

5 206-7

59666-7

82568-8

No. 59666-7-I

WASHINGTON COURT OF APPEALS, DIVISION ONE

In re the Detention of

GALE WEST

STATE'S RESPONSE BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

David J. W. Hackett
Senior Deputy Prosecuting Attorney

W554 King County Courthouse
Seattle, Washington 98104
(206) 205-0580

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR 28 AM 10:36

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES.....1

III. FACTS.....2

IV. LEGAL ARGUMENT 18

**A. The Trial Court Did Not Abuse Its Discretion
By Preventing Discovery Into Unrelated Mental
Health Evaluations that Were Protected By
Work Product Privilege and Statutory Non-
Disclosure Provisions..... 18**

1. Facts Related to Discovery Issue 18

**2. Standard of Review -- Manifest Abuse of
Discretion 22**

**3. The Trial Court Committed No Error in
Refusing to Compel Disclosure of Mental
Health Evaluations That Were
Commissioned by the State for Purposes
of Making a Filing Decision Under RCW
71.09 Where the Case Was Never Filed 23**

**B. The Trial Court Committed No Error By
Allowing Dr. Richards to Explain Available
SCC Treatment in Brief Portions of His
Testimony 27**

1.	Facts Related to Motion	28
2.	West Failed to Preserve His Objection to Testimony Regarding the SCC.....	32
3.	Standard of Review.....	36
4.	The Trial Court Did Not Abuse Its Discretion In Admitted Dr. Richard's testimony	37
5.	West Has Failed to Demonstrate Prejudice	47
V.	CONCLUSION	48

TABLE OF AUTHORITIES

Cases

<i>Com. v. Chapman</i> , 444 Mass. 15, 24, 825 N.E.2d 508, 515 (2005) ..	44
<i>Crenna v. Ford Motor Co.</i> , 12 Wash.App. 824, 828-31, 532 P.2d 290 (1975).....	25
<i>Detwiler v. Gall, Landau & Young Constr. Co.</i> , 42 Wash.App. 567, 568-69, 712 P.2d 316 (1986).....	25
<i>Harris v. Drake</i> , 152 Wash.2d 480, 486, 99 P.3d 872, 874 (2004) 24,	25
<i>Heidebrink v. Moriwaki</i> , 104 Wash.2d 392, 396, 706 P.2d 212 (1985) 24	
<i>In re Detention of Duncan</i> , 142 Wn.App. 97, 2007 WL 4234611, *5 (Wash.App. Div. 3,2007).....	44
<i>In re Detention of Keeney</i> , 141 Wash.App. 318, *325, 169 P.3d 852, **855 (2007)	41
<i>In re Henrickson</i> , 140 Wash.2d 686, 692, 2 P.3d 473 (2000).....	41
<i>In re Turay</i> , 139 Wn.2d 379, 404, 986 P.2d 790 (1999), <i>cert. denied</i> 531 U.S. 1125 (2001).	40, 45, 46, 47
<i>John Doe v. Puget Sound Blood Ctr.</i> , 117 Wash.2d 772, 778, 819 P.2d 370 (1991).	23
<i>Pappas v. Holloway</i> , 114 Wash.2d 198, 209-10, 787 P.2d 30 (1990)..	24
<i>People v. Sumahit</i> , 128 Cal.App.4th 347, 354, 27 Cal.Rptr.3d 233, 238 (2005)	43, 44
<i>People v. Superior Court (Ghilotti)</i> , 27 Cal. 4 th 888, 927, 44 P.3d 949 (Cal. 2002)	41, 42, 43
<i>Seling v. Young</i> , 531 U.S. 250 (2001).....	40
<i>State ex rel. Carroll v. Junker</i> , 79 Wash.2d 12, 26, 482 P.2d 775 (1971).....	23

<i>State ex rel. Clark v. Hogan</i> , 49 Wash.2d 457, 462, 303 P.2d 290 (1956).....	23
<i>State v. Bourgeois</i> , 133 Wash.2d 389, 403, 945 P.2d 1120 (1997)	47
<i>State v. Darden</i> , 145 Wn.2d 612, 619, 41 P.3d 1189 (2002)	36
<i>State v. Davis</i> , 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000)	35
<i>State v. Guloy</i> , 104 Wash.2d 412, 421, 705 P.2d 1182 (1985)	35
<i>State v. Lewis</i> , 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990).	23
<i>State v. Powell</i> , 126 Wn.2d 244, 258, 893 P.2d 615 (1995)	36
<i>State v. Rohrich</i> , 149 Wash.2d 647, 654, 71 P.3d 638 (2003).....	23
<i>State v. Silvers</i> , 70 Wn.2d 430, 432, 423 P.2d 539 (1967).....	35
<i>State v. Tharp</i> , 96 Wash.2d 591, 599, 637 P.2d 961 (1981)	47
<i>State v. Thomas</i> , 150 Wash.2d 821, 871, 83 P.3d 970 (2004) 26, 36, 37, 47	
<i>State v. Vreen</i> , 143 Wn.2d 923, 932, 26 P.3d 236 (2001).....	36
<i>T.S. v. Boy Scouts of America</i> , 157 Wash.2d 416, 423-424, 138 P.3d 1053,1056 - 1057 (2006).....	23

I. INTRODUCTION

Appellant Gale West was civilly committed following a four week jury trial before the Hon. Laura Inveen. The evidence supporting civil commitment was overwhelming. West has a 36 year history of violently raping boys, girls and adult women that includes at least 23 *known* sexual assaults. Based on this evidence and expert testimony, a jury found that West was a sexually violent predator beyond a reasonable doubt. In the face of the strong civil commitment case against West, he limits his appeal to a discretionary pretrial ruling on discovery, and a poorly preserved discretionary ruling on the relevance of portions of a witness's testimony. Because neither issue has merit, West's civil commitment should be affirmed.

II. ISSUES

A. 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.

B. Did West properly preserve his objection to portions of Dr. Richard's testimony when he failed to make a timely objection and his objection failed to provide notice of his complaint? No.

C. 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.

III. FACTS

Gale West was born on June 13, 1954. At age 16, West was sent to a juvenile facility for his various sex offenses and he completed school while in juvenile corrections. After being released from juvenile, West attended Seattle University for a short time before committing more sex offenses.

In January of 1974, West met his girlfriend Denise who was only 16 years old. Later in 1974, during the time that he was involved with Denise (and was having regularly sexual contact with her), West forcibly raped two young boys. Nevertheless, Denise and her family stood by West and continued to provide support to him. He was sent to the Western State Hospital Sexual Psychopath program. In 1977, West was terminated from the program for violating the conditions of the program. West was sent back to the Department of Corrections.

In 1980, during a furlough, West met a young woman named Regina through a mutual friend. West admits that he did not tell Regina

about his criminal history because he was embarrassed. West became involved with Regina and was sexually active with her. During this period of time, while on a furlough, West kidnapped a 16 year old girl and attempted to rape her. Despite his offending against this young girl, Regina stood by him. After he was sent to prison, he and Regina were married in February of 1985. They divorced in 1992.

West admits that he began shoplifting at age 12 or 13 and continued until age 16 or 17. At age 15 or 16, West says that he tried breaking into houses. When he was in junior high, he engaged in "purse snatching" and began skipping school. West said that he associated with kids who engaged in shoplifting, car theft, and smoking marijuana.

West has admitted to extensive substance abuse in his life. West began drinking at age 13, and he began to abuse alcohol at age 15 or 16. At age 14, West began smoking marijuana. As a teenager, West smoked marijuana as often as he could, and he continued to smoke marijuana within the DOC institutions. West claims that he has not smoked marijuana since 1996 when he was last infraacted for using.

West also admits using cocaine, heroin, barbiturates, LSD and "speed. West admits using drugs and alcohol before committing many of

his crimes. West completed a substance abuse treatment program in DOC and he does not believe that he needs any further treatment.

West has a history of offending against numerous children – boys and girls - from an early age. At various times, he has claimed up to 50 victims. VRP 2/12/07 at 77: 2-23. He has also offended against adult women. West's known sexual offense history is as follows:

*** 1970 Rape of 10 Year Old Girl At Knifepoint**

In 1970, West stole a knife out of a someone's coat pocket. A short time later, West saw a ten year girl coming out of a grocery store. West had never seen this girl before. West approached her, pulled out the knife and threatened to hurt her if she did not do what he said. West then took her to the back of a church, made her pull her pants down, and got on top of her. West then "humped" her until he ejaculated. West admits that this young girl was frightened throughout the whole ordeal, and that he threatened to hurt her if she told anyone.

West was arrested and charged with rape. West plead guilty to a reduced charge of Carnal Knowledge and was released. West recalls thinking that he was "lucky" because of his release from custody.

*** 1970 Sexual Assault of Six Year Old Boy**

West admits that he was high on drugs or alcohol when he

committed this offense. While walking down the streets of Seattle, West saw a six year old boy riding a bike. West overpowered the boy, got on the bike, and took the boy with him. While West could not recall the sexual contact with the boy in much detail, he believed that he put the child's penis in his mouth. West admitted that he did not know the boy before the attack and that he just choose to assault this boy because the opportunity presented itself.

West was arrested and charged with Indecent Liberties, taking a motor vehicle without permission and larceny. West was found guilty and was committed to the Department of Institutions on 10/20/1970. West was initially placed at Cascadia for six weeks, and he was then sent to Green Hill for six months.

*** 1970 Sixteen Sexual Offenses Involving Young Boys and Girls**

At the time of the above arrest for indecent liberties, West confessed to Seattle Detectives that he had committed sixteen sex offenses involving young boys and girls. West admitted further that most of these offenses involved the use of force. West showed the detectives two abandoned houses where he committed most of his offenses. These abandoned houses were both in the central district of Seattle, and they had an open door or window. West stated that the

majority of these victims were girls and that their ages ranged from 10 to 13 years old. In a recent interview, West said that he had committed even more offenses than the sixteen he had confessed to. Despite these confessions, West was never charged for these crimes.

*** 1972 Rape of 12 Year Old Girl With Pencil**

While on parole for his 1970 offenses, West admits that he raped a 12 year old girl who he saw coming home from school. West explained that he threatened her with a pencil and told her that he would harm her if she did not do as he said. West attempted to force his penis into her vagina and he ejaculated during the attack. West stated that the police found semen inside this young girl's vagina. It appears that West was never charged with this crime. However, his parole was revoked and he was sent back to the juvenile facility.

*** 1972 or 1973 Attempted Rape of 40-50 Year Old Woman**

During 1972 or 1973, West was in downtown Seattle and he began talking with a 40 or 50 year old woman on a bus. West decided that he would rape this woman, so he followed her off the bus. West threatened this woman with fingernail clippers, and told her that he would hurt her if she did not cooperate with him. At that point the woman said "there go the police" and he fled. West was never charged

with this crime.

*** 1973 Attempted Rape of A Prostitute**

West admits that he attempted to rape a prostitute in 1973. West explained that he picked up the prostitute and they went to a motel. When they got into the parking lot, West attempted to rape her in the car. The woman got away from West, got out of the car and ran. West was never charged with this crime.

*** 1974 Rape of 13 Year old W.B.**

On May 31, 1974, West spotted a 13 year old paper boy, W.B., walking down the street. West had never met this boy or seen him before. West approached W.B. and asked him if he would help him change a tire. The boy refused at first, but when West offered him money, he agreed to help. West then took the boy to an abandoned house that was nearby and told the boy that they needed to go to his apartment and get a jack for the car. Once inside, West threatened the boy by holding a sharp object to his throat and started going through the boys' pockets. West took the boy's watch and some spare change that he had in his pockets.

West then asked W.B. "do you know what I am going to do." When W.B. said no, West repeated this question several times. West

then told W.B. that he would give him three guesses. When W.B. said "you are going to rape me" West responded by saying that this was a "good guess." West then told W.B. to remove his clothing and get on his knees. West then rubbed his penis against the boy's mouth and put his penis inside the boy's mouth. West then attempted to force his penis inside the boy's anus, and ejaculated. During this attack, the boy cried out saying that it hurt. West left the abandoned house and the boy reported West to the police.

On June 11, 1974, W.B. picked West out of a photo montage and West was arrested and charged with sodomy. West lied to the police about what he had done and the case went to trial. The boy was forced to testify in open court about the attack and West was found guilty at trial in July of 1974. After he was convicted, West was released on a bond.

*** 1974 Rape of 14 Year Old Boy**

After being convicted for the rape of W.B. but before his sentencing, West committed another attack on a young boy. On October 1, 1974, West was under the influence of LSD and strawberry mescaline. West spotted a 14 year old boy, J.F., on a bus. West approached J.F. and asked him if he had a brother named Greg. J.F. said that he did not, and he and West continued talking for several

minutes until the bus got downtown.

West then told J.F. that he needed some help moving some heavy typewriters, and asked J.F. for some help. West told J.F. that he would pay him \$5 for his help. West then took J.F. into the 4th and Pike office building and took the elevator up to the 8th floor. West led J.F. to a small storage room and held a fingernail file to his throat. West grabbed J.F. by the hair and checked his pockets.

West ordered J.F. to remove his clothes, and he unbuttoned his pants. West told J.F. to "grab his dick and suck it." J.F. complied. West then forced J.F. to his hands and knees and anally raped the boy. During the attack, West threatened to "slice open" J.F.'s "gut" if he did not comply. West then performed oral sex on the boy and ordered him to have anal intercourse with West.

West was identified with his fingerprints left at the scene. West was charged with sodomy and plead guilty to this charge. At sentencing, West opted for treatment in lieu of prison and he went to Western State Hospital's Sexual Psychopathy program. After approximately 25 months in this program, West was terminated and sent to prison.

*** 1981 Kidnapping and Attempted Rape of 16
Year Old Girl**

In 1980, after serving several years in prison on his sentence for

two counts of sodomy, West was released from custody on a furlough/work release status. While on a furlough, West committed another sex crime on a stranger.

On February 2, 1981, 16 year old R.F. was walking home from school when she saw a male later identified as Gale West standing near his car with an open trunk. As she approached the car, West asked her where the nearest bus station was. West then asked her to repeat herself. As R.F. was doing so, West came up behind R.F. grabbed her around the neck and held a sharp object to her neck. West said "if you scream or say anything I will slice your throat open." West then tried to force R.F. into the trunk of the car, but when she resisted, he put her in the passenger side of the car and tied her hands behind her back. As he got into the car, West again threatened to cut her throat if she moved.

Once inside the car, West patted down R.F.'s pockets to see if she had any money. West then drove the car and asked R.F. if she had ever been raped before. West then told R.F. that this would be her first time getting raped.

West then drove to an underground parking lot. When approached by a maintenance worker, West left. West then "side swiped" another car and got into an accident. When he did so, West told

R.F. to keep her mouth shut or she would never go home because he would kill her. At that point, the driver of the car that West struck approached the car and asked West and R.F. if they were all right. When West turned away, R.F. mouthed to the driver of the other car the words "help me. I was being raped." The driver of the other car understood what R.F. had mouthed to him. When the police arrived, the driver reported what he had seen and West was taken into custody.

West was charged with Kidnapping in the First Degree and he was sentenced to twenty years in prison.

* **"Peeping" and Exposing Behavior**

In addition to the "hands on" offenses described above, West also admitted that he had "peeped" on neighborhood girls. West explained that part of what he confessed to the Seattle Police Department was that he would "peep" on a neighbor girl getting dressed and another girl across the street. West stated that these girls were his age or older. When asked how long this behavior lasted, West said that he did so for six or seven months. West admitted that he had an erection when he engaged in this "peeping" behavior.

West also described some exposing behavior. During his interview with Dr. Rawlings, West admitted that as a teenager he

exposed his penis to two neighbor girls. West also admitted that he exposed himself to the six year boy that he victimized in 1970. West was never charged with any peeping or exposing offenses.

During his incarceration, West received 17 serious infractions including holding a hostage in 1981, fighting in 1983 and at least seven substance abuse infractions. In 1995, West received an infraction for having possession of a tape player with no identifying information. In 1996, West received infractions for possession of pornography, giving and/or selling an item of value, and testing positive for marijuana.

After being sentenced for the rape of the two young boys, West took advantage of the opportunity to do treatment at Western State Hospital's Sexual Psychopathy program in lieu of going to prison. West entered the program on November 22, 1974.

Initially, West seemed to make some progress in treatment. The treatment staff noted that West was able to recognize his hurtful behavior patterns and that he was developing an understanding of his offending pattern. However, the treatment staff also noted that West used manipulation and deviant games to get what he wanted, and that he seemed unable to change his behavior for the better.

In April of 1976, West revealed that he had been smoking pot

while in the program, and that he had minimized his behavior and condoned the deviant behavior of others. The treatment staff elected to give West another chance and did not terminate him from treatment. Unfortunately, West was unwilling to follow the program rules. In January of 1977, West committed two violations: he engaged in an act of oral sodomy with one of his group members, and he ate a marijuana cigarette and lied about it. West was terminated from the program and was sent to Department of Corrections (DOC).

During West's time at the Department of Corrections, he was repeatedly told by DOC staff that he should undergo treatment at the Sex Offender Treatment Program at Twin Rivers. West ignored these recommendations year after year, and has repeatedly refused to do any further treatment.

West was placed in the Special Commitment Center in 2002 after the State sought his civil commitment. He was in phase three of the six phase program when he refused further treatment.

Dr. Leslie Rawlings, the Department of Health and Human Services designed evaluator in this case, was asked to assess whether West met the criteria for civil commitment as a sexually violent predator under RCW 71.09. Specifically, Dr. Rawlings was asked whether or not

West suffers from a mental abnormality or a personality disorder which makes him more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility.

Dr. Rawlings wrote two reports in this case. Dr. Rawlings first report, dated June 3, 2002, was written before the case was filed and without the benefit of a forensic interview as Mr. West refused to meet with Dr. Rawlings. The second report, dated November 28, 2005, was written after Dr. Rawlings' forensic interview with Mr. West. This report includes Mr. West's statements regarding his offending and other relevant questions he was asked by Dr. Rawlings. In both reports, Dr. Rawlings concludes that West does meet the criteria for civil commitment under RCW 71.09.

Dr. Rawlings rendered several diagnoses for West. First, Dr. Rawlings concluded that West suffers from: 1) Pedophilia, attracted to males and females, non-exclusive; 2) Paraphilia not otherwise specified, nonconsent; 3) antisocial personality disorder; 4) marijuana abuse in full remission in a controlled setting.

Dr. Rawlings conducted a risk assessment of West using multiple methodologies. First, Dr. Rawlings utilized several actuarial instruments including the SORAG, the MnSOST-R, and the Static 99.

On the SORAG, Mr. West received a score of 31, with an associated recidivism rate for violent offenses including sex offenses of 89% over 10 years. On the MnSOST-R, Mr. West received a score of 14, which placed him in the highest risk category for the MnSOST-R and is associated with the top 5% of persons on whom the MnSOST-R was developed. Finally, on the STATIC-99, Mr. West was assigned a score of 8, which is the highest risk category and is associated with a recidivism risk for re-conviction for a sexual offense of 52% over 15 years.

Dr. Rawlings then considered other risk factors which had some bearing on West's recidivism risk. Dr. Rawlings noted that the following risk factors are present in this case and increase West's risk to reoffend:

Intimacy deficits: West has never lived with a partner;

Lack of victim empathy: West has not expressed any concern about how he has affected his victims;

Difficulty with sexual self-regulation: West sometimes used sex offending as a means of coping with the negative emotions of boredom, stress, and depression;

History of multiple deviant sexual interests: West engaged in

non-consenting sex with minor males and females, engaging in voyeurism, and attempted sexual assault of adult females;

Poor cooperation with community supervision: West has a history of failing to comply with community supervision and conditions of release.

Dr. Rawlings also considered whether the any protective factors (meaning factors that are associated with reduced risk) were present in this case and concluded the following:

Attitudes tolerant of sexual assault or molestation: West did not express any current attitudes that could be considered tolerant of sexual assault or molestation.

Living in the community offense free: West has not lived in the community offense free for any significant time.

Age: West does not qualify for reduced risk because of advanced age.

Poor health: West does not qualify for reduced risk because of poor health because he does not suffer from poor health.

Sex Offender Treatment: West has not completed cognitive behavior therapy for his sexual offending.

Dr. Rawlings opined that West's diagnoses of pedophilia and paraphilia

not otherwise specified, non-consent, can be discriminated from general criminality by the impairment in emotional and volitional control that it produces that is specific to these disorders. Dr. Rawlings went on to explain that West's emotional control is impaired by his sexual interest and arousal to non-consensual sex with minors. In addition, West's antisocial personality disorder contributes to his impaired emotional and volitional control by its association with willingness to violate acceptable standards of social behavior, decreased impulse control, deceptiveness, disregard for the safety of others, and lack of remorse.

Dr. Rawlings concluded that in his professional opinion, to a reasonable degree of psychological certainty, West's mental abnormalities in the form of pedophilia and paraphilia not otherwise specified, non-consent, and his personality disorder in the form of antisocial personality disorder, as well as the associated risk factors predispose West to commit criminal sexual acts in a degree constituting a menace to the health and safety of others. Dr. Rawlings concluded that in his professional opinion, West is likely to engage in predatory acts of sexual violence if not confined to a secure facility.

After considering this evidence, the jury found that West was a sexually violent predator. This appeal is from the Order of

Commitment.

IV. LEGAL ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion By Preventing Discovery Into Unrelated Mental Health Evaluations that Were Protected By Work Product Privilege and Statutory Non-Disclosure Provisions

1. Facts Related to Discovery Issue

The primary expert testifying on behalf of the State was Dr. Les Rawlings. At his deposition, Dr. Rawlings testified that he had conducted a total of 37 mental health evaluations of persons being considered by the Washington Attorney General or the King County Prosecutor for civil commitment as a sexually violent predators. In 15 of those cases, Dr. Rawlings had determined that the person did not meet criteria for civil commitment. After considering Dr. Rawlings' report, the prosecuting authority determined no to initiate RCW 71.09 proceedings. Where the State initiated sexually violent predator proceedings, Dr. Rawlings report was typically attached to the petition and entered into the public record in accord with RCW 71.09.

Not content with the 22 public reports, counsel for West issued a subpoena requiring Dr. Rawlings to disclose the 15 reports on cases that were never publicly disclosed. The State moved to quash the subpoena. CP 169. In a June 6, 2006 order, the trial denied the State's motion to

quash and ordered Dr. Rawlings to provide copies of all 37 mental health reports to counsel for West. CP 203.

The State sought timely reconsideration of this order. CP 280. The Washington Attorney General and the King County Prosecutor, who had used Dr. Rawlings as a consulting expert on behalf of the State to determine the viability of filing various sexually violent predator cases, objected on work product and statutory non-disclosure grounds. CP 280-285. The State pointed out that Dr. Rawlings' reports in unfiled cases where he served as a consultant are protected work product. CP 281-82. AAG Todd Bowers filed a declaration pointing out that the AG had not waived work product on behalf of the State for cases where the attorney general had used Dr. Rawlings' professional services. CP 286-87. The State further pointed to various statutes, including RCW 4.24.550, which limit dissemination of sex offender evaluations. CP 280-85. Disclosure would also violate the privacy rights of the individuals discussed in the unfiled reports -- individuals who were free in the community because the State determined not to initiate sex predator proceedings. *Id.*

While this motion was pending, counsel for West sought to have Dr. Rawlings held in contempt for not providing the contested work product mental evaluations. *See* CP 315-319; 331-354. This was an

apparent and ham-handed effort to obtain the privileged reports before the trial court had the opportunity to rule on the reconsideration motion.

Although maintaining its position that unfiled, consulting reports were work-product, the State issued a conditional subpoena requiring the defense expert to produce his consulting reports as well. CP 355. The State repeated its disagreement with the trial court's ruling that consulting expert reports were subject to discovery, but pointed out: "if the court determines that a sufficient showing has been made to pierce the privilege with respect to Dr. Rawlings, then the State requests that the same ruling apply to Dr. Wollert." CP 358. Dr. Rawlings ended up hiring his own counsel as did Dr. Wollert to further address the trial court's troubling order requiring the disclosure of consulting expert reports, particularly when the privilege belonged to various different entities or persons.

Through a July 12, 2006 order, the trial court denied West's motion for contempt against Dr. Rawlings. CP 511. Nonetheless, counsel for West attempted to submit another subpoena to Dr. Rawlings before the reconsideration motion could be heard. CP 512.

After hearing extensive arguments, on August 8, 2006, Judge Inveen granted the State's reconsideration motion and prevented disclosure of the various consulting expert mental health reports. CP 519 (attached

as Appendix A). In its order, the court ruled that:

the court finds that reports generated by Dr. Rawlings for cases in which he was retained as a consulting expert the state, and for which legal proceedings were not filed, were prepared in anticipation of litigation. [West] has not demonstrated a substantial need of the materials in the preparation of his case nor that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. The court finds the proffered reasons for disclosure as put forward by [West] are in essence to seek information to impeach the expert about his conclusions regarding his evaluation of Mr. West. The information is available by examining Dr. Rawlings regarding his methodology and conclusions relating to this case, as well as by virtue of the [West's] own expert, who has formulated an opinion on Dr. Rawlings methodology. The issue is the methodology and conclusions he has reached relating to Mr. West, not to others. In any event, West has access to many other reports prepared by Dr. Rawlings for filed cases.

Id. at 519-20. Based on this reasoning, the court ordered that "Dr.

Rawlings shall not disclose reports or information about individuals evaluated pursuant to a request by the state for consideration of RCW 71.09 proceedings, and whose reports were not filed." CP 520.

West then sought reconsideration of this order on August 15, 2006, claiming that he didn't know what was meant by "the state" or "publicly filed." CP 521-24. On October 13, the trial court issued an order clarifying the prior order. CP 525 (attached as Appendix B). The "state" including all state entities that obtained a mental health evaluation for the purpose of informing the prosecuting authority on the question of filing a

petition for civil commitment under RCW 71.09. *Id.* "Publicly filed" meant documents that were filed in open court records. *Id.*

Counsel for West then sought discretionary review under Court of Appeals Number 59008-1-I. On October 30, 2006, West filed an emergency motion to stay the trial date. The State responded, pointing out that there was no merit to West's underlying request for discretionary review because consulting expert reports were properly protected by work product privilege.

Through a November 6, 2006 notation ruling, Commissioner Neel denied respondent's emergency motion for a stay. *See attached appendix C.* In denying the stay, the Commissioner determined that "it is highly unlikely that West will succeed in demonstrating grounds for discretionary review." Order at 3. The Commissioner suggested that West consider the option of withdrawing his request for discretionary review. *Id.* at 4. A ruling dismissing No. 59008-1-I was issued on December 22, 2006 after West withdrew his motion for discretionary review. *See attached Appendix D.*

2. Standard of Review -- Manifest Abuse of Discretion

On direct appeal, West again seeks to ride this dead horse. with regard to discovery orders, a trial court decision is reviewed only for

manifest abuse of discretion:

An appellate court reviews a trial court's discovery order for an abuse of discretion. *John Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 778, 819 P.2d 370 (1991). Judicial discretion 1057 “means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result.” *State ex rel. Clark v. Hogan*, 49 Wash.2d 457, 462, 303 P.2d 290 (1956). An appellate court will find an abuse of discretion only “on a clear showing” that the court's exercise of discretion was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). A trial court's discretionary decision “is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003). A court's exercise of discretion is “‘manifestly unreasonable’ ” if “the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’ ” *Id.* (quoting *State v. Lewis*, 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990)).

T.S. v. Boy Scouts of America, 157 Wash.2d 416, 423-424, 138 P.3d 1053, 1056 - 1057 (2006). West has failed his burden to demonstrate error under this demanding standard of review.

3. The Trial Court Committed No Error in Refusing to Compel Disclosure of Mental Health Evaluations That Were Commissioned by the State for Purposes of Making a Filing Decision Under RCW 71.09 Where the Case Was Never Filed

In refusing to produce prior reports by Dr. Rawlings that are not already in the public record, the trial court relied on the work product

privilege and various State non-disclosure laws. In preparing these reports, Dr. Rawlings served as a consulting expert hired for purposes of litigation. Because his reports were prepared in anticipation of litigation, they are protected by the work product privilege. CR 26.

Under CR 26(b)(4) and 26(b)(5)(C), the work product protections afforded to consulting experts who do not testify are particularly strong. The privilege continues even after termination of the litigation. *Harris v. Drake*, 152 Wash.2d 480, 489-490, 99 P.3d 872 (2004). See also *Pappas v. Holloway*, 114 Wash.2d 198, 209-10, 787 P.2d 30 (1990) (the underlying purposes served by the work product doctrine can be preserved only if the protection attaches even after litigation has terminated).

Before the court may order release of a consulting expert report that is protected by the work product doctrine, West must show a substantial need for the report, not merely an interest in the report. "Under the work product doctrine, documents prepared in anticipation of litigation are discoverable only upon a showing of substantial need." *Harris v. Drake*, 152 Wash.2d 480, 486, 99 P.3d 872, 874 (2004); *Heidebrink v. Moriwaki*, 104 Wash.2d 392, 396, 706 P.2d 212 (1985). Indeed, "work product can be obtained only upon a showing of *necessity* for one's case and an inability to acquire similar material elsewhere." *Id.* (emphasis

added).

For consulting experts, the showing necessary to pierce the privilege is especially high, requiring a further showing of "exceptional circumstances:"

As set out above, CR 26(b)(4) begins with a proviso: "Subject to the provisions of subsection (b)(5) of this rule a party may...." CR 26(b)(5) concerns discovery from experts. CR 26(b)(5) provides that when a party retains an expert, who acquires or develops facts and opinions in anticipation of litigation, and the party does not expect to call that expert at trial, another party may obtain discovery only as provided in CR 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. *Detwiler v. Gall, Landau & Young Constr. Co.*, 42 Wash.App. 567, 568-69, 712 P.2d 316 (1986). The work product doctrine limits not only pretrial discovery but may also prevent a consulting expert who is hired in anticipation of litigation from testifying at deposition *487 or trial. *See Crenna v. Ford Motor Co.*, 12 Wash.App. 824, 828-31, 532 P.2d 290 (1975).

Harris v. Drake, 152 Wash.2d 480, 486-487, 99 P.3d 872, 874 - 875 (2004).

Given the state of the law, the trial court did not abuse its discretion by refusing to compel disclosure of reports were Dr. Rawlings served as a consulting expert. West has failed to demonstrate the exceptional circumstances necessary to obtain the report of a consulting expert, especially when that report is unrelated to the West's case.

The trial court's ruling is independently supported by state

privacy laws. RCW 4.24.550 limits the manner in which information about sex offenders can be disclosed. With regard to consulting reports on unfiled RCW 71.09 cases, no SVP civil commitment case was filed. Because the person was not sufficiently dangerous to merit a filing based on the report and the information known at the time, it would not be appropriate to release the report.

Further, the report is essentially a mental health evaluation and would carry important privacy considerations. The suggestion that state privacy laws could be satisfied through a redaction process is not supported by any citation to statute. For example, RCW 4.24.550 contains no exception allowing disclosure to a litigant in a separate case upon redaction." Particularly when West is on a fishing expedition, this is not enough to override the privacy inherent in a mental health civil commitment evaluation.

Finally, West makes no claim that the trial court's refusal to compel discovery had any effect on the final result in this trial. Even if the trial court erred in disallowing the discovery, West has failed in his burden to demonstrate any reasonable probability that the error changed the trial outcome. *See State v. Thomas*, 150 Wash.2d 821, 871, 83 P.3d 970 (2004) (there must be a "reasonable probability" that the error

materially effected outcome of the trial). Here, the evidence against West was overwhelming. West had ample opportunity to challenge Dr. Rawling's methodologies through cross-examination and the testimony of his own expert, Dr. Wollert. He provides no indication on how access to 15 more reports would have fundamentally altered the sexually violent predator determination. Absent a showing of prejudice, a discovery ruling -- even if erroneous -- cannot justify reversal of the jury's verdict.

The trial court did not err in denying West's request to discover the privileged reports of Dr. Rawlings in other cases where he was acting as a consulting expert. As such, the verdict should be affirmed.¹

B. The Trial Court Committed No Error By Allowing Dr. Richards to Explain Available SCC Treatment in Brief Portions of His Testimony

West argues that the trial court erred by allowing Dr. Henry Richards, the Superintendent of the Special Commitment Center, to testify to the phases of the SCC treatment program. West had participated in the SCC program before dropping out in phase three of the

¹ Counsel on appeal claims that West was entitled to the work product mental health reports under CrR 4.7, the Sixth Amendment, and the *Brady* doctrine. None of these arguments merit consideration because application of CrR 4.7, the Sixth Amendment and the *Brady* doctrine is limited to criminal matters. This is a civil case subject to the civil rules. Moreover, there is no colorable argument regarding how consulting expert reports addressing other sexually violent predators could be "exculpatory" evidence for Mr. West.

six phase program. Without objection from the defense, Dr. Richards briefly mentioned in testimony that the last phase of treatment involved transitional release to the community. West argued that this somehow allowed him to present evidence regarding years-old stages of the SCC federal injunction, even though no testimony from West linked his decision to quit treatment with the injunction. The trial court did not abuse its discretion in allowing Dr. Richards to briefly explain the treatment program.

1. Facts Related to Motion

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.

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.

Prior to Dr. Richards taking the stand for trial, the defense again sought to prevent his testimony. The defense claimed that Dr. Richards "shouldn't be able to testify about the specifics of the treatment program, most notably, he shouldn't be able to talk about the seven phases of treatment. . . ." VRP 1/31/2007 at 124. Counsel did not dispute the relevance of the testimony, but claimed that they would "have a very difficult time creating a full picture for the jury" absent raising additional matters that did not favor their client. *Id.* at 124-125.

The State pointed out that it was not going into the quality of the program, but only a bare description of the program. *Id.* at 125.

Because West had dropped out in phase three of a six phase treatment program, the State argued that it was necessary to fill in the context of the program to explain the significance of Mr. West's decision to drop out of treatment. *Id.* at 125-27. The lack of treatment went strongly

toward both diagnostic and danger issues because it demonstrated that West had done little or nothing to address his underlying problems. *Id.* The court adhered to its prior order and allowed Dr. Richards' testimony, while allowing West to fully explain his decision to terminate treatment. *Id.* at 126.

During his testimony, Dr. Richards mentioned that the last phase of treatment involved transitional release into the community. The defense failed to object to Dr. Richard's testimony, *see below*, but nonetheless moved for a mistrial and/or a curative instruction. The court denied the defense motion, finding that there had been no violations of any pre-trial rulings. *Id.* at 170. The jury would already be instructed on the elements of the case. *Id.* The court ruled:

and frankly, from the jury's perspective, I don't find that what Dr. Richards testified to, the jury could even infer that that was something that they were going to be deciding. [Dr. Richards] just, very briefly, went through the facilities of McNeill. He just touched on the fact that there is a total confinement, and there is a transitional facility at McNeill in Seattle designed to have more access to the community, but no indication as to who is eligible for it, any suggestion that that would include Mr. West, and so I'm going to deny [the motion].

VRP 1/31/07 at 170.

The defense claimed that it was now entitled to cross Dr. Richards regarding the federal injunction against the SCC and other

issues related to conditions of confinement. It submitted various documents as an offer of proof, which represented third party criticism of the SCC. There was no explanation of how these documents were admissible under hearsay rules. None of these documents was more recent than January 2006 and most dated to the earlier days of the injunction. Dr. Richards, outside the presence of the jury, testified that the injunction had been limited for several years to creation of an off-island transitional release facility. VRP 1/31/2007 at 176-177; CP 531. The court agreed to allow further questions by the defense regarding the transition facility, but West did not act on this offer. *Id.* at 183.

West himself later testified that he participated in treatment at SCC for 16 to 17 months. VRP 2/12/2007 at 37:19. West denied that he dropped out of treatment due to advice of counsel, claiming instead that he felt SCC did not provide "real treatment." *Id.* at 38:11-14. He explained his feeling that he could not trust his treatment providers and claimed that there was little chance to be placed "in a less restrictive alternative place." *Id.* at 38:15-25. He noted that he was not criticizing the entire institution, only "about specific people on my treatment team." *Id.* at 39: 10-11. No where in his testimony did he make any claim that the federal injunction caused him to reject treatment. West testified to

various other criticisms of the SCC, when asked to respond to Dr. Richards' testimony. *Id.* at 39-41. West further 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. VRP 2/7/2007 at 139-40. West did not believe, however, that he required any kind of sexual deviancy treatment. VRP 2/12/2007 at 73.

2. West Failed to Preserve His Objection to Testimony Regarding the SCC

The question and answer that West complains of on appeal came into evidence without an objection:

Q. [by Prosecutor] Now, can you tell the jury what is the treatment program at the Special Commitment Center?

A: [Dr. Richards] the Special Commitment Center's treatment program is, I would say, it really has three components. One is just the environment of the Special Commitment Center itself. So we have different environments that comprise part of the treatment.

The initial environment that a resident might enter would be our total confinement center on McNeill Island, and that facility, as implied is really designed to contain an individual and provide all the supports and security that makes treatment possible.

The other environments we have are our transitional facilities, one on McNeill Island and one here in Seattle. Those facilities are different, have somewhat of a different treatment, and are designed to have more access into the community and transition into the community. So that first component of the treatment is the holding environment itself and the staff, rules comprised in that facility.

VRP 1/31/2007 at 158-59. West made no objection during this long answer, including the portion that went beyond the prosecutor's question about the SCC into an explanation of the transitional facility. If West had raised a simple "non-responsive" objection, none of the testimony regarding the transitional facilities would have come before the jury.

When West's counsel did object, after Dr. Richards had already answered, it was a non-specific objection that raised no particular problem with the transitional release testimony: "Mr. HART: Your honor, I'm going to continue my objection, for the record." *Id.* at 159. The court did not grant or deny the objection, but requested the parties to "move on." *Id.*

The prosecutor next asked Dr. Richards: "at the facility on McNeill Island, are there phases of treatment in the treatment program?" *Id.* West again did not object. Dr. Richards answered that there were six phases, "with the sixth phase being a community transition phase." *Id.* Again, the defense offered no objection. The defense offered no objection to the remainder of Dr. Richards' testimony.

Once the prosecutor finished, West's counsel requested a sidebar where the jury was dismissed. *Id.* at 164. West's counsel, despite his lack of an objection, complained about Dr. Richard's brief mention of

the community transition phase of treatment. *Id.* at 165. He noted that "I don't think its any bad faith on Dr. Richard's part." *Id.* After the trial court asked West's counsel what he wanted, counsel eventually asked the court to strike Dr. Richards' testimony. *Id.* He then appeared to withdraw the request, noting that "I haven't totally thought this through and I apologize. I'm sorry for thinking out loud to some degree." *Id.* at 166. Co-counsel then asked for a break so that they could further confer. *Id.*

Following the break, counsel then requested "a mistrial based on Dr. Richard's testimony . . . because [Dr. Richards] made it seem like there's a transitional facility that's available." *Id.* As a fall back position, counsel wanted the court to instruct the jury that "they are not to consider the consequences of commitment," and that they should consider only the civil commitment criteria." *Id.* at 167. The court asked counsel to explain the perceived harm from Dr. Richards' testimony. Counsel for West replied that "It's not that big of a deal." *Id.* at 167. The prosecutor pointed out that Dr. Richard's testimony had truthfully reflected that the final stage involved transition to the community. *Id.* at 168.

A party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *State v. Davis*, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Here, West failed to object to key portions of Dr. Richards' testimony. His primary complaints were delayed until after completion of direct testimony, when he sought a mistrial. By failing to object until completion of the direct testimony, West has not preserved this issue for appeal.

Further, an objection that does not specify **the particular ground** upon which it is based is insufficient to preserve the question for appellate review. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). For example, an objection based solely on ER 402 relevance does not suffice to preserve an appeal on ER 403 claims of prejudice:

Defendants' claim that the trial court erred by not weighing the probative value of the gambling conspiracy evidence against its prejudicial impact as required by ER 403. *The defendants, however, never made an objection on that basis at trial.* This court has "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." *Bellevue Sch. Dist. 405 v. Lee*, 70 Wash.2d 947, 950, 425 P.2d 902 (1967).

State v. Guloy, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985) (emphasis added). The single objection that West made during Dr. Richard's testimony noted no grounds for the objection. In particular, it failed to

provide any notice that West was objecting to Dr. Richards' mention of a "transitional facility." Again, this objection was not sufficient to preserve the issue for appeal.

"Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal." *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004). Because West failed to preserve claim of error with regard to Dr. Richards' testimony, this court should reject his contentions.

3. Standard of Review

As with the trial court's discovery ruling, West cannot prevail under the "abuse of discretion" standard of review. A trial court's ruling on the admissibility of evidence is subject to the "abuse of discretion" standard. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

With regard to ER 402 questions of relevance, the trial court is afforded a "great deal of deference," using the "manifest abuse of discretion standard." *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). Such an abuse occurs only when the trial court's exercise of discretion is

"manifestly unreasonable or based upon untenable grounds or reasons." *Darden*, 145 Wn.2d at 619 (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). "[T]he trial court's decision will be reversed only if

no reasonable person would have decided the matter as the trial court did.”

State v. Thomas, 150 Wash.2d 821, 856; 83 P.3d 970 (2004). West has failed to satisfy this review standard.

4. The Trial Court Did Not Abuse Its Discretion In Admitted Dr. Richard's testimony

Under RCW 71.09.040, an SVP respondent is remanded to the custody of the DSHS Special Commitment Center pending trial for observation and an evaluation "as to whether the person is a sexually violent predator." RCW 71.09.040(4). During this period of pre-trial observation and evaluation, DSHS SCC offers full participation in sex offender treatment. The evaluator is to consider and account for "[a]ll evaluations, treatment plans, examinations, forensic measures, charts, files, reports and other information made for or prepared by the SCC which relates to the resident's care, control, observation, and treatment." WAC 388-880-034.

In the current case, West determined to participate in the SCC treatment program pending trial. His participation was somewhat successful in that he passed the first to phases of the six phase program. He dropped out in phase 3.

If nothing else, Dr. Richards' testimony was necessary to establish the context for the jury to consider West's treatment

participation. Although treatment participation is not directly before the jury, it is relevant to the questions of diagnosis and risk assessment. 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. 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 place him in the community transition phase of treatment. In short, West's treatment was such that his danger remained high and he had not progressed to the point where community transition or release was appropriate. Although West did not appreciate Dr. Richard's opinion on this point, it was certainly relevant

to the question of West's 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 is "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).

A person's treatment progress at the SCC is also relevant under other statutory criteria besides mental condition and risk to reoffend elements. Under the statute, a "secure facility" is defined as "a residential facility for persons civilly committed under [RCW 71.09] that includes security measures sufficient to protect the community" and includes "total confinement facilities." RCW 71.09.020(13).

Washington's only "total confinement facility" for sexually violent predators is the Special Commitment Center, defined as "a secure facility that provides supervisions *and sex offender treatment services* in a total confinement setting." RCW 71.09.020(17). Thus, the question for the jury is whether respondent is more likely than not to re-offend unless placed in a facility that provides security and an opportunity to engage in treatment. It would be error to accept respondent's argument excising

the treatment purpose of the statute for a sole focus on confinement.²

Finally, West's participation in treatment addresses the statutory question posed by RCW 71.09.060, which requires 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. In considering the effects of release on West's danger, therefore, the statute allows the jury

² West was hoping to leave the jury with the false impression that he would be serving a "life sentence." The statute requires that treatment be made available for West. If West is dissatisfied with the offered treatment, it does nothing to prevent his confinement as a sexually violent predator. *Seling v. Young*, 531 U.S. 250 (2001). Instead, he is free to file a separate action challenging implementation of the statute by the executive branch. *Id.* at 269 (Justices Scalia and Souter, concurring). *Accord In re Turay*, 139 Wn.2d 379, 404, 986 P.2d 790 (1999), *cert.*

to consider his current actions in avoiding treatment.

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.

The Washington Court of Appeals has already addressed the propriety of introducing an individual's refusal to participate in pre-trial treatment in *In re Detention of Duncan*, 142 Wn.App. 97, 2007 WL 4234611, *5 (Wash.App. Div. 3, 2007). In that case, the trial court

precluded Duncan from cross-examining the State's expert, Dr. Paul Spizman, regarding his awareness of any complaints about the efficacy of the treatment offered at SCC or the federal lawsuit he had filed against the facility alleging inadequate treatment. The Court of Appeals rejected Duncan's argument that the success rate of the SCC's treatment program was now relevant due to the emphasis placed by the State during its case-in-chief on his refusal to seek pre-trial therapy. It reasoned that the treatment success rate has no relevance in determining whether Duncan currently suffered from a mental abnormality that made him likely to engage in predatory acts of a sexual nature. However, it found appropriate the trial's court's permitting Duncan to testify that he chose not to enter pre-trial treatment because "he did not find it meaningful for him."

Any question on the use of the federal injunction to dispute the civil commitment of a sexually violent predator was resolved by the *Turay* decision. There, Turay claimed that the trial court had committed reversible error "by granting the State's motion in limine to exclude evidence of the conditions of confinement at the SCC and of the verdict in Turay's federal injunction." 139 Wn.2d at 403. The issues in Turay's trial were whether he was a sexually violent predator and

whether release to a less restrictive alternative was in his "best interests." Turay made the exact arguments that West makes in the current appeal, claiming that it was "powerful exculpatory evidence."

Id.

The Supreme Court held that Turay's "arguments in regard to this issue are meritless and demonstrate a fundamental misunderstanding of the purpose of an SVP commitment proceeding." *Id.* at 403-404.

The court determined that the person facing civil commitment "may not challenge the actual conditions of their confinement, or the quality of the treatment at the DSHS facility until they have been found to be an SVP and committed under the provisions of RCW 71.09." *Id.* The federal injunction was "irrelevant." *Id.* Indeed, before the trial court, West's counsel acknowledged this point: "[West] agrees that *Turay* generally precludes evidence of the nature of the conditions and the quality of the treatment program because such evidence is not relevant." CP 266

(Response to State's Motions in Limine):

In short, there is abundant statutory authority and case law supporting the relevance of evidence addressing West's treatment efforts at the SCC, including a factual description of the program that was available to him. It affects his diagnosis, his level of risk and the

likelihood that risk could be ameliorated by voluntary actions in the community. Because this is "potent evidence" of risk, the trial court did not err in admitting Dr. Richards' testimony. Further, under *Duncan* and *Turay*, it was not error to refuse evidence on the federal injunction. The relevant inquiry was West's participation or non-participation in the treatment program, rather than the prospects that West would one day graduate should he ever be committed.

5. West Has Failed to Demonstrate Prejudice

Even if the trial court erred in allowing Dr. Richards testimony, West has failed in his burden to demonstrate any reasonable probability that the error changed the trial outcome. In *State v. Thomas*, 150 Wash.2d 821, 871, 83 P.3d 970 (2004), the court held that prejudice must be proven within "reasonable probabilities:"

We will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. *State v. Bourgeois*, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997). . . . [W]e apply "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wash.2d 591, 599, 637 P.2d 961 (1981). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Bourgeois*, 133 Wash.2d at 403, 945 P.2d 1120.

(Emphasis added).

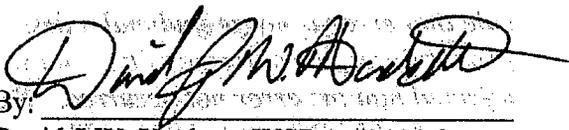
Given the overwhelming evidence against West, it is unlikely that that the obtuse references within Dr. Richards testimony to the transition facility mattered to the outcome. As noted above, the trial court did not perceive any significant impact from this testimony. West himself, as noted above, testified regarding the concept of less restrictive alternatives. Further, West had ample opportunity to air his personal complaints with the SCC program in justifying his decision to abandon treatment. West has failed to provide a "reasonable probability" that different rulings would have significantly mattered in this case.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that the court affirm the Order of Commitment.

DATED this 25th day of April 2008.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
David J. W. Hackett, WSBA #21236
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

FILED
KING COUNTY

AUG 08 2006

SUPERIOR COURT CLERK
BY ANDREW T. HALLIS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Detention of

GALE WEST,

Respondent.

No. 02-2-16726-8 SEA

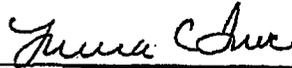
ORDER ON RECONSIDERATION
GRANTING THE STATE'S MOTION
TO QUASH SUBPOENA DUCES
TECUM FOR DOCTOR LESLIE
RAWLINGS AND DENYING THE
RESPONDENT'S MOTION TO
COMPEL

Having reconsidered the Court's Order Denying the State's Motion to Quash Subpoena Duces Tecum for Dr. Leslie Rawlings and Granting the Respondent's Motion to Compel, the Court finds that reports generated by Dr. Rawlings for cases in which he was retained as a consulting expert by the state, and for which legal proceedings were not filed, were prepared in anticipation of litigation. The Respondent has not demonstrated a substantial need of the materials in the preparation of his case nor that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. The Court finds that the proffered reasons for disclosure as put forward by the respondent are in essence to seek information to impeach the expert about his conclusions regarding his evaluation of Mr. West. The information is available by examining Dr. Rawlings regarding his methodology and conclusions relating to this case, as well as by virtue of the Respondent's own expert, who has formulated an opinion on Dr. Rawling's methodology. The issue is the methodology and conclusions he has reached relating to Mr. West, not to others.

1 In any event, the respondent has access to many other reports prepared by Dr.
2 Rawlings for filed cases. Therefore, it is hereby

3 ORDERED that the State's Motion to Quash Subpoena Duces Tecum is GRANTED,
4 and Respondent's Motion to Compel is DENIED, in that Dr. Rawlings shall not
5 disclose reports or information about individuals evaluated pursuant to a
6 request by the state for consideration of RCW 71.09 proceedings, and whose
7 reports were not publicly filed.

8 DONE IN OPEN COURT this 7 day of August, 2005.

9
10 
11 JUDGE LAURA C. INVEEN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
KING COUNTY WASHINGTON

OCT 13 2006

SUPERIOR COURT CLERK
BY ANDREW T. HAVLIS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

In re the Detention of

GALE WEST,

Respondent.

No. 02-2-16726-8 SEA

ORDER CLARIFYING COURT'S
ORDER ON STATE'S MOTION FOR
RECONSIDERATION, AND DENYING
RESPONDENT'S MOTION FOR
RECONSIDERATION

The Respondent, having sought clarification and or reconsideration of the Court's order dated August 5, 2006 (which was dated in error as August 5, 2005), the court hereby clarifies as following:

1. In the last paragraph of the order "the state" includes the End of Sentence Review Board, the Indeterminate Sentence Review Board, the Joint Forensic Unit, and the Washington State Attorney General's Office, in addition to the King County Prosecuting Attorney's Office.
2. "Publicly filed", as referenced in the last paragraph does not include those evaluations filed under seal, even if disclosed to Respondents' attorneys, or testified to. Although the "work-privilege" doctrine may not apply to those evaluations provided to opposing counsel, the Court maintains the remaining rationale in the original order, together with the privacy rights of those evaluated, mandate these reports not be disclosed.

ORDER ON CLARIFICATION

1.
ORIGINAL

App B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DONE IN OPEN COURT this 12 day of October, 2006

Laura C. Inveen
JUDGE LAURA C. INVEEN

ORDER ON AFFIDAVIT
B 499A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

November 6, 2006

Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle, WA, 98104

David J. W. Hackett
King Co Pros Office
516 3rd Ave Ste W554
Seattle, WA, 98104-2390

Brent Aldrich Hart
The Defender Association
810 3rd Ave Ste 800
Seattle, WA, 98104-1695

Peter Michael MacDonald
The Defender Association
810 3rd Ave Fl 8
Seattle, WA, 98104-1655

CASE #: 59008-1-I

In re the Detention of: Gale West, Petitioner v. State of Washington, Resp.

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on November 6, 2006, regarding petitioner's emergency motion to stay the November 13, 2006 scheduled trial court date:

On October 30, 2006, counsel for Gale West filed an emergency motion to stay the November 13, 2006 scheduled trial date in this sexual predator proceeding. The State has filed a response, West has filed a reply, and I heard telephone argument this morning. The motion for stay is denied.

In June 2002, the State filed a petition alleging that West is a sexually violent predator under chapter 71.09 RCW. The parties have been proceeding toward trial since then. Several continuances have been granted. In May 2006, West's counsel deposed the State's expert, Dr. Leslie Rawlings. Dr. Rawlings testified that he had evaluated 37 individuals for civil commitment as sexually violent predators and had concluded that 15 of them did not meet the statutory criteria. Subsequently, West filed a subpoena duces tecum seeking the reports in all 37 cases, including those in which a petition was never filed, with names and other identifying information redacted. The State moved to quash the subpoena. At some point the State also sought an order compelling production of certain records of defense expert, Dr. Woolert, if the court were to grant discovery of Dr. Rawlings reports.

App. C

Page 2
No. 59008-1-I

On June 6, 2006, the trial court denied the State's motion to quash and granted West's motion to compel. The State moved for reconsideration. On August 8, 2006, the trial court granted the State's motion for reconsideration. The court reasoned:

[T]he court finds that reports generated by Dr. Rawlings for cases in which he was retained as a consulting expert by the state, and for which legal proceedings were not filed, were prepared in anticipation of litigation. [West] has not demonstrated a substantial need of the materials in the preparation of his case nor that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. . . . [T]he proffered reasons for disclosure as put forward by [West] are in essence to seek information to impeach the expert about his conclusions regarding his evaluation of Mr. West. The information is available by examining Dr. Rawlings regarding his methodology and conclusions relating to this case, as well as by virtue of [West's] own expert, who has formulated an opinion on Dr. Rawling's methodology. The issue is the methodology and conclusions [Dr. Rawlings] has reached relating to Mr. West, not to others. In any event, [West] has access to many other reports prepared by Dr. Rawlings for filed cases.

On the same date, the trial court also denied the State's motion to compel production of Dr. Woolert's records.

On August 15, 2006, West filed a motion for clarification of the August 8 ruling and for reconsideration. On October 12, 2006, the trial court denied West's motions. A few days later, West filed a notice of discretionary review (and subsequently an amended notice of discretionary review), challenging the June 6 and August 8 decisions. The trial court thereafter denied West's motion to stay the trial.

Then on October 30, West filed the present emergency motion for stay. West has also filed his motion for discretionary review, which is noted for hearing on December 8, 2006 at 9:30 a.m., the first available date. Trial is scheduled to commence November 13, 2006, with jury selection beginning on November 27.

Page 3
No. 59008-1-I

The State argues that West's notice of discretionary review is untimely as to the June 6 order, relying on a comparison of the language in RAP 5.2(a) (notice of appeal) and 5.2(b) (notice of discretionary review). West argues that his notice is not untimely, but even if it is, given the long delay between his motion for clarification/reconsideration and the trial court's decision, extraordinary circumstances exist to grant an extension of time. The State's position appears to be supported by the language of the rule, but there is room to argue to the contrary. See, e.g., State v. Cameh, 153 Wn.2d 274, 281 (2004); In re Detention of Williams, 147 Wn.2d 476, 491-92 (2002); Barry v. USAA, 98 Wn. App. 199, 203 (1999); In re Marriage of Estes, 84 Wn. App. 586, 595 (1997). Because I otherwise conclude that the motion for stay should be denied, I decline to resolve the timeliness issue.

In evaluating whether to stay enforcement of such a decision, the court considers whether the moving party can demonstrate that debatable issues are presented on appeal and compares the injury that would be suffered by the moving party if a stay were not granted with the injury that would be suffered by the nonmoving party if a stay were imposed. RAP 8.1(b)(3). RAP 8.3 also gives the appellate court broad "authority to issue orders, before or after acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party." See Purser v. Rahm, 104 Wn.2d 159, 177, 702 P.2d 1196 (1986) (court considers whether the appeal presents debatable issues, whether a stay is necessary to preserve the fruits of a successful appeal and the equities of the situation).

West argues that he has raised a debatable issue of first impression regarding his ability to discover reports prepared by Dr. Rawlings in other cases. The State responds that West has not raised a debatable issue in light of the discretionary review criteria and the abuse of discretion standard which applies to discovery rulings. At issue in part is the nature of Dr. Rawlings' relationship with the "State" in this and other cases and whether or not his role is that of a consulting expert subject to discovery only under CR 26(b)(5). The parties have not fully addressed the question of discretionary review, and I have not had an opportunity to fully consider it. The debatable issue standard is a relatively low threshold. Based on the materials before me, it is highly unlikely that West will succeed in demonstrating grounds for discretionary review. But that issue is not before me.

Page 4
No. 59008-1-I

Comparing the relative harm to the parties with and without a stay, I conclude that a stay is not warranted. The State filed the SVP petition in June 2002; the matter has been pending for four and a half years. The trial date is only one week away. The trial court, which is in a better position to consider the equities, denied West's motion for a stay. If the State prevails, any discovery issues can be raised on direct appeal, where they can be considered not in isolation, but in context of other evidentiary rulings, for example on the scope of cross examination of both parties' experts, and the evidence presented.

West's emergency motion for a stay of the November 13, 2006 trial date is denied. West shall inform the clerk's office if he intends to withdraw his motion for discretionary review, which is set for hearing at 9:30 a.m. on December 8, 2006 before Commissioner Ellis.

Now, therefore, it is hereby

ORDERED that West's emergency motion for a stay of the November 13, 2006 trial date is denied.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

hek

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re the Detention of:

GALE WEST,

Petitioner.

No. 59008-1-1

COURT ADMINISTRATOR/CLERK
RULING DISMISSING CASE

On November 7, 2006, this court received a "Withdrawal of Motion for Discretionary Review" which states in part:

Because the court has denied Mr. West's motion to stay the proceedings of the trial court, Mr. West hereby withdraws his motion for discretionary review.

The Court Administrator/Clerk has considered the motion and has reviewed the records and files in this court, and it appears that the motion should be granted. Now, therefore, it is hereby

ORDERED that the above case is dismissed.

Done this 22nd day of December, 2006.


Court Administrator/Clerk

APP. D

