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STATE OF WASHINGTON

No. 82568-8
(Ct. App. No. 59666-7-I)

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BY RONALD R. SARTRELL

WASHINGTON SUPREME COURT

CLERK

In re the Detention of

GALE WEST

STATE'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

The State agrees that Petitioner Gale West's Petition for Review should be granted as to the question of the role that treatment evidence properly plays in an RCW 71.09 civil commitment trial. The legitimate ability to address how treatment efforts effect diagnosis and risk to reoffend is an issue of substantial public importance because civil commitment under RCW 71.09 rests on the twin "irrefutably compelling" interests of community protection and treatment for repeat sex offenders, *In re Young*, 122 Wn.2d 1, 33 (1993). In several recent opinions addressing treatment evidence, Division I has issued a number of conflicting opinions that leave little guidance for trial courts or the parties in these proceedings. *Compare In re West*, No. 59666-7-I (November 10, 2008)(allowing evidence regarding SCC treatment participation) *with In re Post*, 145 Wn.App. 728, 187 P.3d 803 (July 14, 2008) (reversing due to evidence of SCC treatment participation)¹ *with In re Dennis Law*, 145 Wn. App. 28, 204 P.3d 230 (Ordered Published July 28, 2008), *review denied* 165 Wash.2d 1028 (2009) (affirming evidence regarding SCC treatment participation). This court should accept review on the treatment evidence issue because definitive clarification by this court is required for numerous on-going RCW 71.09 civil commitment trial proceedings and appeals. With regard to the other issue raised by West -- the work product

concerns surrounding undisclosed expert reports -- the State does not believe that this issue merits review.

II. ISSUES PRESENTED FOR REVIEW

A. Did the trial court abuse its discretion when it admitted relevant testimony outlining the SCC treatment program and refused to admit irrelevant and prejudicial evidence regarding outdated portions of the former SCC injunction? No.

B. Did the trial court manifestly abuse its discretion when it barred discovery into mental health evaluations, unrelated to this case, that were protected by the work product rule and statutory non-disclosure provisions? No.

III. REVIEW IS APPROPRIATE

A. THIS COURT SHOULD ACCEPT REVIEW REGARDING THE ROLE OF TREATMENT EVIDENCE IN RCW 71.09 CIVIL COMMITMENT PROCEEDINGS

The criteria for civil commitment under RCW 71.09 as it relates to evidence of sex offender treatment is a matter of substantial public interest requiring resolution by the Supreme Court. This court has frequently acted to clarify the criteria for civil commitment under the sexually violent predator statute. *E.g. In re Young*, 122 Wn. 1; *In re Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). The role treatment evidence plays in evaluating

¹ The State's Petition from the *Post* case is currently pending.

a person's risk of reoffense is presented in nearly every sexually violent predator matter. The disclarity in lower appellate court decisions on this issue requires this court to resolve the matter.²

1. Evidence of West's Failure to Complete the SCC Treatment Program is Directly Relevant to West's Diagnosis and Risk to Reoffend

The Superintendent of the Special Commitment Center, Dr. Henry Richards, testified regarding the phases of the Special Commitment Center (SCC) treatment program. West had voluntarily participated in the SCC program while detained pending trial, but dropped out in phase thee of the six phase program. Because West's treatment experience is central to questions of a current diagnosis and risk to reoffend, this testimony was properly considered by the jury.

West brought a pre-trial motion to preclude the State from calling Dr. Richards, claiming that evidence of the SCC treatment program was not relevant. CP 527. The State pointed out that the SCC treatment program was relevant because West had participated in the program through phase three before dropping out. CP 545. The State argued that treatment participation was relevant to both risk assessment and diagnostic issues. CP 549.

² It is worth noting that Judge Becker signed the majority in the current case while dissenting in the *Post* matter. Although Judge Becker is certainly consistent in her legal analysis on this issue, it is otherwise difficult to reconcile the two majority decisions.

The trial court agreed with the State:

Based upon the offer of proof provided by the state, the phases of treatment available to [West] at the SCC and the progression of his participation or lack thereof forms part of the basis for Dr. Leslie Rawlings' opinion on West's risk to re-offend. This is probative as to the issue of the ability of [West] to refrain from engaging in predatory acts of sexual violence if not confined to a secure facility. The State shall be allowed to call Dr. Richards to elicit testimony of a brief overview of the program in general and West's participation or lack of participation in the program.

In response, [West] may testify why he chose to terminate treatment, and give any information as to his understanding as to deficiencies in the treatment to support his reasons for terminating. This does not open the door to collateral evidence on the strengths and weakness of the program, including federal [injunction] litigation. [West's] motion to strike the testimony of Dr. Henry Richards is denied.

CP 640-41.

The Court of Appeals ruled correctly on this issue. *But see Post*, 145 Wn. App. 748. If nothing else, Dr. Richards' testimony was necessary to establish the context for the jury to consider West's treatment participation. The extent to which an sexually violent predator participates in treatment is directly relevant to questions of diagnosis and risk assessment. For example, an individual who completes a treatment program would have some argument to remove a DSM-IV diagnosis, or at least decrease the severity of the diagnosis. Concomitantly, a person who fails to complete treatment provides evidence that he or she continues to suffer from the diagnosed mental abnormality due to a lack of treatment intervention. The continuing existence of the diagnosis and

the impact of treatment on that diagnosis goes directly to the questions of whether the person has a mental abnormality or personality disorder, as required for civil commitment.

A person's progress or lack of progress is also relevant to determining danger to reoffend. A primary purpose of sex offender treatment is "relapse prevention," i.e. learning the tools to prevent a sexually violent reoffense. Dr. Richard's testimony put into context how far West had proceeded down the road of treatment. He had passed the beginning phases of treatment -- one and two, but had not made it through the intermediate phases. Importantly, SCC had not seen fit, after judging his treatment progress, to advance him to higher phases of treatment. In short, West's treatment was such that his danger remained high and he had not progressed to the point where completion of advanced phases reduced his risk to reoffend.

West had not yet obtained the tools, through treatment, to allow him to live in the community without a significant risk of relapse. One reason that West was "likely to engage in predatory acts of sexual violence if not confined in a secure facility" is due to his failure to complete treatment, including the transitional phase of treatment. RCW 71.09.020(16).

2. When Evaluating Whether A Proposed Voluntary Treatment Plan Reduces Risk Below The Civil Commitment Threshold, The Jury Is

Allowed To Consider The Person's Current Failure To Complete In-Patient Treatment

Evidence regarding West's participation in treatment and his failure to progress through treatment is also relevant to the RCW 71.09.060 requirement that a jury to consider West's voluntary treatment plans in the community. Under this statute, "[i]n determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition." In other words, the jury is to consider the effects of West's release conditions and his voluntary treatment intentions on his existing risk to re-offend. The fact that West dropped out of sex offender treatment when it is readily available to him free of charge at the Special Commitment Center is certainly relevant to the likelihood that he will *voluntarily* pursue such treatment out of custody.

As allowed by RCW 71.09.060, West put forward a voluntary treatment plan and claimed he would follow it if released unconditionally from the SVP petition by the jury. West explained his release plans, including his plan to ride in the "Mack House." *Id.* at 44-45. The Mack House was a living situation for sex offenders that provided some

community treatment services. VRP 2/7/2007 at 139-40. West's claim was that he participate in supportive community treatment if released and that this treatment would help keep him offense free.

In response to West's claims of voluntary community treatment, the State appropriately introduced testimony that West had failed to fully participate in and complete the free treatment available to him at SCC. The relevance of testimony regarding the in-patient treatment program was explained by the California Supreme Court decision in *People v. Superior Court (Ghilotti)*, 27 Cal. 4th 888, 927, 44 P.3d 949 (Cal. 2002).

In *Ghilotti*, the California Supreme Court determined that an SVP respondent's refusal to do treatment at California's SVP facility was relevant evidence on the question of whether voluntary community treatment measures would reduce risk below the civil commitment "likely" standard. 27 Cal. 4th at 929. In interpreting the Washington SVP law, our appellate courts have previously relied on opinions of the California Supreme Court to interpret similar provisions of RCW 71.09. *E.g. In re Henrickson*, 140 Wash.2d 686, 692, 2 P.3d 473 (2000); *In re Detention of Keeney*, 141 Wash.App. 318, *325, 169 P.3d 852, 855 (2007).

Similar to RCW 71.09.060, the California SVP statute requires that a respondent's risk to re-offend be evaluated against "the person's amenability to voluntary treatment." *Ghilotti*, 27 Cal.4th at 928. As in

Washington, a sexually violent predator is in need of confinement and treatment in a secure facility, unless it is believed that voluntary treatment efforts will reduce the person's risk below the likely risk standard.

In order to determine the effect of voluntary treatment measures on risk as required by statute, the *Ghilotti* decision identifies the following factors:

Of course, given the compelling protective purposes of the SVPA, the evaluators must weigh the possibility of voluntary treatment with requisite care and caution. Common sense suggests that the pertinent factors should include (1) the availability, effectiveness, safety, and practicality of community treatment for the particular disorder the person harbors; (2) whether the person's mental disorder leaves him or her with volitional power to pursue such treatment voluntarily; (3) the intended and collateral effects of such treatment, and the influence of such effects on a reasonable expectation that one would voluntarily pursue it; (4) the person's progress, if any, in any mandatory SVPA treatment program he or she has already undergone; (5) the person's expressed intent, if any, to seek out and submit to any necessary treatment, whatever its effects; and (6) any other indicia bearing on the credibility and sincerity of such an expression of intent.

Ghilotti, 27 Cal.4th at 929. In addressing the effect of voluntary treatment intentions on risk, it is entirely relevant to consider respondent's actions in refusing available in-custody treatment at a commitment center for sexually violent predators: "*it would be reasonable to consider the person's refusal to cooperate in any phase of treatment provided by the Department . . . as a sign that the person is*

not prepared to control his untreated dangerousness by voluntary means if released unconditionally to the community." *Id.* at 929 (2002).

The relevance of such testimony to the statutory consideration of risk in light of voluntary treatment was further explained in two other California appellate decisions. In *People v. Sumahit*, 128 Cal.App.4th 347, 354, 27 Cal.Rptr.3d 233, 238 (2005), the California Court of Appeals determined that the refusal "to undergo treatment constitutes *potent evidence* that he is not prepared to control his untreated dangerousness by voluntary means." (Emphasis added). Another California appellate decision explained that:

The availability of treatment is at the heart of the SVPA. (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1163, 88 Cal.Rptr.2d 696.) "Through passage of the SVPA, California is one of several states to hospitalize or otherwise attempt to treat troubled sexual predators." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1143, 81 Cal.Rptr.2d 492, 969 P.2d 584 (*Hubbart*).) Accordingly, one of the key factors which must be weighed by the evaluators in determining whether a sexual offender should be kept in medical confinement is "the person's progress, if any, in any mandatory SVPA treatment program he or she has already undergone; [and] *the person's expressed intent, if any, to seek out and submit to any necessary treatment, ...*" (*Ghilotti, supra*, 27 Cal.4th at p. 929, 119 Cal.Rptr.2d 1, 44 P.3d 949, italics added.) A patient's refusal to cooperate in any phase of treatment may therefore support a finding that he "is not prepared to control his untreated dangerousness by voluntary means if released unconditionally to the community." (*Ibid.*)

We conclude that defendant's refusal to accept treatment, coupled with a valid diagnosis that he suffers from a sexual disorder affecting his volitional capacity, are sufficient to sustain the court's finding that defendant will, if released to the community, "represent a *substantial danger* of committing

similar new crimes....” (*Ghilotti, supra*, 27 Cal.4th at p. 924, 119 Cal.Rptr.2d 1, 44 P.3d 949, original italics.) No further proof of current dangerousness is required.

People v. Sumahit, 128 Cal.App.4th 347, *354-355, 27 Cal.Rptr.3d 233, 238 - 239 (2005).

Because a refusal to submit to sex offender treatment is relevant to statutory considerations of diagnosis, risk and voluntary treatment options, it would be error to exclude this evidence. It would also mislead the jury on the purposes of the SVP act. *See also Com. v. Chapman*, 444 Mass. 15, 24, 825 N.E.2d 508, 515 (2005) ("The issue is not whether Chapman was "obligated" to participate in sex offender treatment programs, but rather the effect of his failure to participate in such programs on the current state of his mental abnormality and therefore his sexual dangerousness. *This failure is particularly relevant to Chapman's present ability to control a mental abnormality (pedophilia) that otherwise creates a substantial risk of additional sexual offenses . . .*"). It is likely that the trial court would have abused its discretion if it refused Dr. Richards' testimony.

3. Because RCW 71.09 Requires Consideration Of Risk Absent Placement In A "Secure Facility," The Statute Allows The Jury To Evaluate West's Risk Unless Released With Court-Mandated Release Conditions

It is clearly the State's burden to prove beyond a reasonable doubt that West is a "sexually violent predator," meaning a "person who has been

convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence *if not confined in a secure facility.*" RCW 71.09.020(16)(emphasis added). The statute, namely RCW 71.09.020 broadly defines "secure facility" to include both "total confinement facilities" and less restrict alternative placements. As a result, West is subject to civil commitment if his danger exceeds the more likely than not danger threshold absent the control of a total confinement facility or court-mandated conditional release. This does not mean that placement in a less restrictive alternative is necessarily available at the initial civil commitment hearing, *see In re Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003), but only that the State may extend civil commitment jurisdiction over any person who meets the mental abnormality and danger requirements absent court-imposed confinement or strict release conditions.³

The definition of "secure facility" was added by the Legislature in 2001 amendments to the SVP Act. It "means a residential facility for persons civilly committed under the provisions of this chapter that includes security measures sufficient to protect the community. *Such*

³ As noted in *Thorell*, additional observation time following commitment and additional procedures are required prior to placement in a less restrictive alternative. If a person is not initially committed, however, the protections afforded by an LRA plan can never be implemented.

facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096." (Emphasis added).

As indicated in this definition, a "secure facility" includes *all the possible placement options* open to a civilly committed sexually violent predator over the life of an SVP civil commitment, including:

- A "total confinement facility," which is "a secure facility that provides supervisions and sex offender treatment services in a total confinement setting" and includes "the special commitment center and any similar facility designated as a total confinement facility by the secretary." RCW 71.09.020(17);
- A "secure community transition facility", which is "a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter." RCW 71.09.020(14); and
- "[A]ny residence used as a court-ordered placement under RCW 71.09.096," which references the private group home and residential family home placement LRAs allowed under RCW 71.09.096.

Thus, a "secure facility" includes not only the Special Commitment Center, but also any less restrictive alternative placements that can follow placement in this total confinement facility.

Because the term "secure facility" describes both total confinement and LRA placements, the State acted wholly within the statute by presenting evidence of treatment and conditional release that is available to West had he continued his participation in the SCC treatment program. Under RCW 71.09, West's risk required (at a minimum) placement in a

less restrictive alternative following a period of confinement at the SCC. The inclusive definition of "secure facility" leaves the State free to meet its danger burden by demonstrating that West's risk exceeds the more likely than not standard unless he is placed in either a total confinement facility, a secure community transition facility, or any other residence used as part of an LRA.

Especially when West was claiming that his voluntary treatment plans were sufficient to control his danger, the State was free to directly counter this claim with evidence that West required, at a minimum, court-ordered treatment in a community setting, *i.e.* an LRA, rather than voluntary treatment. The State was similarly free to argue, consistent with the "secure facility" definition, that West's level of danger required initial treatment at a total confinement setting like the Special Commitment Center. By presenting evidence that West was more likely than not to reoffend unless placed in an LRA *or* at the Special Commitment Center, the State was directly meeting its burden of demonstrating that West required confinement in a "secure facility." He was more likely than not to reoffend absent placement in a "secure facility."

Contrary to the *West* appellate decision, the *Post* decision by the Court of Appeals directly conflicts with this statutory language. Given the plain language of the "secure facility" definition, the *Post* majority's decision cannot stand without effecting a drastic and unsupportable

judicial re-writing of the SVP statute. By requiring the State to prove that West requires civil commitment at a "secure facility" and by allowing the jury to consider the alternative scenario of unconditional release to voluntary treatment, the SVP statute essentially asks if West the kind of person whose danger level *requires* confinement in a secure facility, or is he appropriate for purely voluntary treatment measures?

Once West is civilly committed and subject to the jurisdiction of RCW 71.09, subsequent proceedings under RCW 71.09.090 operate to determine whether Post's actual placement in an LRA is appropriate. In accord with *In re Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003), the decision on actual *placement* in a less restrictive alternative is a matter considered by a subsequent jury under the RCW 71.09.090 procedures.

The Legislature's decision in this regard makes sense because it captures all relevant classes of sexually violent predators for civil commitment. A sex offender cannot be allowed to avoid civil commitment by simply arguing that placement in a total confinement facility is "too much," even though voluntary placement in the community is "not enough." If allowed to stand, the *Post* majority decision operates to prevent (or make extremely difficult) the civil commitment of persons whose risk can be controlled by an LRA, while simultaneously preventing the necessary LRA due to the lack of a civil commitment. This court should accept review to address the meaning of the "secure facility"

language and reverse the majority opinion below.

The current petition for review should be granted on the issue of treatment evidence because it would allow the Supreme Court to clarify this important area of SVP civil commitment law. The current state of the law, as defined by the *West*, *Post*, and *Law* decisions, leaves much confusion and ambiguity as to the standard of commitment and the evidence that is appropriate to prove this standard. The petition for review should be granted to clarify this issue of substantial public importance and to resolve the conflicting precedent from the Court of Appeals.

**B. THE COURT SHOULD NOT GRANT THE
PORTION OF WEST'S PETITION SEEKING
REVIEW OF THE WORK PRODUCT ISSUE**

In contrast to the important issue raised by the roll of treatment evidence in a civil commitment proceeding, West's work product issue is a fairly pedestrian application of well-settled work product law. Because Dr. Rawlings was hired as a consulting expert on cases that were never filed, his reports in those cases are plainly work product. For West to pierce the privilege, he needed to identify an exceptional interest.

On appeal, he seems to suggest that he had an interest in making sure that Dr. Rawlings did not misrepresent the truth on the percentage of cases where he found the person met or did not meet criteria. Although it is unlikely that a licensed professional would lie on such a basic matter, it

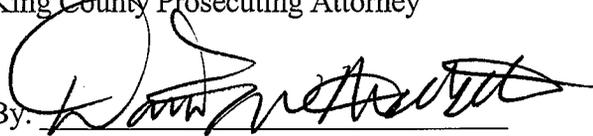
still would not justify piercing the privilege. West could have asked for an in camera review where the trial court could quickly verify Dr. Rawlings' statistics. By failing to make this request, West has no ability to claim error by the trial court. Overall, this is not an issue that merits review by the Washington Supreme Court.

IV. CONCLUSION

For the foregoing reasons, the State asks that the court accept the portion of West's petition addressing the role of treatment evidence in RCW 71.09 civil commitment matters and deny the portion of the petition addressing work product. West's civil commitment should ultimately be affirmed, but it is important to clarify the role of treatment evidence in SVP proceedings and resolve the confusing state of current precedent.

DATED this 23rd day of June, 2009.

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