

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

WASHINGTON SUPREME COURT

In re the Detention of

GALE WEST

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SUPREME COURT
STATE OF WASHINGTON
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STATE'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The civil commitment of sexually violent predators serves the "irrefutable" compelling state interests of sex offender treatment and incapacitation. *In re Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993); *In re Detention of Thorell*, 149 Wash.2d 724, 750, 72 P.3d 708 (2003).

Consistent with these interests, there is an inherent and close link between successful sex offender treatment, a sex predator's current mental condition, and his or her resulting dangerousness. *See* Laws of 2005, c. 344, sec. 1 (legislative finding). The trial court below properly exercised its discretion to admit limited testimony regarding Petitioner West's lackluster sex offender treatment efforts pending his civil commitment trial, including the classes that he refused to take, for the purpose of explaining his current mental condition and dangerousness. The Court of Appeals opinion affirming the trial court should be affirmed.

II. ISSUES PRESENTED FOR REVIEW

A. Did the trial court abuse its discretion when it admitted relevant testimony outlining West's participation in the SCC treatment program pending the commitment trial? No.

B. Did the trial court abuse its discretion when it refused to admit irrelevant and prejudicial evidence regarding outdated portions of the former SCC injunction? No.

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

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE REGARDING WEST'S PARTICIPATION IN THE SCC TREATMENT PROGRAM PENDING TRIAL

Petitioner West participated in the SCC treatment program pending his civil commitment trial, but quit the program without completing it. CP 545. At West's commitment trial, the State presented brief testimony from Dr. Henry Richards, the Superintendent of the Special Commitment Center. VRP 1/31/2007 at 158-160. Dr. Richards explained West's participation in the phased SCC treatment program, including treatment phases that he refused to complete. *Id.* The testimony included a brief explanation of subjects covered in the various phases of the program and a brief mention of the transitional phase. *Id.*

Over the pre-trial objections of the defense, CP 527, the trial court ruled that this testimony was relevant:

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 trial court did not abuse its discretion by admitting this testimony.

A. EVIDENCE REGARDING WEST'S TREATMENT EFFORTS PENDING HIS CIVIL COMMITMENT TRIAL WERE RELEVANT TO DETERMINING HIS MENTAL CONDITION AND DANGEROUSNESS

Citing only the 2-1 decision in *In re Post*, 145 Wn.App. 728, 187 P.3d 803 (2008), *review granted* ___ Wn.2d ___ (September 29, 2009), West claims that the phases of the SCC treatment program are not relevant or admissible under the statute. Pet. for Rev. at 11. To the contrary, evidence regarding West's participation in sex offender treatment and the limits of his participation in sex offender treatment, are highly probative to determining his current mental condition and dangerousness.

The Legislature has specifically recognized the close relationship between sex offender treatment progress, a sex predator's current mental condition, and a sex predator's danger to reoffend. In adopting the sex predator law, the Legislature found that the "treatment needs of this population are very long term, and the treatment modalities for this

population are very different than the traditional treatment modalities . . ."

RCW 71.09.010 (Legislative Finding). In 2005 amendments to the SVP law, the Legislature further found that "that the mental abnormalities and personality disorders that make a person subject to civil commitment under chapter 71.09 RCW" are chronic and require treatment intervention. Laws of 2005, ch. 344, sec. 1. Indeed, "the risk posed by persons committed under chapter 71.09 RCW will generally require *prolonged treatment* in a secure facility followed by intensive community supervision in the cases where positive treatment gains are sufficient for community safety." *Id.* Such legislative findings establishing the relevance of treatment evidence to the SVP inquiry are entitled to substantial deference. *See Washington State Legislature v. Lowry*, 131 Wash.2d 309, 320, 931 P.2d 885 (1997) (noting need to defer to legislative findings of fact).

In accord with these legislative findings, RCW 71.09 explicitly recognizes the relevance of sex offender treatment efforts in determining whether a person meets criteria for civil commitment. Under RCW 71.09.025, a referring agency is required to "provide the prosecutor *with all relevant evidence* including but not limited to . . . All records relating to the psychological or psychiatric evaluation and/or treatment of the person." (Emphasis added). Under administrative rules authorized by RCW 71.09.040, the Department of Social and Health Services likewise mandates that forensic evaluations of sex predators consider any "sex

offender treatment records" and all "treatment plans . . . made for or prepared by the SCC which relate to the resident's care, control, observation, and treatment." WAC 388-880-034(2)(c) and (j).

The actions of the Legislature and DSHS in mandating consideration of treatment records when evaluating whether a person meets criteria for civil commitment strongly supports the relevance of this evidence. The case law, apart from the 2-1 *Post* majority, also recognizes the central role that treatment successes and failures often play in determining whether a person is a sexually violent predator.

The extent to which an sexually violent predator participates in treatment is directly relevant to questions of diagnosis. 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 and where he had ended his efforts. He had passed the beginning phases of treatment -- one and two, but had not made it through the intermediate phases.

Importantly, West had not done the work necessary to advance him to higher phases of treatment. Rather than confront the difficult sex offender issues presented in the advanced treatment phases, West determined to quit the program.

An issue identical to the current case was addressed by the California appellate court in *People v. Castillo*, 170 Cal. App.4th 1156, 89 Cal.Rptr.3d 71 (2009).¹ During the SVP commitment trial in *Castillo*, the trial court "admitted prosecution evidence concerning the nature of the treatment programs offered to SVPs," including some details of the programs' five phases and the availability of a conditional release phase. 89 Cal.Rptr. 3d at 75, 82-84. The SVP respondent has "admitted that by choice he had never participated in any phase other than the first of the five treatment phases at the state hospitals." *Id.* at 83. In admitting the testimony, the trial court ruled that "Castillo's failure to complete aspects of the treatment program was relevant showing potential future dangerousness." *Id.* at 82. A jury "could reasonably infer that Castillo

¹ The California Supreme Court has granted review from the *Castillo* decision, but limited its review to an issue involving the length of the commitment term. *People v. Castillo*, 94 Cal.Rptr.3d 321, 208 P.3d 77 (2009). As such, the un-reviewed portions of the *Castillo*

chose not to go forward with treatment because he did not want to make the effort -- which, in turn, would show he did not appreciate the seriousness of his mental condition and that he could not be expected to take the steps required to control his deviant behavior if released." *Id.*

The appellate court affirmed admission of the challenged treatment evidence, finding "no abuse of discretion here." *Id.* at 83. The court further noted the importance of an overview of the treatment program to establish context for Castillo's actions:

Castillo's reasons for not proceeding with treatment were highly probative as to his amenability to voluntary treatment, since he refused to participate once he was informed what he would be expected to do in that program. As the trial court recognized, *the jury could not properly assess those reasons absent some knowledge of what the treatment plan entailed.*

Id. at 83 (emphasis added). In addition, the court held that there "was nothing prejudicial in the legal sense in informing the jury that Castillo opted out of the program when informed that he would be expected to honestly assess and acknowledge the wrongfulness of his past misconduct and to develop and apply strategies for correcting his improper sexual impulses." *Id.* at 84.

The Massachusetts Supreme Court has similarly recognized the relevance of evidence regarding treatment efforts in an SVP civil commitment case. In *Commonwealth v. Chapman*, 444 Mass. 15, 825

opinion, including those discussed above, will be unaffected by any subsequent review.

N.E.2d 508 (2005), the court noted that:

Most importantly, Chapman, although an admitted pedophile, chose not to participate in sex offender treatment programs appropriate to his condition during the thirteen years subsequent to his release from the treatment center. . . . 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 . . .

Chapman, 444 Mass. at 23-24 (footnotes omitted).

Other states have recognized that testimony regarding treatment efforts is directly relevant to the SVP commitment elements. *See In re Commitment of Wolfe*, 246 Wis.2d 233, 256-257, 631 N.W.2d 240, 251 - 252 (Wis.App. 2001) (State properly presented evidence of the SVP's "inability to participate" in a sex offender treatment program offered at a state facility because such evidence "had the tendency to make the statutory elements of a [Wisconsin SVP] commitment more probable than not . . . and was thus relevant" and "the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice."); *People v. Dinwiddie*, 306 Ill.App.3d 294, 300-301, 715 N.E.2d 647, 65, 239 Ill.Dec. 893, 899 (Ill.App. 1999) (Evidence that respondent "has failed to seek treatment . . . is directly relevant to an ultimate issue in the [SVP] commitment proceeding."); *In re Detention of Lieberman*, 379 Ill.App.3d 585, 599, 884 N.E.2d 160, 174-175, 318 Ill.Dec. 605, 619 - 620 (Ill.App.

2007)(sufficient evidence to support SVP's lack of volitional control over dangerousness where psychologist testified that SVP respondent "refused to undergo treatment for his paraphilia, which is the only way to control that disorder and shows a lack of empathy for his victims and a lack of remorse for his actions."); *See also People v. Roberge*, 29 Cal.4th 979, 988, 62 P.3d 97, 102, 129 Cal.Rptr.2d 861, 867 (2003) ("Evidence of the person's amenability to voluntary treatment, if any is presented, is relevant to the ultimate determination whether the person is likely to engage in sexually violent predatory crimes if released from custody.").

Overall, the testimony demonstrated that West met civil commitment criteria because he 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" was due to his failure to complete SCC treatment that was available to him pending his commitment trial.

B. EVIDENCE OF WEST'S TREATMENT EFFORTS PENDING TRIAL WERE RELEVANT TO EVALUATING HIS PROPOSED VOLUNTARY TREATMENT PLAN

At trial, West claimed that civil commitment was unnecessary because he would engage in voluntary treatment in the community sufficient to manage his risk of reoffending. VRP 2/7/2007 at 44-45.

Under RCW 71.09.060(1), a jury is to consider the effects of West's voluntary treatment intentions and his pre-existing release conditions on his existing risk to re-offend. The fact that West dropped out of sex offender treatment at the SCC -- a program that was available to him free-of-charge -- is entirely relevant to the likelihood that he would *voluntarily* pursue such treatment out-of-custody, or that he would follow the strictures of any treatment program.

In *People v. Superior Court (Ghilotti)*, 27 Cal. 4th 888, 927, 44 P.3d 949 (Cal. 2002), 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. In considering 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 *People v. Sumahit*, 128 Cal.App.4th 347, 354, 27 Cal.Rptr.3d 233, 238 (2005). There, the California Court of Appeals determined that refusal "to undergo treatment constitutes *potent evidence* that he is not prepared to control his untreated dangerousness by voluntary means." *Id.* (Emphasis added). The court concluded that the "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." *Id.* at 354-55.

Once West made voluntary treatment an issue, the State appropriately countered with evidence of incomplete efforts in the SCC

program. The trial court should be affirmed.²

**C. EVIDENCE OF WEST'S TREATMENT EFFORTS
PENDING TRIAL WERE RELEVANT TO THE
STATUTORY "SECURE FACILITY" INQUIRY**

Apart from the independent relevance of the challenged treatment evidence to West's SVP status and his voluntary treatment plans, such evidence is also properly admitted under the "secure facility" language of the SVP definition. 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).

Under RCW 71.09.020, the term "secure facility" broadly incorporates *all possible placements* for a civilly committed sexually violent predator over the jurisdictional life of an SVP civil commitment,

² In the 2-1 *Post* opinion, the majority relies heavily on a 1999 California Court of Appeals decision for the proposition "that *the consequence of a finding* that someone is an SVP has *no relevance* to the question of whether the person has a diagnosed mental disorder or whether such a disorder makes the person a danger . . ." *Post*, 145 Wn.App. at 743 (emphasis added). The *Post* majority misses the point. The evidence of institutional treatment is not relevant because he will receive it if committed, but because he *refused it* while detained *pending* civil commitment. The above cases, which analyze the later, more cogent point, easily find that treatment evidence is relevant to both mental condition and danger. Moreover, the California Supreme Court decision in *Ghilotti* post-dates *Rains* by three years and holds that evidence regarding institutional treatment is relevant to the SVP inquiry, particularly with regard to claimed voluntary treatment. 27 Cal. 4th at 927. Because *Rains* is not particularly good authority in California, it is difficult to

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 necessary to maintain community safety. A person is subject to civil commitment jurisdiction if his danger exceeds the more likely than not threshold absent the control of a "secure facility," *i.e.* a total confinement facility or court-mandated conditional release placement.

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 phases that are available to West had he continued his participation in the SCC treatment program. Under RCW 71.09, West's risk required (at a bare minimum) placement in a less restrictive alternative following a period of

understand why is should be imported into Washington law.

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. Commitment was justified because West required a level of judicial control over his actions. 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."

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 is 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 West's actual placement in an LRA is appropriate. In accord with *In re Thorell*, 149 Wn.2d 724, 751-52, 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. This jury has the benefit of a year of post-commitment observation and treatment of the SVP respondent in a total confinement setting (e.g. the SCC). 149 Wn.2d at 752-53 (Recognizing that "the time for LRA evaluation must be spent in *intensive inpatient treatment*, which occurs only after commitment"). Under RCW 71.09, the LRA *placement* question may be initiated only after one year of commitment at the first annual review.³ *Id.*

The Legislature's decision to allow civil commitment of anyone requiring a level of state control 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 jurisdiction by 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 2-1 *Post* majority operates to prevent the civil commitment of persons whose risk requires state civil commitment jurisdiction and

³ Any claim that this would effectively overrule the *Thorell* decision is entirely misplaced. The *Thorell* decision deals with the question of whether equal protection allows a one year post-commitment delay prior to making any LRA placement decision. It does not preclude considering the need for state control when making a commitment decision, particularly when the SVP respondent has claimed that voluntary treatment is sufficient to

control through an LRA, while simultaneously preventing the necessary LRA by depriving the state of civil commitment jurisdiction. Because the challenged testimony on West's treatment failures at SCC, including his failure to complete advanced treatment phases, directly addresses the "secure facility" inquiry, the trial court did not abuse its discretion by admitting it.

D. ANY ERROR WAS HARMLESS

Even if the trial court committed error in admitting testimony on the phases of the SCC treatment program, any error was harmless. A nearly identical fact pattern was addressed, in depth, by the Wisconsin Court of Appeals in *In re Kaminski*, ___ N.W.2d ___, 2009 WL 3818495, 7 (Wis.App. 2009). There, the SVP respondent claimed that evidence of the state-offered SVP treatment program "introduced an irrelevant comparative analysis that favored the treatment regimen at Sand Ridge " and "implicitly suggested that [his] commitment was in his best interests and that of the community." *Id.* The court held that "[n]one of the allegedly prejudicial testimony prevented the real controversy -- whether Kaminski was a 'sexually violent person' under Wis. Stat. Sec. 980.01(7) -- from being fully tried." *Id.*

The court further noted with regard to testimony on treatment and re-evaluation that "[t]estimony regarding prior treatment is not uncommon

address risk.

. . . evidence of which is relevant and admissible at trial to determine the respondent's current dangerousness." *Id.* A jury could "reasonably infer that Kaminski, once committed, would receive occasional re-evaluations as part of the treatment regimen [because] . . .the state is prepared to provide specific treatment to those committed under ch. 980 and not simply warehouse them." *Id.* Prejudicial error was unlikely because "[w]e are not persuaded that vague references to a post-commitment treatment regime that includes re-evaluation prevented the jury from accurately determining whether the State met its burden of proof on each element, particularly where the jury could infer the existence of the treatment program in the first instance." *Id.* *See also People v. Castillo*, 89 Cal.Rptr.3d 71, 84 (Cal.App. 2009) (the challenged testimony was not particularly lengthy and there is no substantial likelihood the jury would have considered it for an improper purpose).

IV. EVIDENCE OF THE FORMER SCC INJUNCTION WAS NOT RELEVANT

West claims that the trial court erred by not allowing testimony regarding a previous federal injunction against the Special Commitment Center, the total confinement facility where Sexually Violent Predators are treated and housed. However, this court has already determined that evidence regarding the prior SCC injunction is properly excluded in RCW 71.09 civil commitment trials.

In *In re Turay*, 139 Wn.2d 379, 403-404, 986 P.2d 790 (1999), *cert. denied* 531 U.S. 1125 (2001), this court rejected the same argument now forwarded by West as "meritless" and "fundamental[ly] misunderstanding the purpose of an SVP commitment proceeding." In *Turay*, the issue included both the question of whether he was a sexually violent predator and whether a less restrictive alternative was in his "best interests." *Id.* at 403. Evidence of the then-existing federal injunction was relevant to neither question. *Id.* See also *In re Duncan*, 167 Wn.2d 398, 408-410, 219 P.3d 666 (2009)(trial judge acts within his or her discretion in disallowing cross-examination on the effectiveness of the SCC treatment program).

In addition to the *Turay* decision, West cannot overcome a crucial deficiency in his record. Although he made an offer of proof regarding the facts of the prior injunction through Dr. Richards, VRP 1/31/2007 at 176-177, there is nothing on the record linking West's decision to quit treatment with the injunction. West testified to his reasons for quitting treatment, but did not point to the injunction as a factor in his decision. See VRP 2/12/2007 at 37-41; 73. Because the injunction did not motivate West's decision to quit the SCC treatment program, there was simply no relevance to West's proposed injunction testimony, nor to his claim that the trial court's ruling prevented him from presenting a defense.

IV. THE TRIAL COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION WHEN WEST FAILED TO MAKE THE SHOWINGS NECESSARY TO PIERCE WORK PRODUCTION AND PRIVACY PROTECTIONS

The Court of Appeals correctly held that the trial court did not abuse its discretion by refusing, due to work product protections, West's request for copies of 15 confidential mental health reports authored by Dr. Rawlings in other cases. The State adheres to the arguments made in its response brief from pages 18-27.

Although the lower appellate court's result is correct, its analysis fails on one important point. The appellate court ruled that the "exceptional circumstances" test of CR 26(b)(5)(B) does not provide an additional barrier to West's proposed discovery because the rule applies "only when the expert 'is not expected to be called as a witness at trial,'" and Dr. Rawlings testified in the West matter. Slip op. at 7 n.10.

Although it is true that Dr. Rawlings testified in the West case, the more cogent point is that he did not testify in the 15 cases where his evaluation did not result in the commencement of SVP proceedings and his role was that of a consulting, non-testifying expert. If CR 26(b)(5)(B) is to have any meaning, the focus should be on the role of the expert as non-testifying in the case where the report was prepared, not the latter case where the expert is testifying on a different matter, and a new litigant seeks to pierce the privilege.

Because Dr. Rawlings was a non-testifying expert witness in the 15 cases where West sought his reports, West needed to satisfy the exceptional circumstances test of CR 26(b)(5)(B) if he was to obtain copies of those reports in the current matter. As with the work product protection in CR 26(b)(4), the protections of CR 26(b)(5) should survive the anticipated litigation for which the report was commissioned. *See Harris v. Drake*, 152 Wn.2d 480, 491, 99 P.3d 872, 877 (2004). Because West made no showing of exceptional circumstances, the trial court did not abuse its discretion in refusing the discovery.

V. **CONCLUSION**

For the foregoing reasons, this court should affirm the decision of the Court of Appeals. Petitioner West should remain civilly committed as a sexually violent predator.

DATED this 8th day of February, 2010.

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