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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

IN RE THE DETENTION OF

CALVIN TICESON¹

STATE'S RESPONSE BRIEF

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¹ Appellant Ticeson incorrectly captions this matter as State v. Ticeson

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION0

II. STATEMENT OF THE CASE0

 A. Facts0

 B. Expert Testimony 11

III. ISSUES PRESENTED FOR REVIEW 16

IV. THE JURY WAS PROPERLY INSTRUCTED ON
UNANIMITY REQUIREMENTS 16

 A. Ticeson Waived his Unanimity Objection by
 Failing to Raise It below 17

 B. Substantial Evidence Supported Both the Mental
 Abnormality and Personality Disorder Diagnoses 23

 C. There is No Requirement of Unanimity For
 Linking Each Individual Diagnosis to a Discrete
 Level of Danger 27

IV. TICESON RECEIVED A PUBLIC TRIAL 37

 A. Facts 38

 B. Ticeson Lacks Standing To Claim That The
 Public's Right To Open Administration Of Justice
 Was Violated 40

C. Even Assuming The Criminal Cases Cited By Ticeson Applied, The Informal Chamber Conference In This Case Was A Preliminary Discussion Not A Substantive Proceeding That Rose To The Level That Violated The Open Administration Of Justice 46

D. Even If The Court Finds Ticeson Has A Fundamental Right To An Open Trial In SVP Cases, The Court Closure Was De Minimis And Did Not Infringe Upon His Constitutional Rights 54

VI. CONCLUSION 57

TABLE OF AUTHORITIES

Cases

<i>Carson v. Fischer</i> , 421 F.3d 83, 92 (2d Cir. 2005)	56
<i>Carson v. Fischer</i> , 421 F.3d 83, 92 (2d Cir. 2005)	55
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.2d 861 (2004)	40, 41
<i>In re Audett</i> , 158 Wash.2d 712, 727, 147 P.3d 982, 989 (2006). .	17, 20, 45
<i>In re Det. of Keeney</i> , 141 Wash.App. 318, 327, 169 P.3d 852 (2007)	24, 31
<i>In re Detention of Campbell</i> , 139 Wn.2d 341, 986 P.2d 771 (1999)....	42
<i>In re Detention of Halgren</i> , 124 Wash.App. 206, 214, 98 P.3d 1206, 1210 (2004).....	34
<i>In re Detention of Young</i> , 163 Wash.2d 684, 689, 185 P.3d 1180, 1183 (2008).....	18
<i>In re Halgren</i> , 156 Wash.2d 795, 811, 132 P.3d 714 (2006)	passim
<i>In re Pers. Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)	53
<i>In re Personal Restraint of Lord</i> , 123 Wn.2d 296, 306, 868 P.2d 835 (1994).....	47
<i>In re Personal Restraint of Pirtle</i> , 136 Wn.2d 467, 484, 965 P.2d 593 (1998).....	48
<i>In re Pouncy</i> , 144 Wash.App. 609, 618, 184 P.3d 651 (2008)	passim
<i>In re Rights to Waters of Stranger Creek</i> , 77 Wn.2d 649, 653, 466 P.2d 508 (1970)	54
<i>In re Sease</i> , 149 Wn.App. 66, 201 P.3d 1078 (2009)	21, 22, 29, 30
<i>In re Wise</i> , 148 Wn. App.425, 200 P.3d 266 (2009)	43, 44
<i>In re Young</i> , 122 Wash.2d 1, 27, 857 P.2d 989, 1001 (1993) .	16, 22, 41
<i>Ludwig v. Dep't of Retirement Sys.</i> , 131 Wn. App. 379, 385, 127 P.3d	

781 (2006)	44
<i>Mearns v. Scharbach</i> , 103 Wn. App. 498, 511, 12 P.3d 1048 (2000) .	43
<i>Meisenheimer v. Meisenheimer</i> , 55 Wash. 32, 42-43, 104 P. 159 (1909)	50
<i>Peterson v. Dillon</i> , 27 Wash. 78, 84, 67 P. 397 (1901).....	50
<i>Peterson v. Williams</i> , 85 F.3d 39, 42 (2d Cir. 1996).....	55
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 36, 640 P.2d 716 (1982)	40
<i>Seven Gables Corp. v. MGM/IJA Entertainment Co.</i> , 106 Wn.2d 1, 6, 721 P.2d 1 (1986)	36
<i>Snyder v. Coiner</i> , 365 F.Supp. 321 (N.D.W. Va. 1973).....	56
<i>State v. Alger</i> , 31 Wash.App. 244, 249, 640 P.2d 44, <i>review denied</i> , 97 Wash.2d 1018 (1982).....	20
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995)	41
<i>State v. Bremer</i> , 98 Wn. App. 832, 835, 991 P.2d 118 (2000).....	49
<i>State v. Brightman</i> , 155 Wn.2d 506, 511, 122 P.3d 150 (2005)....	41, 53
<i>State v. Collins</i> , 50 Wn.2d 740, 314 P.2d 660 (1957).....	3, 51, 53, 54
<i>State v. Duckett</i> , 141 Wn. App. 797, 801, 173 P.3d 948 (2007)	45
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006)	45, 53
<i>State v. Easterling</i> , 157 Wn.2d 167, 174, 137 P.3d 825 (2006)	40, 41, 55
<i>State v. Fiallo-Lopez</i> , 78 Wn. App. 717, 725, 899 P.2d 1294 (1995) ..	22
<i>State v. Guloy</i> , 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), <i>cert.</i> <i>denied</i> , 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986)...	19
<i>State v. Henderson</i> , 114 Wash.2d 867, 868, 792 P.2d 514 (1990).....	19
<i>State v. Jeannotte</i> , 133 Wash.2d 847, 853, 947 P.2d 1192 (1997).....	25
<i>State v. Johnson</i> , 124 Wn.2d 57, 77, 873 P.2d 514 (1994).....	24
<i>State v. Kitchen</i> , 110 Wash.2d 403, 409, 756 P.2d 105, 108 (1988) ...	21
<i>State v. Marsh</i> , 126 Wash. 142, 145, 217 P. 705 (1923)	40, 53

<i>State v. Momah</i> , ___ Wn.2d ___, 217 P.3d 321 (2009).....	41
<i>State v. Petrich</i> , 101 Wash.2d 566, 569, 683 P.2d 173 (1984)	23, 31
<i>State v. Rivera</i> , 108 Wn. App. 645, 32 P.3d 292 (2001)	49
<i>State v. Sadler</i> , 147 Wn. App. 97, 114, 193 P.3d 1108 (2008).....	49
<i>State v. Strobe</i> , ___ Wn.2d ___, 217 P.3d 310 (2009)	41
<i>State v. Walker</i> , 13 Wn. App. 545, 536 P.2d 657 (1975).....	49
<i>State's v. Ivester</i> , 316 F.3d 955, 906 (9 th Cir. 2003)	56
<i>United States v. De Gross</i> , 960 F.2d 1433, 1437 (9 th Cir., 1992)	44
<i>Walker v. State</i> , 121 Wash.2d 214, 217, 848 P.2d 721, 723 (1993)	19
<i>Worth v. Seldin</i> , 422 U.S. 490, 499, 95 S.Ct. 2197 (1975)	43

I. INTRODUCTION

In the current appeal, Ticeson seeks to greatly expand established doctrines relating to the unanimity of juries in SVP actions, and the provision for public hearings in civil cases. He provides no compelling reason to release these doctrines from their constitutional moorings where they would then be allowed to wander toward new and haphazard applications. Because Ticeson fails to show that the trial court committed any error, his civil commitment should be affirmed.

II. STATEMENT OF THE CASE

A. Facts

At the time of trial, Ticeson was 54 years old. VRP 2/5/09, II2 at 25. For three decades, from 1973 though 1998, Ticeson committed sexual crimes against females, as young as 15 years old. All were strangers to Ticeson. Between criminal offenses, Ticeson spent less than three arrest-free years in the community. VRP 2/9/09 100-101. The jury was presented substantive and non-substantive evidence regarding his history.

Ticeson committed his first offense on June 20, 1973 while in the Army, stationed in Germany. UR Dep at 15-16, Ticeson's Dep at 153. The victim, U.R., was 22 years old. UR Dep at 14-15. At Ticeson's commitment trial, she testified via video perpetuation deposition. U.R.

² There are two transcripts dated 2/5/09. VRP 2/5/09 II references the 11 a.m.

told the jury that she was walking to work when she noticed two black men walk out of a bar. UR at 26. One of the men, later identified as Ticeson, approached her from behind, grabbed her neck, and forcibly placed his other hand on her vagina, tearing her dress at the shoulder and hem. UR dep at 16 - 19, 43. Ticeson was convicted for the crime, but the conviction was overturned for unknown reasons. Ticeson was honorably discharged from the military in 1975. Ticeson's Dep at 154-55.

In 1978, after returning home to Washington State, Ticeson sexually accosted S.M. who testified in-person at Ticeson's commitment trial. S.M. informed the jury that on October 23, 1978, she just finished working a double-shift as a waitress/hostess at a downtown Seattle restaurant. VRP 2/3/09 at 78. Her second shift ended at about 8 pm and as she was walking to the bus, she noticed a man, later identified as Ticeson, keeping pace with her. While waiting for her scheduled bus to West Seattle, a "drunk" tried to "pan-handle" money from her. Ticeson told him to "go away." VRP 2/3/09 at 79.

After a short wait, Ticeson boarded her same bus. VRP 2/3/09 at 79. During the ride, they made casual conversation. Ticeson told her he was new in town and wanted to know the sites. As S.M. proceeded off the bus, Ticeson offered to pay for her fare, which she declined. Ticeson got

transcript.

off at the same stop. As she walked home, Ticeson walked a few steps behind her and lifted the back of her dress. She asked, "what in the hell" was he doing and he replied he wanted to look up her dress and not to call the police. VRP 2/3/09 at 81-82. She told him to leave her alone, but Ticeson persisted. He pushed her to the ground and grabbed her crotch, tearing her panty hose. VRP 2/3/09 at 82-83. S.M. screamed and tried to break free. A large dog began barking, which prompted Ticeson to flee. S.M. ran home and called the police. She later identified Ticeson in a show-up that night. VRP 2/3/09 at 83. Ticeson was convicted of Indecent Liberties. Exh. 118, pg. 2.

Within a year of his release, Ticeson was investigated for a sexual assault against E.K. E.K. testified at trial via perpetuation deposition. She informed the jury that, on October 3, 1979, while walking to a school on First Hill where she taught, a man who appeared similar in description to Ticeson, approached her from behind. He grabbed her crotch, saying "Hi baby." EK deposition at 8, 10-12. E.K. hit him with her bag and he ran. EK dep at 11. E.K. eventually reported the assault to the police. EK dep at 16. The police showed E.K. a photo-montage and she identified Ticeson, along with another individual, from six photos. EK dep at 19.

Dr. Judd, the State's expert witness, testified that he relied on reports from two other incidents that occurred during the same time

frame. Ticeson reportedly followed Susan Barberg into a McDonald's and stared at her. The following day Ticeson assaulted Nona Collins on the street near the bus station. He was convicted of Menacing. VRP 2/4/09 at 54-55.

While on parole, Ticeson violated his conditions. Dr. Judd testified that he relied on records of an April 7, 1982 parole hearing in which it was reported that Ticeson assaulted C.Z. C.Z. testified at the hearing. VRP 2/9/09 at 11-112. Ticeson was on work-release, and as he was checking out, C.Z. was denied admission to the facility to visit a friend. Ticeson followed her out the door, threw her to the ground, and threatened to sexually assault her. VRP 2/9/09 111-12. VRP 2/4/09 at 33. He fled when she started kicking and screaming. VRP 2/4/09 at 33.

In 1984 and 1985, there were two incidents against his former wife, M.M. in which he allegedly physically assaulted her. Dr. Judd relied on the reports and Ticeson's deposition regarding these incidents. VRP 2/4/09 at 36 - 37.

Dr. Judd informed the jury about additional police reports in 1987 - sexual assaults against prostitutes - that he reviewed and relied upon in reaching his opinion. The assaults occurred in the Capital Hill neighborhood. The first involved an assault against L.K. According to the reports, Ticeson approached her, with an erection, and offered money for

sex. She declined and he physically assaulted her while maintaining an erection. L.K. began screaming and when others heard her screams for help, Ticeson fled. VRP 2/4/09 at 37.

Minutes after and within two blocks of the L.K. assault, he approached T.S. and made the same offer. She agreed. As they walked up a staircase, Ticeson attacked her. T.S. screamed for help and when others came to help her, Ticeson fled. VRP 2/4/09 at 35, 38.

Ticeson's next documented crime in which substantive evidence was presented to the jury occurred on the evening of May 15, 1988. P.R., 15 years-old at the time of the crime, testified by deposition. P.R. was on her way to spend the night with a friend. Ticeson noticed her near a phone booth and asked if she needed a ride somewhere. He told her he just drove in from Texas, his name was Bruce, and that he was heading in her direction. PR Dep 18-19,VRP 21-22.

On the way, they talked and P.R. told him she was a run-away. At that point, Ticeson's tone changed. PR dep at 28. He told her to get in the back. P.R. froze and thought about jumping out of the car, but Ticeson had his hand on her. He demanded that she get in the back or he would break her neck. PR dep at 23. Ticeson ordered her to take off her clothes, then pulled over and vaginally raped her. PR Dep at 30-31. After raping

her, he told her to perform fellatio, saying that it was like eating popsicle.

PR dep at 31.

He then drove around while she remained terrified in the backseat. He stopped for liquor at a Hogie's Corner, but she did not escape out of fear. PR Dep 38-43. She testified that at 15 years old, she was young and naive and believed Ticeson when he told her that if she reported anything to the police that she would be in trouble too. PR Dep at 34. He stopped for more liquor near Beacon Hill then took P.R. to an area where he vaginally raped her again. She recalled Ticeson driving around the city and driving to a neighborhood where she could see Lake Washington. PR Dep 48-51.

Eventually, he returned to West Seattle where his car stalled close to her home. He walked her home and told her not tell anyone, and if she did, they were both going to prison. PR at 53. P.R. informed her foster parents of the rape. A K-9 unit arrived at the scene and located Ticeson's car, which contained belongings of P.R.. PR dep at 62.

Two weeks later, on May 30, 1988, Ticeson was arrested for the rape of V.R. The arresting officer, Sammy Derezes, testified at Ticeson's trial. He told the jury that on that date around midnight, he was working as a Seattle patrol officer in the East Precinct. He was on Broadway Avenue when a black female, V.R., waived him down and told him she

had just been raped. VRP 2/2/09 at 22-23. V.R. was very shaken and scared. VRP 2/2/09 at 24. Robinson told Officer Derezes that she had been working as a prostitute around the 700 block of Pike Street that evening when a man, later identified as Ticeson, picked her up. They drove around and ended up on a windy road near a park where he raped her. VRP 2/2/09 at 24-25.

V.R. said that Ticeson grabbed her by the throat and told her she was going to die. VRP 2/2/09 at 25. Ticeson took V.R.'s black panties and said he planned to keep them. VRP 25. V.R. escaped after Ticeson fell asleep in the car. With V.R.'s help, Officer Derezes was able to locate Ticeson's car near Volunteer Park. VRP 2/2/09 at 26. Still shaken, V.R. slunk down in her seat when she saw Ticeson's car. Officer Derezes approached the car and saw Ticeson passed out in the driver's seat with his pants down to his thighs and his penis exposed. Ticeson was arrested after Robinson identified him and Robinson also identified her black underwear recovered between the driver's seat and the door of Ticeson's car. VRP 2/2/09 at VRP 26-28.

Ticeson was charged with two counts of Rape in the Second Degree for the crimes against P.R and V.R. Pursuant to a plea agreement, Ticeson pled guilty for the rape of V.R. and the count against P.R. was dismissed. Ticeson was sentenced to serve 31 months. Exh. 120.

Within a year of Ticeson's release, he assaulted T.H. T.H.'s deposition testimony was presented to the jury. On March 27, 1991, T.H. was on the #48 bus going home when Ticeson boarded. TH dep at 54, 14-15. Ticeson sat directly across her, staring at her. T.H. was wearing a dress and Ticeson's demeanor led her to cover herself with a long coat she was also wearing. When T.H. got off the bus, Ticeson followed her. T.H. was nervous and started running. Ticeson chased her. Thinking that he may be after her purse, T.H. dropped both her purse and her long coat and kept running. TH dep at 14-15. Ticeson jumped on T.H.'s back "like a cat, like a lion with an elk, like in Africa." TH dep at 16. T.H. hit the concrete ground hard, scratching her knees and forearms and breaking her acrylic fingernails. TH dep at 41. Ticeson flipped her on her back, grabbed her arms, and said, "if you don't scream, I won't do anything to you." TH dep at 17. T.H. was "petrified." TH dep at 17. In T.H.'s deposition testimony, she recalled Ticeson grinding on her pelvis. TH dep at 26. The grinding was short-lived as a man came "out of nowhere" and fought Ticeson off her. TH dep 21-22.

T.H. ran to her friend's home and the police arrived. T.H. returned to the scene and noticed that the police had arrested the wrong man. Ticeson approached T.H. and told her not to say anything. Feeling safe with her friend by her side, she told the police that Ticeson was the person

who assaulted her. Ticeson was arrested. TH dep at 21-22. He was convicted of Assault in the Second Degree and sentenced to serve 20 months. 3 Exh. 118.

In 1995, Ticeson was convicted of Failure to Report as a Sex Offender. Within 10 days of his release, Ticeson was arrested for another sexual assault. VRP 2/4/09 at 59. Dr. Judd relied upon the Judgment and Sentence and police reports. The victim, Y.J., was not available for testimony. Dr. Judd testified that, based on the reports, Y.J. was a prostitute. Ticeson picked her up and she became suspicious of him due to his behavior. When she tried to get out of his car, he dragged her back in and choked her to unconsciousness. He raped her multiple times during the course of the evening and throughout the morning. VRP 2/4/09 at 41. He was sentenced to serve 16 months for Unlawful Imprisonment. Exh. 117.

On April 4, 1998., Ticeson approached D.A. in Pioneer Square. D.A. was a drug addict and alcoholic, who at times prostituted herself for a fix. That evening she had a fight with her husband. VRP 2/3/09 at 22-24. She was down and out. VRP 2/3/09 at 21-24. Ticeson approached and offered her some money. She accepted. As they walked to his car, he offered her a place to stay. He told her that sometimes he offered people

3 Ticeson was also convicted of Assault in the Fourth Degree for assaulting the

shelter and said could sleep on his sofa. D.A. believed that Ticeson was a nice person merely offering her assistance. VRP 2/3/09 at 25. D.A. agreed and got into Ticeson's van. He told her to sit in back because he had some boxes in the front passenger seat. As they were driving and Ticeson was clearing the front seat of clutter, she noticed that the police were following them. Ticeson seemed a bit nervous, became silent, and D.A. started questioning her decision to get in his car. VRP 2/3/09 at 27.

Ticeson turned into the Denny Blaine neighborhood near Lake Washington. She noticed it was an "upper class" neighborhood and was relieved that she wouldn't be sleeping in a dump. VRP 2/3/09 at 27. When he parked, she asked him if this is where he lived. He said "no" and "red flags" went up. She knew she "was in trouble." VRP 2/3/09 at 28. It was dark and she did not see lights on in the homes. VRP 2/3/09 at 28. Ticeson turned toward her and placed a gun between the seats. He calmly told her to shut-up and do what I say or "you will end up like all the rest." VRP 2/3/09 at 28. She took off her pants as he ordered and forced her to perform fellatio. He told her that she better satisfy him. Her life flashed before her. VRP 2/3/09 at 29.

As Ticeson slammed her head against the car attempting to vaginally rape her, D.A. observed two woman (appearing to be a mother

man who came to T.H's aid.

and daughter) outside of the van. One woman peered in the window. D.A. was kicking and the van was shaking. She didn't think that Ticeson saw the woman as he kept trying to penetrate her. VRP 2/3/09 at 29.

On the outside, Emily Coe and a friend were walking her dog. They had noticed the van shaking and peered through a window for a closer look. She saw Ticeson on top of D.A. and heard Ticeson threaten, "shut-up bitch or I will kill you." They ran and called the police, who were at the scene within a few minutes. VRP 2/3/09 at 9-11.

When the police arrived, D.A. testified that Ticeson threw the gun out the window and pushed her out the door. She fell to the ground, naked from the waist down. The police ordered Ticeson out of the car. Ticeson tried to pull away, dragging a police officer who was holding on to the driver's door. The police were able to stop the car and arrested Ticeson after a brief struggle. VRP 2/3/09 at 62-63.

Several pair of women's' underwear were located in Ticeson's van. No gun was recovered, but the officer did not know at the time Ticeson had allegedly thrown one out the window. He testified it was dark and things were happening quickly. He could have easily missed seeing something tossed from the car. VRP 2/3/09 at 68, 70-71. Ticeson pled guilty to the crimes of Unlawful Imprisonment and Felony Harassment. He was sentenced to served 60 and 29 months, respectively. Exh. 116.

Throughout the years, Ticeson was also convicted of several misdemeanor crimes, such as Promoting Prostitution, Assault (against his former wife, Marsha Mason), Menacing, Theft, and Driving While Under the Influence, as well as other driving offenses. VRP 2/4/09 at 54-55.

B. Expert Testimony

Dr. Judd relied upon the above evidence in reaching his opinion that Ticeson suffered from multiple mental abnormalities and personality disorders. VRP 2/4/09 VRP 21, 52. Dr. Judd's primary diagnosis for Ticeson was paraphilia, not otherwise specified, non-consent. Id. He also diagnosed Ticeson with alcohol dependence, in remission in a controlled environment; personality disorder not otherwise specified, with antisocial features; and borderline intellectual functioning. VRP 2/4/09 21-22. As a result of his mental condition, Dr. Judd also opined that Ticeson had serious difficulty controlling his behavior based largely on the fact that Ticeson continued to commit assaults despite repetitive incarcerations - he repeatedly assaulted during periods when he was either on supervision or as short as ten days in the community upon release. VRP 2/4/09 59.

Dr. Judd based his paraphilia diagnosis on the multiple instances where Ticeson used physical force, threats and abduction to gain compliance. VRP 2/4/09 46. Dr. Judd outlined instances where Ticeson's fantasies and urges consisted of arousal to non-consensual sex. VRP

2/4/09 48-51. During all but one assault, Ticeson was in a consensual relationship yet pursued non-consensual sex. VRP 2/4/09 49. Multiple instances involved prostitutes where consensual sex was available yet rejected for non-consensual sex. VRP 2/4/09 49-50. And, Ticeson sustained arousal during the incidents despite the fact that the victims were clearly non-consenting and being physically assaulted. VRP 2/4/09 49.

Dr. Judd also testified that Ticeson suffered from a personality disorder not otherwise specified. VRP 2/4/09 53-54. Evidence included: (1) Failure to conform to social norms with respect to lawful behavior. Dr. Judd relied upon Ticeson's lengthy criminal history of sexual assaults and nonsexual crimes (failure to register as a sex offender, promoting prostitution, assault, theft, and multiple offenses for DUI and DWLS) dating back to 1973. VRP 2/4/09 54-55; (2) Deceitfulness. In three sexual assaults, Ticeson lied about his identity. VRP 2/4/09 56-57. In addition, he repeatedly lied about various assaults by giving several different stories about the same incidents. Id; (3) Impulsivity. The sexually assaultive behavior was very impulsive. Id; (4) Irritability and aggressiveness. Dr. Judd relied upon Ticeson's assaultive behavior including the attributes of the various sexual assaults. VRP 2/4/09 57; (5) Consistent irresponsibility. Ticeson had frequent jobs, frequent problems at work, multiple violations of parole and probation, failed to pay legal

financial obligations, and failed to follow treatment recommendations. Id;
(6)⁴ Reckless disregard for the safety of self or others. Dr Judd relied upon the attributes of Ticeson's assaults including his sexual assaults and domestic violence assaults. VRP 2/4/09 57-58; (7) Lack of remorse. Dr. Judd testified that Ticeson has consistently denied he perpetrated the assaults and has been falsely accused. VRP 2/4/09 58.

Dr. Judd testified that Ticeson's alcohol dependence diagnosis would reduce the barriers that would interfere with acting out on the paraphilia. VRP 2/5/09 70. Dr. Judd testified that Ticeson's borderline intellectual functioning would place limitations on an his ability to benefit from treatment. VRP 2/5/09 76.

In addressing Ticeson's risk to reoffend in a sexually violent manner, Dr. Judd explained the results of two standard actuarial instruments.⁵ VRP 2/4/09 68. Dr. Judd testified that he used these two instruments,

... because research again has indicated that there are multiple approaches or multiple ways, doorways, if you will, to re-offending, and sexually re-offending. One of them is antisocial behavior. The second is deviant sexual interest.

The two instruments that I use, one of the instruments' weighs more heavily on what would be regarded as deviant sexual interest, or persistent paraphilic interest. The other one weighs more heavily upon antisocial personality, antisocial behavior.

⁴ The record appears to mistakenly repeat number 5.

⁵ Static 99 and SORAG (Sex Offender Risks Appraisal Guide) VRP 2/4/09 70, 83.

And because of that I feel these two instruments give a fairly good approximation in terms of the individual's level of risk. VRP 2/4/09 69-70.

So, the reason I utilize and have utilized these two instruments is because they provide coverage, if you will, of the major factors which are associated with sexual recidivism." VRP 2/5/09 21.

The Static 99 measures reconviction for a sexual offense and has been cross validated⁶ many times. VRP 2/4/09 19-20. The SORAG measures individual's charged with a new offense including a sexually violent offense and the instrument has also been cross validated many times. VRP 2/4/09 84.

Offenders who score like Ticeson on the Static 99 original sample have a reconviction rate of 33% at five years, 52% at ten years and 57% at fifteen years. Individuals in the re-standardized Static 99 sample have reconviction rates of 38% at five years and 49% at ten years. VRP 2/4/09 81. Offenders who scored like Ticeson on the SORAG, which weighs more heavily on personality disorder characteristics, have a recidivism rate of 58% at seven years and 80% at ten years. VRP 2/4/09 89-90.

Examples of some of the antisocial criteria on the SORAG include, early childhood maladjustment, alcohol use, marital status, all criminal history, supervision compliance, personality disorder, age at most recent offense

⁶ Cross validation means the instrument was applied to independent populations to ensure that it remained predictive. VRP 2/4/09 71

and an individual's score on the Hare Psychopathy Checklist (PCL-R).

VRP 2/4/09 85.

The PCL-R alone is related to sexual re-offending. Studies have shown that individuals who score high on the PCL-R are at higher risk for sexual re-offending. VRP 2/4/09 89. Ticeson scored higher than 75% of North American male offenders. VRP 2/4/09 88. Examples of some of the antisocial items contained in the PCL-R include impulsivity, boredom, lack of empathy, lack of remorse, unwilling to accept responsibility, violation of conditional release, acting irresponsible and acting without regard to the welfare of others. VRP 2/4/09 86-87.

It was Dr. Judd's ultimate opinion that Ticeson was more likely than not to commit further predator acts of sexual violence if not confined in a secure facility and he held that opinion to a reasonable degree of psychological certainty. VRP 2/4/09 95-96. Ticeson's history indicated that he had little ability to control his sexually violent behavior. Dr. Judd testified there were clear indications that he had serious difficulty controlling his behavior based on the repeated assaults either on supervision or as short as tens days in the community upon release. VRP 2/4/09 59. Dr. Judd also concluded that the intensity of Ticeson's urges support difficulty with control by the fact that immediately following the interruption of an attempted rape he sought out another victim to rape

within minutes. VRP 2/5/09 35. Based on a mental condition comprised of a strong paraphilia, personality disorder, alcohol dependence and borderline intellectual functioning, he was more likely than not to continue offending in a sexually violent manner.

III. ISSUES PRESENTED FOR REVIEW

A. Does the alternative means unanimity doctrine apply to the dangerousness element of an SVP civil commitment action when the statute provides for proof by alternative means only on the mental condition element?

B. In a civil case, may a trial court hold an informal chambers conference when all substantive matters are repeated on the record when court re-convenes?

IV. THE JURY WAS PROPERLY INSTRUCTED ON UNANIMITY REQUIREMENTS

Under the Constitution, the state may exercise its civil commitment power based upon a showing of mental illness and dangerousness. *In re Young*, 122 Wash.2d 1, 27, 857 P.2d 989, 1001 (1993). The sexually violent predator civil commitment law satisfies this requirement through the following elements:

- (1) That the respondent had been convicted of or charged with a crime of sexual violence; and
- (2) That the respondent suffers from a mental abnormality or personality disorder; and

(3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility.

In re Audett, 158 Wash.2d 712, 727, 147 P.3d 982, 989 (2006). Element one is frequently referred to as the "predicate offense," element two requires proof of the person's "mental condition," and element three addresses "dangerousness."

The statute allows for two alternative methods of proving the mental condition element, either through a "mental abnormality" or a "personality disorder." *See* RCW 71.09.020. This case raises the question of whether the alternative means unanimity doctrine is limited to the mental condition element, or whether it should be extended to the dangerousness element. Because Ticeson has failed to present a compelling argument for extending alternative means unanimity requirements to the third element of dangerousness, the trial court should be affirmed.

A. **Ticeson Waived his Unanimity Objection by Failing to Raise It below**

In proceedings below, Ticeson accepted the jury instructions. Contrary to his position on appeal, he made no request for a unanimity instruction below. CP 357-58. Quite to the contrary, Ticeson's proposed instruction below recognized that serious difficulty to control behavior

could flow from "either" the mental abnormality" or "personality disorder." CP 358. His final "to commit" instruction reads: "That Calvin Ticeson suffers from a mental abnormality, namely: Paraphilia Not Otherwise Specified, Non-Consent; and/or a personality disorder, Not Otherwise Specified; *either of which causes Mr. Ticeson serious difficulty controlling his sexually violent behavior.* CP 358 (emphasis added). Because Ticeson failed to preserve error below, and actually participated in the "error" he now claims, this court should refuse to consider Ticeson's claim on appeal that the jury should have been instructed to expressly find unanimity on the means of proving Ticeson's mental condition.

First, the rules applicable to civil cases preclude a party from challenging a jury instruction for the first time on appeal. It is well established that RCW 71.09 proceedings are civil in nature and subject to the rules of civil procedure. *In re Detention of Young*, 163 Wash.2d 684, 689, 185 P.3d 1180, 1183 (2008). Because this is a civil case, a claim of instructional error cannot be raised for the first time on appeal:

CR 51(f) requires the party objecting to an instruction to "state distinctly the matter to which he objects and the grounds of his objection, ..." The purpose of this rule is "to clarify ... the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction." *Stewart v. State*, 92 Wash.2d 285, 298, 597 P.2d 101 (1979). "The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Crossen v. Skagit Cy.*, 100 Wash.2d 355, 358, 669 P.2d 1244 (1983). If an exception is inadequate to apprise the judge of certain points of

law, " 'those points will not be considered on appeal.' " *Crossen* at 359, 669 P.2d 1244 (quoting *Stewart*, 92 Wash.2d at 298, 597 P.2d 101).

Walker v. State, 121 Wash.2d 214, 217, 848 P.2d 721, 723 (1993).

Because Ticeson failed to lodge any objection to the instructions, much less a specific one, it would be error on appeal to consider his claim that the jury should have been instructed on unanimity. *Id.* ("This court therefore will not consider Ms. Walker's contention that instruction 18 misstated the law, nor should the Court of Appeals have done so.").

A second independent means for refusing to address Ticeson's new claim of instructional error is found in RAP 2.5 (a). This rule of appellate procedure provides that "the appellate court may refuse to review any claim of error not raised in the trial court." The basic policy behind this rule is simple: a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.

State v. Guloy, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986).

Finally, the court should refuse to review this issue under the invited error doctrine. When a defendant has failed to request the alleged missing instruction or proposed the instruction he now claims to be defective, the doctrine of invited error precludes review. *State v. Henderson*, 114 Wash.2d 867, 868, 792 P.2d 514 (1990). The invited error

doctrine applies even where an alleged error is of constitutional magnitude. *Henderson*, 114 Wash.2d at 871, 792 P.2d 514 (quoting *State v. Alger*, 31 Wash.App. 244, 249, 640 P.2d 44, *review denied*, 97 Wash.2d 1018 (1982)). Here, Ticeson effectively invited his claimed error by submitting jury instructions and agreeing to other jury instructions that did not include the unanimity requirement that he now claims on appeal. He cannot invite the error below and then complain of it on appeal.

The Washington Supreme Court has applied preservation of error doctrine to sexually violent predator cases because, among other reasons:

[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

In re the Detention of Audett, 158 Wash.2d 712, 725, 147 P.3d 982 (2006) (citing 2A Karl B. Teglund, *Washington Practice: Rules Practice RAP 2.5(1)*, at 192 (6th ed. 2004)). In the current case, if Ticeson had pressed his unanimity claims below, the jury could have been instructed on this point, or the State could have made an election. Allowing Ticeson to proceed on this issue would not only violate CR 51(f) and RAP 2.5, it would also encourage litigants to sandbag their opponents. This is especially true in sexually violent predator cases where very few SVP respondent's prevail at trial due to the overwhelming strength of the State's

case and the limited "worst of the worst" pool subject to civil commitment under this law.

It is anticipated that Ticeson will cite the Division II opinion in *In re Sease*, 149 Wn.App. 66, 201 P.3d 1078 (2009) for the proposition that the failure to give a unanimity instruction may be raised for the first time on appeal because it is potentially an error of constitutional magnitude. Division One should decline to follow *Sease* for several reasons.

First, the *Sease* opinion does not consider CR 51(f) and the rule from *Walker* that precludes consideration of a claimed instructional error for the first time on appeal in a civil case. Unlike a criminal case, the trial below was subject to CR 51(f), which placed an affirmative duty on Ticeson to argue any claimed instructional error before the trial court. Under *Walker*, he cannot press his claim now, having failed to do so before the trial court.

Second, the *Sease* opinion also fails to consider or appreciate the *source* of an SVP respondent's right to unanimity. In a criminal case, a defendant has a *constitutional right* to a unanimous verdict under both the Washington and federal constitutions. *State v. Kitchen*, 110 Wash.2d 403, 409, 756 P.2d 105, 108 (1988). As a result, in accord with the *criminal* cases cited by *Sease*, it is not surprising that criminal defendants have been allowed to raise the lack of unanimity for the first time on appeal because

it is a potential violation of their *constitutional* right to unanimity. *See Sease*, 149 Wn.App. at 74-75 (citing only *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995) for the proposition that an SVP may raise an instructional error based on unanimity for the first time on appeal). Because the constitutional right to unanimity found in criminal cases does not apply to civil commitment actions, the *Sease* opinion was too quick to declare without any real analysis that the lack of a unanimity instruction in an SVP action also raises a potential error of constitutional magnitude.

The *Sease* decision errs in failing to recognize that an SVP's right to unanimity arises from *statute*, not from any constitutional provision. As a result, unlike a criminal case, the failure to instruct a jury on unanimity is a statutory error, nor an error of constitutional magnitude necessary for review under RAP 2.5(a)(3).

Based solely on its interpretation of RCW 71.09, the Washington Supreme Court determined in *In re Young*, 122 Wash.2d 1, 47-48, 857 P.2d 989, 1012 (1993) determined that unanimous verdicts were required by statute. The court explained:

Petitioners claim that the Statute provides an inadequate burden of proof by failing to require a unanimous verdict. The Statute is silent on the issue, but we believe that it must be construed to afford an individual the right to a unanimous 12-person verdict.

Our primary goal in interpreting statutes is to carry out the intent of the Legislature. *Anderson v. O'Brien*, 84 Wash.2d 64, 67, 524 P.2d 390 (1974). The sexually violent predator Statute requires the State to prove

beyond a reasonable doubt that the person is a sexually violent predator. RCW 71.09.060(1). The Legislature's use of the "beyond a reasonable doubt" standard suggests an acute awareness of the need for heightened procedural protections in these proceedings. Moreover, in Washington, the beyond a reasonable doubt standard generally requires a unanimous verdict. *See State v. Petrich*, 101 Wash.2d 566, 569, 683 P.2d 173 (1984). *Considering the context normally associated with this high burden of proof, State v. Elgin*, 118 Wash.2d 551, 556, 825 P.2d 314 (1992), we find that the Legislature included the need for a unanimous verdict when it required "proof beyond a reasonable doubt" in the statutory scheme.

122 Wn.2d at 47-48.

At most, if the trial court erred below (without any notice or complaint from Ticeson), it violated a *statutory* unanimity provision, not a constitutional one. The extraordinary relief recognized in RAP 2.5(a)(3) is limited to violations of a constitutional magnitude and cannot be expanded under the terms of the rule.⁷ Because there was no error of a constitutional magnitude in failing to instruct the jury on unanimity, and Ticeson failed to raise his new appellate arguments before the trial court, this court should decline to review Ticeson's claim of error.

B. Substantial Evidence Supported Both the Mental Abnormality and Personality Disorder Diagnoses

⁷ It is fair to ponder whether the case law already offers an overly expansive reading of RAP 2.5(a)(3). Even the ability to raise any error of "constitutional magnitude," when broadly construed, removes the incentive to correct errors at the trial court before they become errors. Certainly, this court should not expand RAP 2.5(a)(3) to cover statutory errors because this would further subvert the trial court's ability to correct error in response to a contemporaneous objection.

Under RCW 71.09.060(1), a jury verdict in a sexually violent predator civil commitment case must be unanimous. *In re Det. of Keeney*, 141 Wash.App. 318, 327, 169 P.3d 852 (2007). Proof that a respondent in an SVP proceeding suffers from a “mental abnormality” and proof that such a respondent suffers from a “personality disorder” constitute statutory alternative means of establishing the mental condition element. *In re Halgren*, 156 Wash.2d 795, 811, 132 P.3d 714 (2006). See RCW 71.09.020(16). As noted in the *Pouncy* decision:

Proof that a respondent in an SVP proceeding suffers from a “mental abnormality” or proof that such a respondent suffers from a “personality disorder” constitute the two distinct means of establishing the mental illness element of the SVP determination. *Halgren*, 156 Wash.2d at 811, 132 P.3d 714. “Mental abnormality” and “personality disorder” are the two factual alternatives set forth in the relevant statute. *Halgren*, 156 Wash.2d at 811, 132 P.3d 714. See RCW 71.09.020(16).

In re Pouncy, 144 Wash.App. 609, 618, 184 P.3d 651 (2008).

In the current case, the jury was instructed that it was required to determine the existence of a mental abnormality or personality disorder by beyond a reasonable doubt and that its verdict must be unanimous on this point. CP 338; 355-56. The jury is presumed to follow the instructions that are given to it. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994)

Ticeson's claim that a further instruction on unanimity was required beyond the one actually given by the trial court was rejected by *In*

re Pouncy, 144 Wn. App. 609, 184 P.3d 651 (2008). In *Pouncy*, the trial court gave a pattern instruction nearly identical to the one given in the current case. Rejecting the same argument raised by Ticeson, this court held that:

Here, the jury was properly instructed that it must unanimously agree as to whether either of the two alternative means, mental abnormality or personality disorder, were proved beyond a reasonable doubt. No further instruction as to unanimity was required.

144 Wash.App. at 619. The *Pouncy* decision thus resolves Ticeson's appeal on this point.

Even if the instruction were inadequate, substantial evidence supported each alternative means of proving Ticeson's mental condition. As *Pouncy* points out, "[w]here a rational trier of fact could have found beyond a reasonable doubt that Pouncy suffered from both a mental abnormality and a personality disorder, Pouncy's constitutional right to jury unanimity was not violated." 144 Wn.App. at 620. In *Halgren*, the Supreme Court underscored "could" for emphasis. 156 Wn.2d at 811. In reviewing a record for substantial evidence, this court will not second guess the credibility determinations of the jury. *E.g.*, *State v. Jeannotte*, 133 Wash.2d 847, 853, 947 P.2d 1192 (1997).

The question here is merely whether substantial evidence supports the diagnoses underlying the mental abnormality and personality disorder

alternative means. The *Pouncy* decision rejected Mr. Pouncy's unanimity claims because "substantial evidence was presented to support a jury finding that he suffered from both paraphilia NOS nonconsent and anti-social personality disorder." 144 Wn.App. at 620. Indeed, Pouncy conceded this point. *Id.*

Likewise, in the current case, Ticeson acknowledges sufficient evidence in support of nearly the same diagnoses by Dr. Judd. He admits that Dr. Judd testified that Ticeson suffers from the mental abnormality of paraphilia not otherwise specified (nonconsent). Opening Brf. at 5. He concedes that sufficient evidence supported the paraphilia NOS (nonconsent) diagnosis regardless of the disagreement of the defense expert. *See Id.* at 19-20. Although the defense expert disagreed with this diagnosis, the jury was entitled to give more weight to the State's expert. *Halgren*, 156 Wash.2d 7at 811-12. He further acknowledges that "Dr. Judd testified in depth about his diagnosis of personality disorder NOS." *Id.* at 20. He admits that his own expert "agreed with Judd's diagnosis." *Id.* at 11.

Under *Pouncy*, the current evidence supporting each diagnosis was sufficient to withstand any unanimity challenge. 144 Wn.App. at 620. Because *Pouncy* is controlling authority, Ticeson's claims should be rejected and the trial court affirmed on this issue.

C. **There is No Requirement of Unanimity For Linking Each Individual Diagnosis to a Discrete Level of Danger**

With his basic claim barred by the *Pouncy* decision, Ticeson attempts to create a new unanimity doctrine where the jury must also be unanimous as to which diagnosis -- mental abnormality or personality disorder -- supports both serious difficulty controlling behavior and a more likely than not level of reoffense. In essence, Ticeson argues that the alternative means unanimity doctrine should spill over from the mental condition element into the dangerousness element. This argument is contrary to the statute, case law, and would substantially thwart the purposes of the sexually violent predator civil commitment statute.

Ticeson's argument is not supported by the language of the dangerousness prong of the SVP statute. Whereas the mental condition prong is satisfied by either a diagnosis of a mental abnormality or a personality disorder, the statute sets up only one means for proving dangerousness -- more likely than not to commit predatory acts of sexual violence. RCW 71.09.020.

Ticeson claims that the jury must be unanimous in parsing out the specific mental abnormality or personality disorder that causes serious difficulty controlling behavior such that the person is more likely than not to reoffend. In essence, Ticeson claims that the jury not only needs to be unanimous as to the diagnosis that supports the mental condition prong,

but also unanimous in identifying the specific diagnosis that independently causes Ticeson's danger to exceed the 50% level. The statute, however, imposes no such requirement to trace Ticeson's dangerousness to a specific diagnosis. Rather, the dangerousness and serious difficulty controlling behavior need only flow from Ticeson's overall mental condition, when his mental condition has already been proven with the alternative means of a mental abnormality of personality disorder.

Under RCW 71.09.020, a sexually violent predator is a person who suffers from "a mental abnormality or personality disorder *which*" makes the person more likely than not to reoffend. (Emphasis added). Contrary to Ticeson's position, the use of "which" in this context does not operate to separate "mental abnormality" and "personality disorder" into alternative means for proving dangerousness. Instead, the use of "which" refers to Ticeson's mental condition as proven by *either* a mental abnormality and/or a personality disorder. The Meriam-Webster on-line dictionary points out that "which" is "used as a function word to introduce a nonrestrictive relative clause and to modify a noun in that clause and to refer together with that noun *to a word or word group in a preceding clause or to an entire preceding clause or sentence or longer unit of discourse.*" <http://www.merriam-webster.com/dictionary/which>

(*Emphasis added*). Thus, a mental abnormality or personality disorder which makes Ticeson more likely than not to reoffend refers to the entire "word group" in the proceeding clause, not an individual mental abnormality or personality disorder.

The limitation of the alternative means unanimity doctrine to the mental condition element of an SVP proceeding is apparent in the case law. As noted above, the *Pouncy* decision focuses on substantial evidence of the mental abnormality or personality disorder diagnosis. In finding substantial evidence that satisfied the unanimity requirement, *Pouncy* did not require additional evidence linking each diagnosis with dangerousness and serious difficulty controlling behavior. The alternative means inquiry was limited to evidence of the diagnosis itself in accord with the limited focus of the mental condition element.

Similarly, in *Sease*, this court made it clear that the sole alternative means issue is limited to the mental condition element -- whether the SVP respondent suffers from a mental abnormality or personality disorder. In discussing *Halgren*, the *Sease* decision limits the alternative means unanimity question to the existence of a mental abnormality or personality disorder:

The Washington Supreme Court has held that the alternative means test applies to SVP proceedings. *Halgren*, 156 Wash.2d at 810, 132 P.3d 714. In *Halgren*, the State's evidence showed that Halgren suffered from one mental abnormality and

one personality disorder. 156 Wash.2d at 800, 132 P.3d 714. Halgren argued that the unanimity rules required that the jury determine unanimously whether it was Halgren's mental abnormality or his personality disorder that caused him to be an SVP. *Halgren*, 156 Wash.2d at 807, 132 P.3d 714. The court held that the SVP statute allowed for two alternative means-either mental abnormality or personality disorder. ^{FN12} *Halgren*, 156 Wash.2d at 811, 132 P.3d 714. But the court determined that the evidence was sufficient to prove both alternative means beyond a reasonable doubt and it, therefore, held that "the trial court did not violate Halgren's constitutional right to unanimity by failing to instruct the jury that it must reach unanimous agreement as to which condition satisfied RCW 71.09.020(16)." *Halgren*, 156 Wash.2d at 812, 132 P.3d 714. *Halgren* makes it clear that the actual diagnosed mental abnormalities or personality disorders are not the alternative means which the State must prove beyond a reasonable doubt; it is whether the person suffers from a mental abnormality or a personality disorder.

Sease, 149 Wash.App. 76-77.

Consistent with the State's analysis, nothing in *Sease* or *Halgren* extends the alternative means unanimity analysis to the danger prong of an SVP civil commitment. There is no requirement -- statutory or otherwise -- to parse and allocate Ticeson's danger or his difficulty in controlling that danger between his mental abnormality or personality disorder. Indeed, the "two alternatives" in the SVP statute are purposed "for satisfying the State's burden of establishing a mental condition." *Sease*, 149 Wn.2d at 78. With the mental illness question satisfied by either a mental abnormality, personality disorder or both, the danger question focuses on whether Ticeson's overall "mental condition" causes him serious difficulty

controlling his behavior such that "he is likely to engage in predatory acts of sexual violence if not confined in a secure facility." *Id.*

Ticeson's efforts to extend an alternative means unanimity requirement to the danger prong of an SVP action also conflicts with this court's decision in *In re Detention of Keeney*, 141 Wash.App. 318, 327-328, 169 P.3d 852, 857 (2007). In *Keeney*, the SVP respondent claimed that a jury needed to be unanimous as to the period of time when he was likely to reoffend. This court rejected his arguments because "likely to engage in predatory acts of sexual violence" -- the danger element -- "does not create alternative means of committing an offense that could threaten jury unanimity." *Id.*

Ticeson merely presents a variation on an argument already rejected by *Keeney*. The statute creates no alternative means to prove risk; it simply defines risk. This risk flows from the person's overall mental condition and is not properly analyzed by looking at constituent parts related to a discrete period of time or a discrete type of diagnosis.

A careful reading of *Halgren* itself counsels that Ticeson is expanding the alternative means unanimity requirement beyond what the Supreme Court recognized as necessary or appropriate. In *Halgren*, the defense argued that "a *Petrich* instruction was necessary in his case because "[t]he unanimity requirement in the [SVP] statute means the jury

must unanimously agree as to whether the person being committed had a mental abnormality or personality disorder, at a minimum.'" *Halgren*, 156 Wash.2d at 808. In determining to apply unanimity requirements to an SVP action, the *Halgren* majority pointed out that a jury was being "asked to find the existence of some fact" determining the SVP respondent's "mental status." *Id.* at 809.

The *Halgren* decision was thus limited to addressing unanimity requirements with regard to the *mental condition element* of an SVP action, not the *dangerousness* element. By statute, unanimity was required because the SVP respondent's mental condition could be proven either by means of a mental abnormality or personality disorder. Contrary to Ticeson's current argument, *Halgren* nowhere addressed, or extended this requirement to the dangerousness element of an SVP action. It imposes no requirement that a more likely than not level of dangerousness must be proven independently and unanimously with regard to a mental abnormality or personality disorder diagnosis.

The State's reading of *Halgren*, which limits the alternative means unanimity requirement to the mental condition element of civil commitment, is confirmed by the *Halgren* majority's substantial evidence inquiry. In determining that substantial evidence existed to support either a mental abnormality or personality disorder, the court was concerned

exclusively with the evidence supporting the diagnosis of paraphilia or personality disorder:

¶ 34 The evidence presented by the State was sufficient for a reasonable jury to conclude that Halgren had both a mental abnormality and a personality disorder beyond a reasonable doubt. The jury heard extensive testimony from Dr. Wheeler regarding his belief that Halgren had the mental abnormality known as paraphilia n.o.s. nonconsent. Specifically, Dr. Wheeler described the results of actuarial tests, hours of interviews conducted over the course of more than a decade, and the results of the PPG examination. Halgren's former psychologist, Dr. Brown, also testified for the State regarding Halgren's PPG examination, paraphilia**722 , and prior psychological condition. Moreover, the jury had evidence of Halgren's prior criminal history, including a previous rape conviction and his admission of involvement in approximately 20 sexual assault incidents. In addition, based on Halgren's behavior, testing, and interviews, Dr. Wheeler testified that Halgren had an antisocial personality disorder. While Halgren's expert provided testimony contrary to that of Dr. Wheeler's, the jury *812 was entitled to give more weight to the State expert's testimony than to the testimony of Halgren's expert. Accordingly, because there was substantial evidence to justify a finding that Halgren had both a mental abnormality and a personality disorder beyond a reasonable doubt, the trial court did not violate Halgren's constitutional right to unanimity by failing to instruct the jury that it must reach unanimous agreement as to which condition satisfied RCW 71.09.020(16).

Halgren, 156 Wash.2d at 811-812.

The evidence found sufficient to satisfy the alternative means unanimity test in *Halgren* is substantively identical to the evidence that exists in the current case. The evidence that Ticeson claims is lacking -- namely evidence linking each individual diagnosis to a 50% likelihood of danger -- was not relevant to the *Halgren* inquiry because the focus is on

the mental condition prong, not the dangerousness prong. The *Halgren* opinion provides no support to Ticeson's argument and is better read to support affirming the trial court because evidence similar to that cited by the *Halgren* majority supports the diagnoses in the current case.

It is worth noting that the Supreme Court would have been forced to decide *Halgren* differently if Ticeson's theories were true. As in the current case, Halgren presented a situation where neither the mental abnormality nor the antisocial personality disorder was sufficient by itself to prove danger. As highlighted by the Court of Appeals, the State's expert testified that "***So the combination of those two things, the paraphilia and the antisocial personality disorder, in combination cause him serious difficulty in controlling his urges and to engage in sexual assault.***" *In re Detention of Halgren*, 124 Wash.App. 206, 214, 98 P.3d 1206, 1210 (2004) (emphasis in original). This court cautioned that an overly broad application of the alternative means unanimity doctrine would thwart the purposes of the SVP statute:

We note that the facts of this case illustrate why, at a fundamental level, Halgren's contention is erroneous. Here, the State's expert, who the jury obviously believed over Halgren's expert, testified that both disorders, paraphilia n.o.s. nonconsent and anti-social personality disorder, caused Halgren's volitional control issues. To force the State to elect or the jury to rely on only one, either the mental abnormality or the personality disorder, would unnecessarily introduce a requirement that is not present in the statute. It would also compromise the value of the clinical

judgments of expert witnesses in this difficult area. Neither the constitution nor the statute requires this.

Id. at 216. By limiting the alternative mean unanimity requirement to the mental condition prong, the Supreme Court in *Halgren* avoided the problems inherent in treating dangerousness and serious difficulty as an alternative problem dependent on diagnosis.

To the extent that the use of "which" in RCW 71.09.020 is ambiguous, the statute should be interpreted in a manner that rejects Ticeson's efforts to inject the alternative means unanimity doctrine onto the dangerousness element. Ticeson's interpretation of the statute, if adopted, would seriously thwart the objectives of the SVP civil commitment law.

A simple example illustrates the folly of Ticeson's approach. It is entirely common, as in the current case, for a person to suffer from both a mental abnormality and a personality disorder. If 45% of this hypothetical SVP respondent's risk was due to his mental abnormality, and another additive 40% of his risk was attributable to his personality disorder, he or she would not be subject to civil commitment under RCW 71.09 because a jury could not be unanimous that a single mental abnormality or personality disorder resulted in a more likely than not level of dangerousness that caused the person serious difficulty controlling his behavior. Under Ticeson's theory, a person who is 95% likely to reoffend

in a sexually violent manner due to his overall mental condition cannot be civilly committed because each of the component parts of his or her mental condition presents a risk less than 50%.

Such an interpretation of the statute should be rejected because it imposes an absurd result and thwarts the compelling purposes of the SVP law. *See Seven Gables Corp. v. MGM/IJA Entertainment Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986)(A court should interpret a statute "to make the statute purposeful and effective" and should avoid any "unreasonable and illogical consequence."). Even more concerning, it is unlikely that any credible expert would be capable of parsing a person's risk to this degree. It is difficult enough for a learned psychologist to assess the risk that flows from a person's overall mental condition. It is unreasonable to require a psychologist to attach each degree of risk or serious difficulty in controlling behaviors to an individual and discrete diagnosis.

In summary, Ticeson's argument for an expanded unanimity doctrine fails by extrapolating the mental condition unanimity requirement to the danger presented by Ticeson to reoffend in a sexually violent manner. Neither the statute nor the constitution requires the State to parse the cause of Ticeson's likelihood to reoffend by attributing his degree of risk to either a mental abnormality or personality disorder. No case has

ever required the state to demonstrate that Ticeson's 50%+ danger arises independently under either the mental abnormality or personality disorder prongs, nor does any case hold that Ticeson's serious difficulty controlling his behavior must trace to either one or the other mental condition alternative means. Ticeson's own jury instruction below recognizes that his appellate position misstates the law.⁸ CP 358. Because Ticeson requests an unwarranted extension of the alternative means unanimity doctrine to the dangerousness prong of an SVP action, this court should reject his arguments and affirm the trial court.

IV. TICESON RECEIVED A PUBLIC TRIAL

Ticeson argues that the trial court violated his right to a public trial by speaking with the lawyers in chambers during the lunch hour. His argument should be rejected. Importantly, he does not have standing to bring such a claim in a civil case. Even if he did have standing, he waived his right to raise such a claim by waiving his presence during the proceedings. As a factual matter, the trial court never closed the courtroom during regular business hours at any point in this case. The informal conference was merely designed to increase the efficiency of limited court room time. The topics addressed informally in chambers were later discussed, as required, on the public record. Because no public

⁸ Ticeson should be judicially estopped from taking a position on appeal that is

trial proceeding was hidden from Ticeson or the public, Ticeson fails to provide a basis to overturn his civil commitment..

A. Facts

At the end of testimony during the morning of February 3, 2009, the court dismissed the jury for an early lunch. VRP 2/3/2009 (a.m.), at 89. The court informed the parties it wanted to discuss deposition designations. *Id.* Mr. Ticeson asked that he be allowed to leave. *Id.* at 90.

The court and the parties then conducted a lengthy discussion *on the record* regarding the deposition testimony of Roland, Ticeson and Linda Patrick. VRP 2/3/2009 (a.m.), at 89-117. The Court noted during the discussion regarding the Patrick deposition that the parties had nine minutes left on the record. After sustaining defense objections on page 13 of the Patrick deposition the court said:

We're stopping. If you want to discuss the rest of this deposition informally in chambers, you're welcome to come back and visit with me. I am going to release the court reporter and my staff for their lunch. Okay? I'll let you talk to each other about what you want to do in terms of going forward with resuming . . . former officer Patrick's deposition.

VRP 2/3/2009 (a.m.), at 117.

contrary to the position he took before the trial court.

After the noon recess, the court went back in session. Mr. Ticeson was present. The court summarized its understanding of the issues related to the depositions that were discussed over the lunch hour. VRP 2/3/2009 (p.m.), at 3. Regarding the Linda Patrick deposition, the court indicated it questioned the admissibility of the Patrick deposition because the deponent relied heavily on hearsay. The court determined to sustain defense objections based on the hearsay. The court observed that it was plain to all parties that the State cannot prove the two alleged instances that Officer Patrick was involved in substantively through the deposition. VRP 2/3/2009 (p.m.), at 4. As a result, the State agreed not to offer Officer Patrick's deposition. VRP 2/3/2009 (p.m.), at 4. The court then took argument from the parties regarding the other issues. VRP 2/3/2009 (p.m.), at 5.

All parties had an opportunity to correct the court's understanding or to place additional discussions on the record. The record does not reflect how long the informal chamber conference lasted, including when the attorneys and the Judge took their own lunch break. After returning from lunch, Ticeson never argued that the informal chamber conference violated his right to a public trial, nor was any objection lodged against discussing issues with the Judge over lunch.

B. Ticeson Lacks Standing To Claim That The Public's Right To Open Administration Of Justice Was Violated

Both civil and criminal judicial proceedings are constitutionally open to the public. *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.2d 861 (2004). Article I, section 22 of the Washington Constitution and the sixth amendment to the United States Constitution each guarantees a *criminal defendant* a right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Additionally, article 1, section 10 of the Washington Constitution that provides "justice in all cases shall be administered openly, and without unnecessary delay," gives the public and the press a right to open and accessible court proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The public's right to an open trial exists separately from a criminal defendant's right. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Only a criminal defendant has the right to an open and accessible court through both article 1, §22 and article 1, § 10 of the Washington State Constitution. The Washington Supreme Court has held that where a courtroom is ordered closed during significant portions of trial a defendant's constitutional rights have been violated.⁹ *Id.*

⁹ The Washington Supreme Court has held that where a courtroom is closed during significant portions of criminal trial, a defendant's constitutional rights are violated. *State v. Marsh*, 126 Wash. 142, 145, 217 P. 705 (1923) (closing court to try an adult as a juvenile); *State v. Bone-Club*, 128 Wn.2d 254, 256-57,

In civil proceedings, the right to open and accessible court proceedings under article 1, § 10 is held by the public and the press, not a party to the proceedings. *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.2d 861 (2004). Certain pretrial discovery procedures, such as depositions and interrogatories, are not public components of a civil trial. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 369, 16 P.3d 45 (2001). They were not open to the public at common law, and in general, are conducted in private as a matter of modern practice. *Id* at 370. Information disclosed as a result of the depositions and/or interrogatories is not open to the public unless it is later used in a court proceeding. *Id*. Any restraints placed on discovered information that has not been admitted into evidence is not considered a restriction on a traditionally public source of information. *Id* at 370.

A sexually violent predator trial is a civil proceeding, not criminal. *In re Young*, 122 Wn.2d 1, 15-52 (1993). The Washington State Supreme Court has made it abundantly clear that, unlike criminal defendants,

906 P.2d 325 (1995) (closing court at State's request for the pretrial testimony of an undercover detective); *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) (closing court for the entire 2 ½ days of voir dire, excluding the defendant's family and friends); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) (excluding the defendant's family and friends excluded from all voir dire proceedings); *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006) (excluding the defendant and his attorney excluded from pretrial motions regarding the co-defendant); *State v. Strode*, ___ Wn.2d ___, 217 P.3d 310 (2009) (private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the Bone-Club factors before holding voir dire in chambers. *State v. Momah*, ___ Wn.2d ___, 217 P.3d 321 (2009) (invited error does not entitled a defendant to a new trial.

individuals subject to civil commitment under RCW 71.09 do not have a Sixth Amendment right to confront witnesses at trial and do not have a blanket Fifth Amendment right to remain silent. *Id.* Without a Sixth or Fifth Amendment right, the requirement that SVP cases be tried in a public forum flows primarily, if not exclusively, from article 1 §10 of the Washington Constitution.

Because SVP proceedings are civil in nature, there is no right to a public trial under article 1 section 22, which is limited to criminal cases by its express terms. *In re Detention of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999). As such, the right to a public SVP trial is held by the public and/or press, not the SVP respondent.

The public has an undeniably serious interest in maintaining current and thorough information about convicted sex offenders. The specific modus operandi of sex offenders, preying on vulnerable strangers or grooming potential victims, is markedly different from the behavior of other types of persons civilly committed and such dangerous behavior creates a need for disclosure of information about convicted sex offenders to the public. Grave public safety interests are involved whenever a known sex offender's tendency to recommit predatory sexual aggressiveness in the community is being evaluated. This substantial public safety interest outweighs the truncated privacy interests of the convicted sex offender.

Campbell, 139 Wn.2d at 356

When the differences between the criminal and civil rights to a public trial are correctly understood, Ticeson's assertion that the court

violated *his* constitutional right to a trial is fundamentally flawed. Ticeson does not have a constitutional right to a public trial in civil sexually violent predator proceedings. Because the criminal and civil public trial rights arise from different sources, Ticeson's effort to reverse his trial on this point should be denied.

First, Ticeson lacks standing to assert that the public's right to access his trial was violated on appeal. Generally, a civil litigant does not have standing to vindicate the constitutional rights of a third party, such as a right to a public trial. *Mearns v. Scharbach*, 103 Wn. App. 498, 511, 12 P.3d 1048 (2000). The U.S. Supreme Court has held that a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties. *Worth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197 (1975). The same holds true in SVP cases. *In re Wise*, 148 Wn. App.425, 200 P.3d 266 (2009) (finding Wise, a SVP, lacked standing to appeal his commitment on the grounds that the public's right to an open trial was violated).

In order to establish standing and raise the rights of another, the litigant must show (1) the litigant has suffered an injury-in-fact, giving him a sufficiently concrete interest in the outcome of the disputed issue; (2) the litigant has a close relationship to the third party; *and* (3) there exists some hindrance to the third party's ability to protect his or her own

interests. *United States v. De Gross*, 960 F.2d 1433, 1437 (9th Cir., 1992); *In re Wise*, 148 Wn. App. 425, 200 P.3d 266 (2009); *Ludwig v. Dep't of Retirement Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006); *Mearns*, 103 Wn. App. at 512, 12 P.3d 1048 (2000); .

Here, although the public had the right to access Ticeson's trial, it did not have a right to access information contained in the deposition excerpts prior to the court's ruling on admissibility. Even assuming the public/press had a right to access that information, Ticeson does not have standing to raise the public's constitutional right. Following the *Ludwig* analysis: Ticeson did not suffer an injury as a result of the informal chambers conference. Ticeson actually benefited from the informal chamber conference because as a result of the conference the State withdrew the Patrick deposition. Moreover, Ticeson makes no representation that he is asserting a violation on behalf of a particular member of the public and that that person cannot protect his/her own interest. Ticeson's interests on appeal are different than the interest of the public. Ticeson benefited from the chambers conference because it ultimately led to the State withdrawing a deposition. The public interest would be in observing the proceedings.

Ticeson claims that the holding in *Wise* -- that an SVP cannot appeal on the grounds of the public's right to an open trial because he

lacks standing -- contradicts the holding in *State v. Duckett*, 141 Wn. App. 797, 801, 173 P.3d 948 (2007). Ticeson is incorrect. Duckett was a defendant in a criminal case. Duckett has a right to a public trial through both article 1, sections 10 and 22 of the Washington State Constitution. *See, State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006). In contrast, *Wise* is an SVP in a civil case who does not hold a Constitutional right to a public trial. Ticeson's analysis fails to make this distinction. The *Wise* decision does make that distinction and it remains not only binding precedent in Washington, but the only precedent regarding an SVP's right to an open trial.

Second, Ticeson cannot forward this issue on appeal because he waived any public right that he might have when he asked that he be excused from the proceedings immediately after the jury was excused for the morning. Under RAP 2.5, Ticeson's argument should be foreclosed because it was not raised in the trial court. It is also error, if any, that Ticeson invited by participating, through counsel, in the conference. Ticeson cannot complain now when he remained silent before the trial court. *In re the Detention of Audett*, 158 Wash.2d 712, 725, 147 P.3d 982 (2006).

Ticeson's claim that the court violated his right to a public trial is without merit and should be dismissed. He cannot raise the public's right and he waived any objections.

C. **Even Assuming The Criminal Cases Cited By Ticeson Applied, The Informal Chamber Conference In This Case Was A Preliminary Discussion Not A Substantive Proceeding That Rose To The Level That Violated The Open Administration Of Justice**

Ticeson cites to a number of cases where a trial court in a criminal proceeding affirmatively closed the courtroom during business hours with court staff present to record proceedings. In contrast, the informal chamber conference at issue here is not a "proceeding" that implicates the public trial right. In the cases cited in Ticeson's brief, all or part of an important substantive criminal proceeding was shielded from public view.¹⁰ In this case, informal conversations occurred in chambers between the court and the lawyers. The informal chamber conference does not qualify as "proceedings" or "hearings" that can fairly be characterized as part of Ticeson's trial. It was a non-factual preliminary discussion about a legal matter – the admissibility of Officer Patrick's deposition designations. Such matters do not trigger analysis under *Bone-Club*, nor

¹⁰ *Bone-Club* (pretrial testimony); *Orange*, (voir dire); *Brightman* (voir dire); *Easterling* (pretrial hearing); *Strode* (voir dire of selected jurors); *Momah* (voir dire of selected jurors).

should *Bone-Club* be extended to cover every off-the-record conversation between attorneys and judges.

In similar contexts, the Washington Supreme Court has recognized that sidebars and the like are not truly trial proceedings to which the defendant or the public must be granted access. For example, in *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the supreme court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge, including a pretrial hearing in which the court deferred ruling on an ER 609 motion, granted a motion for funds to get Lord a haircut and clothing for trial, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence. *Lord*, 123 Wn.2d at 306. It also considered whether Lord had the right to be present during a proceeding where the court announced its rulings on evidentiary matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses' testimony. *Id.*

The Supreme Court held that Lord had a right to be present at none of these purely legal discussions between the court and counsel.

The core of the constitutional right to be present is the right to be present when evidence is being presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a “right to be

present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....’ ” *Gagnon*, 470 U.S. at 526 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, *United States v. Williams*, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

Id.

Similarly, in *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the court held that the defendant need not be present for discussions about the wording of jury instructions, ministerial matters, and whether the jury should be sequestered. In *Pirtle* the court held that, although the defendant should have been present for a hearing where juror misconduct was discussed, his absence was immaterial where the motion was later argued and decided in his presence. *Pirtle*, 136 Wn.2d at 484.

Decisions from the Court of Appeals are similar. In a recent criminal case, the court observed:

The public trial right applies to the evidentiary phases of the trial, and to other adversary proceedings. . . . The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, ... during voir dire, and during the jury selection process. . . . A defendant does not, however, have a right to a public hearing on

purely ministerial or legal issues that do not require the resolution of disputed facts.

State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations and internal quotations omitted). In *State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001), the court held that the defendant had no right to be present at a chambers conference where jurors complained about the hygiene of another juror, because the matter was purely ministerial. In *State v. Bremer*, 98 Wn. App. 832, 835, 991 P.2d 118 (2000), the court held that a defendant had no right to be present at a chambers conference between the court and counsel regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact. In *State v. Walker*, 13 Wn. App. 545, 536 P.2d 657 (1975), the court held that *Walker* had a right to be present at a post-trial motion to determine his competency because factual matters were determined. However, the court also noted that the defendant “need not be present during deliberations between court and counsel or during arguments on questions of law.” *Walker*, 13 Wn. App. at 557 (*cited with approval in Lord*, 123 Wn.2d at 306 n.3).

Finally, the Framers never believed that the open administration of justice required that every judicial act be performed in a public courtroom. Rather, it has always been understood that some judicial business could occur in chambers without violating the principle that justice be

administered openly. For example, when the state constitution was adopted, it was understood that judges "at chambers" had broad powers to entertain, try, hear and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury, all of which could occur in the judge's chambers. *Peterson v. Dillon*, 27 Wash. 78, 84, 67 P. 397 (1901) (*citing* Section 2138, Code of 1881 -- legislature had power to authorize counties to have commissioner who exercise duties of judge at chambers). *See also Meisenheimer v. Meisenheimer*, 55 Wash. 32, 42-43, 104 P. 159 (1909) (order is valid even though judge exercised authority in chambers rather than in open courtroom).

The informal chambers discussions at issue in this case are similar to the cases discussed above. The record shows the informal chamber conference during the noon hour dealt with non-factual preliminary discussion about a legal matter – the admissibility of Officer Patrick’s deposition designations. Such conferences are helpful to the administration of justice because they allow court’s to streamline the issues that are necessary for a public hearing.

As it turns out, once the judge did begin the afternoon trial and once on the record, she went through counsel's potential legal issues outlined during the chamber conference. She then articulated her legal rulings. The public then became privy to the arguments, the ruling and the

judge's reasoning. Justice was clearly administered in public. No actual ruling was made until the judge took the bench, re-convened court, and went on the public record.

It should also be noted that Ticeson attorneys never objected to the informal chamber conference and were given the opportunity not to participate. When a criminal defendant, who has a fundamental right to a public trial (unlike a civil litigant), fails to object to a discretionary courtroom closure, the issue need not be reviewed on appeal. *State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957). In *State v. Collins*, the trial court locked the courtroom door to prevent spectators' filing in and out of the courtroom during closing arguments from disrupting the jury. *Collins*, 50 Wn.2d at 746. People in the courtroom were permitted to remain but those outside could not enter. *Id.* Collins did not object at trial but on appeal he claimed a violation of article 1, section 10 of the state constitution. *Id.*

The Washington Supreme Court refused to consider Collins' argument for the first time on appeal. In doing so, the court distinguished between rulings that clearly violate the right to an open trial versus those rulings that involve the exercise of discretion. *Collins*, 50 Wn.2d 747-48. The court held that a discretionary ruling on courtroom closure must be objected to, whereas an order that clearly violates the right to a public trial

can be reviewed absent an objection. The *Collins* decision is still binding precedent in Washington. The holding is reproduced below in its entirety:

If an order of a trial court clearly deprives a defendant of his right to a public trial, as in *People v. Jelke*, 1954, 308 N.Y. 56, 123 N.E.2d 769, 48 A.L.R.2d 1425 [where both the public and the press were excluded from the whole trial], it is unnecessary for the defendant to raise the question by objection at the time of trial. *State v. Marsh*, 1923, 126 Wn. 142, 145-146, 217 P. 705.

However, if, as in the present case, a reasonable number of people are in attendance and there has been no partiality or favoritism in their admission, an order excluding the admittance of others may be entered if justification exists. The issue then becomes whether the trial court abused its discretion in so ordering, i. e., whether the order complained of was necessary to prevent interference with the orderly procedure of the trial. **Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter.** *Keddington v. State*, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)

There is here no claim of actual prejudice; there was no objection to the discretionary ruling. We are satisfied that the defendant did have a public trial within the purview of our constitutional provisions.

Id. at 747-48 (bold added).

So, too, any ruling "closing" the proceedings in this case -- if such a ruling had ever been made -- would have been discretionary and, thus, an objection was needed to preserve a claim of error. Even in criminal proceedings, had the issue been raised, the trial judge could have exercised

discretion in balancing five factors to determine whether a chambers conference jeopardized the public trial right, and whether a closure analysis was needed. Thus, under *Collins*, a simple failure to object and /or to seek a discretionary ruling from the trial court bars the claim on appeal.

Other decisions of the Washington Supreme Court can be reconciled with *Collins*. In all other open courtroom decisions by the court in criminal proceedings, the courtroom closure reviewed on appeal clearly violated the right to public trial. In *State v. Marsh*, 126 Wash. 142, 145, 217 P. 705 (1923), the superior court tried an adult as if he were a juvenile, closing the entire proceeding and failing to provide counsel. In *State v. Bone-Club*, 128 Wn.2d at 256-57, the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the trial court ordered -- sua sponte -- that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. Likewise, in *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. And, in *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006),

the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant.

All of these cases were criminal proceedings and not civil. Only a criminal defendant has a fundamental right to a public trial. In each of these cases, the constitutional violation was clear because there was no colorable basis upon which to close the courtroom. The errors in these cases were "manifest" and would have been reviewable under *Collins*, even absent an objection in the trial court. *Collins* has never been abrogated.¹¹ Nor has it been established that *Collins* should be overruled because it is incorrect and harmful. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). For these reasons, even if Ticeson has standing to assert a violation, or has the right of a criminal defendant in these proceedings, this Court should hold that Ticeson, like *Collins*, failed to preserve a claim of error as to the trial court's discretionary ruling.

D. Even If The Court Finds Ticeson Has A Fundamental Right To An Open Trial In SVP Cases, The Court Closure Was De Minimis And Did Not Infringe Upon His Constitutional Rights

Even if this court finds that Ticeson has standing or has the rights of a criminal defendant who somehow preserved his claim of error, and

¹¹ Despite being cited and argued by the State, *Collins* was not cited or discussed in the recent *Momah* or *Strode* opinions.

that the court actually closed court to the public, the closure was for such a short period of time it was too trivial to cause a constitutional deprivation. When this occurs the error may be considered de minimis. *State v. Easterling*, 157 Wn.2d 167, 181-182, 183-185, 137 P.3d 825 (2006).

A brief court closure whether intentional or inadvertent is deemed de minimis when weighing the closure against the values advanced by the right. *Easterling* at 184. The court should ask whether the closure implicates any of values advanced by the public trial guarantee: 1) to ensure a fair trial; 2) remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; 4) to discourage perjury. *Carson v. Fischer*, 421 F.3d 83, 92 (2d Cir. 2005). The Supreme Court has determined that this analysis will safeguard the right at stake without requiring a new trial where these values have not been infringed by trivial closure.

Under this analysis the courts have found that an inadvertent courtroom closure of 30 to 40 minutes when the defendant took the stand was considered trivial because most of the defendant's testimony that was relevant was repeated in summation. *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996). A deputy sheriff's erroneous closure of a court room during summation to keep the courtroom quiet was only for a short portion

of the trial was deemed trivial. *Snyder v. Coiner*, 365 F.Supp. 321 (N.D.W. Va. 1973).

Even deliberate closure has been found to be de minimis. A court's exclusion of a defendant's mother-in-law from the courtroom during the testimony of a confidential informant was deemed trivial. *Carson v. Fischer*, 421 F.3d 83, 92 (2d Cir. 2005). A trial court's exclusion of spectators from courtroom during the questioning of a jury about safety concerns was considered de minimis. *State's v. Ivester*, 316 F.3d 955, 906 (9th Cir. 2003).

In this case, the court's informal chambers conference with both parties during the noon recess was trivial at best and did not touch upon Ticeson's alleged right to a public trial. Even if considered a "closure,"¹² it was for a short period of time, no testimony was taken, the discussions were placed on the record in open court during the afternoon session, and the court heard argument from both parties. Clearly, no values upon which public trial is based were infringed upon.

For these reasons, this Court should hold even if Ticeson has a fundamental right to an open trial in SVP cases, an informal chambers conference during the noon recess was de minimis and did not infringe upon Ticeson's constitutional rights.

¹² There is no indication on the record that the court would have excluded others

VI. CONCLUSION

For the foregoing reasons, the State asks that the jury verdict civilly committing Ticeson as a sexually violent predator be affirmed.

DATED this 21st day of January 2010.

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By 

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from this conference if anyone had wished to attend.