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No. 34442-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF

John L. Strand,

Appellant.

Clallam County Superior Court

Cause No. 05-2-00129-4

The Honorable Judge George L. Wood

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The department violated RCW 71.09 by subjecting Mr. Strand to an evaluation before filing a petition.

2. The department violated Mr. Strand's constitutional right to consult with counsel by subjecting him to an RCW 71.09 evaluation before filing a petition.

3. The department violated Mr. Strand's statutory right to consult with counsel by subjecting him to an RCW 71.09 evaluation before filing a petition.

4. The department violated Mr. Strand's constitutional right to have counsel present during his RCW 71.09 evaluation.

5. The department violated Mr. Strand's statutory right to have counsel present during his RCW 71.09 evaluation.

6. The department violated Mr. Strand's right to remain silent regarding uncharged criminal incidents.

7. The department violated Mr. Strand's right to remain silent regarding information that could be used at a future criminal sentencing proceeding for his uncharged criminal incidents.

8. The trial court erred by admitting Mr. Strand's custodial statements without conducting a hearing to determine whether or not they were voluntary.

9. Mr. Strand was denied the effective assistance of counsel when his attorney failed to object to the use of his initial evaluation.

10. Mr. Strand was denied the effective assistance of counsel when his attorney permitted him to participate in a second evaluation without objection.

11. Mr. Strand was denied the effective assistance of counsel when his attorney permitted him to participate in a deposition without objection.

12. Mr. Strand was denied the effective assistance of counsel when his attorney permitted the department to call him as a witness at trial without objection.

13. The trial court should not have considered Mr. Strand's statements to supply the foundation for admitting allegations of prior sexual misconduct.

14. The trial court should not have admitted the testimony of April Winstead.

15. The trial court should not have admitted the testimony of Sandra Banks.

16. The trial court should not have admitted the testimony of Amy Maestas.

17. The trial court should not have admitted the testimony of Monica Kelly.

18. The failure to record evidence presented by Mr. Strand violated his constitutional right to be tried in a court of record.

19. The failure to record evidence presented by Mr. Strand violated his right to due process and to appeal his commitment.

20. The trial court erred by denying Mr. Strand's motion for a mistrial.

21. The trial court erred by denying Mr. Strand's motion for a new trial.

22. The trial court erred by adopting the state's narrative report of proceedings.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

While John Strand was serving time for a 1992 sex offense, he was evaluated by Dr. Kathleen Longwell "pursuant to RCW 71.09." No petition had been filed and no court had made a determination that there was probable cause to believe Mr. Strand was a sexually violent predator. Mr. Strand was not given an opportunity to consult with an attorney prior to being subjected to the evaluation. No attorney was present for the evaluation.

1. Did the state violate the evaluation procedure set forth in RCW 71.09.040 by subjecting Mr. Strand to an evaluation before filing a petition and obtaining a probable cause determination? Assignments of Error Nos. 1-7.

2. Did the state's violation of RCW 71.09.040 infringe Mr. Strand's statutory and constitutional right to consult with counsel prior to submitting to an evaluation? Assignments of Error Nos. 1-7

3. Did the state violate Mr. Strand's statutory and constitutional right to have counsel present during an RCW 71.09 evaluation? Assignments of Error Nos. 1-7, included for preservation of error.

During his evaluation, at his deposition, and at trial, Mr. Strand was asked about incidents of uncharged sexual misconduct for which he still faced exposure for criminal prosecution. He was also asked numerous questions that could be used at a future criminal sentencing proceeding for these uncharged offenses. Despite this, he was not advised of his right to remain silent or to have counsel present during his initial evaluation; nor did his attorney object during his deposition, his second evaluation, or his trial testimony. The trial court admitted his statements and evidence derived therefrom without holding a voluntariness hearing.

4. Did the state violate Mr. Strand's right to remain silent by questioning him regarding allegations of uncharged criminal offenses? Assignments of Error Nos. 6-12.

5. Did the state violate Mr. Strand's right to remain silent by questioning him regarding information that could be used at a future criminal sentencing proceeding for his alleged uncharged criminal offenses? Assignments of Error Nos. 6-12.

6. Did the trial court err by admitting Mr. Strand's custodial statements without conducting a hearing to determine whether or not they were voluntary? Assignments of Error Nos. 6-12.

7. Was Mr. Strand denied the effective assistance of counsel when his attorney failed to object to the use of his initial evaluation? Assignments of Error Nos. 6-12.

8. Was Mr. Strand denied the effective assistance of counsel when his attorney permitted him to participate in a second evaluation without objection? Assignments of Error Nos. 6-12.

9. Was Mr. Strand denied the effective assistance of counsel when his attorney permitted him to participate in a deposition without objection? Assignments of Error Nos. 6-12.

10. Was Mr. Strand denied the effective assistance of counsel when his attorney permitted the department to call him as a witness at trial without objection? Assignments of Error Nos. 6-12.

At trial, the department sought to introduce evidence of prior offenses (including allegations of uncharged criminal offenses). Mr. Strand objected, arguing that the evidence was insufficient to establish that he was the person who had committed the prior offenses. The trial court overruled the objections, holding that Mr. Strand himself had provided the foundation for admitting the offenses, by admitting (during his evaluation and his deposition) that he had been present at the time the alleged offenses were committed.

11. Did the trial court err by considering Mr. Strand's statements to establish the foundation for admission of allegations of prior misconduct? Assignments of Error Nos. 13-17.

12. Did the trial court err by admitting testimony of prior offenses, including allegations of uncharged criminal conduct? Assignments of Error Nos. 13-17.

To rebut the state's expert, Mr. Strand called his own expert witness, Dr. Theodore Donaldson. After Dr. Donaldson's testimony was complete, the court discovered that the evidence had not been recorded, and thus no transcript was available for Mr. Strand's appeal. Mr. Strand's

attorney moved for a mistrial, and later filed a motion for a new trial. The court denied both motions, and, after hearing Mr. Strand's objections, modified and adopted a narrative report of proceedings prepared by the state.

13. Did the failure to record Dr. Donaldson's testimony violate the constitutional requirement that superior courts shall be courts of record? Assignments of Error Nos. 18-22.

14. Did the failure to record Dr. Donaldson's testimony violate Mr. Strand's constitutional right to due process and to appeal? Assignments of Error Nos. 18-22.

15. Did the trial court err by denying Mr. Strand's motion for a mistrial? Assignments of Error Nos. 18-22.

16. Did the trial court err by denying Mr. Strand's motion for a new trial? Assignments of Error Nos. 18-22.

17. Did the trial court err by adopting the state's narrative report of proceedings? Assignments of Error Nos. 18-22.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 1992, John Strand was convicted of Child Molestation in the First Degree, and was sentenced to an exceptional sentence of 150 months. Supp. CP, Exhibit 4. Prior to Mr. Strand's release, Dr. Kathleen Longwell interviewed him and completed an evaluation "pursuant to RCW 71.09," despite the fact that no petition had been filed. RP (1-31-06) 127; Supp. CP, Certification for Determination of Probable Cause, Exhibit 2, p. 1. During the evaluation interview, Mr. Strand made numerous admissions relating to uncharged incidents of sexual misconduct. Dr. Longwell relied upon these and other statements in concluding Mr. Strand qualified as a sexually violent predator. Supp. CP, Certification for Determination of Probable Cause, Exhibit 2.

On February 7, 2005, the state filed a petition alleging that Mr. Strand was a sexually violent predator under RCW 71.09. CP 11-12. An attorney was appointed on February 7, 2005.[1] Supp. CP, Order Appointing Attorney.

With his attorney present, Mr. Strand submitted to a second evaluation on November 8, 2005, and a deposition on December 6, 2005.

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[1] Substitute counsel was appointed on March 4, 2005. RP (3-4-05) 6.

RP (1-31-06) 127-128; RP (2-1-06) 130. He also testified at trial. RP (2-1-06). His attorney did not object to the use of his initial evaluation, and did not attempt to limit his second evaluation, his deposition, or his trial testimony based on his continuing exposure for uncharged criminal offenses.

At trial, the state sought to admit allegations of prior offenses, including prior uncharged misconduct, as substantive evidence. The defense objected, arguing that the incidents were not sufficiently tied to the defendant and thus could not be admitted as substantive evidence. RP (1-30-06) 13-14, 24-25, 84; Supp. CP, Respondent's Motions in Limine. The judge overruled the objections and admitted the evidence of prior misconduct as substantive evidence, relying upon Mr. Strand's admissions (to Dr. Longwell and in his deposition) to establish the foundation for the prior misconduct. RP (1-30-06) 27-30, 84-85.

April Winstead testified (via deposition) about an incident that had occurred in 1986 in Salt Lake City. A man had pulled her into his duplex, tried to pull her pants down, and rubbed her. RP (1-31-06) 36-39. She did not identify Mr. Strand at trial. RP (1-31-06) 33-49. According to Dr. Longwell, the charge was reduced to lewdness; however, no lewdness conviction appeared on a summary Mr. Strand's criminal history. RP (1-31-06) 143; Supp. CP, Certification for Determination of Probable Cause,

Exhibit 2. In his testimony, Mr. Strand confirmed that he had rented a duplex in 1986 in Salt Lake City, that two children had come over without permission, and that he had grabbed one child to get her out of the house. RP (2-1-06) 127-129.

Sandra Banks testified (via deposition) that in 1989 she found her daughter, then three years old, crying in an alley with her pants down. RP (1-31-06) 69-73. Her daughter told her that a man had undone her pants, squeezed her legs together, and put his penis between them. RP (1-31-06) 76. The next day, the police brought a suspect to the Banks' house, and her daughter identified him as the man who had attacked her. RP (1-31-06) 78. Ms. Banks did not identify Mr. Strand at the trial, and her daughter did not remember the incident. RP (1-31-06) 68-87. According to Dr. Longwell, Mr. Strand initially could not recall the incident, but later said that his wife had fabricated the charge. Dr. Longwell confirmed that the incident had not been prosecuted. RP (1-31-06) 145-146. Mr. Strand testified that he had been accused of molesting a girl in 1989 after he and his wife had gone to look at a puppy at the girl's house. RP (2-1-06) 129-132.

Amy Maestas testified (via deposition) that she had gone shopping at a Sears store in Salt Lake City in 1991. While there, a man asked her if she had any hair on her private parts. RP (1-31-06) 52. She did not

identify John Strand in her deposition. RP (1-31-06) 51-62. According to Dr. Longwell, this case was not prosecuted because Mr. Strand had not touched anyone. RP (1-31-06) 146. Mr. Strand testified that he had been in a Sears store in Salt Lake City in 1991, that a girl had asked where the bathroom was, and that he was later confronted by store security. RP (2-1-06) 132-133.

Monica Kelly, who was 19 years old at the time of the trial, testified that she lived in Forks in 1991. She told the jury that when she was four or five years old, she was near the Forks police station when a man offered her a penny if she would pull her pants down and allow him to insert his finger into her vagina. RP (1-31-06) 27-29. She testified that she cooperated with his request, and that the incident lasted a few minutes. RP (1-31-06) 29. She did not recall what the man looked like, and could not identify Mr. Strand. RP (1-31-06) 31. In his testimony, Mr. Strand confirmed that in 1991 he chatted with a girl outside of the Forks police station. RP (2-1-06) 133-134. The state later introduced evidence showing that charges had been filed and dismissed; however, the dismissal was not with prejudice. Exhibits 1 and 2, Supp. CP.

Dr. Longwell testified that Mr. Strand felt no remorse about his actions and was not troubled by the consequences of his behavior. She opined that he was likely to reoffend in a sexually violent manner. RP (1-

31-06) 180-181, 190; RP (2-1-06) 47, 55. She acknowledged that she considered Mr. Strand's statements in reaching her conclusions. RP (1-31-06) 162.

To counter Dr. Longwell's conclusions, the defense called its own expert, Dr. Theodore Donaldson. Dr. Donaldson testified on February 2, 2006; however, the court's recording system was not activated, so his testimony was not preserved. When it was discovered that the defense case had not been recorded, Mr. Strand moved for a mistrial, arguing that a reconstructed record could not be complete since the testimony was complex, and since his attorney was focused on presenting her case and not on taking notes. RP (2-6-06) 5-12. The motion was denied, and the court ordered both attorneys to submit proposed Narrative Reports of Proceedings for consideration.

Mr. Strand then filed a written motion for a new trial. Supp. DCP, Motion and Memorandum for a New Trial. At a hearing held on March 3, 2006, Mr. Strand made numerous objections to the proposed narrative, citing his attorney's lack of memory and inability to evaluate the accuracy of the proposed narrative. RP (3-3-06); Supp. CP, Respondent's Objections to Petitioner's Reconstructed Record. The court denied Mr. Strand's motion for a new trial and adopted a modified version of the state's proposed narrative report of proceedings. RP (3-3-06) 4-39;

Narrative Report of Proceedings, Supp. CP. According to the trial judge, no appeal issues could arise from the missing record. RP (3-3-06) 39.

Mr. Strand appealed. CP 6.

ARGUMENT

I. THE LOSS OF A SIGNIFICANT PORTION OF THE TRIAL RECORD REQUIRES REVERSAL OF THE COURT'S ORDER COMMITTING MR. STRAND AND REMAND FOR A NEW TRIAL.

A. The failure to record the testimony of Dr. Donaldson violated the constitutional requirement that superior courts "shall be courts of record" under Wash. Const. Article IV, Section 11.

Wash. Const. Article IV, Section 11 provides that "the superior courts shall be courts of record..." A "court of record" is " '[a] court that is required to keep a record of its proceedings...' " *State ex rel. Henderson v. Woods*, 72 Wn. App. 544 at 550-551, 865 P.2d 33 (1994), *quoting Black's Law Dictionary* (5th ed. 1979). Washington courts have yet to clarify the reach of this constitutional provision or the remedy for its breach.

In the only published opinion addressing the provision, Division I held that Article IV, Section 11 does not guarantee a "fundamental constitutional right" to have a court reporter transcribe a criminal trial. *State v. Wilcox*, 20 Wn. App. 617 at 619, 581 P.2d 596 (1978).

Whatever else it means, the constitutional provision must mean that proceedings in the superior court are to be documented, using some mechanism adequate to preserve a complete record. The failure to record the evidence presented on behalf of Mr. Strand violates this provision.

Without the missing record, Mr. Strand's rights are compromised. His trial attorney was unable to recollect significant portions of the missing testimony. His appellate counsel is unable to evaluate the record for completeness, and can't independently assess the performance of trial counsel. For these reasons, the failure to comply with Wash. Const. Article IV, Section 11 prejudiced Mr. Strand. The order committing him as a sexually violent predator must be reversed, and the case remanded for a new trial.

B. The failure to record the testimony of Dr. Donaldson violated Mr. Strand's constitutional right to due process and his right to appeal.

Under the right to due process embodied in the Fourteenth Amendment to the federal constitution, a criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review. *State v. Tilton*, 149 Wn.2d 775 at 781, 72 P.3d 735 (2003). The constitutional right to a transcript also attaches in civil cases involving "serious due process concerns..." *Henderson, supra, at* 551; *see also M.L.B. v. S.L.J.*, 519 U.S. 102 at 107, 117 S.Ct. 555, 136

L.Ed. 2d 473 (1996). Where appellate counsel did not represent a litigant at trial, it is particularly important that the record be sufficient to allow counsel "to test the completeness of the [reconstructed record] and determine what errors to assign to obtain an adequate review." *Henderson, supra, at* 550-551; *see also Tilton,* at 781; *State v. Larson*, 62 Wn.2d 64 at 67, 381 P.2d 120 (1963). It is "inappropriate to assume that the missing record would support [the court's order.]" *Henderson, supra,* at 551. An appellate court "may remand a case for a new trial where the trial court's report of proceedings is inadequate." *Henderson, supra,* at 550.

In this case, all of the evidence submitted by Mr. Strand is unavailable. The court's rulings on any objections to Mr. Strand's evidence are lost, as are defense objections to the state's cross-examination, and the court's rulings on those objections. Furthermore, because defense counsel was unable to take notes, her recollection of what transpired was hampered, and the narrative report of proceedings is suspect. In addition, trial counsel disagreed with some of the court's ultimate conclusions as to what had transpired.

It is impossible to accurately and independently determine on appeal whether the jury was precluded from hearing important testimony, or whether the state elicited inadmissible testimony on cross-examination.

Furthermore, it is impossible to evaluate defense counsel's trial strategy to determine whether Mr. Strand was denied the effective assistance of counsel in the presentation of his defense to the petition.

Because of this, Mr. Strand's constitutional right to due process was violated. The court's order must be reversed and the case remanded for a new trial.

II. THE STATE VIOLATED RCW 71.09.040 AND MR. STRAND'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY SUBJECTING HIM TO A SEXUALLY VIOLENT PREDATOR EVALUATION PRIOR TO FILING A PETITION.

RCW 71.09.040 outlines the procedure for initiating a civil commitment proceeding under the sexually violent predator act. Under the statute, the state files a petition alleging that the person is a sexually violent predator, and the court determines whether or not the petition is supported by probable cause. Then, "[i]f the probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator..." RCW 71.09.040 provides the exclusive means for evaluating a person to see if they meet the requirements for commitment as a sexually violent predator. *In re Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002). Under RCW 71.09.040, an evaluation is appropriate "only after probable cause has been determined... The legislature expressly

provided procedures for special mental health evaluations in the SVP statute and did not intend to allow for additional [evaluations]." *In re Det. of Meints*, 123 Wn. App. 99 at 103-104, 96 P.3d 1004 (2004) (prohibiting additional evaluations under CR 35).

In this case, the state violated RCW 71.09.040. Instead of filing a petition, obtaining a probable cause finding, and seeking an evaluation after the right to counsel had attached, the state sought an evaluation first. Since Dr. Longwell's evaluation was obtained in violation of RCW 71.09.040, her testimony and the evaluation itself should not have been used against Mr. Strand as the primary evidence in his civil commitment trial. *Williams, supra; Meints, supra.*

A. The state intentionally circumvented Mr. Strand's statutory and constitutional right to consult with counsel by subjecting him to an RCW 71.09 evaluation prior to filing its petition.

Although no published Washington case has specifically addressed the issue, the weight of authority from other contexts and other jurisdictions suggests that individuals facing involuntary civil commitment under RCW 71.09 have a constitutional right to counsel, guaranteed by the due process clause of the Fourteenth Amendment and its state constitutional counterpart, Wash. Const. Article I, Section 3. *See, e.g., Lassiter v. Dep't of Social Services*, 452 U.S. 18 at 25-27, 101 S.Ct. 2153, 68 L.Ed. 2d 527 (1981); *In re Gault*, 387 U.S. 1, 36-37, 18 L. Ed. 2d 527,

87 S. Ct. 1428 (1967); *Tetro v. Tetro*, 86 Wn.2d 252 at 253-254, 544 P.2d 17 (1975); *see also Project Release v. Prevost*, 722 F.2d 960 at 976 (2nd Cir. 1983); *Heryford v. Parker*, 396 F.2d 393 at 396 (10th Cir.1968); *Conservatorship of Margaret L.*, 89 Cal. App. 4th 675 at 684, 107 Cal. Rptr. 2d 542 (2001); *In re Hop*, 29 Cal.3d 82, 94, 623 P.2d 282, 289, 171 Cal.Rptr. 721, 728 (1981); *Hillsborough County v. Albrechta*, 841 So. 2d 644 at 645 (FL, 2003); *Pullen v. State*, 802 So. 2d 1113 at 1119 (FL, 2001); *In re Civil Commitment of D.L.*, 351 N.J. Super. 77 at 90, 797 A.2d 166 (2002); *In re Rapoport*, 657 N.Y.S.2d 748, 239 A.D.2d 422 (1997); *In re Fisher*, 39 Ohio St. 2d 71, 72, 313 N.E.2d 851, 858 (1974); *Towne v. Hubbard*, 2000 Okla. 30 at 30, n.18, 3 P.3d 154 (2000). The need for counsel is especially acute where an individual is "illiterate and uneducated... [and believed] to be suffering from a mental disease or defect requiring involuntary treatment." *Vitek v. Jones*, 445 U.S. 480 at 496-497, 100 S.CT. 1245, 63 L.Ed. 2d 552 (1980) (*plurality opinion*).[2]

The legislature has also "created the right to counsel... as to all stages leading to the initial trial of whether the person is a sexually violent

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[2] Mr. Strand informed the court that he was illiterate at the probable cause hearing. RP (5-16-05) 8.

predator." *In re Detention of Petersen*, 138 Wn.2d 70 at 92, 980 P. 2d 1204 (1999). This right is codified at RCW 71.09.050:

> At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel...
> RCW 71.09.050(1).

As noted above, RCW 71.09.040 requires the state to file a petition and obtain a probable cause determination before seeking an evaluation pursuant to the statute. RCW 71.09.040. The procedure outlined by the legislature ensures that the statutory right to counsel attaches before a respondent is forced to determine how to respond to a sexually violent predator evaluation.

In this case, the department circumvented Mr. Strand's statutory and constitutional right to counsel by subjecting him to a sexually violent predator evaluation prior to the filing of the petition. When he met with Dr. Longwell at the Department of Corrections, Mr. Strand had not yet had the benefit of a probable cause determination; nor had he had the opportunity to request appointed counsel. Because of this, Mr. Strand did not receive any legal advice prior to his initial interview with the state's expert.

The department's actions violated the statutory procedures outlined in RCW 71.09.040, Mr. Strand's statutory right to counsel guaranteed

under RCW 71.09.050, and his constitutional right to counsel secured by the due process clause of the Fourteenth Amendment and Wash. Const. Article I, Section 3. *Lassiter, supra; Tetro, supra.* This failure to follow statutory procedure and the denial of counsel was not merely academic; instead, it had real consequences affecting the outcome of the case.

B. The state denied Mr. Strand his statutory and constitutional right to have counsel present during his RCW 71.09 evaluation. (Included for preservation of error).

This court has recently ruled that a person facing commitment under RCW 71.09 has no statutory or constitutional right to the assistance of counsel during an evaluation conducted under RCW 71.09.040. *In re Kistenmacher*, 134 Wn. App. 72, 138 P.3d 648 (2006). According to the court in *Kistenmacher,* the right to counsel guaranteed by RCW 71.09.050(1) "[a]t all stages of the proceedings under this chapter..." does not apply to the initial evaluation under RCW 71.09.040, because an evaluation "is not the equivalent of a 'stage' or 'proceeding.' " *Kistenmacher,* at 79. The court expressed fear that if it held otherwise, individuals "would have a right to counsel at every counseling appointment, every visit with a worker at the Special Commitment Center, and every other dispositional activity in a sexually violent predator civil commitment case." *Kistenmacher,* at 79.

Kistenmacher was incorrectly decided and should be reconsidered.

1. Mr. Strand had a statutory right to the presence of counsel during his evaluation.

When a statute is clear and unambiguous, its meaning is to be derived from the language of the statute alone and it is not subject to judicial construction. *State v. Azpitarte*, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000). As noted above, the statute guarantees the right to counsel "[a]t all stages of the proceedings..." RCW 71.09.050(1). The terms "stage" and "proceeding" are not defined in the statute; accordingly, they must be given their plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wn.2d 214 at 225, 137 P.3d 844 (2006). The relevant definition of the term "stage" is "a single step [or] a particular phase...in a process." *Dictionary.com, based on the Random House Unabridged Dictionary*, Random House, Inc. 2006. The relevant definition of the term "proceedings" is "a series of activities or events..." *Dictionary.com, supra.*

By its plain terms, RCW 71.09.050(1) applies to the evaluation required under RCW 71.09.040. It is nonsensical to suggest that the evaluation is not a "step" in the overall "series of activities or events" which culminates in a trial under the act. The statute makes clear that the evaluation is a step to be completed after the probable cause hearing and before the trial. RCW 71.09.040.

Division II's fear that a common-sense reading of RCW 71.09.050(1) would give individuals the right to counsel "at every counseling appointment, every visit with a worker at the Special Commitment Center, and every other dispositional activity in a sexually violent predator civil commitment case," is unfounded. *See Kistenmacher, at* 79. The statute does not outline counseling appointments, worker visits, and other activities as steps on the road to trial; thus they are not stages of the proceedings under the act. *See* RCW 71.09.

Furthermore, the court's decision in *Kistenmacher* contravenes the Supreme Court's decision in *Petersen, supra.* In that decision, the Court concluded that the legislature had "created the right to counsel... as to all stages leading to the initial trial..." *Petersen,* at 92. Only by ignoring the plain meaning of the term "stage" can *Kistenmacher* be reconciled with this language from *Petersen.*

Both the plain language of the act and the Supreme Court's decision in *Petersen* oblige this court to reconsider its decision in *Kistenmacher.* An individual facing commitment as a sexually violent predator has a statutory right to have counsel present during the initial evaluation under RCW 71.09.040. Mr. Strand was not afforded this right; accordingly, the commitment order must be reversed and the case remanded for a new trial. On remand, the state may have Mr. Strand

evaluated, but may not utilize information obtained during the first evaluation.

2. Mr. Strand had a constitutional right to the presence of counsel during his evaluation.

In *Kistenmacher,* this court also concluded that there was no constitutional right to have counsel present during the initial evaluation under RCW 71.09.040. According to the court, the balance struck by the *Petersen* court with respect to annual evaluations applies to the initial evaluation as well. The court should revisit this conclusion.

As the *Petersen* court correctly pointed out, the annual evaluation is geared toward determining whether a person confined as a sexually violent predator might safely be moved to a less restrictive alternative. Cooperation with the evaluation will never result in loss of additional liberty beyond that lost after the initial determination. *See, generally,* RCW 71.09.

A person who has not yet been committed, by contrast, faces a loss of liberty that may develop into confinement for life. Accordingly, it is critical that she or he fully understand the implications of cooperating with the evaluation, and the penalties for not cooperating. Although actions under RCW 71.09 are civil rather than criminal, they are nonetheless highly adversarial proceedings. The assistance of counsel is essential to

ensure that the respondent's interests are protected. Respondent's adversary is not in a position to safeguard respondent's rights while aligned against her or him in court. The Supreme Court in *Petersen* implicitly recognized this difference between the pre-trial and post-trial evaluations: "a *committed* sexually violent predator is not entitled to the presence of counsel during psychological evaluations under state or constitutional law." *Petersen*, at 94, *emphasis added. Petersen* did not purport to deny counsel to all persons who might be evaluated under RCW 71.09.

In this case, Mr. Strand also faces lingering exposure to criminal prosecution for prior uncharged allegations. This fact distinguishes *Kistenmacher*, in which the respondent had not presented any evidence that "the statute of limitations would allow the State to bring additional charges against him based on the information gained at his evaluation." *Kistenmacher,* at 80. Here, counsel's assistance was necessary to determine which questions increased Mr. Strand's exposure to additional *criminal* penalties.

C. If Mr. Strand had been permitted to consult with counsel prior to or during his evaluation, he would have remained silent regarding uncharged criminal offenses.

In this case, a consultation with counsel would have allowed Mr. Strand to determine how best to respond to the department's demand for

an evaluation under RCW 71.09. Competent counsel would have advised Mr. Strand that he faced exposure to criminal charges, and that his best interests would be served by refusing to cooperate with the evaluation as it related to the uncharged criminal conduct.

1. Under the Fifth Amendment, Mr. Strand had an unqualified right to remain silent regarding allegations of uncharged criminal conduct.

The Fifth Amendment to the U.S. Constitution provides that "No person shall... be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. This privilege against self-incrimination is applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964). Similarly, Article I, Section 9 of the Washington State Constitution, provides that "No person shall be compelled in any case to give evidence against himself..." Wash. Const. Article I, Section 9.

An individual facing civil commitment under RCW 71.09 is privileged " 'not to answer official questions put to him where the answers might incriminate him in future criminal proceedings.' " *Allen v. Illinois*, 478 U.S. 364 at 368 (1986), *quoting Minnesota v. Murphy*, 465 U.S. 420 at 426 (1984) *and Lefkowitz v. Turley*, 414 U.S. 70 at 77 (1973). This is so despite the fact that the Fifth Amendment (operating through the Fourteenth Amendment) does not directly shield an individual from

questioning that might subject her or him to civil commitment.[3] *Allen v. Illinois, supra.*

> The Fifth Amendment privilege against self-incrimination
>
> ...can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory... [and] it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.
> *Murphy v. Waterfront Commission*, 378 U.S. 52 at 94, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964) (Justice White, *concurring*).
>
> As the Supreme Court has noted, the privilege
>
> ...does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.
> *In re Gault, supra, at* 49.

In Washington, a person facing civil commitment under RCW 71.09 is not guaranteed immunity from prosecution, and thus retains the right to remain silent:[4] "detainees [facing civil commitment can] not be compelled to incriminate themselves by answering questions about prior uncharged or unconvicted criminal behavior." *In re Young*, 122 Wn.2d 1

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[3] In other words, the federal constitution does not guarantee a right to remain silent when speaking would provide evidence for civil commitment.

[4] This is in contrast to the situation in Illinois, where the state Supreme Court has "ruled that a person whom the State attempts to commit under the Act is protected from use of his compelled answers in any subsequent criminal case in which he is the defendant." *Allen v. Illinois, supra, at* 368.

at 51, 857 P.2d 989 (1993), *habeas corpus petition granted and reversed on other grounds, see Young v. Weston,* 192 F.3d 870 (9th Cir. 1999).

In this case, Mr. Strand faced exposure to criminal prosecution for incidents that occurred in Utah and in Washington prior to his 1992 conviction. First, he was subject to prosecution for a 1989 allegation of molestation of a 3-year-old girl named Megara Banks in Salt Lake City, Utah.[5] Second, he remained subject to prosecution for the alleged Rape of a Child in the First Degree involving Monica Kelly, which occurred in 1991 outside the police station in Forks.[6]

Since Mr. Strand remained vulnerable to prosecution for these offenses, he should have declined to answer any questions relating to them. Furthermore, since he also had a right to remain silent as to anything that could affect his sentence on a criminal charge, he should have declined to answer any questions that could have impacted his potential sentence. Accordingly, he was entitled to refuse to answer any of Dr. Longwell's questions. *See, e.g., Mitchell v. U.S.* 526 U.S. 314, 119

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[5] Although Utah's statute of limitations would ordinarily have barred prosecution for this crime, the limitation period has been suspended since Mr. Strand left the state in 1991. *See* Utah Code Sections 76-1-302, 76-1-303.5, and 76-1-304.

[6] This allegation was subject to prosecution until three years after the victim's 18th birthday, pursuant to RCW 9A.04.080(1)(b) and (c).

S.Ct. 1307 (1999); *Estelle v. Smith*, 451 U.S. 454 (1981); *State v. Tinkham*, 74 Wn.App. 102, 871 P.2d 1127 (1994).

2. If Mr. Strand had asserted his privilege against self-incrimination, the state would have been unable to meet the foundation for introducing allegations of uncharged criminal conduct.

If Mr. Strand had been appointed counsel prior to his evaluation, he would have been advised to reduce his criminal exposure by refusing to answer any question that might incriminate him, or that might be used against him at sentencing. By doing so, he would also have withheld from the state the evidence it needed to tie him to the two Salt Lake City allegations and the Forks allegation, as outlined above. Without his statements, Dr. Longwell would not reasonably have been able to rely on these allegations in her assessment, and the state would have been unable to use them at the trial on the SVP petition.

The denial of counsel in this case is likely structural error. *See, e.g., United States v. Gonzalez-Lopez*, __ U.S. ___, 126 S. Ct. 2557 at 2564, 165 L.Ed. 2d 409 (2006). However, even if it were subject to the lenient standard for nonconstitutional errors, reversal is required. Without the damaging and inflammatory propensity evidence, it is reasonably

probable that the outcome of the trial would have been different.[7] *See, e.g., Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426 at 433, 814 P.2d 687 (1991) (erroneous introduction of character evidence under ER 404 requires reversal if, "within reasonable probabilities, the error materially affected the outcome of trial.") Because of this, the order committing Mr. Strand must be reversed, and the case remanded to the trial court.

Following remand, the department may re-evaluate Mr. Strand after he has had the opportunity to consult with counsel. The department may not rely upon the initial evaluation in its effort to commit Mr. Strand.

III. MR. STRAND WAS ENTITLED TO A VOLUNTARINESS HEARING TO DETERMINE THE ADMISSIBILITY OF HIS STATEMENTS.

An individual facing commitment as a sexually violent predator does not have a constitutional right to remain silent. *Allen v. Illinois, supra.* However, due process forbids the use of involuntary statements, even in civil proceedings. This is so because such proceedings must conform to "traditional standards of fairness." *Bong Youn Choy v. Barber*, 279 F.2d 642 at 646 (9th Cir. 1960), *citations omitted*; *see also United States v. Alderete-Deras*, 743 F.2d 645 at 647 (9th Cir. 1984). In *Choy v. Barber, supra,* Mr. Choy, an alien facing expulsion, made an admission

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[7] The denial of counsel in this case is likely structural error. *See, e.g., United States v. Gonzalez-Lopez*, __ U.S. __, 126 S. Ct. 2557 at 2564, 165 L Ed. 2d 409(2006). However,

after seven hours of interrogation and repeated threats. The Ninth Circuit suppressed the statement, holding that "[e]xpulsion cannot turn upon utterances cudgeled from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given." *Choy v. Barber, supra,* at 646.

In proceedings under RCW 71.09, there is no mechanism in place to determine the voluntariness of a respondent's statements. Nor are there any standards by which voluntariness is to be judged. To accord with due process, the voluntariness of each statement must be determined prior to its consideration by the trier of fact. *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 908 (1964). As the proponent of the evidence, the state should bear the burden of establishing that respondent's statements were voluntary, and the respondent should be given the opportunity to present contrary evidence.

In this case, the department did not establish that Mr. Strand's statements were voluntary; nor did the court make a finding that the statements were voluntary. Accordingly, the case must be remanded to the trial court for a voluntariness hearing. *Jackson v. Denno, supra.*

IV. MR. STRAND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The standard for evaluating whether or not counsel provided effective assistance in a proceeding under RCW 71.09 is the same standard used in criminal cases. *In re Stout*, 128 Wn.App. 21 at 27-28, 114 P.3d 658 (2005). In order to establish ineffective assistance, an appellant must first show that counsel's performance was deficient, and then that the deficient performance prejudiced his case. *In re Greenwood*, 130 Wn.App. 277 at 286-287, 122 P.3d 747 (2005).

A. If the denial-of-counsel claims and the voluntariness-hearing claim are not preserved for review, then Mr. Strand did not receive the effective assistance of counsel.

As noted above, Mr. Strand was denied his statutory and constitutional right to counsel because the state failed to follow the procedures outlined in RCW 71.09. Furthermore, the trial court should have held a hearing to determine the voluntariness (and admissibility) of his statements. If these issues are not preserved for appellate review, then Mr. Strand was denied the effective assistance of counsel.

First, competent counsel would have raised an adequate objection to the improper procedure followed by the state, and would have sought to suppress any statements made by Mr. Strand, as well as the evaluation derived from those statements. Second, if counsel had objected, the state

would have been left without a foundation for admitting the uncharged criminal conduct upon which it relied so heavily at trial. Furthermore, Dr. Longwell's conclusions were based in part on Mr. Strand's statements and would have had less support if she'd been unable to rely on his statements. Without this damaging evidence, the outcome of the trial would likely have been different.

If the issues are waived as a result of counsel's failure to object, then Mr. Strand was denied the effective assistance of counsel. This court should evaluate the merits of his statutory and constitutional denial-of-counsel claims despite the absence of an objection below. This court should also remand the case for a voluntariness hearing to determine the admissibility of his statements.

B. Mr. Strand was denied the effective assistance of counsel when his attorney permitted him to participate in a second evaluation and a deposition, and permitted him to testify during the department's case-in-chief.

Competent counsel would have realized that Mr. Strand faced potential exposure for uncharged crimes, and would have advised him to assert his Fifth Amendment privilege against incrimination as to those uncharged crimes, as well as any information that could be used against him at a future sentencing proceeding. Without Mr. Strand's cooperation, the department would not have been able to introduce evidence of the

uncharged criminal conduct, since the alleged victims in those cases were unable to identify Mr. Strand as the alleged perpetrator. Mr. Strand's statements to Dr. Longwell also contributed to her negative conclusions; without his cooperation, her testimony would have been far less detrimental.

Trial counsel should have advised Mr. Strand to assert his Fifth Amendment privilege against self-incrimination as it related to uncharged criminal conduct and any potential criminal sentencing proceeding. Her failure to do so not only exposed him to further criminal prosecution, it also validated the state's evidence and contributed to the finding that he is a sexually violent predator. Because of this, he was denied the effective assistance of counsel. The order committing him as a sexually violent predator must be reversed, and the case remanded to the trial court. *Greenwood, supra.*

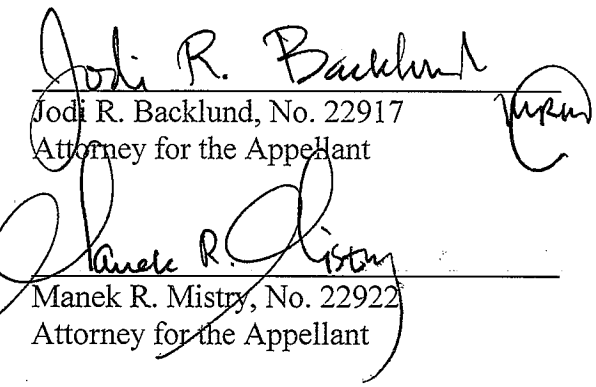
CONCLUSION

For the foregoing reasons, the order committing Mr. Strand as a sexually violent predator must be reversed, and the case remanded for a new trial. In the alternative, the case must be remanded to the trial court for a hearing on the admissibility of his statements. If the trial court

determines that his statements were not voluntary, Mr. Strand must be granted a new trial.

Respectfully submitted on September 22, 2006.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 22, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 22, 2006.

Manek R. Mistry
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