

No. 45540-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In re the Personal Restraint Petition of
PAUL ANDREW GEIER,

Petitioner.

BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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I. ASSIGNMENTS OF ERROR IN SUPPORT OF PETITION

1. Petitioner's restraint is unlawful under RAP 16.4 because his order of commitment was obtained in violation of his Washington State and Federal constitutional rights.
2. Petitioner's restraint is unlawful under RAP 16.4 because the errors that occurred in his commitment trial resulted in a fundamental defect that inherently resulted in a complete miscarriage of justice.
3. Petitioner's restraint is unlawful under RAP 16.4 because he was denied his constitutional and statutory right to effective assistance of trial counsel at his commitment trial.
4. Petitioner's restraint is unlawful under RAP 16.4 because he was denied his constitutional and statutory right to effective assistance of appellate counsel in his direct appeal from his commitment trial.
5. Petitioner's constitutional rights to due process and equal protection were violated when he was denied the opportunity to submit a Statement of Additional Grounds for review in his direct appeal from his commitment trial.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Is Petitioner's restraint unlawful under RAP 16.4?

(Assignments of Error 1, 2, 3, 4, & 5)

2. Was Petitioner denied his constitutional and statutory right to effective assistance of trial counsel at his commitment trial, where his trial counsel: retained an expert to testify on Petitioner's behalf without adequately investigating his disciplinary history; improperly relied upon the State to investigate and disclose the details of the expert's disciplinary history even though the State has no such responsibility; called the expert to testify on Petitioner's behalf despite knowing that the expert had a disciplinary history, without any plan to mitigate the negative impact the history would have on the expert's credibility; improperly relied upon a motion in limine to prevent the disciplinary evidence from being elicited at trial even though the motion did not apply to that type of evidence; and/or failed to discuss the existence of the expert's disciplinary history with the Petitioner before trial?

(Assignments of Error 1, 2 & 3)

3. Was trial counsel's deficient representation prejudicial to Petitioner's right to a fair trial, where the outcome of the case rested primarily on whether the jury believed the State's expert witness or Petitioner's expert witness, and where

Petitioner's expert has a disciplinary history from the State of California that creates significant doubt regarding his credibility and professional judgment? (Assignments of Error 1, 2, & 3)

4. Did the denial of Petitioner's right to effective assistance of trial counsel, and the resulting prejudicial impact of that denial, result in a violation of his constitutional rights and a complete miscarriage of justice? (Assignments of Error 1, 2, & 3)
5. Was Petitioner denied his constitutional and statutory right to effective assistance of appellate counsel in his direct appeal where counsel: continually misinformed Petitioner about the appeal process; initially refused his request to raise an ineffective assistance of trial counsel claim, but finally did raise the issue in a reply brief, which precluded the Court of Appeals from deciding the issue on its merits; and misinformed Petitioner about his options for review of the ineffective assistance of trial counsel claim after the Court of Appeals issued its decision in his direct appeal? (Assignment of Error 1 & 4)
6. Was appellate counsel's deficient representation prejudicial, where she refused to timely raise an ineffective assistance of

counsel claim and failed to properly inform Petitioner how he could seek review of this issue, where the trial record clearly demonstrates that trial counsel was ineffective and this issue, if properly raised on direct appeal, likely would have been successful and resulted in Petitioner receiving a new trial? (Assignments of Error 1 & 4)

7. Did the denial of Petitioner's right to effective assistance of appellate counsel and the prejudicial impact of that denial result in a violation of his constitutional rights and a complete miscarriage of justice? (Assignments of Error 1, 2, & 3)
8. Were Petitioner's constitutional rights to due process and equal protection violated, and was he denied his right to a full and fair resolution of his appeal on its merits, when he was denied the opportunity to submit a Statement of Additional Grounds for review in his direct appeal from his commitment trial? (Assignments of Error 1 & 5)

III. STATEMENT OF THE CASE

A. PROCEDURE AND FACTS FROM COMMITMENT TRIAL

On May 15, 2008, the State filed a petition seeking the involuntary commitment of Paul Andrew Geier as a sexually violent predator (SVP). (CP 1-2) During pretrial motions, the court granted

an agreed motion in limine to preclude questions relating to any prior bad acts or crimes committed by either party's witnesses "unless or until this Court rules such evidence admissible after an offer of proof or hearing is held outside the presence of the jury." (CP 299; 1RP 35-36,)¹

Both the State and Geier called lay and expert witnesses to testify at the commitment trial. The State called a forensic and clinical psychologist, Dr. Harry Hoberman, who opined that Geier suffers from a non-exclusive form of pedophilia and an antisocial personality disorder. (4RP 247-55, 261-62) He testified that Geier's pedophilia meets the legal definition of a mental abnormality, and due to this mental abnormality Geier has serious difficulty controlling his sexually violent behavior. (4RP 312-19, 323-26) Dr. Hoberman testified that the combination of Geier's antisocial personality disorder and pedophilia increases his risk for future sexually violent predatory acts. (4RP 332-38) Dr. Hoberman concluded 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 [and] to commit predatory acts of sexual violence

¹ The transcripts labeled volumes I through XIII will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding.

if not confined to a secure facility.” (7RP 681-82)

To counter the State’s expert, Geier’s counsel called psychologist Dr. Robert Halon. Dr. Halon took issue with the reliability and accuracy of the evaluation methods and tests administered by Dr. Hoberman. (9RP 1014-15, 1017-20, 1039) Dr. Halon’s examinations of Geier revealed no mental disorder of any kind. (9RP 999, 1005) Although Dr. Halon diagnosed Geier with pedophilia, he found no mental disorder that would make him act on his pedophilic interests. (10RP 1099, 1107) Dr. Halon concluded that Geier does not suffer from a mental abnormality or a personality disorder that meets the criteria of a sexually violent predator. (10RP 1108, 1116-17)

During cross-examination of Dr. Halon, the State raised questions about his practice in California. Upon questioning, Dr. Halon acknowledged that the California Department of Mental Health had terminated his contract and removed him from its panel of evaluators after just five months; that his license had been revoked due to a complaint filed against him by the California Board of Psychology in 1998; that his license was reinstated only after a stipulated disciplinary order entered in 1999; and that he was placed on probation for three years during which time his practice was

monitored. (10RP 1187-89, 10RP 1206-07)

After this questioning, Geier's trial counsel moved for a mistrial arguing that the State failed to disclose Dr. Halon's history before trial, that she was unaware of Dr. Halon's history because it was the first time she had used him at trial, and that introduction of the information violated the motion in limine precluding prior bad acts of witnesses. (10RP 1190-91, 1192, 1193-94, 1197) The State responded that the information was not a "prior bad act" but rather a challenge to Dr. Halon's credibility, and that the information was not unknown to Geier's counsel prior to trial. (10RP 1192, 1195, 1198) The State's attorney also told the court that she had received an email from Geier's counsel several months prior to trial, wherein counsel mentioned Dr. Halon's disciplinary history. (10RP 1198-99)

Geier's trial counsel then acknowledged that she knew there was "something" in Dr. Halon's history, but thought the State would respond to her email and inform her exactly what that "something" was. (10RP 1199-1200) When the State did not reply to her email, and when the State later agreed to the motion in limine precluding any prior bad acts, trial counsel thought "okay, it's resolved," and she decided not to obtain a new expert. (10RP 1199, 1201-02; the portion of the report of proceedings containing this colloquy is

Attached in Appendix A)

The trial court denied Geier's motion for mistrial, agreeing that "licensure missteps" are not prior bad acts. (13RP 1203-05) The trial court also asked both parties to find the email so that it could be made part of the record. (10RP 1201, 1205-06) The State later filed a copy of the email that she recalled receiving. (Sup CP 563-66) The email had been sent by Geier's counsel on January 31, 2011 in regards to a different case, but in it she writes:

[W]e recently received some information regarding Dr. Halon which will require we request a 2nd expert on this case. We were informed of a 1995 [*sic*] disciplinary action 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.

(Sup. CP 563-66; a copy of the email is attached in Appendix B)

On June 14, 2011, a jury found that the State proved beyond a reasonable doubt that Geier is a sexually violent predator, and the trial court entered an order committing Geier to the Special Commitment Center in the custody of the Department of Social and Health Services. (13RP 1649; CP 535, 536-37)

B. PROCEDURE AND FACTS FROM DIRECT APPEAL

Geier filed a timely appeal on June 22, 2011. (CP 546-48) The trial court found that Geier was indigent, and appellate counsel

was appointed on July 1, 2011. (CP 549-51, 552) 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 because the State violated the order in limine by asking Dr. Halon about his disciplinary record without the trial court's prior approval. (See Opening Brief of Appellant in Appendix 2 to State's Response to PRP) Appellate counsel declined Geier's request that she challenge trial counsel's use of Dr. Halon at trial. (See Letters dated March 14, 2012 and April 17, 2012 in Appendix A of Geier's PRP) However, appellate counsel apparently had a change of heart and argued for the first time in a reply brief that Geier was deprived of effective assistance of counsel because his trial attorney called Dr. Halon as an expert despite knowing of his prior disciplinary record. (See COA No. 42292-1-II Opinion at 7 fn 2 in Appendix 4 of State's Response to PRP)

On April 9, 2013, this Court issued an unpublished decision affirming Geier's commitment as an SVP. (See COA No. 42292-1-II Opinion) This Court held that the Bone-Club analysis did not apply because sealing juror questionnaires after trial was not a courtroom closure. (Opinion at 7 -9) This Court also held that the trial court did

not err in denying Mr. Geier's motion for a mistrial. (Opinion at 5-7) This Court found that the evidence regarding Dr. Halon's history was admissible, and found that the timing of the questioning was not overly prejudicial because the jury only heard evidence that the trial court ultimately admitted. (Opinion at 5-7) On May 10, 2013, this Court denied Mr. Geier's pro se motion for reconsideration. On August 13, 2013, a mandate was issued terminating the appeal.

Mr. Geier timely filed a Personal Restraint Petition (PRP) on October 30, 2013, asserting that his restraint is unlawful because he received ineffective assistance from both trial and appellate counsel, and because equal protection and due process requires that he be allowed to file a pro se Statement of Additional Grounds on direct appeal. (See Geier's PRP) By order dated October 30, 2014, this Court found that "the issues raised by [Geier's] petition are not frivolous." (CP 559) The Court referred the petition to a panel of judges and ordered counsel to be appointed at public expense. (CP 559-60)

IV. ARGUMENT & AUTHORITIES

Freedom from bodily restraint has always been at the core of the liberty interest protected by the due process clause of the fourteenth amendment to the United States Constitution. In re Det.

of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003).² Commitment for any reason constitutes a significant deprivation of liberty that requires due process protection. Thorell, 149 Wn.2d at 731 (citing Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)); Jones v. United States, 463 U.S. 354, 361, 103 S. Ct. 3043, 77 L.Ed.2d 694 (1983).

Under RCW Ch. 71.09, a person convicted of a sexually violent offense may be committed to a secure facility indefinitely if they are found to be a “sexually violent predator.” RCW 71.09.060.

This Court may grant relief to an individual who is under unlawful restraint. RAP 16.4(a). A personal restraint petition under RAP 16.4 is available as a means of collateral attack upon an initial order of commitment under RCW 71.09. State v. McCuiston, 174 Wn.2d 369, 386 n. 6, 275 P.3d 1092 (2012) *cert. denied*, ___ U.S. ___, 133 S. Ct. 1460, 185 L. Ed. 2d 368 (2013).

Restraint is unlawful if, among other reasons, the restraint violates either the state or federal constitution or any state law, RAP 16.4(c)(2), or “material facts exist which have not been previously presented and heard, which in the interest of justice require vacation”

² Both the Washington and the United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3.

of the order of confinement. RAP 16.4(c)(3).

A personal restraint petitioner has the burden of demonstrating a constitutional error giving rise to actual prejudice, or a nonconstitutional error that constitutes a fundamental defect that inherently results in a complete miscarriage of justice. In re Haverty, 101 Wn.2d 498, 504, 681 P.2d 835 (1984); In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983); In re Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

The facts, arguments and authorities in Geier's PRP and Reply Brief, and the arguments and authorities below, will clearly show that Geier's restraint is unlawful because his order of commitment was obtained in violation of his statutory and due process rights to effective assistance of counsel, and because errors occurred at trial and on appeal that constitute fundamental defects that inherently resulted in a complete miscarriage of justice.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

At all stages of an SVP proceeding, the detainee has the right to counsel, including appointed counsel. RCW 71.09.050(1). Furthermore, it is recognized that there is also a constitutional right to counsel in civil proceedings where liberty is at stake. See, e.g., Tetro v. Tetro, 86 Wn.2d 252, 253, 544 P.2d 17 (1975) ("In

proceedings civil in form but criminal in nature--such as juvenile delinquency or mental commitment hearings--representation is clearly part of due process”).³ And “[t]he right to counsel is meaningless unless it includes the right to effective counsel.” State v. Ransleben, 135 Wn. App. 535, 540, 144 P.3d 397 (2006) (citing In the Det. of T.A.H.-L, 123 Wn. App. 172, 179, 97 P.3d 767 (2004) (the due process protection of the right to counsel in the civil commitment statute “is meaningless unless it is read as the right to **effective** counsel” (emphasis in original))).

To prevail on his claim of ineffective assistance of counsel, the offender must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); T.A.H.-L, 123 Wn. App. at 178 (applying Strickland standards to SVP proceedings).

1. Geier Was Denied His Statutory and Constitutional Right to Effective Assistance of Counsel at Trial

³ Citing In re Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); Heryford v. Parker, 396 F.2d 393 (10th Cir.1968); and Lessard v. Schmidt, 349 F.Supp. 1078 (E.D.Wis.1972).

Before an offender may be committed as an SVP, the State must show that the offender is both mentally ill and that the mental illness causes the offender to be presently dangerous. In re Det. of Young, 122 Wn.2d 1, 27, 857 P.2d 989 (1993). In order to meet this burden, the SVP statute allows the State to require the offender to undergo a psychological examination with an expert of the State's choosing. RCW 71.09.050(1). The offender also has the right to retain his or her own expert, at State expense if the offender is indigent. RCW 71.09.050(1); RCW 71.09.055.

The fact that an offender must have a diagnosable mental disorder to be committed as an SVP, and the fact that the retention of experts to determine the presence or lack of a mental disorder is a specific statutory right given to both parties in an SVP case, demonstrate the vital role that expert testimony and opinion play in an SVP trial. The credibility of these dueling experts is critical to the trier of fact's determination of whether or not the offender meets the definition of an SVP and thereby subject to indefinite civil confinement. Thus, the importance of selecting a credible expert to testify on behalf of the offender cannot be overstated.

In his PRP, Geier contends that his trial counsel provided

ineffective assistance with respect to his expert witness, Dr. Halon, when she: (1) called him to testify as an expert witness without adequate investigation and preparation; (2) failed to discuss Dr. Halon's disciplinary history with Geier before calling him to testify on Geier's behalf; and (3) improperly and unsuccessfully relied on the State's motion in limine to prevent Dr. Halon's disciplinary history from being introduced at trial. (See PRP at 13-23) Geier is correct on all three points.

- a. *Trial counsel failed to adequately prepare for trial by calling Dr. Halon without fully investigating his background and/or attempting to mitigate the damaging impact his disciplinary history would have on the jury.*

An attorney's decision to call a witness to testify is generally "a matter of legitimate trial tactics," which "will not support a claim of ineffective assistance of counsel." State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). However, the presumption of counsel's competence can be overcome by a showing that counsel failed to adequately investigate or prepare for trial. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Byrd, 30 Wn. App. at 799.

In this case, trial counsel either (1) failed to adequately investigate Dr. Halon's disciplinary history and instead relied on the State to conduct any investigation; or (2) knew of his disciplinary

history but (a) pretended not to know while hoping the State would not be aware of it or not be able to use it to impeach Dr. Halon's credibility, or (b) called him to testify despite his history and failed to take steps to mitigate the negative impact it would have on Geier's case. Under any of these scenarios, trial counsel did not live up to objective standards of reasonable representation.

The case of State v. Thomas is instructive here. 109 Wn.2d 222, 743 P.2d 816 (1987). In that case, our State Supreme Court found that the defendant was deprived of effective assistance of counsel because his attorney called an unqualified "expert" witness to testify on his client's behalf. The Court stated:

In the present case, in failing to discover the alcohol counselor trainee's total lack of qualifications, trial counsel's performance was deficient. Had he conducted *any* investigation into [the witness'] qualifications he would have discovered she was only a trainee with minimal experience. . . . However, some minimal investigation into qualifications is required. Here, the record reflects that no investigation was made and, therefore, defense counsel's performance was deficient.

Thomas, 109 Wn.2d 222, 230-31 (emphasis in original) (citing Jury, 19 Wn. App. at 263)

In this case, if trial counsel is to be believed, she was unaware before trial of Dr. Halon's specific disciplinary history with the State

of California. But this information could have been easily obtained by simply asking her expert if he had ever been disciplined. Furthermore, as the State pointed out, this information had been common knowledge for some time. (10RP 1192, 1198) Trial counsel eventually acknowledged that she was aware of “something” in Dr. Halon’s background. But, according to her own admission at trial, she failed to further investigate what that “something” was. (10RP 1199-1200) Like the attorney in Thomas, trial counsel’s performance was deficient in this case because she failed to adequately investigate her expert witness.

Trial counsel told the court that she expected the State would disclose any information regarding Dr. Halon’s professional history before introducing it at trial. (10RP 1199-1200) But this is not a proper trial strategy, and does not relieve her of the duty to investigate Dr. Halon, because the State has no obligation to investigate or reveal any information concerning Dr. Halon’s background. See State v. Lord, 161 Wn.2d 276, 293, 165 P.3d 1251 (2006) (the State is not required to turn over to the defense “[e]vidence that could have been discovered but for lack of due diligence[.]”); see *a/so* Kimmelman v. Morrison, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (counsel’s failure to request

discovery was not based on “strategy,” but on counsel’s mistaken belief that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense). Thus, trial counsel’s failure to investigate was not a proper strategy if it was based on the mistaken belief that the State would turn over any negative information about her witness. This does not excuse her failure to conduct her own investigation.

However, the record suggests that trial counsel actually was aware that Dr. Halon had been subject to disciplinary proceedings in the 1990’s, and had found this fact so alarming that she thought a new expert was required for another client facing an SVP trial. (Sup. CP 566) And yet, she chose not to retain a different, more credible expert for Geier’s trial, and chose not to take any steps to mitigate the negative impact this information would have on the jury (such as asking Dr. Halon about it herself during cross-examination so it would not appear to the jury that she had been unaware or that she was trying to hide something).

Trial counsel was clearly aware, prior to Geier’s trial, that Dr. Halon had some sort of disciplinary history that would make him a potentially undesirable expert witness. Whether she simply forgot, or pretended to forget in the hope that it would somehow be

excluded, is unclear and ultimately irrelevant. No attorney providing effective assistance would have chosen not to more thoroughly investigate their own expert witness, or would have chosen to use an expert whose license had been revoked and whose practice had been monitored by the State of California without also preparing a strategy to mitigate such damaging information. Geier has clearly shown that counsel's performance on this matter was deficient.⁴

b. *Trial counsel failed to discuss Dr. Halon's disciplinary history with Geier before calling him to testify on Geier's behalf.*

Trial counsel's failure to disclose to Geier whatever counsel knew about Dr. Halon's history before choosing him as an expert and calling him to testify also fell below professional norms. Although trial counsel ultimately controls decisions about presentation of witnesses and evidence,⁵ such decisions should not be made without at least minimal discussion with the client.

The Washington Rules of Professional Conduct require an attorney to "**reasonably consult** with the client about the means by

⁴ There are certainly enough facts in the existing record to show that trial counsel's representation was deficient. But if this Court is not satisfied, there is at the very least sufficient facts to warrant a reference hearing to determine exactly what counsel knew and when, and what her thought process was in regards to Dr. Halon.

⁵ See, e.g. In re Pers. Rest. Of Stenson, 142 Wn.2d 710, 741, 16 P.3d 1 (2001).

which the client's objectives are to be accomplished." RPC 1.4 (emphasis added). And the American Bar Association guidelines provide a nonexhaustive list of "strategic and tactical" decisions that should be made by defense counsel **after consultation with the defendant**, including selecting witnesses. ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION std. 4-5.2(b) (3d ed. 1993) ("Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call[.]")⁶ In an SVP case, where expert opinions are crucial to the outcome, the pros and cons of a particular expert should be discussed with the client before a decision is ultimately made by the attorney.

In this case, counsel did not inform Geier before trial that there was any potential issue with Dr. Halon's credibility, and did not inform Geier that Dr. Halon had any disciplinary history. (See Declaration of Paul Geier at 1, attached to Geier's Reply Brief) Geier first became aware of this information when it was elicited by the State at trial. (Declaration of Paul Geier at 1) Had he known this before trial,

⁶ While guidelines promulgated by professional organizations such as the ABA are not dispositive, they may provide guidance in determining what is reasonable conduct on the part of defense counsel. See Strickland, 466 U.S. at 688.

he would have chosen a different expert. (Declaration of Paul Geier at 1) Trial counsel's failure to at least consult with Geier about this issue before it was too late to choose a different course also fell below objective standards of effective representation.

c. *Trial counsel improperly relied upon the State's motion in limine to prevent Dr. Halon's disciplinary history from being introduced at trial.*

If trial counsel's strategy was simply to rely on the agreed motion in limine to prevent the introduction of any damaging evidence against Dr. Halon, then this decision also fell below objective standards of representation because even a cursory review of the evidence rules and case law shows that such evidence would in all likelihood be admitted.⁷

ER 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Trial counsel should have understood that Dr. Halon's disciplinary history would not be offered by the State to show “conformity.” And prior bad acts are admissible for many other reasons, including when relevant to assess a witness' credibility. See ER 404(b); State v. Grant, 83 Wn. App. 98, 100, 920

⁷ Notably, an unpublished case from Division 3 found that this very same information about Dr. Halon was properly admitted as impeachment evidence in a 2004 SVP trial. See In re Detention of Davenport, 157 Wn. App. 1026 (2010).

P.2d 609 (1996). Furthermore, it was easily foreseeable that this evidence would have been admissible under ER 607, which allows a party to cross-examine a witness about matters that affect the person's credibility and bias.⁸ See State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994); In re Det. of Law, 146 Wn. App. 28, 37, 204 P.3d 230 (2008). Accordingly, this strategy, if it was indeed trial counsel's strategy, was doomed to fail, and was not a reasonable tactic.

In summary, it is not entirely clear whether trial counsel was unaware of the full extent of Dr. Halon's disciplinary history, or whether she had forgotten the damaging information about Dr. Halon, or whether she was aware but pretended not to know, hoping that the evidence would not be brought up. But what is clear is that trial counsel knew there was "something" in Dr. Halon's history, and knew enough to be concerned about using his services in an earlier SVP trial. And it is clear that she did not take appropriate action in this case. Again, she either neglected to discover what that "something" was or chose to ignore it, hoping it would not be admitted at trial. She also did not consult Geier about the risks and benefits

⁸ ER 607 provides, "The credibility of a witness may be attacked by any party, including the party calling the witness."

of using Dr. Halon despite his history, and instead went to trial without a strategy to mitigate the damaging impact.

Whatever her strategy, it was unreasonable and “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.” State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting FINER, INEFFECTIVE ASSISTANCE OF COUNSEL, 58 Cornell L.Rev. 1077, 1080 (1973)). There was simply no benefit to Geier in ignoring the red flags, or in hoping that this information would not be raised by the State at trial. It is not a strategy that an attorney providing reasonably competent representation would have taken under the circumstances.

For all of these reasons, trial counsel’s representation in this case fell well below objective standards of reasonable representation.

d. *Trial counsel’s deficient performance prejudiced Geier.*

An offender asserting an ineffective assistance of counsel claim must show that counsel’s deficient performance was prejudicial, “i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” Stout, 159 Wn.2d at 377 (quoting State v. Reichenbach,

153 Wn.2d 126, 130, 101 P.3d 80 (2004)). A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, an offender “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” Strickland, 466 U.S. at 693.

The ultimate question in an SVP trial is whether or not the offender meets the definition of a “sexually violent predator.” RCW 71.09.060(1) (“The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.”) A “sexually violent predator” is a person who “suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). Whether or not an offender suffers from such a mental disorder can only be determined by a jury after hearing and weighing the testimony and opinions of an expert or experts. The credibility of the expert witnesses for each side in an SVP trial is therefore of critical importance. And when the jury hears that the State of California does not trust Geier’s expert witness, there is very little probability that the members of the jury will believe Geier’s expert witness.

As pointed out in the State's response to Geier's PRP, Geier called lay witnesses, friends, and family who all provided favorable testimony on his behalf. (See State's Response to PRP at 16-17) But ultimately, none of this lay testimony matters if the jury did not find Dr. Halon's opinion credible, and instead found Dr. Hoberman's opinion credible. Furthermore, in closing arguments, the State urged the jury to discount Dr. Halon's opinion because of his disciplinary history:

[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.

(13RP 1638)

Thus, it cannot be said that the credibility of Dr. Halon, and the way in which his disciplinary history was presented to the jury (by the State in cross examination with Geier's trial counsel voicing objections in front of the jury), coupled with the State's arguments in

closing, had no impact on the jury's decision.⁹ There is, at the very least, a reasonable possibility that, but for the deficient conduct of trial counsel, the outcome of the proceeding would have differed. Stout, 159 Wn.2d at 377. The deprivation of effective assistance of counsel and its resulting prejudice represents a violation of Geier's constitutional rights and a "fundamental defect that inherently results in a complete miscarriage of justice." Therefore, Geier is entitled to relief and to a new trial.

2. Geier Was Denied His Statutory and Constitutional Rights to Effective Assistance of Counsel on Appeal

Where a civil litigant has a statutory right to counsel at all stages of the court proceeding, as an SVP detainee does, that right includes a right to counsel on appeal. RCW 71.09.050(1); In re Grove, 127 Wn.2d 221, 241, 897 P.2d 1252 (1995).

In his PRP, Geier contends that his appellate representation was also deficient because appellate counsel continually misinformed him about relevant appeal processes, and because she

⁹ In its response to Geier's PRP, the State argues that this Court already found, in his direct appeal, that the questioning of Dr. Halon was not prejudicial. See State's Response to PRP at 20. The State is incorrect. This Court held that Geier was not prejudiced by the fact that the testimony was elicited before the State made an offer of proof and before Geier was able to argue against its admission, because it was ultimately admissible evidence. See Opinion at 6-7. This Court never addressed whether the substance of the testimony was prejudicial. See Opinion at 6-7.

first refused to, and then ultimately improperly raised a claim of ineffective assistance of trial counsel. (See Geier PRP at 3-12) Geier is again correct.

In appellate counsel's letter dated March 14, 2012, sent after she filed the opening brief but before the State filed its response, counsel acknowledges Geier's concern about Dr. Halon being used as a witness, and explains that she believes the record is insufficient to support a challenge even though she also recognizes that "an attorney has a responsibility to conduct a reasonable investigation of their own expert witness before using the expert at trial." (See letter of March 14, 2012 attached in Appendix C)¹⁰

In appellate counsel's letter dated April 17, 2012, she tells Geier that the State has received an extension of time to file its response brief, and informs him that, "At this time, we cannot raise other issues for review because the opening brief has been filed." (See letter of April 17, 2012 attached in Appendix C) Then, in her letter dated May 9, 2012, while still awaiting the State's response brief, appellate counsel declines Geier's request to file a supplemental brief, telling him that "RAP 10.1(h) is not for the

¹⁰ Notably, appellate counsel designated the email from trial counsel in her Designation of Clerk's Papers, so this item was part of the record on direct appeal. (See Sup. DCP 568)

purpose of moving to file a supplemental brief at this point in the appeal process,” but “[p]lease be assured that the issue pertaining to your expert witness will be fully addressed in the reply brief.” (See letter of May 9, 2012 attached in Appendix C)

However, appellate counsel could have sought permission to file a supplemental brief under RAP 10.1(h), which permits this Court to authorize the filing of a supplemental brief in a review of a criminal case. And RAP 18.8(a) also allows this Court to “alter the provisions” of the appellate rules “in a particular case in order to serve the ends of justice[.]” These rules could have been used by appellate counsel to request permission to file an amended opening brief or supplemental brief raising an ineffective assistance of counsel claim, and that request likely would have been granted because the State had not yet filed its response brief.¹¹

For whatever reason, however, appellate counsel waited to raise the issue in her reply brief. But by then it was too late. Following well established precedent, this Court refused to consider the issue, stating:

For the first time in his reply brief, Geier argues that he was deprived [of] the effective assistance of counsel

¹¹ See RAP 10.1(h); *In re Adoption of Doe*, 45 Wn.2d 644, 277 P.2d 321 (1954) (where an appellant seeks permission or leave of court to file an amended brief before respondent has filed his brief, permission is ordinarily granted).

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.

Opinion at 7 fn. 2 (citing 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)). Thus, when appellate counsel did finally decide to raise the issue, she did not raise it in a manner that would have ensured review and consideration by this Court.

Later, appellate counsel advised Geier that “my appointment as appellate counsel does not extend to the Supreme Court.” (See letter of January 28, 2013 and letter of April 12, 2013, attached in Appendix C) While this is technically correct, in that appointed counsel is not *required* to file a petition for review, it is misleading because counsel is permitted and encouraged to file a petition if counsel believes that there are sufficient grounds. (See letters from Office of Public Defense in Appendix A to Geier’s PRP)

Regardless of whether or not appellate counsel had an obligation to file a petition on Geier’s behalf, she most certainly had an obligation to be candid with Geier about her mistake of not raising the ineffective assistance of trial counsel issue in a timely manner,

and to correctly advise him on how he could attempt to remedy that mistake. Instead, she simply told Geier that her representation was at an end, and that he could raise the issue himself in a pro se petition. But this was also incomplete advice, because the Supreme Court does not generally consider issues raised for the first time in a petition for review. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); State v. Cunningham, 93 Wn.2d 823, 837, 613 P.2d 1139 (1980); Peoples Nat'l Bank v. Peterson, 82 Wn.2d 822, 830, 514 P.2d 159 (1973). She should have advised him that, to have this issue considered, he would need to convince the Supreme Court to consider it for the first time under one of the very rarely applied exceptions, or argue that he also received ineffective assistance of appellate counsel in the petition or in a PRP.¹² She advised him of none of these things, and therefore did not adequately apprise him of his legal options or the consequences of her choices as his appellate counsel.

But ultimately, appellate counsel was ineffective because she

¹² See State v. Laviollette, 118 Wn.2d 670, 680, 826 P.2d 684 (1992) (“There are limited exceptions to this rule, where issues pertain to jurisdiction, right to maintain an action, illegality, invasion of fundamental constitutional rights, and lack of claim of relief.”) (citing Peterson, 82 Wn.2d at 830); Byrd, 30 Wn. App. at 800 (personal restraint petition is the appropriate procedure to raise a claim of ineffective assistance of counsel on appeal).

failed to properly raise the issue of ineffective assistance of trial counsel. The strength of this issue was clear from the evidence in the record at the time of the direct appeal. There was no legitimate reason to delay raising this issue or legitimate reason to fail to raise the issue in a way that would preserve it for direct appellate review.

By neglecting to raise the issue in the opening brief or approved supplemental briefing, appellate counsel failed to present and preserve for review a winning issue. This failure fell below objective standards of reasonable representation. Furthermore, Geier was prejudiced by the deficient performance because, as argued in detail above, trial counsel's representation was deficient and prejudicial. If appellate counsel had properly raised the issue, it is likely the outcome of Geier's appeal would have been different. Geier has therefore shown that he did not receive his statutory and due process rights to effective assistance of counsel, and this defect inherently resulted in a complete miscarriage of justice.

B. GEIER WAS DENIED DUE PROCESS AND EQUAL PROTECTION WHEN HE WAS DENIED THE OPPORTUNITY TO FILE A STATEMENT OF ADDITIONAL GROUNDS IN HIS DIRECT APPEAL

Like a defendant in a criminal case, SVP detainees are granted the right to direct appeal following trial and commitment.

RAP 2.1(a)(1); RAP 2.2(a).¹³ But only a criminal defendant may file a Statement of Additional Grounds (SAG) in a direct appeal. RAP 10.10(a), provides that, “In a criminal case on direct appeal, the defendant may file a pro se statement of additional grounds for review to identify and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant’s counsel.”

In his PRP, Geier contends that the language limiting the right to file a SAG to criminal defendants, and not allowing SVP detainees to also file a SAG on direct appeal, violates his rights to due process and equal protection. (See Geier PRP at 24-28) For the reasons argued in Geier’s PRP briefing and below, Geier is correct.

1. Due Process

Civil commitment is a significant deprivation of liberty. Stout, 159 Wn.2d at 369 (citing Addington v. Texas, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). “Therefore, individuals facing commitment, especially those facing SVP commitment, are entitled to due process of law before they can be committed.” Stout, 159 Wn.2d at 369 (citing In re Det. of Halgren, 156 Wn.2d 795, 807-08,

¹³ RAP 2.1(a) lists the methods of seeking review, including “(1) Review as a matter of right, called ‘appeal.’” RAP 2.2(a)(8) states that a party may appeal from a “decision ordering commitment, entered . . . after a sexual predator hearing.”

132 P.3d 714 (2006)). Although SVP commitment proceedings, including appeals, are not criminal proceedings, they still include many of the same due process protections as a criminal proceeding. Seling v. Young, 531 U.S. 250, 260, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001); Young, 122 Wn.2d at 23.

Due process is a flexible concept, requiring “such procedural protections as the particular situation demands.” Sherman v. State, 128 Wn.2d 164, 184, 905 P.2d 355 (1995) (quoting Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). At its core is the right to notice and the opportunity to be heard, but its minimum requirements depend on what is fair in a particular context. Stout, 159 Wn.2d at 370; Sherman, 128 Wn.2d at 184.

In determining what procedural due process requires in a given context, “particularly where SVP proceedings are concerned,” a reviewing court should balance: “(1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures.” In re Det. of Leck, 180 Wn. App. 492, 334 P.3d 1109, review denied, 335 P.3d 941 (2014) (citing Mathews, 424 U.S. at 335; Stout, 159 Wn.2d 357).

As to factor one, “the private interest affected—freedom from confinement—is clearly of great importance.” In re Det. of Brock, 126 Wn. App. 957, 964, 110 P.3d 791 (2005). One’s ability to access the justice system, and have one’s case resolved on its merits, are also interests of great importance.¹⁴

As to factors two and three, this case perfectly demonstrates the risk of deprivation of these interests through existing procedures, the probable value of the additional procedural safeguard, and the governmental interest in providing the additional procedure.

First, “[t]he real value of pro se supplemental pleadings on appeal is the identification of issues not addressed by counsel.” 3 WASH. PRAC., RULES PRACTICE RAP 10.10 (7th ed. 2014) (quoting Drafters’ Comment to RAP 10.10). And “issues raised in the pro se brief have resulted in reversal, remand or dismissal[.]” 3 WASH. PRAC., RAP 10.10 (quoting Drafters’ Comment).

Appellate counsel in this case did not raise the issue of ineffective assistance of trial counsel on appeal. Without the ability to file a SAG, Geier was not able to timely identify the issue, and this

¹⁴ The goal of an appeal is to promote justice and facilitate the decision of cases on the merits, and the purpose of RAP 10.10 is to provide criminal defendants full access to justice. See 3 WASH. PRAC., RULES PRACTICE RAP 10.10 (7th ed. 2014) (quoting DRAFTERS’ COMMENT TO RAP 10.10); RAP 1.2.

Court was unable to address the merits of the issue. He was thus denied access to justice and to a resolution of all potential issues on their merits. As this case shows, there is a considerable risk under current procedures that an SVP detainee will be deprived of the ability to present all potential issues to the court, and to have all potential issues fully considered, without the ability to file a SAG. Certainly, the risk of unjust deprivation of liberty and the denial of access to justice faced by SVP detainees is no less than the risk faced by criminal defendants.

Second, if Geier had been able to raise the issue of ineffective assistance of trial counsel through a SAG, this Court could have reached the merits of that issue at the same time as it determined the merits of the other issues raised by appellate counsel. Because he was not able to file a SAG, Geier has been forced to initiate a new, collateral appeal. This collateral appeal requires appointment of and payment to new counsel to represent Geier, and the output of additional time, effort and expense to both the Attorney General's Office and this Court to review the record for a second time, research the applicable law, and draft and file additional briefs and opinions.

The benefit to the State and to the Court of denying SVP offenders this additional procedural safeguard is minimal, yet the risk

of erroneous deprivation of liberty or denial of access to the justice system is significant. And, as this case shows, the State and the Court could actually receive more benefit than burden from the extension of the right to file a SAG to SVP detainees.

Therefore, denying the SAG procedure to SVP detainees while granting it to criminal defendants violated Geier's right to due process.

2. Equal Protection

The equal protection clauses of the Fourteenth Amendment and Washington Const. art. 1, § 12¹⁵ require that “persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” State v. Phelan, 100 Wn.2d 508, 512, 671 P.2d 1212 (1993) (quoting Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978)). “[E]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.”

¹⁵ The Fourteenth Amendment provides, in relevant part: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Washington Const. art. 1, § 12 provides: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Because these two clauses “are substantially identical, they are considered under the same analysis.” State v. Garcia-Martinez, 88 Wn. App. 322, 326, 944 P.2d 1104 (1997) (citing State v. Shawn P., 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993)).

Young, 122 Wn.2d at 45 (quoting Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 763, 15 L. Ed. 2d 620 (1966)).

The “rational basis” test is generally used to resolve equal protection claims involving SVP commitment proceedings. See In re Det. of Turay, 139 Wn.2d 379, 409-10, 986 P.2d 790 (1999); Thorell, 149 Wn.2d at 748-49; Stout, 159 Wn.2d at 375. Rational basis review requires a legitimate governmental objective and a rational means of achieving it. See Turay, 139 Wn.2d at 410. A legislative classification will be upheld “unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” Turay, 139 Wn.2d at 410 (quoting State v. Thorne, 129 Wn.2d 736, 771, 921 P.2d 514 (1996)).

Although there may be legitimate objectives to treating SVP and criminal defendants differently at trial and in treatment and confinement,¹⁶ that is not the issue in this case. RAP 10.10 affords criminal defendants the procedural right to file a SAG on direct appeal. So there must be a legitimate State objective in treating SVP detainees and criminal defendants differently on appeal, and RAP 10.10 must be a legitimate means of achieving that objective.

¹⁶ See, e.g., Abolafya v. State, 114 Wn. App. 137, 146, 56 P.3d 608 (2002); Stout, 159 Wn.2d at 376.

The State's purpose in granting criminal defendants the ability to file a SAG is to allow them to "[identify] issues not addressed by counsel," and to grant "[a]ccess to justice." 3 WASH. PRAC., RAP 10.10 (quoting Drafters' Comment). The State certainly has a legitimate interest in promoting an open, efficient and fair justice system, and in granting persons who face a deprivation of liberty the opportunity to be heard.

But excluding SVP detainees from this process at the appeal level does not achieve this legitimate purpose. Other than to simply reduce paperwork, it is difficult to conceive of a reason to treat SVP petitioners differently from criminal defendants when it comes to a direct appeal and the opportunity to file a SAG. A criminal defendant and an SVP detainee are in the same position—both are seeking judicial review of a finder-of-fact's determination that resulted in their confinement or deprivation of liberty. Both are seeking justice and a full and complete review of their cases on the merits. Both are represented by counsel who may not raise all of the issues that the accused believes should be addressed.

Granting an SVP detainee the ability to file a SAG places no additional burden on the State at the trial level, and places no additional burden on the State's ability to confine persons who

legitimately meet the SVP definition.

In sum, there is no legitimate governmental objective in excluding SVP detainees from filing a SAG under RAP 10.10. And this exclusion is not a rational means of achieving the goal of open access to justice for those who are being confined by the State and deprived of their liberty. Geier has adequately shown that his inability to file a SAG in his direct appeal violated his constitutional right to equal protection under the law.

V. CONCLUSION

Geier has demonstrated, in the arguments above and in his pro se PRP and Reply Brief, that he was deprived of his constitutional and statutory rights to effective assistance of trial and appellate counsel, and his right to a full and fair appeal because he was not allowed to file a pro se SAG.

Geier has also demonstrated both constitutional errors giving rise to actual prejudice and nonconstitutional errors that constitute a fundamental defect that inherently resulted in a complete miscarriage of justice. Geier's restraint is unlawful under RAP 16.4, and this Court should grant him relief from restraint, reverse the order of commitment, and remand this case for a new trial.

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DATED: February 16, 2015

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Petitioner Paul A. Geier

CERTIFICATE OF MAILING

I certify that on 02/16/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Paul Andrew Geier, Special Commitment Center, PO Box 88600, Steilacoom, WA 98388.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX A
PORTIONS OF VOLUME 10 OF TRIAL TRANSCRIPT

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Honor.

THE COURT: Do you have argument beyond that?

MS. RAINEY: I do, Your Honor.

THE COURT: Ladies and gentlemen of the jury, let me give you a brief recess to go back to the jury room. Please remember not to discuss this case amongst yourselves or with any other persons.

(The following proceedings were held out of the presence of the jury.)

THE COURT: You may be seated.

THE WITNESS: Should I step out, Your Honor?

THE COURT: That's what I was just going to ask.

MS. BARHAM: I would ask that the witness step out.

THE COURT: Okay. If the witness would step out. Thank you.

THE WITNESS: Thank you, ma'am.

(Witness exits.)

THE COURT: Okay. I'll hear the objection.

MS. RAINEY: Yes, Your Honor. We have a motion in limine agreeing not to engage in the communications about prior bad acts from either

1 expert, from both experts. The original motion in
2 limine was written by the State asking that we not
3 bring those prior bad acts of the State's expert. The
4 agreed motion in limine was that we will not bring up
5 prior bad acts of both experts.

6 MS. BARHAM: Your Honor, that's not what the
7 motion in limine was about. It had nothing do with
8 experts. It had to do with witnesses.

9 THE COURT: Do you have the motion in limine
10 order that we signed? Did we file that, Ginele?

11 MS. WHITENER: On the order of Petitioner and
12 Respondent's Motion in Limine on Page 4, Number 13,
13 says preclude references to any alleged prior bad acts
14 or crimes of petitioner's witnesses. It's marked
15 granted. This MIL applies to both petitioner and
16 respondent's witnesses. This MIL does not apply to
17 Mr. Geier or to his prior bad acts.

18 MS. BARHAM: And Your Honor, I'm looking for
19 the actual briefing that the parties filed. The
20 intent of this motion in limine had nothing do with
21 expert witnesses. It had to do with things if you
22 were going bring up that one of the lay witnesses was
23 arrested for DUI or things like that, things that are
24 in the evidence rule books as a prior bad act to
25 impeach.

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This has to do with the credibility of an expert, his licensing, the fact that it was revoked, stayed, he was put on probation. This is not news. Dr. Halon testifies about this in basically every trial that he does and has been for years. This is old news. That's not the intent of this motion in limine. It's not a prior bad act. It's his licensing status, and it goes to his credibility as an expert witness.

MS. RAINEY: Your Honor, while the State asserts that it's old news, it's not been provided to us. We haven't been provided with any information regarding this issue, and the motion in limine is quite clear. It says applies to both petitioner's and respondent's witnesses, and it's alleged prior bad act. Does not necessarily mean a crime.

THE COURT: Right. Right. But what it says is, it says if a party intends to go into bad acts, the references are precluded until there is an offer of proof and the Court rules that evidence is admissible, and that hearing is to be heard outside the presence of a jury. So we are following this. And then it goes on to say the motions based on 403, 608 and 609.

MS. WHITENER: What is the Court looking at?

THE COURT: That was in the attorney

1 general's briefing, and your response to that was that
2 you join in the motion and just request it go to both.
3 So my thought is that what we all meant by this was
4 that there would have to be an offer of proof and that
5 we would have the offer of proof heard outside the
6 presence of the jury so that I could examine the
7 implications potentially caused by evidence rules
8 referenced there: 403, 608, and 609.

9 So what I need to know now from the State is the
10 offer of proof, and then I will hear further from the
11 defense.

12 MS. WHITENER: And Your Honor, if I may. I
13 believe, since the State has already elicited this
14 information in front of the jury, that it has been
15 violated, and an offer of proof at this stage is not
16 going to cure what has just occurred. In addition to
17 which --

18 THE COURT: Well --

19 MS. WHITENER: If I just may finish, Your
20 Honor. In addition to which, the State has indicated
21 to the Court that this is something that she has been
22 aware of in regards to this witness. This is the
23 first time we've had Dr. Halon. So the State had --
24 it was -- the onus was on the State to provide us with
25 this information so we can then decide how to proceed.

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We're hearing about something that occurred that the State has information about that has not been disclosed to the Respondent.

THE COURT: Thank you for your comments. I'm considering them. I need to know what the basis of this complaint was before I know whether we should or should not go forward.

MS. BARHAM: Okay. I'll start with that, Your Honor. Essentially, a complaint was filed against Dr. Halon by the Board of Psychology in 1998. There were some allegations made in 1999. He entered into a stipulated settlement and disciplinary order essentially agreeing to what they were -- what they were recommending, what was recommended.

In that, the State or the Board revoked his license but stayed it at the same time, so it was revoked but the revocation was stayed. He was placed on three years of probation, had to do some things. I think he had to take an ethics course, maybe had a fine. He was monitored by another psychologist in the community until the probation ended. I believe his probation ended early. I'm not sure of the details of that.

That was essentially the extent I intended to go into. That's all of it, unless defense goes into

1 other areas. I wasn't intending to go into the four
2 specific allegations that were made in there that he
3 stipulated to. I wasn't intending to go into that,
4 but just that this occurred.

5 I would note that the defense, that their argument
6 that I've somehow violated a motion in limine, this
7 motion in limine was about, you know, Evidence Rule
8 608 and 609, as the Court said. We are not under that
9 facet with an expert witness. We are under the
10 qualifications of an expert witness, his credibility
11 and his bias under ER 702, 703.

12 If you look at ER 608 and 609, they're
13 inapplicable. They talk about crimes, convictions,
14 truthfulness, evidence of character to prove
15 truthfulness, things like that. This is -- this is
16 apples and oranges. This is mere credibility issue.

17 THE COURT: Okay. I understand where you're
18 coming from, but I still don't know what the
19 allegations were that this is based on.

20 MS. BARHAM: I can advise the Court. Does
21 the Court want this information?

22 THE COURT: Yes, because if it has to do with
23 the types of things that would fit into --

24 MS. BARHAM: As he -- he was a licensed
25 psychologist at the time, was treating an individual.

1 It was disclosed to him that the -- one of the
2 children molested another child. I believe they were
3 both in the same home. So there was an act of sexual
4 abuse that he did not report. He believed that, I
5 think, everyone knew about it; he didn't have to
6 report it. The Board thought otherwise. They did an
7 investigation, discovered some billing issues. How he
8 was coding some billing issues to the State were
9 wrong. And he administered some psychological tests
10 that apparently showed opposite results or very
11 different results, but he claimed that the
12 psychological testing cross-validated each other.

13 So those were the nature of the allegations, and
14 the resolution was stipulated to.

15 THE COURT: So he didn't report as a
16 mandatory reporter in the early days when people
17 didn't understand the law, and he got some billing
18 codes wrong, and he administered two tests which
19 didn't have validating results and reported that they
20 did. Is that basically it?

21 MS. BARHAM: I don't know if it's did not
22 have validating results but they were very different
23 results but he said they cross-validated each other.

24 THE COURT: Right. They cross-validated when
25 that wasn't true. I'll hear again, if anything, from

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Respondent.

MS. WHITENER: First of all, Your Honor, I'd like the State to indicate what Bates stamp number they're referring to, which is the discovery that should have been given to us.

Since they're indicating that this is under Evidence Rule 702 or 703, there is a notice requirement in regards to experts. If you're going to use something against them, and actually, this goes for any witness, you need to provide us with the discovery so that we can then strategize or decide whether or not we want to use someone in the trial, call them to the stand, or whatever. That's one.

Two, the allegations the State is alleging should be allowed does not fit necessarily under 702 and 703. This is prior bad acts. That's exactly what it is. And that is exactly the motion in limine Ms. Rainey has raised as being violated. And the concern we have now is this was brought out before an offer of proof was made so the Court could make an informed decision and tell us which way we're going with this. And I'm at a position where I'm going to ask for a mistrial because this is just totally inappropriate. We don't know what material she's referring to.

THE COURT: Okay. Well, let me ask the

1 State, what is your response to Respondent's
2 contention that this information is part of the
3 discovery and it should have been provided and you
4 should be able to explain the Bates stamp numbers?

5 MS. BARHAM: Your Honor, it's knowledge.
6 There aren't any Bates stamp numbers. It's knowledge
7 I have reading prior transcripts. Our office deposes
8 Dr. Halon quite frequently. He testifies all over
9 Washington and California. He is one of the well-
10 known experts around. It's knowledge that I have
11 about his history, and I'm entitled to question him
12 about his past. There doesn't have to be a Bates
13 stamp number.

14 I would also note --

15 THE COURT: Well, I'm sorry. We signed a
16 motion in limine that set forth a specific procedure
17 and you did not follow that procedure prior, so I
18 assumed, when you began, that you did not follow the
19 procedure prior because this was something the
20 respondent also knew about and was expecting.

21 MS. BARHAM: Your Honor, and I did expect
22 them to bring it up on direct examination. Quite
23 frankly, Counsel had contacted me some time ago
24 wanting to look into obtaining a different expert
25 because they learned of some licensing issues. So I

1 don't -- I know that they have not worked with
2 Dr. Halon before. Some of the attorneys were not
3 aware of it, despite it being from, you know, 1998 and
4 1999. So they did learn of this issue, wanted to look
5 into getting another expert, and apparently chose not
6 to. So it was my understanding that they were going
7 to bring this information up on direct examination.
8 And usually it does come up on direct examination, and
9 I didn't know that that wasn't going to happen.

10 MS. WHITENER: And Counsel is correct in one
11 regards to one thing. We heard that there was
12 something in regards to Dr. Halon. I sent an e-mail
13 to the State, so if there was anything out there,
14 because we did not have any information, if there was
15 anything out there that the State was using, they
16 would provide it to us. We did not get anything. So
17 therefore we did not think it was an issue in this
18 case. And when we saw the motion in limine, we were
19 like, okay. It's resolved. We would be just going
20 on.

21 If there was information out there -- because the
22 State indicated this is knowledge in her office. They
23 have depositions or something like that. She
24 indicated that's discoverable information if you're
25 going to be attacking the expert that we have,

1 especially when I e-mailed you to find out, hey, what
2 is this? What is going on? Because if we had the
3 information, Your Honor, I wouldn't be asking the
4 State or trying to tell the State, hey, I heard
5 something.

6 MS. BARHAM: I would ask Counsel to bring
7 that e-mail. I've never received an e-mail asking for
8 information that we had on this. I didn't get
9 interrogatories on it. I would have been more than
10 happy to talk to Counsel about what I knew.

11 MS. WHITENER: I'm not saying that I said
12 disclose whatever you have. We notified her that we
13 heard something in regards to Dr. Halon. My e-mail
14 was pretty much, hey, do you know anything about this
15 or anything like that? That was the gist of it.

16 THE COURT: But she said she didn't get such
17 an e-mail. Can you find that e-mail?

18 MS. WHITENER: She indicated that she did,
19 but I can look.

20 MS. BARHAM: The e-mail that I got, and I'm
21 paraphrasing --

22 MS. WHITENER: And that's the only one I
23 sent, yeah.

24 MS. BARHAM: It did not request, I want to
25 know what you know, or anything to that effect.

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MS. WHITENER: I didn't --

MS. BARHAM: What information do you have.

MS. WHITENER: Yeah.

MS. BARHAM: It was worded such that we found out this information about Halon, and I'm not recalling the specifics, but that they wanted to look into getting another expert. And for some reason, that did not happen. I don't -- I don't recall the details of that.

MS. WHITENER: And that's --

THE COURT: Well --

MS. BARHAM: But that's the extent of it.

THE COURT: The e-mail needs to go into the record at this point. It needs to go into the record at this point.

MS. WHITENER: And I'll see if I still have it, but I will point out, the State is correct as far as what she remembers. The thing is, when we did not get any information back, we did not think there was an issue, which is why we never brought a motion for a new expert. So we heard something, and I shot off an e-mail, and I now realize the reason she didn't respond is because she thought we had info. We didn't. So when we were prepping our case and we didn't ask again for another expert because, if the

1 State, who has the information, doesn't tell us
2 anything, we're thinking, okay. This is okay. So it
3 appears there was a misunderstanding.

4 But what I'm telling the Court right now, the
5 State has indicated they had information on this and
6 did not disclose it to us. They've been using it, she
7 indicated, for years and has depositions and stuff
8 like that. We don't have that.

9 MS. BARHAM: Your Honor, absent
10 interrogatories, and I don't even know if that would
11 be appropriate to provide depositions on every single
12 case that we have. Our office, you know, deals with
13 hundreds and hundreds of these cases. And to provide
14 every single deposition and transcript from trials and
15 all sorts of things is certainly not required under
16 the discovery rules for Mr. Geier's case. Not only is
17 it not required under the discovery rules, but it was
18 never requested.

19 MS. WHITENER: So --

20 MS. BARHAM: And all I'm doing is asking
21 Dr. Halon about his experience with the Board of
22 Psychology. It's not involving any Bates stamped
23 records.

24 MS. WHITENER: If the Court looks at the
25 motion in limine, I believe it's very clear. The

1 reason why we indicated, because I notice, too, now
2 that I look at it, the State made it specifically to
3 their witness, who would have been Dr. Hoberman and
4 their witnesses. We specifically asked to add the
5 respondent's witnesses as well, and Dr. Halon is one
6 of those. And the State then went back and said,
7 okay, but that does not apply to Mr. Geier, and we
8 were like, okay. That's correct.

9 So I think the motion in limine is actually very
10 clear, and Counsel is going to go into 609, bad
11 acts -- not 609. Prior bad acts, in violation of the
12 motion in limine.

13 THE COURT: Well --

14 (Off-the-record discussion.)

15
16 THE COURT: My interpretation has to be what
17 is in the documents. In Number 13, it says, if I can
18 find it, the State does not know if the respondent
19 intends to offer at trial any evidence of any alleged
20 bad acts or crimes of any petitioner's witnesses. If
21 Respondent intends to do so, the State asks that the
22 Court preclude any such references at trial unless and
23 until this court rules such evidence admissible after
24 an offer of proof or a hearing is held outside the
25 presence of the jury. This motion is based on ER 403,

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608, and 609.

The response to that that I got was, the Respondent would join in this motion and request that the Court preclude any alleged prior bad acts or crimes of both Petitioner and Respondent's witness. That, to me, never meant an absolute prohibition. It meant that we would follow a procedure, which we are now following.

I do not find that licensure missteps such as wrong billing codes, representing that tests that were opposite were actually cross-validating, or even that he failed to mandatorily report something that he may have been mandated by law to report in the nature of child sexual abuse, child against child, are not the types of bad acts that we normally deal with when we are trying to wrongly impugn the credibility of somebody on something having to do with nothing related. It is precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness.

The only issue, it appears to me, is issues around whether or not, under the circumstances of this case, there were agreements or requirements that, before the State used this credibility challenging or competence challenging information, that they had to make sure it

1 was known to the defense counsel who hired this
2 expert. And when I say about this particular case, in
3 some cases, there may or may not have been e-mails or
4 an e-mail such as the one described here where the
5 State became aware that Respondent had heard something
6 and apparently thought that they were asking the State
7 to fill them in and the State didn't take it that way
8 but took it differently.

9 What I am going to do is I'm going to deny the
10 request for the mistrial. We are going to proceed,
11 and I am going to allow the State to finish her
12 examination around this issue. And if she does not
13 bring out the alleged or stipulated facts or whatever
14 it is and it would be helpful for Respondent's case to
15 bring those out, then Respondent certainly is going to
16 be allowed to do that in order to rehabilitate the
17 witness to the extent the witness may have been
18 compromised. And that is going to be my ruling.

19 I do not have a settlement conference, so we could
20 go to 4:30 today, unless my staff knows of some other
21 reason why not. So, I would suggest that we come back
22 in and we proceed along those lines.

23 And when the e-mail is found, we will make it part
24 of the record.

25 MS. WHITENER: I'm looking to see if I still

1 have it, Your Honor.

2 THE COURT: If it was sent to the State, the
3 State can also look for it.

4 MS. BARHAM: I will look for it. I'm not
5 sure if I have it, but it's quite possible.

6 (The following proceedings were held
7 in the presence of the jury.)

8
9 THE COURT: You may be seated. And if
10 someone would get Dr. Halon.

11 Careful of the step.

12 THE WITNESS: May I be seated, Your Honor?

13 THE COURT: Please. The State may continue
14 its cross-examination.

15 MS. BARHAM: Thank you, Your Honor.

16 BY MS. BARHAM:

17 Q. And Dr. Halon, as part of that stipulated settlement,
18 you were placed on probation for three years, correct?

19 A. I stipulated to that, yes.

20 Q. Okay. And there were some things that you had to do
21 as part of that stipulation?

22 A. Yes, ma'am. Correct.

23 Q. And that included, I believe, you had to pay a fine?

24 A. Correct.

25 Q. And --

APPENDIX B

EMAIL FROM GEIER'S TRIAL COUNSEL TO STATE'S ATTORNEY

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,

G. Helen Whitener

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

APPENDIX C
LETTERS TO GEIER FROM APPELLATE COUNSEL

**Valerie Marushige
Attorney at Law
23619 55th Place South
Kent, Washington 98032**

March 14, 2012

Paul Andrew Geier
Special Commitment Center
P.O. Box 88600
Steilacoom, Washington 98388

Dear Mr. Geier:

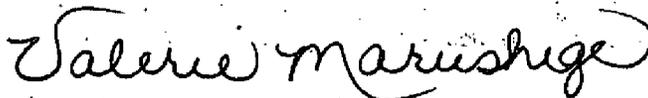
Thank you for your letters acknowledging that you have received a copy of the opening brief. I understand your concern regarding Dr. Halon's background. Unfortunately, when the matter was discussed outside the presence of the jury, it was unclear as to what the e-mail stated. Neither your attorney nor Ms. Barham could remember precisely what the e-mail requested and the judge asked them to provide a copy of the e-mail but it was never provided to the court. Consequently, there was no basis for the judge to determine whether the State acted in bad faith by not disclosing the information they had about Dr. Halon's license revocation. Furthermore, generally, an attorney has a responsibility to conduct a reasonable investigation of their own expert witness before using the expert at trial.

I also need to explain the Statement of Additional Grounds for Review and copies of the transcripts. Unfortunately, a Statement of Additional Grounds for Review is only permitted in criminal cases, not civil commitment cases, and therefore, copies of the transcripts cannot be paid for at public expense. I am sorry for the confusion.

I also wanted to encourage you to focus on your annual review which you are entitled to by law. I am mentioning this because I have heard of a couple of recent cases where detainees have been released based on their annual review, which revealed that they no longer meet the requirements for continued commitment.

At this time, we are waiting for the State to file its response brief. I will send you a copy when I receive it from the State. Thank you for your continued patience throughout this appeal process.

Very truly yours,



Valerie Marushige
Attorney at Law

**Valerie Marushige
Attorney at Law
23619 55th Place South
Kent, Washington 98032**

April 17, 2012

Paul Andrew Geier
Special Commitment Center
P.O. Box 88600
Steilacoom, Washington 98388

Dear Mr. Geier:

There has been a development in your case. The State filed a motion for an extension of time to file its response brief which the Court of Appeals granted. The State's brief is now due on May 21, 2012. I will send you a copy of the brief when I receive it from the State.

I have received several letters from you. At this time, we cannot raise other issues for review because the opening brief has been filed. As I previously explained, unfortunately, you are not allowed to file a Statement of Additional Grounds for Review because your case is a civil matter, not a criminal matter. I apologize for the confusion.

After the State's brief is filed, although it is not required, I always file a reply brief in answer to the State's arguments. I will also send you a copy of the reply brief when it is filed.

In the meantime, thank you for your continued patience throughout this appeal process. I will inform you of any further developments regarding your appeal.

Very truly yours,



Valerie Marushige
Attorney at Law

**Valerie Marushige
Attorney at Law
23619 55th Place South
Kent, Washington 98032**

May 9, 2012

Paul Andrew Geier
Special Commitment Center
P.O. Box 88600
Steilacoom, Washington 98388

Dear Mr. Geier:

I have received your letter requesting that I file a motion pursuant to RAP 10.1(h) for supplemental briefing. Please accept my apologies for the delay in responding, but I have been out of town and consequently have taken longer than usual in following up with all my correspondence.

Unfortunately, RAP 10.1(h) is not for the purpose of moving to file a supplemental brief at this point in the appeal process, but may be useful depending on how the appeal develops. At this time, we must wait for the State to file its response brief. As I have explained, I will then have an opportunity to file a reply brief and file any necessary motions. Please be assured that the issue pertaining to your expert witness will be fully addressed in the reply brief.

I understand that you are anxiously anticipating the resolution of your case, but I would greatly appreciate it if you can continue to exercise your patience throughout this appeal process. I will send you a copy of the State's brief when I receive it and will advise you of any other developments in your case.

Very truly yours,



Valerie Marushige
Attorney at Law

**Valerie Marushige
Attorney at Law
23619 55th Place South
Kent, Washington 98032**

January 28, 2013

Paul Andrew Geier
Special Commitment Center
P.O. Box 88600
Steilacoom, Washington 98366

Dear Mr. Geier:

Thank you for your letter. First and foremost, it is best to take one step at a time during this review process rather than speculating about the outcome which we cannot predict.

The Court of Appeals will consider your case on March 1, 2013 and either order a stay pending the Washington Supreme Court decision on the public trial issue or proceed with the appeal and file a written opinion. Depending on what the Court decides, I will advise you further at that time. The Supreme Court's decision, whenever it is filed, will be binding on the Court of Appeals.

Unfortunately, my appointment as appellate counsel does not extend to the Supreme Court. However, as I have explained, we should await the outcome and determine how to best proceed at that point.

I understand that you are anxiously looking forward to a resolution and want to thank you for your continued patience.

Very truly yours,



Valerie Marushige
Attorney at Law

**Valerie Marushige
Attorney at Law
23619 55th Place South
Kent, Washington 98032**

April 12, 2013

Paul Andrew Geier
Special Commitment Center
P.O. Box 88600
Steilacoom, Washington 98388

Dear Mr. Geier:

I received the Court of Appeals decision in your case as well as notification that the Court also sent you a copy of the decision. I am very sorry that the Court affirmed the trial court's order of civil commitment. It is always difficult to write to clients in situations such as this when we do not prevail on appeal. I can certainly understand your disappointment as we were hopeful for a different result.

I have reviewed the Court's opinion and the record in your case. Unfortunately, I do not believe the Court will reconsider its decision, and as I previously mentioned, my representation does not extend to the Washington Supreme Court. However, many appellants file motions for reconsideration or petitions for review pro se. I have therefore enclosed copies of the relevant portions of the Rules of Appellate Procedure to assist you in the process. Although the Court of Appeals decided not to address the ineffective assistance of counsel issue, you may wish to raise the issue again if you decide to file a petition for review with the Supreme Court. If the Supreme Court grants your petition, it will appoint an attorney to represent you upon request due to your indigent status. A motion for reconsideration must be filed within 20 days or a petition must be filed within 30 days of the date of the Court of Appeals opinion. If you need additional time to prepare and file a motion or petition, you can file a motion for an extension of time with the Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, Washington 98402-4454. The Court understands that you are a lay person without knowledge of the law and will usually grant at least the first motion for an extension of time.

I want to thank you for your patience and cooperation throughout this appeal process. Regrettably, we were unsuccessful in our direct appeal, but I wish you the best of luck in seeking further relief. Thank you for the opportunity to represent you as appellate counsel.

Very truly yours,
Valerie Marushige
Valerie Marushige
Attorney at Law

CUNNINGHAM LAW OFFICE

February 16, 2015 - 2:22 PM

Transmittal Letter

Document Uploaded: 7-prp2-455404-Other Brief.pdf

Case Name: In re the PRP 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: Other _____

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:

Brief in Support of Personal Restraint Petition

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com

A copy of this document has been emailed to the following addresses:

crjsvpef@atg.wa.gov

kristieb@atg.wa.gov

CUNNINGHAM LAW OFFICE

February 16, 2015 - 2:34 PM

Transmittal Letter

Document Uploaded: 7-prp2-455404-Supplemental Designation of Clerk's Papers.pdf

Case Name: In re the PRP 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: S C Cunningham - Email: sccattorney@yahoo.com

A copy of this document has been emailed to the following addresses:

crjvpef@atg.wa.gov

kristieb@atg.wa.gov