

ORIGINAL

NO. 82568-8

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: DETENTION OF GALE WEST,
STATE OF WASHINGTON,
Respondent,
v.
GALE WEST,
Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

1. A person facing civil commitment under RCW 71.09 is entitled to meaningfully prepare a defense through available discovery, including receiving relevant information underlying the opinion and credibility of the State's testifying expert witness. Here, the State's expert witness injected his experience in conducting numerous forensic evaluations in other cases as evidence of his professional credentials and the independence of his opinions despite his years of employment as an expert witness testifying only for the State. Gale West asked for the expert's prior forensic reports or information about them in the course of discovery. Did the trial court misapply the discovery rules by relieving the State's expert of the obligation to provide West with any reports or information about his other forensic evaluations on the basis that they were "work product" and belonged to the prosecution or any State agency that obtained the expert's evaluation in other cases?

2. The proper focus of a commitment trial under RCW 71.09 is on the individual's mental health and likelihood of present dangerousness. Over West's objection, the State introduced detailed evidence of the treatment programs and community supervision services available to individuals only if they are civilly

committed, but the court prohibited West from challenging the effectiveness of those programs. Did the court's admission of irrelevant information improperly distract the jury from the central legal issues in the case and, by restricting West's ability to counteract misapprehensions triggered by the State's evidence, did the court deny him a fair trial?

B. STATEMENT OF THE CASE.

The State claimed Gale West met the criteria for indefinite civil confinement under RCW 71.09. The State's primary expert witness staked the independence and validity of his opinion upon his claim he had evaluated 37 other individuals to determine whether they met the same criteria for commitment, and in 40% of those cases he found that the individuals did not. 2/5/07RP 24. Because the expert's credibility, including his professional experience, fair-mindedness, and his familiarity with the criteria for commitment rested on these numerous other evaluations, West sought further information about these prior evaluations with appropriate redactions during discovery. CP 91 (order granting motion to compel); CP 1006-22 (motion to compel). After some contentious litigation, the trial court expressly barred West from obtaining any "reports or information" about any evaluation the

expert conducted if the evaluation did not result in a publicly filed petition seeking commitment. CP 520, 525 (the court's ruling and its subsequent clarification are attached as Appendix A and B, respectively).¹

During the State's case-in-chief, the superintendent of the Special Commitment Center (SCC), Henry Richards, testified about the various stages of treatment and oversight available to participating civilly committed individuals. 1/31/07RP 155, 157-64. West had disavowed any participation in this treatment program; Richards had never treated West and had no personal knowledge about his needs. CP 586. The court admitted Richards' testimony over West's objection and rejected West's request for a limiting instruction advising the jury that it must confine its decision to whether West met the criteria for commitment and not the availability of services for transition into the community once confined. CP 640-41; 1/31/07RP 183. The court also refused West's request to cross-examine Richards about the failings of the treatment and community transition program, including a federal court injunction upon finding constitutionally inadequate treatment

¹ West filed a motion for discretionary review on this discovery issue but after the court refused to stay his trial, he withdrew his motion. CP 644-45 (COA

and an unacceptable paucity of opportunities for release. Id. at 172-83.

Pertinent facts are further explained in the argument sections below, as well as the Opening Brief filed in the Court of Appeals and the Court of Appeals decision.

C. ARGUMENT.

1. THE COURT IMPERMISSIBLY AND ERRONEOUSLY DENIED WEST ACCESS TO NECESSARY AND IMPORTANT DISCOVERY OF INFORMATION CRITICAL TO CONFRONTING THE STATE'S PRINCIPAL EXPERT WITNESS

a. In a trial seeking a person's indefinite civil commitment under RCW 71.09, obtaining necessary discovery is a critical aspect of preparing and presenting a defense. RCW 71.09 commitments are quasi-civil and quasi-criminal, drawing procedural rules from civil courts but imposing stricter substantive standards and specific protocols in some circumstances. Similar to a criminal case, the prosecuting agency bears the burden of proof beyond a reasonable doubt; the jury must unanimously agree to each essential element of commitment; and the person facing commitment has the right to court-appointed counsel if indigent. In

re Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 396 (1993) (due process protections of criminal cases apply); In re Detention of Halgren, 156 Wn.2d 795, 809, 132 P.2d 714 (2006) (same “constitutionally prescribed unanimity requirement” as criminal cases); RCW 71.09.050 (granting rights to attorney, expert witnesses, and 12-person jury for RCW 71.09 trials); RCW 71.09.060 (burden of proving essential elements of commitment on State beyond a reasonable doubt).

Civil commitment proceedings are “special proceedings,” so civil court rules govern unless inconsistent with a statute or rule. CR 81;² In re the Detention of Williams, 147 Wn.2d 476, 488, 55 P.3d 597 (2002) (RCW 71.09.040 trumps CR 35 because it specifically addresses State’s ability to obtain mental evaluation); In re Detention of Petersen, 145 Wn.2d 789, 801, 42 P.3d 952 (2002) (because no contrary statute, CR 26 entitles detainee to depose State’s expert witness before initial probable cause hearing).

The heightened procedural protections accorded a person facing long term civil commitment under RCW 71.09 reflect the massive curtailment of liberty at stake and the corollary importance

of ensuring a full and meaningful opportunity to defend against the allegations. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 434 (1992); In re Detention of Thorell, 149 Wn.2d 724, 732, 72 P.3d 708 (2003); U.S. Const. amend. 14; Wash. Const, Art, I, § 3.

Here, the trial court found Leslie Rawlings' evaluations and information about them were "work product" for which West had not shown a substantial need. The trial court barred West from obtaining any "reports or information" about prior evaluations Rawlings conducted in other cases, even though he would testify about those other evaluations at West's trial. CP 520, 525.

b. Broad access to discovery is a centerpiece of a fair trial. The discovery rules in both Washington and federal courts are premised upon the principle that, "[m]utual knowledge of all of the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed.2d 451 (1947). Washington's work product rule, CR 26(b)(4) is "nearly identical" to the federal rule and federal cases

² CR 81(a) provides, in relevant part, that "except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings."

provide “persuasive guidance.” Soter v. Cowles Publishing Co., 162 Wn.2d 716, 739, 174 P.3d 60 (2007).³

The rationale underlying the “work product” protection is that it is unfair to permit “an adversary to feed on the industriousness or wits of the other party.” Lewis Orland, Observations on the Work Product Rule, 29 Gonz. L.Rev. 281, 283 (1994). Its aim is excluding private strategy or fact-gathering conducted by one party. See Soter, 162 Wn.2d at 745. But even protected information loses its privilege if a testifying expert considers the information in preparing for the case. When an expert testifies at trial about certain information, the documents underlying that information are not shielded under work product rules, because it would be “manifestly unfair to allow a party to use the privilege to shield information which it had deliberately chosen to use offensively.” CP Kelco U.S. Inc. v. Pharmacia Corp., 213 F.R.D. 176, 178-89 (D. Del. 2003).

³ See also Wright v. Colville, 159 Wn.2d 108, 119 n.2, 147 P.3d 1275 (2006) (CR 26 construed in light of federal rules as interpreted in other jurisdictions); Limstrom v. Ladenberg, 136 Wn.2d 595, 608, 963 P.2d 869 (1998) (CR 26(b)(4) based on federal rule, and Washington uses “similar construction” for scope of work product privilege); In re Matter of Firestorm, 129 Wn.2d 130, 137 n.3, 916 P.2d 410 (1996) (even though text of Fed. R. Civ. P. 26(b)(4) barring ex parte contact with opposing expert different from CR 26(b)(5), federal rule “substantially similar” and federal cases provide guidance); Gillett v. Conner, 132 Wn.App. 818, 823, 133 P.3d 960 (2006) (finding CR 26(b) and (c) are

Discovery related to testifying experts is governed by CR 26(b)(5), not the narrow requirements of CR(b)(4). In re Firestorm of 1991, 129 Wn.2d 130, 137, 916 P.2d 411 (1996). Under the more explicit but substantively similar federal rules, a testifying expert must provide a complete statement of all opinions the witness will express and the basis and reason for them under Fed. R. Civ. P. 26(a)(2)(B) and 26(b)(4).⁴ Sythes Spine Co., L.P. v. Walden, 232 F.R.D. 460, 463 (E.D. Pa. 2005) (work product subject to discovery provisions mandating access to basis of expert's opinion). This requires the expert to disclose "all information that a testifying expert generates, reviews, reflects upon, reads and/or uses in connection with the formulation of his opinions, even if the testifying expert ultimately rejects the information." Waiehu Aina, LLC v. County of Maui, 2009 WL 2414374, *2 (D. Hawaii 2009) (citing Sythes, 232 F.R.D. at 464). An expert must divulge the grounds for his or her opinion, including any information considered by the expert even if only used for background. Kontonotas v. Hygrosol Pharmaceutical Corp., 2009

⁴substantially the same" as federal counterpart).

WL 3719470, *4 (E.D. Pa. Nov. 4, 2009) (“a testifying expert witness has a duty to disclose *all* material ‘considered’ by that expert,” including background (emphasis in original)). In

Kontonotas, the expert received a report prepared by an attorney.

The expert did not explain how he used the report. The court ruled that because the expert received the report and did not deny using it, it was subject to discovery even if consulted only barely, for background information. Id. at *4.

A defendant must have the opportunity to “test the substance” as well as the “independence,” of an expert’s opinions.

Bowers v. NCAA, 564 F.Supp.2d 322, 335 (D. N.J. 2008).

“Generally, work product and privilege are waived as to information disclosed to an expert witness.” Fajardo v. Peirce County, 2009

WL 1765756, *3, recon. granted in part, on other grounds, 2009

WL 1765756 (W.D. Wash. 2009).

As the Supreme Court has cautioned, “[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.” Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579,

⁴ Although some procedures for obtaining discovery under Fed. R. Civ.P. 26(a) were altered in 1993, the substance of the work product rule remains unchanged. Charles Sorenson, *Disclosure Under Federal Rules of Civil Procedure 26(A) – Much Ado About Nothing?*, 46 Hastings L.J. 679, 773 (1995).

595, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (citations omitted). Thus, "it is important to the proper cross-examination of an expert witness that the adverse party be aware of the facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he instead adopted the opinions of the lawyers that retained him." Elm Grove Coal Co. v. Director, O.W.C.P., 480 F.3d 278, 301 (4th Cir. 2007).

c. Evidence used to bolster the State's expert's opinion and establish his credibility was critical to the defense and not privileged work product. Rawlings has testified for the State favoring civil commitment on numerous occasions and never on behalf of an individual facing commitment. 2/6/07RP 111. He is paid handsomely for his time, including the intensive review of records required for any evaluation. Id. at 112-13. At the time of West's trial, Rawlings' pending bill to the State for his efforts in West's case topped \$46,000. Id. at 114.

The prosecution assured the jury that Rawlings was an unbiased, well-credentialed expert. The State emphasized that Rawlings showed his independence and fair-mindedness by his conclusions in 40 percent of his evaluations that people did not meet the criteria for commitment. 2/13/07RP 8-9 (arguing

"important" that Rawlings regularly finds people do not meet criteria for commitment, "because it shows you his objectivity, and he explained to you that if he says this person is not likely to reoffend, that's it."); 2/5/07RP 24 (Rawlings trial testimony and West's objection).

In an effort to prepare his defense and discover pertinent information about Rawlings' evaluation methods and his purportedly independent assessments of individuals' dangerousness despite having been convicted of qualifying sexual offenses, West filed a discovery request for Rawlings' prior forensic evaluations, agreeing to redact private information and limiting the disclosure only to counsel, after Rawlings spoke about the prior evaluations in his deposition. CP 203, 1006-22. These 37 evaluations necessarily involved individuals with the qualifying convictions needed to be considered for civil commitment under RCW 71.09, including at least one sexually violent offense against a stranger. See RCW 71.09.020(17) (defining sexually violent offense for ch. 71.09); RCW 71.09.020(18) (likelihood of "predatory" act of sexual violence required element for commitment). West legitimately wished further information on Rawlings' claimed independence and evaluation methods for

assessing a person's likelihood of reoffending having once committed a sexually violent offense, while knowing that the State would use these statistics to assert the fair-mindedness of Rawlings' opinion that West should be indefinitely confined.

The trial court initially ordered Rawlings to provide the requested information but later reversed itself and broadly ordered that "Rawlings shall not disclose reports or information" about his prior forensic evaluations if they were not publicly filed. CP 203, 520, 525. While the King County prosecutor's office publicly files evaluations when petitioning for RCW 71.09 commitment, the Attorney General's office handles all RCW 71.09 commitments outside of King County and it does not file evaluations publicly even when seeking commitment. CP 286-87 (declaration of assistant attorney general); CP 404 (King County agreeing it uniquely filed evaluations publicly). Thus, the trial court's discovery ruling prohibited Rawlings from providing West with information about the bulk of his evaluations, even in cases where the State sought civil commitments or it had provide evaluations to opposing parties in other cases. CP 525. The Court of Appeals found Rawlings'

evaluations were work product, prepared for litigation, and there was no “substantial need” to give West access under CR 26.⁵

The Court of Appeals claimed West could obtain sufficiently similar information in public files but did not explain how West would locate such information when the trial court had barred Rawlings from giving any information about his prior evaluations to West, including the names of the individuals involved. CP 525. The information was important to West so he could compare other individuals’ patterns of sexually offending behavior with West’s history, and he could not challenge Rawlings’ bias or inconsistency without assessing the basis of his claimed independence. The State improperly insulated its expert from full, fair and effective cross-examination by claiming a work product privilege in materials the State used to prove the expert’s fairness and lack of bias.

d. Necessary discovery includes information relevant to the underpinnings of the testifying expert’s opinions. Rawlings referred to his prior evaluations in his direct testimony at trial as well as his deposition. CP 1007; 2/5/07RP 24. The evaluations he generated were not intended to be confidential communications

⁵ The full text of CR 26 is set forth in Appendix C.

when made and he explicitly informed the people he was evaluating that the evaluation was neither confidential nor intended for treatment purposes. CP 292, 303-04. Privacy protections afforded in health care settings do not apply because Rawlings was not evaluating individuals for purposes of treatment but rather assessing their safety to the community and reporting his opinions to law enforcement. See In re Detention of Campbell, 139 Wn.2d 341, 355-56, 986 P.2d 771 (1999) (recognizing public's "undeniably serious interest" in receiving "current and thorough" information about sex offenders, even if commitment not ordered).

Any evaluation recommending commitment was automatically forwarded to police agencies and the courts by statute, administrative rule, and DOC policy. DOC 350.500(VIII) (policy for RCW 71.09 referrals for any person who appears to meet criteria); WAC 388-880-030 (initial evaluation requirements); WAC 388-880-036 (reporting evaluation requirements). West offered to redact private information from the evaluations but the court refused West access to such information generated by Rawlings even though the State used his prior evaluations to explain his experience and boost his credibility. CP 203.

Rawlings' evaluations in which he determined a person did not meet the criteria for commitment were not prepared in "anticipation of litigation." On the contrary, these evaluations were prepared to evaluate *eligibility* for commitment and in anticipation that there would be no litigation based on the negative finding. 2/6/07RP 112 (no filing would occur when Rawlings did not recommend commitment). In Williams, this Court found a person facing RCW 71.09 commitment could not use "work product" to shield his disability claim from the State because the claim was merely an evaluation of his *eligibility* for benefits. 137 Wn.2d at 494. An evaluation for eligibility does not meet the prepared "in anticipation of litigation" requirement of CR 26(b)(4). Id. Similarly, Rawlings was evaluating an individual's eligibility for civil commitment, rather than preparing private communications in anticipation of litigation.

Even if materials are originally prepared for private use in anticipation of litigation, work product protection may be waived by giving the material to a testifying expert or filing the material in court. Dreiling v. Jain, 151 Wn.2d 900, 918, 93 P.3d 861 (2004). Rawlings prefaced his evaluations by making clear any information communicated was not confidential. He told all individuals he

interviewed that his evaluation was not conducted for purpose of treatment, it would be relayed to the prosecution and courts, and it was not private. CP 292. Where Rawlings found a person met the criteria for commitment, his report would be filed with the court, and given to various police agencies. Because Rawlings was crafting either publicly available evaluations, or evaluations that were not prepared for litigation purposes and were not intended to be private, the State and Rawlings cannot shield prior evaluations under the work product rule.

e. Any work product claim must cede to West's substantial need for the otherwise unavailable materials. A party pierces work product protection when he has a substantial need and the information is otherwise unavailable absent unduly burdensome efforts. CR 26(b)(4); see Heidebrink v. Moriwaki, 104 Wn.2d 392, 401, 706 P.2d 212 (1985). Here, West had no ability to locate Rawlings' prior reports that were not publicly filed in court. Any evaluations not prosecuted by King County were not publicly filed. CP 287, 404. He had no way of searching for these records on his own. The trial court prohibited West from learning through Rawlings and "reports or information" about forensic evaluations that were not publicly filed, even if disclosed to attorneys or if a

petition for commitment was filed but done under seal. CP 520, 525.

The information West sought was in the exclusive possession of the opposing party, yet the trial court ruled that West could not obtain any "information" about Rawlings' underlying prior evaluations. CP 520. West was not going on a fishing expedition, but rather exploring the basis of the expert witness's self-proclaimed independence and experience that the State itself injected into the case and used at trial. Comparing the negative evaluations would yield important information about the expert's assessments of dangerousness for other sexual offenders, including the types of offenses, the number of victims involved, previous diagnoses, the age of the offenders, the amount of time they spent in prison, the individual's amenability to speaking with the evaluator. West was entitled to prepare for cross-examination of this critical witness by examining information about his claimed independence and objectivity.

The State insulated its expert from full, fair and effective cross-examination by claiming a work product privilege in materials the expert prepares at the State's request and for which the State uses as a basis to prove the expert's fairness and lack of bias. The

ruling is contrary to the constitutional right to due process of law. This error, in combination with the improper evidentiary rulings discussed below, affected the outcome of the trial and require reversal.

2. GIVING THE JURY EXTENSIVE EVIDENCE OF TREATMENT AND OFFENDER MONITORING THAT ONLY OCCURS IF WEST WAS COMMITTED, WITHOUT LETTING WEST DEBUNK THE EFFECTIVENESS OF THESE TREATMENT PROGRAMS, DENIED HIM THE RIGHT TO PRESENT A DEFENSE AND RECEIVE A FAIR TRIAL BY JURY

a. The fundamental fairness of a trial involving indefinite detention requires that the court bar inadmissible evidence and afford the detainee a full opportunity to contest the evidence against him. A "comprehensive set of rights" protect an accused person from being indefinitely committed absent due process of law. In re Detention of Stout, 159 Wn.2d 357, 370-71, 150 P.3d 86 (2007); see Foucha, 504 U.S. at 80 ; Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980); U.S. Const. amend. 14; Wash. Const, Art, I, § 3. The bedrock protections accorded a person facing lifelong commitment include the right to mount an effective defense and the right to

prohibit the jury from being influenced by irrelevant and prejudicial information.

b. Testimony regarding SCC treatment and community transition was irrelevant under *Duncan* and the Court of Appeals decision in the case at bar. The Court of Appeals found that the trial court improperly admitted evidence regarding treatment programs available at SCC in the State's case-in-chief. Slip op. at 17-18. This Court likewise found such evidence a "side issue" with only the potential for bare relevance, in *In re Detention of Duncan*, 167 Wn.2d 398, 409-10, 219 P.3d 666 (2009).

In *Duncan*, the detainee wanted to admit evidence about SCC treatment programs with the intent of contending they lacked quality. This Court denounced such evidence as only "barely relevant" and potentially pertinent only to a "side issue." *Id.* The proper focus of the civil commitment trial must be on the individual's mental health and likelihood of reoffending, not on general confinement issues. *Id.*

The Court of Appeals likewise ruled in *In re Detention of Post*, 145 Wn.App. 748, 187 P.3d 803 (2008), rev. granted, 166

Wn.2d 1003 (2009).⁶ The court in Post found that testimony about various levels of treatment and community supervision offered by SCC instilled an impression that the community and individual would be better off by the closely watched transition the State would provide for individuals after they were committed. Id. at 747. The jury would likely think a person has “a better chance” of not reoffending if transitioned into the community through the State’s system. Id. And while that sentiment may be reasonable, and very influential for a juror who does not want to place the public in any unnecessary risk, it plays no proper role in assessing whether a person meets the criteria for commitment. Id.

Additionally, RCW 71.09.060 provides that in a commitment trial, 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.” (emphasis added). Thus, this statutory language precludes the court from admitting evidence of treatment options available upon conditional release, as well as evidence about the options available if the person is committed.

⁶ This Court granted review in Post and will consider that case alongside the case at bar, although these two cases have not been formally joined.

Here, West strenuously objected to the State parading its treatment program before the jury in its case-in-chief, as it had no relevance to West's mental status or likelihood of offending and would encourage the jury to commit West for improper reasons. CP 527-44, 585-617. The treatment program was irrelevant to West's trial because he had not participated in the program in years and did not claim to have reduced his likelihood of reoffending through advanced treatment. 2/12/07RP 31, 33, 37-38. He had engaged in treatment only two times, once in 1974 under a Western State Hospital program that was an alternative to prison, and upon his initial admission into SCC in 2001. He dropped out of the SCC program in 1977 without completing treatment and with no intent to return. 2/12/07RP 38, 73. West admitted in his deposition, which was presented to the jury, as well as his trial testimony that the only therapy he envisioned needing was having someone to talk to, as a safeguard, because he did not believe the programs he had been offered or received taught valuable information. Id. at 73, 79-83.

The actual phases of treatment and the available transitional facilities for committed offenders are not relevant to whether West met the criteria for commitment and are not admissible under the

statute. Post, 145 Wn.App. at 746-47. The notion of treatment offered *upon commitment* encouraged the jury to commit West on an improper basis. Id. Evidence of treatment available to West if committed was improperly admitted. Id.

SCC Superintendent Richards' testified about the "supports and security that make treatment possible" at the total confinement center as well as the "environments" available at the "transition facilities."⁷ He spoke of the six phases of treatment and how progress is incrementally measured as an treated offender "master[s] certain skills that will reduce your recidivism risk." West objected to this testimony before and during trial, and asked the court to instruct the jury that it must focus on the criteria for commitment and not the availability of transition facilities. 1/31/07RP 166, 168. The court refused to provide the limiting instruction, and also prohibited West from questioning Richards about the inadequacy of the treatment and the State's failure to transition almost any individuals into any community-based programs. CP 640-41; 1/31/07RP 183.

⁷ Portions of Richards' testimony are set forth in Appellant's Opening Brief, p. 8-12.

Richards' improper testimony was exacerbated by the court's refusal to allow West to counter the State's claims about SCC treatment phases with evidence indicating this treatment program was ineffective, as demonstrated by the fact that the State had been under court order for failing to provide the bare minimum of constitutionally adequate treatment and that in all the years of the SCC's existence, very few actually "graduated" from this treatment. Denying West the ability to challenge the the State's claims about beneficial treatment offered denied West his right to contest the State's evidence.

This error was not harmless. "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Here, the significance of this evidence is demonstrated by the number of questions the jury asked about the phases of SCC treatment, what West would receive if not committed, and how important treatment was to recidivism. CP 777-80; CP 825-28. The evidence of available treatment options assured the jury that West would be transitioned into the community under the State's guidance if committed, and that commitment would be the best avenue for

offering him services and assistance that he would not have access to if not committed. The evidence distracted the jury from the essential elements of commitment, confused the issues, and encouraged a verdict on an improper ground without permitting West to adequately rebut the evidence against him.

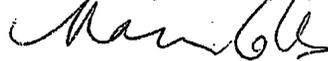
This improperly admitted evidence, taken together with the court's unreasonable and incorrect prohibition of legitimate discovery from the State's primary expert witness, significantly impaired West's ability to receive a fair trial.

D. CONCLUSION.

For the foregoing reasons, Gale West respectfully requests this Court reverse the order indefinitely committing him and order a new trial.

DATED this 8th day of February 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

FILED
KING COUNTY WASHINGTON

AUG 08 2006

SUPERIOR COURT CLERK
BY ANDREW T. HAWLIS
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.

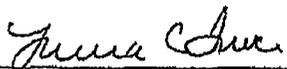
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1 In any event, the respondent has access to many other reports prepared by Dr.
2 Rawlings for filed cases. Therefore, it is hereby

3 ORDERED that the State' 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

APPENDIX B

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:

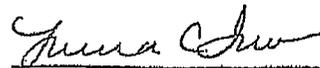
1. In the last paragraph of the order "the state" includes the End of Sentence Review Board, the Indeterminate Sentence Review Board, the Joint Forensic Unit, and the Washington State Attorney General's Office, in addition to the King County Prosecuting Attorney's Office.
2. "Publicly filed", as referenced 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.

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DONE IN OPEN COURT this 12 day of October, 2006



JUDGE LAURA C. INVEEN

APPENDIX C

C

West's Revised Code of Washington Annotated Currentness
Part IV Rules for Superior Court

▣ Superior Court Civil Rules (Cr)

▣ 5. Depositions and Discovery (Rules 26-37)

→ **RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

(a) **Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) **Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) *Insurance Agreements.* A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Structured Settlements and Awards.* In a case where a settlement or final award pro-

vides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) *Trial Preparation: Materials.* Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 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.

(C) Unless manifest injustice would result, (i) the court shall require that the party

seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(7) Discovery From Treating Health Care Providers. The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(8) Treaties or Conventions. If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Use of Discovery Materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel

for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

(j) Access to Discovery Materials Under RCW 4.24.

(1) *In General.* For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) *Motion.* The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

(3) *Decision.* The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

CREDIT(S)

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995; January 12, 2010.]

Current with amendments received through January 15, 2010.

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END OF DOCUMENT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF)

GALE WEST,)

APPELLANT.)

NO. 82568-8

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

DAVID HACKETT, DPA
KING COUNTY PROSECUTOR'S OFFICE
SVP UNIT
KING COUNTY ADMINISTRATION BLDG.
500 FOURTH AVENUE, 9TH FLR
SEATTLE, WA 98104

U.S. MAIL
 HAND DELIVERY

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF FEBRUARY, 2010.

X _____



Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711