

NO. 80570-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of:

JOHN L. STRAND,

Petitioner.

SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON

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I. INTRODUCTION

This case involves an appeal from an order committing John Strand as a sexually violent predator (SVP). RCW 71.09.025(1)(b)(v) requires that, when a case is referred to the prosecuting attorney, the Department of Corrections (DOC) shall provide the prosecutor with, *inter alia*, “a current mental health evaluation or mental health records review.” Strand voluntarily participated in a pre-filing interview with a psychologist and steadfastly denied any sexual wrongdoing. He later participated in a second psychological interview and a deposition with counsel present, and testified without objection at trial, continuing to deny all wrongdoing.

The Court of Appeals properly affirmed the commitment. There was no right to counsel prior to initiation of the SVP proceeding. Nor did any violation of his 5th Amendment rights occur: Strand denied all sexual misconduct during the interview and as such, none of his statements were incriminating. Finally, neither the law nor the facts of this case requires imposition of a voluntariness requirement on the State where Strand voluntarily participated in the interview.

II. ISSUES

This Court has limited its review to the following issues:

- A. Whether the State acted outside the exclusive procedures of RCW 71.09 by evaluating Strand as a sexually violent predator without a judicial finding of probable cause; and

- B. Whether the trial court had to determine that Strand's statements were voluntary before admitting them in the sexually violent predator proceeding.

III. STATEMENT OF THE CASE

On February 7, 2005, while Strand was serving a 150-month sentence for first degree child molestation of a 4-year old girl, the State filed a petition alleging that Strand was an SVP as defined in RCW 71.09. CP 11-12; 109. The petition relied in part on a January 5, 2004, mental health evaluation conducted by Dr. Kathleen Longwell, who had been retained by DOC to conduct an evaluation pursuant to RCW 71.09.025. CP 104; RP 121-22; 127; 128 (1/31/06). Prior to that interview, Dr. Longwell informed Strand that the interview was not confidential and that the information gathered could be used against him in an SVP case. CP 104; 128. After receiving that information, Strand signed a consent form agreeing to the evaluation. CP 104. During the interview Strand denied committing any sex crimes or having any sexual interest, contact, or fantasies involving children. CP 124-25; 129; RP 154; 162; 176 (1/31/06).

On May 16, 2005, the trial court found probable cause that Strand was an SVP. RP 11-12 (5/16/05). No objection to the pre-filing evaluation was raised. On November 8, 2005, in accordance with the trial court's order directing an evaluation pursuant to RCW 71.09.040(4), Dr. Longwell met with Strand a second time with counsel present. RP 128 (1/31/06). Again, no

objection to the conduct of the interview was lodged.

Prior to trial, Strand objected to the testimony of unadjudicated sexual offense victims, arguing that their testimony was irrelevant and prejudicial. CP 50. After a lengthy inquiry into the factual circumstances of each witness the State intended to call at trial (RP 13-44 (1/30/06)), the court determined that, with the exception of one victim, “each of these witnesses is able to state what took place. . .and where it took place.” RP 29 (1/30/06). The court noted that Strand “acknowledged in his deposition that he did have contact with these girls, was maybe not able to identify them by name but put them certainly in the same place. . . .” *Id.* at 29.¹

At trial, the State put forth the testimony of several unadjudicated female victims,² the mother of an alleged victim who was not available to testify, (RP 68-87) and Dr. Longwell (RP 114-94 (1/31/06); RP 16-126 (2/1/06)). The State also offered the testimony of M.L., the 4-year old that Strand was convicted of molesting. RP 20-26. Finally, the State called Strand, who denied having touched any of the victims sexually, but admitted having been in the same locations as each of them. RP 127-36 (2/1/06). The jury returned a verdict for the State. RP 54 (2/6/06); CP 9-10.

¹ With regard to the remaining victim, M.G, the court went on to note that “Mr. Strand has placed himself at that location at that particular time and substantiates pretty much the fact that there was some kind of contact, the fact that he was arrested and accused of this particular crime with regard to this girl.” RP 31 (1/30/05).

² M.K. (RP 26-33); A.W. (RP 33-50); A.M. (RP 50-63); B.W. (RP 92-112) (1/31/06).

The Court of Appeals affirmed the commitment. The court held that Strand consented to the pre-petition evaluation and did not preserve the issue for appeal. *In re Detention of Strand*, 139 Wn. App. 904, 910, 162 P.3d 1195 (2007). The court stated that it could not consider whether the pre-petition evaluation was error unless it was a manifest error affecting a constitutional right. *Id.* The court further determined that because there is no constitutional right to counsel at a psychological evaluation and Strand did not incriminate himself during the evaluation, he failed to demonstrate a manifest error affecting a constitutional right. *Id.* The court also dismissed the claim of ineffective assistance of counsel, stating that counsel's decision not to contest the pre-petition interview or request a voluntariness hearing on the admissibility of Strand's statements to Dr. Longwell was not objectively unreasonable. 139 Wn. App. at 912-13.

IV. ARGUMENT

Strand failed to preserve any objection to his pre-filing interview and cannot raise these issues for the first time on appeal unless he is able to show a manifest error affecting a constitutional right. RAP 2.5(a)(3). No such showing can be made here. The pre-filing psychological evaluation was conducted according to the express terms of RCW 71.09. Because persons under consideration as possible SVPs have no right to counsel before the initiation of legal proceedings, and because there is no blanket 5th

Amendment right in this context, his claims must be rejected. Nor can Strand show that a voluntariness hearing was called for. Finally, even if there was error, Strand has completely failed to demonstrate any prejudice.

A. Strand Has Not Preserved Error

Strand voluntarily participated in the pre-filing interview, and at no time in the two years leading up to trial or during trial did he object to the interview. This Court has “steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); RAP 2.5(a). While an exception may be made if there is a “manifest error affecting a constitutional right,” no constitutional right is implicated here. RAP 2.5(a)(3).

Had Strand objected below, the trial court might have limited Dr. Longwell’s testimony to exclude reference to the interview, or have otherwise clarified the relevance of his statements. His decision to take his chances with the jury and wait until an unfavorable verdict to raise these issues on appeal means that the trial court could not consider the issues and rule accordingly, and the State was deprived of the opportunity to “shape [its] cas[e] to issues and theories” raised at the trial court level, instead “facing newly-asserted errors or new theories and issues for the first time on appeal.” *In re Audett*, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006), *citing* Karl B.

Teglund, *Washington Practice: Rules and Practice RAP 2.5(1)*, at 192. Such tactics should not be permitted.

B. The Psychological Evaluation Conducted by Dr. Longwell Was Within the Statutory Framework of RCW 71.09

Strand's assertion that the pre-filing evaluation violated the statutory framework is based on the misapprehension that RCW 71.09 provides for an evaluation *only after* the initiation of formal SVP proceedings and the attachment of the attendant right to counsel. This is incorrect. RCW 71.09.025(1)(b)(v) requires the referring agency to provide the prosecutor with a current mental health evaluation of the offender referred as a potential SVP. The statute then requires another evaluation after the finding of probable cause. RCW 71.09.040(4). These are two separate and distinct evaluations. Because Strand has no right to counsel at the pre-filing interview, his argument fails.

Most sexually violent predator involuntary civil commitment cases begin with a formal referral to the prosecuting authority from the End of Sentence Review Committee (ESRC). RCW 72.09.345(2); RCW 71.09.025(1). The ESRC was created by the Legislature "for the purposes of assigning risk levels, reviewing available release plans, *and making appropriate referrals for sex offenders.*" RCW 72.09.345(2) (emphasis added). The ESRC screens all sex offenders who are incarcerated in the DOC and whose release date is approaching. As part of the screening process, the ESRC refers offenders to

the prosecuting authority if the offender appears to meet the statutory definition of an SVP. RCW 72.09.345(4); RCW 71.09.025(1). When an offender is referred as a potential SVP, the referring agency is required to provide the prosecutor with records pertaining to the offender, including “a current mental health evaluation or mental health records review.” RCW 71.09.025(1)(b)(v). These materials are essential to ensure that the prosecuting agency is able to make a fully informed decision regarding the filing of a petition.

Dr. Longwell’s pre-filing evaluation was conducted pursuant to this process. Dr. Longwell was retained by DOC to perform the evaluation. CP 104; RP 118 (1/31/06). Following Strand’s voluntary participation in that interview, Dr. Longwell submitted a report, which the State attached to its Certification for Determination of Probable Cause. CP 90; 104-29. After considering the State’s petition and Dr. Longwell’s report, the trial court found probable cause and directed an evaluation pursuant to RCW 71.09.040(4). RP 6 (5/16/05). Dr. Longwell met with Strand a second time on November 8, 2005, this time with counsel present. RP 128 (1/31/06). Both interviews were well within the statutory framework.

1. There Is No Right To Counsel Before A Petition Is Filed

Strand asserts that the procedure in this case constitutes “an end-run around [Strand’s] statutory right to counsel” after the case is filed. Pet. at 7.

This is incorrect. The SVP statute provides the right to counsel at various stages of the SVP proceedings: at the 72-hour probable cause hearing (RCW 71.09.040(3)(a)), after the probable cause hearing and through the initial commitment trial (RCW 71.09.050(1)), and after commitment during post commitment release proceedings (RCW 71.09.090(2)(b)). The statute, however, contains no mention of any right to counsel at any phase **prior** to the initiation of formal SVP proceedings.

The legislature is capable of clearly enunciating a right to counsel where it believes one should exist. *E.g.*, RCW 71.05.150(1)(c), RCW 10.77.020(3).³ Had the legislature intended to provide a right to counsel at the investigatory phase, it would have included such a right in the language of that section, just as it was included elsewhere in the statute. Under the canon of statutory construction known as *expressio unius est exclusio alterius*, the express inclusion in a statute of matters upon which it operates implies that other matters are omitted intentionally. *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). This conspicuous absence demonstrates that the legislature chose not to confer that right to persons being considered for filing under RCW 71.09.

³ RCW 71.05.150(1)(c) provides that a person “shall be permitted to be accompanied by one or more of his relatives, friends, an attorney, a personal physician, or other professional or religious advisor to the place of evaluation. An attorney accompanying the person to the place of evaluation shall be permitted to be present during the admission evaluation.” RCW 10.77, governing procedures for the criminally insane, clearly states that “any time the defendant is being examined by court-appointed experts or professional persons pursuant to the provisions of this chapter, the defendant shall be entitled to have his or her attorney present.” RCW 10.77.020(3).

Nor can a right to counsel at a pre-filing evaluation be found in RCW 71.09.050(1), which provides for assistance of counsel “at all stages of the proceedings.” “Stages of proceedings” must be read in light of definitions of “proceeding.” *Black's Law Dictionary* 1241 (8th ed. 2004), defines “proceeding” as “[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.” Because the pre-filing interview conducted pursuant to RCW 71.09.025 is not a “stage of the proceedings,” persons interviewed have no statutory right to counsel.

Under the doctrine of *noscitur a sociis*, “a single word in a statute should not be read in isolation,” and “the meaning of words may be indicated or controlled by those with which they are associated.” *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999). The phrase “stages of the proceedings” appears only in the section of the act titled “Trial-Rights of Parties.” RCW 71.09.050. This Court has recently interpreted this language to refer to “[o]nly three specific events set forth in the chapter that the legislature might have explicitly considered to be ‘proceedings.’ First, the probable cause hearing. RCW 71.09.040(2). Second, the statutorily mandated examination. RCW 71.09.040(4). Finally, the trial itself.” *In re Kistenmacher*, 163 Wn.2d 166, 171, 178 P.3d 949 (2008).

This Court has previously recognized that there is no overarching right to counsel at every evaluation that might be used in a future SVP proceeding. In *In the Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999) a man previously committed as an SVP argued that RCW 71.09.050(1) conferred a right to counsel at the statutorily mandated post-commitment psychological evaluation pursuant to RCW 71.09.070. Rejecting this argument, this Court observed that RCW 71.09.090(2) contains a specific right to counsel when the committed person petitions for release from confinement. 138 Wn.2d. at 70. This Court reasoned that, “[i]f RCW 71.09.050(1) truly represents the overarching statutory grant of the right to counsel at all stages of all proceedings under the entire chapter, the grant of the right to counsel in the latter section is surplusage.” *Id.* at 92. Likewise, if this Court reads RCW 71.09.050(1) to include all events leading up to and including the initiation of legal action in an SVP case, the language explicitly granting a right to counsel at various other points prior to and after trial would be rendered superfluous.

Finally, Strand argues that the procedure followed in this case (and, by extension, in all other SVP cases) violates the rules set out in *In re Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002) and *In re Meints*, 123 Wn. App 99, 96 P.3d 1004 (2004). Pet. at 5-6. Those cases, however, are inapposite. In *Williams*, this Court determined that, given the express

provisions of RCW 71.09.040(4), it would be inappropriate to infer that additional *discovery* evaluations can be ordered pursuant to CR 35. *Williams*, 147 Wn.2d at 491. Neither *Williams* nor *Meints* consider or address the propriety of pre-trial evaluations under RCW 71.09.025.

2. There Is No Constitutional Right To Counsel Before An SVP Petition Is Filed

Strand argues that his rights to due process were violated by the procedure followed in this case, and, by implication, the procedure set forth in the statute. His argument fails, in that there is no constitutional right to counsel prior to the filing of the SVP action, and the creation of such a right would run contrary to all legal precedent.

In *Petersen*, the appellant also argued that he had a constitutional right to have counsel present at his annual post-commitment evaluation. *Petersen*, 138 Wn.2d at 91. In rejecting this argument, this Court first noted that persons facing commitment as SVPs have no constitutional right to counsel under either the 5th or 6th amendments to the federal constitution.⁴ *Id.* Under both provisions, the right to counsel accrues only in criminal cases.⁵ SVP cases are civil, not criminal, and so those amendments do not

⁴ Even if persons subject to RCW 71.09 were entitled to counsel under the 6th Amendment, they would not be entitled to counsel prior to the filing of the SVP action. The Sixth Amendment right of the “accused” to assistance of counsel in “all criminal prosecutions” is limited by its terms: “it does not attach until a prosecution is commenced.” *Rothgery v. Gillespie Cy., Tex.*, 2008 WL 2484864 (U.S. June 23, 2008).

⁵ Nor would the state constitutional equivalents of the federal 5th and 6th amendments afford persons detained under RCW 71.09 the right to counsel at the psychological evaluation because the state counterparts offer the same, not broader,

apply. *Id.*, citing *In re Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993).

The only constitutional provision that could conceivably provide the right to counsel in an SVP action is the due process clause, referred to by the *Petersen* court simply as “fundamental fairness.” *Petersen*, 138 Wn.2d at 91. However, the *Petersen* Court held that statutory procedures in RCW 71.09 are sufficient to ensure fairness and thus comply with due process without requiring counsel at post-commitment psychological evaluations. Noting that any danger of abuse during the evaluation is cured by statutory procedures that ensure the process, as a whole, is fair, the Court wrote that any concerns about an improper interview “are wholly cured by Petersen’s statutory right to have experts evaluate him and testify on his behalf, and the right to have the court appoint an expert if he can prove indigency.” *Id.* at 92.

Likewise, any abuse in a pre-filing evaluation can be exposed at the 72-hour probable cause hearing, where the person has a right, through counsel, to present evidence and question witnesses, including the evaluating expert. RCW 71.09.040(2); RCW 71.09.040(3). In addition, the detained person has the continuing right to court-appointed counsel and the right to an expert of their choosing at public expense. RCW 71.09.050(1), (2). The civil rules provide counsel with the ability to depose the State’s expert and, at that deposition, to ask questions designed to expose any abuses in the pre-filing

protections than the 5th and 6th amendments. See, *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 232, 978 P.2d 1059 (1999) (Art. 1, § 9).

interview and bring those to the attention of the trial court and jury.

Strand cites no cases in which due process has required a right to counsel prior to initiation of legal proceedings. Imposing a right to counsel prior to initiation of the legal proceedings would radically depart from current law. Cases from other jurisdictions support this conclusion. For example, the California Court of Appeals has held that due process does not require appointment of counsel for a pre-filing SVP evaluation. *People v. Carmony*, 99 Cal. App. 4th 317, 120 Cal. Rptr. 2d 896 (2002). That court held that individual liberty interests were properly protected by statutory entitlement to counsel at the probable cause hearing and trial, the right to retain an expert, and the right to access to all relevant medical and psychological reports. 99 Cal. App. 4th at 326-28. Given these post-filing protections, requiring a court appearance for appointment of counsel before interviews are conducted and before a petition is filed would cause delay and increase the administrative burden without increasing the accuracy of the process. *Id.* at 328. As the court noted, until the evaluation is complete, it is unknown whether there are sufficient grounds to pursue the matter further. *Id.* at 327; *See also Lynch v. Baxley*, 386 F. Supp. 378, 389 n.5 (M.D. Ala., 1974) (Right to counsel in civil commitment proceedings “does not... extend to preliminary information-gathering stages, such as psychiatric interviews, where custodial decisions are not made.”)

Extending the right to counsel to the “current mental health evaluation” under RCW 71.09.025 would also have absurd results. It would be difficult, if not impossible, to limit such a holding, and as such it would conceivably impact innumerable contacts between correctional staff and prisoners.⁶ It is common, for example, for experts conducting SVP evaluations to rely on statements made by the potential SVPs to previous treatment providers or mental health evaluators. Would the right to counsel at the pre-filing evaluation extend to such contacts? Would the State be unable to use highly relevant statements made in the context of such assessments because counsel had not been provided? Strand’s reasoning would support the finding of a right to counsel any time a person makes any form of admission that could later be used to support a conclusion the person is an SVP.

3. Strand’s 5th Amendment Rights Were Not Violated

Strand argues that the State also violated his right to remain silent. Pet. at 8. Strand had, however, no blanket 5th Amendment rights in this context, and, moreover, made absolutely no “incriminating” statements. Even

⁶ Although the *Kistenmacher* Court determined that the reasoning of *In the Matter of the Dependency of J.R.U.-S*, 126 Wn. App. 786, 110 P.3d 474 (2005), did not apply in the context of the **post-probable cause** evaluation under RCW 71.09.040(4), it remains persuasive authority in this context. Just as pre-adjudication services offered under RCW 13.34 “can easily include months of counseling and supervised visits,” extending the right to counsel to the RCW 71.09.025 “current mental health evaluation” could impact innumerable contacts between correctional staff and prisoners, such as individual and group counseling sessions, that might be encompassed by the phrase “current mental health evaluation.”

if he had made any statements that realistically exposed him to criminal liability, the remedy would be to suppress those statements in the criminal proceeding, not to require dismissal of this case.

Generally a person must invoke the 5th Amendment protections in order for them to apply. There are two exceptions to this requirement: (1) custodial interrogation by a state agent; and (2) situations where the assertion of the privilege would be penalized. *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992). To prevail on a 5th Amendment claim, Strand must show that there is a “realistic threat of self incrimination” in a subsequent proceeding. *State v. King*, 130 Wn.2d 517, 524, 925 P.2d 606 (1996). Strand’s 5th Amendment arguments are unsupported by law and the facts of this case. He was not compelled to participate in the pre-filing evaluation, which was entirely voluntary. CP 104. Several days before the evaluation, Strand’s DOC counselor asked whether he wanted to take part in the evaluation. CP 128. When Strand met with Dr. Longwell, she again told him participation was voluntary, and presented him with a document entitled “Notification as a Sexually Violent Predator” that stated the nature and purpose of the interview. CP 104. He was repeatedly told the interview was not confidential and that information he provided “may be included in written reports and testimony on his case.” CP 104; 128. After reading the notice, he agreed to be interviewed and signed the consent form indicating his

agreement. *Id.* Strand made no incriminating statements during the interview⁷ and denied committing any sex crimes or having any sexual interest, contact or fantasies involving children. CP 124-125; 129; RP 154, 162, 176.

Finally, Strand does not identify what abuses might have been cured by the presence of counsel. Even *if* counsel had been present and had advised him not to respond to questions relating to unadjudicated offenses, and *if* the court had upheld such refusal, Dr. Longwell clearly had sufficient information to form her preliminary opinion. CP 104-29.⁸

Strand's real concern does not appear to be the possibility of criminal liability; rather, his concern is avoiding commitment as an SVP. Pet. at 8-9. The only "abuse" Strand claims is that his statements during the examination contributed to Dr. Longwell's conclusion that he appeared to meet the definition of an SVP. Pet. at 8-9. Such concerns do not trigger 5th Amendment protection. *See State v. Lombard*, 273 Wis.2d 538, 684 N.W.2d 103 (2004).

⁷ Slightly over one page of Dr. Longwell's 49-page report is devoted to Strand's own statements about his sexual offending (CP 124-25) and Dr. Longwell makes only one reference to any "admission" by Strand relating to an unadjudicated victim: Strand told Dr. Longwell he had attempted to "grab" a girl "around 1988." CP 124. This may (or ay not) refer to his 1986 assault on A.W. RP 34-49 (1/31/06). All other discussions of his unadjudicated offenses reference only official records.

⁸ Moreover, had Strand refused to testify at trial, the State would have been entitled to a jury instruction that jurors may draw reasonable inferences from his refusal to testify. *Ikeda v. Curtis*, 43 Wn.2d 449, 458, 261 P.2d 684 (1953); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998).

C. Due Process Did Not Require A Voluntariness Hearing

Strand contends due process prohibits use of a person's involuntary statements against them in a civil proceeding, and requires the State to bear the burden of proving voluntariness at a separate hearing prior to a civil commitment trial, as is required in criminal cases. Pet. at 11-12. Strand cites no authority for the proposition that such a proceeding is required in the context of a voluntary psychological interview. Moreover, all of the cases he cites involve serious allegations of government misconduct.⁹ No such misconduct is alleged, much less demonstrated, here. Nor does this case involve any "confession." To the contrary, Strand steadfastly denied having ever had any sexual contact with any of his victims. Strand's argument is without merit.

D. Even If Any Error Occurred, Strand Was Not Prejudiced

Strand argues that he is entitled to a new trial. Even assuming, *arguendo*, that the alleged statutory and constitutional rights exist and were violated, Strand has not shown that he was prejudiced in any way.

The extreme remedy of reversal is inappropriate without a showing

⁹ In *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960), the 9th Circuit considered whether confessions of membership in the communist party, made after seven hours of interrogation, including threats of deportation or prosecution, violated due process. In *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 98 (1964), the Court considered the constitutionality of New York State's procedures for determining voluntariness in a criminal case. The defendant, seriously wounded, was given Demerol and scopolamine immediately before questioning, and claimed that he was "in pain and gasping for breath at the time and was refused water and told he would not be let alone until the police had the answers they wanted." *Id.*, 378 U.S. 368 at 372.

that the error was prejudicial and harmful or that the State willfully ignored the law. *Kistenmacher*, 178 P.3d. at 953. Strand makes no such showing. Like *Kistenmacher*, Strand “had no right to remain silent during the examination, [thus] counsel’s role would have been limited.” *Id.* Likewise, Strand, like *Kistenmacher*, “does not direct [the Court] to any information that Dr. [Longwell] obtained in the clinical examination that was not available from the records the doctor reviewed, the actuarial tests, and/or [Strand’s] deposition in the presence of counsel.” *Id.* Had Strand made inculpatory admissions to the State’s expert, “suppression of those statements or even [the State’s expert’s] testimony might well be the appropriate remedy.” *Id.* at 953-54. Strand, however, like *Kistenmacher*, “made essentially the same admissions in the presence of counsel” when he testified at trial without objection. *Id.* Thus, even if Dr. Longwell had never examined Strand, “there is no reason to think [her] testimony would have been different.” *Id.*

Strand argues that the result would have been different if he had competent counsel at the initial interview, advising him to remain silent rather than participate in the evaluation.¹⁰ Pet. at 7. He claims that without his

¹⁰ On review, there is a strong presumption that counsel’s conduct fell within the range of reasonable professional assistance. *In re Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). The burden is on Strand to establish that: (1) counsel’s actions fell below the objective standard of reasonableness, and (2) “there is a reasonable possibility that but for the deficient conduct the outcome of the proceeding would have differed.” *In re Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). When ineffective assistance of counsel is alleged,

statements, the State could not have established the foundation for admission of the uncharged incidents, and the evaluator would not have been able to consider those incidents in forming her opinion. Pet. at 7-9.

This assertion conflicts with the record. Strand denied all sexual wrongdoing, both in his pre-filing interview and in all subsequent statements. Although he claims his admission to being in the same location as various victims are “inculpatory,” he does not point to any statements by Dr. Longwell to suggest that she factored these alleged “admissions” into her conclusions. To the contrary, Dr. Longwell testified that during the pre-and post-petition interviews, Strand “just categorically denie[d]” committing any sex offenses. RP 176 (1/31/06). Such denial did not prevent her from forming a diagnosis of pedophilia, or from forming an opinion in this case. RP 158; 162 (1/31/06). Indeed, she formed her opinion *despite* what he said about his behavior, rather than because of it: Dr. Longwell testified that while she could not totally discount Strand’s denial of wrongdoing, neither could she negate his extensive record simply based on his denial. RP 162 (1/31/06).

Nor is there any reason to assume the State could not establish the necessary foundation to tie Strand to the offenses in the absence of his statements to Dr. Longwell. During a pre-trial hearing, in discussing the foundation for admission of the victims’ testimony, the State’s counsel

due to a failure to object to the admission of evidence, the appellant must show that the trial court would likely have sustained the objection. *Id.* at 377. Choosing not to object to a proper procedure does not constitute ineffective assistance of counsel. *Id.*

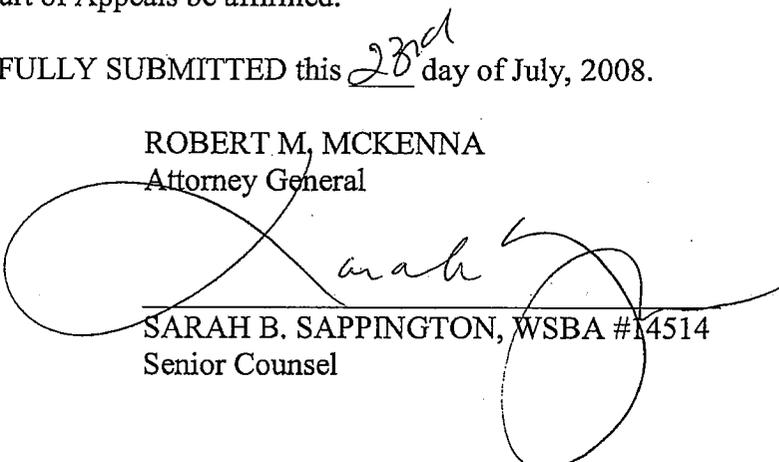
described various ways in which Strand could be tied to the offenses, including numerous statements he made during his deposition placing him at the scene of the offenses, reports identifying Strand as the perpetrator and statements by victims' parents. RP 15, 17-21 (1/30/06). None of these methods depend on the pre-filing interview. Indeed, as to two of the unadjudicated victims, M.G. and M.K., Strand had admitted at the time of the incidents that he had spoken to the victims, but denied having had sexual contact with them. CP 72; 82-83; 110-11. Nor is there any evidence that, beyond making a possible reference to having tried to "grab" A.W., Strand discussed any of the offenses with Dr. Longwell during the pre-filing interview at all. Strand fails to make even a cursory showing that his pre-filing evaluation with Dr. Longwell played any part in forming the basis for the admission of the victims' testimony.

V. CONCLUSION

For the foregoing reasons, the State respectfully asks that Strand's the decision of the Court of Appeals be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of July, 2008.

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