

NO. 44759-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

DARRELL KENT,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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TABLE OF CONTENTS

I.	ISSUES PRESENTED	1
II.	STATEMENT OF THE CASE	1
	A. Procedural History	1
	B. Substantive History	2
	1. Kent’s Criminal Sexual History	2
	2. Expert Opinion Evidence	2
III.	ARGUMENT	4
	A. Kent Received Effective Assistance Of Counsel.....	5
	1. Legal Standard.....	5
	2. Trial Counsel’s Conduct Was Strategic and Reasonable.....	7
	B. The Verdict Would Not Have Been Different Had The Disputed Evidence Not Been Admitted.....	14
IV.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn. 2d 801, 828 P.2d 549 (1992).....	12
<i>In re Marshall</i> , 156 Wn.2d 150, 125 P.3d 111 (2005).....	11
<i>In re Smith</i> , 117 Wn. App. 611, 72 P.3d 186 (2003).....	5
<i>In re Stout</i> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	13, 14
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978).....	6
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	12
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	6
<i>State v. Froehlich</i> , 96 Wn.2d 301, 635 P.2d 127 (1981).....	12
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	6
<i>State v. Manion</i> , 173 Wn. App 610, 295 P.3d 270 (2013).....	13
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	6, 14
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	13

<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998).....	7
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	6
<i>State v. Thomas</i> , 71 Wn.2d 470, 429 P.2d 231 (1967).....	6
<i>State v. Varga</i> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	6
<i>State Wicker</i> , 66 Wn. App. 409, 832 P.2d 127 (1992).....	13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	5, 6
<i>United States v. Holmes</i> , 26 F. Cas. 349 (C.C.Me.1858).....	12

Rules

ER 703	11
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I. ISSUES PRESENTED

Did Kent receive ineffective assistance of counsel when, on cross examination, he intentionally elicited relevant expert opinion testimony clearly permitted by law?

II. STATEMENT OF THE CASE

A. Procedural History

This Sexually Violent Predator (SVP) civil commitment action was initiated on November 21, 2011. CP at 216-17. At the time of filing, Kent was incarcerated following his 2005 conviction for Child Molestation Second Degree. *Id.* His commitment trial began on March 13, 2013 in Wahkiakum County Superior Court.

At trial, the State presented the testimony of the appellant Darrell Kent (RP at 20-23, Exs. 29, 30, and 31 (by deposition); RP at 296-334 (live testimony), three of Kent's victims (C.L. (by stipulation); RP at 24-25; CP at 51-52); P.D. (RP at 26-37), and E.L. (RP at 37-57)), and Dr. Mark Patterson. Ph.D. (RP at 84-287; 554-573). Kent presented the testimony of Dr. Luis Rosell (RP at 340-545) and Brian Weathers, an employee of a property management firm that runs the Hudson Annex, which accepts level three sex offenders. RP at 547-48.

At the conclusion of the four-day trial, a unanimous jury determined that Kent was a sexually violent predator. CP at 9. Kent was committed

to the Department of Social and Health Services at the Special Commitment Center on March 20, where he remains today. CP at 8. This appeal follows.

B. Substantive History

1. Kent's Criminal Sexual History

Except as otherwise noted, the State accepts the statement of Kent's criminal history as set forth in Appellant's Brief at 3-8.

2. Expert Opinion Evidence

At trial, the State offered the expert opinion testimony of forensic psychologist Dr. Mark Patterson. Dr. Patterson has considerable experience in conducting both psychological evaluations and forensic risk assessments and has published extensively on the subject of psychopathy. RP at 87, 92-93, 97-98. He is a licensed as a psychologist in both Washington and California. *Id.* at 86. He has been doing SVP evaluations in California since 2003, and in Washington since 2008. *Id.* at 95. He has conducted approximately 500 evaluations in Washington and California pursuant to those states' SVP laws. *Id.* at 96. After evaluating Kent, Dr. Patterson testified that he suffered from pedophilia, three disorders relating to substance abuse (amphetamine dependence, cannabis abuse, marijuana abuse), alcohol abuse, and an antisocial personality disorder. *Id.* at 111. In addition, he raised a question as to whether a diagnosis of sexual sadism should be assigned. *Id.*

Dr. Luis Rosell, who testified on behalf of Kent, also assigned diagnoses of pedophilia, antisocial personality disorder and substance abuse. *Id.* at 371-72, 428, 457.

As part of their respective risk assessments, both Drs. Patterson and Rosell scored Kent on the Static-99R and Static-2002R, two actuarial instruments that are widely used in risk assessments of sex offenders. On cross-examination, Dr. Patterson was questioned extensively about the fact that he had changed his scoring of an item that appears in both instruments that is related to the age of the offender at the time of his release. RP at RP 266-277. The practical effect of changing this score was to raise Kent's overall score on the instrument. To explain the change, Dr. Patterson testified that he had consulted with a person associated with the development of the Static scoring manual in order to determine whether he was correctly interpreting the coding rules regarding the scoring of that item. RP at 277-78. Dr. Patterson later identified this person as Dr. Amy Phenix. RP at 562. On redirect, he testified that he had consulted with Dr. Phenix to determine whether his "new thinking was accurate" which, he testified, the person she confirmed that it was. *Id.* at 279. *See also* RP at 562.

When Kent's expert, Dr. Luis Rosell, testified on direct, Kent's trial counsel asked him whether he had consulted with anyone about his own scoring of the Static-99R. *Id.* at 402. Dr. Rosell testified that he had consulted with

Dr. Jan Looman, whom he identified as “one of the people who you can send e-mails to. . . “and, over the State’s objection, was permitted to give further explanation as to the reason he had consulted with Dr. Looman. *Id.* at 402-03. On re-direct, Kent’s attorney was permitted to ask further questions about this consultation, and Dr. Rosell said he had consulted with the “Static-99R coding people” and that “they provided me with basically confirmation that I had done it correctly.” RP at 521. He then indicated Dr. Looman was the person with whom he had consulted, saying that he was someone “who helps them out with the coding rules.” *Id.* at 522. On re-cross, the State established that Dr. Looman is not listed as a person involved with the development of the Static-99R coding rules, but that Dr. Phenix was. RP at 530.

III. ARGUMENT

Kent argues that his trial counsel was ineffective for failing to object to the State’s expert’s testimony that he consulted with Dr. Amy Phenix regarding Dr. Patterson’s scoring of an item on the two Static instruments. He characterizes Dr. Patterson’s testimony on this issue as “non-responsive” to his cross-examination, and as constituting “improper vouching” for the expert’s credibility. App. Br. at 26. He further argues that counsel’s failure to object to this testimony opened the door to further testimony on redirect that Dr. Patterson obtained confirmation from the developers that he in fact correctly interpreted the coding rules when scoring Kent which, he

argues, deprived Kent of effective assistance of counsel because “the credibility of Patterson’s risk assessment was ...critical to the state’s case.” App. Br. at 29, 35.

This argument fails. First, Kent’s attorney intentionally elicited the testimony Kent now characterizes as objectionable as part of his trial strategy. Second, the evidence to which he now objects was in fact both relevant and admissible, and a request to strike the testimony would have failed. Finally, even if such testimony was improper and his attorney should have objected, Kent was not prejudiced by its admission. The now-objected-to testimony formed only a minute part of the four-day trial and was offset by comparable testimony by Kent’s expert. This Court should affirm Kent’s civil commitment as a sexually violent predator.

A. Kent Received Effective Assistance Of Counsel

1. Legal Standard

Although sex predator cases are civil, cases in which ineffective assistance of counsel is alleged are analyzed under the *Strickland*¹ standard by courts of this state. *In re Smith*, 117 Wn. App. 611, 72 P.3d 186 (2003). The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said the accused was afforded effective representation and a fair and impartial trial.

¹ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). To establish ineffective assistance of counsel, the defendant bears the burden of proving two things: First, considering the entire record, that he or she was denied effective representation, and, second, that he or she was prejudiced by such ineffectiveness. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting the two-prong *Strickland* test). Both prongs must be met to satisfy the test. *State v. Brockob*, 159 Wn.2d 311, 345, 150 P.3d 59 (2006).

On review, there is a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption will be rebutted only by a clear showing of incompetence. *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). If trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance of counsel (*State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)) and it is the burden of the defendant to show there were no conceivable legitimate strategic or tactical reasons explaining counsel's performance. *McFarland*, 127 Wn.2d at 336.

Trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case will the failure to object constitute incompetent representation that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on a claim of ineffective assistance

based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting; (2) that the trial court would have sustained the objection if made; and (3) the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

2. Trial Counsel's Conduct Was Strategic and Reasonable

Kent's assertion that trial counsel was ineffective mischaracterizes the record below in an attempt to label as ineffective what was in fact a strategic decision by his trial counsel. Kent argues that, having initially "properly recognized the impropriety of such testimony" by filing motions in limine, the defense then "allowed to stand" Dr. Patterson's "non-responsive" answer to one of his questions, an answer which, he argues, improperly bolstered his testimony. App. Br. at 28. In fact, the motions in limine to which Kent refers had nothing to do with Dr. Patterson's reference to Dr. Phenix, testimony that was both anticipated and elicited by Kent's trial counsel.

Kent asserts that "the defense successfully sought to exclude the state's expert from relating the hearsay opinions of other, non-testifying expert witnesses to explain or bolster the testifying expert's opinion." App. Br. at 26. That motion—to which the State agreed (CP at 62) was, however, directed towards an entirely different sort of expert testimony and made no mention of the sort of testimony Kent now identifies as objectionable. Kent's motion in the

trial court sought to preclude the State's experts "from relating the hearsay opinions of other non-testifying witnesses *who may have conducted evaluations of Mr. Kent or who have arrived at some opinion about Mr. Kent.*" CP at 91-92 (Emp. added). Such a motion would appear intended to prevent the State's expert from testifying, in effect, "I think he's very dangerous, and lots of other people do, too." Dr. Patterson's consultation with Dr. Phenix, and his testimony regarding that consultation, would not, however, have fallen within the ambit of this motion: Kent does not suggest that Dr. Phenix "conducted evaluations of Mr. Kent" or "arrived at some opinion about Mr. Kent." Rather, she was consulted on the question of how certain coding rules—which she helped to write—should be interpreted and whether his "new thinking" on that issue was accurate. RP at 278-79. This does not involve evaluating or forming an opinion about Kent; it simply involves an authoritative interpretation regarding how a particular rule should be applied.

Although the motion in limine to which Kent refers did not relate to the testimony he now characterizes as objectionable, there was in fact a motion made, after trial had begun, that was relevant to Dr. Patterson's decision to change his scoring. Following Kent's opening statement, and apparently based on a statement by defense counsel during that opening, the State's attorney made a motion to preclude the defense from implying that she had "had something to do with" Dr. Patterson's decision to change his scoring of one item on the

Static-99R and Static-2002R. RP at 69-70. By way of explanation, the State's attorney told the court that, at Dr. Patterson's deposition several weeks earlier, Dr. Patterson had told counsel that his scoring of the item relating to Kent's age at the time of release might have been incorrect. *Id.* at 69. Dr. Patterson stated, however, that he had not yet changed his score because he "wanted to talk to Dr. Phenix or confer with the individuals who developed the Static-99R and Static-2000R [sic], in particular Dr. Phenix," to confirm what he had subsequently come to believe was the correct approach. *Id.* at 69. At the hearing before the trial court, counsel for Kent did not appear to intend to suggest that the State's attorney had been responsible for that change in scoring, but told the court that "what I want to be able to go into, which I think is significant, is that he's changed his score and *what the reasons were that he changed his score and what the circumstances are of that.*" *Id.* at 71 (Emp. added). "Any questions that I'm asking," he continued, "I'm aiming at the process that the expert went through." *Id.* at 71. The court ruled that the defense "ha[s] every right to inquire what the basis was for his reconsideration or considering that change." *Id.* at 74.

It was thus absolutely clear to all parties that Kent's counsel intended to inquire into the circumstances of Dr. Patterson's having changed his scoring of one item on two related instruments, and that this line of questioning would inevitably elicit testimony regarding his having consulted with Dr. Phenix. This approach was strategic and was not unreasonable.

Kent's trial counsel may well have reasoned that any potential damage as a result of Dr. Patterson's testifying to having consulted with one of the developers of the Static would be outweighed by the damage to Dr. Patterson's credibility that the defense might be able to inflict by a vigorous cross-examination regarding Dr. Patterson's initial mistake in scoring. Indeed, before Dr. Patterson referenced his consultation with Dr. Phenix, the defense had just spent roughly 11 pages attacking his credibility by focusing on his decision to change his scoring of the instrument. RP at 266-77. Defense counsel had asked, for example, whether the decision to change the score "would cast any doubt on your ability to properly code these instruments," (RP at 275) and asked whether Dr. Patterson would regard the opinions of other named persons as "authoritative" or "definitive." RP at 276-77. The defense knew that this information regarding Dr. Patterson's consultation with Dr. Phenix would come out; indeed, he intended that it come out as part of an overall strategy both to use this testimony to suggest that Dr. Patterson's opinion was not credible, and to use it as an opportunity to present testimony by Kent's own expert who, although he had also consulted with an outside expert, decided not to change his scoring.

Even assuming *arguendo* that Kent's attorney should have objected to Dr. Patterson's testimony, any such objection would have been overruled.

ER 703 permits an expert to base his or her expert opinion on facts or data not otherwise admissible provided that they are of a type reasonably relied on by experts in the particular field. Thus, the rule allows expert opinion testimony based on hearsay data that would otherwise be inadmissible in evidence. *In re Marshall*, 156 Wn.2d 150, 150, 154-55, 162, 125 P.3d 111 (2005). An explanation by a developer of the coding rules as to how those rules should be interpreted is certainly “of a type reasonably relied on by experts in the particular field.” Dr. Patterson’s testimony makes clear that such consultations are commonplace when he indicated that he “would normally consult with a fellow expert in the field if I had some uncertainty and wanted to make sure that my thinking was accurate.” RP at 278. Indeed, the website for the Static-99R (<http://static99.org>) includes a link to allow submission of coding questions, suggesting both that it is not unusual for such questions to arise and that it is common for persons using the instrument to seek guidance with such questions.

Kent also argues both that Kent’s attorney was ineffective when he permitted the State’s expert to “bolster” his own testimony through his reference to Dr. Phenix, and that the trial court erred when it sustained the State’s objection to Kent’s attorney’s attempt to elicit further explanation from his own expert, Dr. Rosell, regarding his own consultation with Dr. Looman. App. Br. at 26, 28-29. Kent offers no authority in support of his

theory of “bolstering” or “vouching.” Arguments that are not supported by citation of authority need not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

Even if this Court were to consider this argument, the argument fails. The objected-to testimony by Dr. Patterson was not “bolstering,” but was a legitimate and foreseeable response to a vigorous cross-examination. On the other hand, the elicitation of similar testimony from Kent’s own expert witness on direct was, in fact, objectionable as bolstering. “The general common-law rule is that the proponent may not bolster the witness’s credibility before any attempted impeachment.” *State v. Bourgeois*, 133 Wn.2d 389, 401, 945 P.2d 1120 (1997), citing Edward J. Imwinkelried, *Evidentiary Foundations* 86 (2d ed. 1989); *United States v. Holmes*, 26 F. Cas. 349, 352 (C.C.Me.1858) (“No principle in the law of evidence is better settled than ... the rule, that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard *except in reply to some matter previously given in evidence by the opposite party to impeach it.*”). “Corroborating evidence is admissible only when a witness’ credibility has been attacked by the opposing party and, even then, only on the facet of the witness’ character or testimony which has been challenged.” *Bourgeois*, citing *State v. Froehlich*, 96 Wn.2d 301, 305, 635 P.2d 127 (1981). “Corroborating testimony intended to rehabilitate a witness is not admissible *unless the witness’s credibility has been attacked by the*

opposing party.” *State v. Petrich*, 101 Wn.2d 566, 574, 683 P.2d 173 (1984) (Emp. added).

As noted above, Dr. Patterson mentioned his e-mail exchange with Dr. Phenix only after having been subjected to roughly 11 pages of cross-examination regarding the credibility of his opinion. Kent, on the other hand, sought to expand on Dr. Rosell’s disclosure that he, too, had consulted with an outside “expert,” on direct examination, at a point at which the credibility of his testimony or his opinion had not been called into question. The State’s objection to this line of questioning was properly sustained as bolstering.

Nor, as Kent alleges, did Dr. Patterson’s reference to Dr. Phenix’s statements regarding application of the coding rules violate his right to confrontation. App. Br. at 31-34. In support of this argument, Kent cites two criminal cases: *State Wicker*, 66 Wn. App. 409, 832 P.2d 127 (1992) and *State v. Manion*, 173 Wn. App 610, 295 P.3d 270 (2013). These cases are based on the Sixth Amendment’s confrontation clause, and as such are not applicable in this civil case. *See In re Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007).² Nor does the Due Process Clause confer upon Kent any right to

² Nor does the reasoning of those cases apply: Kent argues that Dr. Patterson’s testimony regarding the instrument’s scoring violated his right to confrontation because Dr. Patterson “changed his score based on the testimonial statement of the non- testifying expert,” and “did not exercise independent judgment at all,” instead relying “entirely on Phenix’s purported assertion as to how Kent should be scored in arriving at his ultimate conclusion.” App.Br. at 33. Kent points to nothing in the record to support these assertions,

confront a live witness at a commitment trial. *Id.*, 159 Wn.2d at 374. Any objection to Dr. Patterson’s response to counsel’s vigorous cross-examination would have been overruled. Given that the testimony was admissible, no prejudice resulted from counsel’s failure to object, and ineffective assistance cannot be shown in the absence of prejudice. *McFarland*, 127 Wn.2d at 335.

B. The Verdict Would Not Have Been Different Had The Disputed Evidence Not Been Admitted

Even if the Court were to conclude that an objection to Dr. Patterson’s testimony would have been sustained, there was no prejudice, and Kent has not demonstrated that his attorney’s alleged errors had any effect on the outcome of the trial. Kent’s attempt to reduce the entire trial to a “battle of the experts” (App. Br. at 28) on one single measure of risk overlooks four days of detailed testimony regarding Kent’s history of sex offenses, his mental condition, the relationship of that mental condition to his potential for re-offense, his risk as measured by various actuarial instruments, and other factors considered in determining his risk. When the entire record in this case is considered, it becomes clear that counsel’s alleged error had no effect on the ultimate outcome of trial, and that Kent was afforded a fair and impartial trial.

and indeed the argument is frivolous. The record in fact demonstrates that Dr. Patterson simply consulted with Dr. Phenix in order to “see if [his] new thinking” on the question of how Kent should be scored “was accurate,” not to turn the evaluation process over to her or to substitute her opinion for his own. RP at 279.

Dr. Mark Patterson conducted a broad-ranging psychological evaluation of Kent. His initial assessment included consideration of over 1500 pages of materials relating to Kent's criminal history, medical and psychological history, employment history, institutional adjustment, mental health treatment, if any, deposition transcripts, and a personal interview with Kent. RP at 101-103. For purposes of formulating his opinion, he considered Kent's three convictions (Attempted Criminal Sexual Penetration (1976; Exs. 1 and 2); Rape of a Child Second Degree (1995; Exs. 3- 5) and Second Degree Child Molestation (2005; Exs. 7-10) *Id.* at 109. He also considered Kent's admission to five addition victims of sexual assault as well as convictions for possession of marijuana, driving while intoxicated, and aggravated assault with a knife. *Id.* at 109-10.

Dr. Patterson diagnosed Kent with pedophilia. RP at 111. Pedophilia is a paraphilia, or sexual disorder, characterized by recurrent, intense, sexually arousing fantasies and sexual urges regarding pre-pubescent children, generally lasting at least six months. *Id.* at 118-19. In formulating this opinion, he considered both the early onset and the persistence of this condition: He considered the fact that Kent had begun sexually abusing his four-year-old sister when he was only eight, and that this abuse "persisted throughout much of his childhood and into his early adulthood." *Id.* at 123. He considered the fact that, in 1976 when Kent was in his early 20s, he was convicted following an

attempted forcible rape of a 48- year- old female store clerk. Exs. 1 and 2. This early onset of his criminal sexual behavior is significant in understanding both the severity and the chronicity of the disorder. RP at 124.

The sexual offending behavior continued in the 1980s, by which time Kent was sexually abusing his eight- to ten-year-old niece. Offenses against her included fondling, digital penetration of her vagina, attempted rape, and taking pictures of her while she was naked. RP at 123-24. In the mid-80s, he had forcible sexual intercourse with an unnamed nine-to-ten-year-old neighbor girl. *Id.* at 125. In 1987, when Kent was in his thirties, he had what he claimed to have been a consensual sexual affair with a 14-year-old girl. *Id.* at 126. In 1988, he raped his own 12-year-old daughter at least twice, and in at least one of those instances he tied her to the bed overnight after one of the rapes to keep her in bed with him. *Id.* at 126.

In 1992, he assaulted his stepdaughter C.L. at least 20 times; some of those assaults included forcible rape during which the child kicked, screamed, and resisted in various ways while he held her down and raped her vaginally. RP at 127. During this same period of time, he forced his three-to-five-year-old biological daughter to stroke his penis and give him oral sex. *Id.* at 127. Finally, during this same period of time he engaged in other sexualized behaviors with two neighbor children, asking one to show him her

chest “to see how much of a woman she was becoming,” and tickling the other “in a sexualized sort of way” while they are driving. *Id.* at 126-27.

Dr. Patterson also considered information obtained when Kent was administered a penile plethysmograph, or PPG, in 1995. The PPG showed significant sexual arousal to female preteens in the 10-to-12 year-old range. RP at 128-29. Kent also reported that he found a naked image of a five-to-six-year-old girl to be 90 percent sexually arousing to him. *Id.* at 129. More recent information pointed to Kent’s continuing deviance as well: In 2002, Kent admitted that 85 percent of his sexual fantasies pertained to girls in the 11-to-13-year-old age range, and in 2003, he admitted to masturbating to sexual fantasies about his stepdaughter C.L., who was 13 when he was arrested in 1995 for that rape conviction. *Id.* at 129-30.

In his 2012 interview with Dr. Patterson, he admitted that, as recently as three to four years earlier (that is, in 2008 or 2009), he had masturbated to thoughts of a 13-year-old girl. RP at 131. Psychological testing provided further evidence of his deviance and the cognitive distortions around that deviance: This testing has revealed that Kent believes, for example, that a young girl is attracted to him when she sees his genitals, that a prepubescent girl is capable of making up her own mind about having sex with him, and that he shows his “love and affection to a child by having sex” with her. *Id.* at 132-33. In addition to the fact that there was comparatively recent

evidence of the persistence of Kent's pedophilia, the jury also heard testimony from Dr. Patterson to the effect that paraphilias are "typically considered lifelong or chronic" and that, while a person may be able to control certain behaviors associated with the condition, "it's always there on some level." *Id.* at 116.

Dr. Patterson, in assessing Kent's risk, also considered the fact that, in addition to pedophilia, Kent shows evidence of sexual sadism: He has used physical force to hold a victim down; he bound his daughter to the bed overnight after having raped her, and he has persisted in the face of his victims' resistance and pleas to stop his sexual assaults. RP at 138. He slapped and threatened his sister when she talked about reporting him. *Id.* at 558. While still with his most recent wife, he implied that he would shoot her, forced her to have sex against her will, and, contrary to both doctor's orders and her wishes, continued to have intercourse with her shortly after she almost miscarried her unborn child, all evidencing "an exertion of control and fear in that sexual relationship." *Id.* at 559. This type of callous or cruel behavior "is on the continuum" of sadistic behavior. *Id.* at 138. Likewise, the use of naked photographs of his niece as a threat of humiliation in order to manipulate or coerce are on this spectrum as well. *Id.* While Dr. Patterson did not believe that a diagnosis of full-blown sexual sadism was

called for, these traits, “at a minimum, “tell us that his pedophilia behavior is more severe than [that of] many, if not most, pedophiles.” *Id.* at 139.

Dr. Patterson also diagnosed Kent with three substance abuse disorders—amphetamine dependence, alcohol abuse, and cannabis abuse. RP at 140. By Kent’s own description, his abuse of amphetamines started in his early twenties and continued into his mid-thirties or forties. *Id.* at 142. Kent also described himself to Dr. Patterson as an alcoholic, reporting that his longest period of sobriety “in his lifespan” was two months. *Id.* at 143. While in prison from 1995-2003, Kent used homemade alcohol, or “pruno,” and drank alcohol while on community supervision in 2003 and 2004. *Id.* Use of substances, Dr. Patterson testified, may interfere with the person’s thought process, making the person more prone to poor judgment, reducing his self-control or increasing his impulsivity. *Id.* at 560-61.

In addition to evaluating Kent’s various mental disorders, Dr. Patterson also conducted a formal risk assessment. A risk assessment, he explained, involves an examination of factors known through research to be associated with a risk of re-offense. RP at 165-66. In conducting a risk assessment, the expert considers “static,” or unchanging, risk factors, as measured by various actuarial instruments, “dynamic” factors subject to more rapid change, and “protective” factors that lower risk. *Id.* at 168-69. The goal, as Dr. Patterson explained, is to “put the whole package together and

integrate what we know about risk factors, whether they are negative factors that push towards risk or protective factors that pull away from risk.” *Id.* at 169. Dr. Patterson used three different actuarial tools: the Static-99R, the Static-2002R, and the SORAG, or Sexual Offense Risk Appraisal Guide. *Id.* at 169-70. The purpose of scoring more than one instrument is to allow the expert to see if consistent results are obtained when a slightly different configuration of static risk factors is used. *Id.* at 188.

Scores on the Static-99R measures the risk of being charged or convicted of a new sexual offense. RP at 170, 181. The tool has limitations, in that it looks only at static factors, but does not include consideration of long-term vulnerabilities, or dynamic risk factors, or protective factors. *Id.* at 171. The instrument is scored with reference to a coding manual. *Id.* at 174. Dr. Patterson assigned Kent a score of four on the Static-99R, which is associated with a “moderately high” risk. *Id.* at 178. On average, people who, like Kent, are considered “high-risk, high-need” individuals, are charged or convicted of a new offense at a rate of 20 percent in five years, and 29.6 percent in ten years. *Id.* at 180. The instrument does not provide information about risk beyond 10 years, whereas a professional conducting an SVP assessment is concerned with lifetime risk. *Id.* at 180-81. Likewise, an SVP risk assessment is concerned with re-offense, not simply re-conviction or a new charge. *Id.* at 181-82. Dr. Patterson testified that, prior to submitting his most recent report, he had

assigned Kent a score of two on the Static-99R, associated with a ten-year estimate of 19.7 percent. *Id.* at 186. Upon realizing that Kent's offenses were part of an index cluster, he corrected that score to a four; this change, however, did not affect his ultimate conclusion in any way. *Id.* at 187.

Dr. Patterson also scored Kent on the Static-2002R, which includes some items not included on the Static-99R. RP at 190. He made the same alteration when scoring the Static-2002R. RP at 189-190. Dr. Patterson ultimately assigned Kent a score of six, which is associated with a risk of 24 percent over 5 years, and 33.8 percent over 10 years. *Id.* at 193. Finally, Dr. Patterson scored Kent on the SORAG, or Sex Offender Risk Assessment Guide. *Id.* at 194. The risk estimate associated with Kent's score of seven was 58 percent over five years, and 80 percent over 10. *Id.* at 196.

All of these risk estimates, Dr. Paterson explained, are conservative estimates, in that they reflect only charges and convictions, and do not include undetected offenses. RP at 198. Kent's own history reflects this disparity between actual and detected offenses: Dr. Patterson noted that only three of Kent's offenses have been adjudicated, although "there are other victims that we know about." *Id.* at 198. Moreover, actuarial tools are only one component of an overall risk assessment. *Id.* at 564. While these tools account for a significant portion of the factors that are related to sexual recidivism, they do not account for all relevant factors, and an evaluator must

look “at the broad range of factors that have been shown to be associated with sexual re-offending.” *Id.* at 565.

In addition to considering the scores on these three actuarial instruments, Dr. Patterson considered various long-term vulnerabilities, or factors outside of the static risk assessment tools. RP at 199. Consideration of such factors adds to the expert’s predictive accuracy. *Id.* at 199. Kent evidenced “a very high level” of dynamic risk factors that were not accounted for by the static, actuarial tools. *Id.* at 206. These include sexual interest in children; sexualized violence; sexual preoccupation, such as fantasizing about minor children, preteens and teens, masturbating to thoughts or fantasies about sexual offending, and a long-term interest in and possession of pornography; a lack of emotional or intimate relationships; an emotional identification with children and discomfort with age-appropriate peers; callousness and a general disregard for the impact of one’s behaviors on others; impulsivity; a resistance to rules and supervision; and, finally, dysfunctional coping, as evidenced by his chronic substance abuse and flight to Alaska to escape repercussions for sexual offending. *Id.* at 202-06.

Dr. Patterson also considered Kent’s scores on the PCL-R, or Hare Psychopathy Checklist-Revised. RP at 207. Generally speaking, psychopathy, combined with sexual deviance—such as a sexual attraction to children—is known to be associated with an elevated risk of sexual re-offense.

Id. at 207-08, 211. Those scoring 25 points and above on the PCL-R are denominated as psychopaths; Kent's score on his most recent evaluation was 27 points. *Id.* at 201. The combination of his high score and his sexual deviance "puts him into the highest risk group for violent sexual re-offending." *Id.* at 568.

Finally, Dr. Patterson testified that there were no "protective factors," or factors that would reduce his likelihood of re-offense, in Kent's case. RP at 211. Since he was incarcerated for his 1995 offenses, Kent had been released for 18 months under community supervision without sexually reoffending. *Id.* at 211-12, 569. This relatively brief amount of time, particularly considering the supervision to which he was subject, was insufficient to be considered a protective factor. *Id.* at 211. Kent had not completed any treatment specific to sex offending, another factor that could be considered likely to reduce his risk to reoffend. *Id.* at 212, 569.

Dr. Patterson's interview with Kent revealed that Kent's understanding of his own sexual offending triggers was superficial, and Kent did not believe he needed treatment at all. RP at 213-14. This, Dr. Patterson testified, suggested a denial of his level of risk as well as a lack of insight into what may drive him to re-offend. *Id.* at 214. In addition, Kent had no appreciation of the relationship of substance abuse to re-offense: Kent told

Dr. Patterson that he planned to resume drinking alcohol if released, and might possibly resume smoking marijuana. *Id.* at 215.

Nor did his age reduce his risk: Although 60 at the time of trial, this was not a protective factor, particularly when considered in light of the early onset of his sex offending history. RP at 216. Although, if released, Kent would have one year of community supervision, given the general absence of planning as to how he would handle himself in the community if released, this factor was also not considered protective. *Id.* at 219-20. All of these factors, Dr. Patterson testified, “combine in my mind in terms of risk assessment to indicate that he is likely to re-offend.” *Id.* at 220.

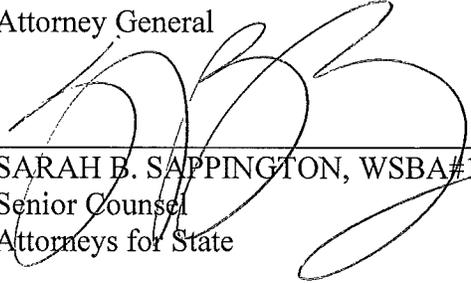
Kent argues that “much of the AAG’s cross examination of Rosell focused on his score for the age item of the Static-99R and Static-2002R. RP 472-474.” App. Br. at 22. The State’s cross of Dr. Rosell went on for 96 pages. RP at 420-505; 529-540. Of those 96 pages, the State devoted fewer than three pages, or roughly 1/32 of its cross examination, to this issue. This does not support Kent’s assertion that this was a central issue at trial.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Kent's civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 20th day of April, 2014.

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NO. 44759-2-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

DARRELL KENT,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

I, Kelly Hadsell, declare as follows:

On this 23rd day of April, 2014, I deposited in the United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

Eric Nielsen
Dana Nelson
Nielsen, Broman & Associates
1908 East Madison St
Seattle, WA 98122

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of April, 2014, at Seattle, Washington.



KELLY HADSELL

WASHINGTON STATE ATTORNEY GENERAL

April 23, 2014 - 2:40 PM

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