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SUPREME COURT
STATE OF WASHINGTON

NO. 79064-7

2007 JUN 15 10 21

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK *RJC*

In re the Detention of:

ALFRED E. KISTENMACHER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON OF LEWIS COUNTY

The Honorable H. John Hall, Judge

AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PERTAINING TO PETITIONER’S ASSIGNMENTS OF ERROR

1. Division 2 of the Court of Appeals held in *In re Det. of Kistenmacher*¹ that an evaluation under RCW 71.09.040(4) is not part of proceedings for which an individual detained pursuant to RCW 71.09 is statutorily entitled to counsel. Does *In re Dep. of J.R.U.-S*,² holding that a parent is not entitled to counsel during a psychological evaluation conducted during a dependency matter and that the evaluation is not a "proceeding" or "stage" of the dependency proceedings, apply to RCW 71.09, where an evaluation is explicitly authorized by RCW 71.09.040(4), and where RCW 71.09.050(1) provides that “[a]t all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel[.]”?

B. STATEMENT OF THE CASE

The State convicted Alfred E. Kistenmacher in 1996 of two counts of first degree child rape and he was sentenced to 102 months of total confinement for the offenses. The offenses involved S.K. and K.K., who were his neighbors in rural Lewis County, Washington. Clerk’s Papers [CP] at 88-91. During subsequent sex offender treatment, Kistenmacher disclosed a number of other, unprosecuted sexual offenses beginning when he was very young and ending with his arrest on July 29, 1995 for the offenses against

¹ 134 Wn. App. 72, 138 P.3d 648 (2006).

² 126 Wn. App. 786, 110 P.3d 773 (2005).

S.K. and K.K. Report of Proceedings (3/22/05) [RP] at 27-35.

The State filed a petition for commitment of Kistenmacher to the Special Commitment Center [SCC] of the Department of Social and Health Services pursuant to RCW 71.09 on July 13, 2004. CP at 118-19.

The trial court found probable cause to believe that Kistenmacher was a sexually violent predator and at the subsequent probable cause hearing, Kistenmacher stipulated to this finding. CP at 109-111. Counsel was appointed to represent Kistenmacher. Kistenmacher was transferred from the Department of Corrections to the SCC at McNeil Island in July, 2004. CP at 29. The trial court ordered Kistenmacher to remain at the SCC for an evaluation pursuant to RCW 71.09.040(4). CP at 105-06.

After the State filed its petition for involuntary commitment, the State arranged for Dr. Goldberg to conduct a forensic evaluation of Kistenmacher pursuant to RCW 71.09.040(4).

Defense counsel moved to suppress the testimony of Harry Goldberg, Ph.D., an independent forensic psychologist, on the basis that that Kistenmacher requested in a Notice of Evaluation as a Sexually Violent Predator that an attorney be present during a clinical evaluation or evaluations. Appendix A-1. SCP at 128. The notice was provided to Kistenmacher on July 19, 2004, by John Rockwell, a therapist at the SCC.

The notice contained the following language:

. . . I have been advised by John Rockwell that that I may have an attorney present during the clinical interview portion of the evaluation for the purpose of commitment as a Sexually Violent Predator.

SCP at 128.

Below that is the following sentence:

X I request that my attorney be present during the clinical interview(s) for commitment as a Sexually Violent Predator.

Kistenmacher signed the form on July 19, 2004.

Sixteen days later, on August 4, 2004, Kistenmacher was interviewed by Dr. Goldberg. Dr. Goldberg provided a second form, also titled Notice of Evaluation as a Sexually Violent Predator. Appendix B-1. This form, which Kistenmacher also signed, contained no reference to having counsel present. In an offer of proof on March 22, Dr. Goldberg stated that he interviewed Kistenmacher on August 2, 2004, and that prior to the interview he had Kistenmacher sign the second form. He stated that Kistenmacher did not request an attorney at any time during the interview. RP (3/22/05) at 12. Kistenmacher stated that he had not previously seen the Notice of July 19. RP (3/22/05) at 12. Dr. Goldberg stated during the State's offer of proof that Kistenmacher proceeded with the interview and did not request that he have his attorney present.

Kistenmacher was examined to determine if he met the criteria of a sexual predator on August 2, 2004, by Dr. Goldberg. Dr. Goldberg received a referral regarding Kistenmacher in July, 2004, and interviewed him on August 2, 2004. RP (3/22/05) at 22, 24. He completed a 39 page evaluation on August 3, 2004. CP at 92.

Dr. Goldberg testified that Kistenmacher admitted to numerous incidents of sexual contact against young females that did not result in prosecution, starting when Kistenmacher was very young. RP (3/22/05) at 27-37. He also testified regarding several acts of exhibitionism. RP (3/22/05) at 44. His recitation of the various offenses that Kistenmacher disclosed concluded with the offenses against K.K. and S.K. that resulted in his incarceration in 1996. Dr. Goldberg testified that Kistenmacher referred to the incidents involving S.K. and K.K. as “consensual.” RP (3/22/05) at 38. He noted that this is an example of “cognitive distortion” and that child molesters “believe that the children are desiring sexual contact.” RP (3/22/05) at 38.

Dr. Goldberg diagnosed Kistenmacher as suffering from the mental abnormalities of exhibitionism and paraphilia (pedophilia). RP (3/22/05) at 45, 46, 47. Dr. Goldberg testified that pedophilia is “not really curable” and that it is considered to be a chronic condition. RP (3/22/05) at 50. He stated

that Kistenmacher acknowledged that there were times in when he had difficulty controlling his sexual desires, particularly in 1995 when he was under the influence of pain medications. RP (3/22/05) at 51-52.

Dr. Goldberg testified that Kistenmacher is involved in sexual deviancy treatment at the SCC and that he is doing well. He was also involved in SOTP while at Twin Rivers. RP (3/22/05) at 73. Dr. Goldberg added the caveat that “there is question as to whether he’s internalizing the concept, whether he’s going to be able to still control his deviant arousal.” RP (3/22/05) at 71. Dr. Goldberg stated that he believed that Kistenmacher “needs more treatment before he can be released into a less restrictive environment.” RP (3/22/05) at 71.

Kistenmacher moved to suppress Dr. Goldberg's testimony on the basis that Kistenmacher was denied his right to counsel by the State when Dr. Goldberg conducted the interview without informing him that he could have his attorney present. CP at 67-72. After hearing argument on the motion, the trial court denied the defense motion and admitted Dr. Goldberg’s testimony. RP (3/18/05) at 33.

At trial, Dr. Goldberg testified that Kistenmacher admitted to numerous incidents of sexual contact against young females that did not result in prosecution, starting when Kistenmacher was very young. RP

(3/22/05) at 27-37. He also testified regarding several acts of exhibitionism. RP (3/22/05) at 44. Dr. Goldberg testified that Kistenmacher referred to the incidents involving S.K. and K.K. as “consensual.” RP (3/22/05) at 38.

On review, Division 2 of the Court of Appeals held that an evaluation under RCW 71.09.040(4) is not a proceeding in which the statutory right to counsel attaches and that, based on this Court’s analysis in *In re Det. of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999), there is no constitutional right for an pre-commitment SVP detainee affording counsel during an RCW 71.09.040(4) evaluation. *In re Det. of Kistenmacher*, 134 Wn. App. 72, 79, 80-81, 138 P.3d 648 (2006).

C. ARGUMENT

1. **KISTENMACHER HAS A STATUTORY RIGHT TO COUNSEL AT EVERY STAGE OF THE PROCEEDINGS, INCLUDING THE RCW 71.09.040(4) EVALUATION.**

- a. **Kistenmacher has a statutory right to counsel at “all stages of the proceedings” under RCW 71.09.050(1).**

The Court of Appeals 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. at 79, 80-81. According to the court, 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*, 134 Wn. App at 79. The Court expressed apprehension 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*, 134 Wn. App at 79.

The process of commitment mandates an evaluation under RCW 71.09.040(4). In order to commit an individual as an SVP under chapter 71.09 RCW, the State must show beyond a reasonable doubt that the individual is an SVP. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 13, 857 P.2d 989 (1993). An SVP is an individual who as been “convicted of or charged with a crime of sexual violence *and* who suffers from a mental abnormality *or* personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(16). *In re Det. of Stout*, 159 Wn.2d 357, 150 P.3d 56 (2007).

The State initiates the process under RCW 71.09.030 by filing a petition alleging that a person is a "sexually violent predator." Upon filing the petition, a judge shall determine whether probable cause exists to believe the person is a sexually violent predator. RCW 71.09.040(1). If the judge makes

such a determination, the judge shall direct the person to be taken into custody. RCW 71.09.040(1). Within 72 hours after being taken into custody, the court shall provide the person with an opportunity to appear in person at a hearing to contest probable cause as to whether the person is a sexually violent predator. RCW 71.09.040(2). If the judge again determines that probable cause exists, "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(4).

Persons who are the subject of an SVP commitment proceeding have a statutory right to the assistance of counsel. RCW 71.09.050(1). *In re Det. of Smith*, 117 Wn. App. 611, 617-18, 72 P.3d 186 (2003). RCW 71.09.050(1) provides in relevant part:

(1) Within forty-five days after the completion of any hearing held pursuant to RCW 71.09.040, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her. The person shall be confined in a secure facility for the duration of the trial.

b. The RCW 71.09.040(4) evaluation is encompassed within the proceedings referenced in RCW 71.09.050(1).

Under RCW 71.09.050, a detainee has the right to counsel at "all

stages” of the proceedings. RCW 71.09.050(1). RCW 71.09.040(4) confers nondiscretionary authority to order an evaluation in pre-commitment proceedings brought under RCW 71.09. The statute provides in relevant part:

(4) If 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.

By its plain language, the evaluation is a critical “stage” in the RCW 71.09 proceeding—it results in a determination whether the person is an SVP and constitutes the crux of the question presented to a jury or judge should the petition be litigated.

Despite the plain language of the statute, and despite the fact that an evaluation is an explicitly delineated and clearly specified part of the pre-commitment proceedings, the Court in *Kistenmacher* found that an evaluation conducted to determine whether a person is a sexually violent predator is not a “stage of the proceedings” for which the person is entitled to presence of counsel by statute. *Kistenmacher*, 134 Wn. App. at 79. 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).

By its plain language, RCW 71.09.050(1) applies to the evaluation

required under RCW 71.09.040. The Court's determination that an evaluation, despite being explicitly mentioned in RCW 71.09.040, is not a "step" in the overall "series of activities or events" which culminates in a trial under the act does not make sense; the statute makes clear that the evaluation is a step or stage to be completed after the probable cause hearing and before the trial. RCW 71.09.040.

The court relied in large part upon *In re the Dependency of J.R.U.-S.*, 126 Wn. App. 786, 110 P.3d 773 (2005) in support of its opinion. In that case, Division 1 of the Court of Appeals considered whether the court in a dependency proceeding abused its discretion when it allowed the parents' counsel to attend court-ordered psychological evaluations and also considered whether the parents had a right to counsel at these evaluations under RCW 13.34.090(2). *J.R.U.-S.*, 126 Wn. App. at 790.

RCW 13.34.090(2) provides in relevant part, "At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court."

The *Kistenmacher* court's reliance on the language of the dependency statute, however, is logically insupportable. The court noted that if the psychological evaluation were a "stage," it would open a slippery slope

where every “activity in a dependency case” would result in the right to counsel at plethora of services. *Kistenmacher*, 134 Wn. App. at 79. Unlike the dependency milieu, however, RCW 71.09.040 specifically authorizes only the evaluation hearing. In other words, the threat of an avalanche of “counseling appointments, every visit with their children, and every other dispositional activity” envisioned by the Court is not present under RCW 71.09. *Kistenmacher*, 134 Wn. App. at 79. A detainee under RCW 71.09 is entitled to an evaluation, specifically for the purpose of determining whether she or he is an SVP, not the plethora of dispositional services that could be ordered by a court hearing a dependency matter. The Court’s ruling fails to recognize that RCW 71.09 does not expressly mention potential activities, such as counseling appointments and visitation, that are available in the pre-trial posture; the RCW 71.09.040(4) evaluation clearly is a pre-trial requirement and therefore a stage that must be satisfied prior to commitment.

This Court considered RCW 71.09.050(1) in the context of an SVP post-commitment annual review hearing. *In re Detention of Petersen*, 138 Wn.2d 70, 92, 980 P.2d 1204 (1999). In *Petersen*, this Court reiterated that the legislature “created the right to counsel only as to all stages leading to the initial trial of whether the person is a sexually violent predator, and not to further proceedings.” *Petersen*, 138 Wn.2d at 92. It is noteworthy that in

Petersen, this Court found that the language of RCW 71.09.050(1), “by referring to “all stages of the proceedings, rather than just to “proceedings,” seems broad enough to include the annual evaluations[,]” and thus did not decide *Petersen* on the basis that a post-commitment review is not a “stage” *Petersen*, 138 Wn.2d at 92.

This is significant because this Court could easily have taken the opportunity to reject Petersen’s argument on the basis that he is not entitled to counsel on the basis that “all stages” refers to in-court hearings, whereas the procedure in question is an “evaluation.” It did not do so.

Instead, this Court noted in response to Petersen’s argument that “all stages” refers to both pre and post commitment proceedings that, the language of the statute “seems broad enough to include the annual evaluations.” *Petersen*, 138 Wn.2d at 92.

This Court rejected Petersen’s argument that he is entitled to counsel at the annual post-commitment evaluation on the basis that Petersen has no Fifth Amendment or Sixth Amendment constitutional right to counsel during annual psychological evaluations because proceedings under chapter 71.09 RCW are civil, not criminal. This Court also found that the Legislature created another statutory right to counsel in RCW 71.09.090(2), and therefore “[i]f the right to 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” and therefore there is no clear declaration from the Legislature that a committed person is entitled to counsel during the annual evaluations. *Petersen*, 138 Wn.2d at 92. Third, this Court rejected Petersen’s equal protection argument and found that that he is not similarly situated to persons committed under chapter 71.05 RCW because his commitment as an SVP had already been made, whereas the entitlement to counsel at a psychological evaluation “under chapter 71.05 RCW is in effect during the evaluation for the *initial* commitment.” *Petersen*, 138 Wn.2d at 94 (Emphasis in original).

Once the State filed its petition, affording him the right to counsel, the court had no right to dictate which hearings or evaluation counsel could attend. In this case, consultation with counsel would have allowed Kistenmacher to determine how best to respond to the Department’s demand for an evaluation under RCW 71.09 and to respond to the evaluation itself.

D. CONCLUSION

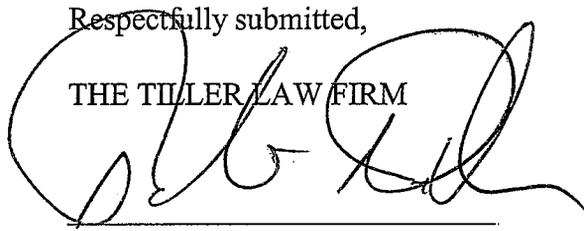
An individual facing commitment as a sexually violent predator has a statutory right to have counsel present during the initial evaluation under RCW 71.09.040(4). Kistenmacher was not afforded this right; accordingly,

the commitment order must be reversed and the case remanded for a new trial.

DATED: June 15, 2007.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Alfred Kistenmacher

A

NOTICE OF EVALUATION AS A SEXUALLY VIOLENT PREDATOR

Because of your past convictions for sexual crimes, you are being evaluated as a possible Sexually Violent Predator under the law (Revised Code of Washington 71.09). The purpose of the evaluation is to decide if you have a mental condition ("mental abnormality or personality disorder") that makes you likely to commit "predatory acts of sexual violence" in the future. If you qualify under the law, you will be sent to court for trial. If the court finds you to be a Sexually Violent Predator, you could be sent to a treatment program at a secure state facility. This would be an involuntary commitment to a treatment program run by the Washington Department of Social and Health Services.

This evaluation includes a review of your records, interview(s) with you by a qualified evaluator, and psychological testing if indicated. The evaluator will write a report on your case, and may later testify if your case goes to court. Any information you provide during the assessment may be used in the report and court testimony. If you give any new information about abuse of children or elders that has not been reported, the evaluator is legally required to report this information to the authorities.

The interview(s) are conducted under court order requiring your participation in the evaluation process. If you do not consent to the interview, place conditions on the interview which cannot for any reason be accommodated, or otherwise refuse to participate, the evaluation will be completed using your records and other sources of information.

EVALUATION CONSENT

I, Alfred Kistenmacher, have been informed by John Rockwell about my evaluation as a Sexually Violent Predator and I have been offered a copy of this notification.

I agree to participate in an assessment for the purpose of evaluation as a Sexually Violent Predator.

I refuse to participate in an assessment for the purpose of evaluation as a Sexually Violent Predator.

WAIVER OF ATTORNEY PRESENCE

I, Alfred Kistenmacher, acknowledge that I have been advised by John Rockwell that I may have my attorney present during the clinical interview portion of the evaluation for the purpose of commitment as a Sexually Violent Predator.

I do not require that my attorney be present during the clinical interview(s) for commitment as a Sexually Violent Predator.

I request that my attorney be present during the clinical interview(s) for commitment as a Sexually Violent Predator.

Alfred Kistenmacher
Resident signature

7/19/04
Date

John Rockwell
Witness signature

7.19.04
Date

B

NOTICE OF EVALUATION AS A
SEXUALLY VIOLENT PREDATOR

Because of your past convictions for sexual crimes, you are being evaluated as a possible Sexually Violent Predator under the law (Revised Code of Washington 71.09). The purpose of the evaluation is to decide if you have a mental condition ("mental abnormality or personality disorder") that makes you likely to commit "predatory acts of sexual violence" in the future. If you qualify under the law, you will be sent to court for trial. If the court finds you to be a Sexually Violent Predator, you could be sent to a treatment program at a secure state facility. This would be an involuntary commitment to a treatment program run by the Washington Department of Social and Health Services.

This evaluation includes a review of your records, interview(s) with you Harry Goldberg, Ph.D. and psychological testing if indicated. The Dr. Goldberg will write a report on your case, and may later testify if your case goes to court. Any information you provide during the assessment may be used in the report and court testimony. If you give any new information about abuse of children or elders that has not been reported, Dr. Goldberg is legally required to report this information to the authorities.

If you do not consent to the interview, place conditions on the interview that cannot for any reason be accommodated, or otherwise decline to participate, the evaluation will be completed using your records and other sources of information.

EVALUATION CONSENT

I, Alfred Kistenmacher, have been informed by Dr. Goldberg about my evaluation as a Sexually Violent Predator and I have been offered a copy of this notification.

I agree to participate in an assessment by Dr. Goldberg for the purpose of evaluation as a Sexually Violent Predator.

I refuse to participate in an assessment by Dr. Goldberg for the purpose of evaluation as a Sexually Violent Predator.

Alfred Kistenmacher
Inmate Signature

Date: 8-2-07

Witness _____

Harry Goldberg
Harry Goldberg, Ph.D.

Date: 8/2/07

Date _____