency Stay of Trial Proceedings and for Interlocutory Discretionary Review in light of new, controlling case authority from this court, and to grant Respondent's motion in light of that authority.

Respondent previously moved this court for an interlocutory discretionary review of the August 1, 2000, order of The Pierce County Superior Court, the Honorable Karen Strombom, Judge presiding, denying

MOTION FOR DISCRETIONARY REVIEW
PAGE 1 OF 8

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1 Respondent Mr. Anderson's motion to dismiss. A copy of the court's order was
2 attached to Respondent's original motion and is thus already part of the
3 record now before this court.

4 **C. Issues Presented for Review**

5 1. Where voluntary mental patient information is constituted
6 confidential by a statute that must be strictly construed is a judicially-
7 implied exception that purports to authorize disclosure proper?

8 2. Where the state unlawfully obtains confidential voluntary mental
9 patient information by committing a statutory privacy violation, which is also
10 a civil rights violation, is that information admissible into evidence against
11 the patient in a subsequent proceeding by the state?

12 3. Where the meaning of a statute that must be strictly construed is
13 clear from the language of the statute alone, is judicial construction or
14 interpretation of the statute proper?

15 4. Where confidential medical information concerning a voluntary
16 mental patient under chapter 71.05 RCW is unlawfully disclosed by a state
17 mental hospital, may the state use that information in an involuntary
18 commitment proceeding under chapter 71.09 RCW?

19 **D. Statement of the Case**

20 Mr. Anderson was a voluntary patient at Western State Hospital (WSH)
21 from 1990 until he was arrested on a warrant issued by the Pierce County
22 Superior Court under RCW 71.09.

23 For the entire time Mr. Anderson was at WSH he was under the protections
24 afforded voluntary patients by chapter 71.05 RCW, the Involuntary Treatment
25 Act (the ITA). This cannot be and is not disputed by the state. This motion
26 concerns the privacy rights that voluntary patients at WSH are afforded in
their mental-health treatment records under § 390 of chapter 71.05 RCW.

MOTION FOR DISCRETIONARY REVIEW
PAGE 2 OF 8

DON LUNDAHL, LAWYER

902 South 10th Street
Tacoma, WA 98405-3425
(253) 272-2206

1 As noted in Respondent's previous motion and above, while still a
2 voluntary patient, Mr. Anderson was arrested on a warrant that had been issued
3 by the Pierce County Superior Court in this case after a petition for his
4 commitment as a sexually violent predator pursuant to RCW 71.09 had been
5 filed. Mr. Anderson was then transported to the Pierce County Jail. He has
6 subsequently been transferred to the Special Commitment Center, where he
7 currently resides pending trial on the State's petition. It is undisputed
8 that the State's petition was based entirely on records compiled during Mr.
9 Anderson's voluntary treatment at Western State Hospital, which were released
10 by the hospital to the End of Sentence Review Board of the Department of
11 Corrections and to the Pierce County Prosecuting Attorney without Mr.
12 Anderson's consent and without express statutory authority.

13 The discovery materials that have been provided to the defense
14 indicate that the state cannot prove the elements required for civil
15 commitment under chapter 71.09 RCW without using Mr. Anderson's voluntary
16 patient information -- the very information that, Mr. Anderson alleges, WSH
17 has unlawfully disclosed. This is not disputed by the state. Rather, the
18 state argues, and the trial court has ruled, that the disclosure of Mr.
19 Anderson's confidential voluntary patient information by WSH was legally
20 authorized by implication from § 390 of chapter 71.05 RCW, and admissible in
21 this proceeding under that same section.

22 Mr. Anderson contended below that the sole pleading in this matter,
23 the petition, is legally insufficient and that the state cannot amend to cure
24 the petition's legal defect because any information that it would seek to use
25 to do so was disclosed in violation of RCW 71.05.390. Respondent therefore
26 moved for a judgment of dismissal on the pleadings on the authority of CR
12(c). That motion was denied, based on the trial court's ruling that under §

MOTION FOR DISCRETIONARY REVIEW
PAGE 3 OF 8

DON LUNDAHL, LAWYER
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1 390 of chapter 71.05 RCW, WSH had implied legal authority to disclose Mr.
2 Anderson's voluntary mental-health treatment information, which the court also
3 ruled is admissible against Mr. Anderson in this chapter 71.09 RCW proceeding.

4 **E. Argument Why Review Should Be Accepted**

5 Mr. Anderson respectfully asks this court to grant an interlocutory
6 discretionary review of the trial court's ruling denying Mr. Anderson's motion
7 for judgment on the pleadings.

8 Mr. Anderson makes this request under RAP 2.3(a); RAP 2.3(b) (1) on
9 the grounds that the superior court has committed an obvious error which would
10 render further proceedings useless, and; RAP 2.3(b) (2) on the grounds that
11 the superior court has committed probable error and the decision of the
12 superior court substantially alters the status quo or substantially limits the
13 freedom of a party to act.

14 Mr. Anderson further asks this court to grant his request for an
15 emergency stay of the trial court proceedings pending this court's ruling on
16 his motion for interlocutory discretionary review of the trial court's ruling
17 denying his motion for judgment on the pleadings.

18 This is a case of the first impression in Washington in that the state
19 has never before attempted to commit a voluntary mental patient at a state
20 hospital as a sexually violent predator under chapter 71.09 RCW. Due to the
21 broad scope of coverage of the ITA, the issues in this case impact the privacy
22 rights of all voluntary mental patients in Washington, inpatient or
23 outpatient, whether at public or private hospitals, or at local community
24 clinics including the offices of individual practitioners. All are covered by
25 the confidentiality provisions of § 390 of the ITA.

26 The material facts in this case are not in dispute, and the arguments
of counsel have been presented to the trial court in three memoranda.

MOTION FOR DISCRETIONARY REVIEW
PAGE 4 OF 8

DON LUNDAHL, LAWYER

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1 Immediate review of Judge Strombom's order is necessary since Mr. Anderson is
2 in custody as a result of this litigation, the termination of which may be
3 materially advanced by immediate review. Respondent's current trial date is
4 April 19, 2004.

5 Judge Strombom denied Respondent's motion on the basis of her
6 construction of 71.05 RCW, and particularly § 390, which everyone agreed
7 protected Respondent's treatment records while at WSH.

8 Without citing any authority, Judge Strombom implied an exception to the
9 privacy protections of RCW 71.05.390 which would authorize the non-consensual
10 release of almost ten years worth of Mr. Anderson's voluntary mental-health
11 treatment records, evidently because the final paragraph of that section
12 mentions that the fact of admission and "records, files, evidence, or orders
13 made prepared collected or maintained" pursuant to RCW Chapter 71.05 could be
14 admissible in a civil commitment proceeding pursuant to chapter 71.09 RCW.
15 Accordingly, she found no violation of Respondent's privacy rights under § 390
16 of chapter 71.05 RCW when WSH gave all of his treatment records to the Pierce
17 County Prosecutor, The DOC End of Sentence review Board and the State Attorney
18 General's office, to provide the basis for the SVP petition which was
19 eventually filed against Respondent. All of the parties to this litigation
20 agree that there would be no basis for SVP proceedings against Mr. Anderson
21 without using the treatment records released by WSH.

22 In the recent case of State v. Wheat, 118 Wash.App. 435, 76 P.3d 280
23 (Wash.App.Div.2 09/16/2003), this court held that where a state statute
24 created a personal privacy interest in treatment records on the behalf of
25 those persons who received such treatment, with disclosure allowed with
26 patient consent or on other statutorily-enumerated exceptions, that the
statute in question was unambiguous and as such would not be construed

MOTION FOR DISCRETIONARY REVIEW
PAGE 5 OF 8

DON LUNDAHL, LAWYER
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1 contrary to the statute's plain language and ordinary meaning. Here, as in
2 Wheat,

3 The issue ... is one of statutory interpretation. "Our primary duty in
4 interpreting any statute is to discern and implement the intent of the
5 legislature." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).
6 In doing so, where the statute's plain language and ordinary meaning
7 are unambiguous, "we will not construe the statute otherwise." J.P.,
8 149 Wn.2d at 450. Finding no ambiguities, we employ a simple and
9 straightforward analysis based upon the plain language of the relevant
10 statutes.

11 Wheat, supra, at 436.

12 This simple and uncontroversial principle was the centerpiece of Mr.
13 Anderson's briefing and argument on his motion below. Judge Strombom
14 nevertheless refused to apply the privacy right afforded WSH patients like Mr.
15 Anderson under RCW 71.05.390 according to the statute's plain language and
16 ordinary meaning, and instead **implied an exception** to those very privacy
17 rights. In light of Wheat, Judge Strombom's ruling was probable error and the
18 decision of the superior court substantially alters the status quo or
19 substantially limits the freedom of a party to act under applicable court rule
20 as noted above.

21 Wheat turns on a construction of RCW 70.96A.150, another Washington
22 statute dealing with privacy of treatment records. The court's opinion in
23 Wheat demonstrates that Judge Strombom's approach and analysis in ruling that
24 the release of Mr. Anderson's treatment records was not prohibited by RCW
25 71.05.390 was fundamentally inconsistent with sound principles of statutory
26 interpretation. Obviously, Judge Strombom simply ignored the plain meaning of
RCW 71.05.390 to reach a result that she preferred. True, the privacy statute
in Wheat is a different statute, but it does exactly the same thing as the
statute in Respondent's case. Both statutes create individual privacy rights
for patients' treatment records. If Mr. Wheat's privacy rights were violated
by a non-consensual disclosure of his treatment records not specifically

MOTION FOR DISCRETIONARY REVIEW
PAGE 6 OF 8

DON LUNDAHL, LAWYER

902 South 10th Street
Tacoma, WA 98405-3425
(253) 272-2200

1 authorized by the applicable statute, then so were Mr. Anderson's. Judge
2 Strombom's implication of an exception to Respondent's privacy rights is
3 obviously inconsistent with the analysis in Wheat.

4 **Mental health treatment records are not public records that can be**
5 **publicly disseminated merely because they may be admissible in a court**
6 **proceeding.**

7 This issue has broad and very grave public policy implications for
8 Washington's long-standing policy of encouraging voluntary mental health
9 treatment. The privacy provisions of the ITA apply to all voluntary mental
10 patients and their mental health treatment records in Washington, regardless
11 of whether they are treated at WSH, another state hospital, at a private
12 mental hospital, or at any outpatient mental health treatment facility. The
13 purpose of this policy is to encourage mental health treatment by assuring
14 patients that neither their treatment records, nor the fact of treatment
15 itself, will be released. If, in the future, confidential voluntary mental
16 health treatment records can be disclosed or publicized without ITA and HIPPA
17 compliant patient consent merely because they might be admissible in a
18 subsequent court proceeding, then the strong public policy of encouraging
19 persons to voluntarily seek mental health treatment will be defeated. There is
20 no reason to believe that the legislature intended such an anomalous and
21 fundamental change when it merely stated in § 390 of chapter 71.05 RCW, the
22 ITA, that mental health treatment records developed under that chapter are
23 admissible in a proceeding under chapter 71.09 RCW, the Sexually Violent
24 Predator law.

25 **F. Conclusion**

26 This court should accept review for the reasons indicated in Part E
and dismiss this illegal action.

MOTION FOR DISCRETIONARY REVIEW
PAGE 7 OF 8

DON LUNDAHL, LAWYER

902 South 10th Street
Tacoma, WA 98405-3425
(253) 272-2206

1 DATED this 14th day of April, 2004.

2 
3 DON LUNDAHL, Lawyer 21424

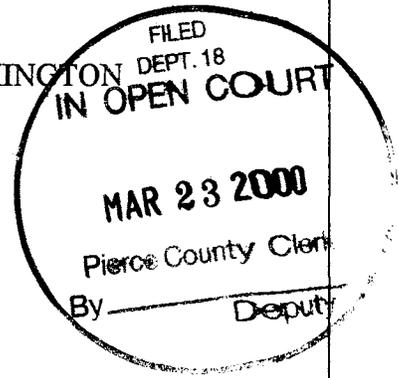
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25 MOTION FOR DISCRETIONARY REVIEW
PAGE 8 OF 8

26 **DON LUNDAHL, LAWYER**

902 South 10th Street
Tacoma, WA 98405-3425
(253) 272-2206

Attachment B

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE



3 State of Washington,)
4)
5 Petitioner,)
6 vs.)
7 John C. Anderson,)
8 Respondent.)
9)

NO. 00-2-05591-4

**EX-PARTE MOTION
AND ORDER ON CO-COUNSEL**

10 **I. MOTION, DATE & PURPOSE**

11 **1.1** This matter comes before the Honorable Judge Karen Strombom, Pierce County
12 Superior Court Judge, on Respondent's Ex-Parte request for funding for co-counsel as
13 provided by WAC 275.156. The assistance of co-counsel is necessary to prepare for
14 trial. Don Lundahl, WSBA # 21424, has agreed to act as co-counsel. There
15 are numerous consultations with the respondent, experts, and the treatment staff which
16 are required within the next five months. Additionally, there are numerous pleadings and
17 transcripts to review in order to prepare for the trial.

18 **II. APPEARANCES**

19 **2.1** Respondent's counsel, Ann Stenberg, appeared on Respondent's behalf.

20 **2.2** The Petitioner's counsel, Sarah Sappington, was advised by telephone on 3-20-00

21 **EX-PARTE MOTION**
22 **AND ORDER ON CO-COUNSEL**
23 **Page 1**

24 **ANN STENBERG**
25 **ATTORNEY AT LAW**
26 707 PACIFIC AVENUE
TACOMA, WA 98402
(253) 779-8124
FAX: (253) 779-8126

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III. MATTERS CONSIDERED

The court considered the Respondent's request for co-counsel funding.

IV. COURT ORDER

The court is now fully advised, and it is hereby

ORDERED as follows:

The Respondent is appointed as co-counsel pursuant to WAC 275.156et.al. Neither Pierce County nor the Superior Court shall be responsible or liable for such expense.

DATED this 23 day of March, 2000.

KAREN L. STROMBOM

Honorable Judge Karen Strombom

Presented by:

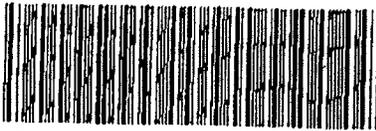


Ann Stenberg, WSBA #22596
Attorney for the Respondent

**EX-PARTE MOTION
AND ORDER ON CO-COUNSEL**
Page 2

ANN STENBERG
ATTORNEY AT LAW
707 PACIFIC AVENUE
TACOMA, WA 98402
(253) 779-8124
FAX: (253) 779-8126

Attachment C



00-2-05591-4 20822331 ORATSC 04-13-04



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SUPERIOR COURT, STATE OF WASHINGTON, PIERCE COUNTY

In re the Detention of
JOHN CHARLES ANDERSON,

NO. 00-2-05591-4

Respondent.

ORDER RE
WITHDRAWAL AND SUBSTITUTION
OF COUNSEL

This matter came on before the Court on the motion of the respondent to allow co-counsel Ann Stenberg to withdraw from further representation and Karen Lundahl to substitute as co-counsel on this matter. The court having heard argument of the parties and reviewed the declaration and pleadings on the file concerning this issue now makes the following

ORDER

Ann Stenberg is allowed to withdraw as counsel for John Charles Anderson and Karen Lundahl is appointed as substitute co-counsel in the above-entitled action as counsel for respondent.

TRIAL DATE OF APRIL 19, 2004 WILL BE MAINTAINED
Done in open court this 2ND day of April, 2004.

[Signature]
Judge Brian Tollefson

Presented by:

[Signature]
Don Lundahl #21424
Attorney for Respondent

Approved as to form:

[Signature]
Telephonic Approval on the Record
on 2 April 2004
Assistant Attorney General

ORDER RE SUBSTITUION OF COUNSEL

DON LUNDABL, Lawyer
902 South 10th Street
Tacoma, WA 98405-4537

Attachment D



00-2-05591-4 20785535 RSP 04-08-04

FILED
IN COUNTY CLERK'S OFFICE
A.M. APR - 5 2004 P.M.
PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, County Clerk DEPUTY

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STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

In re the Detention of:

JOHN CHARLES ANDERSON,

Respondent.

NO. 00 2 055914

RESPONSE IN OPPOSITION TO
DEFENSE COUNSEL'S MOTION TO
WITHDRAW AND SUBSTITUTE
NEW COUNSEL

I. FACTS

This case was filed in February, 2000, and has been pending over 4 years. It is currently set for trial on April 19, 2004. The case has been set for trial at least 6 times.

Mr. Anderson is currently represented by two attorneys, Don Lundahl and Ann Stenberg. On Wednesday, March 24, Mr. Lundahl orally informed the State that Ms. Stenberg intends to move to withdraw as counsel for Mr. Lee. Mr. Lundahl has stated that he intends, upon Ms. Stenberg's withdrawal, to associate Karen Lundahl. To date, the State has received no pleadings in this matter. Ms. Lundahl has indicated that she is noting a hearing in this matter for tomorrow April 1, or Friday, April 2, 2004. The State files this Memorandum in opposition to Ms. Stenberg's withdrawal from the case. If the Court in fact allows Ms. Stenberg to withdraw, the State objects to the association of any additional counsel.

///
///
///

1 **II. ARGUMENT**

2 **A. MS. STENBERG SHOULD NOT BE PERMITTED TO WITHDRAW FROM THIS CASE.**

3 This case was initially filed on or approximately February 25, 2000. Ms. Stenberg has
4 represented Mr. Anderson since approximately February 2000. Billing records indicate that
5 she has spent considerable time on this case, and is presumably thoroughly familiar with it.
6 For the period April 7, 2000 through November 25, 2003, Ms. Stenberg has submitted bills in
7 the amount of \$23,310.60 in this case.¹ See Exhibit 1, Declaration of Kathy Zimmerman at 1.
8 Assuming the hourly statutory rate of \$49.41 (WAC 388-885-020(1)), this represents
9 approximately 471 hours of work. If she is permitted to withdraw at this juncture, over
10 \$23,000 will have been effectively wasted on one attorney on this case, with the case having
11 not yet even gone to trial.

12 **B. NO ADDITIONAL COUNSEL SHOULD BE APPOINTED TO REPRESENT MR. LEE IN THIS CASE.**

13 Should Ms. Stenberg be permitted to withdraw, there is no reason for associating
14 another attorney at this late date. Mr. Lundahl is an experienced attorney who has handled a
15 number of SVP cases over the last five years.² In addition, he is thoroughly familiar with the
16 issues in this case. Mr. Lundahl has represented Mr. Anderson since on or before March 23,
17 2000. Since the inception of this case, Mr. Lundahl has submitted bills in the amount of
18 \$60,010.60 for work done on this case. See Exhibit 1 at 2. Assuming the hourly statutory rate
19 of \$49.41, this represents approximately 1214 hours of work.

20 Clearly, an experienced attorney such as Mr. Lundahl is capable of proceeding to trial
21 on his own having spent this amount of time on the case. He has indicated he does not intend
22 to call any fact or expert witnesses. The State intends to call three witnesses, in addition to
23

24 ¹ No billing records for the period prior to April 2000 are currently available.

25 ² Mr. Lundahl is also serving as appointed counsel in the following SVP cases: *In re Lee*, Pierce County
26 Cause No. 99-2-13179-2; *In re Ayres*, Clark County Cause No. 01-2-00713-4; *In re Fox*, Pierce County Cause No
01-2-07150-1; and *In re Jones/Benjamin*, Clark County Cause No. 95-2-00833-3.

1 Mr. Anderson. Only one attorney is assigned to represent the State in this matter. There is no
 2 justification to assign another attorney to this case at this time. Moreover, it would
 3 presumably take Ms. Lundahl, who does not appear to have handled any sex predator cases
 4 since the Statute's inception, a considerable amount of time to prepare for trial between now
 5 and April 19. This would represent an excessive and completely unnecessary expense to the
 6 taxpayers of the State of Washington.

7 In addition, Mr. Lundahl has repeatedly indicated to the State that he would be
 8 prepared to try this case on his own if necessary. Since early January 2004, the State has
 9 expressed concern to Mr. Lundahl on several occasions that two sex predator cases (*Anderson*
 10 and *Lee*), both initially involving Ms. Stenberg and Mr. Lundahl, are currently set in Pierce
 11 County for April 19, 2004, and another involving only Mr. Lundahl is set for trial in Clark
 12 County on April 26, 2004, only one week later. See Exhibit 2, Declaration of Sarah B.
 13 Sappington. In conversations with the State's counsel on January 9, 2004, when asked how
 14 we could try both Pierce County cases on April 19, Mr. Lundahl indicated that he was not
 15 sure; there were no plans to ask for a continuance in either case, and perhaps he could try one
 16 of the cases and Ms. Stenberg the other. *Id.* On March 9, the State again attempted to discuss
 17 scheduling with Mr. Lundahl, again pointing out that Ms. Stenberg will not be available for
 18 the *Anderson* trial on April 19. *Id.* Mr. Lundahl indicated that, in light of Ms. Stenberg's
 19 plans to withdraw from this case and Mr. Lundahl's plans to associate Karen Lundahl,
 20 Ms. Lundahl could perhaps try this case, and he would try *Anderson*. *Id.* Most recently, on
 21 March 24, 2004, in conversation with Ms. Bush, Mr. Lundahl again indicated that both the
 22 *Lee* and *Anderson* cases would go forward on April 19, 2004, and that he would handle *Lee*
 23 and Ms. Lundahl *Anderson*. See Exhibit 3, Declaration of Krista K. Bush.

24 ///

25 ///

26 ///

III. CONCLUSION

For the reasons outlined above, Ms. Stenberg should not be permitted to withdraw from this case. If she is permitted to withdraw, Mr. Lundahl should not be permitted to associate additional counsel.

DATED this 31st day of March, 2004.

CHRISTINE O. GREGOIRE
Attorney General



KRISTA K. BUSH, WSBA #30881
Assistant Attorney General
Attorneys for Petitioner

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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

In re the Detention of:

NO. 00-2-05591-4

JOHN ANDERSON

DECLARATION OF KATHLEEN
RUTLEDGE-ZIMMERMAN

Respondent.

KATHLEEN RUTLEDGE-ZIMMERMAN declares as follows:

1. I am employed by the Special Commitment Center as a Financial Analyst. I have held this position since November 11, 2001.

2. As part of my job duties, I am responsible for reviewing all bills submitted by counties pertaining to defense and prosecuting attorneys in sex predator cases.

3. I have received and reviewed bills submitted by attorneys Don Lundahl and Ann Stenberg in the case of John Anderson. Based on those bills, I have prepared an Excel spreadsheet showing the amounts and dates of all billings since January 2000 in the case of Mr. Lundahl, and April 2000 in the case of Ms. Stenberg.

4. Between April 7, 2000 and November 25, 2003, Ms. Stenberg submitted \$23,310.60 in bills for work on this case. A true and accurate copy of my Excel spreadsheet is attached hereto as Attachment 1.

EXHIBIT _____

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5. Between January 2000 and January 31, 2004, Mr. Lundahl submitted \$60,010.60 in bills for work on this case. See Attachment 1.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 31st day of March 2004 at Steilacoom, Washington.


KATHLEEN RUTLEGE-ZIMMERMAN

Attorney Billing for John Anderson for 2000-current

<u>Dates of Service</u>	<u>Resident</u>	<u>Attorney</u>	<u>Billing</u>	<u>Total</u>
Jan-01	Anderson, John	Barth & Associates	209.93	209.93
11/3/00-11/30/00	Anderson, John	Lundahl, Don	1,235.25	
Aug-00	Anderson, John	Lundahl, Don	2,292.56	
5/1/00-7/31/00	Anderson, John	Lundahl, Don	5,628.86	
1/1/00-3/31/00	Anderson, John	Lundahl, Don	556.98	
4/1/00-4/26/00	Anderson, John	Lundahl, Don	256.93	
12/4/00-1/23/01	Anderson, John	Lundahl, Don	434.81	
2/01-3/01	Anderson, John	Lundahl, Don	1,087.02	
4/5/01-4/27/01	Anderson, John	Lundahl, Don	207.52	
Jun-02	Anderson, John	Lundahl, Don	1,507.01	
Jul-02	Anderson, John	Lundahl, Don	1,324.18	
Aug-01	Anderson, John	Lundahl, Don	1,166.08	
Sep-01	Anderson, John	Lundahl, Don	578.10	
Oct-02	Anderson, John	Lundahl, Don	1,452.65	
Nov-01	Anderson, John	Lundahl, Don	2,030.75	
Dec-01	Anderson, John	Lundahl, Don	2,060.40	
Jan-01	Anderson, John	Lundahl, Don	879.50	
Feb-02	Anderson, John	Lundahl, Don	835.03	
Mar-02	Anderson, John	Lundahl, Don	405.14	
May-02	Anderson, John	Lundahl, Don	760.91	
Jun-02	Anderson, John	Lundahl, Don	2,510.03	
Jul-02	Anderson, John	Lundahl, Don	1,638.01	
8/1-8/30/02	Anderson, John	Lundahl, Don	1,838.05	
9/3-10/31/02	Anderson, John	Lundahl, Don	2,287.69	
11/1-11/25/02	Anderson, John	Lundahl, Don	1,126.55	
12/2-12/10/02	Anderson, John	Lundahl, Don	2,732.37	
1/2-1/30/03	Anderson, John	Lundahl, Don	2,337.09	
2/3-2/28/03	Anderson, John	Lundahl, Don	1,190.78	
3/3-3/31/03	Anderson, John	Lundahl, Don	1,645.35	
4/2-4/30/03	Anderson, John	Lundahl, Don	1,917.11	
5/6-5/30/03	Anderson, John	Lundahl, Don	1,749.11	
6/4-6/24/03	Anderson, John	Lundahl, Don	1,956.64	
8/4-8/29/03	Anderson, John	Lundahl, Don	2,223.45	
7/8-7/31/03	Anderson, John	Lundahl, Don	1,996.16	
9/3/03-1/31/04	Anderson, John	Lundahl, Don	8,162.53	60,010.60
11/7/00-11/29/00	Anderson, John	Stenberg, Ann	380.46	
10/12/00-10/30/00	Anderson, John	Stenberg, Ann	261.87	
9/1/00-9/27/00	Anderson, John	Stenberg, Ann	652.21	
8/1/00-9/1/00	Anderson, John	Stenberg, Ann	1,050.32	
6/00-7/00	Anderson, John	Stenberg, Ann	1,885.03	
4/7/00-4/28/00	Anderson, John	Stenberg, Ann	563.27	
Dec-00	Anderson, John	Stenberg, Ann	133.41	
Jan-02	Anderson, John	Stenberg, Ann	499.04	
3/01-4/01	Anderson, John	Stenberg, Ann	1,329.13	
Jul-02	Anderson, John	Stenberg, Ann	1,144.86	
Jun-02	Anderson, John	Stenberg, Ann	760.91	
7/31/01-8/29/01	Anderson, John	Stenberg, Ann	434.81	

ATTACHMENT 1

Sep-02	Anderson, John	Stenberg, Ann	770.80	
Oct-02	Anderson, John	Stenberg, Ann	592.92	
Nov-02	Anderson, John	Stenberg, Ann	825.15	
Jan-01	Anderson, John	Stenberg, Ann	805.38	
Jan-01	Anderson, John	Stenberg, Ann	390.34	
Feb-02	Anderson, John	Stenberg, Ann	563.27	
Mar-02	Anderson, John	Stenberg, Ann	172.94	
4/02-7/02	Anderson, John	Stenberg, Ann	612.68	
Jul-02	Anderson, John	Stenberg, Ann	726.33	
Aug-02	Anderson, John	Stenberg, Ann	894.32	
Oct-02	Anderson, John	Stenberg, Ann	716.45	
11/1-11/25/02	Anderson, John	Stenberg, Ann	844.91	
12/6-12/18/02	Anderson, John	Stenberg, Ann	271.76	
1/2-1/28/03	Anderson, John	Stenberg, Ann	622.57	
2/3-2/28/03	Anderson, John	Stenberg, Ann	489.16	
3/7-3/27/03	Anderson, John	Stenberg, Ann	632.45	
4/3-4/28/03	Anderson, John	Stenberg, Ann	469.40	
5/6-5/30/03	Anderson, John	Stenberg, Ann	454.57	
6/6-6/30/03	Anderson, John	Stenberg, Ann	232.23	
7/2-7/25/03	Anderson, John	Stenberg, Ann	558.33	
7/31-8/26/03	Anderson, John	Stenberg, Ann	479.28	
9/3-9/29/03	Anderson, John	Stenberg, Ann	810.32	
10/2-10/31/03	Anderson, John	Stenberg, Ann	859.73	
11/7-11/25/03	Anderson, John	Stenberg, Ann	419.99	23,310.60

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STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

In re the Detention of:

JOHN CHARLES ANDERSON,

Respondent.

NO. 00 2 055914

DECLARATION OF SARAH B.
SAPPINGTON IN OPPOSITION TO
WITHDRAWAL AND
SUBSTITUTION

SARAH B. SAPPINGTON declares as follows:

1. I am Senior Counsel for the Attorney General's Office and counsel for the Petitioner, the State of Washington, in *In re Lee*, another sexually violent predator (SVP) action, om Pierce County.

2. This case is currently scheduled for trial on April 19, 2004.

3. *In re Lee*, Pierce County Cause No. 99-2-13179-2, an SVP case before the Honorable Judge Nelson, is also scheduled to go to trial on April 19, 2004. Mr. Lundahl and Ms. Stenberg were previously co-counsel for the defense in that case; Ms. Stenberg was permitted to withdraw March 12, and Ms. Lundahl substituted for her.

4. *In re Ayers*, Clark County Cause No. 01-2-00713-4, an SVP case before the Honorable Judge John F. Nichols, is scheduled to go to trial in Clark County on April 26, 2004. Respondent in that case is represented by Mr. Don Lundahl.

5. I spoke to Mr. Lundahl on January 9, 2004. I was concerned about scheduling our expert witnesses, and asked how he believed we could try both *Lee* and *Anderson* on April 19.

EXHIBIT 2

DECLARATION OF SARAH B.
SAPPINGTON IN OPPOSITION TO
WITHDRAWAL AND SUBSTITUTION

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

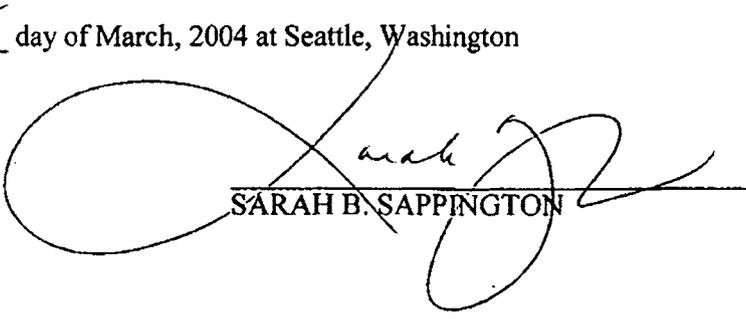
1 Mr. Lundahl indicated that he was not sure precisely how it would work, that there were no plans
2 to ask for a continuance in either case, and perhaps he could try one of the cases and Ms. Stenberg
3 the other.

4 6. On February 24, 2004, the State called Ms. Stenberg, who indicated that she
5 would not be available for trial on April 19 for either *Anderson* or *Lee*, in that she would be in
6 murder trials during the month of April, and that she would need a continuance. She further
7 indicated that she and Mr. Lundahl had not agreed that he would handle Mr. Lee's case on his
8 own. This information was conveyed to Mr. Lundahl, who continued to insist that there were no
9 plans to ask for a continuance of either case.

10 7. On March 9, 2004, I again spoke to Mr. Lundahl. He informed me of
11 Ms. Stenberg's plans to withdraw from this case, and indicated that he planned to associate Karen
12 Lundahl. I again asked how we would try both cases on the same day, in that he would be in *Lee*
13 and Ms. Stenberg was unavailable for *Anderson*. He indicated that he wasn't sure, but perhaps he
14 would try the *Anderson* case and Karen Lundahl would try the *Lee* case.

15 I declare under penalty of perjury that the foregoing is true and correct to the best
16 of my knowledge.

17 DATED this 31st day of March, 2004 at Seattle, Washington

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21 SARAH B. SAPPINGTON
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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

In re the Detention of:

JOHN CHARLES ANDERSON,

Respondent.

NO. 00 2 055914

DECLARATION OF KRISTA K.
BUSH IN OPPOSITION TO
WITHDRAWAL AND
SUBSTITUTION

KRISTA K. BUSH declares as follows:

1. I am an Assistant Attorney General and counsel for the Petitioner, the State of Washington, in this sexually violent predator (SVP) action.
2. This case is currently scheduled for trial on April 19, 2004.
3. In late February, I noted a status conference in this case before this Court, which was held on March 5, 2004. At this status conference, I informed the Court that the two counsel representing Mr. Anderson, Don Lundahl and Ann Stenberg, were both scheduled for trial the week of April 19th in sexually violent predator cases involving Mr. Anderson and Mr. Damon Lee. I also informed the Court that Ms. Stenberg had informed me that, as a result of at least murder two cases in which she was involved, she would not be available for trial until the end of May or early June of this year. At this status conference, Mr. Lundahl assured the Court that there was not, in fact, a scheduling conflict and that he would try one of the two cases and Ms. Stenberg would try the other. At the close of that status conference, trial remained scheduled to begin on April 19, 2004.

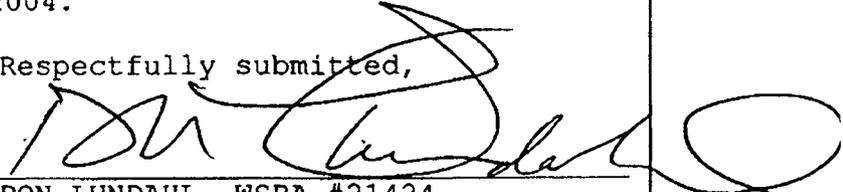
EXHIBIT 3

Attachment E

1 This motion is based on the declaration attached hereto.

2 DATED this 31st day of March, 2004.

3 Respectfully submitted,

4 
 5 DON LUNDAHL, WSBA #21424
 6 Attorney for the Defendant

7 **DECLARATION**

8 I am John Charles Anderson, Respondent herein, and I make
 9 this Declaration in support of my Motion seeking replacement of
 10 my appointed counsel pursuant to CR 71 allowing co-counsel for
 11 the defense ANN STENBERG, Esquire, to withdraw and substituting
 12 KAREN LUNDAHL, Esquire, as co-counsel.

13 I no longer have an effective attorney-client relationship
 14 with my lawyer ANN STENBERG. We have substantial disagreements
 15 about how my defense is to be conducted on several material
 16 points relating to my defense in this matter. Because of personal
 17 difficulties between us, we cannot effectively communicate about
 18 these differences of opinion as to how to handle my defense.

19 We have therefore reached an impasse on these issues and I
 20 believe that it would deprive me of the effective assistance of
 21 counsel to proceed under these circumstances, with my trial date
 22

23 MOTION AND DECLARATION
 24 FOR WITHDRAWAL AND SUBSTITUTION
 25 OF DEFENSE COUNSEL

26 **PAGE 2 OF 6**

DON LUNDAHL, LAWYER
 902 South 10th Street
 Tacoma, WA 98405-3425
 (253) 272-2206

1 rapidly approaching, since important decisions in my case need to
2 be made as soon as possible. As a result of these personality
3 conflicts which compromise our ability to work effectively
4 together in resolving our disagreements about how my case must be
5 handled, I believe that I cannot be provided the effective
6 assistance of counsel by Ms. STENBERG.

7 I believe that Ms. STENBERG agrees that she should be
8 allowed to withdraw as my lawyer, because my other lawyer, DON
9 LUNDAHL, has informed me that Ms. STENBERG has asked him to move
10 this court for an order allowing the withdrawal and substitution
11 of counsel following her receipt of a written request from me
12 that she withdraw from my case. I do not waive my attorney-client
13 privilege with this motion.

14 Following my written request to Ms. STENBERG that she
15 withdraw as co-counsel, I spoke with my other lawyer, DON
16 LUNDAHL, about a replacement for Ms. STENBERG. He informed that
17 his partner (and spouse), KAREN LUNDAHL, would be interested in
18 representing me since she was already quite familiar with the
19 facts of my case and the legal issues involved, because of her
20 involvement in assisting Mr. LUNDAHL with various aspects of my
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23 MOTION AND DECLARATION
24 FOR WITHDRAWAL AND SUBSTITUTION
25 OF DEFENSE COUNSEL

26 PAGE 3 OF 6

DON LUNDAHL, LAWYER

902 South 10th Street
Tacoma, WA 98405-3425
(253) 272-2206

1 case since 2000. According to Mr. LUNDAHL, since April of 2000,
2 she has been a full-time partner in Mr. LUNDAHL's practice.

3 Mr. LUNDAHL was also informed me of the details of KAREN
4 LUNDAHL's legal experience that would be materially helpful in my
5 defense. Specifically, she has done hundreds of civil commitment
6 cases as the contract attorney for Thurston County in defense of
7 all indigent respondents in civil commitment cases in Thurston
8 County for approximately three years.

9 She also has over six years of direct involvement with
10 mental health issues as an assistant attorney general for the
11 State of Washington.

12 Her experience also includes appellate experience as an
13 assistant attorney general. There, she achieved several
14 successful reported decisions by Washington Appellate Courts,
15 including the Supreme Court of Washington.

16 Ms. LUNDAHL was admitted to the Bar of the Supreme Court of
17 the United States in a sexual psychopath case from Washington
18 that she won when the Court ultimately declined certiorari.

19 Ms. LUNDAHL was a Washington State Assistant Attorney
20 General for over eleven years.

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23 MOTION AND DECLARATION
24 FOR WITHDRAWAL AND SUBSTITUTION
25 OF DEFENSE COUNSEL
26 **PAGE 4 OF 6**

DON LUNDAHL, LAWYER
902 South 10th Street
Tacoma, WA 98405-3425
(253) 272-2206

1 For the last three years, the major area of Ms. LUNDAHL's
2 trial work has concentrated on the representation of the
3 criminally accused in Pierce County. During that period, Ms.
4 LUNDAHL has tried ten felony cases, and none of her clients have
5 been convicted of the crimes they were charged with.

6 Recently (within the past three years) Ms. LUNDAHL has
7 attended a WDA-sponsored seminar on chapter 71.09 RCW, the
8 statute that governs the proceedings in this case.

9 Mr. LUNDAHL is obviously biased in favor of his wife, but he
10 has provided me with objective verification of her appellate
11 record, and other verification of her experience and
12 accomplishments as outlined above. I am therefore requesting that
13 Ms. LUNDAHL replace Ms. STENBERG as co-counsel on my case.

14 Mr. LUNDAHL has assured me that because of Ms. LUNDAHL's
15 past and continuing involvement in my case, her appearance as my
16 lawyer when my trial is scheduled for April 19, 2004, will not
17 require a continuance of my trial date. After telephonic and in-
18 person consultations with Mr. LUNDAHL on this issue, I am
19 confident that it is in my best interests that Ms. LUNDAHL
20 replaces Ms. STENBERG, whose trial schedule would not allow my
21 case to go forward without a continuance, and I respectfully
22

23 MOTION AND DECLARATION
24 FOR WITHDRAWAL AND SUBSTITUTION
25 OF DEFENSE COUNSEL

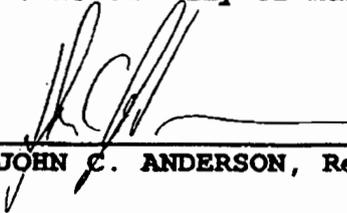
26 PAGE 5 OF 6

DON LUNDAHL, LAWYER
902 South 10th Street
Tacoma, WA 98405-3425
(253) 272-2206

1 request that this Court approve this withdrawal and substitution,
2 which would serve the interests of justice.

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

5 Signed at the Special Commitment Center, McNeil Island,
6 Pierce County, Washington this 31st day of March 2004.

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10 JOHN C. ANDERSON, Respondent

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23 MOTION AND DECLARATION
24 FOR WITHDRAWAL AND SUBSTITUTION
25 OF DEFENSE COUNSEL
26 PAGE 6 OF 6

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