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NO. 59666-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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IN RE THE DETENTION OF GALE WEST

STATE OF WASHINGTON,

Respondent,

v.

GALE WEST,

Appellant.

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

The Honorable Laura Inveen

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

The State filed a sexually violent predator commitment petition against the respondent Gale West. Mr. West sought discovery of all the 37 other evaluations of sexually violent predators Dr. Leslie Rawlings had compiled in order to rebut Dr. Rawlings's testimony that Mr. West was a sexually violent predator that posed such a risk to reoffend he had to be confined in a secure facility. The trial court denied his request. Mr. West appeals, arguing he was denied his constitutional right to present a defense.

During the commitment trial, the State elicited testimony from the Special Commitment Center ("SCC") Superintendent Henry Richards about the phases of treatment available at the SCC. Mr. West objected to the testimony as irrelevant, confusing and misleading to the jury and overly prejudicial. When Dr. Richards further testified about transitional housing available following treatment, Mr. West moved for a mistrial or at least a curative instruction to disregard the testimony, arguing the testimony mislead the jury to believing a committed individual can complete treatment and be released into the community, without the jury hearing that the SCC was subject to a federal injunction

due to its constitutionally inadequate treatment which provided no real path to future release into the community. The trial court denied Mr. West's motion and denied his request for a curative instruction. Mr. West argues on appeal the trial court erred in admitting irrelevant evidence, including the evidence of transitional housing, without providing an opportunity to rebut this testimony with evidence of the federal injunction and zero release rate. This served to mislead the jury and denied him his constitutional right to a fair trial.

B. ASSIGNMENTS OF ERROR.

1. The trial court erroneously admitted irrelevant evidence of the treatment phases at the Special Commitment Center and the transitional facilities, whose probative value was outweighed by its prejudicial effect.

2. The trial court denied Mr. West his constitutional due process right to a fair trial.

3. The trial court erroneously denied Mr. West's pretrial motion for Dr. Rawlings's evaluations and reports in other sexually violent predator cases, contrary to CrR 4.7, constitutional due process, and the Sixth Amendment right to present a defense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Under Evidence Rules 402 and 403, irrelevant evidence must be excluded, and even if the evidence is somewhat relevant, it must be excluded if the probative value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Here, Mr. West objected to the testimony of Special Commitment Center ("SCC") Superintendent Dr. Henry Richards, who had never met Mr. West and would only testify about the phases of treatment at the SCC and about the two transitional facilities the SCC had in place. Did the trial court err in allowing Dr. Richards to testify when the evidence was irrelevant to prove whether Mr. West was a sexually violent predator and even if the evidence was marginally relevant, it was confusing and misleading to the jury and its probative value was outweighed by its prejudicial effect? (Assignment of Error 1)

2. A respondent has a due process right to a fair trial. In the instant case, Dr. Richards testified that the SCC had two transitional houses which suggested Mr. West, once he completed his treatment, would be released into the community. Was Mr. West denied a fair trial, when the State was allowed to mislead the

jury into believing Mr. West would be released into the community and yet the jury was prevented from hearing that a federal injunction was in place because the SCC had no clear path for release and to date no person had ever been released from the SCC? (Assignment of Error 2).

3. Under CrR 4.7(a), a prosecutor must disclose to the defense “books, papers, documents ... or tangible objects” which the prosecutor “intends to use in the hearing or trial or which were obtained from or belonged to the defendant.” In *State v. Boyd, infra*, the Washington Supreme Court analyzed this rule and held that consistent with the Sixth Amendment right to present a defense and to effective representation of counsel, the rule mandates the State provide “meaningful access” by giving copies of the materials to the defense. Did the trial court’s ruling denying Mr. West access to Dr. Rawlings’s evaluations violate Mr. West’s right to present a defense and to the effective representation of counsel? (Assignment of Error 3)

4. Where the materials allegedly contained potentially exculpatory evidence, did the State’s refusal to provide the materials violate Mr. West’s Fifth and Fourteenth Amendment rights to due process of law? (Assignment of Error 3)

D. STATEMENT OF THE CASE.

On June 4, 2002, the State filed a petition and certification of probable cause, seeking to civilly commit Mr. West as a sexually violent predator. CP 1. The petition alleged Mr. West had served a sentence for Kidnapping in the First Degree and had two previous convictions of Sodomy, which constitute "sexually violent offenses" under RCW 71.09.020. CP 1. The State alleged Mr. West suffered from mental abnormalities and a personality disorder which made him likely to engage in predatory acts of sexual violence if not confined in a secure facility. *Id.* The Certification for Determination of Probable Cause indicated numerous prior child rape incidents and Mr. West's lack of sex offender treatment since 1977. CP 3-5.

At a probable cause hearing, Dr. Leslie Rawlings testified he had diagnosed Gale West with an antisocial personality disorder and pedophilia. 6/7/02RP 10-11<sup>1</sup> Following a review of his criminal history and with the assistance of actuarial tables, Dr. Rawlings opined Mr. West was likely to reoffend and needed to be confined in a secure facility. *Id.* at 48. The court found sufficient evidence

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<sup>1</sup> The Verbatim Report of Proceedings will be referred to by their date, followed by "RP" and the page number.

for the probable cause hearing to find Mr. West was more likely than not to reoffend if not confined to a secure facility. *Id.* at 68.

1. Discovery motion to obtain Dr. Rawlings's evaluations of other individual's evaluated for civil commitment. Before his commitment trial, Mr. West moved to obtain Dr. Rawling's reports and evaluations of other individuals accused of being sexual violent predators. Supp. CP \_\_\_, sub no. 83. Although the State objected, the trial court denied the State's motion to quash subpoena duces tecum and granted the respondent's motion to compel. CP 203. In the order, the court directed,

the names, addresses, and social security numbers that would compromise the privacy rights of the individuals evaluated, as well as those of their victims, shall be redacted. Provided further, the reports shall not be shown by counsel to their client, nor shall they be disseminated to anyone other than a professional with whom they are consulting in preparation for this case. Respondent's motion to compel is granted under these terms and deposition of Dr. Rawlings shall resume w/in 2 weeks.

*Id.*

The State filed a motion for reconsideration of the court's order, arguing the SVP reports were confidential and private reports protected under RCW 70.02 and HIPAA, and where no SVP petition was filed were additionally protected from disclosure by the work product doctrine. CP 280-87. Mr. West responded

that the SVP reports were not work product because neither Dr. Rawlings nor the individuals evaluated believed the evaluations would be confidential, since Dr. Rawlings specifically informs the evaluatees the evaluations are not confidential. CP 290-92. Even if the evaluations were work product, Mr. West argued he had a substantial need for the material which would “pierce” the work product protection. CP 293.

The court granted the State’s motion for reconsideration, ruling the reports generated by Dr. Rawlings for cases in which he was retained as an expert by the State, and for which legal proceedings were not filed, were prepared in anticipation of litigation, the respondent had not demonstrated a substantial need, nor was he unable to obtain the substantial equivalent of the materials by other means. CP 519.

Following Mr. West’s motion for clarification of the court’s order (CP 521), the court clarified “the state” included the End of Sentence Review Board, the Indeterminate Sentence Review Board, the Joint Forensic Unit, and the Washington State Attorney General’s Office, in addition to the King County Prosecuting Attorney’s Office. CP 525. Moreover, the court clarified the term

"publicly filed", did not include evaluations filed under seal, and noted,

Although the "work-privilege" doctrine may not apply to those evaluations provided to opposing counsel, the Court maintains the remaining rationale in the original order, together with the privacy rights of those evaluated, mandate these reports not be disclosed.

*Id.*

2. Motion to exclude or limit the testimony of Dr. Henry

Richards. Mr. West moved to exclude the testimony of Dr. Henry Richards, arguing it would deny him a fair trial for the State to question the director of the SCC about phases of treatment and transitional housing, when the defense was precluded from demonstrating the limits of the program and the fact that no one had ever graduated from the "treatment" program. CP 527-44; 1/31/07RP 124.<sup>2</sup>

Rather than present the testimony of someone on Mr. West's treatment team, the State instead decided to have Dr. Henry Richards, Superintendent of the Special Commitment Center, testify. He would testify about Mr. West's treatment,

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<sup>2</sup> The State had first planned to have Special Commitment Center Forensic Therapist Marshall Kirkpatrick testify about Mr. West, who had been a member of Mr. West's treatment team. CP 528.

however, but instead testify about the SCC treatment program in general. *Id.* Mr. West argued such testimony was irrelevant and would needlessly prolong the trial. Mr. West believed he would be denied a fair trial if the SCC Superintendent could testify about the treatment availabilities at the SCC, allowing the jury to believe release is possible, and then not be able to inform the jury that release does not occur and no one had ever actually graduated from the SCC program. 1/321/07RP 124.

Specifically, Mr. West sought to preclude testimony about “the seven phases of treatment,” because the defense was precluded from eliciting testimony about the treatment drawbacks at the SCC and the fact that no person had graduated from the SCC program. *Id.* at 124. Mr. West argued, if the only other reason to have Dr. Richards testify was to testify Mr. West dropped out of treatment, another State witness, Dr. Rawlings, would testify that Mr. West had dropped out of treatment. *Id.* at 125.

The State informed the court it would not seek to elicit testimony from Dr. Richards about how good the SCC treatment program was, but would instead only elicit testimony that Mr. West got to phase three of the seven phases available at the SCC and then dropped out of treatment. *Id.* at 125-26.

Mr. West argued it would be misleading to have Dr. Richards describe each of the seven phases of treatment, implying an end to the treatment program that “practically speaking, doesn’t exist.” *Id.* at 127.

Dr. Richards was then allowed to testify before the jury concerning the SCC program as follows:

State: Now, can you tell the jury what is the treatment program at the Special Commitment Center?

Dr. Richards: The Special Commitment Center’s treatment program is, I would say, it really has three components. One is just the environment of the Special Commitment Center itself. So we have different environments that comprise part of the treatment.

The initial environment that a resident might enter would be our total confinement center on McNeill Island, and that facility, as implied, is really designed to contain an individual and provide all the supports and security that make treatment possible.

The other environments we have are our transition facilities, one on McNeill Island and one here in Seattle. Those facilities are different, have somewhat of a different treatment, and are designed to have more access into the community and transition into the community. So that first component of the treatment is the holding environment itself and the staff, rules comprised in that facility.

1/31/07RP 158-59. Mr. West objected. *Id.* at 159. The court instructed the State to “move on.” *Id.*

Dr. Richards then talked about the seven phases of treatment offered:

The cognitive behavioral treatment itself, the programs are directed by professional staff, consist of six phases of treatment, beginning with introduction, accepting and learning about one's disorders, all the way through to practicing, showing that you can – you've learned and mastered certain skills that will reduce your recidivism risk and that you have chosen and demonstrated that you'll likely continue to choose to exercise those skills in the future. So those are the phases one through six, with the sixth phase being a community transition phase.

*Id.* at 159. Dr. Richards then went into greater detail of each phase offered at the SCC. *Id.* at 160-63.

Upon recess of the jury, Mr. West made an offer of proof, but also asked for a mistrial. *Id.* at 164-66.

We – the attorneys had all discussed the idea that we weren't going to get into the transition phases. I think it's probably miscommunication or lack of communication, but Dr. Richards got into that at least twice. This is part of the problem I really have, because now I'm forced to be in the position where I have to completely open the door, which is something we didn't want to do, and ask him questions about how many people get into the community phase. Of the people you're referring to the so-called community transition phase, many of them are on the island, still at their transitional facility on the island, and what we've done at this point is we've given the jury the impression . . . if Mr. West works hard and gets into treatment that . . . there's this community transition phase at some point.

1/31/07RP 165. Mr. West argued Dr. Richard's testimony regarding a transitional facility prejudiced his case because he would have to now elicit evidence prejudicial to his client such as the annual review process. *Id.* at 166. If the judge would not grant

a motion for mistrial, Mr. West argued the jury should be instructed that it not consider the availability of any transition facilities because it does not go to the elements of the SVP statute. *Id.* at 168.

The court denied the motion for mistrial and declined to instruct the jury. *Id.* at 170.

Mr. West then called Dr. Richards as a witness for an offer of proof. 1/31/07RP 173. Dr. Richards testified the Special Commitment Center has been under a federal injunction since 1992 because of the constitutionally inadequate treatment and conditions of confinement, since there was no "clear route for release." *Id.* at 173-74. Even after the injunction, the SCC was held in contempt of court for not following the court's order to make treatment at the SCC constitutionally adequate. *Id.* at 175-76.

At one point, the injunction was limited to the creation of an off island – a Seattle transitional facility. *Id.* at 176. The SCC now has two transitional facilities, one on McNeill Island, the other in Seattle in order to satisfy the injunction. *Id.* at 177. The Seattle transitional facility is still a secure facility, as any exit into the community must be accompanied by an escort, and must be approved by a transition team. *Id.* at 177-78.

As of January 31, 2007, only two individuals were in the Seattle transitional facility, while four other individuals were in the McNeill Island transitional facility. *Id.* at 178. Dr. Briody, part of an inspection of care committee, was contracted to provide a report of the quality of care standards at the SCC to be submitted to the federal court. *Id.* at 180-81. Dr. Briody filed a February 2006 declaration about the quality of care and in response, his SCC contract with the SCC was terminated. *Id.* Dr. Richards opined he was glad to terminate the contract, because Dr. Briody attempted to “undermine the legitimate authority of management staff.” *Id.* at 182.

Following the offer of proof, the court found the testimony elicited from Dr. Richards in the offer of proof would be inadmissible, except limited questioning about the transitional facility, such as whether it is still secure, the necessity of an escort, and the number of people currently housed in the facilities. *Id.* at 183.

This appeal timely follows. CP 989.

E. ARGUMENT.

1. THE TRIAL COURT ERRONEOUSLY ALLOWED DR. RICHARD'S IRRELEVANT TESTIMONY ABOUT TREATMENT PHASES AND TRANSITIONAL FACILITIES AT THE SPECIAL COMMITMENT CENTER AND ITS PROBATIVE WEIGHT WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

a. Information about phases of treatment at the Special Commitment Center and transitional facilities was not relevant to prove Mr. West was a sexually violent predator who needed to be confined in a secure facility. In order to be admissible, the evidence must be relevant. ER 402. To be relevant, the evidence must meet two requirements:

- (1) the evidence must have a tendency to prove or disprove a fact (probative value), and
- (2) the fact must be of consequence in the context of the other facts and the applicable substantive law (materiality).

*State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

ER 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407 (1986). In doubtful cases, the issue should be resolved in

favor of the defendant and the exclusion of evidence. *State. v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

In the present case, the State sought to civilly commit Mr. West as a sexually violent predator. CP 1. In order for a jury to find an individual is a sexually violent predator, the State must prove beyond a reasonable doubt, the individual was convicted of a crime of sexual violence and currently suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. *In re Detention of Turay*, 139 Wn.2d 379, 407, 986 P.2d 790 (1999), citing RCW 71.09.020(1) and RCW 71.09.060(1).

The State, therefore, was required to prove with Mr. West's criminal history that he had been convicted of a violent sex offense(s) and then have an expert psychiatrist testify about any mental abnormality or personality disorder that required Mr. West be placed at the SCC. RCW 71.09.020.

Mr. West never contested that he discontinued treatment and was not in treatment at the SCC. The State nonetheless sought to elicit testimony from Dr. Henry Richards about the treatment program and transitional facilities offered at the SCC. 1/31/07RP 158-60. Mr. West objected to the elicitation of such

evidence and moved for a mistrial. *Id.* at 159, 166. The trial court denied the motion for mistrial and allowed the evidence of the phases of treatment offered at the SCC, including the transitional housing. *Id.* at 170.

Evidence of transitional housing is not relevant to what the State had to prove at the SVP commitment trial, as no logical connection existed between the evidence and what is to be proven. The State had Dr. Rawlings testify so that it could prove that Mr. West had a mental abnormality that affected his control of his behavior such that he posed a risk to reoffend if not housed in a secure facility. The actual phases of treatment at the SCC and the fact that there are transitional facilities is not relevant to what the State had to prove. Accordingly, the trial court erred in ruling the deputy prosecutor could elicit testimony concerning phases of treatment at the SCC and transitional housing, because such evidence was not relevant.

b. The probative value of the evidence was outweighed by its prejudicial effect. ER 403 provides “evidence may be excluded if its probative value is substantially outweighed by the danger of *unfair prejudice, confusion of the issues, or*

*misleading the jury*, or by considerations of . . . needless presentation of cumulative evidence.

Rule 403 is instead concerned with what is loosely termed "unfair prejudice," usually meaning prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among the jurors. If the evidence is distinctly prejudicial in this sense, and if other less inflammatory evidence is available to adequately make the same point, the balance is tipped towards exclusion.

5 K. Tegland, Wash.Prac., Evidence § 106, at 349 (3d ed. 1989).

Evidence may be unfairly prejudicial under ER 403 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."

1 J. Weinstein & M. Berger, Evidence § 403[03], at 403-36 (1985).

The United States Supreme Court has held:

The term "unfair prejudice," as to a criminal defendant speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged. [Citations omitted.] "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

*Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 650, 136

L.Ed.2d 574 (1997) (quoting Advisory Committee's Notes on Fed.

Rule Evid. 403, 28 U.S. C. App. p. 860).

In the present case, Dr. Richards testified that there are six phases of treatment offered at the SCC and at the end of treatment there were transitional facilities that allowed the individual to return to the community. 1/31/07RP 158-63. Such testimony was confusing to the jury and prejudicial to Mr. West because it allowed the jury to believe that individuals at the SCC were all on a program that allowed them to complete treatment at the SCC and then be transitioned again into the community, which had rarely, if ever, happened. This Court should reverse the order of commitment and remand for a new trial.

c. The trial court denied Mr. West due process when it denied Mr. West's motion for a mistrial, refused to instruct the jury to disregard testimony about the transitional housing, and precluded Mr. West from eliciting testimony about the constitutionally inadequate treatment at the SCC. Mr. West, as an offer of proof, elicited from Dr. Richards that indeed only six individuals were currently housed the two transitional houses, two in Seattle and four on McNeill Island. 1/31/07RP 178. The trial court precluded any testimony regarding the federal injunction that called into question the adequacy of the treatment program implying it was a hoax without any real route for release. *Id.* at

173-74, 183. Dr. Richard's testimony suggesting routine release following adequate treatment without any chance to rebut the testimony was prejudicial to Mr. West and denied him a fair trial.

*Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), is instructive. In *Simmons*, the defendant beat to death an elderly woman in her home. 512 U.S. at 156. One week prior to his capital murder trial, Mr. Simmons pleaded guilty to first-degree burglary and two counts of criminal sexual conduct in connection with two prior assaults on elderly women. *Id.* Those convictions rendered Mr. Simmons ineligible for parole if convicted of any subsequent violent-crime offense. *Id.*

Over objection the trial court granted the prosecution's motion to bar defense from asking any questions during the entire trial about parole and life sentences. *Id.* at 157. Following the trial, Mr. Simmons was convicted of murder. *Id.* At the penalty phase, the prosecution argued that Simmons's future dangerousness was a factor for the jury to consider when fixing the appropriate punishment. *Id.*

In order to rebut the prosecutor's argument of future dangerousness, the defense sought to present evidence that Mr. Simmons dangerousness was limited to elderly women and not

further acts of violence was expected since he was isolated in prison and in concern that the jury might not understand “life imprisonment” does not carry a possibility of parole, asked the judge to clarify this point and define the term for the jury. *Id.* Defense counsel, to buttress the request, proffered evidence establishing Mr. Simmons’s parole ineligibility. *Id.*

During deliberation of the defendant’s sentence, the jury sent an inquiry “Does the imposition of a life sentence carry with it the possibility of parole.” *Simmons*, 512 U.S. at 160. Over defense objection, the trial court instructed the jury not to consider parole or parole eligibility in reaching its verdict. *Id.*

The United State Supreme Court reversed Mr. Simmons’s sentence for a violation of the Due Process Clause, which does not allow the execution of a person “on the basis of information which he had no opportunity to deny or explain.” 512 U.S. at 161, citing *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The *Simmons* Court noted,

In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury’s deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court’s

refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed. Three times petitioner asked to inform the jury that in fact he was ineligible for parole under state law; three times his request was denied. The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process.

*Simmons*, 512 U.S. at 161-62. In reversing the sentence, the Court concluded, "The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole. *Id.* at 171.

The same is true in the instant case, SCC Superintendent Richards testified that there are six phases of treatment at the SCC with two transitional facilities available to assist the individual's release back into the community. 1/31/07RP 159-63. The defense counsel was not allowed to talk about the federal injunction which was ordered because there was no real path for release from the SCC. *Id.* at 183. The jury was not allowed to hear testimony that no person had ever been released from the SCC and was invited to

believe Mr. West's confinement at the SCC would not be a life sentence but rather after some treatment he would be released back into the community. Like *Simmons*, the State was allowed to create a false dilemma by advancing generalized arguments regarding treatment and transitional houses, while, at the same time, preventing the jury from learning that the defendant never will be released from the SCC. *Simmons*, 512 U.S. at 171. The trial court in Mr. West's case should have granted the mistrial or at the very least instructed the jury to disregard Dr. Richard's testimony concerning the consequences of treatment as defense counsel sought. 1/31/07RP 167. Because Mr. West was denied his due process right to a fair trial, this Court must reverse.

2. THE TRIAL COURT ERRONEOUSLY DENIED MR. WEST'S DISCOVERY REQUEST FOR DR. RAWLING'S OTHER EVALUATIONS THEREBY DENYING MR. WEST HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

a. The defense motion requiring Dr. Rawlings to disclose his evaluations and reports. Mr. West moved pretrial for copies of evaluations and reports of other individuals he evaluated to determine whether they met the sexually violent predator criteria. Supp. CP \_\_, sub no. 83. The Court granted the motion; the State

moved for reconsideration, arguing the reports were confidential and work product. CP 203; Supp. CP 280-87.

Mr. West argued the reports were not work product because neither Dr. Rawlings nor the individuals evaluated believed the evaluations would be confidential, since Dr. Rawlings specifically informs the evaluatees the evaluations are not confidential. CP 290-92. Even if the evaluations were work product, Mr. West argued he had a substantial need for the material which would “pierce” the work product protection. CP 293.

A hearing was held before Judge Inveen on July 19, 2006, whereby the State argued the reports prepared by Dr. Rawlings of unfiled cases were subject to the work product privilege.

7/19/06RP at 3. The State conceded that the cases filed by the Attorney General’s Office were public record and not work product since they had been attached to the filings in court. *Id.* at 4. But those not covered by the work product rule should be excluded under RCW 70.02. *Id.*

Concerning RCW 70.02 and HIPAA, Mr. West argued that both apply to health care providers who provide treatment and Dr. Rawlings, as a forensic psychologist who evaluates individuals to determine whether they must be confined at the SCC provides no

treatment or services at all to these individuals. 7/19/06RP at 5, 10. In fact, Dr. Rawlings informs the evaluatee that he is not providing treatment. *Id.* at 11. Moreover, Dr. Rawlings's client is not the evaluatee but the Attorney General, the prosecutor, and various State institutions. *Id.* at 6-7. Mr. West was willing to redact any name or any other identifier from the materials requested. *Id.* at 9.

Concerning the work product argument for unfiled cases, Mr. West argued the prosecuting office is not the only party that hires him for these evaluations – at times independent agencies, such as the Joint Forensic Unit (“JFU”) and ISRB, hire Dr. Rawlings to evaluate an individual. *Id.* at 26. Mr. West argued these independent offices are not a party to litigation. *Id.* at 28. Lastly, Mr. West asserted the evaluatee when evaluated does not expect the report to remain confidential. *Id.* at 29. Instead, the evaluatee realizes the information retrieved by Dr. Rawlings will be reviewed and the used against him in a trial, and Dr. Rawlings specifically tells the evaluatee the evaluation is not confidential. *Id.* at 29-30.

Mr. West argued he had a substantial need for the reports and the denial of the reports would raise due process concerns and prevent him from preparing his defense. 7/19/06RP 30. In the 37

reports, Dr. Rawlings alleged he only found 22 of the evaluatees to have met the sexually violent predator criteria. *Id.* at 32. The defense wanted to review those reports to cross-examine Dr. Rawlings about the circumstances in which he found no basis for commitment. *Id.*

The court granted the State's motion for reconsideration and found the reports were protected work product. CP 519.

b. The trial court erred in denying the defense discovery motion where the evidence was subject to disclosure under CrR 4.7(a), Mr. West required meaningful access to the evidence in order to prepare for trial and receive the adequate representation guaranteed by the Sixth Amendment. Mr. West contends the denial of his discovery request – violated the mandatory disclosure rules of CrR 4.7, precluded him from preparing his defense, and inhibited his counsel's ability to prepare for trial. Because he was prejudiced by the constitutional error, he requests reversal and remand for a new trial at which he will be afforded access to the evidence.

In *State v. Boyd*, the Washington Supreme Court considered a similar issue presented on appeal here. 160 Wn.2d 424, 158 P.3d 54 (2007). *Boyd* and the two consolidated cases were

prosecutions for possession of child pornography in which the State sought to avoid providing discovery of computer files and documents, maintain the materials in the State's custody and restrict the defendant's access to times convenient to the State. 160 Wn.2d at 429. The court entered an order allowing defense counsel to access a mirror image of Boyd's hard drive, but only in a State facility, during two sessions, and only through the State's operating system and software. *Id.*

On review, the Supreme Court first analyzed which provision of CrR 4.7 applied. The Court held the applicable section was CrR 4.7(a), setting forth mandatory disclosures by the prosecution.<sup>3</sup> In so holding, the Court reasoned:

This rule could not be any clearer in establishing what the State must disclose, and this is precisely the type of evidence involved in these cases. The evident purpose of the disclosure requirement is to protect

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<sup>3</sup> That section of the rule reads:

**(a) Prosecutor's Obligations.**

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

....  
(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant.

the defendant's interests in getting meaningful access to evidence supporting the criminal charges in order to effectively prepare for trial and provide adequate representation. The evidence is offered to substantiate the criminal charges. We hold that CrR 4.7(a) controls the issue raised in these cases.

*Boyd*, 158 P.3d at 59.

The Court next addressed what “disclose” means for purposes of the rule, and concluded that “disclose” includes making actual copies of certain kinds of evidence. The Court analyzed the rule in light of the Sixth Amendment right to the effective assistance of counsel as enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984), and reasoned:

The principles underlying CrR 4.7 require *meaningful access* to copies based on fairness and the right to adequate representation. The discovery rules “are designed to enhance the search for truth” and their application by the trial court should “insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.”

*Id.* (quoting *State v. Boehme*, 71 Wn.2d 621, 632-33, 430 P.2d 427 (1967) (emphasis added)). The Court reiterated that “the revelation of facts must be meaningful” in order to ensure a defendant receives the effective assistance of counsel to which he is entitled under the Sixth Amendment. *Id.* at 60. The Court thus held, “Where the nature of the case is such that copies are necessary in

order that defense counsel can fulfill this critical role, CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial.” *Id.*

c. The material was not privileged work product. For civil cases, CR 26 allows for discovery of anything material to the litigation and not protected by privilege, such as work product which has qualified immunity from discovery. *Harris v. Drake*, 152 Wn.2d 480, 485-86, 99 P.3d 872 (2004).

Under the work product doctrine, documents prepared in anticipation of litigation are discoverable only upon a showing of substantial need. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985).

*Id.* at 486 The work product doctrine is incorporated in CR 26(b)(4), which allows discovery of documents upon a showing that the party has “substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

CR 26(b)(5) concerns discovery from experts. CR 26(b)(5) provides that when a party retains an expert, who acquires or develops facts and opinions in anticipation of litigation, and the party does not expect to call that expert at trial, another party may obtain discovery only as provided in DR 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to

obtain facts or opinions on the same subject by other means.

*Harris*, 152 Wn.2d at 486.

In determining whether the work product privilege should apply, the court must consider three questions:

1. Did the work product protection attach in anticipation of litigation between the parties?;
2. If the privilege attached, did it terminate before the trial?; and
3. If the privilege attached and did not terminate, was it properly claimed at the trial of the instant litigation between the parties?

152 Wn.2d at 487. In *Johnson v. McCay*, the Court of Appeals held that under the first question above, work product protection applies “only insofar as the information sought was obtained for the very purpose of preparing for the litigation in question. 77 Wn.App. 603, 609, 893 P.2d 641 (1995), citing *Grinnell Corp. v. Hackett*, 70 F.R.D. 326, 332 (D.R.I. 1976). The *Johnson* Court relied on *Wright’s Federal Practice and Procedure* and concluded “documents prepared for one who is not a party to the present suit are wholly unprotected by Rule 26(b).” *Johnson*, 77 Wn.App. at 609, quoting 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 354 (2d ed. 1994). Here, the material sought in the instant case was not

information that Dr. Rawlings ever ascertained in preparation for Mr. West's commitment trial and therefore cannot be protected work product.

Even if this Court believes the reports of other individuals was once protected by privilege, under the second question listed above, the privilege terminated by the time of Mr. West's commitment trial. The privilege that may or may not have existed between Dr. Rawlings and the 37 other evaluatees terminated when Dr. Rawlings either decided not to advocate for commitment or the case was decided by a jury. Moreover, the persons evaluated earlier had no expectation of privacy, like the insured had in *Harris*, since Dr. Rawlings made it clear that the evaluations were not confidential.

Lastly, under the final question, if the privilege attached and did not terminate, was it properly claimed at the trial of the instant litigation between the parties? The State was not the proper party to claim the privilege. The 37 other evaluatees did not agree to be evaluated by Dr. Rawlings nor did they believe Dr. Rawlings was their advocate. The evaluatees were all in the same position as Mr. West, and other persons Dr. Rawlings was evaluating in order to determine whether they would be confined in a secure facility.

The relationship between the evaluatees and Dr. Rawlings is adversarial and never aligned. Mr. West is entitled to reversal of the commitment order and remand for a new trial at which he will be properly afforded access to Dr. Rawlings former evaluations.

d. Even if this Court decides the reports were work product, Mr. West had a substantial need for the materials. Under CR 26(b)(4), Mr. West may still obtain work product documents “upon a showing that the party seeking discovery has substantial need o the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 401, 706 P.2d 212 (1985), citing *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577 (7<sup>th</sup> Cir. 1981).

In the instant case, Mr. West had a substantial need to obtain the reports of unfiled cases, so that the defense could understand situations when Dr. Rawlings did not believe a person satisfied the SVP criteria and view cases where the evaluatees are similar to Mr. West in age, criminal history, and mental abnormalities. The information was required to properly cross-

examine the only expert who testified as to Mr. West's pedophilia and sadism diagnoses.

e. Mr. West was also entitled to the evidence under the Due Process Clauses of the Fifth and Fourteenth Amendments and *Brady v. Maryland*. As the Court in *Boyd* also recognized, principles of due process require the State to give an accused person evidence "favorable to an accused ... where the evidence is material either to guilt or to punishment." *Boyd*, 158 P.3d at 60 (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)). "The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

Mr. West's attorneys could have found evidence in the reports that was both favorable to Mr. West, which would have enabled him to counter the State's claim even at his advanced age (52 years old), he still had to be committed to a secure facility. This Court should hold the denial of Mr. West's discovery request violated due process.

F. CONCLUSION.

For the foregoing reasons, Mr. West requests this Court reverse the commitment order and remand for a new trial.

DATED this 19<sup>th</sup> day of February, 2008.

Respectfully submitted,



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Washington Appellate Project (91052)  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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IN RE THE DETENTION OF	)	
	)	
GALE WEST,	)	NO. 59666-7-I
	)	
APPELLANT.	)	
	)	

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**CERTIFICATE OF SERVICE**

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 19<sup>TH</sup> DAY OF FEBRUARY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY SVP UNIT KING COUNTY ADMINISTRATION BLDG. 500 FOURTH AVENUE, 9 <sup>TH</sup> FLR SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] GALE WEST DSHS SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2008.

X \_\_\_\_\_ *maria*

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