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STATE OF WASHINGTON

No. 79111-2

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BY RONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
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In re the Detention of

JOHN CHARLES ANDERSON

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2001 SEP 25 P 12: 06  
BY RONALD R. CARPENTER  
CLERK

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**BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING  
ATTORNEYS**

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**I. INTEREST OF AMICUS CURIAE**

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington state. By law, prosecuting attorneys are responsible for the prosecution of all felony matters in this state and have primary jurisdiction over the prosecution of RCW 71.09 civil commitment matters. WAPA members are concerned that the Court of Appeals' decision below leaves trial courts without adequate leeway under the abuse of discretion standard to manage the course of litigation, including the necessity of urging a case to trial four years after its initiation. Further, contrary to existing case law, the decision below suggests an undefined right afforded to indigent criminal defendants or civil committees that appears to generally override the broad discretion of a trial court to deny such requests. WAPA urges this court to reverse the decision below and hold that the trial court properly exercised its discretion in denying an untimely request for appointment of a second expert when there was no showing of good cause.

**II. ISSUE PRESENTED**

Whether the trial court properly exercised its discretion by refusing to appoint a second defense expert witness seven days prior to trial, and by denying an associated defense request for a continuance, when the case had

already been pending for over four years and there was no demonstration of good cause to justify appointment of a second expert?

### **III. STATEMENT OF FACTS**

On February 25, 2000, the State of Washington, through the Washington Attorney General, initiated sexually violent predator proceedings against Mr. Anderson. CP 1. After an involved probable cause proceeding, the trial court entered an order finding probable cause on March 14, 2001. CP 57. Trial in the matter was initially set for August 5, 2002. CP 80.

On March 8, 2002, respondent applied through an ex parte motion for the assistance of a qualified mental health expert, Dr. Brian Judd. CP 77. The purpose of Dr. Judd was to "assist respondent in preparing for trial in this matter." *Id.* Anderson noted in his pleading that Dr. Judd "has significant experience in SCC cases and has served as a court appointed expert in several cases." *Id.* at 77-78.

The trial court approved Dr. Judd's appointment "to conduct an independent evaluation of Mr. Anderson, pursuant to the provisions of RCW 71.09.070<sup>1</sup> and the Washington Administrative Code." *Id.* at 78. In accord

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<sup>1</sup> The correct statutory reference is RCW 71.09.050, which addresses the appointment of an expert witness for indigent respondents in SVP matters.

with RCW 71.09.050 and WAC 388-885-010(3),<sup>2</sup> Dr. Judd was to provide comprehensive expert services to Mr. Anderson, including an "examination, preparation of a written report, travel time, testimony and other approved and related expenses." CP 79.

Following Dr. Judd's appointment, the State issued interrogatories and noted Dr. Judd's deposition. CP 157. Anderson delayed in making Dr. Judd available for discovery. *Id.* Anderson later informed the State that he would not be calling Dr. Judd at trial. *Id.* Anderson's decision to not utilize Dr. Judd as a trial witness, despite court approval to utilize Dr. Judd for this purpose, was confirmed in compelled answers to interrogatories. *Id.* 57-58. Counsel for Mr. Anderson indicated that they would proceed to trial without an expert witness, which is not uncommon in RCW 71.09 cases. CP 158.

Trial in this case was eventually set for April 19, 2004 -- over four years after the State had initiated civil commitment proceedings. CP 158. One week before trial, on April 12, 2004, Anderson brought a motion for the appointment of a second expert, Dr. Richard Wollert. CP 152; 158. At the same time that Anderson made the request to appoint Dr. Wollert, he filed a "Motion for Stay and Interlocutory Review." *Id.*

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<sup>2</sup> The trial court order refers to WAC 275-156, which was recodified to WAC 388-885 in 2003.

Requests for a second expert at public expense are governed by WAC 388-885-010(3). CP 162. In order to exceed the grant of a single expert allowed by statute, RCW 71.09.050(2), the trial court must find "good cause" for the appointment of additional experts. *Id.*

Anderson acknowledged that Dr. Judd had already been appointed to evaluate his case. CP 153. Anderson explained the reason that he was not calling Dr. Judd in this action:

[Dr. Judd] could not offer an opinion that would be helpful to the Respondent. In essence, Dr. Judd stated that based on his clinical judgment, respondent currently met criteria for civil commitment as a Sexually Violent Predator (SVP) under chapter 71.09 RCW. At my request, Dr. Judd did not write a report of his evaluation of the Respondent.

CP 154. Anderson claimed that the lack of an expert "to rebut the opinion of the [State's] expert is a very grave defect in the Respondent's case." CP 153. Anderson felt that good cause existed because he preferred to explore the alternate opinions that Dr. Wollert may hold based on unspecified "recently published articles." CP 154. Anderson noted that Dr. Judd was willing to consult with Dr. Wollert in order to understand Dr. Wollert's theories. CP 155. Without so much as a follow-up phone call to Dr. Judd, however, Anderson claimed that he was unable to arrange for the consultation and therefore needed to hire Dr. Wollert directly. *Id.*

The State opposed the late request for appointment of a second expert. Mr. Anderson's existing expert, Dr. Judd, was fully qualified to testify on all aspects of the case, including relevant literature in the field. CP 162. The State argued that Anderson's choice to attempt appointment of a second expert rather than utilizing the testimony of the expert who was already familiar with his case "appears to be no more than a transparent attempt to gain an unwarranted continuance."<sup>3</sup> CP 162.

The trial court denied both Anderson's request for the appointment of a second expert for trial and his request for a continuance from the April 19, 2004 trial date. CP 168. The trial court found that Anderson had "not shown good cause for the appointment of Dr. Richard Wollert as a second expert."<sup>4</sup> CP 169. The court noted in findings of fact that Dr. Judd had already been assigned to assist Anderson in this case. CP 169. Although

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<sup>3</sup> The State pointed out that it had arranged witnesses for the impending trial. CP 159. The primary expert in the case, Dr. Amy Phenix, was scheduled to fly up from California on April 20, 2004 with non-refundable tickets, to begin her testimony. *Id.* The State had dedicated substantial resources toward complying with the court's order establishing an April 19 trial date and was "prepared to conduct trial in this matter as scheduled." *Id.*

<sup>4</sup> Although the court disallowed Dr. Wollert's use as a trial witness due to the late request and disclosure, the trial court did allow limited funding for Dr. Wollert to consult with defense counsel during trial. The trial court provided that "[t]he respondent may consult with Dr. Richard Wollert; however, trial will not be continued for such consultation. Dr. Wollert will not be permitted to testify at trial." CP 170.

Anderson had already notified the State that Dr. Judd would not be testifying as a expert witness at trial, the court left open the possibility that Dr. Judd could be called as an expert provided that "the Petitioner has adequate opportunity to depose Dr. Judd."<sup>5</sup> CP 170. Given the trial court's rejection of a second expert, the court further found that Anderson had "not shown good cause for a stay of proceedings." CP 169.

Following a bench trial, Anderson was civilly committed as a sexually violent predator. The Court of Appeals reversed the commitment and remanded for a new trial, holding that "the trial court erred in refusing to appoint a testifying expert for Anderson." *In re Anderson*, 134 Wn.App. 309, 139 P.3d 396 (2006). Citing the governing WAC, the Court of Appeals determined that "it was not unreasonable for the [trial] court to require Anderson to make a showing of good cause for the appointment of a second

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<sup>5</sup> On the first day of trial, defense counsel represented to the court that Dr. Judd was no longer available to serve in this capacity because Anderson had previously discharged him. VRP 4/19/2004 at 1-2. He again requested that Dr. Wollert be appointed as a second expert for trial purposes and claimed that Dr. Wollert could somehow complete an evaluation and the State could depose him without delaying trial. *Id.* The State argued that it would be unreasonable to inject a wholly new expert into the case on the first day of trial and that respondent could have attempted to demonstrate good cause for a second expert months, if not years, earlier. *Id.* at 3-8. Specifically, the State's case was prepared based on Anderson's representation that no expert would be called by the defense and the need to account for Dr. Wollert's theories -- whatever they might be in this particular case -- would potentially effect presentation of the entire state case. *Id.* The Court rejected this further

expert.” *Id.* at 320. The Court of Appeals found that the trial court abused its discretion because Dr. Wollert could offer testimony in support of Anderson’s case and four years of delay did not prejudice the State when Anderson was confined pending trial. *Id.* at 320-21. This court accepted review.

#### IV. ARGUMENT

##### A. The Court of Appeals Substituted Its Judgment for that of the Trial Court

On a daily basis, trial judges throughout our state make thousands of discretionary decisions in managing the course of litigation. These necessary decisions urge and cajole parties to trial in accord with case schedules, even though those parties and their attorneys would almost always prefer more time to perfect an argument, or further explore a factual issue. Decisions by the trial court to manage the course of litigation are necessarily discretionary and should be accorded wide latitude by the appellate courts.

In the current case, the Court of Appeals applied the wrong standard of review. It then compounded this error by substituting its judgment for that of the trial court, rather than deferring to the reasonable discretion of the trial court.

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plea for a second expert. *Id.* at 9.

Although the question before the trial court was the *appointment* of a second expert, the Court of Appeals erroneously cited the review standards for *admitting* expert testimony. 134 Wn. App. at 318. In particular, the decision below purports to review the trial court decision for whether the admitted expert testimony “will assist the trier of fact to understand the evidence or to determine a fact.” *Id.* The question before the trial court, however, did not reach the question of admitting Dr. Wollert’s testimony, but only whether he should be appointed as a second expert in the first place.

The decision to appoint a second expert for an indigent defendant or respondent is subject only to the “abuse of discretion” standard. *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001); *State v. Newcomer*, 48 Wn. App. 73, 94, 737 P.2d 1285 (1987). Whether expert services are necessary to an indigent defendant is a determination within the sound discretion of the trial court, and this determination will not be overturned absent a manifest abuse of discretion. *State v. French*, 157 Wn.2d 593, 607, 141 P.3d 54 (2006). A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 p.2d 775 (1971). The defendant also must make a “clear showing of ... prejudice,” to be entitled to relief based

upon the trial court's decision to deny a request for appointment of expert services. *State v. Young*, 125 Wn.2d 688, 691, 888 P.2d 142 (1995).

Importantly, abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97 935 p.2d 1353 (1997). To state it more positively, a trial judge does not abuse his or her discretion when the decision falls within the broad range of decisions that any reasonable trial judge might adopt. “[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did.” *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004).

Similarly, review of the trial court’s denial of a continuance with regard to Dr. Wollert is properly reviewed under the abuse for discretion standard. The statute requires a trial date to be set within 45 days of the finding of probable cause. RCW 71.09.050(1). “The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced.” *Id.* The Washington Supreme Court addressed the standards applicable to a request for continuance:

In both criminal and civil cases, the decision to grant or deny a

motion for a continuance rests within the sound discretion of the trial court. *State v. Miles*, 77 Wash.2d 593, 597, 464 P.2d 723 (1970). Since 1891, this court has reviewed trial court decisions to grant or deny motions for continuances under an abuse of discretion standard. *State v. Hurd*, 127 Wash.2d 592, 594, 902 P.2d 651 (1995); *Skagit Ry. & Lumber Co. v. Cole*, 2 Wash. 57, 62, 65, 25 P. 1077 (1891). We will not disturb the trial court's decision unless the appellant or petitioner makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wash.2d 344, 347 P.2d 1062 (1959)). In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *State v. Eller*, 84 Wash.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; CrR 3.3(f).

*State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). As with the decision to appoint a second expert, the reviewing court properly accords the trial court wide latitude in decision making.

Apart from erroneously reviewing the current case under an admissibility standard, the Court of Appeals also failed in its application of an abuse of discretion standard. In finding an abuse of discretion, the Court of Appeals noted that "[i]t is true that Anderson's counsel did not offer especially persuasive arguments or reasons for the delay in notifying the State and the trial court of the requested expert or the change in trial strategy, *but the record persuades us* that the trial court abused its discretion when it found that Anderson did not have good cause to appoint Dr. Wollert under WAC 388-885-010(3)(c)." *Id.* at 321 (emphasis

added).

The appellate court's reasoning is wholly inconsistent with abuse of discretion review. First, the above passage indicates that the Court of Appeals is looking beyond the reasoning offered by Anderson before the trial court – the not "especially persuasive arguments or reasons" – to his reformulated arguments on appeal. It is inconsistent to reverse a trial court for "abuse of discretion" based on arguments that Anderson failed to make below, or arguments that were inartful below. Second, rather than asking whether the trial court's decisions fits within the range of reasonable trial court decisions, the Court of Appeals determines to reverse based on how it views the record ("the record persuades us"). In short, the Court of Appeals should be reversed by this court because it substituted its judgment for that of the trial court rather than deferring to the discretion of the trial court.

Appellate courts are supposed to apply the abuse of discretion standard because trial courts are in the best position to manage the course of litigation. Particularly by the time a case approaches the eve of trial, the trial judge is in the best position to regulate and appropriately gauge the necessity of interrupting a scheduled trial for further discovery, the feasibility of conducting such discovery during trial, the need to appoint additional experts after the discovery cutoff, or the need to grant a continuance for any

purpose. Because the trial judge has direct experience with the personalities that are involved in a case and the collegial arrangements that have been made to urge a case to trial, the trial judge is in the best position to gauge when it is time for a case to proceed to trial, even over the objections of a party that will always have "one more thing to do." Because the Court of Appeals failed to heed the trial court's discretion, it should be reversed.

**B. The Trial Court Properly Exercised Its Discretion**

There are several reasons why the trial court denied Anderson's request to appoint a second trial expert and a continuance of the trial date. As such, the Court of Appeals' decision to reverse was in error.

**1. Anderson Failed to Establish "Good Cause" for a Second Expert**

When a person is indigent, the Sexually Violent Predator Act provides for the appointment of a single forensic expert for an SVP respondent. RCW 71.09.050(2). An second expert can be appointed to an indigent SVP respondent under WAC 388-885-010 following a "good cause" showing. Here, Anderson did not establish good cause for the appointment of a second expert.

Anderson sought the appointment of Dr. Wollert because he preferred Dr. Wollert and believed that Dr. Wollert would provide an opinion more favorable than the one held by his existing expert, Dr. Judd.

An indigent person does not have a right to the expert of his or her choosing. In criminal cases, where defendants raising sanity issues have a due process right to expert assistance, that right does not include the privilege of choosing the expert. *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed.2d 53 (1985); *State v. Barnes*, 58 Wn. App. 465, 472, 794 P.2d 52 (1990). *Ake* holds that:

[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. **This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.** Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

470 U.S. at 83 (emphasis added). Even a defendant in a capital murder case does not have a constitutional right to an evaluation by an expert of his or her choice. *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1990).

Similarly, the Constitution does not provide a right to “expert shop” until the SVP respondent finds a favorable opinion. Anderson’s right to a single expert at public expense does not include the right to a favorable opinion. *Ake*, 470 U.S. at 83; *Harris*, 949 F.2d at 1516 (“*Ake* does not guarantee access to a psychiatrist ‘who will reach only biased or favorable conclusions.’”) (quoting *Granviel v. Lynaugh*, 881 F.2d 185, 192

(5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990)). This rule was recognized by the 9th Circuit even prior to *Ake*:

The fact that the first psychiatrist finds defendant to be legally sane does not create a necessity that a second psychiatrist be appointed. To hold otherwise could result in the defendant undergoing a series of psychiatric examinations until a favorable psychiatric report was filed with the court.

*U.S. v. Valtierra*, 467 F.2d 125, 126 (9th Cir. 1972) (citing *U.S. v. Maret*, 433 F.2d 1064, 1068 (8th Cir. 1970)). The rule is universally recognized by persuasive authorities.<sup>6</sup>

Anderson fails in his claim that he established good cause merely by asserting that Dr. Wollert might support his case better than Dr. Judd. The right to evaluation by an expert does not of necessity include the right to have an expert agree to the defense position. Federal and state courts, however, have rejected the claim that there is a right to “effective assistance” from an expert, as there is from one’s counsel. *See e.g.*, *Harris*, 949 F.2d at 1517; *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir. 1989); *People v. Samayoa*, 15 Cal.4th 795, 837, 938 P.2d 2 (1997). If

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<sup>6</sup> *Whittle v. State*, 518 So.2d 793, 794 (Al. App. 1987); *People v. Samayoa*, 15 Cal.4th 795, 837, 938 P.2d 2 (1997); *State v. Barker*, 564 N.W.2d 447 (Ia. App. 1997); *Crawford v. Com.*, 824 S.W.2d 847, 850 (Ky. 1992); *Com. v. DeWolfe*, 449 N.E.2d 344, 349 (Mass. 1983); *Com. v. Bridges*, 757 A.2d 859, 867 (Pa. 2000); *State v. Barnett*, 909 S.W.2d 423, 431 (Tn. 1995); *Funk v. Com.*, 379 S.E.2d 371, 373 (Va. App. 1989); *Pruett v. Thompson*, 771 F.Supp. 1428, 1441-42

trials are to serve their truth-finding process, Anderson should not be allowed to expert shop – at public expense – until he finally finds an expert willing to support his position. The trial court did not abuse its discretion in rejecting appointment of a second expert when Anderson’s main desire was to choose an expert aligned with narrow interests.

**2. The Trial Court Correctly Rejected Appointment of a Second Expert Named Just One Week Before a Trial That Had Been Pending for Four Years**

The trial court’s exercise of its discretion is further supported by the timing of Anderson’s request for a second expert. “The trial court has considerable latitude in managing its court schedule to insure the orderly and expeditious disposition of cases.” *Idahosa v. King County*, 113 Wn..App. 930, 937, 55 P.3d 657, 660 (2002); *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn.App. 125, 129, 896 P.2d 66 (1995); *Wagner v. McDonald*, 10 Wn..App. 213, 217, 516 P.2d 1051 (1973). The SVP case had been pending for more than four years by the time Anderson requested a second expert. For much of this period, he had known that Dr. Judd’s opinion was not favorable to him. Under these circumstances, it was not an abuse of discretion to refuse appointment of a second expert on the eve of trial.

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(E.D.Va 1991), *aff’d* 996 F.2d 1560 (4th Cir. 1993).

Although the refusal to appoint a second expert falls in a different category than exclusion of an expert who is a late-named witness, it is important to note that the trial court would have been within its discretion to exclude Dr. Wollert even if he fell in the latter category. In *In re Gillespie*, 89 Wn. App. 390, 406, 948 P.2d 1338 (1997), the appellate court determined that exclusion of a late-disclosed expert was appropriate under facts similar to those in the current case:

Lewis cannot claim a good faith attempt to comply within the rules of discovery when she did not disclose her expert witnesses until *two previously scheduled trial dates had passed*. Given her long-standing medical ailments, Lewis *should have known at a much earlier date* that these witnesses could provide helpful expert testimony.

Further, *two of the witnesses resided in Colorado. This would have made it difficult and costly for Gillespie's attorney to depose them at that late date. And it is likely that yet another continuance of the trial would have been necessary* if Gillespie needed to secure his own medical witness. Because of the potential prejudice to Gillespie, *we cannot say that the trial court lacked justification for its ruling or abused its discretion in excluding the medical witnesses.*

(Emphasis added).

Likewise, in *Dempere v. Nelson*, 76 Wn.App. 403, 405-06, 886 P.2d 219 (1994), the appellate court affirmed exclusion of an expert witness that had not been "properly disclosed." In that case "Dempere failed to disclose [the expert] as required by the case schedule and the pretrial order." *Id.* The court rejected Dempere's excuse that "she had

just discovered [the expert] and therefore did not willfully fail to disclose him." Id. Like Anderson, the efforts put forth in Dempere were insufficient. Id.

A trial court's decision to reject appointment of a new expert just seven days prior to trial should never be labeled an abuse of discretion. A trial court has a constitutional responsibility to ensure that "Justice in all cases shall be administered . . . without unnecessary delay." Wn. Const. Art. 1, § 10 The trial court acted correctly in rejecting Anderson's untimely motion for a second expert.

**C. Reversal Was Inappropriate Where There Was No Reason to Believe that Dr. Wollert's Testimony Would Have Changed the Result**

In reversing the trial court, the Court of Appeals assumes that Dr. Wollert's testimony would have been favorable to Anderson and that it would have made a difference to the commitment decision. These assumptions, however, are not warranted by the record. Anderson never made an offer of proof on Dr. Wollert's anticipated testimony. He made vague references to newly published literature and to Dr. Wollert's practice of testifying for SVP respondents, but failed to make any claim on the substance of the testimony or its anticipated impact on the case. In the absence of a specific offer of proof and an explanation of how Dr. Wollert's opinion would affect the ultimate outcome of the case, it was

error to reverse the trial court.

The exclusion of expert testimony will not be considered on appeal in the absence of a specific offer of proof showing the substance of that testimony. *Ralls v. Bonney*, 56 Wn.2d 342, 343, 353 P.2d 158 (1960); *Sutton v. Mathews*, 41 Wn.2d 64, 67, 247 P.2d 556 (1952). The offer of proof allows the trial court to properly exercise its discretion when reviewing, reevaluating, and revising its rulings if necessary. *State v. Ray*, 116 Wn.2d 531, 538-539, 806 P.2d 1220 (1991). In the absence of a specific and detailed offer of proof, this court generally will not speculate as to what the expert's testimony would have been. *Tumelson v. Todhunter*, 105 Wn.2d 596, 605, 716 P.2d 890 (1986). With no adequate offer of proof, it is impossible to determine if Anderson was actually prejudiced by the trial court's decision not to appoint Dr. Wollert as a second expert. Without prejudice, relief is not warranted. *Kysar v. Lambert*, 76 Wn.App. 470, 491, 887 P.2d 431, *review denied*, 126 Wn.2d 1019 (1995).

There is no indication that Dr. Wollert, even if appointed, would have mattered to the ultimate disposition of the case. Dr. Wollert is well-known for offering opinions outside the mainstream of his field. For example, where Dr. Wollert's testimony was presented to support a request for a new commitment hearing, the Court of Appeals rejected his

opinions that an SVP: (1) had finished treatment, where he had completed only three of six treatment phases; (2) did not suffer from the diagnoses he had been adjudicated as suffering from; and (3) was no longer dangerous because he was two years older than when he was committed. *In re Detention of Elmore*, 134 Wn. App. 402, 415-20, 139 P.3d 1140 (2006), *review granted*, 158 Wn.2d 1025, 152 P.3d 347 (2007).

In another case where an SVP respondent sought a less restrictive alternative, the housing he proposed for himself would not accept him because the Department of Corrections End of Sentence Review Committee and local law enforcement had determined that he was a level III sex offender. *In re Detention of Enright*, 131 Wn. App. 706, 712-13, 128 P.3d 1266 (2006). Dr. Wollert, however, opined that the SVP was actually a level II offender because “out-of-date risk assessment principles” had been used to designate him a level III. *Id.* at 712. Division III rejected that argument. *Id.* at 715-16.

Recently, more of Dr. Wollert’s unique opinions were rejected, despite being relied upon by SVP respondents seeking new commitment hearings. In one case, Dr. Wollert opined that an SVP had a recidivism risk of 10 percent, based on a single Wisconsin study, and that the SVP had never met the statutory requirements for commitment. *In re Detention of Fox*, 138 Wn. App. 374, 383-84, 158 P.3d 69 (2007). He also opined

that a 61-year-old SVP was no longer dangerous because he was two years older than when he was committed, though he had last offended at age 56. *Id.* at 399-400. Even the dissenting judge in *Fox* noted that “[t]he legislature is clearly concerned about Dr. Wollert’s proposed testimony.” *Id.* at 408 n.21 (Armstrong, J., dissenting).

In reversing the trial court, the Court of Appeals presumed substance to Dr. Wollert’s opinion and prejudice to Anderson from the decision to deny Dr. Wollert’s appointment. Because neither presumption is supported by an offer of proof, or otherwise warranted, the decision to reverse the trial court was in error.

V. CONCLUSION

For the foregoing reasons, WAPA urges this court to reverse the decision of the Court of Appeals and affirm Anderson’s civil commitment.

DATED this 18th day of September, 2007.



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