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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

NO. 33082-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

BY dm
DEPUTY

STATE OF WASHINGTON

Respondent,

v.

ALFRED E. KISTENMACHER

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before
The Honorable H. John Hall, Judge

OPENING BRIEF OF APPELLANT

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P.M. 10-19-05

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A. ASSIGNMENTS OF ERROR AND ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. The trial court denied the Appellant Alfred Kistenmacher substantive due process by permitting Dr. Harry Goldberg to testify at trial regarding his evaluation of the Appellant, where Kistenmacher was advised on July 19, 2004 by John Rockwell, an employee of the Special Commitment Center, that he was entitled to have counsel present during clinical interviews conducted pursuant to the State's petition to commit him as a Sexually Violent Predator, where he requested to have counsel present, but was not given counsel during a subsequent clinical interview by Dr. Goldberg conducted 14 days later.

2. The trial court erred in entering the Following Findings of Fact:

11. The Respondent understood the materials in the form referenced in Attachment C.

3. The trial court erred in entering the following Conclusions of Law:

6. Respondent does not have a constitutional right to have an attorney present during a forensic interview conducted pursuant to RCW 71.09.040(4).

7. The phrase "at all stages of the proceedings under this chapter" present in RCW 71.09.050(1) speaks to legal proceedings, and does not encompass forensic interviews.

8. Respondent does not have a statutory right to have an attorney present during a forensic interview conducted pursuant to RCW 71.09.040(4).
9. Respondent has no right, constitutionally, statutorily, or otherwise, to have counsel present during a forensic interview conducted pursuant to RCW 71.09.040(4).
10. Respondent was not prejudiced by denial of the motion.
11. If respondent did not have a right to have counsel present during the interview conducted by Dr. Goldberg Respondent did not have that right, because Dr. Goldberg was not aware that Respondent had earlier been advised by John Rockwell that he could have counsel present during the forensic interview.

Issues related to assignments of Error No. 1, 2, and 3:

- a. Did the ruling of the trial court judge permitting the admission of testimony by Dr. Goldberg regarding his August 2, 2004 clinical interview with the Appellant, where a therapist employed at the Special Commitment Center provided a form titled Notice of Evaluation as a Sexually Violent Predator to the Appellant on July 19, 2004, advising the Appellant of his right to counsel during clinical interviews conducted for the purposes of determining whether the Appellant is an SVP, where the Appellant indicated in writing that he wanted to have counsel present

and signed the form, and where 14 days later Dr. Goldberg provided a second Notice of Evaluation as a Sexually Violent Predator, and where the notice did not contain any mention of having counsel present, and where the Appellant did not request counsel at that time confer on the Appellant a right to counsel?

- b. Was the State bound by the written notice provided by SCC therapist John Rockwell that a detainee may have counsel present during clinical interviews, where the State subsequently sought to retract said proffer by arguing that the Appellant is not entitled to have counsel present during a subsequent clinical interview at the SCC?
- c. Does RCW 71.09.040(4) provide statutory right to counsel during pre-commitment clinical interview?

2. The trial court erred by permitting testimony the State's expert witness Dr. Goldberg regarding the actuarial instruments he used to "anchor" his assessment that the Appellant was likely to commit acts of sexual violence in the future.

Issues related to Assignment of Error No. 2.

- a. Did the trial court err by permitting Dr. Goldberg's testimony

regarding the MnSOST and Static 99—the instruments he used to reach his conclusion that Kistenmacher is likely to commit further offenses of sexual violence if released without conducting a hearing pursuant to *Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (App.D.C.1923)?

- b. Did the trial court err by permitting Dr. Goldberg’s testimony regarding the MnSOST and Static 99, where the state presented no evidence of the “base rate” of persons in the population of “older” offenders who statistically could be expected to commit future acts of sexual violence, and where the existence of a base rate of offenders will have the effect of altering the error rate of the two instruments used for persons in the Appellant’s age group?

B. STATEMENT OF THE CASE¹

1. Procedural history:

Appellant Alfred E. Kistenmacher appeals from an Order of Commitment filed March 24, 2005, following a jury trial in Lewis County Superior Court cause number 04-2-00975-6. Clerk’s Papers [CP] at 6-7. The order committed Kistenmacher as a sexually violent predator [SVP]

pursuant to RCW 71.09.060, and ordered that he be held at the Special Commitment Center [SCC] at McNeil Island for “control, care, and treatment” until he is deemed “safe to be conditionally released to a less restrictive alternative or unconditionally discharged.” CP at 6-7.

The State filed a petition for commitment of Kistenmacher to the SCC pursuant to RCW 71.09 on July 13, 2004. CP at 118-19. The State’s petition alleged that Kistenmacher was convicted in January, 1996 of two sexually violent offenses² —two counts of first degree rape of a child in Lewis County. CP at 118. The State’s petition alleged that Kistenmacher currently suffers from a mental abnormality³ that “causes him to have serious

¹This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

² RCW 71.09.020(15) provides: “Sexually violent offense” means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

³71.09.020(8) defines “mental abnormality” as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.”

difficulty in controlling his dangerous behavior and makes him likely to engage in predatory acts of sexual violence unless confined to a secure facility.” CP at 118-19. The State filed a motion to determine the existence of probable cause on July 13, 2004 and an order was entered pursuant to RCW 71.09.040(2)⁴ the same day. CP at 107-08, 116-17. The parties entered a stipulated order of probable cause on July 15. CP at 109-111.

⁴ 71.09.040 provides:

(1) Upon the filing of a petition under RCW 71.09.030, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made the judge shall direct that the person be taken into custody.

(2) Within seventy-two hours after a person is taken into custody pursuant to subsection (1) of this section, the court shall provide the person with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the person is a sexually violent predator. At this hearing, the court shall (a) verify the person's identity, and (b) determine whether probable cause exists to believe that the person is a sexually violent predator. At the probable cause hearing, the state may rely upon the petition and certification for determination of probable cause filed pursuant to RCW 71.09.030. The state may supplement this with additional documentary evidence or live testimony.

(3) At the probable cause hearing, the person shall have the following rights in addition to the rights previously specified: (a) To be represented by counsel; (b) to present evidence on his or her behalf; (c) to cross-examine witnesses who testify against him or her; (d) to view and copy all petitions and reports in the court file.

(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. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections. In no event shall the person be released from confinement prior to trial. A witness called by either party shall be permitted to testify by telephone.

Kistenmacher was transferred from the Department of Corrections to the Special Commitment Center at McNeil Island in mid-July, 2004. CP at 29.

Kistenmacher was born September 13, 1941, and was 63 years old at the time of the SVP trial. He was convicted by plea of two counts of first degree rape of a child in January 1996. CP at .. The offenses involved S.K. and K.K., who were his neighbors in rural Lewis County. CP at 88-91. Kistenmacher was sentenced to a total of 102 months in the Department of Corrections for both offenses. CP at 90-91. During subsequent sex offender treatment he 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 S.K. and K.K. Report of Proceedings (3/22/05) [RP] at 27-35.

Kistenmacher participated in sex offender treatment program [SOTP] at the SCC. RP (3/23/05) at 45, 49, 62.

The case was tried to a jury on March 18, 21, 22, 23, and 24, 2005, the Honorable H. John Hall presiding.

In order to prevail on a commitment petition, the State must prove that a detainee suffers from a mental abnormality or personality disorder, and is likely to be a sexually violent predator in the future. The term “sexually

violent predator” limits application of the statute to the most dangerous sex offenders; those who can only be controlled by resort to confinement. RCW 71.09.020(16) defines an SVP as:

Any person who has 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 contains five separate required substantive elements of proof:

- i) a predicate crime: “a crime of sexual violence”, listed as “sexually violent offenses” at RCW 71.09.020(6);
- ii) a requisite mental condition which creates a lack of volitional control: a “mental abnormality” (defined at RCW 71.09.020(2) as a “congenital or acquired condition affecting the emotional and volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others”) or a “personality disorder” (not defined by the statute), which renders the person unable to control his sexual behavior, see *Kansas v. Hendricks*, 521 U.S. 346, 138 L.Ed.2d 501, 117 S.Ct. 2072 (1997);
- iii) a risk prediction: a likelihood of reoffense if not confined in a security facility, stated as being “likely to engage in predatory acts of sexual

violent if not confined to a secure facility,” RCW 71.09.020(1), and further defined to mean “that the person more probably than not will engage in such acts” if not confined to a secure facility. RCW 71.09.020(3);

iv) a nexus between mental condition and likelihood of reoffense: the “mental abnormality” or “personality disorder” must result in the person being likely to reoffend (RCW 71.09.020(8)), rather than future criminal behavior being based on specific criminal intent, opportunism, or some other reason not based on or linked to the alleged mental abnormality or personality disorder; and

v) the likelihood of reoffense must be in a predatory and sexually violent manner: “predatory” is defined as “acts directed towards: (a) strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.” RCW 71.09.020(9), and offenses of sexual violent nature are listed at RCW 71.09.020(15). *In re Detention of Thorell*, 149 Wn.2d 724, 745, n. 8, 72 P.3d 708 (2003).

The State filed its petition prior to Kistenmacher’s release from total confinement; the State is therefore not required to prove that Kistenmacher committed a “recent overt act.” RCW 71.09.030; *In re Detention of Albrecht*,

147 Wn.2d 1, 51 P.3d 73 (2002); *In re Detention of Broten*, 115 Wn.App. 252, 256, 62 P.3d 514 (2003) ("The State is relieved of its burden of proving a recent overt act only if the offender has not been released from total confinement since he was convicted.").

Defense counsel moved to suppress the testimony of Dr. Harry Goldberg, who performed a psychological evaluation of Kistenmacher at the SCC in August, 2004. CP at 67-72. The defense argued that Kistenmacher was denied his right to counsel when Dr. Goldberg conducted the interview on August 2, 2004 without informing him that he could have counsel present. Within days of arriving at the SCC Kistenmacher was affirmatively told by John Rockwell—a therapist at the SCC—that he could have counsel present during clinical interviews. The right to counsel was contained in a Notice of Evaluation as a Sexually Violent Predator, which Kistenmacher signed on July 19, 2004. Motion Exhibit 1. Appendix A-1. Kistenmacher signed a subsequent Notice of Evaluation as a Sexually Violent Predator on August 2, 2004. Motion Exhibit 2. Appendix B-1. The second notice did not contain language that the detainee may have counsel present and no indication that Kistenmacher requested counsel is contained in the document. After hearing argument on the motion, the trial judge denied the defense motion and admitted the testimony of Dr. Goldberg. RP (3/18/05) at 33.

The court entered the following Findings of Fact and Conclusions of Law regarding the motion to suppress on August 18, 2005:

I. FINDINGS OF FACT

1. On July 13, 2004, the Honorable Judge David Draper, in an ex parte proceeding held pursuant to RCW 71.09.040(1), found probable cause existed to believe that respondent was a sexually violent predator.
2. On July 17, 2004, respondent and his counsel Joseph O. Enbody appeared before the Honorable H. John Hall for a seventy-two hour probable cause hearing held pursuant to RCW 71.09.040(2). Petitioner was represented by Assistant Attorney General Melanie Tratnik. Respondent and counsel signed a Stipulated Order Affirming The Existence of Probable Cause And Directing The Custodial Detention And Evaluation Of Respondent. (Attachment A).
3. On July 17, 2004, John Rockwell, a therapist at the Special Commitment Center, provided respondent with a form entitled Notice of Evaluation As a Sexually Violent Predator.” (Attachment B). The form stated that respondent “may have an attorney present during the clinical interview portion of the evaluation for the purpose of a commitment as a Sexually Violent Predator.” Respondent signed the form, and checked the line requesting the presence of his attorney.
4. Dr. Harry Goldberg, PhD, is a member of the Joint Forensic Unit, a group of psychologists and psychiatrists who conduct evaluations pursuant to RCW 71.09.040(4).
5. The form attached as “Attachment B,” was never forwarded to Dr. Goldberg.
6. Dr. Goldberg is not an employee of the Special Commitment Center.
7. Dr. Goldberg was not aware the respondent had previously signed the form referenced in Attachment B.
8. On August 2, 2004, Dr. Goldberg conducted a forensic interview of

respondent pursuant to RCW 71.09.040(4), which was the only forensic interview conducted on behalf of the State.

9. Prior to beginning the forensic interview on August 2, 2004, respondent signed a form provided by Dr. Goldberg entitled Notice of Evaluation As A Sexually Violent Predator. (Attachment C). That form did not contain an advisement that Respondent could have counsel present during the forensic interview.

10. On August 2, 2004, respondent signed the form referenced in Attachment C.

11. Respondent understood the materials in the form referenced in Attachment C.

12. On August 2, 2004, Respondent did not request that an attorney be present during the forensic interview with Dr. Goldberg.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the Respondent in this cause.

2. Sexually Violent Predator commitment proceedings governed by RCW 71.09 are civil in nature.

3. On August 2, 2005, after signing the form referenced in attachment C, Respondent voluntarily proceeded to engage in forensic interview with Dr. Goldberg.

4. Because Sexually Violent Predator commitment proceedings are civil in nature there is no Fifth Amendment Right to remain silent.

5. Respondent does not have a constitutional right to remain silent during a forensic interview conducted pursuant to RCW 71.09.040(4).

6. Respondent does not have a constitutional right to have an attorney present during a forensic interview conducted pursuant to RCW 71.09.040(4).

7. The phrase “at all stages of the proceedings under this chapter” present in RCW 71.09.050(1) speaks to legal proceedings, and does not encompass forensic interviews.

8. Respondent does not have a statutory right to have an attorney present during a forensic interview conducted pursuant to RCW 71.09.040(4).

9. Respondent has not right, constitutionally, statutorily, or otherwise, to have counsel present during a forensic interview conducted pursuant to RCW 71.09.040(4).

10. Respondent was not prejudiced by the denial of the motion.

11. If respondent did have a right to have counsel present during the interview conducted by Dr. Goldberg Respondent did not waive that right, because Dr. Goldberg was not aware that Respondent had earlier been advised by John Rockwell that he could have counsel present during the forensic interview.

SCP at 121-138; Appendix C-1 through C-9.

2. Trial testimony:

Appellant Alfred Kistenmacher was convicted of two counts of first degree rape of a child, involving S.K. and her sister K.K., in Lewis County in 1995. RP (3/22/05) at 37-38. Exhibit 1. After receiving his constitutional warnings, Kistenmacher admitted his actions to Jerry Berry, a former Lewis County Deputy Sheriff. RP (3/21/05) at 37. Kistenmacher was sentenced to 102 months of incarceration. CP at 90, 91.

The state played for the jury a videotaped deposition of Kistenmacher, taken March 2, 2005 at the SCC. RP (3/22/05) at 10-15.

a. Testimony of Dr Harry Goldberg:

Dr. Harry Goldberg, a licensed forensic psychologist, evaluated Kistenmacher on August 2, 2004 at the SCC. RP (3/22/05) at 22-25. Dr. Goldberg received a referral regarding Kistenmacher in July, 2004, and interviewed him for 3.5 hours 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 over defense objection 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.

He also testified that he made a “rule out” diagnosis of polysubstance abuse for pain medication. RP (3/22/05) at 43. A “rule out” diagnosis means that the evaluator does not have sufficient information to make a full diagnosis, but notes that the patient may have the condition. RP (3/22/05) at 43.

Dr. Goldberg concluded that Kistenmacher can be considered likely to reoffend in a violent, sexually predatory manner. RP (3/22/05) at 95, 100. In support of his contention that Kistenmacher would commit acts of sexual violence in the future unless confined, Dr. Goldberg relied on two actuarial risk assessment instruments: the Minnesota Sex Offender Screening Tool Revised (MnSOST-R) and the Static-99. RP (3/22/05) at 57. Dr. Goldberg testified that the Static-99 indicated a 26 percent chance that Kistenmacher would reoffend over a five year period, a 31 percent chance of reoffending over a ten year period, and 36 percent chance over a 15 year period. RP (3/22/05) at 62. He stated that under the MnSOST-R, Kistenmacher had a 57 percent chance of reoffending over a six year period. RP (3/22/05) at 65.

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 the 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.

Dr. Goldberg reviewed the results of plemesigraph [PPG] tests administered to Kistenmacher as part of his SOPT treatment. He stated that during the PPG Kistenmacher “did acknowledge that he’s had problems obtaining an erection.” RP (3/22/05) at 84-85. Kistenmacher had a second PPG after completion of SOPT treatment in 2003. RP (3/22/05) at 87.

Dr. Goldberg stated that Kistenmacher’s age is a “big issue.” RP (3/22/05) at 94. He noted that Kistenmacher “reasonably has less sexual drive and better impulse control than he did 10 years ago” and that “this is probably a mitigating factor and decreases the level of risk.” RP (3/22/05) at 95. Regarding age, Dr. Goldberg noted that Dr. Hanson’s study of inmates “found there was a very small percentage of inmates who reoffended after the

age of 60.” RP (3/22/05) at 107.

c. Testimony of defense witnesses:

The Appellant’s brother Ray Kistenmacher testified that he had secured an apartment in Everett for Kistenmacher to live in if released from confinement and that he was prepared to pay rent or assist in paying rent for up to a year for his brother. RP (3/23/05) at 39.

Department of Corrections Community Corrections Officer Errol Shirer testified regarding the anticipated level of supervision if Kistenmacher were released to community placement following his release from prison, rather than commitment to the SCC. RP (3/23/05) at 11.

Edward Fisher, a forensic therapist, Richard Stokes, a psychologist, and Lori Green, a forensic therapist, testified regarding Kistenmacher’s progress in sex offender treatment therapy at the SCC. RP (3/23/05) at 43-70. Theodore Donaldson, a clinical psychologist, evaluated Kistenmacher in late 2004. RP (3/23/05) at 77. He testified that there is “a drop off” in recidivism that occurs with age. RP (3/23/05) at 85. He noted that it was uncertain as to the specific amount of reduction in reoffending that occurs in an aging population of sex offenders. RP (3/23/05) at 85. He placed Kistenmacher’s chance of committing a violent sexual offense in the future at “around 5 percent” and that he did not “see anyway at all to ever get that over

50 percent.” RP (3/23/05) at 107-08.

3. Commitment to the Special Commitment Center:

Neither counsel noted exceptions to jury instructions proposed but not given or objections to instructions given by the court. RP (3/24/05) at 1. CP at 9-22. Following deliberation, the jury found on March 24 that Kistenmacher is a sexually violent predator as defined by Chap. 71.09 RCW. CP at 8.

Kistenmacher timely filed a Notice of Appeal on April 4, 2005 and this appeal followed. CP at 1-3.

D. ARGUMENT

I. THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF DR. GOLDBERG WHERE THE APPELLANT PREVIOUSLY AFFIRMED IN WRITING THAT HE WANTED TO HAVE COUNSEL PRESENT DURING A FORENSIC INTERVIEW

RCW 71.09.030⁵ authorizes a prosecuting attorney or Attorney

⁵ RCW 71.09.030 provides:

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.090(3); (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW 10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the

General to file a petition alleging that a person is a “sexual violent predator.”⁶

A “sexually violent predator” is defined as a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020 (1).⁷

In order to involuntarily commit a respondent under RCW 71.09, the State must prove beyond a reasonable doubt that (1) he has been charged with or convicted of at least one crime of sexual violence; (2) he currently suffers from a mental abnormality and/or personality disorder; and (3) the mental abnormality and/or personality disorder makes him more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility. RCW 71.09.030.

a. Kistenmacher has a statutory right to counsel during clinical interviews

After the state filed its petition for involuntary commitment, the State arranged for Dr. Harry Goldberg to conduct a forensic evaluation of

prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a “sexually violent predator” and stating sufficient facts to support such allegation.

⁶ RCW 71.09.020(16) “Sexually violent predator” means any person who has 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.

⁷ RCW 71.09.020(17) “Total confinement facility” means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility

Kistenmacher. The Appellant submits that the evaluation was conducted in violation of his right to due process. Defense counsel moved to suppress the testimony of Dr. Goldberg 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. 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.

Appendix A-1; 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 the Appellant 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. Prior to the interview he had Kistenmacher

designated as a total confinement facility by the secretary.

sign the second form. He testified 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 seen the July 19 notice before. RP (3/22/05) at 12.

Dr. Goldberg testified during the State's offer of proof that Kistenmacher proceeded with the interview and did not request that he have his attorney present.

The Appellant submits that the State, having propounded that Kistenmacher had the right to counsel during all clinical interests, cannot retract the proffered right in a subsequent interview. John Rockwell, a therapist at the SCC, told him that he had the right to have counsel present. The State subsequently disavowed the actions of the state employee, asserting that "[a] treatment provider who is not an attorney said you may have counsel here if you want." RP (3/18/05) at 19-20. The Assistant Attorney General asserted that the State was not bound by the statements of the treatment provider. RP (3/22/05) at 19-26.

In addition, the State, relying on *In re Detention of Peterson*, 138 Wn.2d 70, 94, 980 P.2d 1204 (1999), argued that a sexually violent predator has no constitutional or statutory right to counsel during post-commitment annual evaluations. Peterson challenged the validity of a post-commitment annual review hearing on the grounds that he was denied counsel at the

evaluation. *Id.* at 91. Our Supreme Court held that person does not have a Fifth Amendment right to counsel or a Sixth Amendment right to effective assistance of counsel because the interview conducted by a psychologist as part of an annual review is not a criminal prosecution. *Id.* at 91.

In the case at bar, the trial court judge seemingly adopted the reasoning of *Peterson* but expanded the Court's holding finding that Kistenmacher did not have the right to counsel during pre-commitment interviews conducted pursuant to RCW 71.09.040(4). Conclusion of Law no. 8. The Appellant disputes the trial court's reasoning and submits that *Peterson* is inapposite. The trial court erred in applying *Peterson* because the case explicitly pertains to post-commitment procedures concerning persons already determined to be SVPs, whereas Kistenmacher was a detainee at the time of his interview with Dr. Goldberg.

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law...." The Washington Constitution contains an identical clause. Procedural due process in Washington requires a meaningful opportunity to be heard. *Olympic Forest Products, Inc., v. Chaussee Corp.*, 82 Wn.2d 418, 421, 511 P.2d 1002 (1973) (citing *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). The

scope of due process involves a balancing of “the private interest to be protected, the risk of erroneous deprivation of that interest by governmental procedure, and the government's interest in maintaining such a procedure.” *Krein v. Nordstrom*, 80 Wn.App. 306, 310, 908 P.2d 889 (1995) (citing *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994)).

It is self-evident that individuals who are prosecuted under RCW 71.09 are to be afforded some, but not all, of the rights afforded an individual being prosecuted under the criminal laws of the State of Washington. For example, individuals under RCW 71.09 are entitled to a 12-person jury trial and to a unanimous verdict before they can be subject to civil commitment under the statute. *In re Personal Restraint of Young*, 122 Wn.2d 1, 47-48, 857 P.2d 989 (1993). On the other hand, they are not entitled to the Fifth Amendment right to remain silent, for the reason that “their cooperation with the diagnosis and treatment procedures is essential.” *Young*, 122 Wn.2d at 52. See also, *In re Detention of Peterson*, 138 Wn.2d 70, 91, 980 P.2d 1204 (1999)(The Supreme Court held that a defendant has no Fifth or Sixth Amendment right to counsel during a sexually violent predator proceeding because it is a civil, rather than criminal, proceeding.)

SVP respondents do have, however, a statutory right to counsel at all stages of a commitment trial. RCW 71.09.050(1); *In re Detention of*

Peterson, 138 Wn.2d 70, 92, 980 P.2d 1204 (1999). RCW 71.09.050(1) specifically guarantees an individual a right to counsel at all stages of the proceedings under RCW Chapter 71.09. 71.09.050 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.

(Emphasis added.)

The statutory right to “counsel at all stages of a commitment trial” was reemphasized in *In re Detention of Stout*, 2005 WL 1460423 (Wn. App. Div. 1 2005).

In the case at bar, the trial court ruled that it found no statutory or constitutional right to counsel. RP at 31. The court ruled that the right to counsel imparted in RCW 71.09.050(1) “refers to the legal proceedings.” RP at 31. The court presented no reason why the clinical interview would be differentiated from the rest of the commitment procedure. The Appellant

submits that the language of RCW 71.09.050 means what it says and that it is binding on *all* commitment procedures, including pre-commitment interviews, and that the trial court erred by ruling a clinical evaluation at the SCC is not part of the “legal proceedings” contemplated in the statute.

b. The Notice of Evaluation as a Sexually Violent Predator signed by Kistenmacher on July 19, 2004 conferred to Kistenmacher a right to counsel during clinical interviews

Even assuming *arguendo* that this Court determines that Kistenmacher had neither a constitutional nor statutory right to counsel, the State’s actions granted a right to counsel to Kistenmacher. John Rockwell provided a Notice of Evaluation as a Sexually Violent Predator explicitly stating that he had a right to counsel. Kistenmacher signed the form and denoted that he wished to have counsel present. When he was interviewed by Dr. Goldberg, he proceeded with the interview. When Kistenmacher subsequently objected at trial, the State attempted to distance itself from Rockwell’s form. The Appellant contends that the State is bound by Rockwell’s assertion and that even if no right existed prior to the hearing, the state is bound by its employee, and that to attempt to abridge or curtail that right at a subsequent hearing is disingenuous. The State should be held to its assertion that he could have counsel present during clinical interviews.

II. THE ADMISSION OF THE ACTUARIAL TESTS USED BY DR. GOLDBERG WAS ERRONEOUS UNDER FRYE, EVIDENCE RULE 403 AND EVIDENCE RULE 702 DUE TO THE FAILURE OF THE STATE TO ESTABLISH THE BASE LINE OF THE POPULATION OF “OLDER” SEX OFFENDERS THAT WOULD HAVE OFFENDED

The state’s expert witness Dr. Goldberg used the results of two offender risk prediction tests to “anchor” his assessment that Kistenmacher, whom he previous termed a sexually violent predator, was likely to commit further acts of sexual violence. The tests utilized by Dr. Goldberg are the MnSOST and Static 99.

Actuarial risk prediction tools require the expert to rate the subject on a number of factors—such as number of prior offenses, age, and gender of victim—which have been shown to correlate with either general violence or sexual violence. The issue of the validity and scientific worth is an open question. For instance, Dr. Karl Hanson states:

Given the small number of recidivists in the above studies (often less than 20), some spurious findings are to be expected. For actuarial methods to be taken seriously, the research needs to be based on large sample sizes (1,000 or more) or replicated on samples other than the samples used to develop the initial weights.

Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 Journal of Psychology, Public Policy, and Law (1998), 50, at 62.

Researchers, using mathematical modeling, have been able to design actuarial prediction methods of future violence—such as the Variable Risk Appraisal Guide [VRAG]—with accuracy rates around .70 or .75. *See*, Quinsey, V.L.; Harris, G.T.; Rice, J.E. and Cormier, C.A. (1998). *Violent Offenders: Appraising and Managing Risk*, Washington, D.C. American Psychological Association; Janus, E.S. and Mechl, P.E. (1997); *Assessing Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, Vol. 1, 3 *Psychology, Public Policy & Law*, pp 33-64.

Among the more frequently-used actuarial instruments for predicting the likelihood of sexual recidivism are the SORAG and the Static-99. These use only immutable “risk” factors in the detainee’s history, such as gender of victim, number of prior offenses, and other “static” factors.

In order to commit an individual as a sexually violent predatory, the state must prove: (1) that the individual has engaged in harmful sexual offending in the past, (2) that the individual currently suffers from a mental disorder, and (3) that because of the mental disorder the individual will likely engage in future acts of harmful sexual re-offending. RCW 71.09.020.

Under *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L. Ed. 2d 856 (2002) the state must also prove that the potential detainee has a serious problem controlling his behavior.

Despite considerable litigation, Washington's civil commitment statute has been upheld, although our Supreme Court has recognized the risks inherent in using statistically-derived predictions of future dangerousness. See e.g., *In re Personal Restraint of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993). In 2003, the Supreme Court found that *Frye*⁸ governs the analysis of scientific issues in sexual offender commitment trials. *In re Detention of Thorell*, 149 Wash.2d 724, 750, 72 P.3d 708 (2003), cert. denied, ___ U.S. ___, 124 S.Ct. 2015, 158 L.Ed.2d 496 (2004); *In re Detention of Skinner*, 122 Wn.App. 620, 94 P.3d 981 (2004); see also, *In re Detention of Strauss*, 106 Wn.App. 1, 7-8, 20 P.3d 1022 (2001), review granted by *In re Thorell*, 145 Wn.2d 1032, 45 P.3d 534 (2002).

a. *Thorell* does not present a blanket rule on admissibility of controversial risk assessment tools.

Although *Thorell* addressed *Frye*, the court in *Thorell* did not discuss the specific genre of error that Kistenmacher contends is present in his case. Instead, the *Thorell* Court broadly addressed and condoned the use of the

⁸ *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923).

various actuarial instruments as a general proposition. *Thorell*, 149 Wn.2d at 726-29.

The *Frye* test applies only to novel scientific theories or techniques. *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994). Under *Frye*, evidence derived from a scientific method or theory is admitted only if the method or theory is generally accepted as reliable in the relevant scientific community. *Copeland*, 130 Wn.2d at 244; *State v. Kunze*, 97 Wn.App. 832, 853, 988 P.2d 977, *rev. denied*, 140 Wn.2d 1022 (2000). General determination must take into account any recent changes in the perceived reliability of the instrument or theory in question. *State v. Greene*, 139 Wn.2d 64, 71, 984 P.2d 1024 (1999); *State v. Cauthron*, 120 Wn.2d 879, 888 n.3, 846 P.2d 502 (1993).

General acceptability is not satisfied “[I]f there is a significant dispute between qualified experts as to the validity of scientific evidence.” *Kunze*, 97 Wn.App. at 853 citing *Cauthron*, 120 Wn.2d at 887). Review of the trial court’s decision under the *Frye* standard is *de novo*. *Russell*, 125 Wn.2d at 41. When general acceptance is reasonable disputed, a hearing must be held under ER 104 to establish general acceptance by a preponderance of the evidence. *Kunze*, 97 Wn.App. at 853 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

In *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), the court noted that “prediction of dangerousness has its attendant problems” but nevertheless held prediction testimony “sufficiently accurate and reliable” to be admissible. In *Young*, the Supreme Court has interpreted this standard of proof of beyond a reasonable doubt to mean that “the likelihood of re-offense is extremely high.” *In re Young*, 122 Wn.2d at 15-18. The court quoted Dr. Vernon Quinsey, as stating that the predictive accuracy of sexual recidivism “can realistically be expected to be in the 80 percent range”, and subsequently relied on that quote to support its assertion that for those selected using a prediction procedure with 80 percent accuracy the “likelihood of re-offense is extremely high”. *Id.*

Dr. Brett Trowbridge, in *Age and Recidivism: How Accurate are Our Predictions?* *Washington Criminal Defense*, November 2004, vol. 18 no. 4, submits that an “80 percent accuracy is a very high estimate, with 70 percent to 75 percent being more realistic accuracy rates.”⁹

Dr. Trowbridge submits:

The Washington Supreme Court has a fundamental misunderstanding of risk assessment, as it seems to conclude that an 80 percent accuracy rate would result in an 80 percent rate of selecting for commitment those who are truly

⁹http://66.102.7.104/search?q=cache:hlxao4QiaKAJ:www.trowbridgefoundation.org/docs/age_and_recidivism.pdf+Trowbrige,+Brett+recidivism+and+age+and+accurate&hl=en

dangerous. As we have seen, it is necessary to factor in the base rates of re-offending, and if those base rates are low, the frequency of false-positives will be objectionably high. As we have already discussed, if the base rate of re-offending among elderly sex offenders is only about 5 percent even an accuracy rate of 80 percent (probably currently unachievable) will result in many false positives. Out of 1000 individuals, 5 percent, or 50, will re-offend and the 80 percent accurate procedure will identify 40 of them (.80x50). However, out of the remaining 950 people who will not re-offend, the 80 percent accurate test will identify 190 of them (.20x950) as likely to re-offend even though if released they would actually not re-offend. Thus, the test would identify 230 offenders (40 +190) as likely to re-offend, but only 40 of those, or about 17 percent, truly would re-offend if released whereas 83 percent would not. How could any court which understood these base-rate issues conclude that an 83 percent false positive rate shows that the individual is “likely” to re-offend, much less “the likelihood of re-offense is extremely high?” Indeed, under these circumstances, what expert could ethically testify that the person was “likely” or “highly likely” to re-offend? If a jury truly understood these concepts, could it rationally find by “evidence beyond a reasonable doubt” that the individual was “likely” or “highly likely” to re-offend?

Nonetheless, Washington’s Supreme Court has recently held that both clinical and actuarial prediction methods are admissible (they meet the *Frye* test of being “generally accepted in the relevant scientific community”) in sex offender commitment proceedings.

Age and Recidivism: How Accurate are Our Predictions,

Trowbridge, (footnote omitted).

As Dr. Trowbridge submits, the Court in *Young and Thorell* ‘got it wrong.’ The Appellant submits that in cases which hinge on a respondent’s age, it is necessary to isolate and correctly apply the base rate of normal

offenses that would be seen in the general population prior to reaching a determination regarding the risk of re-offending. In the present case, there was no indication that a base rate of offending was determined.

The instruments used by Dr. Goldberg to reach his conclusion that Kistenmacher is likely to commit further offenses of sexual violence if released are created by studying groups of sex offenders and determining which of those reoffended after their release from custody. Using statistical analysis, the factors most associated with an increased risk to reoffend were identified and assigned weights. Dr. Goldberg testified that the Static-99 showed a 26 percent change of offending over a five year period a 31 percent chance over a ten year period, and 36 percent chance over a 15 year period. RP at 62. He stated that under the MnSOST-R, he had a 57 percent change of reoffend over a six year period. RP at 65. Needless to say, the results of an erroneous prediction are exceptionally high; a prediction based on faulty data—as the appellate submits was the case here—may result in deprivation of the fundamental right of liberty, although done in the guise of ‘commitment’ rather than ‘incarceration.’

b. The trial court erred by admitting scientific evidence without a *Frye* hearing.

The trial court’s determinations under *Frye* are reviewed *de novo* on

appeal. *State v. Russell*, 125 Wn.2d at 69. Under *Frye*, evidence derived from a scientific theory or method is admitted only if it is generally accepted in the relevant scientific community. *State v. Copeland*, 130 Wn.2d at 244; *Kunze*, 97 Wn.App. at 853. Novel scientific evidence is admissible if the scientific theory has gained general acceptance and “there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.” *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994)(citing *Cauthron*, 120 Wn.2d 879, 846 P.2d 502 (1993)).

General acceptance is not satisfied “[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence.” *Kunze*, 97 Wn.App. at 853. Even where a theory had been previously accepted,

Trial courts must still undertake the *Frye* analysis if one party produces new evidence which seriously questions the continued general acceptance . . . as to that theory within the relevant scientific community.

Cauthron, 120 Wn.2d at 888 n.3.

c. The admission of the actuarial tests without a hearing substantially tainted the trial.

The significant questions raised about the reliability and accuracy of the tests made their admission undeniably prejudicial. The trial court has an especially important gatekeeper role with regard to scientific evidence, based upon the persuasive power of evidence labeled “science,” which may give the

evidence of a false aura of reliability. *See, K. Tegland*, 5B Wash. Prac., Evidence Law and Practice § 702.16, p.57 (1999); *State v. Maule*, 35 Wn.App. 287, 667 P.2d 96 (1983)(expert's testimony unduly prejudicial when use guise of science to claim defendant likely type of person who would commit crime charged).

After hearing Dr. Goldberg's testimony that Kistenmacher was likely to reoffend, the jury would have considerable difficulty disregarding the testimony. The jury was likely to grant undue weight to this testimony, which the Appellant submits was based on erroneous information by failing to take into consideration a base line of reoffending among older offenders. The testimony regarding the actuarial risk assessment tests was inadmissible under *Frye*, ER 403¹⁰ and ER 702.¹¹ The Appellant respectfully submits that

¹⁰ EVIDENCE RULE 403
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE,
CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

¹¹ EVIDENCE RULE 702
TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

the only available remedy is for this Court to remand the case for another commitment hearing without evidence from the actuarial risk predictor tests.

d. The risk predictor tools were inadmissible under the evidentiary rules.

The holding in *Thorell* in no way diminishes the trial court's ability to act within its discretion to exclude particular actuarial instruments which might confuse or mislead the jury. Here, the trial court did not properly weigh the probative value against the prejudicial effect, as required by ER 403, or otherwise properly evaluate its admissibility. ER 702 permits expert testimony if it meets the foundation set forth in ER 703.¹² Conclusionary or speculative opinions lacking proper foundation under ER 703 are inadmissible. *State v. Devries*, 149 Wn.2d 842, n. 2, 72 P.3d 748, 751 n.2 (2003).

The actuarially-based risk assessment tests were substantially confusing, carried a great potential to mislead the jury, and was plainly prejudicial. Its reliability, and thus probative value, was dubious.

The trial testimony delivered by Dr. Goldberg demonstrated the

¹² EVIDENCE RULE 703
BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If

significant prejudice that far outweighed the probative value of the evidence. Based on the evidentiary thresholds discussed in *Thorell*, the trial court did not properly judge the reliability of the proper scientific evidence under *Frye*, ER 403, ER 702 and ER 703.

e. Reversal is required.

The admission of this allegedly scientific evidence was overwhelmingly prejudicial, and as it was presented under the auspices of scientific evidence by expert witnesses, it surely made a strong impact on the jury. The jury heard testimony from Dr. Goldberg that Kistenmacher fit the profile of a sexually violent recidivist, based on instruments based on a faulty or erroneous premise. The jury deliberations were certainly tainted, and reversal is required. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 688 (1984).

D. CONCLUSION

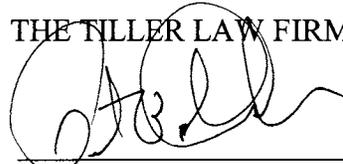
For the reasons stated above, the order of commitment against Alfred Kistenmacher should be vacated, and the case remanded for dismissal of the petition, and the appellant should be released from custody. In the alternative, the Order should be vacated, and the matter remanded to Lewis County Superior Court for a new trial.

of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

DATED this 19th day of October, 2005.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER

WSBA No. 20835

Attorneys for Appellant

P.O. Box 58

Centralia, WA 98531

A

ATTACHMENT 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 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

SCC_KISTENMACHER_A_490236_000236

B

ATTACHMENT C

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, <u>Alfred Kistenmacher</u> , have been informed by <u>JK (Ruben)</u> about my evaluation as a Sexually Violent Predator and I have been offered a copy of this notification.	
<input checked="" type="checkbox"/> I agree to participate in an assessment by Dr. Goldberg for the purpose of evaluation as a Sexually Violent Predator.	
<input type="checkbox"/> I refuse to participate in an assessment by Dr. Goldberg for the purpose of evaluation as a Sexually Violent Predator.	

Alfred Kistenmacher
Inmate Signature

Harry Goldberg
Harry Goldberg, Ph.D.

Date: 8-2-07

Date: 8/2/07

Witness _____

Date _____

C

SUPERIOR COURT
LEWIS COUNTY, WASH.
REC'D & FILED

CC

2005 AUG 18 PM 12: 09

KATHY BRACK, CLERK

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DEPUTY

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**STATE OF WASHINGTON
LEWIS COUNTY SUPERIOR COURT**

In re the Detention of:

ALFRED KISTNMACHER,

Respondent.

NO. 04-2-00975-6

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING RIGHT TO
COUNSEL AT FORENSIC
INTERVIEW CONDUCTED
PURSUANT TO RCW 71.09.040(4)

On March 18, 2005, a hearing on the Respondent's Motion to Suppress the Testimony of Dr. Goldberg was held before the Honorable Judge H. John Hall. On March 21 and March 22, 2005, testimony was heard regarding Respondent's Motion to Suppress the Testimony of Dr. Goldberg. On both dates, Petitioner, State of Washington, was represented by MELANIE TRATNIK. The Respondent was represented by JOSEPH O. ENBODY. The Court, having reviewed the file, read the Respondent's Motion and the Petitioner's response brief and heard the arguments presented by counsel, hereby enters the following findings of facts and conclusions of law.

I. FINDINGS OF FACT

1. On July 13, 2004, the Honorable Judge David Draper, in an ex parte proceeding held pursuant to RCW 71.09.040(1), found probable cause existed to believe that respondent was a sexually violent predator.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING RIGHT TO COUNSEL
AT FORENSIC INTERVIEW
CONDUCTED PURSUANT TO RCW
71.09.040(4)

1 2. On July 17, 2004, respondent and his counsel Joseph O. Enbody appeared before the
2 Honorable H. John Hall for a seventy-two hour probable cause hearing held pursuant to RCW
3 71.09.040(2). Petitioner was represented by Assistant Attorney General Melanie Tratnik.
4 Respondent and counsel signed a Stipulated Order Affirming The Existence Of Probable Cause
5 And Directing The Custodial Detention And Evaluation Of Respondent. (Attachment A).

6 3. On July 17, 2004, John Rockwell, a therapist at the Special Commitment Center,
7 provided respondent with a form entitled Notice Of Evaluation As A Sexually Violent
8 Predator. (Attachment B). The form stated that respondent "may have an attorney present
9 during the clinical interview portion of the evaluation for the purpose of commitment as a
10 Sexually Violent Predator." Respondent signed the form, and checked the line requesting the
11 presence of his attorney.

12 4. Dr. Harry Goldberg, PhD, is a member of the Joint Forensic Unit, a group of
13 psychologists and psychiatrists who conduct evaluations pursuant to RCW 71.09.040(4).

14 5. The form attached as "Attachment B," was never forwarded to Dr. Goldberg.

15 6. Dr. Goldberg is not an employee of the Special Commitment Center.

16 7. Dr. Goldberg was not aware the respondent had previously signed the form referenced
17 in Attachment B.

18 8. On August 2, 2004, Dr. Goldberg conducted a forensic interview of respondent
19 pursuant to RCW 71.09.040(4), which was the only forensic interview conducted on behalf of
20 the State.

21 9. Prior to beginning the forensic interview on August 2, 2004, respondent signed a form
22 provided by Dr. Goldberg entitled Notice Of Evaluation As A Sexually Violent Predator.
23 (Attachment C). That form did not contain an advisement that Respondent could have counsel
24 present during the forensic interview.

25 10. On August 2, 2004, respondent signed the form referenced in Attachment C.

- 1 11. Respondent understood the materials in the form referenced in Attachment C.
2 12. On August 2, 2004, Respondent did not request that an attorney be present during the
3 forensic interview with Dr. Goldberg.

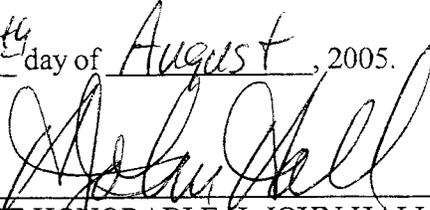
4 **II. CONCLUSIONS OF LAW**

- 5 1. This Court has jurisdiction of the subject matter and the Respondent in this cause.
6 2. Sexually Violent Predator commitment proceedings governed by RCW 71.09 are civil
7 in nature.
8 3. On August 2, 2005, after signing the form referenced in attachment C, Respondent
9 voluntarily proceeded to engage in forensic interview with Dr. Goldberg.
10 4. Because Sexually Violent Predator commitment proceedings are civil in nature there is
11 no Fifth Amendment Right to remain silent.
12 5. Respondent does not have a constitutional right to remain silent during a forensic
13 interview conducted pursuant to RCW 71.09.040(4).
14 6. Respondent does not have a constitutional right to have an attorney present during a
15 forensic interview conducted pursuant to RCW 71.09.040(4).
16 7. The phrase "at all stages of the proceedings under this chapter" present in RCW
17 71.09.050(1) speaks to legal proceedings, and does not encompass forensic interviews.
18 8. Respondent does not have a statutory right to have an attorney present during a forensic
19 interview conducted pursuant to RCW 71.09.040(4).
20 9. Respondent has no right, constitutionally, statutorily, or otherwise, to have counsel
21 present during a forensic interview conducted pursuant to RCW 71.09.040(4).
22 10. Respondent was not prejudiced by the denial of the motion.
23 11. If respondent did have a right to have counsel present during the interview conducted
24 by Dr. Goldberg Respondent did not waive that right, because Dr. Goldberg was not aware that

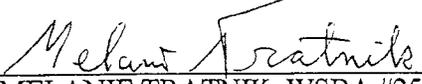
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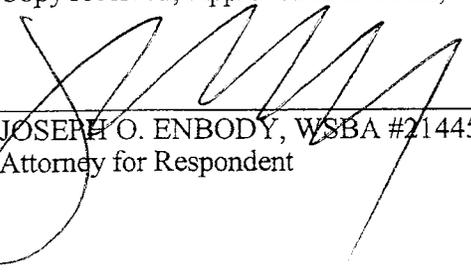
1 Respondent had earlier been advised by John Rockwell that he could have counsel present
2 during the forensic interview.

3 DATED this 18th day of August, 2005.

4 
5 _____
6 THE HONORABLE H. JOHN HALL
7 Judge of the Superior Court

8 Presented by:
9 ROB MCKENNA
10 Attorney General

11 
12 _____
13 MELANIE TRATNIK, WSBA #25576
14 Assistant Attorney General
15 Attorneys for Petitioner

16 Copy received; Approved as to Form;
17 
18 _____
19 JOSEPH O. ENBODY, WSBA #21445
20 Attorney for Respondent

ATTACHMENT A

Received & Filed
LEWIS COUNTY, WASH
Superior Court

JUL 15 2004

Kathy A. Brack, Clerk
By _____ Deputy

STATE OF WASHINGTON
LEWIS COUNTY SUPERIOR COURT

In re the Detention of:

ALFRED E. KISTENMACHER,

Respondent.

NO. 04-2-00975-6

STIPULATED ORDER AFFIRMING
THE EXISTENCE OF PROBABLE
CAUSE AND DIRECTING THE
CUSTODIAL DETENTION AND
EVALUATION OF RESPONDENT

STIPULATION

The Petitioner State of Washington, by and through its attorney, MELANIE TRATNIK, Assistant Attorney General, and Respondent ALFRED E. KISTENMACHER, represented by his attorney, JOSEPH ENBODY (the parties), hereby stipulate to the Findings and Conclusions and Order below, which affirm the Court's July 13, 2004 ex parte finding of probable cause, and require the custodial detention and evaluation of the Respondent pending trial.

1. The Respondent acknowledges that he has received a copy of the Petition and Certification for Determination of Probable Cause filed in this cause alleging that he is a sexually violent predator as defined in RCW 71.09.020.

2. The Respondent reads, writes and understands the English language, and has read the Petition and Certification for Determination of Probable Cause, as well as this document, the Stipulated Order Affirming The Existence Of Probable Cause And Directing The Custodial

STIPULATED ORDER AFFIRMING THE
EXISTENCE OF PROBABLE CAUSE
AND DIRECTING THE CUSTODIAL
DETENTION AND EVALUATION OF
RESPONDENT

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 464-6430

1 Detention And Evaluation Of Respondent. The Respondent has discussed these documents with
2 his attorney.

- 3 3. The Respondent understands that, at a probable cause hearing, he has the right to:
- 4 (a) be represented by counsel;
 - 5 (b) present evidence on his behalf;
 - 6 (c) cross-examine witnesses who testify against him; and
 - 7 (d) view and copy all petitions and reports in the court file.

8 By signing below, the Respondent indicates his understanding that by entering into this
9 Stipulation he is waiving the above-described rights, and is agreeing to entry of the order below,
10 which provides for his custodial detention and evaluation pursuant to RCW 71.09.040(4).

11 FINDINGS AND CONCLUSIONS

12 The parties stipulate to entry of the following Findings and Conclusions:

13 1. The Respondent, ALFRED E. KISTENMACHER, who has signed below, is
14 the same person as the ALFRED E. KISTENMACHER to which the petition and certification
15 for determination of probable cause filed in this matter refer.

16 2. The Respondent, ALFRED E. KISTENMACHER, who has signed below, has
17 the following date of birth: September 13, 1941.

18 3. The Petition and the Certification for Determination of Probable Cause, filed
19 herein on July 13, 2004, establish probable cause to believe that Respondent, ALFRED E.
20 KISTENMACHER, is a sexually violent predator, as that term is defined in RCW 71.09.020.

21 Based on the foregoing Stipulation, and Stipulated Findings and Conclusions, the
22 parties now stipulate to entry of the following:

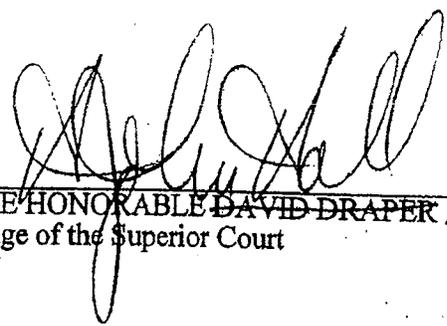
23 ORDER

24 **IT IS HEREBY ORDERED:** That the Court affirms its earlier finding of probable cause
25 and, pursuant to RCW 71.09.040(4), orders that the Respondent remain at the Special
26 Commitment Center (SCC) of the Department of Social & Health Services, located at McNeil

STIPULATED ORDER AFFIRMING THE
EXISTENCE OF PROBABLE CAUSE
AND DIRECTING THE CUSTODIAL
DETENTION AND EVALUATION OF
RESPONDENT

1 Island, in Steilacoom, Washington, for his custodial detention and evaluation pursuant to this
2 Order and RCW 71.09.040(4).

3 DATED this 15th day of July, 2004.

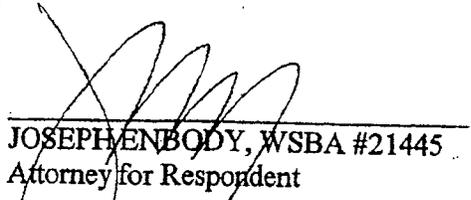


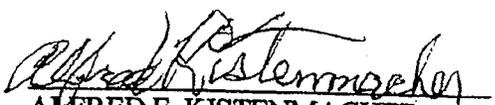
6 THE HONORABLE DAVID DRAPER / J. John Hall
7 Judge of the Superior Court

8 Stipulated to; Copy received;
9 Approved for entry:

10 CHRISTINE O. GREGOIRE
11 Attorney General

12
13 
14 MELANIE TRATNIK, WSBA #25576
15 Assistant Attorney General
16 Attorneys for Petitioner

17
18 
19 JOSEPH ENBODY, WSBA #21445
20 Attorney for Respondent

21
22 
23 ALFRED E. KISTENMACHER
24 Respondent

25
26 STIPULATED ORDER AFFIRMING THE
EXISTENCE OF PROBABLE CAUSE
AND DIRECTING THE CUSTODIAL
DETENTION AND EVALUATION OF
RESPONDENT

ATTACHMENT 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 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

ATTACHMENT C

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

Harry Goldberg
Harry Goldberg, Ph.D.

Date: 8/2/07

Witness _____

Date _____

FILED
COURT OF APPEALS
DIVISION II

05 OCT 20 AM 11:05

STATE OF WASHINGTON

BY DM
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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ALFRED E. KISTENMACHER,

Appellant.

COURT OF APPEALS NO.
33082-2-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to Alfred E. Kistenmacher, Appellant, and Melanie Tratnik, Assistant Attorney General, by first class mail, postage pre-paid on October 19, 2005, at the Centralia, Washington post office addressed as follows:

Ms. Melanie Tratnik
Assistant Attorney General
900 Fourth Avenue, Ste. 2000
Seattle, WA 98164

Mr. David Ponzoha
Clerk of the Court
WA State Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

CERTIFICATE OF
MAILING

1

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE - P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828