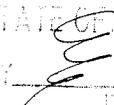


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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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In re the Detention of:

JOHN CHARLES ANDERSON,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**RESPONDENT'S OPENING BRIEF**

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ROB MCKENNA  
Attorney General

KRISTA K. BUSH, WSBA # 30881  
Assistant Attorney General  
Attorneys for Respondent  
900 Fourth Avenue, Suite 2000  
Seattle, WA 98164

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## **I. ASSIGNMENTS OF ERROR**

Respondent herein is the State of Washington, by and through ROB MCKENNA, Attorney General, and KRISTA K. BUSH, Assistant Attorney General. Appellant, JOHN CHARLES ANDERSON, appeals the decision of the trial court below finding that he is a sexually violent predator and ordering Mr. Anderson civilly committed, pursuant to chapter 71.09 RCW. Mr. Anderson raises the following issues pertaining to his Assignments of Error:

1. Where RCW 71.05.390 specifically provides that all “records, files, evidence, findings, or orders made, prepared, collected, or maintained pursuant to [RCW 71.05]” are admissible as evidence in a civil commitment proceeding pursuant to RCW 71.09, did the trial court properly allow the State to utilize Mr. Anderson’s WSH records in this matter?
2. Was it error for the trial court to find that Mr. Anderson committed a recent overt act, as that term is used in RCW 71.09.020?
3. Where Mr. Anderson elected, for tactical reasons, to discharge the expert witness appointed for him at public expense, is it abuse of discretion for the trial court to exclude the proposed testimony of a second expert, appointed only as a consulting expert?

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

On February 25, 2000, the State of Washington (“the State”), filed a petition alleging that John Charles Anderson, (“Mr. Anderson”), is a sexually violent predator as defined by RCW 71.09.020. Finding of Fact

#7, CP at 179;<sup>1</sup> CP at 1 – 3. On June 23, 2000, Mr. Anderson filed a Motion for Judgment of Dismissal on the Pleadings, alleging, *inter alia*, that Mr. Anderson’s Western State Hospital (WSH) files and records are confidential pursuant to RCW 71.05.390 and are not admissible in this matter. CP at 40, 50-51. On August 1, 2000, the trial court denied Mr. Anderson’s Motion, ruling that RCW 71.05.390 impliedly permits the release of Mr. Anderson’s voluntary patient information to the appropriate authorities when a civil commitment is sought under RCW 71.09. RP 08/01/2000, 42-26.<sup>2</sup> As Mr. Anderson sought interlocutory discretionary review in this Court, the trial court granted his Motion for Stay of Proceedings. RP 08/02/2000, 46-47. On March 14, 2001, the parties stipulated that probable cause existed to believe Mr. Anderson is a sexually violent predator. CP at 55-56. This Court’s denial of discretionary review became final on May 10, 2001. CP at 164-165.

Mr. Anderson then asked this Court to reconsider its Ruling Denying Review based upon *State v. Wheat*, 118 Wn. App. 435, 76 P.3d 280 (2003). CP at 164-166. This Court denied Mr. Anderson’s request,

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<sup>1</sup> Findings of Fact not challenged are verities on appeal. *Sherwood v. Bellevue Dodge*, 35 Wn. App 741, 747, 699 P.2d 1258 (1983).

<sup>2</sup> Citations to the record of preliminary hearings are referenced by “RP,” the date of the hearing, and page number of the record. As the pages of the transcript for the trial conducted on April 19, 20, 22, 23, and May 12, 13, and 17, 2004, are sequentially numbered, citations are referenced only by “RP” and the page number of the record.

noting that *Wheat* is “clearly inapposite” and “not controlling.” CP at 165-166.

Trial in this matter commenced on April 19, 2004. On April 12, 2004, one week prior to the beginning of trial, Mr. Anderson requested the trial court appoint Dr. Richard Wollert to his defense team. CP at 158, 168. The State objected, noting that Dr. Brian Judd, a psychologist who specializes in the evaluation and treatment of sex offenders, was appointed in 2001, at public expense, to assist Mr. Anderson. CP at 77-79, 157, 160-163. Subsequently, Mr. Anderson decided not to call Dr. Judd to testify at trial in this matter. CP at 157. The trial court found that Mr. Anderson had not shown good cause for the appointment of Dr. Wollert as a second expert in this matter. CP at 169. The trial court authorized Mr. Anderson’s counsel to consult with Dr. Wollert but ordered that Dr. Wollert would not be permitted to testify at trial. CP at 170.

The first morning of trial, Mr. Anderson renewed his motion to have Dr. Wollert appointed as a testifying expert; that motion was denied. RP 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. RP 441. The trial court again denied the motion. RP 442-448.

After a bench trial on April 19, 20, 22, 23, and May 12, 13, and 17, the trial court determined that Mr. Anderson is a sexually violent predator.

RP 527-534. The trial court entered its written Findings of Fact, Conclusions of Law, and Order of Commitment on June 1, 2004. CP at 178-189. Mr. Anderson now appeals his commitment.

**B. Factual Background**

**1. It is undisputed that Mr. Anderson has been convicted of a sexually violent offense.**

Mr. Anderson has been convicted of one sexually violent offense, as that term is defined in RCW 71.09.020(11). Trial Exhibits (Ex.) 1-3;<sup>3</sup> Finding of Fact #3, CP at 179; Conclusion of Law #2, CP at 188. On April 18, 1988, when Mr. Anderson was 17 years old, he anally raped Bernie H., a two and a half year old boy. Ex. 1-3; Findings of Fact #1-2, CP at 178.

The day of the rape, Bernie was left alone with Mr. Anderson. RP 155. Mr. Anderson pulled Bernie's pants down, laid him face down on a bed, and fully penetrated Bernie's anus with his penis. *Id.* Bernie screamed, cried, and began bleeding from his anus. *Id.*; Finding of Fact #12a, CP at 184.

Mr. Anderson pled guilty to Statutory Rape in the First Degree on June 29, 1988, and he was sentenced to serve 100 weeks commitment to the Department of Juvenile Rehabilitation. RP 156; Ex. 1-3; Findings of

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<sup>3</sup> Trial Exhibits 1-3 were admitted on April 20, 2004. RP at 174-175.

Fact #2 and 4, CP at 178-179. Mr. Anderson's sentence was predicated upon a finding of manifest injustice based upon the brutality of the crime, the vulnerability of the victim, and the danger he posed to the community. Ex. 3. Following completion of his criminal sentence, Mr. Anderson was admitted<sup>4</sup> to Western State Hospital (WSH). RP 158; Finding of Fact #6, CP at 179. Mr. Anderson remained at WSH until his transfer to the Special Commitment Center on March 16, 2001, on the current civil commitment petition. *See* RP 435; Finding of Fact #6, CP at 179.

**2. Mr. Anderson has a history of committing other sexually deviant offenses.**

In addition to the sexually violent offense of which Mr. Anderson has been convicted, he has been convicted of and/or admitted numerous other acts of a sexually deviant nature, beginning at the age of 13. RP 60.

When Mr. Anderson was 13 years old, he molested Aaron, a two and a half year old boy for whom Mr. Anderson was babysitting, by anally raping him as many as 14 times.<sup>5</sup> RP 61. Mr. Anderson removed Aaron's diaper, laid him face down on his mother's bed, and inserted his penis into Aaron's anus, as the boy screamed. RP 151; Finding of Fact #12a, CP at 184. Shortly before Mr. Anderson raped Aaron for the first time,

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<sup>4</sup> Mr. Anderson was initially detained at WSH pursuant to an involuntary commitment petition, but later agreed to remain as a voluntary patient. RP 167; Finding of Fact #6, CP at 179.

<sup>5</sup> Mr. Anderson's offenses against Aaron took place prior to his offense against Bernie.

Mr. Anderson fantasized about having sex with a girl he knew from school; he then decided that, instead of masturbating to that fantasy, he would rape Aaron. *Id.*

The second time Mr. Anderson raped Aaron, he covered Aaron's head with a pillow to muffle Aaron's screams, but he was still able to hear Aaron crying when he ejaculated inside of him. RP 152. Between the first and second times that Mr. Anderson raped Aaron, Mr. Anderson engaged in sexual fantasies about Aaron. RP 152-153; Finding of Fact #12a, CP at 184. Mr. Anderson ultimately raped Aaron several more times. RP 153.

Beginning when Mr. Anderson was 13 years old, he repeatedly molested his younger male cousin; the sexual activity included oral copulation, as well as fondling and other touching. RP 60. During this same time period, Mr. Anderson began engaging in sexual fantasies about a five year old girl who lived near him and he attempted to lure another five year old girl into a park to rape her. RP 61, 153-154; Findings of Fact #12c-d, CP at 185. When Mr. Anderson was 15 years old, he penetrated the anus of a 13 year old neighbor boy with his penis. RP 153; Finding of Fact #12b, CP at 185. The boy told Mr. Anderson that it hurt and he told him to stop; but Mr. Anderson did not stop. *Id.*

While at the Maple Lane School, following his conviction for the rape of Bernie H., Mr. Anderson and another boy sexually abused Mr. Anderson's roommate while the boy slept. RP 62.

The following year, Mr. Anderson exposed his penis on several occasions to a female staff member to whom he was sexually attracted, Sharon L. RP 62, 156-157; Ex. 4-10;<sup>6</sup> Finding of Fact #5, CP at 179. Mr. Anderson also engaged in fantasies involving a combination of forced sex and violence. RP 62-63, 157; Findings of Fact #12f, CP at 185, and #12g, CP at 185. Some of Mr. Anderson's violent sexual fantasies at the Maple Lane School were specific to Sharon L., while others involved women in general. *Id.*

On September 15, 1989, Mr. Anderson pled guilty to Public Indecency for his actions toward Sharon L. and he was sentenced to serve 90 days in the Thurston County Jail. RP 157, 166; Ex. 4-10; Finding of Fact #5, CP at 179.

Mr. Anderson arrived at WSH on June 14, 1990. RP 158. At WSH, Mr. Anderson engaged in sexual contact with other patients, some of whom were developmentally disabled or delayed. RP 118-119.

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<sup>6</sup> Trial Exhibits 4-10 were admitted on April 20, 2004. RP 174-175.

Mr. Anderson admitted that he took sexual advantage of several male patients because of their disabilities.<sup>7</sup> RP 162-163.

**C. Mr. Anderson suffers from Mental Abnormalities and a Personality Disorder**

At the request of the Office of the Attorney General, Dr. Amy Phenix, Ph.D, evaluated Mr. Anderson to determine whether he met the statutory definition of a sexually violent predator. RP 185-186; Finding of Fact #11a, CP at 181. Dr. Phenix testified before the trial court on April 22, 23, and May 12, 2004. Dr. Phenix is a clinical psychologist in private practice and is licensed in Washington, Florida, and California. RP 178; Finding of Fact #11a, CP at 181. Dr. Phenix has performed numerous evaluations of individuals alleged to be sexually violent predators and has testified as an expert on these issues in many superior courts, including those in the State of Washington. RP 183 – 185.

In conducting her evaluation of Mr. Anderson, Dr. Phenix reviewed approximately 2,000 pages of records pertaining to Mr. Anderson's prior offenses, his juvenile adjudication and detention history, his mental health treatment records, and his hospital records. RP 186-87; Finding of Fact #11b, CP at 181. She testified that these documents are of the type upon which she, and other mental health

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<sup>7</sup> The details of Mr. Anderson's sexual contact with vulnerable adult male patients at WSH is contained herein at pages 17-24.

professionals in this field, commonly rely in conducting evaluations for possible civil commitment under chapter 71.09 RCW, and that she relied upon them in this case. RP 187. Dr. Phenix also met with Mr. Anderson and his counsel on October 28, 2001, for a period of approximately four hours. RP 187; Finding of Fact #11b, CP at 181.

In conducting her evaluation of Mr. Anderson, Dr. Phenix used the Diagnostic and Statistic Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), a classification resource that is widely used by mental health professionals in the diagnosis of mental disorders. RP 192. Dr. Phenix diagnosed Mr. Anderson with Sexual Sadism, Pedophilia (males and females, nonexclusive type), and a Personality Disorder, Not Otherwise Specified (NOS), with Anti-Social, Borderline, and Narcissistic Traits. RP 192-193.

### **1. Paraphilias**

Pedophilia and Sexual Sadism are types of Paraphilias, or sexual abnormalities. RP 193. Paraphilias deviate from normal sexuality and are targeted toward either nonconsenting persons or children and can also involve the humiliation of oneself or others, or the infliction of pain or torture. *Id.*; Finding of Fact #11d(1), CP at 182. Paraphilias are chronic conditions that people carry throughout their lives. RP 213-214; Finding of Fact #11d(2), CP at 182.

**a. Sexual Sadism**

Sexual Sadism involves recurrent, intense sexually arousing fantasies or sexual urges or behaviors that involve acts – real, not simulated – in which physical and psychological suffering, including humiliation of the victim, is sexually exciting or arousing to the person. RP 194. These fantasies, urges, or behaviors must be present for at least six months and they must cause marked distress or interpersonal difficulty for the person. *Id.* In diagnosing Mr. Anderson with Sexual Sadism, Dr. Phenix relied upon his history of repeated anal rape of very young boys. RP 196; Finding of Fact #11f, CP at 182-183. She stressed that penetration offenses against very young victims are extremely painful, involving physical injury and dramatic exhibitions of pain. RP 196. Dr. Phenix explained that the abnormality of Sexual Sadism is the ability to maintain an erection when a child is being physically brutalized and is in terrible pain and screaming. RP 196-197. She noted that not only was Mr. Anderson able to maintain an erection and penetrate the boys, he was able to do so repeatedly. RP 197.

Dr. Phenix also relied upon Mr. Anderson's sexual fantasies toward the female staff member at the Maple Lane School. *Id.*; Finding of Fact #11f, CP at 182-183. Dr. Phenix described Mr. Anderson's fantasies involving restraining and sexually mutilating Sharon L. as "very

classically sexually sadistic,” linking torture with sexual arousal, which is the key to sexual sadism. RP 197-199. Dr. Phenix also noted that for individuals with Sexual Sadism, there is a significantly increased risk that they will kill their victim as a result of the type of intentional torture they impose upon that victim. RP 198.

As further evidence of Mr. Anderson’s Sexual Sadism, Dr. Phenix relied upon the results of phallometric assessment<sup>8</sup> of Mr. Anderson conducted by Ms. Saylor in 1998, in which Mr. Anderson achieved 100% arousal to sadistic themes involving prepubescent boys. RP 201; Finding of Fact #9c, CP at 180.

In Dr. Phenix’s professional opinion, Mr. Anderson’s Sexual Sadism constitutes a mental abnormality -- it is either acquired or congenital, severely affects his emotional and volitional capacity, and predisposes him to the commission of criminal sexual acts in a degree constituting him a menace to the health and safety of others. RP 210-211; Finding of Fact #11d, CP at 182. Dr. Phenix testified that Sexual Sadism is the most deviant of all the paraphilias and is the most difficult to treat and to change. RP 211.

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<sup>8</sup> Phallometric or plethysmograph assessment is a method of measuring tumescence of the penis using a mercury strain gauge, which is fitted over the penis of the subject, while visual or audio stimuli are exhibited to the subject. RP 51-52.

## **b. Pedophilia**

Pedophilia is a sexual abnormality involving sexual arousal to prepubescent children. RP 205. It is characterized by sexual fantasies, urges, and behaviors, lasting over at least a six month period, and involving sexual activity with prepubescent children. *Id.* In diagnosing Mr. Anderson with Pedophilia, Dr. Phenix relied upon his offending history, including his rapes of Aaron and Bernie, as well as his early and pervasive sexual interest in children starting when he was 13 years old. RP 206; Finding of Fact #11f, CP at 182. She noted that Mr. Anderson's Pedophilia involves not simply sexual attraction to children, but also arousal to the more forced aspects of rape of children. *Id.* She pointed to his admitted fantasies about both male and female neighborhood children and the continuation of fantasies involving children throughout his hospitalization at WSH, as recently as 1999. RP 207-208; Finding of Fact #11f, CP at 182. Dr. Phenix also noted that phallometric assessment revealed broad deviant arousal to boys and girls of all ages. RP 209.

In Dr. Phenix's professional opinion, Mr. Anderson's Pedophilia is a mental abnormality. RP 212-213; Finding of Fact #11d, CP at 182.

## **2. Personality Disorder**

Dr. Phenix also diagnosed Mr. Anderson as suffering from a personality disorder. RP 215; Finding of Fact #11e, CP at 182. A

personality disorder is an enduring pattern of inner experience and behavior that begins in adolescence. RP 216; Finding of Fact #11e, CP at 182. It involves a person's emotions, thoughts, and behaviors. *Id.* Personality disorders tend to be life-long conditions; they are pervasive, inflexible, and stable over time. *Id.*

Mr. Anderson's personality disorder involves traits of anti-social personality disorder, borderline personality disorder, and narcissistic personality disorder. RP 217; Finding of Fact #11e, CP at 182. The anti-social traits involve a pattern of violation of the rights of others. RP 217-219. In Mr. Anderson's case, this pattern is demonstrated in his early brushes with the law, his fire-starting behaviors at home and at school, and his assaultiveness at an early age, even outside the context of his sexual offending. RP 218-219. Narcissistic personality disorder involves being overly self-involved, grandiose, and having a sense of self-importance that is greater than appropriate. RP 219, 401-402. A person with these personality traits believes he is "special." *Id.* He may feel victimized, poorly understood by others, and have a sense of entitlement, believing that things should go his way at the expense of others. RP 220. Such individuals exploit other people and they do not have appropriate empathy for others because they can only focus on themselves. *Id.* Those with borderline personality traits are marked by poor self-image. RP 221.

Such people do not feel good about themselves, so they put up a shield to protect their vulnerable inner selves. *Id.* This disorder is also characterized by the need to be impulsive. *Id.*

Dr. Phenix testified that Mr. Anderson's multi-faceted personality disorder contributes to his likelihood for future reoffense in several ways. RP 224. First, the anti-social aspects cause him to feel that he can violate the rights of other people; when he experiences deviant sexual fantasies and urges, it allows him to act on those fantasies and urges. RP 224. Second, borderline personality encompasses "neediness" and negative mood states. *Id.* If the behavior which makes a person "feel better" involves deviant sexuality, he will seek to engage in that deviant behavior, increasing the risk of future sexual reoffense. *Id.* Third, if he is not able to perceive the responses of other people because he is only concerned about his own "wants and needs," he will be able to ignore the impact of his behavior upon others and perpetuate sexual offenses upon them. RP 224-225. Dr. Phenix notes that Mr. Anderson's personality disorder is not the primary driving cause toward his sexual offending, but that it contributes to his sexual offending. RP 225.

Dr. Phenix testified that, in her opinion, Mr. Anderson's mental abnormalities and personality disorder cause him serious difficulty controlling his behavior. RP 253; Finding of Fact #11h, CP at 183.

**D. Mr. Anderson is Likely to Commit Predatory Acts of Sexual Violence if Not Confined in a Secure Facility.**

In reaching her opinion concerning whether Mr. Anderson's mental abnormalities (Sexual Sadism and Pedophilia) and/or his personality disorder make(s) him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility, Dr. Phenix conducted a sex offender risk assessment. RP 225, 253-254; Finding of Fact #11i, CP at 183-184. She looked at the pervasiveness and strength of his mental disorders and then considered other risk factors that are correlated in the research with future sexual reoffense. *Id.*

First, she considered those risk factors measured and weighted in actuarial instruments. *Id.* An actuarial instrument is a list of risk factors that are known in the research to be correlated with future sexual reoffense, which are then weighted statistically, and when added together, result in a total risk score, which can be categorized as low, medium, or high risk. *Id.* These scores are also associated with probabilities of sexual reoffense for the sample upon which it was developed or tested over time. *Id.* Dr. Phenix has been using actuarial instruments for assessing risk of sexual reoffense since 1997; these instruments are widely used in sexually violent predator proceedings in all states that have such laws. RP 227-

228. Dr. Phenix cautioned that these instruments are not perfect, but are an improvement over straight clinical judgment. RP 228-229.

Specifically, Dr. Phenix used the Static-99<sup>9</sup> in Mr. Anderson's case because it is the most widely used actuarial instrument for assessing the risk of reconviction for a sex offense. RP 229. The Static-99 has also been tested on more subjects than any other available instrument. *Id.* Mr. Anderson received a score of "5," which is in the medium-high range. RP 409; Finding of Fact #11i(3), CP at 184. Dr. Phenix noted that the Static-99 must be used cautiously when assessing risk for a person who was not yet 18 when he committed his sexual offense, but it can be used. RP 231, 262-263.

Because the Static-99 does not include all the risk factors which have been identified by research in this field as associated with risk for future reoffense, Dr. Phenix explained that it is important to consider other risk factors, such as level of sexual deviancy, effect of treatment, compliance with supervision, presence of a personality disorder, and level of social support in the community. RP 236-245; Finding of Fact #11i(4),

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<sup>9</sup> Dr. Phenix is one of the authors of the Static-99 Coding Rules. RP 254.

CP at 184. Dr. Phenix explained these additional considerations as follows:

. . . his severe and persistent sexual deviancy; the fact that he has not participated in sufficient treatment in my opinion to demonstrate a reduction in his sexual deviancy; that when left to his own devices in the community, he has violated important conditions of his release from the hospital; that he has significant problems with his volition in regard to his propensity to act out on his sexual deviancy. He said in the hospital in June of 1999 that he did not want to engage in sex with a peer, but he felt powerless to stop that. He said in July of 1999, I go for days just wanting to have sex done to me and me doing sex. These are all strong indications of persistent sexual preoccupation on his part that has not been sufficient treated in my opinion. And that Mr. Anderson, finally, he does not have any supervision available to him. I think if he was in the community, it requires intense and long-term supervision to help him to be successful . . .

RP 427-428. After considering Mr. Anderson's history, the results of the actuarial risk assessment instrument, and the other empirical and dynamic risk factors, Dr. Phenix concluded that he is more likely than not to commit future sexually violent predatory offenses if he is not confined to a secure facility. RP 247; Finding of Fact #11i, CP at 183-184.

**E. Mr. Anderson has Committed Recent Overt Acts**

Mr. Anderson engaged in numerous sexual contacts, including fellatio and anal sex, with vulnerable male patients at WSH, including Darryl P., Bobby B., Curtis S., and Rory W. RP 73-80; Finding of Fact #10c, CP at 181. Mr. Anderson described his sexual contacts with these

patients in a sexual history timeline and characterized his sexual contacts with these patients as “deviant.” RP 120, 123. Sexual activity among patients at WSH is not permitted. RP 69. Dr. Larry Arnholt, a licensed psychologist and treatment provider at Western State Hospital, explained that patients at WSH are there for treatment for various kinds of mental illnesses and it is not conducive to their treatment for them to have sexual contacts with other patients. *Id.* The focus of that treatment was to understand what led to their sexually deviant behavior; sexual contacts distracted from that treatment. RP 68. Dr. Arnholt indicated that when such relationships were discovered, WSH staff counseled the patients and took actions to ensure their safety. RP 78. There were consequences imposed upon patients who engaged in known sexual contact, generally including loss of privilege level and geographic isolation. RP 97, 99, 102.

Dr. Arnholt served as primary therapist for Mr. Anderson and for the other members of the unit where Mr. Anderson lived at WSH from 1994 to 1998. RP 67, 73-79; Finding of Fact #10a, CP at 180. Dr. Arnholt testified that Mr. Anderson is highly intelligent. RP 80. Mr. Anderson’s intelligence quotient (IQ) has been tested at between 128 and 130. *Id.* Dr. Arnholt testified that Mr. Anderson was clearly the most intelligent patient he had ever treated at WSH. *Id.*

Dr. Arnholt described each of these men, all of whom were patients on the ward where Dr. Arnholt was the assigned psychologist, to provide the Court with an objective evaluation of their functioning levels. RP 72–80; Finding of Fact 10c, CP at 181. Dr. Arnholt testified that Mr. Anderson’s sexual relationships with these patients, none of whom were capable of being an equal partner in a sexual relationship with Mr. Anderson, were unacceptable. RP 74-75; Finding of Fact 10c, CP at 181.

**1. Darryl P.**

Dr. Arnholt described Darryl P. as being approximately six feet tall, African American, and mildly to moderately retarded. RP 73. Darryl was “very concrete, simplistic. . .[and] would laugh at anything, no matter what it was.” *Id.* Dr. Arnholt indicated that Darryl was easily persuaded to do things but needed reminders and assistance regarding basic functioning and hygiene. *Id.* Dr. Arnholt stressed that Darryl “certainly did not have the mental capacity to take care of himself outside of a structured setting.” *Id.* After Dr. Arnholt learned from Mr. Anderson that Mr. Anderson and Darryl had been having a sexual relationship, Dr. Arnholt counseled him. *Id.* Dr. Arnholt reminded Mr. Anderson that

Darryl was developmentally disabled<sup>10</sup> and was not an equal partner in a sexual relationship. RP 75; Finding of Fact #10c, CP at 181.

In his sexual history timeline, Mr. Anderson characterized his sexual contact with Darryl as “deviant.” RP 120, 123; Finding of Fact #9d, CP at 180. He also clarified that his sexual contact with Darryl included fondling and attempts at anal intercourse and fellatio. *Id.* During his trial testimony, Mr. Anderson admitted that Darryl was not only developmentally delayed, he was “very impaired.” RP 160-161; Finding of Fact #12i, CP at 186. Mr. Anderson admitted that he engaged in sex with Darryl two or three times at WSH. RP 161. He admitted that WSH staff instructed him to terminate his relationship with Darryl. RP 161; Finding of Fact #12i, CP at 186. Mr. Anderson admitted that he took advantage of Darryl because of his disabilities. RP 162-163; Finding of Fact #12i, CP at 186.

## **2. Bobby B.**

Dr. Arnholt described Bobby B. as being in his mid to late 20’s or early 30’s, somewhat overweight, and having unusually long eyelashes. RP 76. Bobby was “easily agitated and his hygiene was quite poor.” *Id.* He had to be reminded fairly frequently to attend to his basic needs. *Id.* Dr. Arnholt indicated that Bobby was also developmentally disabled and

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<sup>10</sup> “Developmentally disabled” is another term for mental retardation. RP 75.

he estimated that Bobby was in the middle range of mild mental retardation. *Id.* After Mr. Anderson told Dr. Arnholt about his sexual relationship with Bobby, Dr. Arnholt counseled him about this relationship in much the same way that he counseled him about his sexual relationship with Darryl P. RP 77.

Mr. Anderson characterized his sexual contact with Bobby as “deviant” when he created his sexual history timeline. RP 121, 123; Finding of Fact #9d, CP at 180. Mr. Anderson indicated in both his sexual timeline and in his trial testimony that his sexual contact with Bobby consisted of fondling, fellatio, and anal intercourse. RP 121, 123, 162-163; Findings of Fact #9d, CP at 180, and 12k, CP at 186.

### **3. Curtis S.**

Dr. Arnholt described Curtis S. as a man in the lower end of mild retardation and possibly moderately retarded. *Id.* Curtis was more easily agitated than the other three patients with whom Mr. Anderson was sexually active. *Id.* Curtis was simplistic, concrete, and poorly able to conceive and grasp abstract concepts. *Id.* When Mr. Anderson revealed his sexual relationship with Curtis to Dr. Arnholt, Dr. Arnholt counseled him about that relationship. RP 78.

When Mr. Anderson included his contact with Curtis on his sexual history timeline, he characterized it as “deviant” and described it as

consisting of fellatio, fondling, and intercourse. RP121; Finding of Fact #9d, CP at 180. During his trial testimony, Mr. Anderson confirmed that he engaged in a sexual relationship with Curtis at WSH and that he took advantage of Curtis because of his disabilities. RP 162-163; Finding of Fact #12l, CP at 186.

**4. Rory W.**

Dr. Arnholt described Rory W., a WSH patient in his late 20's, as of short stature and a relatively slender build (although he gained weight over the years he spent at WSH.) RP 78. Rory was severely physically and sexually abused by men when he was a child. *Id.* He had "low-average intellect," but was not developmentally disabled; his primary problems were that he suffered from a borderline personality disorder and a long history of sexual abuse. RP 79. When Dr. Arnholt learned of Mr. Anderson's sexual relationship with Rory from Mr. Anderson, both men were counseled by WSH staff. *Id.* In Dr. Arnholt's opinion, Rory thought that sexual contact would ensure a special relationship with Mr. Anderson and, when that did not occur, Rory began to act out, required more frequent restraints, and showed deterioration of functioning for a period of time. RP 79-80.

Mr. Anderson identified his sexual contact with Rory as "deviant" in his sexual history timeline. RP 121. He identified the sexual contact as

fellatio and fondling. *Id.*; Finding of Fact #9d, CP at 180. During his testimony at trial, Mr. Anderson admitted that he engaged in fondling, oral sex, and anal sex with Rory. RP 159; Finding of Fact #12h, CP at 185. He admitted that he knew that Rory had a mental illness, was not as intelligent as Mr. Anderson, and was impulsive. *Id.* Mr. Anderson admitted that WSH staff told him that Rory was vulnerable and that having sex with Rory was inappropriate. RP 159-160. Although Mr. Anderson admitted that WSH staff told him to terminate his relationship with Rory, he did not do so and he continued to have a sexual relationship with Rory until shortly before he left WSH. RP 160. Mr. Anderson indicated that he attempted to end this relationship with Rory, but “sometimes I would have difficulties controlling myself” and he would engage in sexual contact with Rory. RP 169-170.

Dr. Phenix testified that, in her opinion, Mr. Anderson’s contact with vulnerable patients at WSH constituted recent overt acts. RP 381, 410. In coming to this opinion, Dr. Phenix considered the fact that Mr. Anderson was counseled not to engage in sexual activity with vulnerable patients because they were developmentally delayed, were of low intellectual functioning, and/or were mentally ill and unstable, and that he continued to engage in that type of behavior. *Id.* Dr. Phenix echoed Dr. Arnholt’s explanation of why such sexual relationships are

contraindicated for Mr. Anderson. RP 382. She explained that, in Mr. Anderson's case, there was a distinct pattern of targeting and engaging in sexual activity with psychiatrically impaired and developmentally delayed peers at WSH. *Id.* This pattern continued throughout Mr. Anderson's hospitalization, despite his years of treatment, and despite the directives to cease such activity by WSH staff. *Id.* Dr. Phenix explained that Mr. Anderson's behaviors with the vulnerable patients at WSH constituted partial reenacting of his past offenses against children because of the manner in which he selected his victims. RP 411. She explained that Mr. Anderson selected children in the past because they couldn't talk. *Id.* He was older, bigger, and smarter than the children and they were vulnerable and easy targets for him. *Id.* WSH staff wanted Mr. Anderson to stop targeting individuals who were more vulnerable to his sexual behavior, because it was similar to the kind of behavior he exhibited with children, when he controlled and sexually assaulted them. RP 411-412.

### III. ARGUMENT

- A. Where RCW 71.05.390 specifically provides that all “records, files, evidence, findings, or orders made, prepared, collected, or maintained pursuant to [RCW 71.05]” are admissible as evidence in a civil commitment proceeding pursuant to RCW 71.09, the trial court properly allowed the State to utilize Mr. Anderson’s WSH records in this matter.**

Mr. Anderson argues that the trial court erred when it allowed the use of his WSH records in his chapter 71.09 RCW civil commitment trial and he asserts that the remedy for what he terms the “unlawful disclosure and use” of these records is reversal of his commitment as a sexually violent predator. Opening Brief at 1. He argues that the trial court improperly created an exception to confidentiality under RCW 71.05.390, characterizing the trial court’s decision that these records could be used in Mr. Anderson’s civil commitment proceeding as a “judicially implied exception” and a “judicially conferred exception.” Opening Brief at 7. His characterization of the exception permitting the use of Mr. Anderson’s WSH records as “judicial” is inaccurate. While there is an exception to the general rule of confidentiality conferred in RCW 71.05.390 for purposes of civil commitment proceedings under chapter 71.09 RCW, that exception was established by the legislature in 1990, not the trial court.

**1. RCW 71.05.390 permits the use of Mr. Anderson's WSH records in this matter.**

The trial court did not err in determining that Mr. Anderson's WSH records could be used in this commitment proceeding. This issue ultimately hinges upon the reading of RCW 71.05.390, which governs confidentiality and disclosure of mental health records compiled pursuant to RCW 71.05. RCW 71.05.390 begins by stating that:

Except as provided in this section, the fact of admission and all information and records compiled, obtained, or maintained in the course of providing services to either voluntary or involuntary recipients of services at public or private agencies shall be confidential.

RCW 71.05.390. The statute then goes on to specifically articulate 14 circumstances under which such records may be released. Release for proceedings brought pursuant to RCW 71.09 is not listed among those 14 exceptions. The final, unnumbered paragraph of the statute, however, reads in pertinent part as follows:

The fact of admission, as well as all records, files, evidence, findings, or orders made, prepared, collected, or maintained pursuant to this chapter shall not be admissible as evidence in any legal proceeding outside this chapter without the written consent of the person who was the subject of the proceeding except in a subsequent criminal prosecution of a person committed pursuant to RCW 71.05.280(3) or 71.05.320(2)(c) on charges that were dismissed pursuant to chapter 10.77 RCW due to incompetency to stand trial *or in a civil commitment proceeding pursuant to chapter 71.09 RCW.*

RCW 71.05.390 (emphasis added). In light of the clear language of this portion of the statute, it cannot be said that the trial court erred in determining that files and records maintained pursuant to RCW 71.05 are available to the State in a civil commitment proceeding pursuant to chapter 71.09 RCW.

Such a result is entirely consistent with the Washington State Supreme Court's observation in *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994), where, in upholding Washington's sex offender registration statute, the Court stated that:

Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Release of information about sexual predators to public agencies and under limited circumstances, the general public, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to furtherance of those goals.

*State v. Ward*, 123 Wn.2d at 502. The Court later reaffirmed that position, stating that:

The specific *modus operandi* of sex offenders, preying on vulnerable strangers or grooming potential victims, is markedly different from the behavior of other types of persons civilly committed and such dangerous behavior creates a need for disclosure of information about convicted sex offenders to the public. Grave public safety interests are involved whenever a known sex offender's tendency to recommit predatory sexual aggressiveness in the community is being evaluated. This substantial public

safety interest outweighs the truncated privacy interests of the convicted sex offender.

*In re Detention of Campbell*, 139 Wn.2d 341, 356, 986 P.2d 771 (1999), cert. denied by *Campbell v. Washington*, 531 U.S. 1125, 121 S. Ct. 880, 148 L. Ed. 2d 789 (2001).

Both the clear language of the Involuntary Treatment Act, RCW 71.05, and the policy of Washington's Legislature support release of information relating to dangerous sex offenders to the prosecutor for use in sex predator proceedings.

**2. *State v. Wheat* does not support Mr. Anderson's argument.**

This Court's opinion in *State v. Wheat*<sup>11</sup> does not alter this analysis or undermine the determination of the trial court. Mr. Anderson argues that *Wheat* is controlling authority which not only prohibits the use of his WSH records in this civil commitment matter, but also requires dismissal of the petition. Opening Brief at 10-11. He is incorrect. As recognized by this Court, Mr. Wheat's case is so dissimilar to that of Mr. Anderson that it can be neither controlling nor persuasive authority. CP at 164-165.

In *Wheat*, the State used confidential drug treatment records obtained in violation of the statute making those records confidential in support of a criminal prosecution. Mr. Anderson's case is not criminal,

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<sup>11</sup> *State v. Wheat*, 118 Wn. App. 435, 76 P.3d 280 (2003).

but civil. *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003), *cert. denied*, *Thorell v. Washington*, 541 U.S. 990, 124 S. Ct. 2015, 158 L. Ed. 2d (2004). The State obtained and used Mr. Anderson's Western State Hospital records for the purpose of commitment proceedings, as envisioned by the statute creating confidentiality for those records, not in violation of that statute, as in Mr. Wheat's case. Further, Mr. Anderson, unlike Mr. Wheat, is an adjudicated sex offender and, as such, has a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. *See State v. Ward*, 123 Wn.2d 488, 870 P.2d 295 (1994). While Mr. Wheat's records were obtained and used by the State for the purpose of pursuing criminal prosecution, Mr. Anderson's records were obtained and used by the State for the purpose of advancing public safety. Therefore, this Court's opinion in the *Wheat* case does not require or support reversal of his commitment.

**3. RCW 71.05.630 does not prohibit disclosure of Mr. Anderson's treatment records.**

Mr. Anderson further argues that RCW 71.05.630 affirmatively prohibits the disclosure of his treatment records and is in direct conflict with the exception at issue in RCW 71.05.390. Opening Brief at 10. The

relevant provision, however, specifically provides that, “*Except as otherwise provided by law*, all treatment records shall remain confidential . . .” RCW 71.05.630(1) (emphasis added). The introductory phrase makes this provision entirely consistent with the exceptions, including the one at issue in Mr. Anderson’s case, in RCW 71.05.390.

The trial court’s determination that Mr. Anderson’s WSH records may be used in this civil commitment case was not error and does not require reversal of his commitment as a sexually violent predator.

**B. The trial court did not err in finding that Mr. Anderson committed a recent overt act, as that term is used in RCW 71.09.020.**

Mr. Anderson makes two arguments<sup>12</sup> concerning the trial court’s finding that he committed a recent overt act: (1) there was insufficient evidence to support the trial court’s finding that he committed a recent overt act; and (2) the trial court improperly relied upon *In re Pugh*,<sup>13</sup> in determining whether Mr. Anderson committed a recent overt act. He styles this alleged error as one of statutory interpretation, requiring *de novo* review of the trial court’s findings and conclusions. This characterization is only partially correct. While the second challenge, the

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<sup>12</sup> Mr. Anderson also appears to wish to challenge the definition of recent overt act contained in chapter 71.09 RCW for vagueness, however, he provides insufficient information concerning this claim to allow the State to respond substantively.

<sup>13</sup> *In re Pugh*, 68 Wn. App. 687, 845 P.2d 1034, *rev. denied* 122 Wn.2d 1018, 863 P.2d 1352 (1993).

applicability of *In re Pugh*, may involve the applicability of law, the first challenge is to the sufficiency of the evidence.

**1. There was sufficient evidence to support the trial court's finding that Mr. Anderson committed a recent overt act.**

Mr. Anderson essentially argues that the trial court did not have sufficient evidence from which to determine, beyond a reasonable doubt, that he has committed a recent overt act. He is mistaken. The Washington Supreme Court has concluded that the criminal standard applies when reviewing the sufficiency of the evidence in a civil commitment proceeding pursuant to chapter 71.09 RCW. *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). Under that standard, evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the required elements by evidence beyond a reasonable doubt. *Id.*, at 744. Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-416, 824 P.2d 533, *rev. denied* 119 Wn.2d 1011, 833 P.2d 386 (1992). Circumstantial evidence is no less reliable than direct evidence. *State v. Delmarter*, 94

Wn.2d 634, 638, 618 P.2d 99 (1980). In addition, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Once an offender has been released to the community, even to a mental health facility such as WSH if the conditions under which he is maintained are not secure, due process requires that the State prove current dangerousness. *In re Detention of Albrecht*, 147 Wn.2d 1, 10, 51 P.3d 73 (2002); *In re Detention of McGary*, \_\_\_ Wn. App. \_\_\_, 116 P.3d 415 (Division II, July 19, 2005). Due process is satisfied when the State proves that the offender is currently dangerous because he has committed a recent overt act. *Id.*

A recent overt act is “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm 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).

At Mr. Anderson’s commitment trial, the State established his current dangerousness by proving that he engaged in behavior, both general and specific, that would cause an objective person who was aware of Mr. Anderson’s criminal history and mental abnormality to be apprehensive about his likelihood to reoffend in a sexually violent manner.

Mr. Anderson's admittedly deviant sexual contacts with vulnerable patients, committed during his sex offender treatment at a mental hospital, after being instructed to terminate these sexual relationships, clearly create a reasonable apprehension of harm of a sexually violent nature and constitute recent overt acts.

Despite years of inpatient treatment, Mr. Anderson's sexual fantasies and behaviors were still not controlled and created a reasonable apprehension of harm of a sexually violent nature. He repeatedly "groomed" and engaged in sexual activity with psychiatrically impaired patients with low adaptive functioning and intellectual impairment in contravention of the instructions of his treatment team. While at WSH between 1991 and 1999, he engaged in sexual activity with patients whose intellectual functioning was in the mild to moderate range of mental retardation and/or who suffered from serious mental illnesses. This behavior is a perpetuation of his previous pattern in the community of seeking children who would be less likely to inform on him. Indeed, the trial court specifically found that Mr. Anderson engaged in sexual activity with these vulnerable male patients as substitutes for his preferred victims, children. RP 529, 530; Finding of Fact #23, CP at 187.

As recently as late 1999, Mr. Anderson continued to be sexually preoccupied with vulnerable adult patients at WSH. *See* RP 160. Despite

repeated instructions by WSH staff to cease targeting vulnerable patients for sexual activity, he continued to do so, reporting that he “would have difficulties controlling myself” and then he would engage in sexual contact with Rory W., a vulnerable adult patient. RP 169-170.

Viewing this evidence in the light most favorable to the State, a rational finder of fact could and did find, beyond a reasonable doubt, that Mr. Anderson committed recent overt acts. The trial court’s finding, therefore, is supported by substantial evidence and should not be overturned.

**2. The trial court did not err in relying upon the case of *In re Pugh* in determining that Mr. Anderson committed a recent overt act.**

Mr. Anderson argues that the trial court erred in relying upon the case of *In re Pugh*, in determining whether he committed a recent overt act. Opening Brief at 12-15. In *Pugh*, this Court held that when considering whether an overt act is recent, it is appropriate to consider the time span since the act occurred in the context of “all the surrounding relevant circumstances.” *In re Pugh*, 68 Wn. App. at 695. It was not error for the trial court to rely upon the *Pugh* analysis in making its findings in Mr. Anderson’s case, even though the case is not factually similar to this one. *Pugh* is instructive in its guidance that a “recent overt act” can be viewed in the context of the offender’s environment and access to victims.

Mr. Pugh, who had been convicted of statutory rape and sentenced to prison in 1986, was about to be released in 1989 when the State filed a petition for involuntary civil commitment under chapter 71.05 RCW, alleging that he was a danger to others. Mr. Pugh argued that the trial court could not conclude that he posed a danger to others if released because there was no proof that he had committed an overt act more recent than those for which he was sentenced in 1986. As Mr. Pugh had been institutionalized and isolated from children – his preferred victims – for a period of five years, the Court found there was no requirement that the State prove that he had committed any more recent overt act. The Court noted,

The absence of more recent overt acts during confinement is readily explainable as a lack of opportunity to offend rather than a demonstration of improvement so as to negate the showing that he presents a substantial risk of physical harm.

*Id.*, at 696. While *Pugh* involved civil commitment pursuant to chapter 71.05 RCW,<sup>14</sup> this Court has relied upon its analysis in the context of civil commitment pursuant to chapter 71.09 RCW. *Henrickson v. State*, 92 Wn. App. 856, 965 P.2d 1126 (1998), *affirmed*, 140 Wn.2d 686, 2 P.3d 473 (2000), *reconsideration denied* (2000). *Henrickson I*.

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<sup>14</sup> As noted by Mr. Anderson's counsel during argument in this matter. RP 511.

In Mr. Anderson's case, the trial court consulted *Pugh* and relied upon its guidance to examine the individual situation presented when determining whether the State has proven that Mr. Anderson's dangerousness has been evidenced by a recent overt act. RP 529. The trial court noted that Mr. Anderson, like Mr. Pugh, had been institutionalized since the age of 17 and, thus, had been isolated from his preferred victims – children. RP 530. The trial court noted that Mr. Anderson was not cooperative with his WSH mental health treatment team, particularly in the sense that they counseled him about the kinds of relationships in which he involved himself, yet he continued to be involved in those relationships. *Id.* The trial court observed that Mr. Anderson's behavior demonstrates that he follows his own rules, rather than the rules of society. *Id.*

The trial court found that Mr. Anderson had demonstrated little, if any, improvement during the period he was in treatment and that testing indicated that Mr. Anderson lacked the volitional control necessary to demonstrate improvement. *Id.* Finally, the trial court noted that Mr. Anderson continued to be involved in what he admits is deviant behavior. *Id.* The trial court followed the analysis set forth in *Pugh* to determine whether Mr. Anderson's dangerousness was evidenced by a

recent overt act and found that it was. RP 530-531. This Court should affirm the trial court's finding.

**C. Where Mr. Anderson has chosen, for tactical reasons, to discharge the expert witness appointed for him at public expense, it was not an abuse of discretion for the trial court to exclude from trial the proposed testimony of a second expert, appointed only as a consulting expert.**

The trial court did not abuse its discretion in denying Mr. Anderson's untimely motion for an additional expert witness. Discretion is only abused by the trial court when its decisions are manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) The trial court in Mr. Anderson's case appropriately denied Mr. Anderson's request for the appointment of a second expert witness at public expense,<sup>15</sup> first raised one week before trial in this matter,<sup>16</sup> and appropriately denied Mr. Anderson's renewal of that motion on the first morning of trial.<sup>17</sup> Finally, the trial court appropriately denied Mr. Anderson's renewal of that motion for a third time on May 12, 2004,<sup>18</sup> when the motion was couched as a request for rebuttal testimony.

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<sup>15</sup> As the trial court determined that Mr. Anderson is indigent, Dr. Wollert, if appointed, would have been paid with public funds. See WAC 388-885-010.

<sup>16</sup> CP at 168-170.

<sup>17</sup> RP 10.

<sup>18</sup> RP 448.

After this matter was initiated, Dr. Brian Judd, a psychologist who specializes in the evaluation and treatment of sex offenders, was appointed in 2001 to evaluate Mr. Anderson and to serve as an expert witness. CP at 77-79, 157. The State noted a deposition of Dr. Judd in November 2001. CP at 157. This deposition was rescheduled several times. *Id.* Ultimately, after Mr. Anderson's counsel informed the State that they did not intend to call Dr. Judd at trial, the State ceased attempts to schedule a deposition of him. *Id.*

On March 13, 2002, the State served Interrogatories and Requests for Production upon Mr. Anderson and his counsel. CP at 107-125, 157. After the State brought a Motion to Compel responses, Mr. Anderson provided limited answers. CP at 157. In Mr. Anderson's responses, received by the State on June 5, 2002, 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.* In the same response, Mr. Anderson informed the State that he wished to consult with Dr. Wollert, but had not yet made any formal arrangements with him.<sup>19</sup> CP at 157-158. On June 7, 2002, the Honorable Karen L. Strombom ordered Mr. Anderson to provide the State with "a copy of a report

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<sup>19</sup> To the State's knowledge, Mr. Anderson, at no point prior to April 12, 2004, requested this Court appoint Dr. Wollert to his defense team. CP at 158.

prepared by Dr. Brian Judd, Respondent's expert witness" no later than June 21, 2002. CP at 158.

After the trial court issued this order, Mr. Anderson's counsel informed the State, on June 24, 2002, that he would not be calling Dr. Judd, would not be calling any other expert witnesses, and would only be calling Mr. Anderson and one additional fact witness. *Id.* The following day, Mr. Anderson's counsel informed the State that, while he was still not calling any expert witnesses, he was now considering calling approximately seven additional fact witnesses. *Id.* Despite requests from the State, Mr. Anderson never provided further information concerning these witnesses and never filed a witness list in this case. *Id.*

WAC 388-885-010(3) provides that an indigent respondent in sex predator actions is entitled to the appointment, at public expense, of one expert. WAC 388-885-010(3). The court may appoint an additional expert(s) only for good cause. *Id.* The trial court appropriately found that Mr. Anderson did not demonstrate good cause for the appointment of Dr. Wollert as an additional expert in this case. CP at 168-170.

Mr. Anderson was provided with the services of one expert, Dr. Brian Judd, at public expense. *Id.*; CP at 162. Dr. Judd is familiar with RCW 71.09 and has been involved in numerous prior sex predator cases. CP at 162. In addition, by the very nature of his practice as a

psychologist who specializes in the evaluation and treatment of sex offenders, Dr. Judd is familiar with the two issues about which experts testify in sex predator actions: 1) whether Mr. Anderson suffers from a mental abnormality or personality disorder; and 2) an assessment of the risk Mr. Anderson poses if he is not confined in a secure facility. *Id.*

These facts support the conclusion that Dr. Judd would have been fully capable of offering testimony on the relevant subjects on behalf of Mr. Anderson at his trial, had Mr. Anderson chosen to use him. Nonetheless, Mr. Anderson chose, almost two years prior to his trial, to conduct that trial without calling an expert. By asking for an additional expert less than one week before trial was scheduled to begin, Mr. Anderson appears to have been making a tactical attempt to change or add experts on the cusp of trial.

After Dr. Phenix testified and was ably cross-examined by Mr. Anderson's counsel, Mr. Anderson made yet another request to call Dr. Wollert as a witness in this matter, this time couching the request in the context of rebuttal testimony. RP 441. Specifically, Mr. Anderson requested permission to call Dr. Wollert to rebut Dr. Phenix's testimony on two matters: (1) her opinion that Mr. Anderson is more likely than not to commit predatory acts of sexual violence if not confined in a secure facility, given his score of "5" on the Static-99; and (2) her opinion that

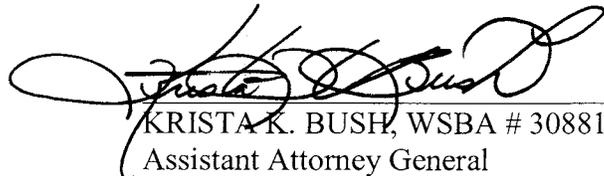
Mr. Anderson suffers from the Paraphilia of Sexual Sadism. RP 441-442. As noted by the State when this request was made on May 12, 2004, these issues are not a matter of rebuttal testimony, but are issues commonly and appropriately addressed in the party's case in chief. RP 442-448. The trial court did not abuse its discretion by denying this motion. RP 448.

#### IV. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm Mr. Anderson's civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of August, 2005.

ROB MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Krista K. Bush", is written over a horizontal line.

KRISTA K. BUSH, WSBA # 30881  
Assistant Attorney General  
Attorneys for Respondent,  
State of Washington

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COURT OF APPEALS  
DIVISION II

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NO. 31915-2-II

STATE OF WASHINGTON

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

DEPUTY

In re the Detention of:  
  
JOHN C. ANDERSON,  
  
Appellant,  
  
v.  
  
STATE OF WASHINGTON

DECLARATION OF  
SERVICE

GRACE M. SUMMERS declares as follows:

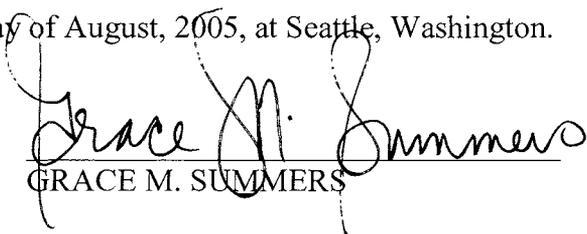
On August 19, 2005, I deposited in the United States mail, first-class postage affixed, addressed as follows:

JUDITH M. MANDEL  
ATTORNEY AT LAW  
524 TACOMA AVENUE SOUTH  
TACOMA, WA 98402

a copy of the following documents: RESPONDENT'S OPENING BRIEF and DECLARATION OF SERVICE.

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

DATED this 19th day of August, 2005, at Seattle, Washington.

  
GRACE M. SUMMERS