

NO. 45540-4-II

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

In re the Personal Restraint Petition of:

PAUL ANDREW GEIER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

RESPONSE TO PERSONAL RESTRAINT PETITION

ROBERT W. FERGUSON
Attorney General

KRISTIE BARHAM
Assistant Attorney General
WSBA #32764 / OID# 91094
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430

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I. INTRODUCTION

Respondent, State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney General, and Kristie Barham, Assistant Attorney General, submits this response to the Petitioner's personal restraint petition (PRP) in accordance with RAP 16.9. This response is supported by the records and files in this proceeding and by the following appendices:

Appendix 1: Order of Commitment, *In re Det. of Geier*, Pierce County Superior Court Cause No. 08-2-08313-1

Appendix 2: Mr. Geier's Opening Brief, dated March 2, 2012, *In re Det. of Geier v. State*, Court of Appeals No. 42292-1

Appendix 3: State's Response Brief, dated May 21, 2012, *In re Det. of Geier v. State*, Court of Appeals No. 42292-1

Appendix 4: *In re Det. of Geier*, Unpublished Opinion issued April 9, 2013, Division II Court of Appeals

Appendix 5: Email from Mr. Geier's trial counsel, dated January 31, 2011 (CP 637-40; CP 701)

Appendix 6: Clerk's Papers, CP 637-40; CP 701, Court of Appeals No. 42292-1

Appendix 7: Letter from the Court Clerk to Mr. Geier's appellate counsel, dated August 10, 2011, Court of Appeals No. 42292-1

Appendix 8: Statement of Arrangements and Designation of Clerk's Papers filed by appellate counsel on August 16, 2011, Court of Appeals No. 42292-1

II. AUTHORITY FOR RESTRAINT OF PETITIONER

Petitioner Paul Andrew Geier is confined at the Special Commitment Center in Steilacoom, Washington pursuant to an order of commitment entered by the Pierce County Superior Court. Appendix 1, Order of Commitment. A jury found that Mr. Geier is a sexually violent predator pursuant to RCW 71.09.060. *Id.* On June 14, 2011, in accordance with the jury's finding, the superior court ordered Mr. Geier committed to the custody of the Department of Social and Health Services for control, care, and treatment. *Id.*

III. RESPONSE TO PETITIONER'S CLAIMS

Mr. Geier alleges that he is being unlawfully restrained because:

1. He received ineffective assistance of trial counsel.
2. He received ineffective assistance of appellate counsel.
3. His due process and equal protection rights were violated by not being permitted to file a Statement of Additional Grounds for Review.

None of Mr. Geier's claims merit relief.

IV. STATEMENT OF THE CASE

On June 14, 2011, Mr. Geier was committed as a sexually violent predator (SVP) following a jury trial. Appendix 1. Mr. Geier raised two

issues in his direct appeal: (1) that the trial court violated his right to a public trial by sealing the juror questionnaires without conducting a *Bone-Club* analysis; and (2) that the trial court erred by denying his motion for a mistrial after the State questioned Dr. Halon about a 1999 disciplinary issue. Appendix 2, Mr. Geier's Opening Brief. The State argued: (1) that the trial court did not err by sealing juror questionnaires at the conclusion of trial because it did not constitute a courtroom closure; and (2) that the trial court did not err by denying Mr. Geier's motion for a mistrial, in part, because the questioning did not prejudice Mr. Geier such that he was deprived of a fair trial. Appendix 3, State's Response Brief.

On April 9, 2013, this Court issued an unpublished decision affirming Mr. Geier's commitment as an SVP. Appendix 4, *In re Det. of Geier*, Division II Court of Appeals decision. This Court held that the *Bone-Club* analysis did not apply because sealing juror questionnaires after trial was not a courtroom closure. *Id.* at 7-9. This Court also held that the trial court did not err in denying Mr. Geier's motion for a mistrial regarding the State's cross-examination of Dr. Halon over his disciplinary record. *Id.* at 4-7. This Court held that "the violation did not cause any prejudice, let alone prejudice for which a new trial is the only available remedy." *Id.* at 6.

On May 10, 2013, this Court denied Mr. Geier's motion for reconsideration. On August 13, 2013, a mandate was issued terminating the appeal. Mr. Geier timely filed a PRP.

V. STANDARD OF REVIEW

In a PRP, the petitioner must show that he is being unlawfully restrained under one of the reasons enumerated in RAP 16.4(c). *In re Pers. Rest. of Cashaw*, 123 Wn.2d 138, 149, 866 P.2d 8 (1994); RAP 16.4. The petitioner should identify why the restraint is unlawful under the reasons specified in RAP 16.4(c) and why other remedies are inadequate. RAP 16.7(a)(2).

As a threshold matter, the petitioner must state the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. RAP 16.7(a)(2); *In re Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). To obtain relief, the petitioner must show that he was actually and substantially prejudiced by the alleged error. *In re Pers. Rest. of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). If the petitioner fails to meet his threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed. *Rice*, 118 Wn.2d at 885.

"Bald assertions and conclusory allegations will not support the holding of a hearing." *Id.* at 886; *In re Cook*, 114 Wn.2d 802, 813-14, 792

P.2d 506 (1990). Rather, a petitioner must state with particularity the facts, which, if proven, would entitle him to relief. *Rice*, 118 Wn.2d at 886. “[A] mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient.” *Id.* (emphasis in original). The petitioner must present evidence showing that his factual allegations are based on more than speculation or conjecture:

If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify.

Id. If the petitioner does not provide facts or evidence and instead relies on conclusory allegations, the Court should refuse to reach the merits of the PRP. *Cook*, 114 Wn.2d at 813-14; *see also In re Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988).

If the issues presented are frivolous, the petition should be dismissed. RAP 16.11(b). If the petition cannot be determined solely on the record, the petition is transferred to the superior court for a reference hearing. *Id.* However, the purpose of the reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. *Rice*, 118 Wn.2d at 886. To

obtain a hearing, petitioner must demonstrate that he has competent, admissible evidence to establish facts that would entitle him to relief. *Lord*, 123 Wn.2d at 303. Once the petitioner makes this threshold showing, the Court then examines the State's response. *Rice*, 118 Wn.2d at 885.

VI. ARGUMENT

As a threshold matter, Mr. Geier fails to identify why his restraint is unlawful under one or more of the reasons specified in RAP 16.4(c). *See* RAP 16.7(2). He also fails to present evidence showing that his factual allegations are based on more than mere speculation or conjecture. Under *Rice*, Mr. Geier is required to demonstrate that he has competent, admissible evidence to establish facts that entitle him to relief. *See Rice*, 118 Wn.2d at 886. Furthermore, he is not permitted to simply state what he thinks others would say, but “must present their affidavits or other corroborative evidence.” *Id.*

Mr. Geier has not submitted any affidavits or corroborating evidence and instead relies on bald assertions and conclusory allegations to support his PRP. This is insufficient to justify relief, and the Court should decline to reach the merits of the PRP. *See Cook*, 114 Wn.2d at 813-14; *see also Williams*, 111 Wn.2d at 364-65. “[N]aked castings into the constitutional sea are not sufficient to command judicial consideration

and discussion.” *Williams*, 111 Wn.2d at 365 quoting *U.S. v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970).

A. Mr. Geier Has Not Shown That He Received Ineffective Assistance Of Trial Counsel

Individuals subject to SVP commitment proceedings have the right to effective assistance of counsel. *State v. Ransleben*, 135 Wn. App. 535, 540, 144 P.3d 397 (2006). Washington has adopted the 2-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) for determining whether counsel was ineffective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Under that test, the defendant must show (1) that counsel’s performance was deficient; and (2) that such deficient performance prejudiced him. *Strickland*, 466 U.S. at 687.

The first prong requires a showing that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *Brett*, 126 Wn.2d at 198. There is a strong presumption that counsel’s representation was effective. *In re Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004); *see also State v. Piche*, 71 Wn.2d 583, 591, 430 P.2d 522 (1967) (where a court appoints a member of the bar to represent an indigent defendant, there is a strong presumption of counsel’s competence that may only be overcome by a clear showing of

incompetence derived from the whole record). The petitioner can rebut this presumption by proving that his counsel's representation was unreasonable under prevailing professional norms and was not sound strategy. *Davis*, 152 Wn.2d at 673. Counsel's competency is determined based on the entire record below. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The second prong requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Brett*, 126 Wn.2d at 198. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). Counsel's errors must be so serious as to deprive the defendant of a fair trial. *In re Elmore*, 162 Wn.2d 236, 252, 172 P.3d 335 (2007).

Matters of trial strategy or tactics do not establish that counsel's performance was deficient. *In re Det. of Strand*, 139 Wn. App. 904, 912, 162 P.2d 1195 (2007); *In re Det. of Stout*, 128 Wn. App. 21, 28, 114 P.3d 658 (2005). If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as the basis for an ineffective assistance of counsel claim. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993); *see also State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982) ("This court has refused to find ineffective assistance of counsel

when the actions of counsel complained of go to the theory of the case or to trial tactics.”). The relevant question is whether counsel’s choices were reasonable. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

An attorney is allowed wide latitude and flexibility in choice of methodology to be used, action to be taken or avoided, and trial tactics. *State v. Wilkinson*, 12 Wn. App. 522, 524, 530 P.2d 340 (1975). Such flexibility is essential to skillful representation:

If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off—indeed, in some instances, whether to interview some witnesses before trial or leave them alone—he will lose the very freedom of action so essential to a skillful representation of the accused.

Piche, 71 Wn.2d at 590. An attorney’s decision to call a witness is generally a matter of legitimate trial tactics that will not support a claim of ineffective assistance of counsel. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981).

Although there are basic rights that the attorney cannot waive without the fully informed consent of the client, the attorney has full authority to manage the conduct of the trial. *Taylor v. Illinois*, 484 U.S. 400, 417-18, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988). “The adversary process could not function effectively if every tactical decision required

client approval.” *Id.* at 418. In general, a client must accept the consequences of tactical decisions made by his attorney. *Id.* Moreover, counsel is not required to raise issues that the client believes are important:

Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court and jury which in retrospect may seem important to the defendant; nor is he obliged to obtain a written waiver or instructions from the defendant as to each and every turn or direction the accused wants his counsel to take.

Piche, 71 Wn.2d at 590.

To prevail on his ineffective counsel claim, Mr. Geier must identify the acts or omissions of counsel that he alleged are not the result of reasonable professional judgment. *See Strickland*, 466 U.S. at 690. The Court must determine whether, in light of all the circumstances, the identified conduct was outside the range of professionally competent assistance. *Id.* Competence of counsel must be judged from the whole record and not from isolated segments of it. *Piche*, 71 Wn.2d at 591. In addition, Mr. Geier bears the burden of establishing deficient performance. *See McFarland*, 127 Wn.2d at 335.

Moreover, “[a] defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom.” *State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978).

The practice of law is not a science, and it is easy to second guess a lawyer's decisions with the benefits of hindsight:

Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

Id.

1. Mr. Geier Fails To Include Any Affidavits or Cite Any Evidence In Support of His Allegations.

Mr. Geier argues that he received ineffective assistance of trial counsel because his attorney failed to conduct a reasonable investigation into the background of his expert, Dr. Robert Halon. PRP at 17-21. Specifically, he claims that he should have been informed of a disciplinary action taken against Dr. Halon twelve years earlier in order to make an “informed decision” as to whether to use that expert or obtain a different expert “free of problems.” *Id.* at 17. Mr. Geier's claims have no merit.

Mr. Geier fails to cite to any facts or evidence supporting his allegation that counsel failed to conduct a reasonable investigation, and his bald and conclusory allegation is insufficient under *Rice*. *See Rice*, 118

Wn.2d at 885-86. Mr. Geier has not submitted any affidavits or other corroborating evidence as required. *See id.* Rather, he appears to merely speculate that his attorney did not conduct a reasonable investigation of his expert. Such speculation is insufficient to establish the necessary facts entitling him to relief. *See id.* Mr. Geier fails to present *any* factual allegations to this Court in support of his claim. Based on this alone, the Court should deny his petition.

Moreover, evidence indicates that Mr. Geier's trial counsel knew of the disciplinary action relating to Dr. Halon approximately five months prior to trial. *See* Appendix 5, email from Mr. Geier's trial counsel;¹ CP 637-40; CP 701; *see also* 13RP 1198-99.² On January 31, 2011, Mr. Geier's trial counsel emailed the Assistant Attorney General handling Mr. Geier's case to advise that they recently received some information regarding Dr. Halon involving a 1995 disciplinary action. Appendix 5; CP 640. Despite this knowledge, Mr. Geier's counsel apparently made a

¹ This email was part of the trial court record below and was designated as a Clerk's Paper. *See* CP 637-40; CP 701. For the Court's convenience, the State attaches CP 637-40 and CP 701, with the list of Clerk's Papers designations as Appendix 6.

² Citations to the Verbatim Report of Proceedings (VRPs) are as follows: 1RP - 5/27/08; 2RP - 8/29/08; 3RP - 7/30/10; 4RP - 5/23/11; 5RP - 5/24/11; 5(a)RP - 5/24/11 (corrected version: individual voir dire); 6RP - 5/25/11; 6(a)RP - 5/25/11 (individual voir dire); 7RP - 5/26/11; 8RP - 5/31/11; 9RP - 6/1/11; 10RP - 6/2/11; 11RP - 6/6/11; 12RP - 6/7/11; 13RP - 6/8/11; 14RP - 6/9/11; 15RP - 6/13/11; 16RP - 6/14/11. This is the same citation system used by Mr. Geier and the State in the direct appeal.

strategic decision to keep Dr. Halon as an expert witness.³ Clearly, counsel conducted a reasonable investigation of Mr. Geier's expert because she uncovered a disciplinary action that occurred *twelve years* prior to trial. *See* Appendix 5; CP 640.⁴ Mr. Geier points to nothing in the record that supports his unfounded accusations. Consequently, this Court should deny his PRP.

2. Mr. Geier Fails to Show That Counsel's Performance Was Deficient

Mr. Geier has not met his burden of establishing deficient performance. *See McFarland*, 127 Wn.2d at 335. Mr. Geier fails to satisfy even the first prong of the *Strickland* test, which requires a showing that counsel's performance was deficient in light of all the circumstances.

The decision of Mr. Geier's counsel to call Dr. Halon as an expert witness was a legitimate trial strategy that cannot serve as the basis for an ineffective assistance of counsel claim. *See Benn*, 120 Wn.2d at 665; *see also Byrd*, 30 Wn. App. at 799. Counsel was allowed wide latitude and

³ At trial, the parties discussed the email Mr. Geier's counsel sent to the State involving Dr. Halon and the disciplinary issue. 13RP 1198-1206. The judge requested the parties submit the email as part of the record. 13RP 1201, 1204-06; 14RP 1225. Neither party was able to locate the email during the trial. *See* 14RP 1225. However, approximately two weeks after trial, the State located the email and filed it with the court. CP 637-40; CP 701. The email indicates that counsel knew of the disciplinary action involving Dr. Halon.

⁴ Mr. Geier's counsel references Dr. Halon's "1995" disciplinary action in the email. This year appears to be a typo, as the only disciplinary action known to the parties and testified to at trial involved Dr. Halon's "1999" disciplinary action. *See* 13RP 1189-1207. This is the disciplinary action counsel was referencing in the email.

flexibility in deciding whether to call Dr. Halon as a witness. *See Wilkinson*, 12 Wn. App. at 524; *see also Piche*, 71 Wn.2d at 590. Counsel had full authority to manage the conduct of the trial, and Mr. Geier must accept the consequences of his attorney's tactical decisions. *Taylor v. Illinois*, 484 U.S. at 417-18.

Strategic and tactical decisions are made by counsel, and counsel need only consult with clients on such decisions where “feasible *and appropriate*.” *See ABA, Standards for Criminal Justice: Defense Function* std. 4-5.2. (emphasis added). Decisions made by counsel include what witnesses to call, cross-examination, juror selection, what trial motions to make, and what evidence to introduce. *Id.*

An attorney is only required to “reasonably” consult with a client. *See* RPC 1.4(a)(2). However, many trial decisions are made by the attorney, not the client. An attorney shall abide by a client's decision on whether to settle a matter or enter a plea, whether to waive a jury trial, whether the client will testify, and whether to testify. RPC 1.2(a); *see also ABA, Standards for Criminal Justice: Defense Function* std. 4-5.2. All other decisions are left to counsel. Furthermore, Mr. Geier's counsel was not required to raise issues that Mr. Geier himself deemed important. *See Piche*, 71 Wn.2d at 590.

Mr. Geier fails to cite to any authority indicating that he was entitled to make the decision about his expert. He also fails to cite to any authority for his claim that he is entitled to personally choose an expert of his liking that is “free of problems.” See PRP at 17. An indigent individual does not have a constitutional right to retain the expert of his choice. See *Ake v. Oklahoma*, 470 U.S. 68, 77, 83, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985) (indigent defendant is not entitled to “all the assistance that his wealthier counterpart might buy”). The decision to call witnesses rests with counsel, not the client. *In re Pers. Rest. of Stenson*, 142 Wn.2d 710, 741, 16 P.3d 1 (2001). Thus, the decisions made by Mr. Geier’s counsel regarding Dr. Halon fall under legitimate trial tactics that cannot support a claim of ineffective assistance of counsel. See *Byrd*, 30 Wn. App. at 799.

The relative wisdom of the decisions made by Mr. Geier’s counsel should not be open for review after commitment. See *Adams*, 91 Wn.2d at 91. Only when the conduct of Mr. Geier’s counsel “cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel’s performance be considered inadequate.” See *id.* Mr. Geier has not overcome the strong presumption that counsel was competent. See *Piche*, 71 Wn.2d at 591. He has not

shown that his attorney's representation was "unreasonable under prevailing professional norms" and "not sound strategy." *See Davis*, 152 Wn.2d at 673.

Based on all of the circumstances, counsel's representation did not fall below an objective standard of reasonableness. *See Brett*, 126 Wn.2d at 198. Mr. Geier's trial lasted more than three weeks and his counsel presented numerous witnesses who provided favorable testimony for Mr. Geier. *See* 11RP 878-908; 12RP 921-41, 952-57; 12RP 958-1051, 13RP 1057-1117, 14RP 1353-76; 13RP 1128-52, 1159-68; 14RP 1386-94, 1399-1403; 15RP 1410-1500.

Several witnesses testified about the positive changes they had seen in Mr. Geier over the years. Mr. Geier's Buddhist teacher, Tad Mauney, had been providing counseling to Mr. Geier on a weekly basis for approximately fifteen years. 13RP 1128-30, 1134-35. Mr. Mauney testified about the positive changes he had seen in Mr. Geier over the years, including his ability to control his behavior and his attitude regarding his sexual offending. *See id.* at 1138-43, 1150-52. Mr. Geier's brother, Jeffrey Geier, also testified about the positive changes he had seen in his brother over the years since his involvement in both Buddhism and sex offender treatment. *See* 12RP 921-32.

David Hagstrom testified about the stability and support he would provide for Mr. Geier in the community. *See* 14RP 1386-1403. Rick Minnich, a polygraph examiner, administered a penile plethysmograph (PPG) test to Mr. Geier to assess his sexual interest and arousal. 11RP 878, 886-87. Mr. Minnich testified that Mr. Geier did not show any significant arousal to any of the deviant images. *See id.* at 894-900. On the contrary, he showed significant sexual arousal to non-deviant, consensual sex with an adult partner. *See id.* at 899-900.⁵ Mr. Geier also testified on his own behalf at trial. 15 RP 1410. He testified, in part, about the progress he has made over the years due to treatment. *See e.g.* 15RP 1146-48, 1473, 1488-99.⁶

Dr. Halon provided extensive testimony at trial that was favorable to Mr. Geier, including the following testimony: (1) that the PPG results verified Mr. Geier's statements that he had learned to switch his fantasies from children to adults and that his current sexual interests involve adults;⁷ (2) that "the PPG was about as good of objective evidence as we could possibly have" that he has no arousal to children;⁸ (3) that there is no evidence that Mr. Geier has any kind of mental disorder or that he had any

⁵ Mr. Geier's mental abnormality is pedophilia, which means that he is sexually attracted to sexual activity with prepubescent children. 7RP 247-49, 312.

⁶ Mr. Geier's video deposition was also admitted at trial. Ex. 26-30.

⁷ 12RP 1021; 13RP 1114-15.

⁸ 12RP 1021; 13RP 1116.

self-control problems;⁹ (4) that mentally disordered individuals can rarely get away with the types of crimes Mr. Geier committed;¹⁰ (5) that there is no information in the record that indicates Mr. Geier is suffering from any form of mental disorder that will make reoffend against children;¹¹ and (6) that Mr. Geier does not suffer from a personality disorder and that there is no such thing as a personality disorder that predisposes a person to reoffend.¹² Dr. Halon also disputed, in great detail, many of the opinions of the State's expert witness. *See e.g.* 12RP 1014-20; 13RP 1067-88.

Furthermore, counsel conducted thorough cross-examinations of all the State's witnesses. *See* 8RP 409-42; 9RP 495-553, 560-70; 10RP 687-746; 11RP 767-862. Based on all the circumstances and the totality of the record, counsel's representation was not deficient and Mr. Geier has failed to overcome the strong presumption that counsel was effective. *See Davis*, 152 Wn.2d at 673.

3. Mr. Geier Fails to Show That He Was Prejudiced By His Counsel's Performance

If an ineffective assistance claim can be resolved on one prong of the *Strickland* test, the Court need not address the other prong. *State v.*

⁹ 12RP 1051; 13RP 1093, 1096, 1105-07. The State had to prove beyond a reasonable doubt at trial that Mr. Geier had a mental abnormality or personality disorder that makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility. *See* RCW 71.09.020(18).

¹⁰ 12RP 1051.

¹¹ *See* 13RP at 1107.

¹² *See* 13RP 1116-17.

Staten, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991). However, assuming arguendo, that counsel's performance was deficient, Mr. Geier still must show that he was prejudiced and deprived of a fair trial under the second prong of the *Strickland* test. Mr. Geier fails to articulate how he was prejudiced by the cross-examination of his expert over a minor disciplinary action that occurred *twelve years* prior to trial.

Dr. Halon testified in detail about his qualifications, credentials, and experience that qualified him as an expert witness. *See* 12RP 958-71. The cross-examination involving the disciplinary issue was very brief and limited and involved only *two* pages of a 368-page transcript of Dr. Halon's testimony. *See* 13RP 1188-89, 1206-07.¹³ Furthermore, the jury heard very minimal information about the complaint itself. The jury heard that a complaint was filed in 1998 and the parties reached a stipulated settlement where Dr. Halon agreed pay a fine, have his practice monitored for three years, and take an ethics course that he was required to take regardless of the settlement. 13RP 1189, 1206-07.¹⁴ Dr. Halon testified that his license was never revoked and that his practice has "not been interrupted for a minute in the 30-something years I've had the license." 13RP 1189, 1207.

¹³ Dr. Halon's entire testimony is located at 12RP 958-1051, 13RP 1057-1220, and 14RP 1259-1385.

¹⁴ The jury did not hear any evidence of the nature of the allegations in the complaint. *See* 13RP 1194-96.

Mr. Geier has not shown how Dr. Halon's brief testimony involving one disciplinary action twelve years prior to trial prejudiced him such that he was deprived of a fair trial. *See Elmore*, 162 Wn.2d at 252. Taking into consideration all the favorable testimony Dr. Halon provided on Mr. Geier's behalf, Mr. Geier simply has not shown that there is a reasonable probability that the trial would have been different. *See Brett*, 126 Wn.2d at 198.

Moreover, the issue of prejudice has already been considered and rejected by this Court. *See Appendix 4 at 4-7*. In his direct appeal, Mr. Geier argued that the trial court erred by denying his motion for a mistrial after the State questioned Dr. Halon about the 1999 disciplinary issue. *Appendix 2 at 9-13*. This Court disagreed and held that Mr. Geier was not prejudiced by the questioning such that a new trial was warranted. *See Appendix 4 at 4-7*. As such, this issue has been resolved, and Mr. Geier may not recast the same issue as an ineffective assistance claim. *See In re Pers. Rest. of Benn*, 134 Wn.2d 868, 905-06, 952 P.2d 116 (1998) (rejecting PRP claim where petitioner attempted to recast an issue previously rejected by the Court as an ineffective assistance of counsel claim).

This Court has already determined that Mr. Geier was not prejudiced by the testimony of Dr. Halon's licensing issue. *See Appendix*

4. This Court should not reconsider this same issue that Mr. Geier has now recast as an ineffective assistance of counsel claim. *See Benn*, 134 Wn.2d at 905-06. Mr. Geier has not met either prong of the *Strickland* test. He fails to show that he was “actually and substantially prejudiced” by any error and is not entitled to any relief. *See Lord*, 123 Wn.2d at 303.

**4. This Court Should Not Consider Mr. Geier’s
Unfounded Assertions**

Mr. Geier’s PRP is riddled with unfounded statements involving both factual allegations and arguments that lack any citation to authority, including the following: (1) that anything that could put doubt in the credibility of the expert’s testimony “will distroy [sic] that party’s case”; (2) that potential jurors were exposed to significant sex offender “fear tactics” by the media; (3) that many people repeatedly watch shows like “To Catch a Predator” [sic] and conclude all sex offenders need to be locked up for life; that due to “America’s Most Wanted” and other media reports, the majority of jurors “firmly believe that sex offenders will re-offend at a rate of over 80%”; and that if jurors watch the above referenced programs, the trial court will not excuse them for cause, despite their biases being very difficult to overcome. PRP at 14-16. None of these statements or issues were discussed or alluded to during Mr. Geier’s jury selection process.

The State disputes these claims and asks that the Court not consider them on appeal. They are not part of the record. Mr. Geier fails to cite to any portion of the record, or cite to any authority, for such bald, unsubstantiated assertions. Appellate courts need not consider issues unsupported by argument or citation to authority. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

B. Mr. Geier Has Not Shown That He Received Ineffective Assistance of Appellate Counsel

1. Appellate Counsel Is Not Required to Raise Issues Suggested by Mr. Geier

Mr. Geier argues that he received ineffective assistance of appellate counsel because his attorney refused to raise an ineffective assistance of trial counsel claim on appeal and failed to explain to him why she did not. PRP at 4-5. Citing to the Rules of Professional Conduct (RPC), he claims that appellate counsel's performance was deficient for failing to advise him of "each issue" she was planning to raise in her opening brief prior to filing it. PRP at 6. Mr. Geier's unique interpretation of the RPCs is inaccurate.

Mr. Geier appears to be suggesting that he has a right to decide what issues his appointed attorney raise on appeal. First, there is no right to the sort of "hybrid" representation to which Mr. Geier suggests he was entitled. *See State v. Harris*, 48 Wn. App. 279, 283, 738 P.2d 1059

(1987). Second, it is up to Mr. Geier's appointed attorney to decide what issues to raise on appeal. *See Stenson*, 142 Wn.2d at 733-34.

The United States Supreme Court, the Ninth Circuit, and the Washington Supreme Court have given counsel wide latitude to control strategy and tactics. *Id.* at 733. In the appeals context, an indigent appellant does not have a constitutional right to compel counsel to press nonfrivolous points requested by him on appeal, if counsel, as a matter of professional judgment, decides not to present those points. *Id.* citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983).

By providing counsel to indigent appellants, the Supreme Court recognized "the superior ability of trained counsel" in examining the record, researching the law, and marshalling arguments on the appellant's behalf. *Jones v. Barnes*, 463 U.S. at 751. Appellate counsel is not required to raise issues deemed important to the client:

For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard.

Stenson, 142 Wn.2d at 734 quoting *Jones v. Barnes*, 463 U.S. at 754. Thus, appellate counsel was not required to raise the

ineffective assistance of trial counsel claim suggested by Mr.

Geier.¹⁵

The “process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L.Ed.2d 434 (1986) citing *Jones v. Barnes*, 463 U.S. at 751-52. Although it is possible to bring a *Strickland* claim based on counsel’s failure to raise a particular claim, it is difficult for the appellant to demonstrate that counsel was incompetent. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L.Ed.2d 756 (2000) citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (“Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.”).

Mr. Geier also claims that his appellate counsel was ineffective because she was sanctioned for being late in filing the opening brief. PRP at 5-6. This is inaccurate. On August 10, 2011, the Court Clerk sent a letter to appellate counsel indicating that sanctions would be imposed *if* the appeal was not timely perfected by filing the statement of

¹⁵ Mr. Geier claims that he “wrote a couple of letters to appellant [sic] counsel regarding the ground of Ineffective Assistance of Counsel” but she failed to include it in her opening brief. PRP at 4. However, Mr. Geier does not submit any of these letters with his PRP or include any affidavits attesting to such facts.

arrangements and designation of clerks papers “on or before fifteen days from the date of this letter.” Appendix 7, Letter from Court Clerk. Appellate counsel filed both documents the following week and no sanctions were ever imposed. See Appendix 8, Statement of Arrangements and Designation of Clerk’s Papers.

Mr. Geier has not met either prong of the *Strickland* test. There is a strong presumption that counsel’s representation was effective. *Davis*, 152 Wn.2d at 673. Mr. Geier has not met his burden of establishing that his appellate counsel’s performance was deficient. See *McFarland*, 127 Wn.2d at 335. Mr. Geier’s counsel was entitled to use her own professional judgment in deciding what issues to raise on appeal. See *Stenson*, 142 Wn.2d at 733.

As previously discussed, the ineffective assistance of trial counsel claim has no merit. This Court has already determined that Mr. Geier was not prejudiced by the cross-examination into Dr. Halon’s disciplinary action. See Appendix 4. Thus, trial counsel could not have been ineffective for using Dr. Halon as an expert. It follows that appellate counsel also could not have been ineffective to failing to raise an issue lacking merit.

2. Mr. Geier Has Failed to Show That Appellate Counsel was Ineffective for Not Filing a Petition for Discretionary Review

Mr. Geier argues that he received ineffective assistance of counsel by appellate counsel's "refusal" to appeal this Court's ruling to the Washington Supreme Court. *See* PRP at 8-11. Mr. Geier's argument is not supported by the record.

First, Mr. Geier fails to provide any affidavits or other corroborating evidence that his counsel ultimately decided not to file a petition for discretionary review based solely on her belief that her appointment did not extend to the Supreme Court. Mr. Geier must present factual evidence that his allegations are based on more than just speculation or conjecture. *See Rice*, 118 Wn.2d at 886. Mr. Geier may not simply state what he thinks his appellate counsel would say about this issue; rather, he is required to present an affidavit from counsel or some other corroborative evidence. *See id.* Mr. Geier's entire argument is based on mere speculation and is insufficient to justify review.

In a letter dated January 28, 2013, appellate counsel informed Mr. Geier that her "appointment as appellate counsel does not extend to the Supreme Court" and that she has already explained that they should "await the outcome [of the direct appeal] and determine how to best proceed at that point." PRP, Appendix A (letter dated January 28, 2013). Appellate

counsel never said that she was *refusing* to file a petition for discretionary review as Mr. Geier alleges. *See* PRP at 10. Counsel merely stated that “it is best to take one step at a time” during the review process, as opposed to speculating about the outcome. PRP, Appendix A (letter dated January 28, 2013). At the time counsel wrote the letter to Mr. Geier, this Court had not even issued a decision in the direct appeal. *See* Appendix 4. Counsel was merely informing Mr. Geier that it was premature to consider further appellate action until this Court issued a decision in the direct appeal.

Despite the fact that Mr. Geier’s appellate counsel was allowed to file a petition for discretionary review, she was not required to do so.¹⁶ The Supreme Court accepts review only in very limited circumstances. RAP 13.4(b).¹⁷ There is no indication, or argument by Mr. Geier, that his case falls into any of limited situations where the Supreme Court accepts review. Given the strong presumption of counsel’s competence, Mr. Geier’s appellate counsel arguably knew there were no grounds for review

¹⁶ Letters submitted by Mr. Geier indicate that he was informed by the Office of Public Defense that it is the attorney’s discretion whether to file a petition for review. *See* PRP, Appendix A (letters dated September 9, 2013 and October 3, 2013).

¹⁷ The Supreme Court will accept review of a Court of Appeals decision only if (1) the decision is in conflict with a Supreme Court decision; (2) the decision is in conflict with another decision of the Court of Appeals; (3) a significant question of law under the constitution is involved; or (4) the petition involves an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b).

after reading this Court's decision in the direct appeal. *See Piche*, 71 Wn.2d at 591.

Mr. Geier claims that his appellate counsel was required to consult with him on the appropriateness of filing a petition for discretionary review. PRP at 9. Mr. Geier fails to provide any authority that this was required, and his unsupported allegation is insufficient to warrant judicial review.

The United States Supreme Court rejected a bright-line rule requiring counsel to always consult with the defendant regarding filing a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000). "We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient." *Id.* at 479 (emphasis in original). "Such a holding would be inconsistent with both our decision in *Strickland* and common sense." *Id.*

Finally, Mr. Geier's accusation that his appellate counsel "lied" to him about her representation is unsupported by the record. *See* PRP at 9-10. A "lie" is defined as "an assertion of something known or believed by the speaker to be untrue with intent to deceive" and "a deliberate misrepresenting of fact with intent to deceive." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1305 (1993) (definition 4).

At most, his appellate counsel was mistaken about the extent of her appointment. Regardless, there is no indication from the facts or evidence submitted by Mr. Geier that this mistaken belief was the reason a petition for discretionary review was ultimately not filed. He fails to present any facts, affidavits, or other corroborative evidence in support of his conclusory allegation. *See Rice*, 118 Wn.2d at 885-86. This is insufficient to justify relief. *See Cook*, 114 Wn.2d at 813-14. In addition, he has failed to meet his threshold burden of showing actual prejudice from a constitutional error. *See Rice*, 118 Wn.2d at 885.

C. Mr. Geier Is Not Permitted to File a Statement of Additional Grounds for Review

1. RAP 10.10(a) only applies to criminal cases.

Mr. Geier argues that it is a violation of his due process and equal protection rights to not allow him to file a “Statement of Additional Grounds for Review” under RAP 10.10(a). PRP at 24. Mr. Geier claims that his appellate counsel initially informed him in a letter dated July 20, 2011 letter, that he was entitled to do this. *Id.* Mr. Geier indicated that he was attaching the letter in Appendix A to his PRP. *Id.* However, there is no such letter in Appendix A. Mr. Geier asserts that appellate counsel subsequently informed him that RAP 10.10(a) only applies to criminal cases. PRP at 24. His appellate counsel is correct. Under RAP 10.10(a),

only a defendant/appellant in a *criminal* case may file a pro se statement of additional grounds for review. RAP 10.10(a). Thus, Mr. Geier's appellate counsel accurately informed him of the law and there are no grounds for relief.¹⁸

2. Mr. Geier Fails to Adequately Address His Constitutional Claims

Other than Mr. Geier's vague assertions that his inability to file a Statement of Additional Grounds for Review violates his due process and equal protection rights, he fails to undertake any detailed analysis under either clause. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). In addition, appellate courts "will not consider fleeting and unsupported assertions of constitutional claims." *State v. Hoisington*, 123 Wn. App. 138, 145, 94 P.3d 318 (2004); *see also State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (parties raising constitutional issues must present considered arguments to this court.)

¹⁸ Mr. Geier claims that appellate counsel apologized in a letter dated March 14, 2012 for misinforming him that he had a right to file a Statement of Additional Grounds for Review. PRP at 5. Mr. Geier misinterprets counsel's March 14, 2012 letter. Counsel accurately informs him that such a statement is not permitted in civil commitment cases and indicates that she is sorry for any confusion. *See* PRP, Appendix A (letter dated March 14, 2012). Mr. Geier does not submit any affidavits or letters indicating that appellate counsel ever gave him inaccurate information.

Mr. Geier fails to adequately brief these complex constitutional issues sufficiently to allow for meaningful review. *See Hoisington*, 123 Wn. App. at 146. Naked castings into the constitutional sea are not sufficient to merit judicial consideration. *Williams*, 111 Wn.2d at 365. Thus, this Court should decline to consider his bare assertions.

3. The SVP Statute Is Civil, Not Criminal, In Nature

Should the Court address the merits of Mr. Geier's equal protection and due process claims, Washington case law provides that there are valid reasons for treating sexually violent predators (SVPs) and criminal defendants differently. They are not similarly situated classes of people as Mr. Geier alleges in his PRP. *See* PRP at 25-26.

Washington's SVP statute is civil, not criminal, in nature. *In re Young*, 122 Wn.2d 1, 18-23, 857 P.2d 989.¹⁹ Unlike individuals who are convicted of a crime and sent to prison, SVPs are committed solely for treatment purposes and must be released as soon as they are no longer mentally ill and dangerous. *See id.* at 20-21. "[T]he goals of civil and criminal confinement are quite different; the former is concerned with incapacitation and treatment, while the latter is directed to retribution and deterrence." *Id.* at 21; *see also Seling v. Young*, 531 U.S. 250, 261, 121 S. Ct. 727, 148 L.Ed.2d 734 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 361-

¹⁹ A portion of the *Young* decision has been superseded by statute on other unrelated grounds.

63, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997) (SVP act does not implicate retribution or deterrence).

The SVP statute is not concerned with the criminal culpability of the individual's past actions; rather, the focus is on treating that individual for a current mental abnormality. *Young*, 122 Wn.2d at 21. The SVP commitment scheme serves no punitive purposes. *Id.* at 25. By contrast, the United States Supreme Court has repeatedly said that retribution and deterrence are punitive, and thus are the goals of criminal law. *Id.* at 22 citing *U.S. v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989). Thus, SVPs and criminal defendants are not similarly situated classes of people as Mr. Geier alleges in his PRP. *See* PRP at 25-26.

Moreover, criminal constitutional protections are not applicable to SVPs beyond those supplied in the SVP statute and those granted in *Young*. *In re Det. of Twining*, 77 Wn. App. 882, 895, 894 P.2d 1331 (1995), abrogated on other grounds by *In re Det. of Pouncy*, 168 Wn.2d 382, 229 P.3d 678 (2010). The State's decision to provide some of the procedural safeguards applicable in criminal trials does not turn SVP proceedings into criminal prosecutions. *See Kansas v. Hendricks*, 521 U.S. at 364-65.

Mr. Geier compares his civil commitment as "akin to receiving a criminal sentence of life in prison," arguing that his commitment is

“indefinite.” PRP at 25. However, SVP commitment is only “*potentially* indefinite.” *Kansas v. Hendricks*, 521 U.S. at 364 (emphasis in original).²⁰ The purpose of the SVP statute is to hold the person only as long as he is mentally ill and dangerous. *Id.* at 363-64.

Mr. Geier’s equal protection claim has no merit. Equal protection principles of the Fourteenth Amendment and article I, section 12 of Washington’s constitution require that similarly situated persons receive similar treatment under the law. *Young*, 122 Wn.2d at 44. However, equal protection does not require that all persons be dealt with identically; rather, it requires that a distinction made have some relevance to the purpose for which the classification is made. *Id.* at 45. The distinct goals of the SVP commitment scheme justify treating SVPs differently from criminal defendants.

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²⁰ *Kansas v. Hendricks* involves the Kansas SVP Act, which was modeled after Washington’s SVP Act and is “strikingly similar.” *See Selig v. Young*, 531 U.S. at 260-61.

VII. CONCLUSION

The Respondent respectfully requests that the Court deny Mr. Geier's PRP. None of his claims merit relief.

RESPECTFULLY SUBMITTED this 12th day of June, 2014.

ROBERT W. FERGUSON
Attorney General



KRISTIE BARHAM
Assistant Attorney General
WSBA #32764/OID #91094

Appendix 1

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STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

In re the Detention of:
PAUL ANDREW GEIER,
Respondent.

NO. 08-2-08313-1
ORDER OF COMMITMENT

Upon the finding of the Jury on June 14, 2011, that Respondent, Paul Andrew Geier, is a sexually violent predator pursuant to RCW 71.09.060, the Court hereby enters the following:

ORDER OF COMMITMENT

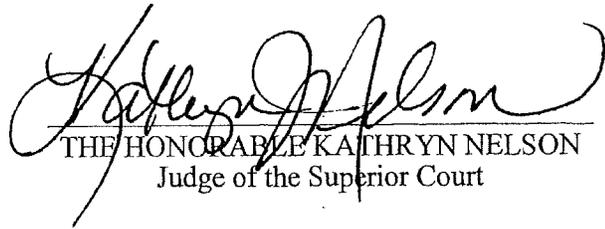
Respondent, Paul Andrew Geier, shall be committed to the Special Commitment Center in Steilacoom, Washington, to the custody of the Department of Social and Health Services, for

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control, care, and treatment until such time as his mental abnormality and/or personality disorder has so changed that the Respondent is safe to be conditionally released to a less restrictive alternative or unconditionally discharged.

DATED this 14th day of June, 2011.


THE HONORABLE KATHRYN NELSON
Judge of the Superior Court

Presented by:

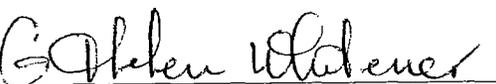
ROBERT M. MCKENNA
Attorney General



KRISTIE BARHAM, WSBA # 32764
Assistant Attorney General
Attorney for State of Washington



Copy received; Approved as to form:


G. HELEN WHITENER, WSBA # 28968
LYNN RAINEY, WSBA # 40055
Attorneys for Respondent



Appendix 2

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CRIMINAL JUSTICE DIVISION
ATTORNEY GENERAL'S OFFICE

NO. 42292-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PAUL ANDREW GEIER,

Appellant.

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

The Honorable Kathryn J. Nelson

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Petitioner

23619 55TH Place South
Kent, Washington 98032
(253) 520-2637

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A. ASSIGNMENTS OF ERROR

1. Did the trial court err in denying appellant's motion for a mistrial?

2. Did the trial court error in sealing jury questionnaires without properly conducting a Bone-Club analysis?

Issues Pertaining to Assignments of Error

1. Did the trial court err in denying appellant's motion for a mistrial where the State violated a motion in limine precluding prior bad acts which denied appellant a fair trial?

2. Did the trial court err in failing to conduct a Bone-Club analysis before jury questionnaires in violation of the right to an open and public trial?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On May 15, 2008, the State filed a petition seeking the involuntary commitment of appellant, Paul Andrew Geier, as a sexually violent predator. CP 1-2. On August 29, 2008, the trial court entered a stipulated order finding probable cause and directing custodial detention

¹ There are 16 volumes of verbatim report of proceedings: 1RP - 05/27/08; 2RP - 08/29/08; 3RP - 07/30/10; 4RP - 05/23/11; 5RP - 05/24/11; 6RP - 05/25/11; 7RP - 05/26/11; 8RP - 05/31/11; 9RP - 06/01/11; 10RP - 06/02/11; 11RP - 06/06/11; 12RP - 06/07/11; 13RP - 06/08/11; 14RP - 06/09/11; 15RP - 06/13/11; 16RP - 06/14/11.

and evaluation of Geier. CP 117-19. Following a commitment trial before the Honorable Kathryn J. Nelson, on June 14, 2011, a jury found that the State proved beyond a reasonable doubt that Geier is a sexually violent predator and the court entered an order committing Geier to the Special Commitment Center (SCC) in the custody of the Department of Social and Health Services. CP 631-33. Geier filed a timely appeal. CP 634-36.

2. Substantive Facts²

a. Motions in Limine

During pretrial motions, the court granted an agreed motion in limine to preclude questions of any prior bad acts or crimes of petitioner's and respondent's witnesses. 4RP 35-36.

b. Trial Testimony

Dr. Harry Hoberman, a forensic and clinical psychologist, reviewed the record in Geier's case and interviewed him in 2006 and 2010. 6RP 165, 190-95. He examined police reports, criminal history records, court documents, Department of Corrections treatment records, Special Commitment Center records, and reviewed depositions. 6RP 196-97, 200-01. The court documents included a certified copy of a

² In accordance with RAP 10.3(a)(4), the facts are limited to those relevant to the issues presented for review.

judgment and sentence reflecting that Geier pled guilty to three counts of rape of a child in the first degree committed in 1991. 7RP 217-22. Dr. Hoberman described a chart from the Sex Offender Treatment Program at Twin Rivers Correctional Center where Geier disclosed numerous incidents of sex offenses against children. 7RP 232-36. When Dr. Hoberman asked Geier about these incidents in the 2006 interview, Geier agreed with the chart of his sexual offending history but later disputed its accuracy in the 2010 interview. 7RP 236-43.

Dr. Hoberman applied the criteria in DSM-IV³ using information contained in Geier's record and his interviews to conclude that Geier suffers from a non-exclusive form of pedophilia. 7RP 247-55. He also diagnosed Geier with antisocial personality disorder finding that Geier met six of the seven criteria described in DSM-IV. 7RP 261-62. During his interviews with Geier, Dr. Hoberman administered three psychological tests: the Minnesota Multiphasic Personality Inventory (MMPI-2), the Millon Clinical Multiaxial Inventory (MCMI), and Multiphasic Sex Inventory, Roman Numeral II, commonly used in clinical and forensic evaluations. 7RP 291. He also tested for psychopathic traits using a test called the Psychopathy Checklist Revised

³ Diagnostic and Statistical Manual published by the American Psychiatric Association primarily used for diagnosis. 7RP 244.

(PCL-R). 7RP 302. The checklist is “a rating scale,” ranging from zero, a very low score of psychopathy, up to forty, the highest score. 7RP 303. Geier scored a 27 when Dr. Hoberman evaluated him in 2006 and scored a 31 in his 2010 evaluation. 7RP 307.

Dr. Hoberman concluded that Geier’s pedophilia meets the legal definition of a mental abnormality, and based on Geier’s disclosures, his mental abnormality causes serious difficulty controlling his sexually violent behavior. 7RP 312-19, 323-26. He explained that the combination of Geier’s antisocial personality disorder and pedophilia increases his risk for future sexually violent predatory acts. 7RP 332-38. Dr. Hoberman used three actuarial instruments to assess Geier’s risk of reoffending: the Static-99, Minnesota Sex Offender Screening Tool Revised (MnSOST-R), and Sex Offender Risk Appraisal Guide (SORAG), which are regularly used by experts in Washington. 9RP 572. Dr. Hoberman opined that Geier’s mental abnormality and personality disorder “causes him serious difficulty and control and that make him more probable than not to sexually re-offend if not confined to a secure facility, and that he would be more probable than not to commit predatory acts of sexual violence if not confined to a secure facility.” 10RP 681-82.

Melissa Sayer was formerly employed as a sex offender treatment specialist at the Twin Rivers Facility of the Monroe Correctional Complex. 8RP 367. Sayer worked as therapist for the Sex Offender Treatment Program (SOTP) which involved group therapy and individual therapy, and she treated Geier for about six months in 2005. 8RP 374-75, 382. Sayer explained a chart that she created which documented Geier's disclosure of numerous sexual offenses against children. 8RP 386-89. During her time as Geier's treatment provider, "he was minimally getting by" and he had difficulty regulating his anger and anxiety, but a willingness to continue treatment is a positive sign. 8RP 398, 403, 437-38.

Deborah LaRowe-Prado works as a psychology associate at the Special Commitment Center. 9RP 451-52. Geier entered treatment at the SCC in 2009 and was assigned to her caseload in 2010. 9RP 461. While in treatment, Geier refused to follow rules, argued with group leaders, and was temporarily suspended from treatment February to May 2011 for violating restrictions, lying, and yelling at other group members. 9RP 466-71. During group therapy in October or November 2010, Geier admitted that he had sex with other residents, which is a violation of SCC rules. 9RP 479, 482. He revealed that if he kept lying "about his sexual activity at SCC and was released, he would likely re-offend."

9RP 489. Despite his admissions, Geier continued to violate subsequent restrictions that were administratively imposed. 9RP 489-93.

Dr. Robert Halon, a psychologist, met with Geier three times, reviewed his record, and wrote a report in October 2008 and September 2010. 12RP 995-96. As part of the evaluation process, he reviewed psychological tests, Department of Corrections reports, the Twin Rivers Sexual Offender Treatment Program summaries, SCC files, police reports, and criminal history summaries. 9RP 997-98. Dr. Halon also administered several psychological tests: the Shipley Institute of Living Scales, the MMPI-2, 16 Personality Factors Fifth Edition (16-PF-5), and the Rorschach Inkblot test. 9RP 999. The MMPI-2 which tests for mental disorders revealed “no mental disorder of any kind, no evidence that he doesn’t know what he’s doing whenever he’s doing it.” 9RP 999, 1005. The Rorschach Inkblot Test confirmed that Geier had no mental disorder that was interfering with his ability to think logically and coherently. 9RP 1011.

Dr. Halon noted that Dr. Hoberman gave Geier the MCMI-II psychological test in 2006 which was “defunct” and no longer in use because it gave false impressions of mental disorders and personality disorders. 9RP 1014-15. Dr. Hoberman also administered the PCL-R which is problematic because it is a test for research purposes not for

forensic purposes and is “a very complicated instrument, not very reliable in terms of scoring.” 9RP 1017-20. The Static-99 should not be used because it does not take into consideration the change in the base rates of recidivism or the age differences or the reduction in recidivism due to age. 9RP 1039.

For his 2010 evaluation, Dr. Halon reviewed the results of Geier’s penile plethysmograph (PPG) which verified that Geier has switched his fantasies from children to adults because he had no arousal to children but had significant arousal to adult males. 9RP 1020-21. Although Dr. Halon diagnosed Geier with pedophilia, he has no mental disorder that would make him act out on his pedophilic interests. 9RP 1099, 1107. Dr. Halon opined that Geier does not suffer from a mental abnormality or a personality disorder that meets the criteria of a sexually violent predator. 9RP 1108, 1116-17.

Paul Geier began serving his sentence with the Department of Corrections in 1992 and he immediately signed up for sex offender treatment but was not allowed to enter treatment until 18 months before his earned early release date. 15RP 1420-22, 1433. In 1996, he repeatedly requested a transfer to Twin Rivers Corrections Center to enroll in its voluntary sex offender program. 15RP 1435-43. In 2002, he was screened for the SOTP at Twin Rivers and went through an

orientation in 2004. 15RP 1465-66, 1476-77. Geier earned early release in 2005 and was assigned to a parole officer and treatment provider. 15RP 1496. During his civil commitment, Geier has received support from his brother, his spiritual advisor, a longtime friend who helped him when he was a juvenile, and a support group of registered sex offenders who have been succeeding in the community since being released. 15RP 1497.

c. Motion for a mistrial.

During the cross-examination of Dr. Halon, the State raised questions about his psychology license from California and asked him if his license had been revoked due to a complaint filed against him by the California Board of Psychology. 13RP 1187-89. Following a discussion outside the presence of the jury, Geier's counsel moved for a mistrial arguing that the State violated a motion in limine precluding bad acts of witnesses. 13RP 1197. The court denied the motion concluding that "licensure missteps" are not bad acts. 13RP 1203-05.

d. Jury Questionnaires

During trial, the court brought to the parties that if the jury questionnaires are sealed, the court must do a Bone-Club analysis. 8RP 445. The State responded that it had "standard Bone-Club findings and conclusions" and would speak with counsel and probably present an

agreed order. 8RP 446. At the end of trial, the court entered an agreed order sealing the jury questionnaires. 16RP 1654; CP 610-12.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING GEIER'S MOTION FOR A MISTRIAL WHERE THE STATE REVEALED PREJUDICIAL EVIDENCE IN VIOLATION OF A MOTION IN LIMINE.

Reversal is required because the State revealed prejudicial evidence in violation of a motion in limine which deprived appellant of a fair trial.

When considering a motion for a mistrial, the proper inquiry is whether the accused was denied a fair trial. State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). A mistrial should be granted only when the accused has been so prejudiced that nothing short of a new trial can ensure that the accused will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). Only errors affecting the outcome of the trial will be deemed prejudicial. Id. In determining whether the trial irregularity affected the outcome, appellate courts examine: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Here, the State made a motion in limine to preclude questions of any bad acts or crimes of the petitioner's witnesses, stating that it appears that the defense agrees and "wants it to apply to both witnesses, Petitioner's and Respondent's witnesses." 4RP 35. Defense counsel concurred and the court granted the motion as agreed. 4RP 36.

During trial, the State conducted a cross-examination of Dr. Halon who testified as an expert witness for the defense:

Q. And you have a psychology license in the state of California, correct?

A. Correct.

....

Q. And you've previously had your license revoked in California; is that correct?

A. No. My license has never been revoked.

Q. You had the license revoked and then the revocation was stayed, correct?

A. Well, that means that the license is not revoked.

Q. Did you enter into a stipulated order, a disciplinary order and stipulated settlement with the state of California in 1999?

A. Yes, ma'am.

Q. And the order indicates that your license is revoked but the revocation was stayed, correct?

A. Yep. That's the language that has to be in there because the State is not allowed to go into a stipulated settlement of any kind without that language.

Q. And that the stipulated settlement that you entered into was based on a complaint that was filed against you by California Board of Psychology in 1998?

A. That's correct.

Q. And there were about four allegations in that complaint?

13RP 1188-89.

The State's line of questioning prompted defense counsel to object and request to be heard outside the presence of the jury. 13RP 1189.

Defense counsel argued that the State violated the motion in limine to exclude prior bad acts of witnesses. The State responded that the motion had nothing to do with experts, arguing that Dr. Halon's license revocation is well known and goes to credibility. 13RP 1191-92. The court referred to the State's written motions in limine which provided that any evidence of prior bad acts are precluded until an offer of proof is made and the court rules on its admissibility. 13RP 1192. Defense counsel pointed out that she sent an e-mail to the State inquiring whether it was going to use any information against Dr. Halon. 13RP 1199. The State acknowledged that it received an e-mail but did not

interpret the e-mail as a request for further information about Dr. Halon.
13RP 1200-01.

Defense counsel moved for a mistrial, arguing that State failed to make an offer of proof before introducing evidence of prior bad acts in violation of the motion in limine and the error could not be cured. 13RP 1197. The court recognized that the State failed to make an offer of proof but denied the motion, concluding that “licensure missteps” are not bad acts and “is precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness.”

13RP 1203-05.

The court allowed the State to question Dr. Halon further and he acknowledged that as part of the stipulated settlement, he agreed to a three-year probation and monitoring, paid a fine, and took an ethics course. 13RP 1206-07.

The trial court erred in denying the motion for a mistrial because the record substantiates that the State violated the court’s in limine ruling which precluded evidence of prior bad acts. The State’s violation constitutes a serious irregularity because as the our Supreme Court emphasized in State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996), the courts “do not condone cavalier violation of trial court pretrial rulings” and such violations may be “so flagrantly prejudicial as

to be incurable by instruction.” Clearly, the evidence was not cumulative and after the evidence was revealed, the error could not be cured.

Given the fact that Dr. Halon’s expert testimony was vital to Geier’s defense, he was denied a fair trial because the highly prejudicial evidence cast Dr. Halon in a bad light before the jury. Furthermore, the State used the evidence in closing argument to discredit Dr. Halon and seal its case against Geier:

[W]hat do we know about Dr. Halon? Well, he takes issue with Dr. Hoberman’s psychological testing. That’s based on Dr. Halon’s own personal opinion. And you are the sole judges of credibility. And what do we know about Dr. Halon? We know that he was fired from the California Department of Mental Health after being there for less than five months. We know that his license was revoked, and that revocation was then stayed while he was put on probation for three years. He had to pay a fine. He had to have another psychologist supervise him. He had to take an ethics course. This is what we know about Dr. Halon.

14RP 1638.

The importance of Dr. Halon’s testimony is abundantly clear, particularly where he disputed key aspects of Dr. Hoberman’s testimony, the State’s primary witness. Consequently, Geier was substantially prejudiced and he is entitled to a new and fair trial. Johnson, 124 Wn.2d at 76.

2. THE TRIAL COURT ERRED BY SEALING THE JURY QUESTIONNAIRES WITHOUT FIRST CONDUCTING THE REQUIRED BONE-CLUB ANALYSIS.

Article I, section 10 of the Washington Constitution provides that “Justice in all cases shall be administered openly.” Division One of this Court recently concluded in State v. Tarhan, 159 Wn. App. 819, 246 P.3d 580 (2011), that a trial court must conduct a Bone-Club⁴ analysis before sealing jury questionnaires and the court’s failure to do so violates the public’s right to open and accessible court proceedings under article I, section 10. 159 Wn. App. at 834. The court held that the appropriate remedy is to remand the case for reconsideration of the sealing order in light of Bone-Club and other relevant authority. 159 Wn. App. at 835. Tarhan filed a petition for review arguing that sealing

⁴ The trial court must perform a weighing test consisting of five criteria:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

of the jury questionnaires without a Bone-Club hearing violates the right to an open and public trial which constitutes structural error warranting a new trial. The Washington Supreme Court accepted review and a decision is pending (Supreme Court No. 85737-7).

Here, during trial, the court brought to the attention of the parties that “if the jury questionnaires are to be sealed, the court must do a Bone-Club analysis.” 8RP 445. The State responded that it had “a standard Bone-Club findings and conclusions and stuff, so Counsel and I can talk about that, and we’ll probably present an agreed order to that effect.” 8RP 446. The court replied, “Okay. Well, if everyone thinks that’s appropriate, that’s certainly something the Court would entertain.” 8RP 446. At the end of trial, the court entered an agreed order sealing the jury questionnaires without conducting a Bone-Club analysis on the record. 16RP 1654; CP 610-12.

The court’s order contains findings of fact and conclusions of law which address the Bone-Club factors and concludes that “The analysis required for sealing jury questionnaires pursuant to *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716 (1982) has been made by the Court. CP 611. To the contrary, the record establishes that the court did not perform a Bone-Club analysis and merely signed the agreed

order presented to court. 14RP 1654. The court's failure to properly conduct a Bone-Club hearing violates Wash. Const., article I, section 22 and article I, section 10 which protects the right to a public trial. The violation of the right to an open and public trial is a structural error and the remedy is a remand for a new trial. See State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009).

Geier is aware of this Court's decisions in State v. Smith, 162 Wn. App. 833, 262 P.3d 72 (2011)(the court did not err in sealing the jury questionnaires without a Bone-Club analysis) and In re Stockwell, 160 Wn. App. 172, 181 248 P.3d 576 (2011)(sealing of jury questionnaires does not constitute structural error). However, he respectfully requests that this Court stay its decision on this issue pending a decision by the Washington Supreme Court.

D. CONCLUSION

“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” Foucha v. Louisiana, 540 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982)).

For the reasons stated, this Court should reverse and remand for a new commitment trial.

DATED this 2nd day of March, 2012.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Paul Andrew Geier

Appendix 3

RECEIVED
COURT OF APPEALS
DIVISION ONE

MAY 21 2019

NO. 42292-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

PAUL ANDREW GEIER,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

KRISTIE BARHAM
Assistant Attorney General
WSBA #32764
800 Fifth Avenue
Seattle, WA 98104
(206) 464-6430

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GR 31 6

I. ISSUES PRESENTED

- A. Whether the trial court erred in denying Geier's motion for a mistrial where the State cross-examined Geier's expert on a prior disciplinary action against his license?
- B. Whether the trial court was required to engage in a *Bone-Club* analysis prior to sealing the jury questionnaires at the conclusion of the trial where all voir dire proceedings occurred on the record in open court?

II. STATEMENT OF THE CASE

A. Motion in Limine to Preclude Prior Bad Acts

On the first day of trial, the trial court heard oral argument on the motions in limine (MIL) filed by the parties. 4RP 11, 35-36.¹ The State's MIL #13 was to preclude references to any alleged prior bad acts or crimes of petitioner's witnesses under ER 608, ER 609, and ER 403. CP 666. The MIL requested that the court preclude such testimony until an offer of proof is made outside the presence of the jury. *Id.* The trial court granted this MIL, ruling that it applied to both the State's and Geier's witnesses. CP 563; 4RP 35-36.

¹ For the Court's convenience, the State will use the Verbatim Report of Proceedings (VRPs) citation system used by Appellant as outlined in Brief of Appellant at page 1, footnote 1. The State filed a motion to supplement the record with VRPs of individual voir dire, which are cited as follows: 5(a)RP – 5/24/11 (corrected version); 6(a)RP – 5/25/11.

B. Cross-Examination of Geier's Expert on Disciplinary Action Against His License

On direct examination, Dr. Halon, Geier's expert, testified that he's been a licensed psychologist since 1977. 12RP 958. He also testified in detail about his qualifications and credentials as an expert witness. 12RP 958-69.

On cross-examination, Dr. Halon clarified that his psychology license is in the State of California, not Washington. 13RP 1188. The State then questioned Dr. Halon about whether this license had ever been revoked. 13RP 1188-89. Dr. Halon testified that in 1999, he entered into a stipulated settlement with the State of California. 13RP 1189. The disciplinary order revoked his license, but the revocation was stayed. *Id.*² Dr. Halon testified that the stipulated settlement was based on a complaint filed against him by the California Board of Psychology in 1998. *Id.* When the State asked Dr. Halon whether there were four allegations in the complaint, Geier's counsel objected and asked to be heard outside the presence of the jury. *Id.* The State indicated that the question went to his credibility. *Id.* The court then excused the jurors. 13RP 1189-90.

Outside the presence of the jury, Geier's counsel argued that the State's cross-examination violated MIL #13. 13RP 1190-93. The State

² Dr. Halon actually denied that his license was ever revoked. 13RP 1189. He testified that the stay meant his license was not revoked. *Id.*

disagreed, arguing that the intent of MIL #13 had nothing to do with experts, but rather prior bad acts of witnesses that are referenced in ER 608 and ER 609. 13RP 1191-95. The State argued that the testimony is not a prior bad act under ER 608 or ER 609, but rather goes to Dr. Halon's credibility as an expert witness. *Id.* Geier's counsel asked for a mistrial, arguing that the State should have first made an offer of proof about the testimony. 13RP 1197.

Outside the presence of the jury, the trial court inquired as to the basis of Dr. Halon's disciplinary action and the nature of the allegations. 13RP 1194-95. The State advised that a complaint was filed against Dr. Halon by the Board of Psychology regarding some allegations in 1999. 13RP 1194. Dr. Halon entered into a stipulated settlement and disciplinary order regarding the allegations. *Id.* The Board revoked his license, but stayed the revocation on the condition that he take an ethics course, pay a fine, undergo monitoring by another psychologist, and remain on probation for three years. *Id.* The specific allegations involved: (1) failure to report an act of sexual abuse reported to him by a patient due to his belief that everyone knew about the abuse and he was not required to report it; (2) errors in the coding on some billing issues; and (3) errors in reporting the results of some psychological tests he administered. 13RP 1195-96. The State advised the court that it did not intend to go into

the specifics of the allegations as part of the cross-examination.
13RP 1194-95.

In denying Geier's request for a mistrial, the trial court noted that MIL #13 was never meant to be an "absolute prohibition" against evidence of prior bad acts and that it was following the intended procedure by hearing the offer of proof outside the presence of the jury. 13RP 1203-05. The court ruled that the "licensure missteps" at issue were not prior bad acts. *See* 13RP 1204. The court stated, "It is precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness." 13RP 1204. The court allowed the State to finish its cross-examination around the licensing issue, noting that if it did not question Dr. Halon on the specific allegations or other information helpful to Geier's case, that Geier could elicit that information on redirect examination. 13RP 1205.

The State continued its cross-examination of Dr. Halon. 13RP 1206-07. Upon questioning by the State, Dr. Halon testified that as a result of the stipulated settlement, he was placed on probation for three years and was required to pay a fine. 13RP 1206. He testified that he had to take an ethics course, which he would have had to take regardless of the settlement, and that his practice was monitored by another psychologist. 13RP 1207. Dr. Halon also testified that his psychology practice has "not

been interrupted for a minute in the 30-something years I've had the license." *Id.* The State did not ask any further questions of Dr. Halon on this issue, and Geier did not ask any questions of Dr. Halon about the issue on redirect examination.

C. Jury Questionnaire and Voir Dire

On May 23, 2011, the first day of trial, the parties submitted a joint questionnaire to be completed by the jurors prior to voir dire. CP 703-10; *see* 4RP 51-52, 58; 6RP 140-41. Based on their answers to the questionnaire, some jurors were questioned individually outside the presence of the other jurors. *See* 4RP 59-60, 66.³ Based on the individual questioning, several jurors were excused for cause at Geier's request. 5(a)RP 104-14, 123-31, 139-45; 6(a)RP 174-78.⁴ The courtroom remained open to the public during general and individual voir dire. 4RP 20-21; CP 709. On May 25, 2011, the jury panel was seated and sworn in. 6RP 141-42.

On May 25, 2011, the State called its first witness at trial. *See* 6RP 164-65. On May 31, 2011, the court sua sponte informed counsel that it would have to do a *Bone-Club* analysis if the juror

³ The transcript of individual voir dire is located at 5(a)RP 4-166 and 6(a)RP 169-178.

⁴ Numerous other jurors were excused for cause after indicating they could not be fair and impartial. *See e.g.* 5(a)RP 70-74, 85-90, 131-39, 147-50, 157-62.

questionnaires were subsequently sealed by the court. 8RP 445. The court indicated that after closing arguments, “we could discuss whether or not we have need of a *Bone-Club* hearing or if there were some stipulations that the parties would be willing to make concerning *Bone-Club* factors.” *Id.*⁵ The State indicated it believed the parties were in agreement regarding whether to seal the juror questionnaires and that it had standard *Bone-Club* findings and conclusions and would discuss the issue with Geier’s counsel. 8RP 446.

On June 14, 2011, the parties rested, and the case went to the jury for deliberations. 16RP 1555-56, 1645-47. The jury reached a verdict committing Geier as a sexually violent predator that same day. 16RP 1649-52. After the jury returned its verdict, the parties presented agreed proposed findings of fact and conclusions of law for the court to engage in a *Bone-Club* analysis finding compelling reasons to seal the juror questionnaires and giving anyone present an opportunity to object. 16RP 1654. The trial court adopted the agreed *Bone-Club* analysis, without oral analysis, and signed and filed the findings of fact, conclusions of law, and agreed order to seal the questionnaires. CP 610-12; 16RP 1654-56.

⁵ The court also referenced GR 31.

III. ARGUMENT

A. **The Trial Court Did Not Err In Denying Geier's Motion For A Mistrial Where The State Cross-Examined Geier's Expert About A Prior Disciplinary Action Against His License.**

1. **A trial court's decision to admit evidence should not be overturned on appeal absent manifest abuse of discretion.**

The decision to admit evidence is within the sound discretion of the trial court. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). An appellate court reviews a trial court's decision as to the admissibility of evidence under an abuse of discretion standard. *In re Detention of West*, 171 Wn.2d 383, 396, 256 P.3d 302 (2011). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* at 397.

2. **The State is entitled to cross-examine an expert witness about matters affecting his credibility and bias.**

The scope of cross-examination lies within the discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion. *State v. Dixon*, 159 Wn.2d 65, 75, 147 P.3d 991 (2006). "Trial courts have broad discretion in determining the scope of cross-examination, particularly with respect to the examination of experts." *In re Detention of Griffith*, 136 Wn. App. 480, 485, 150 P.3d 577 (2006) (citations omitted). The scope of cross-examination usually has little

effect on the outcome of a trial and therefore is usually given great discretion. *State v. Marks*, 90 Wn. App. 980, 984, 955 P.2d 406 (1998).

ER 607 governs the use of impeachment evidence and provides that the credibility of a witness may be attacked by any party. ER 607. A party has the right to cross-examine a witness about matters that affect the person's credibility and bias. *State v. Russell*, 125 Wn.2d 24, 92, 882 P.2d 747 (1994); *see also In re Detention of Law*, 146 Wn. App. 28, 37, 204 P.3d 230 (2008). The scope of such cross-examination is within the discretion of the trial court. *Russell*, 125 Wn.2d at 92.

Evidence is relevant if it has "any tendency" to make the existence of any fact of consequence to the action more or less probable. ER 401. All relevant evidence is admissible. ER 402. Evidence offered to impeach a witness is relevant if it casts doubt on the credibility of the person being impeached and that person's credibility is a fact of consequence to the action. *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999).

Because the credibility of an expert's professional judgment is important to the jury's determinations, cross-examination of expert witnesses on credibility issues is allowed particularly wide latitude. "Generally, the cross-examination of an expert allows for wide-ranging questioning which touches on all matters testified to in chief, or which

tends to test the qualifications, skill, or knowledge of the witness and the accuracy or value of his or her opinion.” George L. Blum, *Propriety Of Questioning Expert Witness Regarding Specific Incidents Or Allegations Of Expert’s Unprofessional Conduct Or Professional Negligence*, 11 A.L.R.5th 1 (originally published in 1993). The scope of cross-examination of an expert is appropriately broad:

The cross-examination of an expert generally allows for more latitude in the questions put to the witness than is permissible in the cross-examination of ordinary opinion witnesses. Routinely, the examination can be wide-ranging, touching on all matters testified to in chief, or tending to test the qualifications, skill, or knowledge of the witness and the accuracy or value of his or her opinion. Just as the bias or prejudice of an expert may be shown on cross-examination as an independent fact even though it protracts the trial by introducing a new issue, the incompetency of a professed expert may also be shown in the same way and for the same reason—that is, because it may demonstrate that otherwise persuasive testimony cannot be relied upon. With respect to the precise limits of examination, however, the circumstances of each case are the controlling factors, and the matter must be left to the discretion of the trial judge.

Id. at §2a; see also Duggins v. International Motor Transit Co., 153 Wn. 549, 555, 280 P. 50 (1929) (noting the general rule that wide latitude is permitted in the cross-examination of an expert and that the trial court has wide discretion in admitting or excluding evidence on cross-examination).

In Geier's case, the impeachment evidence was properly admitted as a relevant challenge to the professional judgment and credibility of Dr. Halon. Dr. Halon placed his qualifications, credibility, and professional judgment at issue when he proffered himself as an expert on the issues at trial. The revocation of Dr. Halon's license was probative of these qualities and relevant to his credibility.

Furthermore, Dr. Halon opened the door to questions about his license by testifying about it on direct examination. *See* 12RP 958-69. When a party opens up a subject of inquiry on direct examination, the evidence rules permit cross-examination on that same subject:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). By eliciting testimony regarding Dr. Halon's credentials and psychology license, Geier opened the door for the State to explore the details of that licensing.

Dr. Halon's qualifications, judgment, and credibility were relevant at trial; consequently, the revocation of his license and the reasons for revocation were probative of these qualities. The State was entitled to cross-examine Dr. Halon about his license and prior disciplinary action so the jury could assess his credibility. *See Russell*, 125 Wn.2d at 92. Jurors were instructed that they were the sole judges of credibility of the witnesses and that they may consider a variety of factors in evaluating an expert's testimony. CP 614-17. It was within the trial court's discretion to allow cross-examination on the licensing issue, and the court did not abuse its discretion in allowing the testimony.

3. Cross-examination regarding a disciplinary action against an expert's license does not involve a prior bad act under ER 608 or ER 609.

The trial court granted the State's MIL #13, which was to "preclude references to any alleged prior bad acts or crimes of Petitioner's witnesses." CP 666; CP 563. The trial court ruled that this MIL also applied to Respondent's witnesses. CP 563. This MIL was explicitly based on ER 608, ER 609, and ER 403. CP 666.

ER 608 governs the impeachment of a witness by evidence of his reputation for truthfulness in the community or specific instances of conduct concerning his character for truthfulness or untruthfulness. ER 608. ER 609 governs impeachment by evidence that the witness has

been convicted of a crime. ER 609. Under ER 403, relevant evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The State's MIL #13 was based only on these three evidence rules.

ER 608 involves only evidence concerning a witness' character for truthfulness or untruthfulness. ER 609 involves only evidence of a conviction of a crime. The evidence the State elicited from Dr. Halon on cross-examination did not involve either of these evidence rules.

The fact that Dr. Halon's California license was revoked and stayed as part of a stipulated settlement goes to his credibility as an expert witness. The State was entitled to cross-examine Dr. Halon about the complaint filed against him by the Board of Psychology that resulted in his license revocation and stay. This evidence was admissible under ER 607, which governs the use of impeachment evidence and provides that the credibility of a witness may be attacked by any party. ER 607; *see also Law*, 146 Wn. App. at 37 (referencing ER 607 as the applicable rule allowing impeachment of an expert's credibility).

Furthermore, the probative value of the revocation and sanctions was not substantially outweighed by the danger of unfair prejudice. Evidence is not inadmissibly prejudicial merely because it damages an expert's credibility. *Richmond v. Longo*, 604 A.2d 374, 378 (1992). Geier

offers no analysis of how the evidence was unfairly prejudicial under ER 403. The testimony elicited by the State did not involve Dr. Halon's character for truthfulness or untruthfulness in the community under ER 608, and it did not involve a conviction for a crime under ER 609. Consequently, it was not a violation of the State's motion in limine to question Dr. Halon regarding the disciplinary action against his license.

4. Even assuming the court erred in admitting the evidence, the alleged error was neither prejudicial nor did it deny Geier a fair trial.

A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). An appellate court will find abuse of discretion only when "no reasonable judge would have reached the same conclusion." *Id.* A trial court's denial of a motion for a mistrial will be overturned only when there is a "substantial likelihood" that the error affected the verdict. *Id.* at 269-70. Trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *Id.* at 270; *see also State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (A mistrial should be granted only when nothing the trial court could have said or done would have remedied the harm done to the defendant).

An evidentiary error is grounds for reversal only if it results in prejudice. *West*, 171 Wn.2d at 410. An error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. *Id.* “Something more than a possibility of prejudice must be shown to warrant a new trial.” *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). Only errors affecting the outcome of the trial will be deemed prejudicial. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

The trial court has wide discretion to cure trial irregularities. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). In determining whether a trial irregularity warrants a new trial, the court may consider: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the irregularity could be cured by an instruction to disregard the remark. *Johnson*, 124 Wn.2d at 76; *In re Detention of Smith*, 130 Wn. App. 104, 113, 122 P.3d 736 (2005). The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the entire trial that the person did not receive a fair trial. *Post*, 118 Wn.2d at 620; *Weber*, 99 Wn.2d at 164.

It is well settled that a litigant is entitled to a fair trial but not a perfect one. *In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007) citing *Brown v. U.S.*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). A defendant is entitled to a trial free from prejudicial

error, not one that is totally error free. *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). The appropriate inquiry is directed at the effect of the testimony, and the judge should not consider whether the testimony was deliberate or inadvertent. *Weber*, 99 Wn.2d at 163-64. Rather, the appropriate inquiry is whether the testimony prejudiced the jury, thereby denying the defendant the right to a fair trial. *Id.* at 164-65.

The trial court did not abuse its discretion in denying Geier's request for a mistrial. Geier has not shown that "no reasonable judge would have reached the same conclusion" or that there is a "substantial likelihood" that any alleged error affected the verdict. *See Rodriguez*, 146 Wn.2d at 269-70. Even assuming it was error to allow cross-examination of Dr. Halon on the licensing issue, Geier has not established that this one line of questioning constitutes prejudicial error or that it deprived him of a fair trial.⁶

⁶ Geier points out in his brief that when defense counsel requested a mistrial, they referenced an email they sent to the State inquiring "whether it was going to use any information against Dr. Halon" and that the State "did not interpret the e-mail as a request for further information about Dr. Halon." *See* Brief of Appellant at 11-12 *citing* 13RP 1199-1201. At trial, the State disputed receiving any such request from counsel, either through interrogatories or an email. 13RP 1199-1200. Rather, the State indicated the email from defense counsel was to advise the State that they had actually learned of the licensing issue and consequently wanted to obtain a different expert. 13RP 1198-1201. Defense counsel then agreed that the State's account was correct, but they assumed it would not be an issue at trial. 13RP 1201-02. The court indicated it wanted the email to be part of the record. 13RP 1201, 1204-06; 14RP 1225. The State subsequently found the email referenced by the parties and filed it with the court. CP 637-40; CP 701. The email indicates that Geier's counsel knew of the disciplinary action involving Dr. Halon several months prior to trial. *See* CP 640.

The trial court had broad discretion in determining the scope of cross-examination of Dr. Halon. *See Griffith*, 136 Wn. App. at 485. It was not error for the trial court to allow cross-examination of Dr. Halon regarding an issue affecting his credibility as an expert witness. *See Law*, 146 Wn. App. at 37; *see also State v. Allen S.*, 98 Wn. App. at 459-60. Geier has not shown how allowing this testimony prejudiced his right to a fair trial. Geier's trial lasted more than three weeks and he had a full opportunity to present his defense. Dr. Halon pointed out that his license was never actually revoked and that his psychology practice has "not been interrupted for a minute in the 30-something years I've had the license." 13RP 1189, 1207. Brief questioning regarding the credibility of Dr. Halon involving one disciplinary action approximately twelve years prior did not undermine the fairness of the trial.

The State did not violate the motion in limine, and even if it had, any potential error was cured by the court having a hearing outside the presence of the jury as soon as an objection was made. Geier did not object when the State asked Dr. Halon if his license had been previously revoked. 13RP 1188-89. He did not object when the State asked Dr. Halon about entering into a stipulated disciplinary order with the State of California in 1999. 13RP 1189. He also did not object when the State asked Dr. Halon whether the settlement was based on a complaint filed

against him by the California Board of Psychology. *Id.* Geier made no objections to this entire line of questioning. It wasn't until the State asked Dr. Halon whether there were four allegations contained in the complaint that Geier objected. *Id.* Geier objected *before* Dr. Halon answered the question and then immediately asked to be heard outside the presence of the jury. 13RP 1189-90. The court granted his request. *Id.* The court then heard argument at length from both parties outside the presence of the jury and subsequently allowed the State to continue its line of questioning on the issue. 13RP 1190-1207.

As the record makes clear, as soon as Geier objected to a question posed by the State, the court held a hearing outside the presence of the jury and before Dr. Halon answered the question. *See* 13RP 1189-90. Thus, there was no "prejudicial evidence" elicited, as Geier claims, before the court heard argument on its admissibility outside the presence of the jury. *See* Brief of Appellant, at 9. The court allowed the State to continue questioning Dr. Halon on the licensing issue because it is "precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness." *See* 13RP 1204. Thus, there was no prejudicial error and the trial court properly denied Geier's request for a mistrial.

B. The Trial Court Did Not Err By Sealing Juror Questionnaires at the Conclusion of the Trial.

1. A trial court should engage in a *Bone-Club* analysis prior to a courtroom closure.

Article 1, section 10 of the Washington Constitution states that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This provision entitles the public to openly administered justice. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The requirement of a public trial is for the benefit of the accused. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). “The public trial right serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

In order to protect the right to a public trial, a trial court must weigh five factors before closing a courtroom in a criminal trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995);⁷

⁷ The five factors are:

1. The proponent of the closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

see also Ishikawa, 97 Wn.2d at 37-39. This five-part analysis protects both the public's right under article I, section 10 and the defendant's right under article I, section 22.⁸ *State v. Tarhan*, 159 Wn. App. 819, 825, 246 P.3d 580, *review granted*, *State v. Beskurt*, 172 Wn.2d 1013, 259 P.3d 1109 (2011). "Article I, sections 10 and 22 serve complementary and interdependent functions in assuring fairness of our judicial system[.]" *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

The right to a public trial also extends to jury selection. *Id.* However, the right to a public trial is not absolute. *Id.* The presumption in favor of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest. *Id.* Thus, a trial court may close a courtroom under certain circumstances. *Id.* Whether the right to a public trial has been violated is a question of law subject to de novo review. *Id.* at 147.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

⁸ Article I, section 22 of the Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right ... to have a speedy trial by an impartial jury...."

2. The trial court was not required to engage in a *Bone-Club* analysis because sealing juror questionnaires after trial does not constitute a courtroom closure.

This Court has held that a trial court's sealing of confidential juror questionnaires after voir dire does not constitute a courtroom closure and, therefore, no *Bone-Club* analysis is required. *State v. Smith*, 162 Wn. App. 833, 848, 262 P.3d 72 (2011), *review denied*, 173 Wn.2d 1007, 271 P.3d 248 (2012).

In *Smith*, the parties agreed to use a joint juror questionnaire and the entire voir dire occurred on the record in open court. *Smith*, 162 Wn. App. at 840-41. When individual jurors wanted to discuss specific issues privately, the trial court and counsel questioned them on the record in open court. *Id.* at 841. The trial court neither closed the courtroom nor excluded the public at any time. *Id.* After the parties completed voir dire, the trial court sealed the questionnaires. *Id.* This Court held that sealing juror questionnaires after voir dire is neither "structural error" nor does it render the trial fundamentally unfair. *Id.* at 847; *see also In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 180-81, 248 P.3d 576 (2011) (trial court's failure to consider *Bone-Club* factors prior to sealing juror questionnaires was not structural error).

In *Smith*, this Court noted that the defendant actively participated in voir dire and used the questionnaires to his advantage by identifying

and engaging with jurors who wanted to be questioned individually. *Smith*, 162 Wn. App. at 847. Sealing juror questionnaires after voir dire did not affect the public's right to open information because the defendants used the content of the questionnaires to question the jurors in open court where the public could observe. *Id.* "Under these circumstances, there was no courtroom closure and, therefore, no need for the trial court to consider the *Bone-Club* factors." *Id.* at 848.⁹

In *Stockwell*, Stockwell filed a personal restraint petition, arguing that the trial court violated his right to a public trial by sealing the juror questionnaires. *Stockwell*, 160 Wn. App. at 175-77. This Court concluded that sealing juror questionnaires after voir dire was not structural error and did not render the trial fundamentally unfair. *Id.* at 180-81. This Court noted that Stockwell stipulated to using the questionnaires and did not object to sealing them, that he actively participated in voir dire and used the questionnaires to identify which jurors to question individually, that he

⁹ This Court specifically declined to follow *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009), in which Division One held that the trial court was required to conduct a *Bone-Club* analysis before sealing juror questionnaires that contained information about the jurors' sexual history. *Smith*, 162 Wn. App. at 848 n.9. This Court found Judge Van Deren's concurring opinion in *Stockwell*, 160 Wn. App. at 182 more persuasive. *Smith*, 162 Wn. App. at 848 n.9. The *Stockwell* concurrence indicated that the dispositive point is that "the content of the questionnaires was used in open court, where the public could observe. Accordingly, no part of voir dire was closed to the public. Under these circumstances, I do not believe there is a closure triggering the requirement of a *Bone-Club/Waller* analysis." *Stockwell*, 160 Wn. App. at 183-84 (Van Deren J., concurring).

benefitted from sealing the questionnaires, and that the parties questioned the jurors in open court. *Id.* In addition, the questionnaire's promise of confidentiality made it more likely jurors would candidly reveal critical information for Stockwell to use in challenging a juror for cause. *Id.* at 180.

Conducting voir dire in open court, with only other jurors excluded, does not constitute a courtroom closure. *State v. Price*, 154 Wn. App. 480, 487, 228 P.3d 1276 (2009), *review denied*, 169 Wn.2d 1021, 238 P.3d 504 (2010), *cert. denied*, *Price v. Washington*, 131 S. Ct. 1818, 179 L. Ed. 2d 776 (2011); *see also State v. Erickson*, 146 Wn. App. 200, 206 n.2, 189 P.3d 245 (2008) (questioning individual jurors in open court separate from other prospective jurors is not a courtroom closure and it secures the right to a public trial). If there is no courtroom closure, the right to a public trial is not implicated, and no *Bone-Club* inquiry is required. *Price*, 154 Wn. App. at 486-89.

In *Erickson*, this Court held that it was error to conduct part of voir dire in the jury room without first conducting a *Bone-Club* analysis. *Erickson*, 146 Wn. App. at 211. This Court noted that "the better practice is to question individual jurors regarding sensitive topics separate from the rest of the prospective jurors, but within the courtroom." *Id.* at 211, n.8. "Such an approach is not a closure of the courtroom and thus requires no

Bone-Club analysis.” *Id.*; see also *State v. Vega*, 144 Wn. App. 914, 184 P.3d 677 (2008), review denied, 165 Wn.2d 1024, 203 P.3d 381 (2009). In *Vega*, the Court held that a weighing of *Bone-Club* factors is not required when a judge questions jurors in open court apart from the other jurors because (1) jurors become officers of the court when they are sworn in and are not members of the public; and (2) questioning individual jurors apart from other jurors about matters that may taint the other jurors serves to preserve a fair trial. *Vega*, 144 Wn. App. at 915-17.

Under the facts of Geier’s case, there was no closure triggering the requirement of a *Bone-Club* analysis. This case is similar to *Smith*, where this Court held that no *Bone-Club* analysis was required prior to sealing the questionnaires after voir dire. See *Smith*, 162 Wn. App. at 846-48. In Geier’s case, all portions of voir dire occurred on the record in open court, and the trial court did not seal the questionnaires until after the trial concluded. See 4RP 20-21; CP 709; CP 610-12. Moreover, similar to *Smith* and *Stockwell*, Geier actively participated in voir dire and used the questionnaires to his advantage by questioning jurors individually and excusing numerous jurors for cause. See 5(a)RP 104-14, 123-31, 139-45; 6(a)RP 174-78.

Sealing the questionnaires at the conclusion of trial did not affect the public’s right to open information because Geier used the content of

the questionnaires to question jurors in open court where the public could observe. *See Smith*, 162 Wn. App. at 847. The questionnaire was simply used as a screening device to identify jurors who might prefer to be questioned individually outside the presence of the other jurors. *See* CP 703-10. The questionnaire, in and of itself, did not determine whether a person would serve on the panel or be excused. Rather, the questionnaire triggered additional questioning by the parties, all of which occurred in open court. *See* 5(a)RP 4-166; 6(a)RP 169-178.

Thus, given the limited scope of the questionnaire and the limited manner in which it was used at trial, sealing the questionnaire at the conclusion of trial did not violate the public right to trial. The public was free to attend any and all portions of the jury selection process. The court made this clear when a spectator in the courtroom inquired how long voir dire would take because they didn't need to be present for that portion of the trial. 4RP 20-21. The court told the spectator, "Well, it's up to you. The courtroom is open. I want to make sure that I don't exclude anybody who wants to be here." *Id.* The dispositive point is that the content of the questionnaires was used in open court, where the public could observe. *See Stockwell*, 160 Wn. App. at 183-84 (Van Deren, J., concurring). Accordingly, no part of voir dire was closed to the public and a *Bone-Club* analysis was not required.

3. **Even if this Court finds a *Bone-Club* analysis should have been conducted prior to sealing the juror questionnaires, the appropriate remedy is to remand to the trial court for a *Bone-Club* analysis.**

If an appellate court determines that a person's right to a fair public trial has been violated, it devises an appropriate remedy to that violation. *Momah*, 167 Wn.2d at 149. A case should be remanded for a new trial only when an error is structural in nature. *Id.* at 155. Not all violations of the right to a public trial result in structural error requiring a new trial. *Id.* at 150. The remedy must be appropriate to the violation. *Id.* at 156; *see also Waller v. Georgia*, 467 U.S. at 50. A new trial should only be required in cases where the closure rendered the trial fundamentally unfair. *See Momah*, 167 Wn.2d at 150.

In *Waller v. Georgia*, the trial court closed the courtroom for a suppression hearing over the defendant's objection and, on review, the Supreme Court held that the defendant was entitled to a new suppression hearing, but not a new trial. *Waller*, 467 U.S. at 42, 50. The Court reasoned that the remedy should be appropriate to the violation, and automatically granting a new trial would be "a windfall for the defendant, and not in the public interest." *Id.* at 50. In *Waller*, the Court did not conclusively presume prejudice and automatically grant a new trial, but

rather required a showing that the defendant's case was actually rendered unfair by the closure. *Momah*, 167 Wn.2d at 150.

In *Momah*, our Supreme Court held that the trial court's closure of a portion of voir dire to safeguard the defendant's right to an impartial jury was not structural error requiring a new trial. *Momah*, 167 Wn.2d at 155-56, *cert. denied*, *Momah v. Washington*, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010). In *Momah*, Momah's counsel agreed to private questioning of jurors and was granted the expansion of in-chambers questioning over concerns of contaminating the jury pool. *Id.* at 146, 155. In finding that this was not structural error, the Court explained that "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefitted from it." *Id.* at 151.

The choices a party makes at trial may impact his ability to seek relief from an alleged error or may affect the remedy he receives. *Id.* at 153. The Court presumed Momah made tactical choices to achieve what he perceived to be the fairest result. *Id.* at 155. The *Momah* Court applied the basic premise of the invited error doctrine to determine what, if any, relief should be granted. *Id.* at 154.¹⁰ The Court noted numerous

¹⁰ Courts have used the invited error doctrine to analyze the impact a party's tactical choices have on an alleged error. The basic premise of the doctrine is that a party who sets up an error at trial cannot claim that action as error on appeal in order to receive

actions by Momah's counsel that promoted and safeguarded his right to an impartial jury, including his deliberate choice to pursue in-chambers voir dire to avoid contaminating the jury pool and his ability to exercise numerous challenges for cause and remove biased jurors from the venire due to the closure. *Id.* at 155. The Court concluded that the closure did not prejudice Momah and affirmed his conviction. *Id.* at 156.

However, on the same day it filed *Momah*, the Supreme Court filed *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), in which it reversed Strode's conviction with the plurality reasoning that the court's closure of voir dire was a structural error that violated the defendant's right to a public trial. In *Strode*, several jurors were questioned privately in chambers without the court first performing a *Bone-Club* analysis. *Id.* at 224. A plurality concluded that prejudice is presumed by the trial court's failure to engage in a *Bone-Club* analysis prior to the closure. *See id.* at 231.¹¹

a new trial. The doctrine was designed in part to prevent a party from misleading the trial court and receiving a windfall by doing so. *Momah*, 167 Wn.2d at 153.

¹¹ Two of the justices concurred in the result, explaining that Strode did not actively participate in the closure to the same extent that Momah had. *Id.* at 231-36 (Fairhurst J., concurring). However, the concurrence disagreed with the lead opinion to the extent that it appeared to conflate the rights of the defendant and the public. "A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived." *Id.* at 236. "As the various opinions and shifting alignments in *Momah* and *Strode* demonstrate, a majority of our Supreme Court is apparently unwilling at this time to allow a defendant to assert the public's 'open' justice rights." *Stockwell*, 160 Wn. App. at 181.

Several months after *Momah* and *Strode*, the United States Supreme Court decided *Presley v. Georgia*, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). In *Presley*, the Court found that the defendant's right to a public trial was violated when the trial court excluded a member of the public from voir dire without first considering alternatives to closure. *Presley*, 130 S. Ct. at 722-25.

Two different panels of this Court have concluded that *Momah* and *Strode* are no longer controlling authority in light of *Presley v. Georgia*. See *State v. Leyerle*, 158 Wn. App. 474, 482, 242 P.3d 921 (2010); *State v. Paumier*, 155 Wn. App. 673, 685, 230 P.3d 212, review granted, 169 Wn.2d 1017, 236 P.3d 206 (2010). However, a third panel disagreed, noting that *Presley* did not consider whether an erroneous court closure necessarily results in structural error, particularly where the defendant did not object to the alleged closure, participated in it, and subsequently sought to use the closure to collaterally attack his conviction. See *Stockwell*, 160 Wn. App. at 180 n.4. Thus, this panel applied *Momah* and *Strode* to consider whether the alleged error warranted reversal. *Id.*¹²

¹² One possible explanation for the different remedies in *Momah* and *Strode* is that the record in *Strode* lacked any hint that the trial court considered the defendant's public trial right before questioning jurors in chambers. See *Strode*, 167 Wn.2d at 228-30. However, in *Momah*, the trial court recognized the competing article I, section 22 interests and closed part of voir dire in order to safeguard the defendant's right to an impartial jury. See *Momah*, 167 Wn.2d at 156.

When an error is not structural, reversal is not the proper remedy. *See State v. Coleman*, 151 Wn. App. 614, 623-24, 214 P.3d 158 (2009). The proper remedy for an error in sealing questionnaires and violating the public's right to open court records is to remand for reconsideration of the sealing order based on the *Bone-Club* factors. *Id.* The *Coleman* Court explained:

The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right, and did not create defect[s] affecting the framework within which the trial proceeds.

Id. at 624 (quotations and citations omitted).

In *Tarhan*, at the conclusion of voir dire, the trial court sealed the juror questionnaires used in voir dire without first conducting a *Bone-Club* analysis. *Tarhan*, 159 Wn. App. at 822. The Court held that this did not violate Tarhan's right to a public trial, but remanded for a *Bone-Club* analysis and reconsideration of the sealing order. *Id.* Noting substantially similar facts to those in *Coleman*, the Court reasoned that Tarhan failed to point to any part of his record in which the jury selection was not held in open court. *Id.* at 829. "More importantly, he fails to point to anything in

this record to show that the completed questionnaires were used for anything other than jury selection, which proceeded in open court.” *Id.* The Court also explained that the trial court entered the sealing order six days *after* the parties accepted the jury and that Tarhan failed in his burden to show that the questionnaires were unavailable for public inspection during jury selection. *Id.* at 829-31.

Geier’s case is materially indistinguishable from *Coleman* and *Tarhan*. Under *Coleman* and *Tarhan*, Geier must show that the juror questionnaires were not available for public inspection prior to the June 14th sealing order. He has not. The questionnaires were not sealed until several weeks after the jury was selected and sworn in. CP 610-12; 16RP 1654. The questionnaires were used only for jury selection, which occurred in open court. There is nothing in the record to indicate the questionnaires were not part of the open public proceedings during the three-day jury selection process between May 23rd and May 25th or prior to their sealing *after trial* on June 14th. There is also nothing to indicate that the questionnaires were not available for public inspection during the entire trial.

In Geier’s case, the trial court clearly recognized the right to public trial issue at the beginning of trial when it sua sponte informed counsel that it would have to do a *Bone-Club* analysis if the juror questionnaires

were subsequently sealed. *See* 8RP 445. The court indicated that after closing arguments “we could discuss whether or not we have need of a *Bone-Club* hearing or if there were some stipulations that the parties would be willing to make concerning *Bone-Club* factors.” *Id.* At the conclusion of trial, the parties presented agreed findings to the court regarding the *Bone-Club* factors, which the court then adopted. 16RP 1654-56; CP 610-12. Unlike *Strode* where the record lacked any hint that the trial court considered the defendant’s public trial right, the trial court in Geier’s trial clearly recognized the public trial right at issue and entered specific findings of fact and conclusions of law regarding the *Bone-Club* analysis before sealing the questionnaires. *See* CP 610-12. Thus, the court did engage in a *Bone-Club* analysis and there was no error.

However, if this Court concludes that a verbal *Bone-Club* analysis was required prior to sealing the questionnaires, in addition to the written findings of fact and conclusions of law regarding the *Bone-Club* analysis, the proper remedy is to remand for reconsideration of the sealing order. *See Coleman*, 151 Wn. App. at 623-24. The remedy must be appropriate to the violation. *Waller v. Georgia*, 467 U.S. at 50. Geier should receive a new trial only if his trial was fundamentally unfair. *See Momah*, 167 Wn.2d at 155-56. The questionnaires were not sealed at any point during Geier’s trial. It wasn’t until *after* the jury returned its verdict on

June 14th that the questionnaires were sealed. CP 610-12; CP 631; 16RP 1654-56. Automatically granting Geier a new trial under these circumstances would create a windfall for Geier and not be in the public interest. *See Waller v. Georgia*, 467 U.S. at 50.

Moreover, Geier agreed to sealing the questionnaires and benefitted from the voir dire process. Similar to the defendant in *Momah*, Geier made tactical choices to achieve what he perceived to be the fairest result. *See Momah*, 167 Wn.2d at 155. He used the questionnaires to identify individuals who may not be fair and impartial and excused numerous jurors for cause. *See* 5(a)RP 104-14, 123-31, 139-45; 6(a)RP 174-78. Geier has not shown any possible prejudice to him resulting from an order sealing questionnaires after his trial concluded and reversal is not the appropriate remedy. *See Coleman*, 151 Wn. App. at 624.

4. The State does not oppose Geier's request that this Court stay its decision on this issue pending the Supreme Court's decision addressing the right to public trial issue.

Geier requests that this Court stay its decision on this issue pending the Washington Supreme Court's decision in *State v. Tarhan*. *See* Brief of Appellant, at 14-16. There are two cases pending before our Supreme Court that involve the right to a public trial. *State v. Tarhan*,

159 Wn. App. 819, *review granted*, *State v. Beskurt*, 172 Wn.2d 1013, 259 P.3d 1109 (2011); *State v. Paumier*, 155 Wn. App. 673, *review granted*, 169 Wn.2d 1017, 236 P.3d 206 (2010).¹³

In *Paumier*, the trial court allowed potential jurors who preferred private questioning to be questioned in chambers. *Paumier*, 155 Wn. App. at 676. This Court held that conducting a portion of jury selection in chambers violated Paumier's right to a public trial and reversed his convictions. *Id.* at 677, 686. In *Tarhan*, the trial court sealed the juror questionnaires used in voir dire at the conclusion of voir dire without first conducting a *Bone-Club* analysis. *Tarhan*, 159 Wn. App. at 822. Division I held that this did not violate Tarhan's right to a public trial, but remanded for a *Bone-Club* hearing. *Id.* The Washington Supreme Court subsequently granted review of both *Paumier* and *Tarhan* and decisions are currently pending.

The State does not object to Geier's request that this Court stay its decision on this issue pending a decision by the Washington Supreme Court.¹⁴ Although *Tarhan* is more on point with the facts of this case, given that there are two decisions pending before the Supreme Court on

¹³ The Washington Supreme Court granted review in *Tarhan* on September 8, 2011 and in *Paumier* on August 6, 2010.

¹⁴ In *Leyerle*, this Court ordered proceedings stayed pending our Supreme Court's decisions in *Strode* and *Momah* and then ordered the parties to provide supplemental briefing once decisions were issued. *Leyerle*, 158 Wn. App. at 478 n3.

the right to public trial issue, if the Court grants Geier's request to stay the appeal, the State requests the stay remain until the Supreme Court issues decisions on both *Tarhan* and *Paumier*.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the civil commitment of Geier as a sexually violent predator.

RESPECTFULLY SUBMITTED this 21st day of May, 2012.



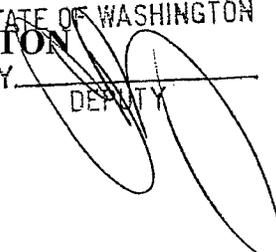
KRISTIE BARHAM, WSBA #32764
Assistant Attorney General
Attorney for Respondent

Appendix 4

FILED
COURT OF APPEALS
DIVISION II

2013 APR -9 AM 9:01

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY 
DEPUTY

IN THE MATTER OF THE
DETENTION OF:

No. 42292-1-II

PAUL ANDREW GEIER,

UNPUBLISHED OPINION

Petitioner.

WORSWICK, C.J. — Paul Andrew Geier appeals an order of civil commitment following a jury determination that he is a sexually violent predator. Geier argues that the trial court (1) erroneously denied his motion for a mistrial and (2) violated his right to a public trial. We affirm.

FACTS

A. *Prior Bad Acts Evidence and Motion for Mistrial*

Before Geier's trial, the State filed a motion in limine, "based on ER 403, ER 608, and ER 609," to prohibit "any evidence of any alleged bad acts or crimes of any of [the State's] witnesses. . . . unless and until this Court rules such evidence admissible after an offer of proof or hearing is held outside the presence of the jury." Clerk's Papers (CP) at 666. Geier agreed to this motion, provided that it applied to both parties' witnesses, except Geier himself. The trial court entered an order in limine granting the motion as modified.

During the trial, both parties called expert witnesses to testify about whether Geier had a mental abnormality or personality disorder. The State called Dr. Harry Hoberman, a forensic

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and clinical psychologist. Dr. Hoberman testified that he evaluated Geier and diagnosed him with pedophilia and antisocial personality disorder. Dr. Hoberman also opined that the diagnosed conditions and a lack of self-control made Geier more likely than not to commit more predatory acts of sexual violence, unless he was confined.

Geier called Dr. Robert Halon, a psychologist and marriage family therapist. Dr. Halon criticized some of the methods Dr. Hoberman had used to evaluate Geier. Dr. Halon also opined that Geier did not suffer from any personality disorder that would cause Geier to meet the criteria of a sexually violent predator.

On direct examination, Dr. Halon testified that he was “a licensed psychologist [in California] since 1977.” 9 Verbatim Report of Proceedings (VRP) (June 7, 2011) at 958. On cross-examination, the State asked Dr. Halon whether he had entered into a stipulated order in a disciplinary action commenced by the California Board of Psychology. Dr. Halon answered affirmatively. Dr. Halon also testified that the stipulated order said it revoked his license, but that the order was immediately stayed. The State then asked about the underlying allegations in the disciplinary action.

Before Dr. Halon could answer, Geier objected and argued that the questioning violated the order in limine by referring to Dr. Halon’s prior bad acts. Outside the presence of the jury, the State made an offer of proof that (1) the allegations involved failing to report a client’s sex offense as required by law, incorrectly billing the state for services, and misrepresenting the results of tests; and (2) the stipulated order imposed three years of probation, and required Dr. Halon to take an ethics course and pay a fine. Contending that the offer of proof came too late to prevent the damage, Geier moved the trial court to declare a mistrial.

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Even though the State elicited evidence from Dr. Halon regarding his prior disciplinary record before seeking a ruling by the trial court, the trial court denied the motion for mistrial. The trial court stated that the order did not prohibit the admission of all prior bad act evidence, but instead “meant that we would follow a procedure, which we are now following.” 10 VRP (June 8, 2011) at 1204. The trial court determined that the State’s questioning would yield “precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness.” 10 VRP (June 8, 2011) at 1204. Accordingly, the trial court overruled Geier’s objection and allowed the State to inquire about the allegations for which Dr. Halon was disciplined.

After the parties rested, the jury returned a verdict finding that Geier was a sexually violent predator. The trial court then entered an order of commitment.

B. *Voir Dire and Jury Questionnaires*

Before Geier’s jury trial began, the trial court directed the potential jurors to complete a questionnaire, to which the parties agreed. The questionnaire required the potential jurors to identify themselves by name and “to disclose such sensitive information as whether they had been [victims] of sexual abuse or received mental health counseling.” CP at 610; *see* CP at 702-10 (blank questionnaire). In open court, the trial court and the parties’ counsel reviewed the completed questionnaires and conducted individual voir dire. After the verdict, the trial court entered an agreed order sealing the jury questionnaires and stating that the trial court conducted the analysis described in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

Geier appeals.

ANALYSIS

I. MOTION FOR MISTRIAL

Geier first argues that the trial court erred in denying his motion for a mistrial. We disagree.

A trial court should grant a motion for mistrial only when the harmed party has been so prejudiced by an irregularity that only a new trial can remedy the error. *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 178, 947 P.2d 1275 (1997). We review the denial of a motion for a mistrial for an abuse of discretion. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 136, 750 P.2d 1257 (1988). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

Geier contends that a new trial is required to remedy the irregularity that occurred when the State violated the order in limine by asking Dr. Halon about his disciplinary record without the trial court's prior approval. We disagree.¹

A violation of an order in limine is not necessarily grounds for mistrial. *State v. Clemons*, 56 Wn. App. 57, 62, 782 P.2d 219 (1989). In determining whether an irregularity caused prejudice warranting a mistrial, we examine (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court gave a proper curative instruction. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); *In re*

¹ Geier does not argue that the trial court made the wrong decision after the State submitted its offer of proof. Geier argues only that the questioning violated the motion in limine by proceeding to cross-examine Dr. Halon without *first* notifying the trial court about the alleged prior bad act and allowing the court to rule on the evidence's admissibility.

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Det. of Smith, 130 Wn. App. 104, 113, 122 P.3d 736 (2005). Here, the parties do not dispute that the questioning did not elicit cumulative evidence and that the trial court gave no curative instruction. Thus, we examine only the seriousness of the irregularity here.

Citing *State v. Easter*, 130 Wn.2d 228, 242 n.11, 922 P.2d 1285 (1996), Geier argues that the State's violation of the order in limine was a serious irregularity warranting mistrial. But *Easter* is distinguishable. In *Easter*, an arresting officer testified that the defendant behaved like a "smart drunk" after a car accident, thus violating an order in limine prohibiting such commentary and insinuating the defendant's guilt. 130 Wn.2d at 242. Although the *Easter* court disapproved of the violation, it expressly declined to hold that every violation of an order in limine warrants a new trial. 130 Wn.2d at 242 n.11. Instead, the *Easter* court stated that a violation "may be so flagrantly prejudicial as to be incurable by instruction." 130 Wn.2d at 242 n.11 (emphasis added).

In contrast, the violation here was not nearly so serious. The State violated the order in limine by beginning to question Dr. Halon about a prior bad act before making the required offer of proof. When Geier objected, the State made the required offer of proof, and the trial court allowed the questioning to proceed. Unlike *Easter*, where the State elicited testimony that the trial court specifically excluded, here the jury heard evidence that the trial court ultimately admitted. Moreover, Geier does not argue that admission of the evidence was error.

Instead, Geier argues that the violation of the order in limine prejudiced him because (1) the jury heard the State's questioning before Geier could dispute the evidence's admissibility; (2) if Geier had known that Dr. Halon's disciplinary record would be an issue, Geier could have mitigated its impact by inquiring about it on direct examination; (3) the violation precluded the

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trial court from conducting an ER 403 analysis; and (4) the prior bad act evidence was prejudicial to Geier's case. We hold that the violation did not cause any prejudice, let alone prejudice for which a new trial is the only available remedy.

First, Geier argues he suffered prejudice because he could not dispute the admissibility of prior bad act evidence before the State began questioning Dr. Halon about it. We disagree. After Geier objected, he still had a full opportunity to argue that the trial court should not admit the evidence. Because the trial court ultimately admitted the evidence, the State's premature questioning did not prejudice Geier.

Second, Geier argues that he was prejudiced by losing an opportunity to mitigate the prior bad act evidence by addressing it on direct examination. This argument fails because the order in limine required the offer of proof to come before the *questioning*; it did not require the offer of proof to come before Geier had finished direct examination. Thus the order did not secure Geier's opportunity to address the issue on direct examination.

Third, Geier contends that the violation "deprived Geier of the opportunity to argue that even if relevant, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice." Reply Br. of Appellant at 6. This contention lacks merit. Again, Geier had an opportunity to make this argument to the trial court while contesting the admissibility of the prior bad act evidence. Even though the trial court reiterated that ER 403 was a basis of the order in limine, Geier did not argue that the danger of unfair prejudice substantially outweighed the probative value of the evidence.

Finally, Geier argues that he was prejudiced by the prior bad act evidence involving Dr. Halon, who was a key witness. But the State elicited admissible evidence of Dr. Halon's prior

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bad acts. This is not an irregularity. Only prejudice resulting from an irregularity can be grounds for a mistrial. *See Kimball*, 89 Wn. App. at 178. Because the State's violation did not cause prejudice warranting a new trial, the trial court did not abuse its discretion in denying Geier's motion. *See Dix*, 160 Wn.2d at 833; *Adkins*, 110 Wn.2d at 136. Geier's argument fails.²

II. RIGHT TO A PUBLIC TRIAL

Geier next argues that he is entitled to a new trial because the trial court violated the Washington Constitution when it sealed the jury questionnaires without conducting a sufficient *Bone-Club* analysis.³ We disagree.

The Washington Constitution protects the public's right to the open administration of justice and a criminal defendant's right to a public trial. WASH. CONST. art. I, §§ 10, 22.⁴ But

² For the first time in his reply brief, Geier argues that he was deprived the effective assistance of counsel because his trial attorney called Dr. Halon as an expert despite knowing of his prior disciplinary record. But this court does not consider arguments—even constitutional arguments—that are made for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Oostra v. Holstine*, 86 Wn. App. 536, 543, 937 P.2d 195 (1997).

³ In their briefs, both parties consented to postpone consideration of this appeal while our Supreme Court reviewed the decision in *State v. Beskurt*, 159 Wn. App. 819, 246 P.3d 580, *review granted*, 172 Wn.2d 1013 (2011). In addition, the State requested that the stay remain in effect pending review of *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212, *review granted*, 169 Wn.2d 1017 (2010). Because our Supreme Court has decided both cases, there is no longer any basis for a stay. *State v. Beskurt*, ___ Wn.2d ___, 293 P.3d 1159 (2013); *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012).

⁴ The State does not challenge Geier's assumption that article I, section 22 applies in this civil commitment trial. We recognize that article I, section 22 refers only to "criminal prosecutions," and Division One of this court has held that it does not apply in civil commitment trials. *In re Det. of Ticeson*, 159 Wn. App. 374, 381, 246 P.3d 550 (2011), *abrogated on other grounds by State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). In addition, our Supreme Court has not resolved whether a defendant has standing to assert the public's right to the open administration of justice under article I, section 10. *State v. Wise*, 176 Wn.2d 1, 16 n.9, 288 P.3d 1113 (2012).

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these rights are not absolute; a trial court may close a courtroom if closure is warranted under the five-part test set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995),⁵ and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). Whether the closure of a proceeding violates article I, section 10 or section 22 of the Washington Constitution is a question of law reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

Geier is not entitled to a new trial, given our Supreme Court's decision in *State v. Beskurt*, ___ Wn.2d ___, 293 P.3d 1159 (2013). In *Beskurt*, the trial court sealed jury questionnaires without applying the *Bone-Club* test. 293 P.3d at 1160. A four-justice plurality and a separate concurrence by Justice Stephens each concluded, for two different reasons, that the defendants were not entitled to a new trial. *Beskurt*, 293 P.3d at 1162 (plurality opinion), 1168 (Stephens, J., concurring).⁶ Both reasons defeat Geier's argument.

⁵ The five criteria are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)) (alteration in original).

⁶ Chief Justice Madsen, in another concurrence signed by two other justices, would have found that the defendants waived their public trial argument. *Beskurt*, 293 P.3d at 1166. Thus Chief Justice Madsen's opinion did not address the public trial argument.

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First, under the reasoning of the *Beskurt* plurality, the *Bone-Club* test does not apply here because sealing jury questionnaires is not a courtroom closure. Although a trial court must apply the *Bone-Club* test before closing voir dire to the public, *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012), the plurality concluded that a trial court need not apply the *Bone-Club* test when sealing jury questionnaires that were completed before voir dire began. *Beskurt*, 293 P.3d at 1162. Here, the jury questionnaires were completed before voir dire began, and all voir dire questioning occurred in open court. Therefore, on the plurality's reasoning, sealing the jury questionnaires cannot have violated either the public's right to the open administration of justice or Geier's right to a public trial. *Beskurt*, 293 P.3d at 1162.

Second, under Justice Stephens's reasoning, sealing jury questionnaires is a courtroom closure but a new trial is unwarranted here even if the trial court failed to apply the *Bone-Club* test. *Beskurt*, 293 P.3d at 1166-67. Justice Stephens concluded that, when a trial court seals jury questionnaires after the trial has ended, a failure to apply the *Bone-Club* test is not grounds for a new trial. *Beskurt*, 293 P.3d at 1168. Here, the trial court sealed the jury questionnaires after the trial ended. Therefore a new trial is unwarranted here. *Beskurt*, 293 P.3d at 1168. Geier's argument fails.

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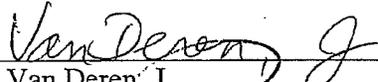
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Worswick, CJ.

We concur:



Van Deren, J.



Penoyar, J.

Appendix 5

Barham, Kristie (ATG)

From: Helen Whitener [whitenerh@wrwattorneys.com]
Sent: Monday, January 31, 2011 10:58 AM
To: Barham, Kristie (ATG)
Cc: 'Lynn Rainey'
Subject: [REDACTED]

Kristie, we recently received some information regarding Dr. Halon which will require we request a 2nd expert on this case. We were informed of a 1995 disciplinary action and a recent matter where our client Mr. C [REDACTED] was mentioned in an evaluation Dr. Halon did for one of his other client's. Let me know if you would be objecting to our request and if you are then we will schedule a motion to address this issue.

Thanks,

H. Helen Whitener

WHITENER RAINEY PS
820 Sixth Avenue, Suite A
Tacoma, WA 98405
Office: (253) 830-2155

Appendix 6



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

800 Fifth Avenue #2000 • Seattle WA 98104-3188

June 29, 2011

The Honorable Kathryn Nelson
Pierce County Superior Court
930 Tacoma Ave S, Rm 334
Tacoma, WA 98402-2108

RE: *In re the Detention of Paul Geier, Respondent*
Pierce County Superior Court No. 08-2-08313-1

Dear Judge Nelson:

The parties concluded this sexually violent predator trial on June 14, 2011 after the jury returned a verdict committing Mr. Geier as a sexually violent predator.

During the trial, your honor requested that the parties search for an email that was discussed on the record regarding Mr. Geier's expert, Dr. Robert Halon. (The issue had to do with whether or not Mr. Geier's counsel was aware of the prior disciplinary action involving Dr. Halon's license.) Your honor inquired at one point during the trial whether either party had been able to locate the email. At the time, neither party had been able to locate the email.

I recently found the email that the parties discussed on the record. It was located in another Respondent's materials. The email pertains to a different client being represented by counsel, but addresses the information the court inquired about. I have redacted the name of the client for confidentiality and privacy reasons. Because your honor requested that the email be part of the court record for potential appellate purposes, I am forwarding a copy of the email. I am also forwarding a declaration to accompany the email. I am requesting that these materials be filed with the court as part of the record in this case. I have contacted counsel regarding this information and am forwarding this same letter, declaration, and email to counsel.

Sincerely,

KRISTIE BARHAM
Assistant Attorney General, WSBA No. 32764
(206) 389-2004
kristieb@atg.wa.gov

Enclosure(s)

cc: G. Helen Whitener & Lynn Rainey (w/encl)

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**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

In re the Detention of:

PAUL ANDREW GEIER,

Respondent.

NO. 08-2-08313-1

DECLARATION OF
KRISTIE BARHAM

I, KRISTIE BARHAM, make the following declaration:

1. I am an Assistant Attorney General and am assigned to represent the State of Washington in this case.
2. During trial on this sexually violent predator case, the Court requested that the parties search for an email that was discussed on the record. The email pertained to whether or not Mr. Geier's attorney(s) knew about Dr. Halon's prior disciplinary action involving his license in California. The Court wanted to the email to become part of the record in this case.
3. I searched for the email during trial but was unable to locate it.
4. I recently located the email that the parties referenced on the record during trial. See January 31, 2011 email from G. Helen Whitener to Kristie Barham, attached hereto as Appendix A.
5. The reason I was unable to locate the email previously was because it involved another respondent represented by Mr. Geier's counsel and was filed in this respondent's file. I believed at the time of trial that the email pertained to Mr. Geier. However, the email

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pertains to a different client of counsel. The email references counsel's knowledge of Dr. Halon's prior disciplinary action.

6. I am forwarding the email for filing as part of the court record as the Court previously requested. I have redacted the name of the client for confidentiality and privacy reasons.

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

DATED the 20th day of June, 2011 at Seattle, Washington.



Kristie Barham

APPENDIX A

Barham, Kristie (ATG)

From: Helen Whitener [whitenerh@wrwattorneys.com]
Sent: Monday, January 31, 2011 10:58 AM
To: Barham, Kristie (ATG)
Cc: 'Lynn Rainey'
Subject: [REDACTED]

Kristie, we recently received some information regarding Dr. Halon which will require we request a 2nd expert on this case. We were informed of a 1995 disciplinary action and a recent matter where our client Mr. C [REDACTED] was mentioned in an evaluation Dr. Halon did for one of his other client's. Let me know if you would be objecting to our request and if you are then we will schedule a motion to address this issue.

Thanks,

Helen Whitener

WHITENER RAINEY PS
820 Sixth Avenue, Suite A
Tacoma, WA 98405
Office: (253) 830-2155

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON

August 31, 2011

Petitioner

vs.

No.: 08-2-08313-1

PAUL ANDREW GEIER

Court of Appeals No.: 42292-1

Respondent

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REQUEST OF APPELLANT
TO THE
COURT OF APPEALS,
DIVISION II

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By Kelly Hadsell at 10:50 am, May 10, 2012

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON

Petitioner

May 10, 2012

vs.

No.: 08-2-08313-1

PAUL ANDREW GEIER

Respondent

Court of Appeals No.: 42292-1

CLERK'S PAPERS PER
REQUEST OF APPELLANT
TO THE
COURT OF APPEALS,
DIVISION II

HONORABLE KATHRYN J. NELSON
Trial Judge

Valerie Marushige
23619 55th Pl S
KENT, WA 98032-3307

ATTORNEY FOR APPELLANT

Kristie Barham
800 5th Ave Ste 2000
SEATTLE, WA 98104-3188

ATTORNEY FOR RESPONDENT

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON

May 10, 2012

Petitioner

vs.

No.: 08-2-08313-1

PAUL ANDREW GEIER

Court of Appeals No.: 42292-1

Respondent

CLERK'S PAPERS PER
REQUEST OF APPELLANT
TO THE
COURT OF APPEALS,
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EXHIBIT'S: # 1 - 5 AND 24a - SENT UNDER SEPARATE COVER.

Appendix 7



Washington State Court of Appeals Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

August 10, 2011

Valerie Marushige
Attorney at Law
23619 55th Pl S
Kent, WA, 98032-3307
ddvburns@aol.com

Kristie Barham
Kent Y Liu
Office of the Attorney General
800 5th Ave Ste 2000
Seattle, WA 98104-3188

RE: CASE #: 42292-1-II: In Re The Detention of Paul Andrew Grier v AG

Case Manager: Debbie

Valeria Marushige:

Our records indicate that the above-referenced appeal has not been timely perfected due to your failure to file the statement of arrangements and designation of clerks papers, due August 1, 2011.

Accordingly, a sanction of \$300.00 will be imposed against you unless the item indicated above is filed with this court on or before fifteen days from the date of this letter. If you do not file the item referred to above on or before the aforementioned date, a check for the amount of the sanction, payable to the State of Washington, will be due. Once a sanction becomes due, no further filings will be accepted until that sanction is paid in full.

Further, this appeal is scheduled for other and further sanctions for want of prosecution pursuant to a motion by the clerk. The motion will be considered, without oral argument, if the document is not filed by August 29, 2011. The clerk's motion for further sanctions will be stricken if the defect in perfection is cured prior to that date. Please note, however, that striking the clerk's motion will not release you from the payment of the sanction imposed on August 25, 2011, unless perfection of this appeal occurs on or before that date.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a large, stylized flourish at the end.

David C. Ponzoha
Court Clerk

DCP:dln

Appendix 8

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON AUG 17 2011
DIVISION TWO

CRIMINAL JUSTICE DIVISION
ATTORNEY GENERAL'S OFFICE

STATE OF WASHINGTON,)	
Petitioner,)	No. 42292-1-II
)	
)	
PAUL ANDREW GRIER,)	STATEMENT OF
Respondent.)	ARRANGEMENTS
_____)	

Valerie Marushige, counsel for the above named respondent, states that on August 16, 2011, respondent ordered transcription of the original and one copy of verbatim report of proceedings as follows for Pierce County Cause No. 08-2-08313-1:

<u>Court Reporter</u>	<u>Hearing Date(s)</u>	<u>Judge</u>
Dana Eby	05/27/08, 08/29/08, 07/30/10, 05/23/11, 05/24/11, 05/25/11, 05/26/11, 05/31/11, 06/01/11, 06/02/11, 06/06/11, 06/07/11, 06/08/11, 06/09/11, 06/13/11, 06/14/11	Judge Nelson

Respondent has arranged to pay the cost of transcription by Order authorizing appeal in forma pauperis and the preparation of the record on appeal at public expense.

DATED this 16th day of August, 2011.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney for Appellant
WSBA No. 25851
23619 55th Place South
Kent, Washington 98032
(253) 520-2637

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AUG 17 2011

CLERK OF COURT DIVISION
COUNTY CLERK'S OFFICE

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

STATE OF WASHINGTON,)	
)	Cause No. 08-2-08313-1
)	
Petitioner,)	
)	Appeal No. 42292-1-II
)	
PAUL ANDREW GEIER,)	
)	DESIGNATION OF
Appellant.)	CLERK'S PAPERS
_____)	

TO: Superior Court Clerk

Please prepare and transmit to the Court of Appeals, Division Two, the following Clerk's Papers:

<u>DOCUMENT TITLE</u>	<u>DATE FILED</u>
Petition	05/15/08
Certification for Determination of Probable Cause	05/15/08
Motion for Order Determining Existence of Probable Cause	05/15/08
Waiver of Time for Probable Cause Hearing	05/27/08
Order for Continuance	05/27/08
Waiver of Time for Trial	08/29/08
Order Re: Existence of Probable Cause	08/29/08
Agreed Order Setting Trial Date	08/29/08
Order for Continuance of Trial Date	05/08/09
Waiver of Time for Trial	05/08/09
Order for Continuance of Trial Date	01/15/10
Waiver of Time for Trial	01/15/10
Notice of Intent to Videotape Deposition	07/16/10
Amended Motion to Require Respondent's Participation	07/22/10

DESIGNATION OF CLERK'S PAPERS - 1

<u>DOCUMENT TITLE</u>	<u>DATE</u>
Motion for Order Denying Motion to Compel	07/29/10
Order Requiring Participation in Evaluation	07/30/10
Order Setting Trial Date	09/08/10
Corrected Waiver of Speedy Trial	09/14/10
Notice of Telephonic Deposition	11/09/10
Waiver of Time for Trial	01/05/11
Order for Continuance of Trial Date	01/05/11
Order Setting Original Case Schedule	01/19/11
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Court's Instructions to Jury	06/14/11
Verdict	06/14/11
Order of Commitment	06/14/11
Notice of Appeal	06/22/11
Declaration of Kristie Barham	07/01/11

DATED this 16th day of August, 2011.

/s/ Valerie Marushige
 VALERIE MARUSHIGE
 WSBA No. 25851
 23619 55th Place South
 Kent, Washington 98032
 (253) 520-2637
ddvburns@aol.com

NO. 45540-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Personal Restraint Petition of:

PAUL ANDREW GEIER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

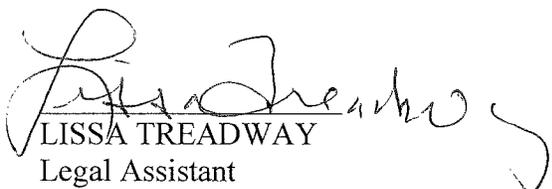
DECLARATION OF
SERVICE

I HEREBY CERTIFY that on the 12th day of June, 2014, I served true and correct copies of the Response to Personal Restraint Petition and Declaration of Service by depositing same in the United States Mail, first-class delivery, postage prepaid and addressed as follows:

Paul Andrew Geier, SCC #4903337
Petitioner Pro Se
Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

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

RESPECTFULLY SUBMITTED this 12th day of June, 2014.


LISSA TREADWAY
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

June 12, 2014 - 4:15 PM

Transmittal Letter

Document Uploaded: prp2-455404-Response.pdf

Case Name: Personal Restraint Petition of Paul Andrew Geier

Court of Appeals Case Number: 45540-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lissa Y Treadway - Email: lissat@atg.wa.gov