

Criminal Law

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From the Chair

Aaron J. Wolff – *Criminal Law Section Chair*

I am honored to serve as the Chair of the Executive Committee for the Criminal Law Section. Our section is truly unique as its members comprise both prosecutors and defense attorneys. And our Executive Committee is evenly represented by both groups, with the goal of advocating for all attorneys involved in criminal law. While our work in the courtroom may be representing opposing interests, our work for the committee is unified in supporting all attorneys who practice criminal law.

Our committee has been very busy since the start of 2012. On January 28th, we held a free member benefit at the Seattle University School of Law. We had excellent speakers and topics. **Karl Tegland** spoke about common evidence issues for the criminal law practitioner. **Jimmy Hung** discussed changes to Washington's Domestic Violence laws. **Hugh Birgenheier** gave a great presentation on ethics using real-life ethical violations made by criminal law practitioners as examples from which to draw lessons. **John Strait** spoke about recent ethical developments for Brady violations. Overall, the CLE was a great success and very well received by the attendees and I extend my sincerest gratitude to all of the speakers.

Edwin Aralica, **Jimmy Hung** and **Professor John Strait** have been working very hard as the section's Legislative Action Committee. Collectively, they review every single bill that is related to the practice of criminal law. There was a bill that would have eliminated public defense funding as well as funding for the Washington Defender Association and the Death Penalty Assistance Center that fortunately did not pass. At our last Executive Committee meeting on March 10th, we unanimously agreed to send a letter to legislators in both the House and Senate stating our support for appropriate funding for criminal justice – for both prosecution and public defense in the state.

DO YOU LIKE TO WRITE?

Do you have an article you would like to publish in our newsletter? Submit articles to chris@maryattlaw.com. All articles will be considered. Articles accepted may be edited for content.

Hugh Birgenheier and **Kim Hunter** are co-chairs for the Criminal Justice Institute, which will be held on September 8th and 9th. They are organizing what will be another fantastic CLE. There will be a change in location this year and they are working on securing a venue. Currently, they are exploring possibilities in South King County or in Tacoma. More information will be sent to our members as soon as it becomes available.

I want to also personally thank **Chris Maryatt** for his work as secretary/treasurer of our committee and for creating this newsletter. In the past, we have had times where several months passed between newsletters and it is great that we have gotten back on track and are now publishing them on a regular basis. Should anyone wish to write an article for a future newsletter, please feel free to email Chris directly at chris@maryattlaw.com.

Our next committee meeting will be on Saturday, June 2nd at 9:15 a.m. If anyone has a question, issue or concern as it relates to our committee or the practice of criminal law, I ask that you contact me directly via email at aaron@cowanlawfirm.com or via phone at 425-822-1220.

I feel very privileged to be the chair of such a great committee and to have the opportunity to work together with my fellow members. We are off to a great start in 2012 and I am very excited for what is in store.

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Washington State Supreme Court: The Legislature's Adoption of Special Sexual Offense Character Rules Is Unconstitutional

By Professor Ann Murphy – Gonzaga School of Law

On January 5, 2012, the Washington State Supreme Court determined that there was an “irreconcilable conflict” between “other bad acts” evidence (a rule adopted by the Washington state courts) and the child molestation special character rules later passed by the Washington State Legislature. See *State of Washington v. Michael Gresham*; and *State of Washington v. Roger Scherner* (consolidated cases), available at <http://www.courts.wa.gov/opinions/pdf/841489.opn.pdf>.

The Court decided the case by a 7-2 vote, with Chief Justice Madsen dissenting and Justice James Johnson concurring in part and dissenting in part. Justice Madsen’s dissent is available at: <http://www.courts.wa.gov/opinions/pdf/841489.no1.pdf>; and Justice James Johnson’s concurrence and dissent opinion is available at: <http://www.courts.wa.gov/opinions/pdf/841489.ip1.pdf>.

All of the Washington Rules of Evidence were modeled on the Federal Rules of Evidence (the Washington Rules were adopted in 1979). The use of character evidence is limited in trials, both under the Federal Rules of Evidence (FRE) and the Washington Rules of Evidence (ER). This is to assure that the jury concentrates only on the crime or event in issue and that it not be swayed by the prior behavior of a defendant, victim or witnesses. The following is the text of ER 404:

RULE ER 404
CHARACTER EVIDENCE NOT ADMISSIBLE TO
PROVE CONDUCT;
EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

- (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
- (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b) above is commonly known as “Prior Bad Act” evidence. Washington adopted the equivalent of Federal Rule 412 (ER 412 – Sexual Offenses – *Victim’s Past Behavior*), but it did not adopt the equivalent of the other sexual offense federal rules (413 through 415) which affect the character of the *defendant*. Those rules were passed by the United States Congress over the objection of the Judicial Conference of the United States. See: 159 F.R.D. 51 (1995). Nevertheless, in 2008 the Washington State Legislature adopted RCW 10.58.090 (Sex Offenses – Admissibility).

The provisions of RCW 10.58.090 are as follows:

RCW 10.58.090

SEX OFFENSES – ADMISSIBILITY.

- (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant’s commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.
- (2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.
- (4) For purposes of this section, “sex offense” means:
 - (a) Any offense defined as a sex offense by RCW 9.94A.030;
 - (b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and
 - (c) Any violation under RCW 9.68A.090

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Washington State Supreme Court...

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(communication with a minor for immoral purposes).

- (5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."
- (6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:
 - (a) The similarity of the prior acts to the acts charged;
 - (b) The closeness in time of the prior acts to the acts charged;
 - (c) The frequency of the prior acts;
 - (d) The presence or lack of intervening circumstances;
 - (e) The necessity of the evidence beyond the testimonies already offered at trial;
 - (f) Whether the prior act was a criminal conviction;
 - (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
 - (h) Other facts and circumstances.

Accordingly, the trial courts in both the *Gresham* case and the *Scherner* case allowed the State to introduce evidence that each of the men had previously committed sex offenses with children. In the cases at issue, Gresham was charged with four counts of child molestation in the first degree and Scherner was charged with first-degree rape of a child and first-degree child molestation (later amended to three charges of first-degree child molestation). The trial court admitted evidence of Gresham's prior conviction involving the molestation of a young girl under RCW 10.58.090. In Scherner's case, the trial court admitted evidence of his molestation of four prior victims of child sexual abuse under RCW 10.58.090, but also admitted the prior sex offenses under ER 404(b) – as showing a common scheme or plan.

The Washington Supreme Court reversed the conviction of Gresham because it determined that the Legislature's adoption of RCW 10.58.090 was unconstitutional as it violated the State's Separation of Powers Doctrine. Scherner's conviction was affirmed due to the fact that the trial court in that case had used ER 404(b) as a secondary reason for

admitting prior sexual offenses and the Supreme Court found no abuse of discretion by the trial judge.

There is no formal Separation of Powers Clause in the Washington State Constitution, but it is presumed. See *Putman v. Wenatchee Valley Medical Center*, 216 P.3d 374 (2009). The Washington State Constitution gives Washington courts the "power of the judiciary." See Article IV, Section I of the Washington State Constitution. The Washington Supreme Court, in 1929 and 1940, determined that the Washington Legislature had power over the "substantive" law. See Notes to RCW 10.58.090, "The legislature's authority for enacting rules of evidence arises from the Washington Supreme Court's prior classification of such rules as substantive law. See *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law")." On the other hand, in 1975, the Court ruled that "the power to proscribe rules for practice and procedure" is "an inherent power of the judicial branch." See *State v. Gresham*, at paragraph 32.

Therefore, the Washington Supreme Court needed to determine first, whether Rule ER 404(b) could be harmonized with RCW 10.58.090 (it decided it could not be) and second, whether the legislation passed in 2008 was substantive or procedural (it decided it was procedural – and therefore within the province of the courts). The Court found the legislation violated the Separation of Powers Doctrine and was unconstitutional. Allowing in evidence these prior sexual offenses in order to prove conformity therewith was exactly what ER 404(b) prohibits.

Justice James Johnson appears to dissent to the reversal of Gresham's conviction because of the grievous nature of the charges. According to him, the legislature must protect "the rights of unusually vulnerable victims." This is really beside the point and avoids the real question. Chief Justice Madsen wrote in her dissent that she found no conflict between ER 404(b) and RCW 10.58.090, and even if there was a conflict, the two provisions could in fact be harmonized.

Incidentally, the Michigan Supreme Court heard oral arguments in November 2011 on the same issue in *People v. Watkins*, Docket No. 142031. See <http://courts.michigan.gov/supremecourt/clerk/11-11/142031/142031-Index.html>; and <http://courts.michigan.gov/supremecourt/Press/November2011orals.pdf> at p. 5.

House Bill 2777: In a Nutshell

By Jimmy Hung – Senior Deputy Prosecuting Attorney, King County

When I began my career as a deputy prosecutor in 1999, the late King County Prosecutor, Norm Maleng, created a specialized unit designed to tackle the complex problem of domestic abuse. Maleng recognized that crimes committed against loved ones were often times more heinous and more serious than those perpetrated against strangers because, as he put it, domestic violence is a crime against the “human spirit.” Over a decade later, lawmakers have now passed legislation echoing Maleng’s views on domestic violence.

On August 11, 2011, all provisions of HB 2777 went into effect. The bill most notably restructures the sentencing guidelines for felony domestic violence (DV) offenses, thereby drastically increasing the potential penalties for repeat domestic violence felons. Prior DV misdemeanor convictions for “repetitive domestic violence offenses,” which include assault in the fourth degree, harassment, violation of a court order, and stalking, now count as points toward felony domestic violence scoring. Moreover, prior DV felonies for assault, violation of a no contact order/protection order (assault and two prior prongs), harassment, stalking, kidnapping, robbery, and arson count as two points towards a defendant’s offender score.

In order for these sentencing consequences to take effect, the legislature requires county, district, and municipal prosecutors to “plead and prove” the domestic violence relationship after August 11, 2011. Plead and prove means the domestic violence relationship as defined in RCW 10.99.020 must be pleaded in the charging document, and proven to a jury or judge beyond a reasonable doubt.

To accomplish this, prosecutors need to ensure the following: 1) The charging document must allege the family and household relationship under RCW 10.99.020; 2) guilty plea forms should reflect that the DV relationship has been admitted; 3) when a defendant enters a guilty plea, establish that there is a factual basis for the “family or household” allegation; 4) if there is a trial, then the prosecutor needs to set forth sufficient admissible evidence to prove the family or household relationship and properly instruct the jury on this issue; and 5) judgment and sentences must reflect that the DV relationship was established.

The following are highlights of the other significant changes brought about by HB 2777:

Intent (Sec. 101.)

The legislature specifically gave courts “tools to identify violent perpetrators of domestic violence and hold them accountable,” and improves the overall response to the problem of domestic violence.

The legislature intends to improve the lives of persons who suffer from the adverse effects of domestic violence and to require reasonable, coordinated measures to prevent domestic violence from occurring. The legislature intends to give law enforcement and the courts better tools to identify violent perpetrators of domestic violence and hold them accountable. The legislature intends to: increase the safety afforded to individuals who seek protection of public and private agencies involved in domestic violence prevention; improve the ability of agencies to address the needs of victims and their children and the delivery of services; upgrade the quality of treatment programs; and enhance the ability of the justice system to respond quickly and fairly to domestic violence. In order to improve the lives of persons who have, or may suffer, the effects of domestic violence the legislature intends to achieve more uniformity in the decision-making processes at public and private agencies that address domestic violence by reducing inconsistencies and duplications allowing domestic violence victims to achieve safety and stability in their lives.

Police and Arrest (Sec. 201. RCW 10.31.100)

This bill also modifies the DV “primary aggressor” arrest provision. The change requires officers in making this determination to consider “the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse.” This section used to merely read “the history of domestic violence between the persons,” but has now been expanded to include an offender’s full DV history. Giving consideration to the full DV history (including other victims) is a theme throughout the new legal changes.

Advocacy, Protection Orders, and No Contact Orders

Eligible at age 13 (Sec. 302. RCW 26.50.020): Protection orders are expanded to provide protection for “[a]ny person thirteen years of age or older” who “has been the victim of violence in a dating relationship and the respondent is sixteen years of age or older.” A petitioner under the age of 16 seeking such relief, however, “is required to seek relief by a parent, guardian, guardian ad litem, or next friend.” If the petitioner is over age 16 but under the age of 18, they may seek relief without a guardian or next friend. This is a significant change and provides relief to victims of teen dating violence. This change will most likely result in an increased number of juvenile court cases as well.

Cyberstalking (Sec. 304 and 305. RCW 26.50): Courts may also now provide expanded relief in protective orders and no contact orders, specifically prohibiting cyberstalking: “[r]estrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the

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House Bill 2777: In a Nutshell *from previous page*

victim's children, or members of the victim's household. For the purposes of this subsection, "communication" includes both 'wire communication' and 'electronic communication' as defined in RCW 9.73.260."

Long arm statute (sec. 306, 307, and 306 new sections): A victim fleeing from another state as a result of domestic abuse or sexual assault no longer has to return to their home state to obtain a protection order. Now they can get such relief from a Washington court exercising jurisdiction over a nonresident individual by several means.

Courts (Sec. 301. RCW 10.99.045)

The theme of considering the full DV history is also found in new requirements for first appearance. Prosecutors must now provide for the court's review in district and superior court:

- (i) The defendant's criminal history, if any, that occurred in Washington or any other state;
- (ii) If available, the defendant's criminal history that occurred in any tribal jurisdiction; and
- (iii) The defendant's individual order history.

Sentencing

Felony mitigating circumstance or the "victim-defendant" exception: "The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse."

Felony aggravating circumstances or serial offender aggravator: "The current offense involved domestic violence, as defined in RCW 10.99.020, and the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims."

The aggravating circumstance for multiple victims is a response to the high number of cases that involve offenders who move from one victim to the next.

DV Sentencing in Courts of Limited Jurisdiction (Sec. 404. adding to RCW 10.99): In sentencing for a crime of domestic violence as defined in this chapter, courts of limited jurisdiction shall consider, among other factors, whether:

- (a) The defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse;
- (b) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; and
- (c) The offense occurred within sight or sound of

the victim's or the offender's minor children under the age of eighteen years.

and

In sentencing for a crime of domestic violence as defined in this chapter, the prosecutor shall provide for the court's review:

- (i) The defendant's criminal history, if any, that occurred in Washington or any other state;
- (ii) If available, the defendant's prior criminal history that occurred in any tribal jurisdiction; and
- (iii) The defendant's individual order history.

DV Probation in Courts of Limited Jurisdiction (sec. 405, 406, and 407 RCW 3.66.068, 3.50.330, and 35.20.255)

For a *period not to exceed five years* after imposition of sentence for a defendant sentenced for a domestic violence offense or under RCW 46.61.5055 and two years after imposition of sentence for all other offenses, the court has continuing jurisdiction and authority to suspend or defer the execution of all or any part of its sentence upon stated terms, including installment payment of fines. A defendant who has been sentenced, or whose sentence has been deferred, and who then fails to appear for any hearing to address the defendant's compliance with the terms of probation when ordered to do so by the court, shall have the term of probation tolled until such time as the defendant makes his or her presence known to the court on the record. For the purposes of this section, "domestic violence offense" means a crime listed in RCW 10.99.020 that is not a felony offense.

DV Treatment (Sec. 501. RCW 26.50.150)

This area was modified to instruct DSHS to certify programs at a minimum level for DV treatment and make sure that treatment programs examine the history of treatment from past DV perpetrator treatment programs.

Any program that provides domestic violence treatment to perpetrators of domestic violence must be certified by the department of social and health services and meet minimum standards for domestic violence treatment purposes. The department of social and health services shall adopt rules for standards of approval of domestic violence perpetrator programs (that accept perpetrators of domestic violence into treatment to satisfy court orders or that represent the programs as ones that treat domestic violence perpetrators). The treatment must meet the following minimum qualifications:

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House Bill 2777: In a Nutshell *from previous page*

All treatment must be based upon a full, complete clinical intake including but not limited to: Current and past violence history; a lethality risk assessment; *history of treatment from past domestic violence perpetrator treatment programs*; a complete diagnostic evaluation; a substance abuse assessment; criminal history; assessment of cultural issues, learning disabilities, literacy, and special language needs; and a treatment plan that adequately and appropriately addresses the treatment needs of the individual.

Controlling disposition of remains (Sec. 602. RCW 68.50.160):

A person who has been charged with the decedent's death no longer has the right to control the disposition of his or her remains.

Conclusion

In conclusion, HB 2777 is groundbreaking legislation that will greatly impact those accused and convicted of crimes of domestic violence. Both prosecutors and defense attorneys need to familiarize themselves with these important changes in order to best advocate for the interests of the communities and individuals they represent.

Oral Arguments Heard in the Civil Commitment of Kevin Coe (The "South Hill Rapist") in February

By Professor Ann Murphy – Gonzaga School of Law

The Washington Supreme Court heard oral arguments on February 28, 2012, for *In re: Detention of Kevin Coe a/k/a Frederick Harlan Coe*, No. 85965-5. This was a *civil case* brought at the conclusion of Coe's full *criminal* sentence for rape. Coe gained notoriety as the "South Hill Rapist" and his conviction of criminal rape in the early 1980s was the subject of the book *Son: A Psychopath and his Victims*, by Jack Olson. Additionally, Dateline NBC aired a story on the case – available at: http://www.msnbc.msn.com/id/24922815/ns/dateline_nbc-crime_reports/t/case-south-hill-rapist/#.T1B_J67U_kY. The NBC program was taped before the civil commitment part of the case.

There are many evidentiary issues before the Washington Supreme Court and many twists and turns in this case. The rape for which he was convicted occurred in Spokane, Washington. During the late 1970s and early 1980s there were a series of rapes in the South Hill neighborhood of Spokane. During a three-year period approximately 40 women were reportedly raped – the women were always allegedly alone and approached from behind. The crimes caused terror in both the neighborhood and the city, particularly after one of the popular local radio news personalities, Shelly Monahan ("Sunshine Shelly") was raped. One of the odd things about some of the incidents was that the perpetrator was brutal when attacking the victims (many times ramming his fist or fingers down the throats of the victims causing permanent damage) but he also talked with many of them after the attack as if he were a friend (for example, after the rape of Ms. Monahan, he discussed her future career in the media).

Coe's mother, Ruth Coe, was a socialite in Spokane society and his father, Gordon Coe, was the managing editor of one of the local papers at the time. After Coe was physically identified by one victim and his car movements were monitored, he was arrested. He was charged in 1981 with six counts of rape and convicted of four – and given a life sentence.

In the original criminal trial, an issue was the hypnotic enhancement of memory. Many of the victims were hypnotized during the police investigation and prior to trial so that they might be able to recall the events of the rapes and the license plate of the auto seen in the area of one of the rapes. The Washington Supreme Court reversed and remanded Coe's conviction, and held that "the admissibility of the testimony of the previously hypnotized witnesses should

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Oral Arguments Heard in the Civil Commitment of Kevin Coe (The “South Hill Rapist”) in February *from previous page*

be determined in accordance with our holding in *State v. Martin*,” 101 Wn. 2d 713, 684 P. 2d 651 (1984).

A new trial was held in King County (after a change in venue) and the jury found Coe guilty of three of the four charged rapes and sentenced him to a total term of 55 years. Direct review of that trial was sought to the Washington Supreme Court, and was granted. “The primary issues on appeal are whether the admission of testimony by previously hypnotized witnesses was proper and whether the State proved the use or threatened use of a deadly weapon – one of the elements of first degree rape.” In 1988, the Supreme Court found that the post-hypnotic testimony was not reliable. *Washington v. Coe*, 109 Wn. 2d 832, 750 P. 2d 208 (1988). Four Supreme Court justices upheld one conviction; three justices determined that all of the convictions should be upheld; and two justices held that no convictions should be upheld. Coe was retried and this time found guilty of one rape – of the only woman who was able to identify him after the attack. He was sentenced to 25 years in prison.

Coe’s mother and father had been his alibi witnesses, testifying that he was with them at the time of the rapes. Amazingly, Coe’s mother, Ruth, told a friend she wished to hire a hit man to kill the judge and prosecutor in the case. The friend alerted the police. A police officer impersonated a hit man, and after she was caught on tape indicating she would pay to have the judge killed (but wanted the prosecutor severely injured so he would suffer for the rest of his life), she was charged, tried, and found guilty of the solicitation of first-degree murder.

Coe was nearing the end of his 25-year sentence in 2006 when the Washington Attorney General decided to begin a civil commitment action under Revised Code of Washington (RCW) Section 71.09.060 – to ask a court for a finding that Coe was a Sexually Violent Predator (SVP). Despite the civil nature of the trial, the statute requires proof “beyond a reasonable doubt” by a unanimous jury. The statute provides for the “control, care and treatment” of the SVP. Once committed, a SVP is required to be held at McNeil Island in Puget Sound “until such time as the condition has so changed” or upon a conditional release to a less restrictive alternative. The statute had been passed in Washington in 1990. In order for commitment, the State must prove a defendant suffers from a mental defect.

At the trial court, Coe was found guilty and sent to McNeil Island in Puget Sound upon his release from the 25-year prison term. Judge Kathleen O’Connor issued some findings after an earlier evidentiary hearing – see: http://www.spokesmanreview.com/media/pdf/20080530_coeruling.pdf. McNeil Island by November 2011, housed nearly

300 sex offenders in the “Special Commitment Center” provided by RCW 72.09.333. It was featured on an “Oprah” show – see: <http://www.oprah.com/oprahshow/Dangerous-Sex-Offenders-Confined-on-an-Island/2>.

Coe appealed his commitment case to the Washington Court of Appeals, Division III and the court affirmed his commitment to McNeil Island. *In the Matter of the Detention of Kevin Coe, The State of Washington v. Kevin Coe*, 160 Wn. App. 809, 250 P. 3d 1056 (2011). The Appellate Court found Judge O’Connor had not abused her discretion. Two of the many interesting issues are whether an expert would even assist the jury (and thus be necessary as a witness) and whether an expert may rely on data from non-charged offenses (from a “HITS” database). HITS is “Homicide Investigation Tracking System.” See: [http://www.atg.wa.gov/uploadedFiles/Another/Supporting_Law_Enforcement/Homicide_Investigation_Tracking_System_\(HITS\)/HITS_handout.pdf](http://www.atg.wa.gov/uploadedFiles/Another/Supporting_Law_Enforcement/Homicide_Investigation_Tracking_System_(HITS)/HITS_handout.pdf). The court used the “signature” theory of admissibility of character evidence under ER 404(b).

There was no Confrontation Clause issue, because it was not a criminal case. The appellate court determined that the experts were entitled to rely on unadjudicated cases from the data base (based upon hearsay statements made to the police and the medical authorities by other victims of rape during this time period in this geographic area). The court found that the experts were able to rely upon inadmissible evidence in reaching their expert conclusions. However, at the oral arguments, Justice Stephens, among others, asked about the substantive use of HITS data versus the simple reliance upon the data by the experts. Assistant Attorney General Malcolm Ross represented the State of Washington and was masterful in his explanation of the difference between the substantive use and the experts’ reliance on the data to form their opinions. Attorney Casey Grannis represented Coe. Many members of the Court seemed troubled by the use of unadjudicated crimes, even in a civil commitment trial.

It will be fascinating to see what the Washington State Supreme Court decides concerning the evidence. The questions before the court are available here: <http://www.wasupremecourtblog.com/2012/02/articles/oral-argument/todays-arguments-february-28-2012/>.

A similar case was decided by the Appeals Court of Massachusetts – *Commonwealth v. Mazzarino*, No. 10-P-755, decided March 1, 2012.

Editor's Note

While all articles submitted require citations, most citations with the exception of those to specific statutes and cases are omitted for the purposes of this newsletter. However, if anyone wants to cite check and receive a list of full citations for an article, please do not hesitate to contact our editor, Chris Maryatt, at *chris@maryattlaw.com*.

Join the Section

The officers and Executive Committee of the Criminal Law Section invite you to join as a member. Seminars and newsletter reports are included in the benefits available to members. All Washington State Bar Association members are eligible.

- Please enroll me as an active member. Enclosed is a check for \$25 for annual dues.
- I am not a member of the Washington State Bar Association, but I want to receive your newsletter. My \$25 check is enclosed.

For membership year: October 1, 2011 - September 30, 2012

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