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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Detention of Kevin Coe, a/k/a Frederick Harlan Coe:

STATE OF WASHINGTON,

Respondent,

v.

KEVIN COE,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT  
STATE OF WASHINGTON**

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ORIGINAL

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## I. INTRODUCTION

The jury that civilly committed Kevin Coe as a sexually violent predator heard expert testimony that he suffered from several mental disorders, including an undisputed personality disorder, which made him sexually dangerous. On appeal, Coe challenges the trial court's discretionary decisions that admitted expert testimony about a ritualistic crime signature, Homicide Investigation Tracking System (HITS) data that showed a unique modus operandi crime signature, and the victim and expert testimony about unadjudicated crimes those signatures linked to Coe. He also claims his attorneys were ineffective.

The record reveals the trial court properly exercised its discretion after carefully examining the evidence at two full-day pre-trial hearings. A report Coe submitted from his own crime signature expert undermined his arguments and, to the extent Coe preserved the objections he raises on appeal, they pertain to the weight of the evidence and not its admissibility.

Coe asserts his attorneys should have proposed a definitional jury instruction for "personality disorder" and moved to exclude the HITS data. His arguments do not overcome the strong presumption that his counsel were effective. Prior case law, as well as legitimate strategic and tactical considerations, supported his counsels' decisions. Coe's trial was fair and the verdict should be affirmed.

## II. ARGUMENT

### A. **The Decision By Coe's Counsel To Not Request An Instruction Defining "Personality Disorder" Was Not Ineffective Assistance Because Existing Case Law Supported Their Decision And Coe Admitted Through His Expert That He Suffered From That Condition**

The Court of Appeals properly rejected Coe's claim that his counsel were ineffective because they did not propose a jury instruction defining "personality disorder."<sup>1</sup> Prior case law did not require the instruction, there are legitimate tactical reasons why counsel may not have proposed it, and Coe was not prejudiced by the lack of the instruction, since his own expert agreed that he suffered from a "personality disorder."

To establish ineffective assistance of counsel, Coe must show: 1) that his counsel performed below an objective standard of reasonableness; and 2) he was prejudiced by it. *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Reviewing courts assume counsels' assistance was effective, and generally will not find ineffective assistance if the challenged action relates to trial tactics. *Id.*; *State v. Woods*, 34 Wn. App. 750, 759, 665 P.2d 895 (1983). Coe fails to satisfy either of these two required elements.

#### 1. **Coe's Counsel Knew Then-Existing Precedent Did Not Require The Instruction And Had A Tactical Reason To**

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<sup>1</sup> Coe concedes that the absence of a definitional instruction for a technical term is not an error of constitutional magnitude. Resp. Br. at 16. The state agrees.

### Not Request It

At Coe's trial, longstanding precedent held that "personality disorder" did not require definition in Sexually Violent Predator (SVP) cases. *See In re Detention of Twining*, 77 Wn. App. 882, 895-96, 894 P.2d 1331 (1995) (citing *State v. Allen*, 101 Wn.2d 355, 361-62, 678 P.2d 798 (1984)). The *Twining* rule had been in effect 13 years.

Coe's argument relies on hindsight and lacks merit. He asserts *Twining* addressed trial court discretion and counsel were still required to request the instruction, citing *State v. Allen*, 101 Wn.2d 355, 362, 678 P.2d 798 (1984). But *Twining* distinguished *Allen*, concluding it applied only to "statutorily defined terms with specific legal definitions" and not to "personality disorder" because it lacked a legal definition. 77 Wn. App. at 895-6. *Twining*, consequently, held that only legally-defined terms required definition. "Personality disorder" was not so defined at the time of Coe's trial and there was no authoritative legal source from which to craft a definition. *In re Detention of Pouncy*, 168 Wn.2d 382, 397, 229 P.3d 678 (2010), (Madsen, C.J., dissenting).<sup>2</sup>

*Pouncy* changed the *Twining* rule and its interpretation of *Allen*. But

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<sup>2</sup> Coe argues that the term was defined in the Washington Administrative Code (WAC). Resp. Br. at 13. That definition, however, was clearly not intended to be a legal reference for jury instructions because it merely points to the definition in the Diagnostic and Statistical Manual of Mental Disorders and includes "psychopathy as assessed using the Hare PCL-R or similar instrument." WAC 388-880. Such a technical definition would not be helpful to a jury and would likely be objectionable itself.

counsel are not required to anticipate changes in the law. *See, e.g., Jameson v. Coughlin*, 22 F.3d 427, 429 (2d Cir. 1994) (trial counsel cannot be deemed incompetent for failing to foresee a higher court would overrule existing precedent).<sup>3</sup> Coe attempts to elevate hindsight to a competency standard, but reviewing courts must attempt to “eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” *In re Personal Restraint Petition of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Coe’s counsel relied on existing precedent and were not ineffective for doing so.

Furthermore, if counsels’ decisions “can be characterized as legitimate trial strategy or tactics,” they are not ineffective. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986). Coe’s counsel had a powerful tactical reason to leave the term undefined. That Coe had a “personality disorder” was conceded: Coe’s expert testified he would make the diagnosis “even stronger.” 1RP at 3582. Therefore, defining the term would have provided the jury an undisputed and pejorative description of Coe’s mental state. It would have been an admission that Coe had

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<sup>3</sup> *See also Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990) (ineffectiveness not established by claim that “counsel should have realized that the Supreme Court was planning a significant change in the existing law[.]”). Trial attorneys are not required to anticipate even strong appellate arguments. *United States v. Ardley*, 273 F.3d 991, 993, 15 Fla. L. Weekly Fed. C 95 (11th Cir. 2001) (counsel not ineffective for failing to foresee results of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, at 685 (4th Ed., Text Revision 2000). Coe was far better off leaving the term undefined, and his counsels' decision to not seek the instruction was a reasonable and legitimate trial tactic. As this Court has recognized, in the absence of a definition for a technical term, "one can imagine justifications for defense counsel's failure to object[.]" *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2010). Here, the justification is clear.

## **2. Coe Was Not Prejudiced By His Counsels' Decision**

Even if Coe's counsel were deficient, Coe must show a reasonable possibility that the decision affected the outcome of the trial. *Stout*, 159 Wn.2d at 377. The Court of Appeals correctly concluded he cannot. *In re the Detention of Coe*, 160 Wn. App. 809, 1071, 250 P.3d 1056 (2011). Coe's expert testified he suffered from a "personality disorder." 1RP at 3582. Since there was no dispute about the meaning of "personality disorder" or that Mr. Coe suffered from one, there is no reasonable probability that the outcome of the trial would have been affected if the definitional instruction had been given.

Coe argues that the Court of appeals “misconstrued the record” because the experts disagreed about the “personality disorder.” Pet. for Rev. at 7. The disagreement, however, was not over whether Coe had a “personality disorder.” The experts disagreed only about the presence of a single “trait” within the disorder – antisociality. Coe’s expert agreed that Coe had a personality disorder with narcissistic and histrionic traits. *Id.* The disagreement had no bearing on the *definition* of Coe’s disorder. Thus, Coe cannot show prejudice because he presented evidence at trial that he suffered from a “personality disorder.”

**B. The Trial Court Properly Exercised its Discretion When it Permitted An Undisputedly Qualified Expert to Testify About a Ritualistic Crime Signature Linking 18 Rapes**

Coe alleges the trial court abused its discretion when it admitted expert testimony by Dr. Robert Keppel linking his crime of conviction to 17 uncharged rapes. He asserts the expert’s ritualistic crime signature was insufficiently unique. Coe’s arguments are more properly directed at the weight of the evidence and he does not establish an abuse of discretion.

Expert testimony is admissible under ER 702 if (1) the witness qualifies as an expert and (2) the testimony is helpful to the trier of fact. *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994). Coe does not dispute Dr. Keppel’s qualifications, and the trial courts in *Russell* and below both found him to be a recognized authority in the subject. *Id.* at 69; CP 890.

Instead, Coe argues that the testimony was not helpful to the jury. This Court broadly construes “helpfulness to the trier of fact.” *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

“Other crimes” evidence is relevant for establishing identity when the *modus operandi* (MO) is so distinctive “that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.” *Russell*, 125 Wn.2d at 66-67. The more distinctive the MO, the more likely the alleged perpetrator committed the crimes. *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002) (citing *State v. Coe*, 101 Wn.2d 772, 777-78, 684 P.2d 668 (1984) (*Coe 1984*)). Crimes that share a “ritualistic quality” are highly probative of identity. *State v. Fualacu*, 155 Wn. App. 347, 357, 228 P.3d 771 (2010) (citing *Russell*, 125 Wn.2d at 67-68). Ritualistic behaviors need not be bizarre or extraordinary as Coe suggests, but are behaviors that are symbolic rather than functional and derive from the motivation for the crime and the sexual fantasies behind it. See *In re Detention of Coe*, 160 Wn. App. 809, 820, 250 P.3d 1056 (2011).

Expert crime signature testimony is admissible under ER 702. *Russell*, 125 Wn.2d at 69. Dr. Keppel reviewed Coe’s conviction and concluded he exhibited a “highly specialized ritual” with five elements. See Resp. Br. at 18-21. He then reviewed 50 other cases and found Coe’s

ritualistic signature in 17 of them. CP 4421, 4431, 4435-53.

Coe argues the five signature elements are unexceptional.<sup>4</sup> But he relies primarily on cases where prosecutors, unaided by experts, attempted to link two crimes by an MO signature. *See* App. Br. at 28-29. Those cases do not address expert testimony about a ritualistic signature, and their possibility of coincidence is higher than in the instant case, where 18 crimes were linked by similar features. Moreover, Coe's argument is wholly undermined by his own expert's report, which he submitted to the trial court. Coe's expert found no linkage but constructed numerous ritualistic signatures in the crimes at issue from the same type of features that Coe now criticizes. CP 5578-5604; Resp. Br. at 25-26.

On appeal, Coe asserts error because not every crime shared all five signature elements. He did not raise that argument below and this Court should not consider it. *See* Resp. Br. at 27-28. Even if the Court were to consider the claim, the signature identified by Dr. Keppel is conspicuously unique under this Court's standards. Dr. Keppel discriminated between sufficient and insufficient signatures and eliminated 33 cases because they had insufficient, partial signatures. CP 4419-21. But the ritualistic signature he identified was sufficiently distinctive to link some crimes based on partial

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<sup>4</sup> The similarity of these adjudicated crimes is easily recognized when the signature is set out for each crime. *See* Resp. Br. at 31-36 (most important signature elements of each crime); *Coe*, 160 Wn. App. at 821-24 (showing each crime's signature elements).

signatures. 1RP at 2976.

Where a methodology is not novel, challenges to how it is applied in a particular case go to weight, not admissibility. *State v. Gregory*, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006). Coe cross-examined Dr. Keppel and was free to present his own expert's opinions. His arguments go to the weight of the evidence and do not show an abuse of discretion.

**C. The Trial Court Properly Exercised its Discretion When It Read The Jury A Limiting Instruction And Then Permitted Dr. Phenix To Testify About The Bases Of Her Opinions**

Trial courts have discretion to permit experts to relate otherwise inadmissible evidence to explain the bases of their opinions, subject to a limiting instruction. The state's SVP expert, Dr. Amy Phenix, relied on a number of crimes linked to Coe, some of the details of which she discussed in testimony. The trial court instructed the jury they were to use the evidence only to determine the credibility and weight of her opinions. The court exercised its discretion appropriately and there was no error.

Coe raises two issues regarding this testimony. He argues the trial court abused its discretion because the jury likely considered it substantive evidence, notwithstanding the limiting instruction. His argument has no merit because jurors are presumed to follow their instructions. Second, in five out of 33 cases Dr. Phenix relied on and testified about, Coe did not depose or cross-examine the victim. He therefore asserts a due process violation. This

argument also has no merit because Coe had no right to confront the sources of non-substantive information Dr. Phenix relied on.

**1. The Trial Court Properly Exercised Its Discretion Under ER 703 and ER 705**

Under ER 703, an expert can rely on facts or data not otherwise admissible, if of a type reasonably relied on by experts in the field.<sup>5</sup> ER 705 addresses disclosure of the facts and permits experts to testify to otherwise inadmissible information.<sup>6</sup> It gives the trial court discretion to admit hearsay to explain the bases of the expert's opinions. *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 275, 215 P.3d 990 (2009); 5B Karl B. Tegland, *Washington Practice: Evidence Law And Practice* § 703.5, at 232-33 (5th ed. 2007)). Such evidence is not substantively admitted. *In re Detention of Marshall*, 156 Wn.2d 150, 163, 125 P.3d 111 (2005). SVP experts routinely rely on unadjudicated offenses, the occurrences of which are "quite common." IRP at 3085.

Coe argues the trial court never ruled whether Dr. Phenix could testify

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<sup>5</sup> ER 703 provides: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

<sup>6</sup> ER 705 provides: The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

under ER 705 about the offenses she relied on. But he again raises an issue he did not preserve in the trial court. Coe moved to preclude Dr. Phenix from *relying* on the offenses. 1RP at 2110-12. Later, he argued she could not testify Coe was “the perpetrator” of the crimes. 1RP at 2098. He did not move to preclude her ER 705 testimony. Even if he had properly preserved this argument, it has no merit. An SVP respondent’s criminal sexual history is presumptively admissible under ER 403. *See In re Detention of Young*, 122 Wn.2d 1, 53, 857 P.2d 989 (1993); *In re Detention of Turay*, 139 Wn.2d 379, 401, 986 P.2d 790 (1999).

The trial court properly exercised its discretion when it gave an appropriate limiting instruction and then permitted Dr. Phenix to testify about crimes she relied on in forming her opinions. 1RP at 3085-86. In fact, this Court has previously found the same testimony by Dr. Phenix to be admissible to explain the bases of her opinions. *Marshall*, 156 Wn.2d at 163. The jury is presumed to have followed its instructions and to have considered the evidence for its limited purposes. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007).

Coe argues that limiting instructions are ineffective, citing a Texas criminal case where an expert related testimonial statements from an autopsy report in violation of the confrontation clause. Pet. for Rev. at 22-23 (citing *Wood v. State*, 299 S.W.3d 200, 212-13 (Tex. App. 2009)). But SVP cases

are civil, and the Sixth Amendment confrontation clause does not apply. *Stout*, 159 Wn.2d at 369. Coe also relies on an Alaska case, but that case supports the state's argument, not Coe's. *See* Pet. for Rev. at 23 (citing *Vann v. State*, 229 P.3d 197 (Alaska App. 2010)). *Vann* – another confrontation clause case – analyzed expert hearsay testimony under the “conduit versus independent analysis” rule. 229 P.3d at 208. The court found no error because the expert was not acting as a conduit for testimonial statements and the defense was able to cross examine her about the information she relied on. *Id.* at 210. Similarly here, Dr. Phenix was subject to cross-examination and was not acting as a conduit for testimonial statements, but rather engaging in routine, even necessary, review of prior offenses in forming her expert opinion.

**2. Admission of Non-Substantive Evidence Under ER 705 Did Not Bestow a Due Process Right of Confrontation on Coe**

Coe next asserts that the trial court erred in admitting Dr. Phenix's testimony because he could not confront five victims of crimes she testified about. *See* App. Br. at 85-86. Coe acknowledges the confrontation clause does not apply but argues he had a due process right to confront the victims Dr. Phenix testified about. He bases his argument on a misapplication of *Stout*. *Stout* addressed *substantive evidence* used to establish the predicate sexually violent offense. 159 Wn.2d at 368. The state used the victim's

videotaped deposition to prove that Stout's burglary conviction was sexually motivated. *Id.* The issue here, however, concerns *non-substantive* evidence under ER 705. *Stout* did not create a due process right to confront victims discussed by an expert under ER 705.

Reliance on otherwise inadmissible facts is an inherent part of expert psychological testimony in an SVP case. Such information is meaningful both diagnostically and for risk assessments. *Young*, 122 Wn.2d at 53. In fact, Coe's expert relied on and testified about some of the same offense reports and victim statements as did Dr. Phenix. *See, e.g.* 1RP at 3462-63. Because Coe had the opportunity to, and did, vigorously challenge the bases of Dr. Phenix's opinions, due process was satisfied and his argument should be rejected. *See, e.g.* 1RP at 3299-306; CP 906.

**D. Coe Did Not Object To Substantive Admission Of HITS Data At The Trial Court Level Or Preserve A Hearsay Objection**

The state's Homicide Investigation Tracking System (HITS) is a database that stores details of reported crimes. *See* Resp. Br. at 40-43. This Court calls it a "sophisticated record-keeping" system. *Russell*, 125 Wn.2d at 70. It was used in this case to demonstrate that ten MO features in the rapes linked to Coe by Dr. Keppel's ritualistic signature analysis and other evidence, were, in combination, unique. Resp. Br. at 43-44.

On appeal, Coe claimed for the first time that the trial court should have excluded the HITS results based on hearsay and other grounds. This

Court should decline to consider his arguments because Coe never moved to exclude HITS as substantive evidence in the trial court, and the trial court never heard or ruled on a motion to exclude HITS.

**1. Coe Never Moved to Exclude HITS as Substantive Evidence or Raised a Hearsay Objection to It.**

The record indisputably establishes that Coe did not move to exclude HITS at the trial court:

**February 13, 2008:** Coe's counsel states he will reserve argument about the substantive admission of HITS for a later hearing. 1RP at 176.<sup>7</sup>

**March 13, 2008:** At a full-day hearing to determine how much weight the court would give HITS when deciding the admissibility of other crimes evidence, Coe did not move to exclude HITS as substantive evidence or raise a hearsay objection (1RP at 3869-4052); significantly, Coe did not dispute the state's observation for the record that Coe had not yet challenged the substantive admission of HITS. 1RP at 4036.<sup>8</sup>

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<sup>7</sup> On February 13, 2008, Coe's counsel stated, at 1RP 176: "Now, I understand that a separate hearing will be set regarding the admissibility of HITS and the data associated with it, so this was briefed and outlined, and I will save any comments and argument that I have for the appropriate time when that hearing is to be held.

<sup>8</sup> Near the end of the hearing on March 13, 2008, counsel for the State made the following undisputed observation, at 1RP 4036:

In the hearing before your Honor, the issue is not whether HITS is admissible at trial. They have not made a motion to exclude HITS. The issue before the Court is the admissibility of substantive evidence relating to 40 odd sexual offenses attributed to Mr. Coe in one way or another. This is one of many pieces of evidence that we provided to the Court in this pretrial hearing, to determine whether or not substantive evidence of those other sexual assaults should be admissible at trial.

March 14 – October 15, 2008: Coe’s counsel do not move before or during trial to exclude HITS.

Coe asserts the trial court abused its discretion by not sustaining his hearsay objection to HITS, but cites nothing showing it ever considered such an objection. Coe never moved to exclude HITS as hearsay; never argued orally HITS was hearsay; the State had no opportunity to respond to a hearsay objection; and the court never heard or considered a hearsay objection to HITS. Coe cites nothing to the contrary.

Appellate courts examine objections in the context within which they occur. *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 427, 40 P.3d 1206 (2002). Coe portrays his brief reference to hearsay in a section of a pretrial reply document, imbedded in an ER 403 argument, as a hearsay objection to the substantive admission of HITS. CP 3995, 3999. That passing reference is clearly insufficient. Even after he filed that document, Coe indicated on February 13, 2008, that he would reserve argument about the substantive admission of HITS for a future hearing. Thereafter, he never raised the issue.

It was Coe’s burden to “use his best efforts to keep (the) trial free from error.” *State v. McDonald*, 74 Wn.2d 141, 145, 443 P.2d 651 (1968);

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The issue of the admissibility of HITS is something completely different, and I guess we’ll cross that bridge when they make a motion to exclude it.

see also ER 103(a)(1); *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Coe never moved to exclude HITS on hearsay or other grounds and this Court should not reach that issue.<sup>9</sup>

**2. Coe's Counsel Made an Objectively Reasonable Decision to Use HITS to Attack the State at Trial**

Coe argues his trial counsel were ineffective if they did not preserve a hearsay objection to HITS. He must again show his counsel performed below an objective standard of reasonableness and he was prejudiced. *Stout*, 159 Wn.2d at 377. This Court presumes counsel were effective. *Id.* This Court must also "make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)).

Coe's counsel were not ineffective because they made a strategic decision to attack HITS through cross-examination of HITS investigator

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<sup>9</sup> Moreover, the state had no opportunity to respond to a hearsay objection below and there is no record on how the trial court would have responded to one. Certainly there are several arguments the state could have raised. HITS data were not offered to prove the truth of the matters asserted within it because it ultimately showed an *absence* of crime reports containing the ten MO features. It was therefore not hearsay under ER 801(c), and any prejudice could have been cured by a limiting instruction. Alternatively, HITS data are business records, and the data was admissible either under RCW 5.45, or more appropriately, under ER 803(a)(7) because it demonstrated the absence of crime reports with similar MO features. But the state was unable to make any of these arguments below in the absence of an objection. Therefore, this Court should not reach the hearsay issue.

Tammee Matheny. In fact, to ensure she would testify, they placed her on their witness list. CP 6944. Their decision was perfectly reasonable. They knew the trial court had found HITS to be reliable, as has this Court. CP 892; *Russell*, 125 Wn.2d at 70 (HITS is a “sophisticated record-keeping” system). They knew the jury would hear about HITS through Dr. Phenix, just as the jury in *Russell* heard about it through Dr. Keppel. 125 Wn.2d at 69-70. But Dr. Phenix is not a HITS expert like Dr. Keppel, and Coe’s counsel could not effectively attack HITS through cross-examination of her. They needed Matheny to establish their theory.

Coe theorized that the HITS evidence was manufactured by overzealous prosecutors. He attempted to build a record through a lengthy and confrontational cross-examination of Matheny. See 1RP at 2689-2726, 2734-36. One of his last questions is illustrative:

Do you feel as though [the prosecutor] was manipulating you, and the process that you were engaged in, to come up with a particular conclusion, and evidence that would ultimately be delivered at this trial?

1RP at 2726. Then in closing argument Coe’s counsel vigorously attacked HITS, calling it “manipulated” and “manufactured evidence, created by the Attorney General’s Office.” 1RP at 3827-29. He based those accusations on the record he attempted to create with Matheny. He could not have attempted to fashion the same record through Dr. Phenix, a fact he even pointed out to the jury. 1RP at 3829.

This Court determines whether counsel's assistance was reasonable given all the surrounding circumstances, under scrutiny that is "highly deferential." *Strickland v. Washington*, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). Coe's counsel faced a daunting challenge. Their client insisted he had never committed a sexual offense. CP 3008. Yet, overwhelming evidence showed he had committed numerous sexual crimes. *See* Resp. Br. at 64-81. He was identified at trial by many of his victims.<sup>10</sup> Evidence that he remained deviantly disordered included proof that, only a few months prior to his SVP trial, Coe had exposed himself while masturbating, to a female staff member of the Special Commitment Center. 1RP at 2586-88.

Facing overwhelming evidence of predatory sexual deviancy, Coe's counsel made a reasonable decision to put the state on trial. Using Matheny, they developed a theory that the state manufactured evidence. A highly

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<sup>10</sup> Rita S. identified Coe as the person who committed indecent liberties by forcible compulsion against her in 1966. 1RP at 2195-2204. Coe was caught at the scene and identified as committing burglary, indecent liberties and the digital rape of Diane J. in 1971. 1RP at 2212-23, 2232-33. Robin T. identified him as the person who committed indecent liberties against her in 1978. 1RP at 2240-45; State's Ex. 16. Mary L. identified Coe from a line-up photo as the man who raped her in 1981. 1RP at 2374-75, 2377-78, 2778-79; Respondent's Exhibit 263. Julia H. identified Coe in a live lineup as the man who raped her in 1980 and Coe was convicted of that crime. CP 6891, 6893; 1RP at 2416-17. Teresa K. identified him as the person who raped her in 1981. 1RP at 2283. Ann J. identified Coe as the man who held a dildo to his crotch and chased her in 1981. 1RP at 2515-22, 2777-78. Mary G. identified him as the man who held a dildo to his crotch in 1981. 1RP at 2448-55, 2461-68. John L. identified him as the person he saw running, naked from the waist down, in broad daylight on Spokane's South Hill. 1RP at 2434-42, 2778.

deferential scrutiny of the surrounding circumstances should conclude that Coe's counsel provided effective assistance when they decided not to oppose substantive admission of HITS.

**3. Substantive Exclusion of HITS Would Not Have Altered the Outcome of the Trial**

Coe cannot establish that he was prejudiced by the alleged ineffective assistance of counsel. Had Coe successfully moved to exclude HITS, the jury would still have heard about its results through Dr. Phenix, because this Court has found it admissible for that purpose. *Russell*, 125 Wn.2d at 70. Thus, Coe would not have been able to cross-examine any witness to develop his theory of prosecutorial fabrication. Furthermore, other overwhelming evidence demonstrated that Coe is mentally ill and sexually dangerous. *See Resp. Br.* at 64-81. In light of that evidence, there was no prejudice to Coe and any error was harmless.

**E. Evidence at the March 13, 2008 Hearing Established the Reliability of HITS**

Coe also claims that the HITS evidence is unreliable, but this Court has already concluded that HITS and other crime data programs "are nothing more than sophisticated record-keeping systems." *Russell*, 125 Wn.2d at 70. HITS was admissible in *Russell* as information Dr. Keppel relied on because "there is no prohibition against using well-founded statistics to establish some fact that will be useful to the trier of fact." *Id.*

The trial court conducted a full-day hearing on March 13, 2008, to determine how much weight should be accorded the HITS results. 1RP at 3869-4052. The state presented testimony about how information is received and input to HITS, and about the computer system that stores HITS data, its security and backup systems. 1RP at 3871-81; 3922-41, 4006-7, 4011-32. Coe offered no testimony, or evidence and made minimal arguments. 1RP at 4034-35. Similarly, Coe offers no evidence to support his claims that the database evidence is biased or that its results were misleading because not every Washington rape is entered into it. Coe's arguments address the weight of the evidence, not its admissibility.

**F. Other Arguments**

Coe's other issues rely primarily on his main arguments, to which the state has responded herein and in its Division III Respondent's Brief.

**III. CONCLUSION**

For the foregoing reasons, the Court should affirm the involuntary civil commitment of Kevin Coe as a sexually violent predator.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of October, 2011.

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NO. 85965-5

SUPREME COURT OF THE STATE OF WASHINGTON

In re Detention of Kevin Coe, a/k/a  
Frederick Harlan Coe:

DECLARATION OF  
SERVICE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN COE,

Appellant.

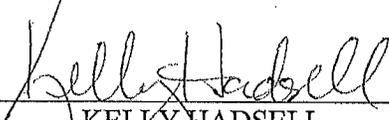
I, Kelly Hadsell, declare as follows:

On October 28, 2011, I served via United States mail, postage prepaid, true and correct cop(ies) of Supplemental Brief Of Respondent State Of Washington and Declaration of Service, postage affixed, addressed as follows:

Casey Grannis  
1908 E. Madison Street  
Seattle, WA 98122

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

DATED this 28<sup>th</sup> day of October, 2011, at Seattle, Washington.

  
KELLY HADSELL