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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE: DETENTION OF GALE WEST

STATE OF WASHINGTON,

Respondent,

v.

GALE WEST,

Petitioner.

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

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER.

Gale West, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. West seeks review of the Court of Appeals' decision dated November 10, 2008, a copy of which is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A person facing indefinite, involuntary commitment under the sexually violent predator (SVP) laws has a Fourteenth Amendment right to due process of law, including the right to prepare and present a defense, as well as statutory rights to counsel and a fair trial by jury. In the case at bar, the State's expert predicated his credibility and experience on having reviewed a number of SVP petitions and finding a significant percent of those individuals did not meet the criteria for commitment. Mr. West sought pretrial discovery of the evaluations in which the expert had not recommended SVP commitment. Did the trial court and Court of Appeals err and deny Mr. West his right to present a defense by

finding the expert's evaluations in other cases were undiscoverable work product, even though the expert mentioned those evaluations in his testimony, and thus denied Mr. West access to those reports?

2. Does the court's refusal to provide Mr. West with access to evaluations used to bolster the State's expert's credibility and demonstrate the expert's experience present an issue of substantial public interest?

3. Mr. West's right to due process of law includes the rights to effectively cross-examine the State's witnesses and to exclude irrelevant and unduly prejudicial information from a trial at which life-long custodial commitment is at stake. Here, the court erroneously admitted evidence that Mr. West would have numerous treatment options available if committed, and denied Mr. West the opportunity to challenge the actual availability and effectiveness of this treatment. Did the admission of irrelevant information about available treatment options improperly distract the jury from the essential elements of commitment, suggest commitment should occur on an improper basis, and violate Mr. West's right to due process of law?

4. In light of the Court of Appeals ruling that treatment available to committed offenders is inadmissible in an SVP case in In re Detention of Post,¹ is this issue one of substantial public interest meriting review?

D. STATEMENT OF THE CASE.

Before his commitment trial, Gale West asked to review reports written by the State's expert when he evaluated other people facing SVP commitment proceedings, including those in which he recommended not to commit the individual. The trial court initially granted Mr. West's motion to compel discovery with the *proviso* that the information disclosed would be redacted to exclude identifying information of the person evaluated and would be viewed only by the attorneys and not the client or others. CP 203. But the court reversed itself following a State request for reconsideration. CP 519. The court then denied Mr. West's discovery request, finding the evaluations were "work product" prepared in anticipation of litigation and disclosure would violate the privacy rights of the people examined. As expected, Dr. Leslie Rawlings testified that he routinely reviewed files of sexual offenders for whom the State sought civil commitment and often

¹ 145 Wn.App. 748, 187 P.3d 803 (2008).

recommended against civil commitment. 2/5/07RP 24-25. The State used this evidence as proof of Dr. Rawlings' fairness and credibility. 2/13/07RP 8-9.

During the commitment trial, Mr. West objected to testimony regarding the phases of treatment available at the Special Commitment Center (SCC) from Dr. Henry Richards, the director of the SCC. Mr. West explained that this information should be inadmissible unless he was allowed to challenge the efficacy of the treatment offered and the extreme unlikelihood that he would ever "graduate" from this program based on the fact that no one had ever completed all phases of treatment. 1/31/07RP 124-27, 167-83; CP 640-41. He elaborated on the need to meaningfully cross-examine the witness's testimony by questioning the availability and meaningfulness of such treatment. The trial court barred Mr. West from discussing problems with the treatment program while allowing the State to introduce evidence of the availability of treatment for committed SVP offenders. Several jurors asked questions about the success rates of this treatment. CP 779-80, 825-28.

The Court of Appeals ruled that Dr. Rawlings' evaluations of other people in the SVP context were protected work product that

were not subject to discovery. The Court of Appeals further ruled that admitting evidence of treatment available to committed offenders was not harmful to Mr. West.

The facts are further set forth in the Court of Appeals opinion, pages 2-4, Appellant's Opening Brief, pages 5-13, and throughout the pertinent argument discussions. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT.

1. THE LIMITS ON DISCOVERY IMPROPERLY HAMPERED THE ABILITY TO PRESENT A DEFENSE AND RAISES AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE

a. Due process requires meaningful access to discovery and the right to present a defense in a SVP commitment trial. Although a SVP commitment trial carries a "civil" label, a person against whom involuntary, indefinite commitment is sought possesses many rights equivalent to those guaranteed to a person accused of a crime. See In re Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1993) (due process protections of criminal cases apply where SVP statute indicates similar standards); U.S. Const. amend. 14; Wash. Const. Art. I, §§ 3, 21.

The right to procedural due process requires, at a minimum, the right to counsel, to cross-examine witnesses, and to present witnesses at a civil commitment trial. Specht v. Patterson, 386 U.S. 605, 609-10, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); see In re Detention of Stout, 159 Wn.2d 357, 371, 150 P.3d 86 (2007) (“ample opportunity to cross-examine” witness at pretrial deposition satisfies due process in SVP proceeding); In re Detention of Schuoler, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986) (rights to counsel, to present evidence, and to cross-examining witnesses inherent aspects of fair mental health hearing). Mr. West is entitled to the same procedural protections afforded to involuntary mental committees. Baxstrom v. Herold, 383 U.S. 107, 110-11, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); RCW 71.05.200(1)(d); RCW 71.05.250(2); RCW 71.05.310 (right to cross-examine).

SVP commitment requires many of the procedural protections afforded criminal defendants because of the fundamental deprivation of liberty. See Young, 122 Wn.2d at 48 (due process protections of criminal cases apply where SVP statute indicates similar standards); see also In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.2d 714 (2006) (same “constitutionally prescribed unanimity requirement” as in criminal

cases applies to SVP proceedings); RCW 71.09.050 (granting accused in SVP proceeding rights to attorney, expert witnesses, and 12-person jury); RCW 71.09.060 (requiring State to prove SVP allegations beyond a reasonable doubt to unanimous jury). These rights include the right to present a defense. The right to present a defense is meaningful only if it includes the right to sufficient discovery and cross-examination of the State's evidence.

b. Evidence used to bolster the State's expert's opinion and establish his credibility was critical to the defense and not privileged work product. In the case at bar, the trial court initially granted Mr. West's discovery request for information underlying the State's expert's opinion and credibility assessment. CP 203. The court ordered that Dr. Rawling's evaluations be disclosed only to counsel, with identifying information redacted, so that counsel could prepare its defense, including cross-examining the expert's claim that he routinely found people he evaluated did not meet the criteria for commitment. Id. Indeed, at trial, the State emphasized Dr. Rawling's credibility and fair-mindedness were established by his evaluations of other people and his conclusions in 60 percent of those cases that people did not meet the criteria for commitment.

The State specifically argued to the jury that it is "important" that Dr. Rawlings finds someone meets the criteria for commitment in only 60 percent of the cases he has evaluated. "It's important because it shows you his objectivity, and he explained to you that if he says this person is not likely to reoffense, that's it." 2/13/07RP 8-9.

Yet the court reconsidered its ruling granting discovery pertaining to Dr. Rawlings' evaluations of others and barred Mr. West access to this information. The Court of Appeals found that Dr. Rawling's evaluations were work product, prepared for litigation, and there was no "substantial need" to give Mr. West access to this work product.

The Court of Appeals ruling ignores the importance of discovery of the basis of the expert's opinion and the ability to cross-examine the expert as to his claim that he routinely evaluates others and often finds these people do not meet the criteria for commitment. The work product doctrine was misapplied to the circumstances of this case. Moreover, there is a substantial need for this information, which cannot be gathered from any other source as only Dr. Rawlings and the State can speak to evaluations Dr. Rawlings performs that do not result in publically filed court

cases. Thus the State insulates its expert from full, fair and effective cross-examination by claiming a work product privilege in materials the expert prepares at the State's request and for which the State uses as a basis to prove the expert's fairness and lack of bias. The ruling is contrary to the constitutional right to due process of law.

Substantial public interest favors review in the case at bar, to discuss the right to prepare a defense in the SVP context, where the State possesses a trove of information about its experts which the defense cannot access but which the State uses to enhance its case.

2. THE COURT'S ADMISSION OF SCC TREATMENT AVAILABLE ONLY IF THE JURY FAVORED MR. WEST'S COMMITMENT, WITHOUT ALLOWING EVIDENCE CRITICIZING THE TREATMENT, VIOLATED MR. WEST'S RIGHT TO A FAIR TRIAL

The right to due process of law bars the State from massively curtailing Mr. West's liberty without adequate procedural protections. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980); U.S. Const. amend. 14; Wash. Const, Art, I, § 3. He has a statutory right to counsel, to a trial of a 12-person jury, a

unanimous verdict, and to adequate cross-examination of the evidence against him. Stout, 159 Wn.2d at 371; see RCW 71.09.050 (granting accused in SVP proceeding rights to attorney, expert witnesses, and 12-person jury); RCW 71.09.060 (requiring State to prove SVP allegations beyond a reasonable doubt to unanimous jury).

Here, the State was required to prove Mr. West he had been convicted of a violent sex offense and had a 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 engaged 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.

In re Detention of Post, 145 Wn.App. 748, 187 P.3d 803 (2008).

The State used Dr. Rawlings to establish 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. Dr.

Richards had no direct involvement in treating Mr. West.

The actual phases of treatment at the SCC and the fact that there are transitional facilities are not relevant to what the State had to prove, and are not admissible under the statute. Post, 145 Wn.App. at 746-47. The notion of treatment offered *upon commitment* encouraged the jury to commit Mr. West on an improper basis. Id. Evidence of treatment available to Mr. West if committed was improperly admitted. Id.

This error was compounded by the court's refusal to allow Mr. West to challenge the State's claim of available treatment options with evidence indicating the treatment was ineffective, as demonstrated by the fact that the State had been under court order for failing to provide the bare minimum of constitutionally adequate treatment and that in all the years of the SCC's existence, few if anyone actually "graduated" from this treatment. Mr. West asserted that of the hundreds of people committed, only a few were

ever allowed any transition to less restrictive alternatives under the State's program. Denying Mr. West the ability to confront and challenge the substance of the State's claim further denied Mr. West his right to contest the State's evidence.

This error was not harmless. The jury asked a number of questions about the phases of SCC treatment. The evidence of available treatment options assured the jury that Mr. West would be transitioned into the community under the State's guidance if committed, and to feel assured that commitment would be the best avenue for offering him services and assistance that he would not have access to if not committed. The evidence distracted the jury from the essential elements of commitment, confused the issues, and encouraged a verdict on an improper grounds without permitting Mr. West to adequately rebut the evidence against him. Encouraging the jury to think release is imminent is contrary to statute and the rules of fundamental fairness. Review of this matter is in substantial public interest based on the likelihood the State will rely on treatment options in numerous SVP commitment cases.

F. CONCLUSION.

Based on the foregoing, Petitioner Gale West respectfully requests that review be granted because the decision of the Court of Appeals is inconsistent with prior decisions of this Court, contrary to the constitutional right to due process of law, and presents issues of substantial public importance pursuant to RAP 13.4(b).

DATED this 10th day of December 2008.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

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Washington Appellate Project

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of)	NO. 59666-7-1
)	
GALE WEST.)	DIVISION ONE
)	
)	UNPUBLISHED OPINION
)	
_____)	FILED: November 10, 2008

LEACH, J. — Gale West appeals his civil commitment as a sexually violent predator (SVP) under chapter 71.09 RCW. He claims that the trial court erred when it (1) barred discovery of other individuals' mental health reports prepared by the State's expert that did not lead to SVP proceedings, (2) admitted testimony about phases of the Special Commitment Center (SCC) treatment program in which West did not participate, as well as testimony about transitional release, and (3) excluded testimony relating to the SCC federal injunction and conditions of confinement. We hold that the trial properly denied discovery of the reports as work product for which West failed to establish substantial need and correctly excluded evidence regarding the federal injunction and terms of confinement. Any error the trial court may have committed in admitting evidence about the SCC treatment phases and transitional release was harmless. Therefore, we affirm.

Background

On June 4, 2002, the State filed a petition and certification of probable cause, seeking to civilly commit West as an SVP under chapter 71.09 RCW.¹ The petition alleged that West's 1981 conviction for kidnapping in the first degree and two convictions for sodomy in 1974 constituted "sexually violent offenses" under RCW 71.09.020 and that West suffered from a mental abnormality or personality disorder which made him likely to engage in predatory acts if not confined in a secure facility.

In support of these allegations, the certification extensively documented West's history of sexual assaults, which included numerous incidents of rape and molestation, as well as West's record of multiple infractions while incarcerated. The certification also reported that throughout this history, West participated in only one sex offender treatment program, dating back to 1975—a program from which he was removed after 25 months of participation for committing offenses involving drug use and sexual misconduct.

Additionally, the certification included evaluations from two psychologists, Drs. Meri Mendelsohn and Leslie Rawlings. In the first evaluation, dated July 26, 2001, Mendelsohn, a psychologist with the Department of Corrections (DOC), concluded that West met the criteria of an SVP based on her examinations of him. Mendelsohn further reported that West lacked awareness of his drug

¹ RCW 71.09.020(16) defines a "sexually violent predator" as "any person who has been convicted of or charged with a crime of sexual violence and who 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."

dependency and the impact of his crimes and suffered from pedophilia and paraphilia, not otherwise specified. In the second evaluation, Rawlings, a certified sex offender treatment provider and licensed psychologist, performed a record review of West based on 2,427 pages of police reports, court documents, psychological evaluations, and DOC records.² Rawlings determined that West satisfied the definition of an SVP and also suffered from pedophilia and antisocial personality disorder.³

Rawlings confirmed his findings in a second report, dated November 2005, after conducting a three-day forensic interview of West and reviewing over 6,000 pages of discovery material. In this report, Rawlings stated that West met the SVP criteria and rendered diagnoses of pedophilia, sexual sadism, and antisocial personality disorder.

West deposed Rawlings on May 8, 2006. At this deposition, West learned that Rawlings had performed 37 evaluations of persons considered by the State for civil commitment as an SVP. In 22 cases, Rawlings had recommended SVP proceedings, while in 15 cases he had not.⁴ On May 30, 2006, West served a subpoena for all 37 reports. In a subsequent motion to compel, West proposed identifying information be redacted in the 15 reports involving unfiled petitions. The trial court denied the State's motion to quash this subpoena. After the State

² West declined an interview with Rawlings.

³ Rawlings testified about these findings at West's probable cause hearing on June 7, 2002. The court concluded that there was sufficient evidence to find that West was more likely than not to reoffend if not confined to a secure facility.

⁴ In the 22 cases that led to SVP proceedings, Rawlings' report was attached to the petition and entered into the public record pursuant to chapter 71.09 RCW.

moved for reconsideration, however, the trial court barred discovery of the 15 reports on grounds that they were work product for which West had not demonstrated substantial need as required by CR 26(b)(4).

The trial court also denied West's motion to strike Henry Richards, the SCC superintendent, from the State's witness list. Because Richards planned to discuss phases of the SCC treatment program in which West did not participate—West had dropped out in 2002 after reaching phase two of the six-phase program—West claimed that Richards' testimony was irrelevant. At trial, Richards testified about the SCC treatment program as follows:

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

A. The Special Commitment Center's treatment program . . . 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.

West objected. After the court instructed the State to "move on," Richards proceeded to describe the phases of the SCC treatment program:

[The SCC treatment] program consist[s] of six phases of treatment, beginning with introduction, accepting and learning

about one's disorders, all the way through to practicing, showing that . . . 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. . . . [T]hose are the phases one through six, with the sixth phase being a community transition phase.

Richards then provided more details about the different components of the SCC program. In a sidebar, West requested that the jury be instructed to focus on the SVP criteria and not on the availability of transitional facilities. The court declined to so instruct the jury.

West then called Richards as a witness to provide an offer of proof. Richards testified that the SCC had been under a federal injunction since 1992 for constitutionally inadequate treatment and conditions of confinement. The court ruled this testimony inadmissible.

In total, the State called 21 witnesses, with Rawlings testifying as its primary expert. West testified on his own behalf and called three witnesses, none of whom were expert witnesses. On February 14, 2007, a unanimous jury concluded that West was an SVP requiring total confinement. West appeals the commitment order.

Standard of Review

We review a trial court's discovery and evidentiary rulings for abuse of discretion.⁵ “When a trial court's exercise of its discretion is manifestly

⁵ In re Det. of Post, ___ Wn. App. ___, 187 P.3d 803, 810 n.8 (2008) (quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists.”⁶

Discussion

A. Discovery Ruling Regarding Mental Health Reports

1. Work Product Protection

West argues that the trial court should have compelled the production of Rawlings’ mental health reports in unfiled cases because these reports were not protected under the work product rule. We disagree. The trial court did not abuse its discretion in finding that the reports were work product and thus not discoverable.⁷

CR 26(b)(4), which establishes the work product rule, provides:

Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials . . . and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.^[8]

⁶ Post, 187 P.3d at 810 n.8 (citing Stenson, 132 Wn.2d at 701).

⁷ The trial court confined its application of the work product rule to the facts contained in Rawlings’ reports. As these reports also contain Rawlings’ opinions, we further consider whether the reports are entitled to protection as opinion work product.

⁸ CR 26(b)(4). See also Harris v. Drake, 116 Wn. App. 261, 269, 65 P.3d 350, (2003) (stating that CR 26(b)(4) and (b)(5) “must be read together where . . . ‘work product is claimed and discovery from an expert is sought’”) (quoting In re Firestorm 1991, 129 Wn.2d 130, 158, 916 P.2d 411 (1996) (Madsen, J., concurring)), aff’d, 152 Wn.2d 480, 99 P.3d 872 (2004).

Thus, CR 26(b)(4) states the test for “documents and tangible things” or factual work product and provides for protection of “mental impressions, conclusions, opinions, or legal theories” or opinion work product.⁹ West fails to meet the required showing for both factual and opinion work product.

The test for discovery of factual work product is “whether the documents were prepared in anticipation of litigation and, if so, whether the party seeking discovery can show substantial need.”¹⁰ West fails both prongs of this test.

In determining whether documents are prepared “in anticipation of litigation,” our courts have “a measure of discretion in administering this requirement. Materials may be protected even though they are not prepared while litigation is in progress. The prospect of litigation should be sufficient to trigger the rule.”¹¹ Moreover, this protection “extends beyond the litigation in which the protected materials were developed.”¹² Therefore, documents prepared for litigation that never proceeds to trial may still receive protection in subsequent proceedings.

For example, in Dever v. Fowler,¹³ this court found that documents were prepared in anticipation of litigation when they were developed in a prior case

⁹ See Firestorm, 129 Wn.2d at 159 (“[CR 26 (b)(4)] concerns both ordinary factual work product and opinion work product.”).

¹⁰ Heidebrink v. Moriwaki, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). The State claims that the “exceptional circumstances” test under CR 26(b)(5)(B) also applies. However, CR 26(b)(5)(B) is relevant only when the expert “is not expected to be called as a witness at trial.” CR 26(b)(5)(B). Because Rawlings testified at West’s commitment trial, the State’s claim of protection under Rule 26(b)(5)(B) fails.

¹¹ 14 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 13.11, at 407 (2003).

¹² Harris, 152 Wn.2d at 491.

¹³ 63 Wn. App. 35, 816 P.2d 1237 (1991).

that did not proceed to trial.¹⁴ In Dever, a prosecutor charged Dever with arson and prepared documents in anticipation of trial.¹⁵ The prosecutor dismissed the case before trial, and Dever filed an action for malicious prosecution against the investigating fire marshal.¹⁶ When Dever sought discovery of the prosecutor's documents, the prosecutor claimed work product protection, even though he was not a party to the civil case.¹⁷ The court concluded that the prosecutor's documents were protected from discovery: "[B]ased on the underlying purposes served by the work-product doctrine, . . . protection under the work product doctrine extends to documents prepared in anticipation of any litigation, regardless of whether the party from whom it is requested is a party in the present litigation."¹⁸

In this case, Rawlings' reports were prepared "in anticipation of litigation." Even though these reports did not lead to proceedings under chapter 71.09 RCW against the examined individuals, they were developed with the prospect of such proceedings. Moreover, the work product privilege held by the State—which initially attached to the information Rawlings acquired when he examined individuals as the State's expert—extended to West's commitment trial.¹⁹

¹⁴ Dever, 63 Wn. App. at 47.

¹⁵ Dever, 63 Wn. App. at 38.

¹⁶ Dever, 63 Wn. App. at 39.

¹⁷ Dever, 63 Wn. App. at 46.

¹⁸ Dever, 63 Wn. App. at 47.

¹⁹ See Harris, 116 Wn. App. at 278-79 ("In general, the holders of work product protection are the person who prepared a document or tangible thing in anticipation of litigation, or who retained an expert to acquire and develop facts and opinions in anticipation of litigation."). Here, the State is the holder of the work product privilege as it retained Rawlings as an expert to examine

West mistakenly focuses on the relationship between Rawlings and the examined individuals, claiming that the holders of the privilege are the examinees who are absent in the present litigation. This misperception also leads West to argue that the work product privilege terminated when Rawlings “either decided not to advocate for commitment or the case was decided by a jury.” Because the State is the holder of this work product privilege, it was properly claimed by the State and did not terminate after attaching to the information acquired during Rawlings’ examinations. The trial court correctly concluded that the reports were prepared in anticipation of litigation.

The second prong of the test requires that the party seeking discovery show “substantial need.” In deciding whether substantial need exists, our courts “look to whether the work product is the only source of information, so that the person seeking disclosure is unable to obtain the information elsewhere.”²⁰ In Heidebrink v. Moriwaki,²¹ for instance, our Supreme Court found that the plaintiff failed to show “substantial need” when she did not obtain information from the available defendant.²² The plaintiff in Heidebrink sued for injuries received in an automobile accident and attempted to discover a recorded statement made by the defendant to his insurance company.²³ The insurance company refused to produce the statement, asserting that it was work product.²⁴ Our Supreme Court

individuals, including West, and to assist it in deciding whether the State should initiate proceedings under chapter RCW 71.09.

²⁰ 14 TEGLAND, at 408.

²¹ 104 Wn.2d 392, 706 P.2d 212 (1985).

²² Heidebrink, 104 Wn.2d at 402.

²³ Heidebrink, 104 Wn.2d at 393-94.

²⁴ Heidebrink, 104 Wn.2d at 394.

agreed, finding that the plaintiff failed to show substantial need for the statement because the defendant was “not unavailable . . . [and] [t]here is no claim that he has no present recollection of the events in question.”²⁵ Pointing out that the “primary reason for acquiring the statement . . . [was] impeachment,”²⁶ the court further stated that “[i]f the possibility of impeachment alone were [sic] sufficient to show substantial need, the work product immunity rule . . . would be meaningless as [a]ny effort at discovery would be said to have a possible impeachment purpose.”²⁷

Here, the trial court found that West did not show substantial need for the reports because he had other means of obtaining information contained in them:

[West] has not demonstrated a substantial need of the materials in the preparation of his case nor that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. . . . The information is available by examining Dr. Rawlings regarding his methodology and conclusion relating to this case, as well as by virtue of the Respondent's own expert, who has formulated an opinion on Dr. Rawling's [sic] methodology. . . . In any event, the respondent has access to many other reports prepared by Dr. Rawlings for filed cases.

Furthermore, the trial court noted that “the proffered reasons for disclosure . . . are in essence to seek information to impeach the expert about his conclusion regarding his evaluation of Mr. West.” Like the plaintiff in Heidebrink, West did not demonstrate substantial need for Rawlings' reports in unfiled cases. In sum, the facts and circumstances of this case establish that the reports were prepared in anticipation of litigation and that West failed to show substantial need for them.

²⁵ Heidebrink, 104 Wn.2d at 402.

²⁶ Heidebrink, 104 Wn.2d at 402.

²⁷ Heidebrink, 104 Wn.2d at 402 (quoting Thomas v. Harrison, 634 P.2d 328, 333 (Wyo. 1981)).

The trial court properly denied West discovery of the factual information in the reports as factual work product under CR 26(b)(4).

We further note that, compared to factual work product, “[o]pinion work product receives greater protection than [factual] work product.”²⁸ “Opinion work product . . . enjoys nearly absolute immunity. . . . The court may release it only in very rare and extraordinary circumstances.”²⁹ The greater protection afforded to the opinions in Rawlings’ reports further supports the trial court’s decision to deny their discovery.

Even if the trial court erred in finding that the reports were entitled to work product protection, this error would not warrant reversal. “Error without prejudice is not grounds for reversal, and error is not prejudicial unless it affects the case outcome.”³⁰ Here, the evidence supporting the jury’s decision was overwhelming. Production of the 15 reports at issue would not have affected the outcome.

2. Additional Grounds

West asserts several other grounds to support his contention that the trial court erred in barring discovery of the mental health reports. First, West argues that under Brady v. Maryland³¹ he was denied due process. Although

²⁸ Firestorm, 129 Wn.2d at 162.

²⁹ Soter v. Cowles Publ’g Co., 131 Wn. App. 882, 894, 130 P.3d 840 (2006), aff’d, 162 Wn.2d 716, 174 P.3d 1033 (2007).

³⁰ Qwest Corp. v. Washington Utils. & Transp. Comm’n, 140 Wn. App. 255, 260, 166 P.3d 732 (2007) (citing Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)); Bernsen v. Big Bend Elec. Coop., Inc., 68 Wn. App. 427, 436, 842 P.2d 1047 (1993) (finding error in discovery ruling harmless).

³¹ 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Washington courts have not addressed the applicability of Brady in proceedings under chapter 71.09 RCW—which are civil in nature³²—this court has refused to apply Brady in license revocations. “Brady . . . is limited to criminal cases; a license revocation is a civil proceeding. . . . We are not prepared to extend the rule”³³ In addition, West fails to satisfy the materiality standard in Brady as “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”³⁴ Here, the disclosure of the reports in unfiled cases would not have resulted in a different outcome.

Second, West argues that denial of his discovery request violated CrR 4.7(a). This rule governs criminal discovery and requires disclosure of “any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use . . . [at] trial.”³⁵ Division Three has stated: “A trial pursuant to chapter 71.09 RCW, although a civil action, requires by statute or implication certain criminal rights. . . . Other criminal protections, such as the Fifth Amendment right to remain silent and additional peremptory jury challenges, are not applicable.”³⁶ In the absence of controlling authority on whether CrR

³² In re Det. of Young, 163 Wn.2d 684, 689, 185 P.3d 1180 (2008) (citing In re Det. of Williams, 147 Wn.2d 476, 55 P.3d 597 (2002)).

³³ Hatten v. Dep’t of Motor Vehicles, 15 Wn. App. 656, 657, 551 P.2d 145 (1976) (alteration in original) (citing Turner v. Dep’t of Motor Vehicles, 14 Wn. App. 333, 335, 541 P.2d 1005 (1975)).

³⁴ United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

³⁵ CrR 4.7(a)(1)(v); State v. Boyd, 160 Wn.2d 424, 432, 158 P.3d 54 (2007).

³⁶ In re Pers. Restraint of Twining, 77 Wn. App. 882, 895, 894 P.2d 1331 (1995) (citing In re Pers. Restraint of Young, 122 Wn.2d 1, 47-51, 857 P.2d 989

4.7(a) applies in proceedings under chapter 71.09 RCW, we may consider the decisions of other courts.³⁷ Emphasizing that a proceeding under California's Sexually Violent Predator Act (SVPA) "is civil in nature, which both affects the defendant's rights and determines what rules of discovery apply,"³⁸ the California Court of Appeals held that "rather than the statutes governing discovery in criminal cases, discovery in a civil commitment proceeding under the SVPA is governed by the Civil Discovery Act."³⁹ Additionally, we note "that the scope of civil discovery is far more broad than that allowed in criminal cases."⁴⁰ We decline to apply CrR 4.7(a).

Even if CrR 4.7(a) did apply to this case, a violation here would not justify reversal. In State v. Garcia,⁴¹ this court held that reversal is warranted when "[t]he suppressed exculpatory evidence . . . [is] constitutionally 'material' either to guilt or punishment pursuant to Brady."⁴² As stated previously, the denial of Rawlings' reports cannot be deemed "material" under Brady.

Finally, West argues that he was denied effective representation under the Sixth Amendment. In In re Detention of Stout,⁴³ our Supreme Court declared: "It

(1993)). In his brief, West merely states that he was denied due process under the Fifth Amendment. Under Twining, his claim fails.

³⁷ See People v. Burns, 128 Cal. App. 4th 794, 803, 27 Cal. Rptr. 3d 352 (2005) ("California courts have consistently refused to treat SVP Act proceedings as criminal and transplant the full range of procedural rights accorded criminal defendants to a civil commitment proceeding.").

³⁸ People v. Dixon, 148 Cal. App. 4th 414, 442 (Cal. Ct. App. 2007).

³⁹ Dixon, 148 Cal. App. 4th at 442.

⁴⁰ King v. Olympic Pipeline Co., 104 Wn. App. 338, 363, 16 P.3d 45 (2000).

⁴¹ 45 Wn. App. 132, 139, 724 P.2d 412 (1986).

⁴² Garcia, 45 Wn. App. at 139.

⁴³ 159 Wn.2d 357, 150 P.3d 86 (2007).

is well settled that the Sixth Amendment right to confrontation is available only to criminal defendants (citations omitted). As such, the Sixth Amendment right to confrontation is not available to an individual challenging an SVP commitment.”⁴⁴ The Court concluded: “For the reasons stated above, we reject any assignment of error premised on the Sixth Amendment.”⁴⁵ Thus, West’s Sixth Amendment claim lacks merit.

B. Rulings on Richards’ Testimony

1. SCC Phases of Treatment and Transitional Release

West argues that the trial court erred when it allowed Richards to testify about (1) phases of the SCC treatment program in which West did not participate, and (2) transitional release into the community. West contends this testimony was irrelevant and unfairly prejudicial, citing ER 401 and 403.

Evidence must be relevant in order to be admissible.⁴⁶ Under ER 401, relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁴⁷ Relevant evidence, however, may be excluded under ER 403 “if its probative value is substantially outweighed by the danger of unfair prejudice”⁴⁸ Evidence is unfairly prejudicial if it “is more likely to arouse an emotional response than a rational

⁴⁴ Stout, 159 Wn.2d at 369.

⁴⁵ Stout, 159 Wn.2d at 369 n.10.

⁴⁶ Post, 187 P.3d at 807 n.1; ER 402.

⁴⁷ Post, 187 P.3d at 807 n.1; ER 401.

⁴⁸ Post, 187 P.3d at 807 n.2; ER 403.

decision by the jury.”⁴⁹

This court in In re the Detention of Post held that evidence regarding (1) treatment phases in which the offender did not participate and (2) less restrictive potential alternatives (LRAs), such as conditional release, was not relevant in proceedings under chapter 71.09 RCW.⁵⁰ In that case, Post presented extensive evidence relating to his voluntary treatment program.⁵¹ The State then called on an SCC therapist to portray the SCC treatment program as an alternative to Post’s program. The therapist not only discussed the first two phases of the SCC program in which Post had participated, but also the remaining phases of the program:

Treatment is divided into a series of phases of treatment and there are a total of six phases in the treatment program, ranging from one to six. The first phase is a beginning entry phase; and then progressing through the sixth phase of treatment, that’s when it’s considered that the residents . . . will soon be considered, or likely to be considered, for a conditional release into the community.^{52]}

The therapist proceeded to describe in detail each of the SCC treatment phases as well as different aspects of the program.⁵³ This court held that the therapist’s testimony was not relevant because “[e]vidence concerning the final four phases of the SCC program, in which Post did not participate, and evidence regarding potential future less restrictive alternatives to total confinement were not relevant

⁴⁹ State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)).

⁵⁰ ___ Wn. App. ___, 187 P.3d 803, 806 (2008).

⁵¹ Post, 187 P.3d at 808.

⁵² Post, 187 P.3d at 808.

⁵³ Post, 187 P.3d at 808-09.

to the jury's determination of whether Post was proved to be an SVP."⁵⁴ The court further ruled that the therapist's testimony about these final four phases, without a limiting instruction, was unfairly prejudicial:

Admission of this evidence allowed the jury to premise its verdict on considerations of the desirability of the LRAs and SCC treatment phases available to Post only if he was first committed as an SVP, rather than focusing the jury's attention on the question before it: whether the State had proved that Post was an SVP.^[55]

As in Post, Richards described other treatment phases of the SCC treatment program even though West had only participated in the first two phases:

[The SCC treatment] program consist[s] of six phases of treatment, beginning with introduction, accepting and learning about one's disorders, all the way through to practicing, showing that . . . 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. . . . [T]hose are the phases one through six, with the sixth phase being a community transition phase.

Richards also briefly discussed the transitional facilities in Seattle and on McNeil Island as well as different components of the SCC program. The trial court declined to issue any limiting instructions with respect to Richards' testimony.

However, any error the trial court may have committed by admitting Richards' testimony was harmless. "Evidentiary error is grounds for reversal only if it results in prejudice."⁵⁶ "An error is prejudicial if, within reasonable

⁵⁴ Post, 187 P.3d at 811; RCW 71.09.060(1) states that "[t]he court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator."

⁵⁵ Post, 187 P.3d at 806.

⁵⁶ Post, 187 P.3d at 814 (quoting State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”⁵⁷ “Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole.”⁵⁸

In Post, the court found that the error was committed by the trial court was not harmless because it was “well within the reasonable range of probabilities that the outcome of the trial was influenced by the admission of the challenged evidence, the absence of a limiting instruction, and the State’s argument.”⁵⁹ The court noted that the case had been previously tried before a jury that was ultimately unable to reach a verdict in light of the extensive evidence presented by both parties.⁶⁰ Moreover, the therapist’s testimony had not been subjected to any limiting instruction and had prompted several jurors to ask the therapist about the SCC treatment program.⁶¹ Finally, the State’s closing argument improperly focused the jury’s attention on “the course of action that would most likely keep Post from reoffending.”⁶² These facts, the court concluded, justified reversal.⁶³

In contrast with Post, any error the trial court may have committed here was harmless because the outcome of West’s trial was not affected by the admission of Richards’ testimony. First, this case, unlike Post, was not closely

⁵⁷ Post, 187 P.3d at 814 (quoting Neal, 144 Wn.2d at 611).

⁵⁸ Post, 187 P.3d at 814 (quoting Neal, 144 Wn.2d at 611).

⁵⁹ Post, 187 P.3d at 814.

⁶⁰ Post, 187 P.3d at 814.

⁶¹ Post, 187 P.3d at 814.

⁶² Post, 187 P.3d at 813.

⁶³ Post, 187 P.3d at 814.

contested, as the weight of evidence strongly supported the State's position. Moreover, Richards' testimony was brief compared to the therapist's testimony in Post, reducing the need for limiting instructions. Finally and significantly, the State's closing argument in this case properly focused on whether West met the criteria of an SVP. The State neither attempted to cast the SCC treatment program as an alternative to West's voluntary treatment plan nor suggested that the program represented West's best chance to reduce his risk for recidivism. We conclude that the admission of Richards' testimony, if error, was harmless.

2. SCC Federal Injunction

West asserts that the trial court erred when it excluded Richards' testimony regarding the SCC federal injunction. We disagree. The trial court correctly ruled that such testimony was not relevant and, therefore, inadmissible.

Our Supreme Court in In re Detention of Turay⁶⁴ determined that evidence relating to the conditions of confinement at the SCC was properly excluded in proceedings under chapter 71.09 RCW.⁶⁵ In Turay, the offender argued that the trial court erred in excluding evidence that the SCC had been placed under an injunction for constitutionally inadequate conditions of confinement.⁶⁶ The Supreme Court upheld the trial court's ruling, stating that such evidence was irrelevant: "The trier of fact's role in an SVP commitment proceeding . . . is to determine whether the defendant constitutes an SVP; it is not to evaluate the

⁶⁴ 139 Wn.2d 379, 986 P.2d 790 (1999).

⁶⁵ Turay, 139 Wn.2d at 404.

⁶⁶ Turay, 139 Wn.2d at 403.

potential conditions of confinement.”⁶⁷ West raises the same challenge as the offender in Turay with the same result. The trial court properly excluded Richards’ testimony regarding the SCC federal injunction and the SCC’s conditions of confinement.

Conclusion

The trial court properly applied the work product rule in barring discovery of the 15 reports in unfiled cases. While the court may have erred under Post when it admitted Richards’ testimony about the SCC treatment phases and transitional release, that error was harmless. The court properly excluded

⁶⁷ Turay, 139 Wn.2d at 404.

Richards' testimony regarding the SCC injunction and conditions of confinement under Turay.

Affirmed.

Leach, J.

WE CONCUR:

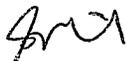
Azid, J.

Becker, J.

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DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 59666-7-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for respondent: **David Hackett - King County Prosecuting Attorney-SVP Unit**, appellant and/or other party, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 10, 2008