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STATE OF WASHINGTON

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NO. 81230-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

BRYAN DUNCAN,

v.

STATE OF WASHINGTON,

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SUPREME COURT
STATE OF WASHINGTON
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Petitioner,

Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

JOSHUA CHOATE
Assistant Attorney General
WSBA #30867
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2011

ORIGINAL

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I. STATEMENT OF ISSUES

1. When an attempt was made to discredit the psychological evaluation procedures of the State's expert witness by implying his efforts were intentionally limited to a review of records prepared by others, did the trial court properly exercise its discretion in permitting the witness to explain that he attempted to interview Mr. Duncan, but Mr. Duncan declined the invitation?
2. Where no objection was raised at trial, did the trial court abuse its discretion by admitting evidence that, if he were released into the community, Mr. Duncan intended to reside with an individual who had a history of sexual offending against children?
3. Where no testimony concerning the available treatment at the Special Commitment Center (SCC) was elicited by the State during the direct examination of Dr. Paul Spizman, were Mr. Duncan's due process rights violated by the trial court when it limited cross-examination of Dr. Spizman to matters discussed during the direct exam, and not matters pertaining to treatment conditions at the SCC?
4. Since the relevant issue in this civil commitment proceeding was whether a current mental abnormality made Mr. Duncan likely to engage in predatory acts of sexual violence if released, did the trial court violate Mr. Duncan's due process rights by precluding the defense expert to opine as to the perceived shortcomings of the treatment available to Duncan at the SCC if the jury determined he should continue to be confined?

II. STATEMENT OF THE CASE

A. Procedural History

The State of Washington filed a petition in Benton County Superior Court on March 22, 1996, alleging that Bryan Duncan (Duncan) is a sexually violent predator. CP 1870-1871. The petition was supported by a psychological evaluation authored by the State's expert

Leslie Rawlings, Ph.D., a licensed psychologist and certified sex offender treatment provider. Duncan was initially evaluated by Dr. Rawlings in March, 1996. CP at 1817. Dr. Rawlings' resulting report indicated that he conducted a clinical interview with, and psychological testing of Duncan in March 1996. CP at 1818. Based upon the findings of the 1996 evaluation, this case was filed against Duncan when he was about to be released from the custody of the Juvenile Rehabilitation Administration.

Despite numerous trial date settings, the matter did not proceed to trial until 2005. The reasons for the delay were varied, but always agreed upon by Mr. Duncan. For example, Mr. Duncan retained the services of two expert witnesses to assist him with his defense. Dr. Robert Halon was retained in February, 2001, and Dr. Richard Wollert was not retained until January, 2005. CP at 1607; CP at 326. On January 2, 2001, Mr. Duncan sought discretionary review of a pretrial ruling by the trial court. CP at 1692. The proceedings were stayed until the motion for discretionary review was denied on February 14, 2001. CP at 1652-3. Mr. Duncan supported continuing his trial in February, 2002, in order to consider the impact of recent SVP case law on his case. 2/1/02 RP at 123-4. In addition, the case was continued in 2004 so Dr. Halon could have knee surgery. 11/22/04 RP at 131-4.

Given the delay in bringing the case to trial, on May 3, 2000, the State filed a motion to have Duncan submit to a supplemental mental examination by Dr. Rawlings. CP at 1753-1761. The State's motion was based upon CR 35. CP at 1753. It does not appear from the record that Duncan filed any formal objection to the State's CR 35 motion. On May 9, 2000, the trial court granted the State's motion. CP at 1748-1750. In its order, the trial court indicated that failure to comply with the order could result in the imposition of the sanctions outlined in CR 37. CP at 1750.

On August 25, 2000, the State filed a motion for CR 37 sanctions based upon Duncan's refusal to meet with Dr. Rawlings. CP at 1721-1729. After considering the State's motion and Duncan's response, the trial court granted the State's motion, and ordered that Duncan be prevented from presenting any expert testimony on the issue of whether he suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence if he is not confined to a secure facility, one of the central issues at Duncan's trial. CP at 1694. Despite the 2000 order granting the evaluation, and the subsequent order granting CR 37 sanctions, Duncan never participated in a clinical interview by Dr. Rawlings after March 1996. 11/3/05 RP 1328.

In October 2005, the Honorable Craig J. Matheson presided over the jury trial. At the conclusion of the trial, the jury returned a verdict finding Duncan to be a SVP. CP at 9. The trial court entered an order committing Duncan to the custody of the Department of Social and Health Services for placement in a secure facility. CP at 29-30. On December 4, 2007, without oral argument by the parties, the Court of Appeals affirmed the commitment order in a published decision. *In re the Detention of Bryan Duncan*, 142 Wn. App. 97, 174 P.3d 136 (2007).

B. Substantive History

Bryan Duncan is a schizophrenic child molester who suffers from pedophilia. 11/2/05 RP 1074-5. He claims to have molested between twenty and forty children. 11/2/05 RP 1067. He has been criminally convicted of molesting and raping five children ranging in age from four to eleven. *Id.* He threatened to kill at least one of his victims if the victim reported the abuse. 11/2/05 RP 1064. Mr. Duncan has often experienced fantasies of killing and mutilating children for sexual gratification, and has often masturbated to these fantasies. 11/1/05 RP 806; 11/2/05 RP 1065-6. He has written about kidnapping women and young boys, killing the women by electrocuting them with an “electronic dildo,” and freezing the kidnapped boys in order to eat them at a later time. 11/1/05 RP 810-11.

As a consequence of his convictions, Mr. Duncan was institutionalized at Maple Lane School, a secure juvenile rehabilitation institution. 10/31/05 RP 697. While there, Mr. Duncan presented numerous behavioral challenges for facility staff. He was consistently physically and verbally abusive, and exposed himself to staff on multiple occasions. 10/31/05 RP 717-18; 11/1/05 RP 829; 11/2/05 RP 982-84, 1026-27. Throughout his time at Maple Lane, Duncan was "totally preoccupied" with sexually acting out with children, be they other youth residing at the facility or children in the community. 11/1/05 RP 936. At one point, Mr. Duncan became fixated on a young boy who was visiting another resident at the school to the point of masturbating to thoughts of the boy. 11/2/05 RP 1016-7.

The behavioral difficulties persisted after this SVP case was filed and Mr. Duncan was awaiting trial at the Special Commitment Center on McNeil Island (SCC), a state-run treatment facility for SVPs. 11/4/05 RP 1402-3. At trial, Dr. Paul Spizman, a psychologist who works at the SCC, testified that Duncan was cited for behavioral violations thirty to forty times. 11/4/05 RP 1408-9. Those violations included assaulting and threatening to kill SCC staff, and engaging in sexual contact with other SCC residents. 11/4/05 RP 1409-13. Mr. Duncan was also cited for collecting photos of children from magazines and hiding them in his room.

11/4/05 RP 1413. Dr. Spizman also testified that he was concerned that Duncan would reoffend sexually if released because he had not learned to engage in healthy relationships, and there was no information indicating that Duncan had learned to avoid circumstances that prompt him to sexually offend against children. 11/4/05 RP 1413-4.

The jury also heard the State's expert, Dr. Rawlings, opine that Duncan's pedophilia was a "mental abnormality," and that he is likely to continue to commit acts of predatory sexual violence if released. 11/2/05 RP 1126. Dr. Rawlings told the jury that Duncan himself had said on several occasions, both at Maple Lane and the SCC, that he would likely sexually re-offend against a child if released. 11/2/05 RP 1118.

Despite the trial court's order sanctioning him for refusing to participate in an interview with Dr. Rawlings, Duncan presented the testimony of two experts: Dr. Richard Wollert and Dr. Robert Halon. *See generally* 11/7/05 RP 1153 through 11/9/05 RP 1906; 11/9/05 RP 1929 through 11/10/05 RP 2039. Dr. Wollert largely limited his testimony to the general validity of the actuarial instruments used by Dr. Rawlings, the validity of those instruments when applied to juvenile offenders, and the impact of brain development on the test results. Dr. Halon, on the other hand, was permitted to testify regarding whether Duncan suffered from a mental abnormality that makes him likely to engage in predatory acts of

sexual violence if he is not confined. *Cf.* 11/8/05 1768-72; 11/10/05 RP 2029-30. Specifically, Dr. Halon opined that Duncan did not suffer from pedophilia. Rather, Dr. Halon testified that Duncan's deviant behavior was driven by a need to "experiment," and that there was no evidence that Duncan had a preference for children. 11/9/05 RP 1972-78.¹

III. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion By Permitting the State's Expert to Explain Why He Had Not Interviewed Duncan**

Duncan attempts to use this Court's *Williams* and *Marshall* decisions to argue that the trial court erred in admitting evidence that Duncan declined to be interviewed by the State's expert, Les Rawlings, PhD. Duncan does correctly report that those cases hold that, in an SVP case, the State is not entitled to utilize the procedures of CR 35 to obtain a pre-trial psychological evaluation of the SVP detainee. *See In re the Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002); *In re the Detention of Marshall*, 156 Wn.2d 150, 154, 125 P.3d 111 (2005). However, the question of whether the State has a "right" to a

¹ It is not clear from the record why the Order Granting Petitioner's Motion for Sanctions was not enforced at trial. However, *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002), holding that the State cannot compel a CR 35 psychological evaluation in the context of SVP proceedings, was issued after entry of the Order and before the commencement of Duncan's trial. The State assumes trial counsel intentionally chose, in light of *Williams*, to forgo any attempt to enforce sanctions.

CR 35 evaluation is not at issue in this case.² Rather, the question is, where Duncan intentionally attacked the Dr. Rawlings' credibility based on his failure to conduct a supplemental interview of Duncan prior to trial, did the trial court properly exercise its discretion in allowing Dr. Rawlings to explain, in an exceedingly restrained way, the reason for that failure?

Admission or exclusion of relevant evidence is within the sound discretion of the trial court, which has broad discretion to balance the probative value of evidence with its potentially prejudicial impact. *State v. Stenson*, 132 Wn.2d 668, 701-02, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). A trial court's ruling under ER 403 is subject to review only for abuse of discretion. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed.2d 331 (1993). Moreover, "[a]n evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the

² The State does not dispute that, pursuant to *Williams*, a CR 35 evaluation would not, at the time of trial, have been available to the State. The State did not, however, actually obtain a CR 35 evaluation of Duncan and, as explained above, never sought to enforce its CR 37 Order for sanctions that would have precluded the expert testimony presented by Duncan at trial. In this case, as in *Marshall*, no CR 35 evaluation was conducted prior to trial. Rather, for the purpose of updating his original 1996 evaluation of Mr. Duncan, Dr. Rawlings conducted a record review of "over 5,000 pages" of documents relating to Mr. Duncan's criminal history and incarceration, treatment history, and past psychological evaluations. *Compare Marshall* at 160, 125 P.3d 111, 116 (Nothing in *Williams* foreclosed the "records review" type of evaluation conducted by the State's expert or her expert testimony at the commitment trial); 11/2/05 RP 1052-3.

outcome of the trial.” *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (internal citations omitted).

Here, at trial, during its direct examination of Dr. Rawlings, the State carefully limited its questioning to be clear that the 1996 interview was being discussed:

Q: Did you meet with Mr. Duncan?

A: I did. I met with Mr. Duncan in March of 1996 for about six and a half hours of direct interview, and then there was an additional time span with psychological testing.

Q: And where was he at that time?

A: Well, at that time Mr. Duncan was at Maple Lane School, which is a juvenile rehabilitation institution for adolescents and young adults.

11/2/05 RP 1053-4. Dr. Rawlings went on to discuss the content of the 1996 interview during his testimony on direct, and the State specifically refrained from asking him to clarify or explain why he had not interviewed Duncan in the nine years since. *See* 11/2/05 RP 1062-3.

During cross-examination, however, defense counsel overtly highlighted this fact during the following exchange:

Dr. Rawlings: . . . Now the other side of this is, though, that [Mr. Duncan] has continued to experience fantasies and continues to masturbate to thoughts about sex with kids, and that’s something there has not been a change in.

Mr. Thompson: **Now that, of course, is based on what others have written about Bryan?**

A: Well, it’s what he’s told other people. It’s what he said with his own mouth.

Q: **Well, again you weren’t there, were you?**

A: No, no, I wasn't there, but I might point out that Bryan's own expert a Dr. Halon evaluated Bryan Duncan in 2001, and he told Dr. Halon that he continued to have fantasies about having sex with kids, with boys, and that he felt that he wasn't able to control himself at times. So that's what he's told not just the people at the Special Commitment Center but of [sic] also individuals outside of the Special Commitment center, at least one individual.

Q: **That's what has been written about him? Is that correct?**

A: Yes.

11/3/05 RP 1256-7 (emphasis added).

Only after this attempt to undermine Dr. Rawlings' credibility did the State attempt, on redirect, to mitigate its impact. At that point, the State posed three pertinent, constrained questions: First, Dr. Rawlings was asked if he would "have liked [an] opportunity to update your evaluation of him by meeting with him?" 11/3/05 RP 1328. The single-word response to this question was "yes." *Id.* The next day, after argument on the subject by trial counsel, Dr. Rawlings was asked whether he requested another interview of Duncan, to which he responded that he had. He was then asked, following that request, whether he "was able" to interview Duncan. 11/4/05 RP 1341. To the final question, Dr. Rawlings replied, "no." *Id.* No further testimony on the subject was elicited by the State. Also, the State did not attempt to elicit any evidence to the effect that Duncan refused or avoided a subsequent interview. Moreover, in

response to a juror's question as to why the second interview had not occurred, the trial court advised the jury that Duncan had no obligation to participate. 11/9/05 RP 1921.

Duncan's argument that the evidence of Dr. Rawlings' inability to conduct a post-1996 interview unfairly gave the jury the impression that Duncan had something to hide fails to recognize that this evidence was relevant on several grounds. Clearly, any actions taken, or not taken, by Dr. Rawlings when conducting his assessment of Duncan are relevant to the credibility of the result. Given the nine year passage of time between Dr. Rawlings' initial interview of Duncan and the trial, and the inference raised by defense counsel during cross-examination, the State had an interest in explaining why follow-up contact with Duncan had not occurred. These two purposes are proper. Consequently, the trial court's decision to admit evidence implying a refusal to participate was not error. 11/4/05 RP 1340; *See, e.g., State v. Chase*, 59 Wn. App. 501, 507-8, 799 P.2d 272, 275-6 (1990).

Moreover, even if this Court accepts Duncan's invitation to strain to find prejudicial impact in testimony that Dr. Rawlings was "unable" to interview him after 1996, any such prejudice is so slight that ER 403 considerations are not implicated. In this case, the jury heard testimony that Mr. Duncan was a schizophrenic child molester who suffers from

pedophilia. 11/2/05 RP 1074-5. He claims to have molested between twenty and forty children while in the community, has been criminally convicted of molesting five children, and continued to fantasize about children to the point of cutting out pictures of children from magazines and hiding them in his room at the SCC. 11/2/05 RP 1064-7. The jury also heard Dr. Rawlings opine that Mr. Duncan is likely to continue to commit acts of predatory sexual violence if released. 11/2/05 RP 1126.

Thus, Mr. Duncan's claim that evidence that Dr. Rawlings was unable to interview him after 1996 cast him "in a negative light" is absurd given the overwhelming evidence admitted at trial that Mr. Duncan was a sexually violent predator. Questions pertinent to his claim would never have been asked but for defense counsel's decision to attack Dr. Rawlings' credibility by noting the absence of a post-1996 interview. For these reasons, Mr. Duncan's claim should be rejected by this Court.

B. Duncan's Claim That He Was Unfairly Prejudiced by Trial Testimony Concerning the Criminal History of His Proposed Roommate is Without Merit.

The fact finder in an SVP case may consider "placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." RCW 71.09.060(1). Again utilizing the ER 403 "unfair prejudice" allegation, Duncan objects to the trial court's admission of

evidence concerning the criminal history of Dion Walls, the man Duncan informed the jury would be his roommate if he were released. PFR at 12. Specifically, Duncan alleges that the trial court failed to balance the probative value of Walls' history of sexually abusing children against the prejudicial effect of that evidence upon Duncan's case. *Id.* at 14. However, Duncan did not object to testimony regarding Mr. Walls' criminal history at trial.³ Nor did Duncan raise ER 403 or allege undue prejudice. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); RAP 2.5(a). As such, he waived this argument.

Regardless, any possibility of prejudice is more than outweighed by the probative value of Mr. Walls' history of sexual offenses against children. Mr. Walls met Duncan while both men were confined at the SCC. 11/7/05 RP 1507. Mr. Walls was subsequently released into the community where he continued to reside as of the date of Duncan's trial. 11/9/06 RP 1812-13. Evidence relating to his history of sex offenses against children tended to prove Duncan's likelihood of re-offense by showing that, if released, his primary source of community support was an individual who had committed like offenses. As a result, Dr Spizman

³ In response to the proposed introduction of Mr. Walls' criminal background, defense counsel argued such evidence opened the door to other evidence concerning Mr. Walls' "success in the community" after his release. 11/9/06 RP 1812-14. The trial court concluded, without responsive comment by defense counsel, that counsel was "trying to raise a flag," but was not objecting to the proffered testimony. 11/9/05 RP 1815.

testified that, if Duncan planned to reside with another sex offender, information about the proposed roommate would be relevant in determining Duncan's recidivism risk. Dr. Spizman noted, "you would want [Duncan] to be with somebody who knew themselves well enough that they would not take advantage of [him] in a problematic way ... you would wonder how far that individual had gone in his own treatment ... if [Duncan] is not in a positive, stable, healthy sexual relationship, you have area for some real problems." 114/05 RP 1414-5. Thus, information pertaining to Mr. Walls' background is directly relevant to central trial issues relating to how the placement conditions Duncan proposed would affect his risk to reoffend.

Moreover, the evidence Duncan complains of was introduced through a defense expert, Dr. Richard Wollert, who was called to testify regarding the issue of likelihood of reoffense. Dr. Wollert's brief comments about Mr. Walls came after Duncan himself had already testified that Mr. Walls was "his boyfriend," and that Mr. Walls "might have mentioned [his sex offending history] in passing." 11/7/05 RP 1508. Further, Dr. Spizman had already testified regarding Duncan's susceptibility to cognitive distortions, and the negative affect that living with another sex offender in the community may have on him. Hearing whether Dr. Wollert shared similar concerns allowed the jury to evaluate

the credibility of both of these witnesses. Asking Mr. Duncan's expert on risk assessment whether he considered all of the details of Mr. Duncan's release plan was admissible under ER 705.

Finally, "Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative." Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L.Rev. 277, 279 (1995-6) (internal citations omitted). Here, Dr. Wollert merely testified to facts that had been discussed by two of the previous testifying witnesses. Such evidence is clearly cumulative, and should not be grounds for reversal of Mr. Duncan's civil commitment.

In sum, Dr. Wollert's testimony regarding Mr. Walls' criminal history was relevant to a central issue in the case (the stability of Duncan's release plan), was not unfairly prejudicial, and was not likely to have affected the outcome given the previous testimony received by the jury. Thus, admission of evidence of Mr. Walls' background did not constitute an abuse of discretion, and Duncan's civil commitment should be affirmed.

C. Duncan's Right to Due Process Was Not Violated by Limiting the Scope of His Cross-Examination of Dr. Spizman.

Duncan argued to the Court of Appeals that the trial court violated his right to due process by improperly limiting his

cross-examination of Dr. Spizman. PFR at 15-16. Specifically, Duncan continues to allege that the trial court erroneously precluded cross-examination of Dr. Spizman on the issue of his opinion regarding the effectiveness of the special needs sex offender treatment program at the SCC. The trial court's ruling was not surprising given that the fact finder's role at an SVP civil commitment proceeding "is to determine whether the defendant constitutes an SVP; *it is not* to evaluate the potential conditions of confinement." *In re Detention of Turay*, 139 Wn.2d 379, 404, 986 P.2d 790 (1999), *citing* RCW 71.09.060(1) (emphasis in original).

Regardless, Duncan's argument is without merit because his trial theory – that the SCC treatment program is flawed – was effectively presented at trial without this additional testimony. The Court of Appeals found that the trial court's limitation of the cross examination of Dr. Spizman "did not increase the risk that Mr. Duncan would be erroneously committed," and that Duncan's right to due process of law remained unaffected. *Duncan* at 107. That conclusion is particularly correct when viewed in the context of ER 611(b), which mandates, "[c]ross examination **should be limited** to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." (Emphasis added) "It is a basic and essential

rule that “[t]he extent of the cross-examination of a witness upon collateral matters which tend to affect the weight to be given the witness’ testimony rests within the sound discretion of the trial court.”” *State v. Temple*, 5 Wn. App. 1, 4, 485 P.2d 93 (1971) (citing *State v. Goddard*, 56 Wn.2d 33, 37, 351 P.2d 159 (1960)).

In determining what procedures due process requires, the court balances three factors: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the value of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *In re Detention of Stout*, 159 Wn. 2d 357, 370, 150 P.3d 86 (2007). The appellate court applied this analysis and found the risk of erroneous deprivation of Duncan’s liberty interest by limiting cross-examination of Dr. Spizman was negligible. Dr. Spizman was a staff member at the SCC who was called to recount the infractions Duncan committed during his time there. In declining Duncan’s request to cross-examine Dr. Spizman regarding the “effectiveness” of the SCC treatment program, the trial court correctly noted that this case was about Duncan, not “the system,” and that Duncan was free to criticize the SCC treatment options through his own testimony. 11/4/05 RP 1420-24. The court permitted defense counsel to question Dr. Spizman about how success in

treatment was measured, and to elicit testimony that Duncan was currently in the first of seven phases of treatment. 11/4/05 RP 1424-26. In addition, Duncan was permitted to testify that he did not think the available treatment at the SCC was “meaningful.” 11/9/05 RP 1927.

Regardless of whether Dr. Spizman would have agreed that the SCC’s special needs treatment program would not have been “meaningful” for Mr. Duncan, that defense was made available through testimony of other witnesses throughout the trial. As a result, Duncan’s liberty interest remained intact, and the Court of Appeals correctly ruled that his argument is without merit.

D. Duncan’s Right to Due Process Was Not Violated by Exclusion of Dr. Halon’s Opinion Regarding the Effectiveness of the SCC’s Treatment Program.

Duncan argues that his right to due process was violated when the trial court excluded opinion testimony of defense expert Dr. Halon regarding the effectiveness of the special needs sex offender treatment program at the SCC. However, as was simply put by the Court of Appeals, “the relevant issue in this civil commitment proceeding was whether a current mental abnormality made Duncan likely to engage in predatory acts of sexual violence if released.” *Duncan* at 109. Thus, to allow the defense expert to opine as to the perceived shortcomings of the treatment available was patently irrelevant.

An examination of the record reveals that the Court of Appeals was on firm ground when it held that exclusion of Dr. Halon's testimony about the quality of SCC treatment was not an abuse of discretion. Admissibility depends on whether "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." *Id.* (internal citations omitted):

The [expert's] opinion must be founded on facts in evidence, whether disputed or undisputed, and all material facts necessary to the formulation of a sound opinion must be considered. If the expert's opinion assumes the existence of conditions or circumstances not of record, its validity dissolves and the answer must be stricken. So long as the answer is fairly based on material facts, supported by substantial evidence under the examiner's theory of the case, however, the opinion testimony is proper. The trial court has wide discretion to determine whether expert testimony falls within the above rules.

Tokarz v. Ford Motor Co., 8 Wn. App. 645, 653, 508 P.2d 1370 (1973)
(internal citations omitted).

In this case, there was little, if any, evidence presented that suggests that Dr. Halon was qualified to opine as to whether the special needs treatment program at the SCC was likely to be "successful." Dr. Halon is licensed in California, and does not practice in Washington. 11/9/05 RP. The primary purposes of Dr. Halon's testimony were to offer a diagnosis of Duncan and to render an opinion regarding the reliability of

the actuarial instruments used by Dr. Rawlings. 11/9/05 RP 1972-78; 11/10/05 RP 1996-2002. 1929. He testified that he had been to the SCC “probably six” times. 11/10/05 RP 2002. Dr. Halon’s sole experience with the special needs treatment program at the SCC comes through his review of the “protocol or something.” 11/10/05 RP 2004. Nor did Dr. Halon indicate, when describing his areas of expertise, that he had experience assessing the quality of treatment facilities or programs. Accordingly, any opinion he might have offered regarding the treatment program at the SCC would not have been founded upon any facts of record. Exclusion of such opinion testimony was not an abuse of discretion, and the Court of Appeals was correct to deny Duncan’s claim of error.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Duncan’s civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 31st day of October, 2008.

ROBERT M. MCKENNA
Attorney General



JOSHUA L. CHOATE, WSBA #30867
Assistant Attorney General
Attorneys for Petitioner