

ORIGINAL

NO. 33082-2-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

In re the Detention of:

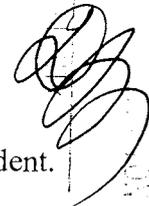
ALFRED KISTENMACHER,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.



RECEIVED
COURT OF APPEALS
DIVISION II
JAN 19 2006

OPENING BRIEF OF RESPONDENT

ROB MCKENNA
Attorney General

MELANIE TRATNIK
Assistant Attorney General
WSBA #25576
Criminal Justice Division
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
(206) 389-2004

TABLE OF CONTENTS

- I. ISSUES PRESENTED1
 - A. Where Appellant has neither a statutory nor constitutional right to be represented by counsel at a forensic interview conducted pursuant to RCW 71.09.040(4), did the trial court err in allowing the testimony of Dr. Goldberg after he conducted such an interview?1
 - B. Where Appellant has neither a statutory nor constitutional right to be represented by counsel at a forensic interview conducted pursuant to RCW 71.09.040(4), can such a right be created when a staff member at the Special Commitment Center erroneously advises Appellant that he may have such a right?.....1
 - C. Where Appellant suffered no prejudice as a result of his participation in a forensic interview without counsel, was the admission of testimony concerning that interview harmless error?.....1
 - D. When Appellant failed to object to testimony regarding actuarial instruments at trial, was it error for the trial court to admit that testimony in the absence of a *Frye* hearing?1
- II. STATEMENT OF THE CASE1
- III. ARGUMENT8
 - A. Mr. Kistenmacher had no right to have counsel present during a forensic interview.8
 - 1. The legislature did not provide Mr. Kistenmacher a statutory right to counsel at a forensic interview.....10
 - a. Statutory scheme.10

b.	The general right to counsel provided at “all stages of the proceedings” does not apply to forensic interviews.	12
2.	Mr. Kistenmacher does not have a constitutional right to have counsel present during a forensic interview.	15
a.	The reasoning of the California Court of Appeals that a person does not have a constitutional right to counsel at a pre-commitment forensic evaluation is persuasive authority for establishing the same holding in Washington.	16
b.	The reasoning of the Washington court of appeals that a person does not have a constitutional right to counsel at a dependency evaluation is persuasive authority for establishing the same holding for sexually violent predator pre-commitment evaluations.	21
3.	Mr. Kistenmacher has no due process right to have counsel present at a forensic interview.	26
a.	Procedural Due Process.	26
b.	Substantive Due Process.	28
B.	Appellant has neither a statutory nor constitutional right to be represented by counsel at a forensic interview, and such a right cannot be created when a staff member at the Special Commitment Center erroneously advises him of such a non-existent right.	29
1.	A right to counsel is not created by a person’s request for counsel if that right does not already exist.	29
2.	A right to counsel is not created by an erroneous action by a state agency.	31

3.	Equitable estoppel does not apply.	32
4.	A right to counsel is not created by an employee who is not acting as an agent of the state.	34
C.	Even if Mr. Kistenmacher had a right to have counsel present at Dr. Goldberg’s evaluation he was not prejudiced by the absence of counsel.....	37
1.	Mr. Kistenmacher’s Fifth Amendment Rights against self-incrimination were not violated during the forensic interview conducted by Dr. Goldberg.	37
2.	Assuming <i>argueo</i> that Mr. Kistenmacher had a right to have counsel present during Dr. Goldberg’s forensic evaluation and that the admission of Dr. Goldberg’s testimony at trial was error, the error was harmless error.	39
a.	Even if Mr. Kistenmacher had a statutory right to counsel his counsel’s absence at the evaluation was harmless error.....	39
b.	Even if Mr. Kistenmacher had a constitutional right to counsel, his counsel’s absence at the evaluation was harmless error.....	40
D.	Having failed to object to the admissibility of testimony regarding actuarial instruments at the trial court, Mr. Kistenmacher cannot argue for the first time on appeal that a <i>Frye</i> hearing should have been held prior to such testimony.....	41
IV.	CONCLUSION	43

TABLE OF AUTHORITIES

Cases

<i>Alberston v. Superior Court</i> , 19 Cal. 4th 796 (2001).....	18
<i>Allen v. Illinois</i> , 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986).....	20
<i>Bagration v. Superior Court</i> , 110 Cal. App. 4th 1677, 3 Cal. Rptr. 3d 292 (2003).....	18
<i>Bean v. Taylor</i> , 408 F. Supp. 614 (M.D.N.C. 1976)	31
<i>Correale v. United States</i> , 479 F.2d 944, 947 (1st Cir. 1973).....	36
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	33
<i>Estelle v. Smith</i> , 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed 359 (1981).....	22
<i>Frye v. United States</i> , 293 F.1013 (D.C.Cir. 1923).....	41, 42
<i>Hubbart v. Superior Court</i> , 19 Cal. 4th 1138, 81 Cal. Rptr. 2d 492, 969 P.2d 584 (1999)	19
<i>In re Detention of Petersen</i> , 138 Wn.2d 70, 980 P.2d 1204 (1999).....	passim
<i>In re Detention of Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	41
<i>In re Personal Restraint of Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	9, 23, 37

<i>In the Matter of the Dependency of J.R.U.-S.,</i> 126 Wn. App. 786, 100 P.3d 773 (2005).....	passim
<i>Kansas v. Hendricks,</i> 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).....	19
<i>Kramarevcky v. Dep't of Soc. & Health Servs.,</i> 122 Wn.2d 738, 863 P.2d 535 (1993).....	33
<i>Lee v. Munroe & Thornton,</i> 7 Cranch 366, 11 U.S. 366, 3 L. Ed. 373 (1813)	35
<i>Mathews v. Eldridge,</i> 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	26
<i>McKune v. Lile,</i> 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002).....	24, 25
<i>Moore v. Eyman,</i> 464 F.2d 559 (9th Cir. 1972)	31
<i>Morris v. Blaker,</i> 118 Wn.2d 133, 821 P.2d 482 (1992).....	27
<i>Palermo v. Warden,</i> 545 F.2d 286 (2d Cir. 1976)	36
<i>Palko v. Connecticut,</i> 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).....	28
<i>People v. Burns,</i> 128 Cal. App. 4th 794, 27 Cal. Rptr. 3d 352 (2005).....	passim
<i>People v. Collins,</i> 100 Cal. App. 4th 340, 1 Cal. Rptr. 3d 641 (2003).....	19
<i>People v. Leonard,</i> 78 Cal.App. 4th 776, 93 Cal. Rptr. 2d 180 (2000).....	19
<i>Reno v. Flores,</i> 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).....	28

<i>Rivett v. City of Tacoma</i> , 123 Wn.2d 573, 870 P.2d 299 (1994).....	27
<i>Rochin v. California</i> , 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952).....	28
<i>Smith v. Estelle</i> , 602 F.2d 694 (5th Cir. Tex 1979).....	23
<i>State of Oklahoma.</i> , 428 F.Supp. 288 (W.D.Okla. 1976).....	30
<i>State v. Bryant</i> , 146 Wn.2d 90, 42 P.3d 1278 (2002).....	35, 36
<i>State v. Bryant</i> , 97 Wn. App. 479, 983 P.2d 1181 (1999), review denied, 140 Wn.2d 1026, 10 P.3d 406, <i>cert. denied</i> , 531 U.S. 1016, 121 S. Ct. 576, 148 L. Ed. 2d 493 (2000).....	23
<i>State v. Cantrell</i> , 111 Wn.2d 385, 758 P.2d 1 (1988).....	37
<i>State v. Carlin</i> , 40 Wn. App. 698, 700 P.2d 323 (1985).....	40
<i>State v. Gulby</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020 (1986).....	40
<i>State v. Harris</i> , 102 Wn. App. 275, 6 P.3d 1218 (2000).....	34
<i>State v. Lively</i> , 130 Wn.2d 1, 921 P.2d 1035 (1996).....	36
<i>State v. Myers</i> , 102 Wn.2d 548, 689 P.2d 38 (1984).....	36
<i>State v. Pitney</i> , 79 Wash. 608, 140 P. 918 (1914)	28

<i>State v. Poupart</i> , 54 Wn. App. 440, 773 P.2d 893 (1989).....	34
<i>State v. Sanchez</i> , 146 Wn.2d 339, 46 P.3d 774 (2002).....	42
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	39
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	39
<i>State v. WWJ Corporation</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999).....	42
<i>U.S. v. Howle</i> , 166 F.3d 1166 (11th Cir. 1999)	32
<i>United States v. Salerno</i> , 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).....	28
<i>Utah Power & Light Co. v. United States</i> , 243 U.S. 389 (1917).....	35
<i>Wash. Pub. Ports Ass'n v. Dep't of Revenue</i> , 148 Wn.2d 637, 62 P.3d 462 (2003).....	12

Statutes

42 U.S.C. § 1983.....	24
RCW 9.94A.670.....	24
RCW 9A.44.070.....	5
RCW 9A.44.073.....	5
RCW 9A.44.076.....	5
RCW 9A.44.083.....	5

RCW 9A.44.100(1)(b).....	5
RCW 9A.64.020.....	5
RCW 13.34.090(2).....	14, 15
RCW 71.09	9, 15, 26
RCW 71.09.040	10
RCW 71.09.040(4).....	passim
RCW 71.09.050(1).....	12, 14, 15, 20
RCW 71.09.050(2).....	10, 12, 20
RCW 71.09.070	8, 15
RCW 9A.04.080(c).....	5

Other Authorities

Cal. Welf. & Inst. Code § 6603	17
Cal. Welf. & Inst. Code § 6603(c).....	18
Cal. Welf. & Inst. Code §§ 6600-6609.3	17
Cal. Welf. & Inst. Code § 6603(a).....	20

Rules

RAP 2.5(a)(3).....	41, 42
---------------------	--------

Regulations

WAC 388-880-010.....	25
WAC 388-880-030(2).....	11
WAC 388-880-033.....	11

WAC 388-880-050..... 11

Constitutional Provisions

Const. art. I, § 12..... 28

Const. art. I, § 3..... 28

I. ISSUES PRESENTED

- A. **Where Appellant has neither a statutory nor constitutional right to be represented by counsel at a forensic interview conducted pursuant to RCW 71.09.040(4), did the trial court err in allowing the testimony of Dr. Goldberg after he conducted such an interview?**
- B. **Where Appellant has neither a statutory nor constitutional right to be represented by counsel at a forensic interview conducted pursuant to RCW 71.09.040(4), can such a right be created when a staff member at the Special Commitment Center erroneously advises Appellant that he may have such a right?**
- C. **Where Appellant suffered no prejudice as a result of his participation in a forensic interview without counsel, was the admission of testimony concerning that interview harmless error?**
- D. **When Appellant failed to object to testimony regarding actuarial instruments at trial, was it error for the trial court to admit that testimony in the absence of a *Frye* hearing?**

II. STATEMENT OF THE CASE

The State does not dispute the facts set forth by Mr. Kistenmacher, but expands upon facts pertinent to the issues presented in this appeal. On July 19, 2004, Mr. Kistenmacher received a form from John Rockwell, an intake worker at the Special Commitment Center, entitled Notice of Evaluation as a Sexually Violent Predator. RP 3/21/05, p. 5. Among other things, this form included the following two statements: “I agree to participate in an assessment for the purpose of evaluation as a Sexually Violent Predator,” and “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.” CP 123. Mr. Kistenmacher put a check on the line next to these two statements, indicating he would participate in the evaluation and that he wished to have an attorney present. RP 3/21/05, p. 5; CP 123.

Fourteen days later, on August 2, 2004, Mr. Kistenmacher met with Dr. Goldberg. RP 3/21/05, p. 5. At that time, Dr. Goldberg presented Mr. Kistenmacher with another form entitled Notice of Evaluation as a Sexually Violent Predator. RP 3/21/05, p. 5; RP 3/22/05, p. 11; CP 124. This form was substantially the same as the form Mr. Kistenmacher received from John Rockwell on July 19, 2004, except that it did not contain any language regarding the presence of an attorney. RP 3/21/05, p. 6. Mr. Kistenmacher checked the line on this form indicating that he would participate in the interview. RP 3/21/05, p. 6; CP 124.

Mr. Kistenmacher testified that he has an Associates Degree in liberal arts, and a Bachelors Degree in English from the University of Washington. RP 3/21/05, p. 8. He also testified that he understood that the purpose of Dr. Goldberg’s evaluation was to determine if he had a mental abnormality or personality disorder that makes him likely to commit predatory acts of future violence. RP 3/21/05, p. 9. He testified that he reviewed the form and signed it prior to participating in the

evaluation, that he had no memory of not understanding it, and that he never asked Dr. Goldberg or anyone else for an attorney. RP 3/21/05, p. 9. He also testified that he did not know whether Dr. Goldberg was there “for me or for the state,” and that he cooperated with the interview “because I didn’t have any reason to think there was anything wrong.” RP 3/21/05, p. 6. He added that “I had no idea that I had a reason or a right to have one [an attorney] there.” RP 3/21/05, p. 12.

Dr. Goldberg testified that he is an independent contractor with the Washington State Department of Corrections, and that he is not an employee of the Special Commitment Center. RP 3/22/05, p. 11. He testified that Mr. Kistenmacher did not have any questions about the substance of the form, did not express any misunderstandings about it, and never made any inquiry pertaining to an attorney. RP 3/22/05, p. 12. Dr. Goldberg testified that he had never seen the form that Mr. Rockwell gave to Mr. Kistenmacher on July 19, 2005, and did not know that Mr. Kistenmacher had previously been presented with it. RP 3/22/05, pp. 12-13. Dr. Goldberg explained that the presence of a third party can interfere with a forensic evaluation, and that this interference can occur even if the third party remains silent. RP 3/22/05, pp. 12-13.

Dr. Goldberg testified that he has been a licensed psychologist since 1985, and that he specializes in forensic psychology. RP 3/22/05,

pp. 17-18. Prior to meeting with Mr. Kistenmacher for a three and a half hour forensic interview, he reviewed approximately 1200 to 1500 pages of materials pertaining to him. These are the types of documents commonly relied on by persons conducting sexually violent predator evaluations. RP 3/22/05, pp. 23-24.

Dr. Goldberg explained that one of the documents he received was a list containing prior unadjudicated offenses Mr. Kistenmacher had admitted to during a Special Offender Sentencing Alternative evaluation [sic – Special Sex Offender Sentencing Alternative] conducted in 1995 by a woman named Ms. Macy. RP 3/22/05, pp. 25-26 & 118. During that evaluation, Mr. Kistenmacher disclosed twenty-eight separate incidents of sexual contact or sexual exposure involving minors.¹ RP 3/22/05, pp. 25-34. Mr. Kistenmacher told Ms. Macy that these acts occurred when he was between the ages of eight and forty-two,² and that his victims were between the ages of five and seventeen. RP 3/22/05, pp. 25-34.

Dr. Goldberg testified that during his forensic interview of Mr. Kistenmacher on August 2, 2004, he asked him about each of the

¹ A few of these incidents involved multiple contacts with the same victim, or described acts committed against several different victims.

² During a video deposition conducted on March 2, 2005, Mr. Kistenmacher indicated that an unadjudicated sexual act occurred “at the age of 48, which would have been about 1989.” See Appendix A, p. 119. The Report of Proceedings regarding Dr. Goldberg’s testimony indicates that Dr. Goldberg referenced this sexual act as occurring “when he was age 41, this was in 1989.” RP 3/22/05, p. 34. Since Mr. Kistenmacher’s date of birth is September 13, 1941, he would have been 48 at that time, indicating that his statement during the video deposition is accurate. CP 63; Appendix A, p. 119.

admissions he had made to Ms. Macy. RP 3/22/05, p. 26. Dr. Goldberg testified that Mr. Kistenmacher told him he did not remember two of the incidents. He admitted to the remaining twenty-six incidents, sometimes making very slight changes in describing the acts. RP 3/22/05, pp. 26-34. With regard to the five acts in which he told Ms. Macy he was between the ages of eight and eleven, Mr. Kistenmacher confirmed the accounts, but told Dr. Goldberg he believed he was in his mid-teens during these acts. RP 3/22/05, pp. 26-28.

Mr. Kistenmacher was born on September 13, 1941. CP 63. During his Special Sex Offender Sentencing Alternative (SSOSA) evaluation with Ms. Macy in 1995, and during his interview with Dr. Goldberg on August 2, 2004, all of the acts Mr. Kistenmacher admitted to were well outside the statute of limitations.³

In 1996, Mr. Kistenmacher was convicted of two counts of Rape of a Child in the First Degree, committed against Stacy and Kelsey Knabel. CP 113. Dr. Goldberg testified that when he asked Mr. Kistenmacher about his adjudicated offense involving Stacy Knabel, Mr. Kistenmacher

³ All of Mr. Kistenmacher's possible criminal acts which he discussed involve sexual contact with children. These acts would be governed by the statute of limitations set forth in RCW 9A.04.080(c) pertaining to Rape of a Child in the First and Second Degree, Child Molestation in the First and Second Degree, (former) Statutory Rape in the First and Second Degree, and Incest in the First Degree. RCW 9A.04.080(c) provides: "Violations of the following statutes shall not be prosecuted more than three years after the victim's eighteenth birthday or more than seven years after their commission, whichever is later. RCW 9A.44.073, 9A.44.076, 9A.44.083, 9A.44.070, 9A.44.100(1)(b), or 9A.64.020.

stated that Stacy was “an exhibitionist.” RP 3/22/05, p. 36. He acknowledged digitally penetrating her, and licking her vagina. RP 3/22/05, p. 36. Dr. Goldberg testified that Mr. Kistenmacher also told him that he had rubbed Kelsey’s genitals, digitally penetrated her, and orally copulated her. RP 3/22/05, p. 37.

On March 2, 2005, Mr. Kistenmacher was deposed by the State’s attorney in the presence of his counsel. That video deposition was played for the jury. RP 3/21/05, p. 43.⁴ During that video deposition, Mr. Kistenmacher was again asked about each of the admissions he had made to Ms. Macy in 1995 regarding sexual conduct with minors. Appendix A, pp. 73-124. During the deposition, Mr. Kistenmacher made substantially the same admissions he had made to Dr. Goldberg during the forensic evaluation, acknowledging that most of these acts occurred as described except for a few minor differences.⁵ Appendix A, pp. 73-124. Dr. Theodore Donaldson evaluated Mr. Kistenmacher, and testified on his behalf. Dr. Donaldson testified that he also went through the admissions

⁴ The portions of the transcript of the video deposition referenced in this brief have been attached to this brief as Appendix A. The court published this transcript, as well as a redacted version of the transcript which removed several sentences from the video deposition by agreement of the parties. None of these redacted portions are pertinent to the issues raised on appeal, and the State has not referenced any such portions. Therefore, the redacted transcript has not been added as an Appendix. A Supplemental Designation of Clerk’s Papers has been filed, as has a motion to Supplement the Record, to include these two transcripts.

⁵ He also discussed one additional act omitted when he was 51-53 years old in which he brushed his hand against a girl in her early teens while in a store. Appendix A, p. 124.

Mr. Kistenmacher had made to Ms. Macy in 1995, and that Mr. Kistenmacher had told him that all those prior offenses were “consensual.” RP 3/23/05, p. 130.

Dr. Goldberg testified that Mr. Kistenmacher told him he preferred sex with children between the ages of nine and eleven. RP 3/22/05, p. 50. He further noted that during his deposition Mr. Kistenmacher reported masturbating to fantasies of children. RP 3/22/05, p. 80. Dr. Goldberg diagnosed Mr. Kistenmacher with pedophilia. RP 3/22/05, p. 50.

Dr. Goldberg testified that he used two actuarial instruments in assessing Mr. Kistenmacher’s risk to sexually reoffend, one of which indicated he presented a moderate risk to sexually reoffend, and another which indicated he presented a high risk to reoffend. RP 3/22/05, pp. 59-65. He also testified that Mr. Kistenmacher presented many empirically supported factors which aggravated his risk to reoffend, such as intimacy deficits, lack of concern for others, sexual preoccupation, sexual coping, deviant sexual interests and impulsivity. RP 3/22/05, pp. 68-91. Dr. Goldberg testified that he concluded to a reasonable degree of psychological certainty that Mr. Kistenmacher’s pedophilia causes him serious difficulty in controlling his sexually violent behavior, and makes him more likely than not to commit predatory acts of sexual violence if he is not confined in a secure facility. RP 3/22/05, pp. 99-100.

III. ARGUMENT

A. **Mr. Kistenmacher had no right to have counsel present during a forensic interview.**

Mr. Kistenmacher argues that he had a right to have counsel present at the forensic interview conducted on August 2, 2004, by Dr. Goldberg pursuant to RCW 71.09.040(4). Neither statutory construction nor case law supports his argument.

Although no Washington Court has yet addressed the issue of right to counsel at a 71.09.040(4) pre-commitment forensic interview, the Washington Supreme Court has held that a sexually violent predator (SVP) has no constitutional or statutory right to counsel at annual evaluations conducted pursuant to RCW 71.09.070. *In re Detention of Petersen*, 138 Wn.2d 70, 94, 980 P.2d 1204 (1999).

Mr. Petersen challenged the validity of an annual review evaluation on the basis that he was denied counsel at the evaluation. *Peterson*, 138 Wn.2d at 91. Specifically, he argued that due process established a right to counsel and that the absence of counsel invalidated his evaluation. The Court examined and summarily rejected each of Mr. Petersen's claimed bases for a right to counsel. "In summary, we reject all three of Petersen's arguments and hold a committed sexually

violent predator is not entitled to the presence of counsel during psychological evaluations under state or constitutional law.” *Id.* at 94.

Although the *Petersen* Court was examining the right to counsel during an SVP evaluation conducted after a person has been committed, the principles underlying the Court’s decision remain the same in this case. In reaching their conclusion, the Court began its analysis by emphasizing that RCW 71.09 proceedings are civil in nature, not criminal. *Peterson*, 138 Wn.2d at 91, citing *In re Personal Restraint of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). As such, the Court rejected Mr. Peterson’s due process argument, explaining that he had neither a Fifth Amendment constitutional right to counsel because the proceedings are civil and he is in no danger of incriminating himself, nor a Sixth Amendment right to assistance of counsel “because the personal interview by a psychologist is not a ‘criminal prosecution.’” *Id.* at 91.

Having rejected all of Mr. Petersen’s constitutional challenges, the Court identified considerations of “fundamental fairness” as the only remaining avenue for Mr. Petersen to assert a claim that he had a right to counsel. The Court rejected this argument as well, noting that any concerns respondent had regarding the fairness of an examination conducted by a State’s expert were removed by his statutory right to select

his own experts to evaluate him and testify on his behalf at state expense.

Peterson, 138 Wn.2d at 91-92.

1. The legislature did not provide Mr. Kistenmacher a statutory right to counsel at a forensic interview.

a. Statutory scheme.

Revised Code of Washington 71.09.040 sets forth the procedures for a person to be evaluated as a SVP. First, pursuant to subsection (1), if a judge makes an ex parte probable cause determination that a person is a SVP then he is taken into custody. Second, pursuant to subsection (2), an adversarial probable cause hearing is held within 72-hours. Pursuant to subsection (3), the person has the right to be represented by counsel during the adversarial probable cause hearing. Pursuant to subsection (4), if the court again finds probable cause the person is transferred to an appropriate facility for an evaluation which “shall be conducted by a person deemed to be professionally qualified to conduct such an examination.” Nowhere is subsection (4), the section dealing with the forensic evaluation, does the statute provide for the right to counsel. Additionally, RCW 71.09.050(2), which sets forth the rights pertaining to experts during SVP proceedings, makes no mention of the right to counsel during expert evaluations. Subsection two provides:

Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professional persons to perform an examination on their behalf. When the person wishes to be examined by a qualified expert or professionally person of his or her own choice such examiner shall be permitted to have reasonable access to the person for the purposes of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

Although the statutory scheme addressing the use of experts details the rights and procedures pertaining to the psychological pre-commitment evaluation, it fails to identify the right to counsel as one of the rights afforded in that process. Similarly, the provisions of the Washington Administrative Code (WAC) governing such evaluations fail to specifically link the right to counsel to an evaluation performed under RCW 71.09.040(4). WAC 388-880-030(2) states that “[t]he evaluation must be conducted in accordance with the criteria set forth in WAC 388-880-033.” Section 388-880-033 simply identifies what qualifications the evaluator must have, and does not provide for the right of an attorney to be present. WAC 388-880-050 is entitled “[r]ights of a person court-detained or court-committed to the special commitment center.” It provides, in relevant part:

(1) During a person's period of detention or commitment, the department shall:

(a) Apprise the person of the person's right to an attorney and to retain a professional qualified person to perform an evaluation on the person's behalf.

Like RCW 71.09.050(2), this WAC references a general right to counsel, but fails to attach that right to the evaluation.

b. The general right to counsel provided at “all stages of the proceedings” does not apply to forensic interviews.

Mr. Kistenmacher urges this court to reject the trial court's conclusion that the right to counsel guaranteed in RCW 71.09.050(1) refers only to judicial proceedings, and not to other events such as forensic interviews. CP 118. Interpretation of a statute is a question of law which the appellate court reviews de novo. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003).

Revised code of Washington 71.09.050(1) provides in relevant part:

At all stages of the proceedings under this chapter, any person subjected 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. (emphasis added)

The Court in *Petersen* noted that this language did not apply to the annual review process, holding that “all stages of the proceedings”

pertained only to all stages of the pre-commitment proceedings. 138 Wn.2d at 92. However, the Court did not identify what constitutes a “proceeding” to which a right to counsel would attach.

A similar argument as that made by Mr. Kistenmacher, that “all stages of the proceedings” should apply to his forensic interview, was recently rejected by the court in *In the Matter of the Dependency of J.R.U.-S.*, 126 Wn. App. 786, 100 P.3d 773 (2005). In *J.R.U.-S.*, a set of parents became the subject of a dependency proceeding after medical personnel identified injuries to their child. A criminal investigation had also begun, but no charges had yet been filed. *Id.* at 790. As part of the dependency proceedings the Department of Social Services asked that the parents be evaluated to assess whether the parents’ psychological condition could endanger the child. The father argued that taking part in the evaluation would violate his Fifth Amendment rights, and argued that he should not have to take part in the evaluation unless his counsel was present and he was given complete immunity from any incriminating statements he might make. The court commissioner ordered the evaluation to take place, but granted the father’s request for counsel to be present and ordered that the evaluation only be disclosed to the parties and to treatment providers. *Id.* at 791. A different judge ruled that the mother could have counsel present at the evaluation, and that the evaluation would

be sealed and given only to the parties. *Id.* at 792. The Department appealed.

On appeal the parents argued that RCW 13.34.090(2) provided them with a statutory right to counsel at the psychological evaluation, because the evaluations were statutorily authorized and therefore constituted a “stage” of the proceeding. The statute 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 Court of Appeals rejected that argument, finding that a psychological evaluation is not a “proceeding” or “stage” of the proceedings.” The court concluded that such an interpretation would lead to “absurd results,” explaining that “[i]f the evaluation were considered a “stage” of the proceedings, then parents would have a right to counsel at every counseling appointment, every visit with their children, and every other dispositional activity in a dependency case.” *J.R.U.-S*, 126 Wn. App. at 802.

The language of RCW 71.09.050(1) is virtually identical to the language of RCW 13.34.090(2) addressed in *J.R.U.-S*. The only difference is that RCW 71.09.050(1) grants a person the right to counsel at

“all stages of the proceedings,” while RCW 13.34.090(2) grants a person the right to counsel as “all stages of a proceeding.” As in dependency actions, the evaluation conducted pursuant to RCW 71.09.040(4) is a statutorily-mandated evaluation. Additionally, as in the case of dependency actions, persons subject to proceedings under RCW Chapter 71.09 are engaged in many activities outside of judicial proceedings, such as individual and group counseling sessions and routine administrative interactions at the Special Commitment Center.

To hold that the language of RCW 71.09.050(1) affording a person the right to counsel at “all stages of the proceedings” encompasses the psychological evaluation conducted pursuant to RCW 71.09.040(4) would lead to similar “absurd” results as those identified by Court of Appeals in *J.R.U.-S*. As such, the trial court did not err when it held that “all stages of the proceedings” referred only to judicial proceedings, and that therefore Mr. Kistenmacher did not have a statutory right to counsel at the forensic interview. See CP 118.

2. Mr. Kistenmacher does not have a constitutional right to have counsel present during a forensic interview.

Mr. Kistenmacher acknowledges that pursuant to *In re Detention of Peterson* a person does not have a constitutional right to counsel at forensic interviews conducted pursuant to RCW 71.09.070. 138 Wn.2d

70, 94, 980 P.2d 1204 (1999). However, it is unclear from his brief whether or not he is arguing that he has a constitutional right to counsel at a pre-commitment evaluation. Since it is unclear whether or not Mr. Kistenmacher is raising a constitutional challenge the State is addressing the issue.⁶

- a. **The reasoning of the California Court of Appeals that a person does not have a constitutional right to counsel at a pre-commitment forensic evaluation is persuasive authority for establishing the same holding in Washington.**

Although no Washington court has specifically addressed the right to counsel at a pre-commitment psychological evaluation, the California Court of Appeals recently ruled in *People v. Burns* that no such right exists. 128 Cal. App. 4th 794, 27 Cal. Rptr. 3d 352 (2005). In *Burns*, appellant appealed his commitment as a sexually violent predator, arguing that he had the right to have his counsel present during an updated psychological evaluation compelled by the State after a petition to commit him had been filed. *Id.* at 799. Specifically, he argued that he was entitled

⁶ Mr. Kistenmacher provides no argument as to why he should have a constitutional right to counsel at an RCW 71.09.040(4) evaluation other than to state that “*Peterson* is inapposite ... because the case explicitly pertains to post-commitment procedures concerning persons already determined to be SVP’s, whereas [he] was a detainee at the time of his interview with Dr. Goldberg.” *Appellant’s Opening Brief*, p. 22. He then follows-up with the statement that “SVP respondents do have, *however*, a statutory right to counsel at all stages of a commitment trial.” *Appellant’s Opening Brief*, p. 23. (emphasis added) Mr. Kistenmacher’s phraseology and failure to cite authority pertaining to a constitutional basis for the right to counsel suggests that he is limiting his right to counsel argument to purely statutory grounds.

to the same constitutional protections as criminal defendants, because the liberty interests involved in SVP proceedings were similar to that of a criminal defendant. *Id.* at 802. The court rejected Mr. Burns' argument, holding that neither the law nor public policy gave him a constitutional right to have counsel present during a pre-commitment mental evaluation interview. *Id.*

Because the statutory scheme in California's Sexually Violent Predator Act (SVPA) is very similar to Washington's Sexually Violent Predator statute, the reasoning of the *Burns* court is compelling. Welfare and Institutions Code sections 6600 through 6609.3 govern the proceedings involving sexually violent predators in California. California Welfare and Institutions Code Section 6603 sets forth the rights of a person subject to civil commitment procedures under California's SVP Act. Subdivision (a) provides:

A person subject to this article shall be entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person's request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf.

California's SVP Act contains an additional provision not contained in Washington's SVP Act in which the State's attorney may request that an updated evaluation be performed if he or she determines it is necessary to properly present the case for commitment. Section 6603 at subd. (c); *Alberston v. Superior Court*, 19 Cal. 4th 796, 804-05 (2001).

The *Burns* case involved this latter provision regarding updated evaluations. In that case, two evaluators interviewed and evaluated Mr. Burns in February 2000, two months before the SVP Act petition was filed. 128 Cal. App. 4th at 802. Later, in December 2003, the State's attorney moved for an order compelling an updated evaluation. *Id.* The trial court ordered the evaluation, and denied Mr. Burns' request to have his counsel present stating that his presence would interfere with the evaluation. *Id.* . Mr. Burns appealed, and the appeals court upheld the trial court's ruling.

The *Burns* court began its analysis by noting that the purpose of the SVPA is not punishment, but rather to identify and treat persons who have certain mental disorders who may pose a threat to the community. *Burns*, 128 Cal. App. 4th at 800, citing *Bagration v. Superior Court*, 110 Cal. App. 4th 1677, 1683, 3 Cal. Rptr. 3d 292 (2003). The court explained that allowing counsel to be present during a pre-commitment mental health evaluation designed to make these determinations would

seriously undermine the aforementioned legislative goal. *Burns*, 128 Cal. App. 4th at 805, citing *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 1144, 1171, 81 Cal. Rptr. 2d 492, 969 P.2d 584 (1999). The court emphasized that it has “consistently refused to treat SVP Act proceedings as criminal and transplant the full range of procedural rights accorded to criminal defendant to a civil commitment proceedings. *Burns*, 128 Cal. App. 4th at 803 citing *Hubbart* at 1170-79 (state and federal ex post facto clauses not implicated by SVP Act proceedings); *People v. Collins*, 100 Cal. App. 4th 340, 348, 1 Cal. Rptr. 3d 641 (2003)(Because proceedings under the SVP Act are civil in nature, “we do not apply principles applicable to criminal proceedings unless the Legislature has indicated otherwise).

The court characterized Mr. Burns’ argument as similar to the argument made in *People v. Leonard*, where the court rejected the claim that a person in a SVP proceeding could exclude incriminating statements made during a compelled psychiatric evaluation. 128 Cal. App. 4th at 803, citing 78 Cal.App. 4th 776, 93 Cal. Rptr. 2d 180 (2000). The court explained that in rejecting Mr. Leonard’s claim, it relied on *Kansas v. Hendricks* and *Allen v. Illinois* for the rule that “because SVP Act proceedings are civil in nature, the Fifth Amendment protections against self-incrimination do not apply.” *Id.* at 803, citing 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); 478 U.S. 364, 106 S. Ct. 2988, 92 L.

Ed. 2d 296 (1986). Using the same reasoning, the *Burns* court then held that there was no constitutional right to counsel at an updated pre-commitment mental health evaluation. *Burns*, 128 Cal. App. 4th at 805.

In conclusion, the *Burns* court held:

Neither the law nor public policy supports appellant's argument that an SVP Act defendant has a constitutional right to the presence of counsel at an updated mental evaluation interview. This right would be inconsistent with the civil nature of SVP Act proceedings and would impede, not promote the legislative goal. We decline to impose it.

Id.

Although the *Burns* case involves an "updated evaluation" compelled pursuant to a statutory scheme, such updated evaluations occur only after the commitment petition has been initiated and the person is already represented by counsel. As such, these evaluations stand in the same procedural posture as the interview conducted as part of the evaluation of Mr. Kistenmacher pursuant to RCW 71.09.040(4).

As in California, the Washington statutory scheme specifically provides for a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports. Compare Cal.Welf. & Inst. Code Section 6603, subd. (a) with RCW 71.09.050(1) and (2). The *Burns* court recognized that even

though the statute provides for a general right to counsel, that right does not extend to mental health evaluations conducted pursuant to the SVP Act, as such evaluations are clearly different than judicial proceedings.

The reasoning of the *Burns* court is sound in light of the fact that the purpose of SVP laws is to assess and treat the mental disorders of dangerous offenders and that the presence of counsel can undermine the meaningful mental health examination necessary to achieve this purpose. Given the close similarities between California and Washington's SVP laws, this court should adopt the sound reasoning of the California Court of Appeals in *Burns*, and find that Mr. Kistenmacher had no constitutional right to counsel at the interview conducted pursuant to RCW 71.09.040(4).

b. The reasoning of the Washington court of appeals that a person does not have a constitutional right to counsel at a dependency evaluation is persuasive authority for establishing the same holding for sexually violent predator pre-commitment evaluations.

In *In the Matter of the Dependency of J.R.U.-S*, discussed *supra*, the court found that a person subject to a dependency evaluation did not have a right to counsel at such an evaluation, because the statutory language providing for counsel at "all stages of the proceedings" did not encompass mental health evaluations. 126 Wn. App. 786, 802, 100 P.3d 773 (2005). The court in *J.R.U.-S* also found that the parents did not have

a constitutional right to counsel at their evaluation, because they were not under compulsion to speak. *Id.* at 793-94. Because the statutorily-mandated evaluation at issue in that case is equivalent to that provided for in RCW 71.09.040(4), the *J.R.U.-S* court's reasoning regarding the lack of a constitutional right to counsel should lead to the same conclusion when applied to SVP evaluations.

In *J.R.U.-S*, the court explained that “compulsion exists when a person is either subjected to custodial interrogation, ordered to produce incriminating evidence, or threatened with serious penalties if the evidence is not produced.” *J.R.U.-S*, 126 Wn. App. at 794, *citations omitted*. The court found that although the parents were ordered to participate in the evaluation, they were not ordered to answer questions, and no direct or automatic penalties would result from a failure to produce incriminating evidence. Therefore, no compulsion which would trigger a right to counsel existed. *Id.* at 793-94.

The *J.R.U.-S* court also recognized that “the presence of counsel might well undermine both psychological evaluations and the dependency process.” *J.R.U.-S*, 126 Wn. App. at 800, citing *Estelle v. Smith*, 451 U.S. 454, 470 n. 14, 101 S. Ct. 1866, 68 L. Ed 359 (1981)(expressing doubt as to the existence of a constitutional right to counsel at a court-ordered mental examination in a criminal case and noting with approval that “[i]n

fact, the Court of Appeals recognized that ‘an attorney present during psychiatric interview could contribute little and might seriously disrupts the examination’”(quoting *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. Tex 1979)). Likewise, Dr. Goldberg testified that the presence of a third party, including counsel, could interfere with or disrupt the forensic interview process. RP 3/22/05, pp. 12-13. This concern also guided the analysis of the court in *J.R.U.-S*.

The *J.R.U.-S* court balanced the concern of counsel’s potential to undermine the evaluation with a person’s Fifth Amendment right against self-incrimination by holding that the court should order derivative use immunity in such evaluations rather than allowing counsel to be present.⁷ 126 Wn. App. at 800-01. This part of the analysis would rarely apply to evaluations conducted as part of SVP proceedings, because respondents in sexually violent predator cases have no right to remain silent under the Fifth Amendment except when still subject to criminal prosecution. *In re Personal Restraint of Young*, 122 Wn.2d 1, 857 P.2d 989 (1993).

The mere fact that a person may admit to past uncharged offenses does not in and of itself entitle him to the presence of counsel or a

⁷ The Court explained that “[i]n essence, use and derivative use immunity leave the witness, and the government, in the same situation they would have been in had the witness not given a statement or testified.” *Id.* at 798, citing *State v. Bryant*, 97 Wn. App. 479, 485, 983 P.2d 1181 (1999), review denied, 140 Wn.2d 1026, 10 P.3d 406, *cert. denied*, 531 U.S. 1016, 121 S. Ct. 576, 148 L. Ed. 2d 493 (2000).

guarantee of immunity for such admissions. For instance, no right to counsel or immunity provisions exist for persons undergoing a Special Sex Offender Sentencing Alternative (SSOSA) evaluation in which the offender is required to disclose his or her offense history. *See* RCW 9.94A.670. Additionally, persons detained at the Special Commitment Center in either a pre-commitment or post-commitment status often take part in treatment groups which encourage discussion of all prior offenses.

The Supreme Court has recognized the importance of full-disclosure in sexual treatment groups so fully that it has upheld a Kansas prison sexual treatment program which requires offenders to disclose all past offenses without any legal immunity for admissions to uncharged offenses. *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). In *Lile*, an offender was ordered to participate in a treatment program which required disclosure of all past offenses without any protections that admissions to uncharged offenses would not be used to initiate criminal charges. *Id.* The inmate refused to participate on the ground that the required disclosures would violate his Fifth Amendment privilege against self-incrimination, and brought an action under 42 U.S.C. section 1983 after his refusal to participate led to a reduction of his prison privileges. *Id.* Although this case is distinguishable from sexually violent

predator petitions in that it involves criminal detainees versus civil detainees, several aspects of the Court's reasoning are relevant.

The *Lile* Court noted that, since no person had ever been charged based on disclosure of a prior offense, the program was not a subterfuge for conducting criminal investigations. The Court further found that the refusal to offer immunity served two legitimate state interests: (1) The potential for additional punishment reinforces the gravity of the participants' offenses and thereby aids in their rehabilitation; and (2) the State has a valid interest in deterrence by keeping open the option to prosecute particularly dangerous sex offenders. *Lile*, 536 U.S. at 25.

A psychological evaluation conducted pursuant to RCW 71.09.040(4) is "an examination, report, or recommendation by a professionally qualified person to determine if a person has a personality disorder and/or mental abnormality which renders the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." WAC 388-880-010. The purpose of the SVP Act is to identify, confine, and treat persons who pose a substantial future threat to the community. As in *Lile*, the State has a valid interest in maintaining the option to prosecute particularly dangerous sex offenders, and obtaining a full understanding of a dangerous person's offense history is essential in planning for appropriate treatment of that person.

Because of the different populations at issue in dependency and SVP proceedings, and the different state interests which flow from these differences, persons subject to evaluations pursuant to RCW 71.09.040(4) should not be given immunity from statements they may make during such evaluations. The fact that Mr. Kistenmacher fails to cite any instances in which admissions by a person subject to SVP proceedings were used to initiate criminal charges demonstrates that evaluations conducted under chapter 71.09 are not a subterfuge for conducting criminal investigations. To impose the right to counsel or additional protections against possible admissions of uncharged offenses to RCW 71.09.040(4) evaluations would deter the legitimate state interest of the SVP Act in identifying and treating sexually violent predators.

3. Mr. Kistenmacher has no due process right to have counsel present at a forensic interview.

a. Procedural Due Process.

Mr. Kistenmacher submits that the evaluation conducted pursuant to RCW 71.09.040(4) was conducted in violation of his right to due process. *Appellant's Opening Brief*, p. 20. The standard for evaluating a claim alleging a violation of a procedural due process right involves balancing three factors established by *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The three factors are: (1) the

private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures; and (3) the government's interests in maintaining the procedures. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 583, 870 P.2d 299 (1994)(citing *Morris v. Blaker*, 118 Wn.2d 133, 144-45, 821 P.2d 482 (1992)).

Clearly, Mr. Kistenmacher has a liberty interest at stake in the civil commitment action. However, the risk of erroneous deprivation of his liberty is minimized by the procedures provided in the statute. Mr. Kistenmacher had the protection of two probable cause determinations: an ex parte finding by the judge, as well as a contested probable cause hearing. He had the right to legal representation at all judicial proceedings, to retain his own expert at public expense, to a full adversarial hearing in which the State had to prove beyond a reasonable doubt to a unanimous twelve-person jury that he is a sexually violent predator, and he has the right to appeal the result of that trial. The State's interests in this matter are extremely high and focus upon treating dangerous persons and protecting the community from them. Given the balancing of these three factors, Mr. Kistenmacher's procedural due process challenge is without merit.

b. Substantive Due Process.

Mr. Kistenmacher asserts that his substantive due process rights were violated when the trial court admitted the testimony of Dr. Goldberg regarding an evaluation he conducted pursuant to RCW 71.09.040(4) in the absence of counsel, after an employee of the Special Commitment Center advised him that he may have counsel present at such an evaluation. *Appellant's Opening Brief*, p. 1. Substantive due process is guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. *See Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). The principle behind substantive due process is that it “prevents the government from engaging in conduct that ‘shocks the conscience’” *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)(quoting respectively, *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). Article I, sections 3 and 12 of the Washington State Constitution provide similar protections. *See State v. Pitney*, 79 Wash. 608, 610, 140 P. 918 (1914)(“The provisions of the Federal and state constitutions relative to ... due process of law are substantially the same”).

Mr. Kistenmacher fails to set forth conduct committed by the government which “shocks the conscience,” or a result that transpired

from government conduct which shocks the conscience. As is apparent from a review of the underlying facts, the most Mr. Kistenmacher can establish is that he drew a mistaken belief that he had the right to counsel at a psychological evaluation based on an unclear document given to him by an intake worker at the Special Commitment Center. Mr. Kistenmacher not only fails to identify any ill intent, coercive measures, or deliberate acts of injustice or malfeasance which would meet the threshold of actions which shock the conscience, but he also fails to identify how he was prejudiced or harmed by governmental action. As such, nothing he alleges shocks the conscience. Thus, his substantive due process challenge must fail.

B. Appellant has neither a statutory nor constitutional right to be represented by counsel at a forensic interview, and such a right cannot be created when a staff member at the Special Commitment Center erroneously advises him of such a non-existent right.

1. A right to counsel is not created by a person's request for counsel if that right does not already exist.

During an intake process at the Special Commitment Center Mr. Kistenmacher was presented with a form that read "I have been advised by John Rockwell that I may have my attorney present" during a psychological evaluation to determine if he meets the criteria as a sexually violent. [CP 123] Contrary to Mr. Kistenmacher's interpretation, the form

does not establish and confer upon Mr. Kistenmacher a right to have counsel present at the evaluation. Rather, the plain language of this form simply states that the SCC will not actively prevent an attorney from attending an evaluation. Indeed, Mr. Kistenmacher was never prevented from having counsel present at his clinical assessment, despite the fact that he is not statutorily or constitutionally entitled to such.

Mr. Kistenmacher seeks to transform the plain language of the form that he “may have counsel present” from a passive allowance permitting the presence of counsel to an absolute right to not be interviewed unless counsel is present. However, Mr. Kistenmacher provides no authority for his proposition that the merely permissive statement by an SCC employee that they would not prevent counsel from being present somehow created an absolute right to not be interviewed absent the presence of counsel.

Mr. Kistenmacher also cites no authority for the proposition that a right to counsel can be created by a person’s request for counsel when no such right exists. Contrary to Mr. Kistenmacher’s unsupported assertions, courts that have addressed this issue have concluded that a request for counsel does not create such a right if that right does not exist. In *Young v. State of Oklahoma*, 428 F.Supp. 288, 292 (W.D.Okla. 1976), a defendant requested to have counsel present at a lineup, but it was well established

that the federal right to counsel guaranteed by the 6th and 14th Amendments attached only at or after the time that adversary judicial proceedings had been initiated. He was therefore not entitled to counsel and his request was denied. When he argued on appeal that it was error to deny him counsel, the court pointed out that since he had no right to counsel in the first place, his request could not of itself create a right to counsel which did not otherwise exist. *See, similarly, Moore v. Eyman*, 464 F.2d 559 (9th Cir. 1972).

2. A right to counsel is not created by an erroneous action by a state agency.

State agencies cannot spontaneously “generate” rights merely by mistakenly informing individuals they are entitled to such rights. For example, in *Bean v. Taylor*, 408 F. Supp. 614 (M.D.N.C. 1976), the state entered into an employment contract with an uncertified sanitation worker. When his lack of qualifications were discovered and his employment was terminated, he filed suit, but the court held that, “when the right to do a thing depends upon legislative authority, and the legislature has failed to authorize it, or has forbidden it, the approval of the doing of it by a ministerial officer cannot create a right to do that which is unauthorized or forbidden.” *Id.* at 621.

In another example, in *U.S. v. Howle*, 166 F.3d 1166 (11th Cir. 1999), the defendant entered into a plea bargain with the government in which several counts against him were dismissed, in exchange for which he waived the right to appeal his sentence. However, the trial court either ignored or forgot about the plea bargain and encouraged defendant to appeal, and defendant therefore contended that his waiver was somehow invalidated by the trial court's statement. The appellate court explained:

The district court, faced with a difficult legal question and having forgotten the details of the plea agreement, mistakenly told the defendant that he had a right to appeal and encouraged him to do so. It was as if the district court had said that the sky is pink--the fact that it was said by the district court did not make it true. Such dicta, although confusing for the defendant, had no effect on the terms of a previously approved plea agreement. *See United States v. Benitez-Zapata*, 131 F.3d 1444, 1446 (11th Cir.1997) (holding that district court's remark at sentencing that 'it is your right to appeal from the judgment and sentence within ten days' did not invalidate a previously entered plea agreement in which the defendant had waived his right to appeal).

Id. at 1168. The appeals court held that the statement was merely dicta that had no effect on the prior acceptance of the plea agreement.

3. Equitable estoppel does not apply.

Mr. Kistenmacher appears to also be making an argument equivalent to the doctrine of equitable estoppel, asserting that the State should be estopped from claiming he had no right to have counsel present

at his assessment because Mr. Rockwell's statements and conduct were inconsistent with the claim afterward asserted by the State, and he was somehow injured by the contradiction or repudiation of those statements. Equitable estoppel may apply where an admission, statement, or act has been detrimentally relied on by another party. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). However, equitable estoppel against the government is disfavored. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

To establish equitable estoppel against the government, there must be proof by clear, cogent, and convincing evidence of an admission, act, or statement that is inconsistent with a later claim, another party's reasonable reliance on the admission, act, or statement, and injury to the other party that would result if the first party is permitted to repudiate or contradict the earlier admission, act, or statement. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d at 20. The doctrine may not be asserted against the government unless it is necessary to prevent a manifest injustice and it must not impair the exercise of government functions. *Id.*

There is no evidence that Mr. Kistenmacher detrimentally relied on the form given to him by Mr. Rockwell, that he was injured as a result of any reliance, or that a manifest injustice occurred. Mr. Kistenmacher never raised the issue of having his attorney present after he signed the

form given to him by Mr. Rockwell. Additionally, Mr. Kistenmacher cannot demonstrate that reliance on the actions of the State were to his detriment or caused any worsening of his position. Indeed, he offers no evidence to show that the outcome of Dr. Goldberg's evaluation would have been any different if his attorney had been present.

4. A right to counsel is not created by an employee who is not acting as an agent of the state.

Mr. Kistenmacher asserts that the State is bound by a form provided to him by John Rockwell, a staff member of the Special Commitment Center (SCC) and a government employee. Mr. Kistenmacher's argument is without merit, because not all state government employees are necessarily agents of the State. For example, courts have indicated that community correctional officers responsible for preparing presentence investigation reports, while staff members of the DOC, do not act as agents of the State of Washington but instead act on behalf of the independent judiciary. *State v. Harris*, 102 Wn. App. 275, 286-7; 6 P.3d 1218 (2000). Probation counselors and DCFS caseworkers have also been determined not to be agents of the State. *State v. Poupart*, 54 Wn. App. 440, 773 P.2d 893 (1989). As a Forensic Therapist, Mr. Rockwell is primarily responsible for directing the care, custody, evaluation and treatment for court-detained and court-committed offenders

at the SCC. His role is as an objective provider of mental health services to individuals like Mr. Kistenmacher, and Mr. Kistenmacher provides no authority for his contention that Mr. Rockwell was acting under the control or influence of the Attorney General's Office.

Furthermore, even if Mr. Rockwell were an agent of the State, the State is not bound by his erroneous representations to Mr. Kistenmacher. A state is not liable for the acts of its agents which are beyond the scope of the agent's actual authority. *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (establishing that the government is not bound by the unauthorized acts of its agents); *Lee v. Munroe & Thornton*, 7 Cranch 366, 11 U.S. 366, 3 L. Ed. 373 (1813)(the government cannot be bound by the mistaken representations of an agent unless it is clear that the representations were within the scope of the agent's authority).

Courts have previously held that the principle of "fundamental fairness" grounded in the 14th Amendment may require that the government perform a promise made by an agent who exceeded his actual authority. For example, in *State v. Bryant*, 146 Wn.2d 90, 42 P.3d 1278 (2002), the King County prosecutor offered immunity to a defendant who then incriminated himself and others, leading to evidence against him for crimes in Snohomish County. The court held that the King County immunity agreement did not bind the Snohomish County prosecutor, but

because the defendant had been promised the government wouldn't use any information against him, "fundamental fairness and public confidence in government officials" required they "be held to meticulous standards of both promise and performance." *Id.* at 105, citing *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976)(quoting *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973).

However, to affect "fundamental fairness," the government's conduct must be more than merely violative of due process – it must rise to the level that is "shocking." *See State v. Myers*, 102 Wn.2d 548, 551, 689 P.2d 38 (1984). This is a high threshold, as demonstrated by the fact that it was not until 1996 in *State v. Lively* that a Washington court dismissed a prosecution for outrageous conduct by government agents. *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996) The *Lively* court noted that "dismissal based on outrageous conduct is reserved for only the most egregious circumstances. It is not to be invoked each time the government acts deceptively." *Id.* at 20, citations omitted. Additionally, it is not the role of the court to define due process according to "personal and private notions" of fairness, but instead, to decide only whether the criticized act violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions" and which define "the community's sense of fair play and decency." *State v. Cantrell*, 111 Wn.2d

385, 389, 758 P.2d 1 (1988). Here, the government's conduct amounts, at most, to a mistake or misunderstanding, and does not shock the conscience.

C. Even if Mr. Kistenmacher had a right to have counsel present at Dr. Goldberg's evaluation he was not prejudiced by the absence of counsel.

1. Mr. Kistenmacher's Fifth Amendment Rights against self-incrimination were not violated during the forensic interview conducted by Dr. Goldberg.

Even if Mr. Kistenmacher had the right to have counsel present during his evaluation, he is unable to establish that the outcome of his trial would have been different had his right to counsel been honored. Therefore, the trial court did not err when it concluded that he was not prejudiced by the court's denial of his request to suppress Dr. Goldberg's testimony. CP 118.

Mr. Kistenmacher acknowledges that persons who are subject to SVP proceedings are not entitled to the Fifth Amendment right to remain silent, because "their cooperation with the diagnosis and treatment procedures is essential." *Opening Brief of Appellant*, p. 23, citing *In re Personal Restraint of Young*, 122 Wn.2d 1, 52, 857 P.2d 989 (1993). Thus, if counsel had been present during Dr. Goldberg's evaluation of Mr. Kistenmacher, his role would have been limited to that of an observer. The only questions that counsel could have possibly objected to were

those that elicited statements that Mr. Kistenmacher engaged in sexual conduct with children for which he was never charged. All of the admissions addressed by Dr. Goldberg, had already been made to Ms. Macy in 1995. As such, by verifying his prior admissions to Dr. Goldberg Mr. Kistenmacher was simply confirming information that already existed. More importantly, since all of those admissions are well outside the statute of limitations counsel would have had no valid legal basis upon which to object to these admissions.

When Mr. Kistenmacher was deposed in the presence of his counsel he admitted to all these same prior uncharged acts, an obvious demonstration that counsel correctly recognized that no basis for objecting to these statements existed. Given that the same admissions were made in the presence of counsel as were made in the absence of counsel, it is self-evident that counsel's presence at the evaluation would have had no impact on the evaluation. Mr. Kistenmacher's video deposition in which he admitted to all his prior uncharged offenses was played for the jury without objection. As such, Mr. Kistenmacher was not prejudiced by the fact that the same counsel who represented him at his deposition and during the trial was not present at his evaluation.

///

2. **Assuming *argueo* that Mr. Kistenmacher had a right to have counsel present during Dr. Goldberg's forensic evaluation and that the admission of Dr. Goldberg's testimony at trial was error, the error was harmless error.**
 - a. **Even if Mr. Kistenmacher had a statutory right to counsel his counsel's absence at the evaluation was harmless error.**

If Mr. Kistenmacher had a statutory right to counsel, the absence of his counsel at the forensic evaluation would constitute non-constitutional error. Non-constitutional error is not reversible unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

Even if Mr. Kistenmacher had a statutory right to counsel his counsel could not have objected to his statements regarding prior uncharged offenses outside the statute of limitations. Therefore, even if his counsel had been present, the same statements regarding these offenses would have been made. Since evidence of Mr. Kistenmacher's prior uncharged offenses would have come before the jury regardless of whether or not counsel was present at his evaluation with Dr. Goldberg, it

cannot be said that the admission of these offenses would have had any impact on the jury. Thus, assuming it is error at all, the admission of Dr. Goldberg's testimony constitutes harmless error.

b. Even if Mr. Kistenmacher had a constitutional right to counsel, his counsel's absence at the evaluation was harmless error.

If Mr. Kistenmacher had a constitutional right to counsel, the absence of his counsel at the forensic evaluation would constitute constitutional error. A constitutional error is harmless "if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence or error." *State v. Gulby*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Under the overwhelming evidence test, the court examines whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt. *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985).

Again, since evidence of Mr. Kistenmacher's prior uncharged offenses would have come before the jury regardless of whether or not counsel was present at his evaluation with Dr. Goldberg, it cannot be said that the admission of these offenses or Dr. Goldberg's testimony would have had any impact on the jury. As such, any reasonable jury would have reached the same result in the absence of this error.

D. Having failed to object to the admissibility of testimony regarding actuarial instruments at the trial court, Mr. Kistenmacher cannot argue for the first time on appeal that a *Frye* hearing should have been held prior to such testimony.

Mr. Kistenmacher argues for the first time on appeal that Dr. Goldberg should not have been permitted to testify to his use of actuarial instruments without the court first performing a *Frye* hearing. *Frye v. United States*, 293 F.1013 (D.C.Cir. 1923). He acknowledges that *In re Detention of Thorell* “condoned the use of the various actuarial instruments as a general proposition,” but asserts that *Thorell* does not govern the use of such instruments in his case because he is an older offender. *Appellant’s Opening Brief*, pp. 27-28. 149 Wn.2d 724, 726-729, 72 P.3d 708 (2003). Mr. Kistenmacher never asked the trial court to hold a *Frye* hearing and, since this is not an issue of manifest error affecting a constitutional right he cannot raise this for the first time on appeal.

The question of whether a litigant may raise an issue for the first time on appeal is governed by RAP 2.5(a)(3), which provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in an appellate court:

...(3) manifest error affecting a constitutional right. A party may present a ground for affirming a trial court decision

which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground...

Because RAP 2.5(a)(3) is an exception to the general rule that parties cannot raise new issues on appeal, this Court has construed the exception narrowly. *State v. WWJ Corporation*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). RAP 2.5(a)(3) was not designed to allow parties “a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *Id.* Having neither raised nor litigated the issue of the admission of actuarial instruments without a *Frye* hearing, Mr. Kistenmacher is precluded from doing so at this juncture.

The process for conducting an inquiry under RAP 2.5(a)(3) was discussed in *State v. Sanchez*:

When a defendant claims constitutional error, the court previews the merits of the claimed error to determine whether the argument is likely to succeed...The error is considered “manifest” under RAP 2.5(a)(3) if the facts necessary to review the claim are in the record and the defendant shows actual prejudice.

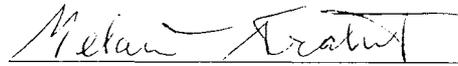
146 Wn.2d 339, 346, 46 P.3d 774 (2002)(citations omitted).

Here, Mr. Kistenmacher fails to raise an issue of constitutional magnitude. Even if the issue were one of constitutional magnitude, it is not manifest because the facts necessary to review the claim are not in the record. Nor can Mr. Kistenmacher show any actual prejudice from the alleged error. As such, his argument fails.

IV. CONCLUSION

For the reasons stated above, this Court should affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 20th day of January, 2006.



MELANIE TRATNIK, WSBA #25576
Assistant Attorney General

APPENDIX A

1 I was touching her buttocks, and she kind of shied
2 away from me. And I asked her if she didn't like
3 that, and she said not particularly. And okay, from
4 then on I made it a point not to touch her sexually
5 because she had expressed that she didn't like it.

6 Q. What role did the girls play in causing or
7 allowing these sexual contacts to occur?

8 A. It wasn't their fault. It was my fault.

9 Q. Okay.

10 A. They were very friendly, they were
11 accessible, they had no qualms about being seen nude
12 or partially nude. I frequently saw them without
13 clothes on or while they were changing clothes or
14 whatever. And it didn't seem to bother them in the
15 least. But of course, they were children. Children
16 seem to be that way, I guess.

17 Q. I guess that's a good question. Do you
18 think these were typical kids for their age?

19 A. Fairly.

20 Q. Now, in 1995 when this arrest occurred, you
21 talked to a Ms. Macy, and you made a number of
22 disclosures. And I know Dr. Goldberg has talked to
23 you about those.

24 A. Right.

25 Q. And I know Dr. Donaldson has, as well. And

1 I'm going to go through those one at a time now. Do
2 you want to take a break before you --

3 A. Yes.

4 Q. Because it's a natural breaking point.

5 A. Yes.

6 Q. Okay.

7 THE VIDEOGRAPHER: The time is 11:10.

8 (Recess.)

9 THE VIDEOGRAPHER: We're back on the record.

10 It's 11:22.

11 Q. (By Ms. Tratnik) Mr. Kistenmacher, before
12 the break, we had just finished talking about the 1995
13 conviction --

14 A. Yes.

15 Q. -- which led to you talking with Ms. Macy
16 about --

17 A. Yes.

18 Q. -- other acts. I'm just going to go through
19 them one at a time.

20 A. Right. Now, my memory back then may not be
21 very clear because we're talking about 40-plus years
22 ago. So...

23 Q. That has got to be true.

24 A. Yes. I'm not at all certain that everything
25 I reported actually happened or whether some of it was

1 fantasies. I know there were mood fantasies that
2 could have been remembered as fact.

3 Q. Okay.

4 A. So the best I can tell you is to the best of
5 my recollection. That's it.

6 Q. The first thing you had said to Ms. Macy is
7 that at the age of eight, you fondled and digitally
8 penetrated the vagina of a six-year-old female.

9 A. Yes. I was 12 or 13 at that time.

10 Q. So that occurred, but the age is wrong.

11 A. Yes. That was after the onset of puberty,
12 so I had to be at least 12.

13 Q. Okay. Who was the girl?

14 A. A girl that my mom was baby-sitting after
15 school.

16 Q. So she was in your house?

17 A. Yes.

18 Q. Had you met her before, the girl --

19 A. Before my mom started baby-sitting her, no.

20 Q. Had you met the girl before this sexual
21 contact?

22 A. Oh, yes, yes. She was in the house five
23 nights -- or five afternoons a week. So yes.

24 Q. And how were you, on that incident, able to
25 get her alone?

1 A. No particular effort involved. Just
2 whatever we were doing, we'd be talking or going
3 around in the house and things, and then occasionally
4 we were alone. There were occasions when I touched
5 her when we weren't alone, by slipping my hand under
6 her buttocks or whatever.

7 Q. So don't let me put words in your mouth.
8 Was there sexual contact separate from this, and then
9 eventually there was the digital penetration?

10 A. Yeah, yeah. And I think in almost every
11 case where anything eventually led to digital
12 penetration, there was -- how would I express this?
13 Exploring, boundary testing, seeing how close I could
14 get to what I was after without the girl complaining.
15 And if there were any complaints, then that was it
16 with that girl.

17 Q. Okay.

18 A. But that was the first one.

19 Q. Okay. The next one would be -- and again,
20 I'm reading straight from the report. So you correct
21 me --

22 A. Yes.

23 Q. -- on things that you think are incorrect.
24 "Between the ages of eight and 13, he fondled the
25 vaginas of 13 peer-age females within three years of

1 his age. Additionally, he said he performed
2 cunnilingus on two of the 13 females."

3 And again, you and I know what we're talking
4 about, but cunnilingus would be oral sex.

5 A. Yes, licking --

6 Q. I've got to try and use terms that everyone
7 can understand.

8 A. Licking the girls' genitals.

9 Q. Yes.

10 A. Yes. Okay. I think the numbers are wrong
11 there, and I know the ages are wrong because it
12 started when I was 12 or 13 and in about my mid-teens.
13 I seriously doubt that there were anywhere near that
14 number of girls. I would say maybe six or seven
15 girls. And of those, three or four were blood
16 cousins. The others were neighbor girls, except for
17 the one that my mom was baby-sitting.

18 Q. Okay. And it says within three years of
19 your age. So were they always younger, or could some
20 have been older?

21 A. No, no. These were all girls that were
22 younger than me, and I wouldn't say within three years
23 my age either. I would say that -- I was in my early
24 teens, and they were probably between six and nine or
25 10.

1 Q. Okay. At age 10, you fondled your
2 six-year-old cousin and attempted digital penetration.

3 A. Okay --

4 Q. You thought it would hurt her if you
5 penetrated her -- I'm sorry -- so you stopped. And I
6 read all of that because I want to be accurate --

7 A. Right.

8 Q. -- and it may also --

9 A. Right.

10 Q. -- give a memory trigger for you.

11 A. I was probably about 13 or 14 at that time,
12 at a guess. Again, it's hard to remember that far
13 back, but I'm trying.

14 Q. Okay. So this was a cousin.

15 A. Yes.

16 Q. How did you have access to her?

17 A. Most of my cousins -- well, let's say about
18 half my cousins lived out in the country. And we'd be
19 out playing in the fields, out in the woods, what have
20 you. So there was plenty of opportunity for access.

21 Q. And you say you thought it would hurt her,
22 so you stopped.

23 A. Yes.

24 Q. Did you ever try again in the future with
25 this girl?

1 A. With that some one, if it's the one I'm
2 thinking it is -- was that Nelly?

3 Q. Nelly, uh-huh.

4 A. No, no, never did again.

5 Q. Between the ages of 10 and 11, you fondled
6 and digitally penetrated the vagina of a different
7 cousin, who would have been about eight or nine.

8 A. Okay. What did it say for ages?

9 MS. TRATNIK: We're getting an interruption
10 at the door. Let's go off the record for a second.

11 (Discussion off the record.)

12 Q. (By Ms. Tratnik) I'll read it again because
13 we had to go off the record for the interruption.
14 Between the ages of 10 and 11, fondled and digitally
15 penetrated the vagina of an eight- to nine-year-old
16 cousin.

17 A. Okay.

18 Q. And again, I have indications from --

19 A. Yes.

20 Q. -- the two male doctors that we may be off
21 on the ages.

22 A. The ages were wrong on both of those. I was
23 in my early teens, and she would have been from about
24 six to nine or thereabouts during that time period, if
25 it's the one I'm thinking it is. You can show me if

1 you don't want it on the record.

2 Q. You know, that is part of what's going on.

3 A. Yeah, that would be about right.

4 Q. And was that a one-time occurrence, or did
5 that --

6 A. That was over a period of two or three
7 years, I fondled her on several occasions, digitally
8 penetrated her at least two or three times during that
9 time and performed cunnilingus on her at least once
10 during that time.

11 Q. Being oral sex?

12 A. Right.

13 Q. Language we can all understand.

14 And right now we're in your early teen
15 years?

16 A. Yes.

17 Q. Around 12, 13.

18 A. Probably between 12 and 15 for all of this,
19 for most of this anyway.

20 Q. How is it that this would occur with
21 different girls on different occasions? Where were
22 the adults? Why were you never found out?

23 A. Good question. Because we were playing, we
24 were going around different places, we were --
25 basically like most kids do, we were running around,

1 we were in different rooms in the house, we were
2 outside, we were out in the shed, we were out in the
3 woods, whatever. A lot of motion.

4 Q. Okay. At the age of 11 -- and here's what's
5 going on. The ages are getting a little bit higher,
6 and yet, you're indicating that the prior ages were
7 higher. So all of these --

8 A. All of those --

9 Q. Because of the sequence, they're probably
10 going to be off by --

11 A. They should all be off by about the same
12 amount. So --

13 Q. Which I'm looking at about three or four
14 years off.

15 A. Yes.

16 Q. Okay. What it says is at the age of 11,
17 you fondled and digitally penetrated your
18 eight-year-old niece.

19 A. Okay.

20 Q. Oh, you were caught -- you were caught by
21 Cheryl's sister. Remind me who Cheryl is?

22 A. Cheryl is my cousin.

23 Q. Okay.

24 A. And I don't know how they got niece out of
25 that.

1 Q. Okay. Okay. So early teens?

2 A. She's my mother's sister's daughter.

3 Q. A lot of relations here.

4 A. Yes.

5 Q. So at the age of 11, probably -- you
6 subsequently said you were in your mid-teens at this
7 point.

8 A. Right.

9 Q. And she was about eight or nine. And was
10 this a niece?

11 A. Cousin.

12 Q. This was a cousin. And you were then caught
13 by --

14 A. By her younger sister.

15 Q. And that was one of my questions. The
16 sister that caught you, how old was the sister?

17 A. Year and a half, two years younger.

18 Q. Okay. So also a child.

19 A. Yes.

20 Q. See, when I read that, I was kind of
21 thinking adult. So caught by another child.

22 A. Right.

23 Q. And then it says you got yelled at for this
24 activity. Is this --

25 A. She got yelled at for it.

1 Q. Is this the one we talked about before?

2 A. Yes, this is the same one. She got told,
3 "Honey, don't do that," and that was it.

4 Q. When you would have this sexual contact with
5 nieces or cousins -- it seems like it was mostly
6 cousins -- how were these girls reacting? What was
7 their demeanor?

8 A. None of them ever gave any indication that
9 they were opposed to doing it. None of them tried to
10 pull away, none of them avoided me after the fact or
11 anything like that. So the implication that I got was
12 that they enjoyed it. Of course, that's not
13 necessarily so. It very well could have been they
14 just put up with it. But my feeling at the time was
15 they must have enjoyed it.

16 Q. Did you think it was wrong at the time?

17 A. I knew it was legally wrong. But my feeling
18 at the time was I'm not doing harm, I'm giving them
19 pleasure, it must be all right.

20 Q. Moving on to the next one, at the age of 13,
21 sexually assaulted a six-year-old female your mother
22 was baby-sitting. Did this by fondling her bare
23 vagina and performing oral sex on her. Is this a
24 different --

25 A. Same one.

1 Q. Same girl that your mother was baby-sitting.

2 A. Yes.

3 Q. Okay.

4 A. So that other one must have been about
5 something else that didn't happen. I don't know. But
6 it's one incident there.

7 Q. Did you ever have sexual contact with more
8 than one girl that your mother was baby-sitting?

9 A. No.

10 Q. Okay. So this would always be the same
11 girl.

12 A. Yeah.

13 Q. Okay. "At the age of 14, he said he had a
14 liking for panties and stole a pair of panties off a
15 drying rack of an unknown person's residence. He said
16 he thinks he used the panties while masturbating. He
17 kept the panties for a few days before throwing them
18 away."

19 A. True. And I think I might have been about
20 15 or 16.

21 Q. Okay. "At the age of 15, possibly a little
22 older" --

23 A. Yeah.

24 Q. -- "he exposed his penis on four occasions
25 to four different females. He said two females were

1 between the ages of 30 and 35 and the other two were
2 between the ages of 13 and 15."

3 A. To be perfectly honest, I can't really say.
4 I have no recollection of what that would have been
5 about.

6 Q. Okay. "At the age of 17, exposed himself to
7 a 12-year-old neighbor twice."

8 A. Okay. I know -- wait a minute. 17. That
9 could be accurate on the time. Yeah, that sounds
10 about right.

11 Q. Was it -- you said it was a neighbor. So
12 you'd have been like about six years apart. Did you
13 know the girl?

14 A. Oh, yeah, yeah. She was very friendly to
15 me. She always said "hi" and always waved, big
16 smiles.

17 Q. Okay.

18 A. She had a habit of taking a shortcut through
19 our yard, and that's when I exposed to her..

20 Q. And I take it she saw you.

21 A. Well, I'm sure she must have.

22 Q. Do you remember how she reacted?

23 A. I don't recall any reaction at all.

24 Q. But you certainly --

25 A. She continued to be friendly.

1 Q. Okay. And I think you mentioned this
2 before. At the age of 23, brushed the back of your
3 hand against the buttocks of a 16-year-old female in a
4 store. And you had mentioned an incident earlier when
5 we were talking. Is this the incident?

6 A. Uh-huh. I don't know about her age. I
7 would guess her to be in her early to mid-teens.

8 Q. Do you recall why you did that?

9 A. It looked good. I wanted to see what it
10 felt -- or find out what it felt like. It was one of
11 those spur-of-the-moment things, which has only
12 happened one other time that I can recall, and that
13 was a similar incident later in my life.

14 Q. And this occurring in a store. Were you
15 afraid of getting caught?

16 A. There were people everywhere. I'm sure
17 somebody probably saw it happen but probably thought
18 it was unintentional. It was crowded, it was busy.
19 Probably figured it was just incidental contact.

20 Q. You had mentioned some peeping before. At
21 the age of 25, you looked in an apartment window by
22 your apartment and saw a female undressing. You
23 indicated you just watched her.

24 A. Yes. That's right. She was apparently
25 getting ready to take a shower. I watched.

1 Q. So you were living in an apartment at the
2 time?

3 A. Yes.

4 Q. And this would have been someone else maybe
5 in an apartment?

6 A. Yes.

7 Q. Did you know her?

8 A. Yeah.

9 Q. How long did --

10 A. We had met. We had -- actually, I was at a
11 party at her house prior to that.

12 Q. Why did you do that?

13 A. Because she was pretty, and I wanted to see
14 what she looked like without her clothes on.

15 Q. About how old was she? You were about 25.
16 This would have been an adult, as well, or --

17 A. She was probably in her mid-20s, mid- to
18 late 20s.

19 Q. Did you have any subsequent contact to that?
20 You said you had met her at a party.

21 A. Yeah.

22 Q. Did you keep having contact with her after
23 that?

24 A. Oh, yeah. "Hello" in passing, that sort of
25 thing. We were neighbors.

1 Q. Were there any other incidents involving
2 her, other than this one?

3 A. No.

4 Q. "At the age of 25, exhibited his genitals to
5 a 12-year-old female and groped her bare vagina"?

6 A. I have no idea where that came from. Not a
7 clue.

8 Q. "At the age of 25, while staying in a motel,
9 saw two 19-year-old females check into the motel, then
10 voyeured on them while they were undressing and saw
11 them in their underpants."

12 A. Yes. I was on a TDY assignment in the
13 military, living in a motel at the time for a
14 couple-month period, and I was walking around, and I
15 just happened to see them getting ready for bed. So I
16 stopped and looked.

17 Q. Is that fair to say these were strangers?

18 A. Yes, yes. I would say they were probably
19 late teens, but I'm going to say for sure, looked to
20 be late teens.

21 Q. And how does this happen? You look over
22 there, and they just happen to be undressing, or you
23 look and --

24 A. Yeah, yeah. Well, the curtain is open about
25 this big, and I can see they're undressing. So I stop

1 and look.

2 Q. Did you go up to the window to get closer
3 or --

4 A. Close enough to see, yeah.

5 Q. Okay. So you're at the window --

6 A. Right.

7 Q. -- looking between curtains. Kind of your
8 typical --

9 A. Right.

10 Q. -- peeping-Tom image?

11 A. Peeping, exactly. I was peeping. There's
12 no question of that. I wasn't looking to do that when
13 I went out to walk. I was just walking around to be
14 walking around. But I happened to see that, and I
15 stopped.

16 Q. The opportunity presented itself?

17 A. The opportunity was there; I took it.

18 Q. Okay. At the age of 26 or so, saw two
19 17-year-old females walking down the street and
20 exposed your penis to them.

21 A. Don't know.

22 Q. Okay.

23 A. Can't recall it.

24 Q. And then this one we talked about, at the
25 age of 26, exposed your penis to two 11- or

1 12-year-old females who were walking down the
2 street --

3 A. Yes.

4 Q. -- was arrested, went through one year of
5 treatment for this offense.

6 A. Uh-huh.

7 Q. That's the one we talked about, isn't it?

8 A. Yes.

9 Q. Okay.

10 A. Yes, it is.

11 Q. And you did go to jail for that, correct?

12 A. One day.

13 Q. Okay.

14 A. Or one night. Spent the night in jail, and
15 then I was bailed out by my father and went to court
16 and got a year probation.

17 Q. And that's when the treatment was ordered
18 that we talked about?

19 A. Yes.

20 Q. Having done some treatment thereafter, why
21 do you think you kept offending thereafter? Why
22 didn't that treatment stick?

23 A. I don't know. Maybe the shrink wasn't that
24 good at his job. I don't know. Maybe I didn't pay
25 that much attention because I didn't want to. I'm

1 sure I probably felt I knew better than they did.

2 Q. "At the age of 28, he took panties from
3 friends on two occasions and used them to enhance his
4 masturbation. After several occasions of
5 masturbating, he threw the panties away."

6 A. Probable. I know at least one time.

7 Q. Were you masturbating a lot during this
8 period of your life?

9 A. Yes.

10 Q. Do you still masturbate?

11 A. Some.

12 Q. Less but yes?

13 A. Oh, a lot less. A lot less.

14 Q. About how much would you say now?

15 A. Maybe on average, maybe once a week.

16 Q. Okay.

17 A. And it's a lot less satisfying.

18 Q. Is it harder now; do you need more stimulus?

19 A. Yes. It's hard to get it up, it's hard to
20 keep it up, and it's extremely hard to get off. It --
21 basically, it's not worth the trouble.

22 Q. But you keep doing it.

23 A. The urge is still there, but it's hardly
24 worth the effort.

25 Q. At the age of 28, you wore female panties

1 out of curiosity. That's a quote. "He said he kept
2 them on for a while and then removed them."

3 A. True. I'm not sure about the age, but the
4 event, yes.

5 Q. Okay. Did that do anything for you?

6 A. It was a little bit exciting because it was
7 different.

8 Q. And did you do that afterwards, or was this
9 kind of a one-time --

10 A. It was a try it out and see what it was
11 like.

12 Q. Try it out and see what it was like.

13 A. Yeah.

14 Q. Okay. At the age of 29, sexually assaulted
15 the 14-year-old sister of a friend. You engaged in
16 vaginal intercourse with her three times during a
17 two-month period. You said she came into your house
18 on each occasion that the sexual contacts occurred.

19 A. Yes. She came to my house specifically to
20 have sex with me.

21 Q. And she was about 14.

22 A. Yes --

23 Q. Is 29 right?

24 A. -- I think she was 14.

25 29 is probably close to right. 28, 29,

1 somewhere in there, yes.

2 Q. Was this consensual?

3 A. Absolutely. But of course, I can't legally
4 say that because she was under age. But yes. She
5 came to my house with the intention of having sex with
6 me.

7 Q. Okay. Do you think she was old enough to
8 consent at 14, mid-teens?

9 A. I probably would not have thought so except
10 that she had told me that she had been having sexual
11 intercourse since the age of eight and with any and
12 all -- anybody who wanted it, and enjoyed it.

13 Q. At what age would you think that kids can
14 consent -- or people can consent? I don't know.

15 A. Legally 16. When they're actually old
16 enough to realize what they're doing and really decide
17 for themselves what they're doing and so on, it's
18 probably after the onset of puberty.

19 Q. I know what I think the onset of puberty is,
20 but what --

21 A. Yeah, 12-ish, 12, 13, 14, depending on the
22 individual.

23 Q. That's what I would have said.

24 A. Yeah. And this would not be true for
25 everyone because there are some people that don't

1 really know their own mind until they're at least in
2 their 20s. So I would say some people would be old
3 enough to decide for themselves then. Some probably
4 should never do it just because they never really
5 know.

6 Q. Given the individual variances in people,
7 can that go both ways? Would some people be --

8 A. Yeah.

9 Q. -- able to consent younger and some able to
10 consent older?

11 A. That think they're old enough to decide for
12 themselves, yes. That actually psychologically are
13 prepared for it, probably not.

14 Q. So to have -- although a bright-line rule
15 might be impossible, you think about the onset of
16 puberty would be a good --

17 A. Good average for when they might be able to
18 decide reasonably well for themselves. But like I
19 said, there are a whole lot of them that don't really
20 know their own minds, though. Well, until they're at
21 least in their 20s. So...

22 Q. And how did you know her? You said she
23 would come over to the house.

24 A. Who?

25 Q. This is the 14-year-old --

1 A. Oh, I visited --

2 Q. -- sister --

3 A. Yeah, yeah --

4 Q. -- of a friend.

5 A. I visited my friend at their house, and she
6 was there.

7 Q. Okay.

8 A. And we'd shoot pool together or sit and talk
9 or whatever.

10 Q. Okay. So the friend was an adult?

11 A. He was 20-ish, I think.

12 Q. And he had --

13 A. He was younger --

14 Q. -- a younger sister?

15 A. He was younger than me. I knew him, I knew
16 a couple of his brothers and his sister. And they
17 were strung out from the late 20s down to early teens.

18 Q. And how did you and this 14-year-old have
19 sex for the first time? How did that come about?

20 A. Okay. We were playing pool one day. I went
21 over to see her brother, and he wasn't there. She
22 said, "Come on in. Let's play some pool." Okay. So
23 we shot some pool. And she was wearing a short skirt
24 and a low-cut blouse, and I couldn't help but see
25 things whenever she'd bend over shooting -- to shoot

1 at the pool ball. And I got kind of turned on with
2 it, and we were sitting there talking, and I started
3 touching her, fondling her. And I tried to fondle her
4 genitals, and she pulled away and said, "No," said,
5 "Wait a few days. I'll come over to your house." And
6 a few days later, she knocked on the door, I opened
7 the door, she walked in, said, "Are we alone?" "Yep."
8 She walked straight back to my bedroom, took off her
9 clothes, laid down on the bed and said, "Do me," just
10 like that.

11 Q. Did your friend ever find out about this?

12 A. I don't know. I know that he -- I'm sure
13 that he knew that his sister was sexually active and
14 had been for a long time.

15 Q. Do you think he would have approved?

16 A. I suspect he would have been neutral on it
17 because he knew of her sexual activity.

18 Q. At the age of 30, you had sexual contact
19 with a 14-year-old female who you met at a Denny's
20 restaurant in Burien --

21 A. That's correct.

22 Q. -- which you frequented. "He said he talked
23 to her several times during a two-month period.
24 Eventually the female invited him to her house, and
25 while at her house, he engaged in vaginal intercourse

1 with her. He said he did not know where her parents
2 were. He said her mother learned he was at the house,
3 and she forbid the female from seeing him again."

4 A. That's correct.

5 Q. Okay.

6 A. Yes, I was sitting in a Denny's restaurant.
7 I think I was writing a poem.

8 Q. I'm sorry? Writing a poem?

9 A. Yes. And anyway, I was sitting there
10 sipping coffee, nursing a cup of coffee and writing or
11 whatever. And the waitress came over to me and says,
12 "You see that girl over there?"

13 I said "Yeah." She says -- hands me this
14 note from the girl. I open it up. It says: "I think
15 you're cute. Can we talk?" Okay. So she came over
16 and sat with me and talked, and that's how it all
17 started.

18 Q. At that time, was it common for you to
19 befriend teenagers versus adults?

20 A. I wouldn't say "versus." I would say "as
21 well as."

22 Q. Okay.

23 A. Yes.

24 Q. That's fair.

25 A. Yes, yes.

1 Q. So you're in your late 20s, early 30s, and
2 you have adult friends?

3 A. Yes, and teenage --

4 Q. And you would have teenage friends.

5 A. Mostly in their late teens, yeah.

6 Q. Okay. Why teenage friends?

7 A. To be perfectly frank, because they liked to
8 party. And at that age, I was into parties.

9 Q. Okay.

10 A. Partying and game playing, did a lot of game
11 playing.

12 Q. Do you think that people have ever
13 mischaracterized your relationships with children or
14 teenagers?

15 A. Yes. I can give you a prime example. One
16 of my friends who was a teenager, I think he was
17 probably 17 or 18 at the time, and I was in my late
18 20s, I'm absolutely certain that his father was
19 convinced that I was homosexual and that I was coming
20 on to his son.

21 Q. Okay.

22 A. Because of the age difference.

23 Q. Okay. Do you think that people have ever
24 mischaracterized your relationships with teenagers
25 that were girls?

1 A. I'm sure they probably must have. I know
2 there have been a lot of teenage girls that I've been
3 friends with that I wasn't involved with sexually.
4 I'm sure people probably thought we were.

5 Q. Whose idea -- this girl from the Denny's
6 restaurant, whose idea was it to have sex?

7 A. I think it was mutual. We talked about a
8 bunch of things, and I think that was one of the
9 things we talked about. And basically, we said,
10 "Should we?" And the answer was, "Sure, why not,"
11 and we did.

12 Q. And how long did you know her before this
13 occurred?

14 A. I can't really say. I know it had been long
15 enough that we'd had several conversations and written
16 letters back and forth. So probably a couple months
17 maybe. I'm not sure.

18 Q. And at some point, her mother learned you
19 were at the house.

20 A. Yes.

21 Q. Were you having sex at the time that the
22 mother became --

23 A. The time that her mother knew about?

24 Q. Uh-huh.

25 A. Yeah, yeah. I only went to her house that

1 one time.

2 Q. Okay.

3 A. And apparently the neighbor told her mother
4 that someone -- that a man had been at the house while
5 she was gone.

6 Q. Okay. So when it says that the mother
7 forbid her from seeing you again, is it because she
8 knew what was going on?

9 A. Probably because she suspected what was
10 going on.

11 Q. Okay. If you hadn't been having sex, if you
12 were just hanging out with this 14-year-old girl, and
13 you were 30, do you think that a parent -- do you
14 think that it would be appropriate for a parent to
15 kick you out of that situation if you weren't having
16 sex?

17 A. Because of the risk involved, yes.

18 Q. The risk between you and a teenager or
19 between a man who's 30 and a teenager?

20 A. Exactly, between a man of 30 and a teenager.

21 Q. Okay.

22 A. Because of the age difference, they would
23 have to be suspicious.

24 Q. During the age of 30 and 40, walked around
25 in the woods nude on four occasions. You stated you

1 did not think anybody saw you. And you said that
2 further, on one of those occasions you masturbated to
3 ejaculation while in the woods.

4 A. Probably true.

5 Q. Okay.

6 A. And at that time, I was being careful to
7 make sure nobody saw me. I didn't want to be
8 exposing, but I wanted to be nude.

9 Q. Okay. You wanted to be nude outside?

10 A. Right, exactly.

11 Q. Do you know why?

12 A. I liked I feel of the sun and the breeze on
13 my bare skin. I think I was born nude. That was a
14 joke.

15 Q. At the age of 31, you met a 17-year-old
16 female who was in the 12th grade. After becoming
17 friends with her, you engaged in mutual fondling and
18 vaginal intercourse.

19 A. I believe that's true.

20 Q. Do you remember --

21 A. She was a --

22 Q. -- where you met her?

23 A. I think she was a friend of a friend.

24 Q. Maybe a friend of a teenage friend?

25 A. I think the friend was probably a little bit

1 older. But yeah, a friend of a friend.

2 Q. Whose idea was it to have sex; do you
3 recall?

4 A. I suspect I probably asked if she would like
5 to, and she probably said she would be willing to try
6 it.

7 Q. Okay. How did you become friends? Like
8 what does somebody in his early 30s and a
9 17-year-old -- like what kinds of things would you do
10 to become friends?

11 A. Conversation, talking about mutual
12 interests, talking about people we knew in common.

13 Q. And about a year later, you would have been
14 about 32. And it says you dated -- that's in quotes,
15 you dated a 17-year-old female for two months. During
16 this time you engaged in mutual fondling, digital
17 penetration, and oral sex with her. Is that a
18 different girl?

19 A. Yes.

20 Q. Okay. So --

21 A. I was very much in love with that girl, too.

22 Q. 32, you would have been about -- this would have
23 been in the '70s. So you were -- you'd probably been
24 married at least once at that point.

25 A. Uh-huh.

1 Q. And you said you were in love with this
2 girl?

3 A. Yes.

4 Q. Okay. Do you remember her name?

5 A. If it's the one I'm thinking of, her name
6 was Sally.

7 Q. How did this end, then? How was it that you
8 two didn't stay together?

9 A. I was -- I think she felt I was pushing too
10 hard to have sexual intercourse with her. And her
11 father didn't like the way she was reacting to our
12 relationship, like he felt like I was getting too
13 pushy with her or something, anyway, like I was
14 disturbing her.

15 (Discussion off the record.)

16 Q. (By Ms. Tratnik) We've got five minutes on
17 the tape, so there's a natural break that's going to
18 occur in a few minutes.

19 At the age of 34, had sexual contact with
20 your at-the-time wife's 12-year-old cousin.

21 A. Uh-huh, 11-year-old cousin.

22 Q. Okay, 11-year-old cousin. Indicated you
23 fondled her vagina while she was asleep on a couch.

24 A. No, she was not asleep.

25 Q. And that she --

1 A. She was lying on the couch. I was sitting
2 on the couch. We were watching TV.

3 Q. And that is corrected after you talked to
4 Dr. Goldberg.

5 A. Yes.

6 Q. So please continue.

7 A. Okay. And that's it. I felt her thigh. I
8 touched her between the legs. I pulled her panties
9 aside and touched her on her bare genitals, and that's
10 it. Rubbed on her for a little bit.

11 Q. And why was she there? Was she like
12 visiting or something?

13 A. Yeah, yeah.

14 Q. Was this consensual?

15 A. She made no objections, so I assume that she
16 was -- oh, as a matter of fact, I asked her if it was
17 okay, and she said sure.

18 Q. Okay.

19 A. She said, "You're not hurting me or
20 anything," so it was fine.

21 Q. Okay.

22 A. When I wanted to do more than that, she was
23 afraid we'd get caught. Said, "We better not. We'll
24 get in trouble."

25 Q. And did anybody find out about this?

1 A. I don't believe so.

2 Q. Were you afraid of being caught?

3 A. Yes.

4 Q. At the age of 34, there was a 12-year-old
5 female who delivered newspapers in an apartment
6 complex that you lived?

7 A. Yes.

8 Q. What happened there?

9 A. She was walking by -- I said "hi" to her
10 frequently when she'd go by delivering the papers
11 because I'd see her all the time. And I also saw her
12 when she -- after she got done with her papers, she'd
13 go swim in the swimming pool at the apartments, and I
14 saw her there frequently. Anyway, she was walking by
15 one day, and I'm chatting with her, I'm standing at
16 the window, I'm right up against the wall --

17 Q. Okay.

18 A. -- she can't see anything --

19 MS. TRATNIK: Okay. Let's take a break --

20 MR. ENBODY: I have a question.

21 MS. TRATNIK: Yeah.

22 MR. ENBODY: Did you want to go through
23 this, then eat lunch, or eat lunch right now?

24 (Deposition recessed from
25 12:00 p.m. to 12:30 p.m.)

1 <<<<<< >>>>>>

2

3 E X A M I N A T I O N (continued)

4 BY MS. TRATNIK:

5 Q. Okay. We're back on the record.

6 Mr. Kistenmacher, when we had left off, we
7 had just begun talking about an incident when you were
8 about 34, and there was this 12-year-old girl who
9 would deliver newspapers in your apartment complex,
10 and you had started to talk about that.

11 A. Right, right. I frequently would talk to
12 her as she went by, say, "Hi, how you doing today?"
13 that sort of thing. And I was standing at the bedroom
14 window, I was nude, but she couldn't see that I was
15 nude. She could only see from about mid-waist up, or
16 mid-belly up. And I was talking to her while I was
17 nude. I may have been masturbating while I was
18 talking to her, but I'm not sure.

19 Q. You had previously indicated to Dr. Goldberg
20 and you said now that you may have masturbating. That
21 was my understanding from that previous conversation.

22 A. Right.

23 Q. Were you talking to her as this was going on
24 or --

25 A. Yes.

1 Q. Okay.

2 A. I talked to her briefly as she was going by.
3 "Hi. How you doing today?" you know, that sort of
4 thing.

5 Q. Okay. So she was walking by.

6 A. Right.

7 Q. Okay. About the same time period, so about
8 the age of 34, there was a 12-year-old daughter of a
9 neighbor, and I don't know if this is the same one or
10 not --

11 A. No.

12 Q. Okay. That makes sense. "He said this
13 female was standing on her toes looking at the
14 window" -- "looking at the window as her mother left
15 the residence" --

16 A. Looking out the window.

17 Q. "Looking out the window," I'm thinking that
18 should say.

19 A. Right.

20 Q. "She then asked the client to left her high,
21 and he lifted her and held her by the buttocks. He
22 said he believes he touched her clad vagina at the
23 time. Approximately one month later, he was sleeping
24 and awoke with the sound of a doorbell. He said he
25 answered the door while nude, and the 12-year-old

1 female was standing outside the door. He said he did
2 not know he was nude until he answered the door
3 because he was sleepy."

4 A. Uh-huh.

5 Q. Did that occur?

6 A. Yeah.

7 Q. And that's a different 12-year-old?

8 A. Yeah. This is a girl I was baby-sitting.

9 Q. The one we're talking about now?

10 A. Yes. And I'd been baby-sitting her for some
11 time. There was no problems with the relationship or
12 anything until that day when she came over to borrow
13 something and woke me from a sound sleep, and I
14 answered the door nude.

15 Q. You said you were baby-sitting her for some
16 time. And then at some point you lift her up --

17 A. No, that was before. The first time I ever
18 saw her --

19 Q. Okay.

20 A. -- was when she asked me to pick her up so
21 she could wave to her mother as she was pulling out of
22 the parking lot.

23 Q. Oh, okay.

24 A. Okay.

25 Q. And it's an --

1 A. And after that, her mother asked me to
2 baby-sit her after school whenever she was at work
3 during those hours, which I did.

4 Q. Okay. And it said on that first occasion
5 when you lifted her, you were able to touch her clad
6 vagina. That's --

7 A. Right. She was right --

8 Q. -- the word used. "Clad" is undressed,
9 correct?

10 A. Clad is dressed.

11 Q. Okay.

12 A. Right. She was wearing -- as I recall, she
13 was wearing a nightgown, and she had underwear on
14 under it. And my hand was outside the nightgown. It
15 was between her legs.

16 Q. And why is this a reported sexual contact
17 incident?

18 A. Because I touch her between her legs.

19 Q. Is that what you had intended to do or --

20 A. It was just the way I picked her up. But
21 I'm sure I had sexual thoughts when I did it,
22 probably. But I had one arm around her waist and one
23 arm under her butt. Or one hand under her butt, I
24 mean.

25 Q. And apparently you answered the door nude.

1 Were you often -- did you used to sleep in the nude?

2 A. Yes, I did. And it was a hot summer day.

3 At that time, I was working nights and sleeping during
4 the day.

5 Q. Okay. About a year later -- we're now at
6 the age of 35 -- there was an eight-year-old and a
7 12-year-old girl in a swimming pool?

8 A. Uh-huh.

9 Q. Do you recall that incident?

10 A. Yeah. I played around with the kids. One
11 of them, the younger one, we were splashing around
12 together, and I was picking her up and tossing her in
13 the air and stuff like that. And I touched her
14 genitals under her shorts. She wasn't wearing
15 anything under her shorts. Okay. That was
16 incidental. The other one I was picking up and
17 tossing up in the air because she was enjoying that,
18 too, coming down and making a big splash, giggle,
19 giggle, all of that stuff. And it was just -- I
20 considered it to be harmless play at the time, but
21 thinking back on it, I considered there was sexual
22 contact there because I was touching them between the
23 legs.

24 Q. It says here: "He stated he became
25 'somewhat sexually aroused.'" Is that true?

1 A. Probable.

2 Q. Okay. Did you know them?

3 A. No. They were neighbors. It was in a big
4 apartment complex.

5 Q. Okay. We're still in the apartment complex.
6 I see.

7 A. Yeah.

8 Q. And it says he touched -- "His hand touched
9 the eight-year-old bare's vagina."

10 A. Uh-huh.

11 Q. Was there a bathing suit or shorts? I'm
12 confused --

13 A. She was wearing cutoffs, short cutoffs.

14 Q. Like cutoff jeans or something?

15 A. Right.

16 Q. Okay.

17 A. With nothing on underneath.

18 Q. Okay. So did you slip your hand under there
19 or --

20 A. I had my hand on her thigh, and it slipped
21 up and touched her between the legs.

22 Q. Okay. And then when it says you became
23 somewhat sexually aroused, would that be tied to that,
24 I take it?

25 A. Exactly, because I was touching her

1 genitals, and she wasn't wearing anything on them, no
2 underclothes.

3 Q. Were there any adults around as this
4 occurred?

5 A. Oh, hell yeah. Hot summer day, the pool was
6 full. There were people everywhere.

7 Q. Any indication that anybody noticed, like
8 another adult?

9 A. I'm sure they saw that I was playing with
10 the kids. But I don't think anybody thought we were
11 doing anything wrong or I was doing anything wrong.
12 In fact, the older girl that I was talking about
13 there, after the girl's mother decided it was time to
14 go home, the mother thanked me for playing with her
15 kid and entertaining her because she was having a good
16 time.

17 Q. Do you think parents often enjoy that break?

18 A. Probably.

19 Q. About a year later, at age 36 and again at
20 age 41, your sister -- so you were about age 36 and
21 41, and your sister-in-law was 12 and 17 while you
22 were 36 and 41.

23 A. Uh-huh, we've already covered that one.

24 Q. Okay. Which one was that? It sounds like
25 you already know which one I'm talking about.

1 A. Yes. Want to name names?

2 Q. I prefer not to --

3 A. Yeah.

4 Q. -- but you know what I'm talking about.

5 A. You have it written there?

6 Yep.

7 Q. What happened there?

8 A. We already talked about that one.

9 Q. Which incident was that?

10 A. Oh, wow, she was sleeping on the sofa, had a
11 little babydoll nightie -- and I don't know if I
12 described it this way or not -- she'd kicked off the
13 covers, and I could see her panties. I slipped my
14 hand underneath her panties and slid my finger in her
15 vagina.

16 Q. Did she wake up?

17 A. Yeah.

18 Q. And what happened when she woke up?

19 A. She just pushed me away, and that was it,
20 went back to sleep.

21 Q. And then the second time happened about five
22 years later --

23 A. When she was about 16 or 17, that's the one
24 I said when she came over to our house, and she was
25 drunk and stoned out of her head, and she had been

1 chasing after everything with pants on all summer
2 long. And I was tempted, and I did it again.

3 Q. Okay. Anybody find out about this?

4 A. The first one she told about a couple months
5 afterwards.

6 Q. Who did she tell after the first event?

7 A. She told her mother and my wife, I think.

8 Q. Okay. And they confronted you?

9 A. Yeah. And that's when her mother and father
10 said that I wasn't to be around when the kids were
11 around. And that kept on for a year or two, and then
12 they decided that it was okay.

13 Q. Okay. That was the incident we talked about
14 earlier --

15 A. Yes, it was, exactly.

16 Q. At the age of about 41, there was your
17 cousin's stepdaughter --

18 A. Uh-huh.

19 Q. -- who was about five. What happened with
20 her?

21 A. Oh, okay. Her mother and I and I think one
22 of my other relatives were laying out in the sun,
23 sunbathing on a hot summer day. And the little girl
24 was rubbing oil on me. And she was rubbing it on my
25 thigh, and her hand went up underneath my cutoffs and

1 touched my penis.

2 Q. Okay.

3 A. That was it.

4 Q. Did you have any reaction to that?

5 A. Yeah, it felt great, but I wasn't about to
6 encourage it because she was so young, you know. I
7 didn't have any sexual desire for her or anything. It
8 was just -- it was just a nice sensation momentarily,
9 and that was it. It was exciting.

10 Q. It also says you told Ms. Macy that prior to
11 that, you had exhibited your genitals to her by
12 allowing her to see you when you were urinating in the
13 bathroom.

14 A. I'm not real sure about that, but it's
15 possible that she did at some time or another because
16 we were around each other a lot because I visited my
17 cousin a lot, and her kids and their kids were around
18 a lot. So yeah, it's entirely possible.

19 Q. Would you ever leave the bathroom door open
20 when you were urinating, when other people were
21 around, when children were around?

22 A. I might have. I don't recall that I did,
23 but I might have.

24 Q. At the age of 41, you had sexual contact
25 with your cousin's 12-year-old daughter. And this is

1 a different one.

2 A. Right.

3 Q. "He said he touched her breasts and rubbed
4 his bare penis on the crotch of her jeans while he
5 stood behind her."

6 A. Yeah, I wasn't standing behind her. She was
7 laying down on her side, and I laid down behind her.

8 Q. Okay. "He then unzipped her jeans, at which
9 time she told him she was not supposed to have sexual
10 activity with anyone over the age of 18."

11 A. True. She was also afraid we'd get caught.

12 Q. Okay. When she said that, what happened
13 then?

14 A. I quit.

15 Q. Were you disappointed?

16 A. Yeah, kind of.

17 Q. Were you afraid of getting caught?

18 A. Yeah.

19 Q. This was your --

20 A. Cousin's daughter.

21 Q. -- cousin's 12-year-old daughter. Did you
22 know her prior to that?

23 A. Oh, yeah, yeah. I've known her since she
24 was probably about six or seven.

25 Q. Okay. Other than this incident, did you

1 ever have sexual contact with her?

2 A. No.

3 Q. And again, why were you alone with her?

4 A. I wasn't alone. I was sleeping on the sofa.
5 She was sleeping on a pad on the living room floor.
6 There were other people sleeping in various bedrooms
7 upstairs --

8 Q. Okay.

9 A. -- and so on.

10 Q. Okay.

11 A. There were many, many, many occasions when I
12 was visiting there when I was within arm's reach of
13 young girls and never did anything except sleep.

14 Q. And at least some of the people in your
15 family at some point knew that there had been
16 problems, correct?

17 A. I expect so.

18 Q. There was at least one confrontation that
19 we're aware of that you discussed earlier with the
20 12-year-old.

21 A. Yeah, yeah, with my in-laws, right.

22 Q. Sticking with the same girl, it looks like
23 about a year later, there was an incident where she
24 was sleeping. Do you remember that?

25 A. The same one --

1 Q. Uh-huh, at the age of --

2 A. -- the 12-year-old?

3 Q. At the age of 42 --

4 A. My cousin's daughter?

5 Q. -- again, this is your cousin's 12-year-old
6 daughter --

7 A. Oh, oh, oh, oh --

8 Q. -- you were sleeping in the same --

9 A. She was sleeping -- that was the same
10 incident. She was asleep when I first touched her,
11 and then she woke up.

12 Q. Okay.

13 A. There was another girl who was visiting
14 there, one of her friends, who was 14 or 15 --

15 Q. The cousin's -- yes, yes.

16 A. -- and I touched her sexually.

17 Q. What occurred there?

18 A. I rubbed my penis on her panties while she
19 was falling asleep, I think. I don't think she was
20 asleep yet. I think she just pushed me away.

21 Q. So that was a friend that was visiting the
22 teenager, who was also a teenager.

23 A. Yes.

24 Q. Okay. When you did this to the girl's
25 friend, was the girl sleeping?

1 A. I think she was just starting to fall
2 asleep.

3 Q. Okay.

4 A. Because she was instantly aware that I was
5 there and pushed me away.

6 Q. Was that the end of it?

7 A. Uh-huh.

8 Q. Did you ever see her again?

9 A. Oh, yeah.

10 Q. Anything ever happen with her --

11 A. No.

12 Q. -- other than that?

13 A. No, that was it.

14 Q. "At the age of 48," which would have been
15 about 1989, "his brother's 11-year-old stepdaughter,"
16 not going to say the name, "was visiting the client
17 and his mother Nelly in Centralia. He said he rubbed
18 her bare breasts and buttocks as she sat on his lap.
19 He then rubbed her vagina. Afterwards, he placed his
20 hands in her shorts and fondled her and digitally
21 penetrated her bare vagina."

22 A. Okay, except for the digitally penetrated.
23 I rubbed on her clitoris. I never penetrated her.
24 And it's my -- they continually get this relationship
25 wrong. I had this trouble all the way through therapy

1 with my therapist. This girl is not related to me in
2 any way.

3 Q. Okay.

4 A. It is my brother's ex-wife's daughter by her
5 second marriage after she was my sister-in-law.

6 Q. Okay. Say that again. Your brother's?

7 A. My brother's wife -- after they divorced,
8 she got married then. This is her daughter by that
9 marriage.

10 Q. I see.

11 A. So she's not --

12 Q. So therefore, this is --

13 A. -- blood relation.

14 Q. And this is not the stepdaughter of Raymond,
15 then.

16 A. No.

17 Q. I see.

18 A. She -- as far as legally, she's family
19 friend --

20 Q. Okay.

21 A. -- because my brother's first wife remained
22 close friends with us.

23 Q. So at this point, your brother Raymond is no
24 longer married to this woman. This woman goes out,
25 and she remarries --

1 A. No. She's been married to somebody else for
2 a long time. She's been married to somebody else for
3 a long time. She's got two children, this girl and a
4 boy.

5 Q. Okay. So after she --

6 A. And they're all family friends.

7 Q. So after she divorced -- are you saying that
8 after she divorced from Raymond, she stayed a friend
9 of the family's?

10 A. Absolutely.

11 Q. I only question that because a lot of
12 times --

13 A. Absolutely.

14 Q. -- when people get divorced, you know how it
15 is.

16 A. We've always been close. From the time they
17 got married -- she very much likes me and my mother,
18 and she'd come visit my mother frequently, and that's
19 what was happening there. She came to visit with my
20 mother and I.

21 Q. Okay. And was Raymond still on good terms
22 with her, even though they had --

23 A. Oh, absolutely. He visited with them all
24 the time. Always bought gifts for the kids even
25 though they weren't his.

1 Q. Okay. So even though they divorced, it
2 was --

3 A. They were on good terms.

4 Q. -- like, okay, we're not meant to be
5 married --

6 A. Right, right.

7 Q. -- but they didn't hate each other.

8 A. Right.

9 Q. And you said that he has bought presents --
10 he would buy presents for the --

11 A. Oh, yes. He bought Christmas and birthday
12 presents for them for a long time. As far as I know,
13 he probably still does, and they're probably full --
14 I'm sure they're grown up by now.

15 Q. So did he have somewhat of a paternal
16 relationship with them even though he wasn't the
17 stepfather?

18 A. I would say more -- check this out, using my
19 college --

20 Q. Avuncular is what you're going to say --

21 A. Avuncular.

22 Q. -- aren't you? Yes.

23 A. Avuncular, yes.

24 Q. Which means like an uncle, correct?

25 A. Like an uncle, right.

1 Q. Okay.

2 A. Such a big word for "like an uncle."

3 Q. And does Raymond know about this incident?

4 A. I think that's the only thing that I haven't
5 disclosed to him. I think he knows that it happened
6 but not who it was.

7 Q. You lost me on the last part.

8 A. I don't think I told him specifically who it
9 was. I think I may have told -- related the incident
10 and the age --

11 Q. I understand.

12 A. -- but not who the girl was.

13 Q. And why haven't you told Raymond this?

14 A. Because I value his relationship with me too
15 much to endanger it by that because I know he loves
16 the girl very much.

17 Q. What were you thinking --

18 A. And we had a long conversation over that.
19 My therapist in SOTP and I finally came to the
20 conclusion that I was right in that, that it would be
21 too risky to reveal that information.

22 Q. And at the time this occurred, you were
23 about 48. And you obviously at this point already
24 knew that this is somebody that was close to your -- a
25 child that was close --

1 A. Yes.

2 Q. -- to your brother.

3 A. Yes.

4 Q. Why did that not stop you?

5 A. I really can't answer that. I honestly
6 don't know. I know that I was very attracted to her
7 and that she was very friendly with me and enjoyed my
8 company and liked sitting on my lap and cuddling and
9 all that kind of stuff and giving me kisses.

10 Q. Between the ages of 51 and 53, it indicates
11 you rubbed the back of your hand against a 12- and
12 14-year-old female -- so at 51 there was a 12-year-old
13 girl, and at 53 there was a 14-year-old girl -- in a
14 store while they were shopping? Do you recall that?

15 A. I recall one incident. But I'm not sure of
16 the age, but I would say probably early teens.

17 Q. And why were you doing that?

18 A. Because I was stupid.

19 Q. Was it to get a sexual --

20 A. Yeah, it was for a sexual thrill, just to
21 touch somebody on their buttocks.

22 Q. And in a store, there would be a lot of
23 other people around, right? We talked about this
24 before.

25 A. Uh-huh.

NO. 33082-2-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

In re the Detention of:

ALFRED KISTENMACHER,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

RECEIVED
COURT OF APPEALS
DIVISION II
JAN 20 2006 10:58 AM
SEATTLE, WA

MACEY ANTHONY declares as follows:

On Friday, January 20, 2006, I deposited in the United States Mail,
with first-class postage affixed, addressed as follows:

PETER TILLER
ATTORNEY AT LAW
P. O. BOX 58
CENTRALIA, WA 98531

a copy of the following documents:
OPENING BRIEF OF RESPONDENT and DECLARATION OF
SERVICE.

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

SIGNED this 20th day of January, 2006, at Seattle, Washington.


MACEY ANTHONY