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SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 24820-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRYAN DUNCAN,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Craig J. Matheson

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PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY

Petitioner Bryan Duncan, the appellant below,<sup>1</sup> asks this Court to review the decision of the Court of Appeals, Division Three, referred to in section B.

B. COURT OF APPEALS DECISION

Duncan seeks review of the Court of Appeals decision in In re Detention of Bryan Duncan, Court of Appeals No. 24820-8-II, filed on December 4, 2007, attached as appendix A. The Court denied Duncan's Motion for Reconsideration by order filed on January 11, 2008, attached as appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in concluding that the trial court did not deny Duncan his constitutional right to a fair trial by admitting unfairly prejudicial evidence that he refused to undergo a second examination by the state's psychologist during pretrial discovery when another examination was prohibited by law?

2. Did the Court of Appeals err in concluding that the trial court did not deny Duncan his constitutional right to a fair trial by admitting unfairly prejudicial evidence that the person he planned to live with, if released, was a child molester while precluding Duncan from

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<sup>1</sup> Duncan was committed as a sexually violent predator on November 14, 2005. CP 29-31.

presenting evidence that this person had not reoffended and was succeeding in the community?

3. Did the Court of Appeals err in concluding that the trial court did not violate Duncan's due process right to meaningful cross-examination by precluding defense counsel from cross-examining the state's expert witness about a subject matter raised during direct examination?

4. Did the Court of Appeals err in concluding that the trial court did not violate Duncan's due process right to present evidence in his defense by not allowing his expert witness to provide testimony essential to his defense?

D. STATEMENT OF THE CASE

At Duncan's commitment trial, psychologist, Dr. Lesley Rawlings, testified that he interviewed Duncan in March 1996; conducted psychological testing; and reviewed police reports, medical records, psychological and psychiatric evaluations, and institutional disciplinary records. 25RP<sup>2</sup> 1052-53. The information that Rawlings reviewed

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<sup>2</sup> There are 32 verbatim report of proceedings: 1RP - 3/27/96; 2RP - 4/5/96; 3RP - 5/10/96; 4RP - 8/23/96; 5RP - 8/30/96; 6RP - 9/26/96; 7RP - 2/1/00; 8RP - 5/9/00; 9RP - 6/20/00; 10RP - 9/11/00; 11RP - 1/12/01; 12RP - 2/14/01; 13RP - 7/27/01; 14RP - 2/1/02; 15RP - 1/22/04; 16RP - 2/4/05; 17RP - 5/3/05; 18RP - 10/18/05; 19RP - 10/21/05; 20RP - 10/24/05; 21RP - 10/25/05; 22RP - 10/26/05; 23RP - 10/31/05; 24RP - 11/1/05; 25RP - 11/2/05; 26RP - 11/3/05; 27RP - 11/4/05; 28RP - 11/7/05; 29RP - 11/8/05; 30RP - 11/9/05; 31RP - 11/10/05; 32RP - 11/14/05.

included a report by Duncan's therapist at the Special Commitment Center (SCC) that he recently disclosed having sexual fantasies about children. 27RP 1356-57, 1369-71, 1381-83. Rawlings diagnosed Duncan with schizophrenia and a severe form of pedophilia which predisposes him to commit sexual offenses against children. 25RP 1073-75. Rawlings concluded that Duncan suffers from a mental abnormality which causes him serious difficulty in controlling his sexually violent behavior and he is more likely than not to commit sexually violent predatory acts if not confined in a secure facility. 25RP 1127-28.

Rawlings emphasized that Duncan's refusal to participate in treatment at the SCC increased his risk of reoffending, "it's a concern because he hasn't learned or internalized the kinds of skills that potentially could help him to control his behavior." 25RP 1127. Over defense counsel's objection, the court allowed Rawlings to testify that he was prevented from evaluating Duncan again. 26RP 1328-32, 1340-41.

Dr. Paul Spizman testified that he is a psychologist employed by the State as a forensic evaluator at the SCC, which has about 225 residents who are detained or civilly committed. 27RP 1403-05. Stating that he was familiar with Duncan's files and records, Spizman was concerned that Duncan has moved in and out of the treatment program at the SCC, "I didn't see any indication that he has fully invested himself for any

significant period of time.” 27RP 1405-08. Spizman underscored the importance of treatment for sex offenders, “They have certain risk factors. They need to learn how to manage those risk factors.” 27RP 1415.

During cross-examination, defense counsel asked, “Doctor, you had an opportunity to talk about treatment at some length. How would you measure success for treatment?” 27RP 1424. The state objected when Spizman began explaining the different phases of the treatment program and the court ruled that such evidence was irrelevant. 27RP 1423-26.

Psychologist, Dr. Richard Wollert, testified that actuarial instruments such as the SORAG, MnnSost-R, and Static 99 cannot reliably predict the recidivism rate for juvenile offenders like Duncan. 29RP 1764, 1768-69. Wollert explained that the human brain is not fully developed until sometime after age 18, “[a]nd the parts of the brain that develop last are those parts of the brain that have do with maturity of judgment, with impulse control, with thinking about the consequences on one’s self and others.” 29RP 1777-78. Citing studies showing that low recidivism rates for juvenile offenders “are a consistent finding over five decades,” Wollert concluded that the risk of Duncan reoffending is far below the more likely than not standard to classify him as a sexually violent predator. 29RP 1769-72.

During cross-examination about conditions that might impact a released sex offender's risk of reoffending, the state asked Wollert about Duncan's plans if he were released. Over defense counsel's objection, the court allowed Wollert to respond that Duncan planned to live with [Clarence Deon] Walls, who had a criminal history of sexual offenses against children. 29RP 1811-15.

Psychologist, Dr. Robert Halon, testified that he interviewed Duncan at the SCC and administered the Rorschach, known as the inkblot test. 30RP 1936-39. Halon diagnosed Duncan as developmentally disabled, "[E]verything you see in this man can be explained by a pervasive developmental disorder in him, not a mental disorder. This is the way Mr. Duncan is as a human being." 30RP 1950. He disagreed with Dr. Rawlings' diagnosis of Duncan as a schizophrenic and pedophile. 30RP 1947-49, 1974-75. Halon concluded that Duncan suffers from a developmental disability, not a mental abnormality. 30RP 2006.

Stating that he was familiar with the treatment program at the SCC, Halon began explaining that the treatment is not effective because it is not individualized. The state objected and the court ruled that Halon's opinion about treatment at the SCC was irrelevant. 30RP 2004-06.

Bryan Duncan was thirty years old at the time of trial. 23RP 585. Duncan testified that he has been regularly meeting with his therapist at

the SCC for the last five years. 28RP 1492. Although he generally had a good relationship with his therapist, the administration at the SCC would not allow him to discuss sex offender issues with her. 28RP 1492-94. He recently met with her to discuss a relapse prevention plan, and she misunderstood him when he asked what he should do if his sexual fantasies reoccur. 28RP 1496-97. Duncan explained why he discontinued treatment at the SCC, "I don't want to quit learning about how to solve my sexual deviancy problem since it is an ongoing thing throughout my life, but the thing is that there is no meaningful treatment at the Special Commitment Center." 30RP 1913.

On appeal, Duncan argued that the trial court denied him his right to a fair trial by admitting unfairly prejudicial evidence and violated his due process right to meaningfully cross-examine witnesses and present evidence in his defense. The Court of Appeals affirmed the trial court's order, concluding that the court's rulings were discretionary and that the court did not abuse its discretion. Appendix A at 1. Duncan seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

IN VIOLATION OF DUNCAN'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS, THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE AND PRECLUDING DUNCAN FROM MEANINGFULLY CROSS-EXAMINING THE

STATE'S EXPERT WITNESS AND PRESENTING EVIDENCE  
IN HIS DEFENSE.

This Court should accept review under RAP 13.4(b)(3) because this case involves the violation of Duncan's fundamental and constitutional rights to a fair trial and due process and the Court of Appeals overlooked and misapprehended points of law and facts in erroneously concluding that Duncan's rights were not violated.

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE THAT DUNCAN WOULD NOT SUBMIT TO ANOTHER EXAMINATION BY THE STATE'S PSYCHOLOGIST DURING PRETRIAL DISCOVERY.

A person not yet determined to be a sexually violent predator cannot be compelled to undergo an examination by the state's expert during pretrial discovery in civil commitment proceedings under chapter 71.09 RCW. Detention of Marshall v. State, 156 Wn.2d 150, 154, 125 P.3d 111 (2005); In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

During redirect examination of its expert, Dr. Lesley Rawlings, the state questioned him about having another opportunity to evaluate Duncan:

- Q. Doctor, you saw Mr. Duncan in 1996?  
A. Correct.  
Q. And you have not seen him since?  
A. That's correct.

Q. Would you have liked [an] opportunity to update your evaluation of him by meeting with him?

A. Yes.

Q. And what stopped you from doing that?

26RP 1328.

At this point, defense counsel requested a side bar asserting that he was going to make a motion for a mistrial. Counsel argued that the state was not entitled to another examination, "All it does is open up a situation where: Gosh, what's he hiding? That casts a pall on my client. The current case law in our state does not require him to do that. How do you cure that?" 26RP 1331. The state conceded that it would withdraw the question but the court decided to recess for the day, "Let's think about it overnight." 26RP 1331-32.

The following morning, the state argued that because the defense has asserted that Dr. Rawlings' opinion is based on records and reports written by other people, he should have an opportunity to explain that Duncan would not meet with him again. Defense counsel renewed his argument that such testimony would be unfairly prejudicial. 26RP 1338-39.

The court agreed with the state:

What we have here is the fact that this case has been extended over an extensive period of time for my [sic] number of reasons, and a subsequent interview probably would have been appropriate. It wasn't done, and it wasn't

done because apparently the defendant wouldn't consent to it. And I think the state's entitled to show that. Why they didn't do it was not because they were inept or incompetent or lazy or anything like that. So I think in fairness to the state and -- and the defense has raised a point that this was all based on hearsay reports, which they need to do. I mean you have to do that. But I think that we get closer to the truth by frankly putting it out there and let the jury decide, and they're entitled to know that this professional's opportunity to have a subsequent interview was denied.

26RP 1340.

Thereafter, the state continued its examination of Rawlings:

Q. When we broke yesterday I was just in the process of asking you whether you would like to have had an opportunity to meet with Mr. Duncan again.

A. Yes.

Q. That is yes, you would have liked to?

A. Yes, you were asking me that, and yes, I would like to have.

Q. And did you request an opportunity to interview him again?

A. I did through the Attorney General's Office.

Q. And were you able to interview him?

A. No.

26RP 1341.

It is evident from the record that the trial court admitted the evidence based on its erroneous conclusion of law. The court's ruling that a subsequent interview "would have been appropriate" and it was not done because the "defendant wouldn't consent to it" disregards this Court's holding that the state is not allowed another examination during pretrial discovery and evidence of such an examination is inadmissible. Marshall,

156 Wn.2d at 154; Williams, 147 Wn.2d at 476. Accordingly, because the state had no right to another examination, evidence that Duncan would not meet with Rawlings again was irrelevant and unfairly prejudicial. The evidence implied that Duncan had reason to be apprehensive about another evaluation and that he was being less than honest and open about his rehabilitation. The prejudicial effect upon the jury was apparent by the nature of the jury's question for Duncan, "Why did you choose not to be evaluated for this trial?"<sup>3</sup> 30RP 1921.

Initially, the Court of Appeals misconstrued Duncan's argument, stating that "Mr. Duncan contends it was unfairly prejudicial to allow Dr. Rawlings to testify that he had not been able to interview Mr. Duncan." Appendix A at 5. Accurately stated, Duncan argued that the trial court abused its discretion in admitting irrelevant and unfairly prejudicial evidence that he would not submit to another examination. Brief of Appellant (BOA) at 11-14. It is clear from the record that Rawlings' testimony led the jury to conclude that Duncan refused a subsequent examination because the jury asked Duncan why he chose not to be evaluated for the trial. 30RP 1921.

Then the Court of Appeals determined superfluously that Duncan "does not have a constitutional right to refuse a mental examination" and

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<sup>3</sup> By agreement of the parties, the jurors were allowed to question the witnesses.

does not “have a Fifth Amendment right to remain silent about the examination,” citing In re Det. of Audett, 159 Wn.2d 712, 726, 147 P.3d 982 (2006). Appendix A at 5-6. In Audett, this Court clarified that a civil commitment respondent does not have a due process right to refuse to submit to a CR 35 type examination or a Fifth Amendment right against self-incrimination. Id. at 726. Audett has no application to this case because Duncan did not argue on appeal that he had a due process right to refuse a subsequent examination or assert a Fifth Amendment right against self-incrimination.

The Court of Appeals concluded that the trial court had grounds to allow the state to ask why Rawlings had to rely on secondhand information because Duncan asked him about his reliance on hearsay and therefore Rawlings’ explanation was relevant. Appendix A at 6. The Court overlooked the fact that the reasons why Rawlings had to refer to secondhand information were because a subsequent examination is prohibited by law, not because of Duncan’s refusal, and the state chose not to call Duncan’s therapist at the SCC as a witness.

Based on its misapprehension of the law, the trial court found that “we get closer to the truth by frankly putting it out there and let the jury decide, and they’re entitled to know that this professional’s opportunity to have a subsequent interview was denied.” 26RP 1340. To Duncan’s

detriment, the court's ruling led the jury away from the truth that Rawlings was denied a subsequent interview as a matter of law. Consequently, contrary to the Court of Appeals' conclusion, the trial court's ruling that the jury had a right to know that Duncan refused another examination constitutes an abuse of discretion, in violation of Duncan's right to a fair trial.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING UNFAIRLY PREJUDICIAL EVIDENCE THAT, IF RELEASED, DUNCAN PLANNED TO MOVE IN WITH A PERSON WHO WAS A CHILD MOLESTER WHILE PRECLUDING EVIDENCE THAT THIS PERSON HAD NOT REOFFENDED AND WAS SUCCEEDING IN THE COMMUNITY.

Evidence may be unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action. Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994)(citing 1 J. Weinstein & M. Berger, Evidence sect. 403[03], at 403-36 (1985)). Unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. Lockwood v. AC & S, Inc., 109 Wn.2d 235, 257, 744 P.2d 605 (1987); State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983).

During cross-examination of defense expert, Dr. Richard Wollert, the State asked him about Duncan's plans upon release:

- Q. . . . [D]o you know what Mr. Duncan's plans are if he is not committed and is released into the community?
- A. No.
- Q. As I understand it he plans to live with Mr. Walls. You know something about Mr. Walls, don't you?
- A. I do know Mr. Walls, yes.
- Q. What is Mr. Walls' criminal sexual history?
- A. Mr. Walls --

30RP 1811.

At this juncture, defense counsel requested a side bar and objected to the state's line of questioning. The state argued that evidence of Duncan's plans if he is unconditionally released is relevant to his recidivism risk. 30RP 1813. Defense counsel argued that if the court allows such evidence then he should be allowed to present evidence that Walls was a juvenile offender who was released, has not reoffended, and is being successful in the community. 30RP 1812-14.

The state conceded, "If the Court doesn't want me to go there, I won't go there." 30RP 1813. Nonetheless, the court ruled that evidence of Duncan's relationship with Walls was relevant and it did not open the door for the defense to present further evidence, allowing the state to continue its questioning:

- Q. One question about Mr. Walls. Does Mr. Walls have a criminal history of sexual offenses against children?
- A. Yes.

30RP 1815.

The Court of Appeals erroneously concluded that evidence of Walls' history of sexually abusing children was relevant and not unfairly prejudicial. Appendix A at 7-8. Clearly, the evidence was unfairly prejudicial and "dragged in" for the "sake of its prejudicial effect." Carson, 123 Wn.2d at 223-24. The record reflects that the trial court failed to balance whether the probative value of the evidence was substantially outweighed by the danger of prejudice. Under the balancing process of ER 403, the balance may be tipped towards exclusion "if the undesirable characteristics of the evidence are very pronounced." State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). The prejudicial effect upon the jury was evident from its question for Duncan, "Dr. Wollert stated that Mr. Walls is a child molester. What would you do if you found out that Mr. Walls was sexually molesting children at the apartment you would be sharing with him?" 30RP 1916. Moreover, the court's error allowed the state to repeatedly emphasize during closing argument that Duncan plans to move in with Walls, "another child molester." 32RP 2083, 2084, 2095.

Furthermore, the Court of Appeals neglected to address the critical fact that in allowing the evidence, the trial court excluded the defense from admitting evidence that Walls was released, had not reoffended, and

was succeeding in the community. 30RP 1811-15. Appendix A at 6-8. In State v. Stackhouse, 90 Wn. App. 344, 356, 957 P.2d 218 (1998), cited by the Court of Appeals, the Court emphasized that the trial court is obligated to weigh the evidence, “bearing in mind fairness to both the State and defendant.” Accordingly, in admitting highly prejudicial evidence about Walls while unfairly excluding rebuttal evidence, the trial court abused its discretion by failing to properly and fairly weigh all the evidence, in violation of Duncan’s right to a fair trial.

3. THE TRIAL COURT VIOLATED DUNCAN’S DUE PROCESS RIGHT TO MEANINGFULLY CROSS-EXAMINE THE STATE’S EXPERT WITNESS ON A SUBJECT MATTER RAISED DURING DIRECT EXAMINATION.

The sexually violent predator statute is civil in nature, so the right to confrontation does not apply. In re Detention of Brock, 126 Wn. App. 957, 963, 110 P.3d 791 (2005). However, freedom from bodily restraint has always been at the core of the liberty interest protected by the due process clause of the fourteenth amendment to the United States Constitution. In re Detention of Thorell, 149 Wn.2d 724, 731, 72 P.3d 798 (2003); U.S. Const. amend. XIV, sect. 1. Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). Thus, due process may guarantee the right to cross-

examine witnesses even if the confrontation clause does not apply directly.

In re Brock, 126 Wn. App. at 963.

During direct examination, the state's expert, Dr. Paul Spizman, testified that Duncan was not under treatment at the SCC, "From my review of the documents he has moved in and out a few times of treatment. I didn't see any indication that he has fully invested himself for any significant period of time in the treatment program." 27RP 1407.

Spizman underscored the importance of sex offender treatment:

The way I look at it is that people offend sexually because of deficits they have, or I think dynamic risk factors have probably been discussed so far. They have certain risk factors. I would never say that somebody has successfully completed sex offender treatment because it's an ongoing ability to apply the positive, appropriate coping strategies to manage their risk. So I would say that somebody is in a different stage of treatment: Beginning, middle, ending stage of treatment.

27RP 1415.

During cross-examination, defense counsel asked Spizman to explain how one would advance through the different levels of treatment and clarify how success in treatment is measured, which prompted an objection from the state. The court ruled that evidence of the success or failure of the treatment program at the SCC was irrelevant. 27RP 1424-25.

The Court of Appeals concluded that “it is within the trial court’s discretion to limit a foray into the side issue of the program’s general success rate for other participants,” citing ER 611(b). Appendix A at 9-10. The Court misapprehends the scope of ER 611(b), which limits cross-examination “to the subject matter of the direct examination and matters affecting the credibility of the witness.” Spizman’s testimony implied that Duncan remains a risk because he has refused sex offender treatment at the SCC. Consequently, under ER 611(b), defense counsel had a right to cross-examine Spizman further about how the treatment program benefits sex offenders. Moreover, the evidence was relevant to Duncan’s defense that he discontinued treatment because it was not meaningful. “Evidence tending to establish a party’s theory, or to qualify or disprove the testimony of an adversary, is relevant evidence.” Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 617, 20 P.3d 496 (2001)(citing Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978); Maicke v. RDH, Inc., 37 Wn. App. 750, 752, 683 P.2d 227 (1984), rev. denied, 102 Wn.2d 1014 (1984)).

As defense counsel argued during side bar, the jury should not “be left with the impression that if you go to SCC and you put your mind to treatment that somehow that results in an LRA or being out, because that simply isn’t the facts.” 27RP 1423. The jury was indeed left with that

impression, as reflected by its question for Duncan, “Why would you want to avoid sexual offender treatment if you want to leave the SCC?” 30RP 1913. By unduly limiting defense counsel’s questioning, the trial court violated Duncan’s due process right to meaningfully cross-examine Spizman on a subject matter raised by the state.<sup>4</sup>

4. THE TRIAL COURT VIOLATED DUNCAN’S DUE PROCESS RIGHT TO PRESENT EVIDENCE IN HIS DEFENSE BY NOT ALLOWING HIS EXPERT WITNESS TO PROVIDE TESTIMONY ESSENTIAL TO HIS DEFENSE.

The right to present evidence in one’s defense is a fundamental element of due process. State v. Ellis, 136 Wn.2d 498, 527-28, 963 P.2d 843 (1998). This due process right applies in involuntary commitment proceedings. In re Detention of Skinner, 122 Wn. App. 620, 630, 94 P.3d 981 (2004), rev. denied, 153 Wn.2d 1026, 110 P.3d 213 (2005).

Defense expert, Dr. Robert Halon diagnosed Duncan as developmentally disabled. 30RP 1950. He testified that he has been to the Special Commitment Center at least six times and was familiar with the sex offender treatment program. 31RP 2002-04. Halon began explaining that the treatment program is not individualized for those with developmental disabilities. 31RP 2003.

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<sup>4</sup> As historically cited in many cases by the courts, cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” 5 Wigmore on Evidence sect. 1367 (3<sup>rd</sup> ed. 1940).

This prompted the state to request a side bar asserting that defense counsel was apparently going to have Halon testify about the quality of treatment at the SCC which was irrelevant. Defense counsel clarified that he wanted “the doctor to give his opinion on whether the treatment which is available, given his understanding of it, has any applicability for Bryan Duncan.” 31RP 2004. The court ruled that Halon’s opinion about the treatment program at SCC was not relevant because “it would be too much of a side issue.” 31RP 2006.

The Court of Appeals concluded that Halon’s opinion was irrelevant, mistakenly relying on State v. Stenson, 312 Wn.2d 668, 715 n. 9, 940 P.2d 1239 (1997), where this Court concluded that “the proper test for the admissibility of scientific evidence is ER 702, not the balancing test of *Matthews v. Eldridge*.” Appendix A at 11-12.<sup>5</sup> Stenson has no application to this case because Halon was not testifying about scientific evidence. The Court’s flawed analysis notwithstanding, Halon’s expert opinion was admissible under ER 702 because it would have helped the jury understand why Duncan could not progress in treatment and why it was not meaningful treatment.

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<sup>5</sup> The Court also incorrectly states that “Mr. Duncan urges this Court to apply the procedural due process balancing factors set out in [*In re Det. of Brock*, 126 Wn. App. [957] at 964.” Appendix A at 11. Duncan never made such an argument. See BOA at 21-23.

Furthermore, Duncan had a right to present evidence in response to testimony provided by Rawlings and Spizman. 27RP 1406-08, 1415-16; 25RP 1126-27. During Rawlings' testimony, the jury asked, "So his inaction of treatment at SCC then is Bryan's action or decision to not improve? Is that right?" Rawlings replied, "Yes, he's made a choice. He's made a decision not to participate in treatment, and he's made a choice not to address the problems that he has. His inaction prevents him or he's made the choice to not acquire the skills to not learn how to better regulate his sexual behavior." 27RP 1395. Halon would have provided expert testimony to the contrary. By excluding Halon's testimony on whether the treatment program benefited Duncan, the trial court violated Duncan's due process right to present essential evidence in his defense.

F. CONCLUSION

For the reasons stated, particularly in light of the accumulation of errors in Mr. Duncan's case,<sup>6</sup> this Court should accept review.

DATED this 9<sup>th</sup> day of February, 2008.

Respectfully submitted,

  
VALERIE MARUSHIGE  
WSBA No. 25851  
Attorney for Petitioner

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<sup>6</sup> State v. Coe, 101 Wn.2d 520, 529, 674 P.2d 668 (1984).

## **APPENDIX A**



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intercourse with her when he was 13 years old. The second count involved acts against a 10-year-old boy when Mr. Duncan was 13 years old. All of these incidents occurred in Benton County and all were defined as sexually violent offenses in former RCW 71.09.020(6) (1995). Mr. Duncan was also adjudged guilty in separate actions for two counts of communication with a minor for immoral purposes. Mr. Duncan was committed to the Department of Juvenile Rehabilitation for three consecutive 52-week sentences following these adjudications. He served his sentences at Maple Lane School, a juvenile facility in Centralia.

Mr. Duncan participated in a sex offender treatment program while at Maple Lane. He admitted sexual acts with more than 20 children between 1984 and 1992. One Maple Lane case manager reported that Mr. Duncan claimed between 70 and 100 victims. During a mental health assessment in 1996, Mr. Duncan admitted to sexual activity with as many as 40 children. These victims, mostly male, ranged in age from 2 to 13 years old. The sexual acts included vaginal and anal intercourse, forced sexual games, fellatio, fondling, and masturbation. Mr. Duncan also revealed in counseling that he fantasized about sex with children and that these fantasies sometimes involved the mutilation, killing, and eating of his victims. He received over 75 infraction reports for non-compliance with staff orders, acting out, and violence during his stay at Maple Lane.

Mr. Duncan was due to be released from Maple Lane School in late March 1996, on his 21st birthday. On March 22, 1996, the State filed a petition for commitment of

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Mr. Duncan as an SVP. RCW 71.09.030. He was then moved to the Special Commitment Center (SCC) pending the outcome of the petition. For a variety of reasons—mostly at the request of Mr. Duncan’s counsel—the commitment trial was delayed until October 2005. The jury concluded that Mr. Duncan was a sexually violent predator.

#### DISCUSSION

Mr. Duncan assigns error to a number of the court’s rulings on evidence. The trial court has wide discretion on questions of evidence. *In re Det. of Bedker*, 134 Wn. App. 775, 777, 146 P.3d 442 (2006). Evidentiary rulings usually are not of constitutional magnitude. So even an erroneous ruling must materially affect the outcome of the trial to warrant reversal. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

#### UNFAIR PREJUDICE

Mr. Duncan first contends the trial court abused its discretion by admitting evidence that he refused to submit to a psychological examination during pretrial discovery. He contends this evidence was unfairly prejudicial.

Dr. Leslie Rawlings is a psychologist. He evaluated Mr. Duncan in 1996 just before the State filed its petition for commitment. He considered his 1996 evaluation and Mr. Duncan’s history of sex offenses. He reviewed his records. And he undertook an actuarial risk assessment. The actuarial approach to risk assessment uses a statistical analysis to identify a limited set of risk factors that assist in the prediction of future

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dangerousness. *In re Det. of Thorell*, 149 Wn.2d 724, 753, 72 P.3d 708 (2003). Dr. Rawlings concluded that Mr. Duncan exhibited schizophrenia and severe pedophilia and had great difficulty controlling his sexual behavior. He testified that this mental abnormality made it more likely than not that Mr. Duncan would commit acts of predatory violence if not confined.

Dr. Rawlings admitted that his conclusion that Mr. Duncan still fantasized about children was based “on what others have written.” Report of Proceedings (RP) at 1256. The State then asked whether he would have liked an opportunity to update his evaluation of Mr. Duncan. Dr. Rawlings said yes. The State then asked, “And what stopped you from doing that?” *Id.* at 1328.

Mr. Duncan moved for a mistrial. He argued that the question put Mr. Duncan in a “terrible light.” *Id.* at 1329. Left dangling, the question suggested that he was hiding something. A respondent in a commitment proceeding cannot be compelled to submit to a mental examination during pretrial discovery under chapter 71.09 RCW. *In re Det. of Marshall*, 156 Wn.2d 150, 154, 125 P.3d 111 (2005).

The trial judge ruled that the State could ask whether Mr. Duncan had refused a mental examination because this was a civil action and Mr. Duncan therefore had no right to confrontation or to remain silent. The court also concluded that fairness entitled the State to ask whether Mr. Duncan had consented to a more recent interview because he had made the point that Dr. Rawlings’ opinion was to some degree based on hearsay

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reports. The court denied Mr. Duncan's motion for mistrial. The State then asked Dr. Rawlings if he had asked to interview Mr. Duncan again. Dr. Rawlings answered, "Yes." RP at 1341. The State then asked, "And were you able to interview him?" *Id.* Dr. Rawlings answered, "No." *Id.* No further testimony was presented on this subject.

Mr. Duncan contends it was unfairly prejudicial to allow Dr. Rawlings to testify that he had not been able to interview Mr. Duncan. Testimony that is likely to provoke an emotional response rather than a rational decision is unfairly prejudicial. *State v. Ortega*, 134 Wn. App. 617, 624, 142 P.3d 175 (2006), *review denied*, 160 Wn.2d 1016 (2007); *State v. Stackhouse*, 90 Wn. App. 344, 356, 957 P.2d 218 (1998); ER 403. Such testimony should be excluded if its potential prejudice substantially outweighs its probative value. *Stackhouse*, 90 Wn. App. at 356. The trial court must weigh the proffered evidence in context to make this decision. *Id.*

The State argues that Mr. Duncan waived this issue because he did not specifically ask the trial court to balance the probative value of the evidence against its prejudicial effect. But Mr. Duncan objected to the admission of this evidence. And the trial court considered both its relevance and its fairness. Accordingly, we conclude that the issue was properly preserved for appeal.

Mr. Duncan does not have a constitutional right to refuse a mental examination. He has a statutory right to do so. *In re Det. of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006). Nor does he have a Fifth Amendment right to remain silent about the

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examination. *Id.* Jurors here asked him why he chose not to be reevaluated for this trial. The trial court answered: "Mr. Duncan did not wish to do so, and the Court did not order him to participate in further evaluation." RP at 1921. We conclude that the trial court did balance the possibility that this information was prejudicial against its relevance. Mr. Duncan asked about Dr. Rawlings' reliance on hearsay information. The court then concluded that it was only fair to allow the State to ask why Dr. Rawlings had to rely on secondhand information. Those are tenable grounds for the judge's ruling.

This was an SVP civil commitment proceeding. A central issue then was Mr. Duncan's current mental state and his likelihood to engage in predatory acts of sexual violence if released. *In re Det. of Kelley*, 133 Wn. App. 289, 292, 135 P.3d 554 (2006), *review denied*, 159 Wn.2d 1019 (2007). Reliable, up-to-date information on Mr. Duncan's psychological state was highly relevant. And an explanation why the State could not provide current information was also therefore relevant. The trial court did not abuse its discretion in allowing the State to pursue this line of questioning. *Stackhouse*, 90 Wn. App. at 356.

Mr. Duncan next assigns error to the trial court's admission of evidence that he intended to move in with convicted child molester Clarence Walls. Mr. Duncan had a sexual relationship with Mr. Walls while both were incarcerated in the SCC. Mr. Walls was released from the SCC in 2004 after the State agreed to dismiss an SVP petition against him. Mr. Duncan's expert, Dr. Richard Wollert, is a psychologist. In Mr. Walls'

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SVP proceeding, Dr. Wollert had questioned the effectiveness of the actuarial tools in predicting recidivism in juvenile offenders. The court ordered Mr. Duncan not to question Dr. Wollert about Mr. Walls' case in front of the jury.

The State showed on cross-examination of Dr. Wollert that Mr. Duncan intended to move in with Mr. Walls. Mr. Duncan argued, outside the presence of the jury, that this opened the door to inquiry about the Walls proceeding and specifically to inquiry about why the SVP proceeding against Mr. Walls was dismissed. The court disagreed and refused to allow the inquiry of Dr. Wollert.

Mr. Duncan now contends the admission of Mr. Walls' criminal sexual history was unfairly prejudicial. He did not object on the basis of prejudice at trial. But that aside, we conclude that the trial court did not abuse its discretion. Mr. Duncan testified that he had an adult sexual relationship with Mr. Walls and now had appropriate masturbatory fantasies as a result. The fact that Mr. Walls had a history of sexually abusing children was relevant, given the fact that Mr. Duncan intended to live with him.

Moreover, Mr. Duncan had the opportunity to address that fear. In response to a juror who asked what he would do if he found out Mr. Walls was sexually molesting children in their apartment, Mr. Duncan answered that he would leave and call the police. Information that Mr. Duncan's intended roommate had a history of sexual offenses against children was not then unfairly prejudicial under the circumstances. *Stackhouse*,

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90 Wn. App. at 356. And the trial judge did not, therefore, abuse his discretion by refusing further inquiry into the Walls proceeding.

LIMITATION ON CROSS-EXAMINATION RE: SUCCESS OF THE SCC PROGRAM

Dr. Paul Spizman is a psychologist at the SCC. He testified for the State. He related Mr. Duncan's history of treatment and infractions at the SCC. He also stated that untreated sexual offenders have great difficulty learning to control criminal sexual behavior. On cross-examination, Mr. Duncan's counsel asked Dr. Spizman if he was aware of complaints about treatment at the SCC, including a federal lawsuit filed by Mr. Duncan alleging inadequate treatment. The State objected and argued that the parties had agreed that the federal lawsuit, which was still unresolved, was irrelevant to this civil commitment proceeding. Mr. Duncan argued that the success of the treatment program was now relevant due to the emphasis placed on his refusal to seek therapy. The trial court ruled that evidence about the federal lawsuit and the success or failure of the SCC's treatment program was "not the issue before this Court, and we can't possibly do it justice in any reasonable length of time." RP at 1424.

Mr. Duncan now assigns error to the trial court's refusal to allow him to ask about the success of the SCC programs generally.

A trial court has discretion to set the scope of cross-examination. ER 611(b). And we will not reverse the trial court's ruling absent a manifest abuse of that discretion. *State v. McDaniel*, 83 Wn. App. 179, 184-85, 920 P.2d 1218 (1996). Cross-examination

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should be limited to the subject matter of the direct examination and the credibility of the witness. But inquiry into other matters may be allowed. ER 611(b).

Involuntary commitment of an SVP under chapter 71.09 RCW is a civil proceeding. The Sixth Amendment right to confrontation does not, then, apply. *In re Det. of Brock*, 126 Wn. App. 957, 963, 110 P.3d 791 (2005). But due process may guarantee certain procedures in cross-examining witnesses because of the significant deprivation of liberty at stake. *Id.* We consider three factors: “(1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards; and (3) the governmental interest.” *Id.* at 964.

The private interest affected here is Mr. Duncan’s freedom from involuntary commitment. This interest is substantial. *Id.* But so is the State’s interest in limiting testimony to relevant issues. *See id.* (finding substantial government interest in limiting expert witnesses at SVP show cause hearing when documentary evidence is sufficient). In light of the relatively equal weight of these interests, the second factor becomes dispositive.

The court allowed Mr. Duncan to cross-examine Dr. Spizman. But the court refused to allow inquiry of Dr. Spizman as to the treatment program’s success rate. Mr. Duncan was allowed to testify that he chose not to attend treatment at the SCC because he did not find it meaningful for him. It was within the trial court’s discretion to limit a

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foray into the side issue of the program's general success rate for other participants. ER 611(b); *State v. King*, 113 Wn. App. 243, 289, 54 P.3d 1218 (2002) (scope of cross-examination is within the trial court's sound discretion).

The relevant question here was whether Mr. Duncan currently had a mental abnormality that made him likely to engage in predatory acts of sexual violence. Former RCW 71.09.020(1) (1995). The trial court's refusal to allow cross-examination into the general success of the SCC's treatment program did not increase the risk that Mr. Duncan would be erroneously committed. *Brock*, 126 Wn. App. at 964. The trial court did not deny Mr. Duncan's right to due process of law. Accordingly, the trial judge did not abuse his discretion by limiting the scope of questions put to Dr. Spizman on cross-examination.

#### EXCLUSION OF EXPERT TESTIMONY

Finally, Mr. Duncan contends the trial court denied him his right to due process by preventing another witness from testifying about the effectiveness of the mental health treatment at the SCC. Dr. Robert Halon is a forensic psychologist and marriage therapist. He testified that he gave Mr. Duncan a Rorschach (ink blot) test that indicated Mr. Duncan was not a schizophrenic. Dr. Halon felt that Mr. Duncan was impulsive, still fantasized about children, and could reoffend if angered. But he did not think the evidence established that Mr. Duncan had a mental abnormality such as pedophilia.

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Mr. Duncan's lawyer asked Dr. Halon if he had reviewed the treatment program at the SCC. Dr. Halon answered that he had reviewed the protocol and the deposition of an employee at the SCC. The State objected to Dr. Halon giving an opinion on the quality of treatment at the SCC. The State argued that this testimony was not relevant. The trial court agreed. It noted that Mr. Duncan could testify that he did not pursue treatment at the SCC because it did not help him. An expert's opinion on the general success rate of treatment at the SCC, the court continued, was just too much of a side issue. Mr. Duncan contends this limitation on expert testimony prevented him from rebutting the State's evidence that he simply chose not to participate in treatment. He asserts the inadequacy of the SCC treatment program was an essential element of his defense.

Again, we review a trial court's decision to exclude expert testimony for abuse of discretion. *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004); ER 702. The right to present defense witnesses is a fundamental element of due process. *State v. Ellis*, 136 Wn.2d 498, 527, 963 P.2d 843 (1998) (Talmadge, J., dissenting). This right is not unfettered, however. *Id.* at 528. The proffered evidence must be relevant. *Id.* In other words, the expert testimony must be helpful to the trier of fact. *Willis*, 151 Wn.2d at 262. Mr. Duncan urges this court to apply the procedural due process balancing factors set out in *Brock*, 126 Wn. App. at 964. But the offer of this expert testimony did not implicate the confrontation rights at issue in *Brock*. See *State v. Stenson*, 132 Wn.2d 668, 715 n.9, 940 P.2d 1239 (1997) (the proper test for the admissibility of expert testimony is under

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ER 702, not the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (adopted in *Brock*, 126 Wn. App. at 964)).

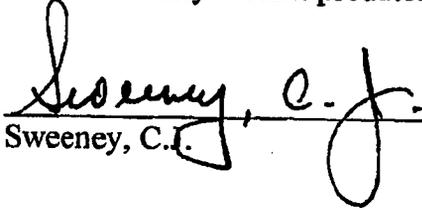
Dr. Halon had testified that Mr. Duncan had a developmental disability and that treatment programs are not very effective for people with developmental disabilities. Mr. Duncan argued that Dr. Halon's opinion of the quality of treatment at the SCC was necessary to show that even if Mr. Duncan had attended the treatment program, it would not have made a difference. But again, the relevant issue in this civil commitment proceeding was whether a current mental abnormality made Mr. Duncan likely to engage in predatory acts of sexual violence if released. Former RCW 71.09.020(1); former RCW 71.09.060(1) (1995). The success rate of a program is barely relevant to that question, and in any event is a side issue. The trial court did not then abuse its discretion by refusing to allow expert testimony on the success rate of the SCC treatment program.

#### CUMULATIVE ERROR

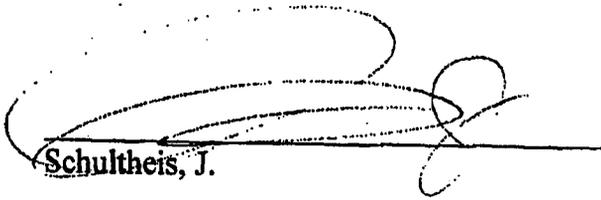
Mr. Duncan contends that even though the claimed evidentiary errors standing alone may not justify reversal, cumulatively they denied him a fair trial. We will reverse for cumulative error when several errors that are not sufficient standing alone may be prejudicial in their cumulative effect. *State v. Korum*, 157 Wn.2d 614, 652, 141 P.3d 13 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). We have concluded that the trial court did not err in its evidentiary rulings. There was then no cumulative error. *Korum*, 157 Wn.2d at 652.

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We affirm the order declaring Mr. Duncan a sexually violent predator.

  
Sweeney, C.J.

WE CONCUR:

  
Schultheis, J.

  
Stephens, J.

## **APPENDIX B**

FILED

JAN 11 2008

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

**In the Matter of the Detention of**

**BRYAN DUNCAN,**

**Appellant.**

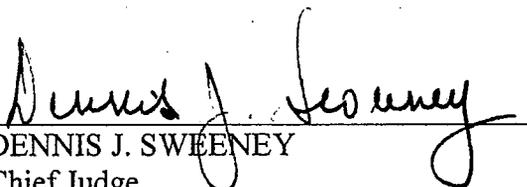
)  
) **No. 24820-8-III**  
)  
)  
) **ORDER DENYING**  
) **MOTION FOR**  
) **RECONSIDERATION**

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of December 4, 2007, is denied.

DATED: January 11, 2008

FOR THE COURT:

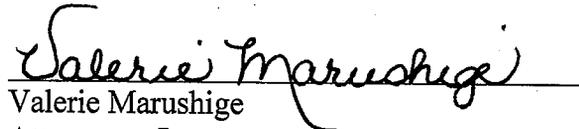
  
DENNIS J. SWEENEY  
Chief Judge

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Sarah Sappington, Office of Attorney General, 800 5<sup>th</sup> Avenue, Suite 2000, Seattle, Washington 98104-3188.

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

DATED this 9<sup>th</sup> day of February, 2008 in Kent, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851