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CLERK OF SUPREME COURT
STATE OF WASHINGTON

NO. 79111-2

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

JOHN C. ANDERSON,

Petitioner,

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
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v.

STATE OF WASHINGTON,

Respondent.

SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON

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I. INTRODUCTION AND ISSUES

The Court has accepted review of Mr. Anderson's Petition and the issue raised in the State's Response to the Petition. There are two issues, therefore, before the Court:

1. **Whether evidence presented by the State of a recent overt act was sufficient to commit Mr. Anderson as a sexually violent predator under RCW 71.09?**
2. **Whether the trial court abused its discretion when it denied Mr. Anderson's request to add an expert witness one week before trial, where the case has been pending for over four years, where Mr. Anderson had prior access to the expert but repeatedly indicated that he did not intend to call an expert at trial, and where adding the expert one week before trial was demonstrably prejudicial to the State's preparation and interest in bringing the case to trial?**

II. STANDARD OF REVIEW

The question of whether the State's evidence of Mr. Anderson's actions met the statutory definition of ROA requires the Court to accept the evidence as submitted by the State as believed by the fact finder. The reviewing court will affirm a trial court's findings if, after analyzing the evidence and all inferences that can be reasonably draw in favor of the trial court's findings substantial evidence supports those findings. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). When the record contains conflicting testimony, the reviewing court will not disturb the trier of fact's credibility determinations. *State v. Hughes*, 154 Wn.2d 118,

152, 110 P.3d 192 (2005). Finally, the issue of whether the trial court erred by denying the addition of an expert witness the week before trial is tested by an abuse of discretion standard. *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984). A court abuses its discretion when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

III. ARGUMENT

A. The State Presented Sufficient Evidence Of The Commission Of A Recent Overt Act

The parties agree that the State is required to prove a Recent Overt Act (ROA) in this case. Mr. Anderson argues that the State did not present sufficient evidence at trial to find that he had committed an ROA. Pet. at 1. He also suggests constitutional deficiencies with the definition of ROA and its application.

Rather than focusing on the evidence presented at trial, Mr. Anderson argues that the term “recent overt act” should be reinterpreted to mean an act or acts that create “a fear of ‘sexually violent harm’ in minds of the **recipients** of those behaviors.” Pet. at 14 (emphasis added). Mr. Anderson thus argues that a common law definition of assault should be used to define “reasonable apprehension” of “harm of a sexually

violent nature.” Pet. at 16. In doing so, he incorrectly suggests that, to constitute a recent overt act, there must be an identifiable victim against whom the act is directed.

Mr. Anderson’s arguments are contradicted by the language of the statute, do not advance the purposes of the statute, and should be rejected. A “recent overt act” or “ROA” is defined as an act that creates a “reasonable apprehension of [harm of a sexually violent nature] **in the mind of an objective person** who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(10) (emphasis added). This plain language requires that the act be evaluated against an “objective person” and defeats Mr. Anderson’s premise.

The argument offered by Mr. Anderson was rejected by the Court of Appeals in *In re Det. of Froats*, 134 Wn. App. 420, 140 P.3d 622 (2006). The Court of Appeals explains persuasively why Mr. Anderson’s construction is not consistent with the statute or case law:

Froats urges us to apply a standard of reasonable apprehension of harm from the common law governing assault. Neither the statute nor case law supports his argument that a recent overt act must cause reasonable apprehension of harm in the intended victim. On the contrary, the question is whether an objective person familiar with the person’s mental health and offense history would reasonably fear harm. The act or threat itself need not be dangerous. (...act of masturbating while covertly following girls around a store); (act of being in a part at a children’s playground without a chaperone); (act of luring a young boy with 50 cents)

134 Wn. App at 436 (internal citations omitted).

Mr. Anderson's reliance on assault concepts as an element of an SVP commitment would create a barrier to commitment and treatment that the legislature has never required. Moreover, adding what would be equivalent to proving the crime of assault as an element of an SVP commitment is unnecessary in light of the other elements which include proof of a prior conviction for a sexually violent offense as defined in RCW 71.09.020(15)(d).

Mr. Anderson's other arguments rely on the Constitution to support his particular construction, but those arguments are likewise contrary to existing case law. The *Froats* Court also rejected an argument that the term "recent overt act" was void for vagueness:

Froats argues that a broad interpretation of recent overt act offends constitutional principles, including substantive due process and the vagueness doctrine. We disagree.

In Albrecht's appeal after remand, Division Three rejected a similar argument, noting that the recent overt act requirement is but one part of the showing the State must make in proof of a person's status as a sexually violent predator. The recent overt act requirement was added to the existing statutory scheme to ensure an extra layer of proof in support of a finding of current dangerousness. In addition to a recent overt act, the State must prove that an individual suffers from a mental abnormality that makes it likely the person will engage in predatory acts of sexual violence if not confined to a secure facility. This requirement satisfies due process.

134 Wn. App. at 436-37 (internal citations omitted).

Mr. Anderson offers no authority for his argument that the Constitution requires that a recent overt act include an “effort, attempt, or threat to carry out a dangerous act,” as is required under the common law definition of assault. This reading of recent overt act would, moreover, thwart the purpose of the SVP law by requiring a new crime—assault—before the State can file a commitment that serves to treat the predator and prevent crime. Keeping in mind that all attempts at sexually violent offenses are themselves sexually violent offenses, see RCW 71.09.020(15)(d), it makes no sense to require a new sexually violent offense or something very close to it before the State can act to protect society from danger. Such a requirement cannot be found in the language or purpose of the recent overt act.

B. Mr. Anderson Engaged in Behavior at Western State Hospital That Qualifies as Recent Overt Act.

Mr. Anderson also argues that “[c]onduct that is over thirty years old cannot possibly qualify as ‘recent.’” Pet. at 15. He does not identify the conduct to which he refers, and elsewhere in his brief, states that “the state’s position it is [sic] possible to look as far back as sixteen years to find conduct that satisfies the statutory criteria.” Pet. at 15. The conduct identified by the Court of Appeals as ROAs, however, in fact occurred

during Mr. Anderson's 10-year stay at Western State Hospital (WSH) between 1990 and the filing of the SVP petition in 2000:

. . . . Dr. Phenix indicated that several of Anderson's actions qualified as recent overt acts, which created a reasonable apprehension of sexually violent harm in the mind of an objective person who knew Anderson's history and mental condition. *See* RCW 71.09.020(10). For example, she pointed to Anderson's relationships with vulnerable patients, like Rory, at WSH. Although the evidence at trial did not indicate that Anderson had committed an actual rape, he engaged in serial sexual behaviors that exploited vulnerable adults, which acts were closely akin to his assaults on children. And his persistence in that conduct, his ongoing sexual fantasies involving sexual violence of children, his rule breaking behavior, and his inability to avoid high risk situations all indicated that he posed a clear risk to reoffend if released from custody.

In re Det. of Anderson, 134 Wn. App. 309, 323-24, 139 P.3d 396 (2006).¹

¹ The Court of Appeals described Mr. Anderson's behavior at WSH as follows:

While at WSH, Anderson engaged in sexual behavior with at least four male patients. In 1991, he had a sexual relationship with Daryl, a mildly to moderately retarded patient. In 1994 and 1995, Anderson had a relationship with Bobby, a mildly retarded patient. In 1996, Anderson had a sexual relationship with Curtis, a mildly retarded patient. All of these encounters involved fondling, fellatio, and either attempted anal intercourse, or anal intercourse. Anderson told his treating physician, Dr. Arnholt, about each of the relationships, and Dr. Arnholt counseled Anderson to end the contact because each of the men was disabled. In addition, from 1993 to 1999, Anderson had an ongoing relationship with Rory. Rory was not retarded but had low-average intelligence, a borderline personality disorder, and had been seriously physically and sexually abused as a child. Dr. Arnholt counseled both men to end the relationship. They did not end it until shortly before Anderson left WSH. According to Dr. Arnholt, Rory had a "crush" on Anderson and he thought that sexual contact with Anderson would ensure a "special relationship." RP at 79. But when that relationship did not come to fruition, Rory began to act out, had difficulty controlling his anger, and showed functional deterioration for a time.

Anderson, 134 Wn. App at 314.

Mr. Anderson offers no legal authority for the proposition that events that occurred some years ago are, as a matter of law, not “recent” enough to constitute ROAs. Moreover, this argument is contrary to settled law. For example, in *In re Det. of Pugh*, the Court of Appeals relied upon acts committed five, eleven, and even thirteen years before. 68 Wn. App. 687, 694-95, 845 P.2d 1034 (1993). Likewise, in *In re Det. of Henrickson v. State*, this Court determined that convictions for Attempted Kidnapping and Communicating with a Minor for Immoral Purposes occurring six years before the SVP petition’s filing constituted ROAs. 140 Wn.2d 686, 698, 2 P.3d 473 (2000). The key, then, is not some arbitrary time limit, but rather whether the acts alleged are “still probative of the subject’s present sense of dangerousness.” *Pugh*, 68 Wn. App. at 694.

The Court should affirm that an ROA does not require an arbitrary time limit, but instead must fulfill the factual question posed by RCW 71.09.020(10). Mr. Anderson engaged in behavior demonstrating his sexual dangerousness until shortly before the SVP petition’s filing. This Court should affirm the Court of Appeals’ finding that these behaviors in fact create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows Mr. Anderson’s history and mental condition. RCW 71.09.020(10).

Mr. Anderson also argues that the ROAs involved only fantasy - as opposed to actual behavior or consensual sex. Citing Judge Armstrong's dissent, Mr. Anderson suggests that finding an ROA where the individual does nothing more than have consensual sex while confined implies that an individual with a history of sex offenses commits an ROA if he engages in sexual behavior of any kind. Pet. at 12-14. This argument mischaracterizes the testimony at trial as well as the majority's determination that Mr. Anderson's various behaviors, not limited to fantasies or consensual sex, constituted ROAs. Whether there is an ROA remains a fact-dependent question. Review of the record in this case demonstrates that substantial evidence supports the trial court's determination that Mr. Anderson committed ROAs and met the definition of sexually violent predator.

C. The Trial Court Did Not Abuse Its Discretion By Refusing Mr. Anderson's Last-Minute Request for an Expert.

The State filed its petition against Mr. Anderson in February of 2000. *Anderson*, 134 Wn. App. at 315. The week before trial, on April 12, 2004, Mr. Anderson moved to add Dr. Richard Wollert as an additional expert witness. *Id.* The trial court denied the motion, as well as subsequent motions to the same effect. *Id.* at 316.

The trial court did not abuse its discretion by refusing to allow Mr. Anderson's last-minute request for an expert. A trial court does not abuse its discretion when it excludes witnesses for a willful violation of a discovery order. *Allied Financial Services v. Mangum*, 72 Wn. App. 164, 168-69, 871 P.2d 1075 (1993). A spirit of cooperation and forthrightness during the discovery process is mandatory for the efficient functioning of modern trials *Washington State Physicians Ins. Exch. Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 342, 858 P.2d 1054 (1993). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Junker*, 79 Wn.2d at 26. Anderson's decision to make a last-minute request for an expert he had previously indicated he would not call constitutes a willful violation of the rules of discovery and the court acted within its sound discretion to reject the request. The Court of Appeals' ruling that the trial court abused its discretion reflects an erroneous application of the abuse of discretion standard, encourages dilatory behavior by party seeking to avoid or delay trial, and creates a potential for serious costs in this and other cases.

1. Procedural History

In 2001, the trial court appointed Dr. Brian Judd, a psychologist who specializes in the evaluation and treatment of sex offenders, to assist Mr. Anderson at trial. CP at 77-79, 157, 160-163. On June 5, 2002, in his response to the State's Motion to Compel answers to interrogatories, Mr. Anderson acknowledged that Dr. Judd was serving as his expert but indicated that he no longer wished to use Dr. Judd in this capacity. CP at 157. Mr. Anderson indicated instead that he wished to consult with Dr. Wollert, but had not yet made any formal arrangements with him. CP at 157. Three weeks later, Mr. Anderson, through counsel, notified the State that he would not be calling Dr. Judd **or any other expert witnesses**. CP at 158.

At a status conference on April 12, 2004, one week before trial and almost two years after he had said that he would not be calling an expert witness, Mr. Anderson requested for the first time that the trial court appoint Dr. Wollert to his defense. CP at 158, 168. He also asked to stay the already long-delayed trial in order to allow him to seek review of an order entered in 2001.² CP at 168. The State opposed both motions.

² In 2000, Mr. Anderson had filed a Motion for Judgment on the Pleadings on the question of the State's use of his records from WSH. *Anderson*, 134 Wn. App. at 315; CP at 41-51. The trial court denied his motion, and he sought review by Division II, which denied review in May 2001. *Anderson*, 134 Wn. App. at 315. CP 52; 53.

CP at 156-159; 160-163. The trial court denied the motion for a stay, found that Mr. Anderson had failed to show good cause for Dr. Wollert's appointment, and ruled that Dr. Wollert would not be permitted to testify at trial. *Id.* at 168-70. The trial court ordered that Mr. Anderson's counsel could, however, consult with Dr. Wollert. *Id.*

On April 19, 2004, the first morning of trial, Mr. Anderson renewed his motion to have Dr. Wollert appointed as a testifying expert. VRP at 1-10. That motion was denied. *Id.* After the State's expert, Dr. Amy Phenix, testified at trial, Mr. Anderson made yet another request to call Dr. Wollert. *Id.* at 441. The trial court again denied the motion. *Id.* at 442-448.

The Court of Appeals determined that the trial court had abused its discretion in refusing to allow Mr. Anderson to call Dr. Wollert as an expert, stating that:

[t]he timing of Anderson's request for Dr. Wollert's appointment did not...result in delay or prejudice to the State's case. Change of trial counsel over the course of four years leading up to the trial, the availability of an expert with knowledge of actuarial instruments' applicability to adults convicted of sexually violent crimes

On April 15, 2004, three days after his oral request to the trial court to stay trial court proceedings and four days before trial, Mr. Anderson filed a motion for discretionary review with Division II, asking for an emergency stay of trial pending interlocutory review of that same trial court Order, citing a September, 2003 decision as "new controlling case authority" as a basis for review. CP 238-245; *see also* CP 158. The State opposed that renewed attempt for interlocutory review, and on April 16, 2004, the Court of Appeals again denied review. CP 164-166.

as juveniles, notice two years earlier that Dr. Wollert was a possible expert witness, and the lack of actual trial delay all comprised good cause under WAC 388-885-010(3)(c).

Anderson, 134 Wn. App. at 320-21. Each of these four reasons is flawed, or contrary to the record, and not a basis for concluding that the trial court abused its discretion.

a. There Were No Significant Changes in Mr. Anderson's Counsel.

The Court of Appeals first cites to the fact that there had been a "change of counsel over the four years leading up to the trial..." as a basis for allowing Dr. Wollert's appointment. 134 Wn. App. at 321. The record demonstrates, however, that the change of counsel before trial did not provide a good reason Mr. Anderson's last-minute request.

When the case was filed in February of 2000, Mr. Anderson was represented by Ms. Ann Stenberg; Mr. Don Lundahl joined as counsel the following month. CP at 217-218.³ Three weeks before trial, Ms. Stenberg was permitted to withdraw as counsel and Mr. Lundahl's (then) wife and legal partner, Ms. Karen Lundahl, substituted. CP at 225. The State opposed this substitution and expressed its concern that substitution would

³ The State has included in its Supplemental Brief references to five separate documents with CP designations of CP 217 through CP 247, which are the subject of a Motion to Supplement the Court's record, filed on June 21, 2007 and set for consideration without oral argument on August 16, 2007. If that Motion is denied, the State will seek leave to submit, within 7 court days of notification of the Motion's denial, a version of the brief in which all such references are redacted.

delay the already long-delayed trial, pointing to numerous conversations with Mr. Lundahl in which the State had tried to clarify both who would represent Mr. Anderson at trial and whether he would be requesting a continuance. CP at 226-237. Mr. Lundahl had repeatedly told the State that there were no plans to ask for a continuance. *Id.* at 234-235. Significantly, the trial court's Order granting Mr. Anderson's request to allow Ms. Lundahl to substitute for Ms. Stenberg provided that the trial date of April 19, 2004 "will be maintained." CP at 225.

The trial court was also aware that the substitution of Ms. Lundahl was, by the defense's own admission, not a basis for the last-minute addition of Dr. Wollert. When Mr. Anderson renewed his motion to add Dr. Wollert on the first day of trial, the State's counsel objected, noting that the State had had no opportunity to depose Dr. Wollert, and that the State had relied upon the court's ruling that the defense would not be permitted to call him at trial. VRP at 3-4. The State also argued that Mr. Anderson had made a tactical decision to discharge Dr. Judd two years previously and that, if counsel believed that a second expert was necessary, "they could have made that request shortly after discharging Dr. Judd; that could have been done six months ago, that could have been done three months ago," and that making the request one week before trial made it impossible for the State to prepare. *Id.* at 7.

Ms. Lundahl responded: "I don't think that counsel for respondent should be held to or penalized for tactical decisions made several years ago." *Id.* Ms. Lundahl's remark about "tactical decisions made several years ago" implies that entirely different counsel had come on board since those decisions. This was, however, contrary to the record before the trial court: Mr. Lundahl had been counsel of record for all four years and made the very tactical decisions that Ms. Lundahl sought to disavow.

Nor does the record permit Ms. Lundahl to disassociate herself from earlier "tactical decisions". In late March, 2004, when Mr. Anderson moved to substitute Ms. Lundahl for Ms. Stenberg, Mr. Anderson submitted a declaration stating:

Following my written request to Ms. Stenberg that she withdraw as co-counsel, I spoke with my other lawyer, Don Lundahl, about a replacement for Ms. Stenberg. He informed that his partner (and spouse) Karen Lundahl, would be interested in representing me **since she was already quite familiar with the facts of my case and the legal issues involved, because of her involvement in assisting Mr. Lundahl with various aspects of my case since 2000. According to Mr. Lundahl, since April of 2000, she has been a full-time partner in Mr. Lundahl's practice...**Mr. Lundahl has assured me that because of Ms. Lundahl's **past and continuing involvement in my case**, her appearance as my lawyer when my trial is scheduled for April 19, 2004 will not require a continuance of my trial date.

CP at 221-223 (emphasis added).

When Ms. Lundahl rather than Mr. Lundahl argued the motion to add Dr. Wollert, it perhaps gave the impression of new counsel disavowing a prior tactical decision. The trial court was aware, however, that Mr. Lundahl had been on the case for four years at the time the motion was made, and had at least partial responsibility for “tactical decisions made several years ago.” VRP at 8-9.

Moreover, the trial court could see that the “tactical decision” not to pursue Dr. Wollert’s appointment was not simply something decided several years ago, but was an ongoing action, reflected in the fact that neither Mr. nor Ms. Lundahl raised the issue at any point before the April 12, 2004, status conference.

The trial court also knew, based on Mr. Anderson’s April 1, 2004, Declaration, that Ms. Lundahl had sufficient long-standing familiarity with Mr. Anderson’s case to enable her to come in fewer than three weeks before trial and join Mr. Lundahl, who had been counsel for four years, and to maintain the trial date. The trial court thus had no reason to give any weight to a supposed need to add an expert because Ms. Lundahl had only recently formally associated with the case. The trial court’s decision to deny Mr. Anderson’s motion to add Dr. Wollert one week before trial is therefore not “manifestly unreasonable” as held by the Court of Appeals.

The trial court's decision flowed logically from counsel's own representations of familiarity with the case.

b. Abuse of Discretion Is Not Established by the Fact That Dr. Wollert Was Mentioned as a Possible Witness in 2002.

As its second and third reasons for finding an abuse of discretion, the Court of Appeals noted "the availability of an expert with knowledge of actuarial instruments' applicability to adults convicted of sexually violent crimes as juveniles," and "notice two years earlier that Dr. Wollert was a possible expert witness." *Anderson*, 134 Wn. App. at 321. Under the trial court record, neither ground has substance.

Dr. Wollert's area of expertise was presumably known to defense counsel when they contacted Dr. Wollert in 2002. CP at 157-58. If that expertise was not fully understood at that time, it is not unreasonable to assume that it became known at some point prior to one week before trial.⁴ Indeed, the explanation for not having followed up on that initial contact or having designated him as an expert prior to April 12, 2004, was described by Ms. Lundahl as a "tactical decision." VRP at 8-9.

A statement two years earlier that Dr. Wollert *might* be a trial witness does not alleviate the prejudice of adding a significant expert

⁴ This seems particularly likely in view of the fact that Mr. and Ms. Lundahl appear to have both been working with Dr. Wollert in the *Lee* case, which was going on at the same time in Pierce County. VRP at 5, 6; 445-46.

witness one week before trial with no updating of discovery and no real showing of a basis for the delay. The trial court's decision in this regard is particularly appropriate here because Mr. Anderson affirmatively informed the State that Dr. Wollert would **not** be called as a witness. This ensured that the State would not conduct any discovery or otherwise prepare for Dr. Wollert's possible testimony. CP at 157-58. Under such circumstances, a trial judge can fairly put some reasonable burden on a party to come forward far earlier than the week before trial.

The Court of Appeals erred by finding an abuse of discretion based on the defense's mention, two years earlier, that it was considering calling Dr. Wollert. The possibility of calling Dr. Wollert was superseded by written discovery to the contrary, which the trial court properly enforced.

c. Mr. Anderson's Last-Minute Addition of Dr. Wollert Would Inevitably Have Delayed Trial.

The Court of Appeals determined that, because trial adjourned and Dr. Phenix's testimony was not completed until May 12, 2004, Mr. Anderson could have added Dr. Wollert as a witness without causing delay. *Anderson*, 134 Wn. App. at 320-21. This characterization, however, is not fair to the trial judge because it relies on hindsight rather than considering the information available to the trial court at the time of the decision. The trial court record showed that allowing the defense to

add Dr. Wollert on the eve of trial, with no written reports or discovery, would have forced the State to choose between being unprepared for trial and requesting a continuance in an already long-delayed trial. No trial judge should be required to sanction a last-minute expert witness that forces a party to make such a choice, where there is no showing of diligence or good cause by the party seeking to add the witness and force the delay.

At the time, Ms. Lundahl argued that prejudice would be minimal, noting that Dr. Wollert had been deposed in another case and asserting that “his opinion would be not too much different.” VRP at 5. The State, however, explained why being forced to rely on a deposition from an unrelated case would be prejudicial:

Dr. Wollert has apparently been deposed fairly recently in a different sexually violent predator case, [but] I don't know the facts of Mr. Lee's case, I'm not involved in Mr. Lee's case. Certainly, had this happened even just several weeks ago, I could have taken steps to prepare for that. Monday morning of trial, when I have another trial scheduled for next week, another trial in May, a Supreme Court argument on a criminal matter, is just simply unreasonable, your Honor. I'm not prepared to adequately cross-examine Dr. Wollert at this point nor could I become so this week.

VRP at 6. As is clear from the State's comments, the State was willing to accommodate any reasonably timely request to add Dr. Wollert; the

motion, however, coming on the eve of trial and at a time that the State could not possibly prepare, was manifestly unreasonable and prejudicial.

Moreover, Ms. Lundahl's characterization of Dr. Wollert's testimony in the other case, *In re Det. of Lee*, 134 Wn. App. 1031, 2006 WL 2329469, (unpublished) was inaccurate. *Lee* involved an adult rapist who committed the vast of majority of his crimes as an adult. Mr. Anderson, in contrast, had committed his last adjudicated sexual crime as a juvenile. It was on this very different issue that Mr. Anderson argued he required Dr. Wollert's expertise, and upon which Mr. Anderson extensively examined the State's expert, Dr. Phenix. *Anderson*, 134 Wn. App. at 320; VRP 262-307.

Under these circumstances, it was entirely reasonable to conclude that it would have been prejudicial and unfair for State's counsel to prepare to cross examine Dr. Wollert. Despite the State's efforts to resist further delay in the case, a continuance would have been unavoidable. The trial court's denial of Mr. Anderson's last-minute request for an expert was entirely appropriate.

d. The Court of Appeals' ruling is contrary to sound public policy.

The Court of Appeals reached an unreasonable result because its ruling undermines a trial court's authority to require parties to follow basic rules of notice. Such a ruling encourages trial by ambush.

Additionally, the Court of Appeals' ruling undermines the public interest in a cost-effective judicial system. The delay underlying Mr. Anderson's last minute motion to call Dr. Wollert imposes considerable costs to the State both as a prosecutor and in its role funding a fair defense.⁵ Experts prepared to go forward must put the case away until a later trial date. Plane tickets must be purchased again, schedules must be re-arranged, and attorneys are shifted to new cases when delay causes a conflict in their caseload.

Here, the trial court could reasonably conclude that Mr. Anderson's designation of a new expert witness of this type would have delayed trial or substantially prejudiced the State. The trial court could also have reasonably concluded that the problem could have been easily avoided by defense counsel, who had been in contact with Dr. Wollert at least two years before and who had had continued contact with Dr. Wollert in the *Lee* case. Had the defense simply told the trial

⁵ Pursuant to WAC 388.885, the State is responsible for the costs of both the prosecution and defense in SVP cases.

court and the parties of their plans, they could easily have avoided the trial court's reasonable conclusion that the last-minute designation was a tactical decision to force a continuance.⁶

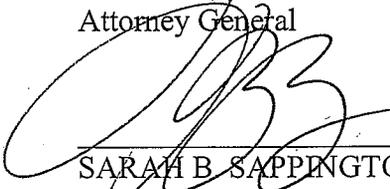
For all these reasons, it was not an abuse of discretion to deny Mr. Anderson's untimely request to add a second expert and to require Mr. Anderson to proceed to trial. The Court of Appeals' ruling should be reversed and the trial court's ruling affirmed.

IV. CONCLUSION

The Court should affirm the Court of Appeals determination that behaviors by Mr. Anderson while at WSH constitute a recent overt act. In addition, this Court should reverse the Court of Appeals' ruling that the trial court abused its discretion in refusing to allow the last-minute designation of Dr. Wollert.

RESPECTFULLY SUBMITTED this 6th day of July, 2007.

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⁶ That the defense desired a delay is also evidenced by Mr. Anderson's simultaneous efforts in both the trial court and the Court of Appeals to stay the trial during the week before trial. CP at 164-66; 168; 238-45.