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COURT OF APPEALS

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STATE OF WASHINGTON
BY

NO. 34399-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE DETENTION OF: DAVID T. FAIR

STATE OF WASHINGTON,

Respondent,

vs.

DAVID T. FAIR,

Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the respondent's pre-trial motion to dismiss for failure to allege that the respondent had committed a recent overt act as defined by RCW 71.09.020(10).

2. The trial court erred when it entered findings of fact 8:

(See findings of fact set forth in full in the appendix).

3. The trial court erred when it entered findings of fact 71.

4 The trial court erred when it entered findings of fact 72.

5. The trial court erred when it entered findings of fact 73.

6. The trial court erred when it entered findings of fact 74.

7. The trial court erred when it entered findings of fact 75.

8. The trial court erred when it entered findings of fact 76.

9. The trial court erred when it entered findings of fact 77.

10. The trial court erred when it entered findings of fact 78.

11. The trial court erred when it entered Conclusions of Law 3:

(See conclusions of law set forth in full in the appendix).

12. The trial court erred when it entered Conclusions of Law 4.

13. The trial court erred when it entered Conclusions of Law 5.

14. The trial court erred when it entered Conclusions of Law 6.

15. The trial court erred when it entered Conclusions of Law 7.

16. The trial court erred when it entered an Order of Commitment based on a finding that the respondent was a sexually violent predator.

17. The respondent was denied due process of law guaranteed by Wash. Const. Art. I, sec. 3 and by the Fifth and Fourteenth Amendments of the United States Constitution.

Issues Pertaining to Assignments of Error

1. Whether the due process clauses of the state and federal constitutions require the Attorney General to allege and to prove a recent, overt act of sexual violence during the period of time that a respondent was living in the community, before they may be allowed to obtain an Order of Civil Commitment? A petition seeking the civil commitment of the defendant was filed just prior to his release from total confinement while serving a non-sexually violent sentence? (Assignments of Error 1, 15 and 17.)

2. Whether the trial court erred when it entered findings of fact 8:

> "On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and 88-1-00362-7."

The undisputed evidence showed the respondent was sentenced to 20 months confinement on June 25, 1992- in case No. 88-1-00362-1- when his SOSSA sentence was revoked based on a conviction 1988 for Child Molestation in the Second Degree. This sentence was ordered to run

concurrent with case No. 90-1-00498-6, which was a conviction for Robbery in the First Degree entered on June 10, 1992 where the defendant was sentenced to 87 months confinement. (Assignment of Error 2.)

3. Whether the challenged findings of fact are supported by sufficient evidence? (Assignments of Error 3-10.)

4. Whether the court erred as a matter of law when it entered Conclusions of Law based on the record? (Assignments of Error 11-15.)

5. In this sexual violent predator proceeding, was the opinion of the State's expert witness sufficient to support the trial court's conclusions of law that the respondent was likely to engage in predatory acts of sexual violence if he was not confined in a secure facility? (Assignments of Error 3-10, 15.)

6. Whether the plaintiff proved beyond a reasonable doubt that the defendant was a predatory sex offender that should be civilly committed to a secure facility upon his release from department of corrections? (Assignments of Error 15 and 17.)

B. Statement of the Case

Statement of Procedure

The respondent, David T. Fair, was convicted of child molestation in the second degree in 1989. Later, while serving a SOSSA sentence and released on community supervision he committed robbery in the first

degree in Kitsap County. He then absconded to New Mexico. There he was convicted of numerous non-sexual crimes in November 1989 and served time in prison. He was returned to Washington where he was sentenced to prison for twenty months for the sex offense, after his SOSSA sentence was revoked, and 87 months concurrent on the robbery conviction. VI RP 2, 11. He was scheduled to be released in 2004. He is age 38 and has been in prison since 1989.

More particularly, the following appears in the Findings of Fact:

"2. On September 27, 1988, Respondent plead guilty to one count of Child Molestation in the Second Degree, under cause number 88-1-00362-7. On February 15, 1989, he was sentenced to a special Sex Offender Sentencing Alternative (SOSSA) sentence." CP 434. This incident occurred on July 23, 1988...the respondent was given credit for 137 days that he had served in custody." CP 70.

"3. On November 1, 1989, the State filed a Motion and Affidavit for Order Revoking the SOSSA, based on Respondent's failure to maintain sex offender treatment and his failure to report to the Department of Corrections. Respondent absconded." CP 435. The record shows that on November 10, 1989 the respondent assaulted and robbed Steven D. Slagle of his pick-up truck in Kitsap County, Washington. CP 122.

"4. On April 24, 1990, Respondent was sentenced in New Mexico

under cause number CR-89-00097, to 18 months for one count of Receiving a Stolen Vehicle, 18 months for one count of Receiving Stolen Property, three years for one count of Great Bodily Injury by Vehicle, and 18 months for another count of Receiving Stolen Property, all sentences to be served consecutively." CP 435.

The respondent was incarcerated in New Mexico as of the date of the arrest on November 15, 1989. CP 81. 'Respondent was transferred from New Mexico back to Washington State under the Agreement on Detainers Act." CP 435.

"6. On June 10, 1992, Respondent was sentenced for one count of Robbery in the First Degree under Kitsap County cause number 90-1-00498-6, to 87 months to run consecutively to the sentence under New Mexico cause number CR-89-00097." CP 435.

"7. On June 25, 1992, Respondent's SOSSA sentence under Kitsap County cause number 88-1-00362-7 was revoked...Respondent was sentenced to 20 months to run concurrent with the 87 month sentence imposed on Kitsap County cause number 90-1-00498-6." CP 435.

Respondent's release date was June 28, 2004. CP 435. "9. On June 23, 2004, the State filed a petition seeking to commit Respondent as a Sexually Violent Predator (SVP)." CP 436.

Trial Testimony

Lisa Dandesku testified for the State. She "...was Respondent's primary treatment provider at the Department of Correction's Sexual Offender Treatment Program (SOTP) for about fourteen months beginning in January 2003." CP 436. She testified that Mr. Fine completed that 12 month treatment program in March 2004 . I RP 37.

With regard to the Child Molestation charge in 1988 three girls between the ages of 12-13 were involved. Over the course of the day Fine gave them alcohol to lower their inhibitions. He then "...fondled them under and over their clothing and aggressively pursued kissing the girls." I RP 39.

During treatment Fair admitted to having sexual contact with nineteen different individuals, including 17 child victims with ages ranging from 2 to 17 years old. I RP 41; CP 436, ff 11. "His offenses against children included acts of fondling, sexual intercourse, intercural sex, cunnilingus, having a victim masturbate him, and engaging in kissing and French kissing." CP 436, ff. 11.

While serving his SOSSA sentence and while in the community Fair met another male at a bar. I RP 42. Later, Fair, hit him on the head with a heavy object and stole his pick-up truck. In New Mexico Fair allegedly committed armed robbery of an elderly couple at a rest stop. He also injured a police officer while trying to run through a roadblock.RP 43.

Ms. Dandesku testified: "Mr. Fair minimized the aggressiveness, violence, continued to say really he wasn't a violent person, which was something we talked about quite a bit in group. He just didn't really see it as anything outside of what any person is capable of." id. With regard to empathy and except for one victim who cried, she testified: "...he couldn't really see how his sexual offending had negatively impacted anybody." I RP 44. He also minimized his violent, non-sexual offenses. id.

During treatment Fair frequently reported sexual arousal and of masturbating to thoughts of minor girls mostly. He accompanied this with pictures of clothed minor females as young as 7 or 8 years old from magazines. He also employed a catalog of adult naked women for "appropriate arousal." She testified: " He didn't enjoy it as much as the arousal and masturbation to the minors." I RP 46. She reported that he '...did not want to stop masturbating to minors." I RP 48.

Dandesku testified that the clinical team assessed Mr. Fine a high risk to re-offend. I RP 49; CP 437, ff 11.

Theodore Donaldson testified that he was a clinical psychologist with a specialty in forensic psychology having practiced within his specialty since 1980. II RP 71.

He has substantial experience in evaluation of sex offenders. CP 443, ff. 55. At the time of trial he had performed 500 first -time sex

offender evaluations for amenability to treatment in California, where he had been certified and then licensed since 1963. He had conducted 367 evaluations on 244 alleged sexually violent predators. He testified: "Of that 244, I have found 24 meet the criteria." II RP 73.

After reviewing the discovery and materials in the case consisting to some 2200 pages, he interviewed Mr. Fair over a two hour period in January 2005. II RP 74; CP 443, ff. 59. He composed a written evaluative report. Ex. 36. He was asked: "Does Mr. Fair suffer from mental abnormality or personality disorder?" His answer was no. Specifically he testified: "First of all, whatever his abnormality or personality disorder is, has to predispose him to sexual violence and no personality disorder in psychology predisposes a person to any specific behavior." II RP 76.

He testified that the "Key issue in addressing the issues of mental abnormality disorder or illness, whatever term you use, is discriminating between criminal behavior and pathological behavior. In this case, it would be how you discriminate between a child molester and pedophile." II RP 84. A pedophile was described as a mentally ill individual. id. A pedophile was further described as "...to make the diagnosis of pedophilia, the patients's preferred route to sexual excitement must be fantasized or enacted sex with prepubescent children." II RP 85.

Dr. Donaldson was informed by Mr. Fair with regard to reported

contact with multiple victims "going back to his own childhood, while he was in Europe...he told me he made it all up." II RP 89. He testified:

> "And so that was sort of consistent with his making up. He said he read this material, so he would know how to fake a mental disorder. Then he told me at one point, he was at Twin Rivers, and his therapist Sonja, didn't seem to buy it. And so he wrote her a letter, just describing all kinds of bizarre dreams and violence and sex and so forth because he wanted to convince her he wanted to stay in treatment." II RP 90.

He was then asked:

> 'Q. Now on those facts, are you aware of any official report or any contact with these others?
> A. No, that's, there has never been a single follow-up on any of those reported offenses."
> Q. Reported by him?
> A. Reported by him. Everything we know about his prior sex offending is his self-reports, which he now says he did in order to go to a treatment center, instead of Walla Walla, so we're stuck." id.

Dr. Donaldson testified that antisocial personality disorder "..does not predispose a person to any particular behavior." id. "Personality disorder, particularly antisocial personality disorder does not predispose (sic) a person to sexual violence, nor does psychopathy." II RP 94; CP 444, ff 61.

Dr. testified with regard to the third prong of the statute as to whether Mr. Fair was likely to engage in sexually violent predatory behavior as a result of mental abnormality. II RP 95.

He testified specifically with regard to the STATIC-99, used to predict recidivism, it was unclear from the police reports whether the victim of Fair's 1988 sex offense was "a stranger victim" or whether Fair knew the victim from previous acquaintance. II RP 98. He arrived at a score of 3 with a 19 percent probability of recidivism over a 15 year period of time. id. The percentage represented "...the proportion of offenders with that score, who re-offended in his sample." II RP 99.

According to him, Dr. Doren reached the high levels of recidivism percentage by factoring in the sexual encounters that Mr. Fair made up and self-reported.. II RP 105 He testified: "One of the criticisms of these instruments has been it doesn't take into account changes a person might make, that is, most of the things on Static-99 won't change. Mr. Fair's score on Static-99 is essentially the same in '88, as it is today, and will be the same 20 years in the future." II RP 112.

Dr. Donaldson was asked his opinion of Dr. Doren's conclusions:

> "A. Well, the diagnosis of deviancy or the assessment of deviancy, based upon the history, is based upon the self-reports of unknown validity. So we're right back to the original question, what do we make out of self-reports he now says he made only in order to stay out of doing hard time." II RP 117.

Dr. Dennis Mitchell Doren testified: "I am a psychologist employed part time by the State of Wisconsin, as the evaluation director at

the Sand Ridge Secure Treatment Center." III RP 200. The center detains or confines sexually violent predators. Dr. Doren engages in the private practice of psychology outside the state of Wisconsin. id. He specializes in sex offender diagnostic and risk assessments for sex offender civil commitment cases. id.

Dr. Doren has assessed approximately 220 cases involving sex offenders and civil commitment. III RP 204. He had been doing sexually violent predator evaluations in Washington since 1999. He "...conducted a forensic interview of the Respondent for 4.25 hours on May 24, 2004." CP 437, ff. 15.

His interview was divided into two parts. The first phase was a records review with Mr. Fair of the accuracy of the information in his notes and whether Mr. Fair agreed or disagreed with the information. III RP 215. The second phase consisted of "the relapse prevention interview" consisting of "...looking at what changed about the individual since the last time he committed an offense." id. Prior to the interview he conducted as risk assessment based on a records review. III RP 216,

Dr. Doren testified: "He acknowledged having many times, having had sexual fantasies involving children, girls in particular...he talked about the medication that he had been taking and that according to him, the fantasies then finally went away." III RP 222. According to Dr. Doren,

Mr. Fair admitted to 16 other victims in the 8 to 12 year range, except for a young adult prisoner. III RP 223; CP438, ff. 18-19.

Specifically, Fair admitted to putting his mouth over a 3 year old boy he was babysitting "...basically to see what it was like." id. He further admitted to "touching the breasts of young girls and touching the vaginal area of girls." id. He had anal intercourse with the adult male inmate. And he reported masturbating an 18 year old retarded male. III RP 224.

Dr. Doren was asked: Q. And are you aware, doctor, that since your interview with him, he now states he only made up the prior victims in hopes of doing softer time at Twin Rivers, versus say a different DOC facility. A. I came to learn that, yes." III RP 225.

Another incident from the Fair's records indicated a 12 year old girl that he had sexual contact with in England when in was in the military. III RP 226. In addition, Fair reported that there were three different victims during the 1988 incident. III RP 227. Also, he disclosed that he masturbated when he had sexual fantasies involving children. III RP 229.

What affected his decision was Fair's adjudicated offenses. Dr. Doren's opinions were also affected by Fair's criminal history for non-sex offenses in 1989. III RP 240. There was an another conviction on February 21, 1986 in England for property damage to a window. RP 242.

Dr. Doren's diagnosis was pedophilia, sexually attracted to

females, non-exclusive. III RP 246. "The second condition is called paraphilia, not otherwise specified, including urophilia. The third condition was alcohol dependence.. The fourth was cannabis abuse and the fifth was antisocial personality disorder. III RP 247.

Paraphilia was described as recurrent sexual fantasies involving something other than consenting adults that occurs over a period of at least six months. id. "...paraphilia is the general concept of the sexual arousal disorder, and then the two you named are arousal towards specific things, towards children, being pedophilia, or involving urine, being urophilia." III RP 248; CP439-40, ff 28.

It was Dr. Doren's professional opinion to a reasonable degree of psychological certainty, that the respondent suffered from recurrent, intense, sexually arousing fantasies, sexual urges or behaviors involving sexual activity with prepubescent children , generally age 13 years or younger. III RP 249.

Dr. Doren also had the opinion based on a reasonable professional certainty that the respondent's pedophilia constituted a mental abnormality. III RP 272. He believed that Fair's condition of pedophilia predisposed him to commit criminal sexual acts to a degree that constituted him a menace to the health and safety of others." III RP 273; CP 439, ff 27.

Dr. Doren testified that based on a reasonable degree of scientific certainty: " I believe that Mr. Fair has an antisocial personality disorder." III RP 284. This was based on -according to the DSM-IV disregard for and in violation of the rights of others. III RP 285; CP440, ff. 30. Dr. Doren was asked: "Q. In your opinion, does the respondent's antisocial personality disorder cause him serious difficulty in controlling his sexually violent behavior? A. In my opinion, yes." III RP 291.

He was also asked "Q. And also does the respondent's antisocial personality disorder make him likely to engage in predatory acts of sexual violence if not confined to a secure facility? A. In my opinion, to a reasonable degree of professional certainty, the answer is yes." III RP 291. Dr. Doren believed that this was because of Mr. Fair's violation of and disregard for the rights of others. He felt Mr. Fine was predisposed by the disorder to commit sexual offenses as well as non-sexual offenses. R 293.

Instead of using actuarial scores to predict recidivism, Dr. Doren testified that he had to rely on the Psychopathy Check List Revised (PCLR). This was a psychological test that was not designed to be a risk assessment. III RP 318. It was a test used "...to assess the degree to which people have a certain type of personality structure." III RP 318. The highest score measuring whether someone is a "prototypic psychopath" is 40. Mr. Fair scored 30, which ranked him as 'high degree of

psychopathy." III RP 320; CP 442, ff. 47. On a previous test, he scored 31. Dr. Doren testified that the higher the degree of psychopathy the higher the degree of recidivism in convicted sex offenders. III RP 321.

Dr. Doren testified that he concluded that Mr. Fair was sexually deviant primarily because he met the definition of pedophilia, although Fair was never tested with a penile plethysmograph (PPG). III RP 323. He testified that even without Mr. Fair's self-reports of additional victims he would still find that Fair met the criteria for sexual deviancy. III RP 325. However, he did base his opinion on Mr. Fair's self-reporting of fantasies and his preferred sexual interest in something other than consenting adults. Doren reported that Fair's unwillingness to give up his fantasies and his ambivalence about them could easily substitute for what a PPG would measure. III RP 326.

Dr. Doren testified that in his opinion Mr. Fair's high degree of psychopathy in combination with sexual deviancy resulted in a "risk for sexually re-offending [that] is quite high." III RP 333; CP 442, ff 50. Dr. Doren believed, based on a reasonable degree of scientific certainty, that Fair was more likely than not to re-offend, even if there were no actuarials at all. III RP 334.

The final two findings of fact regarding Dr. Doren's extended testimony stated: "53. Dr. Doren testified that to a reasonable degree of

scientific and professional certainty, that the Respondent is more likely than not to reoffend in a sexually violent manner if not confined in a secure facility." CP 442-3, ff. 53. "Dr. Doren testified that even if he did not consider the actuarial risk assessment instruments, it would still be his opinion to a reasonable degree of scientific and professional certainty, that the Respondent is more likely than not to reoffend in a sexually violent manner if not confined in a secure facility." CP 443, ff. 54.

Dr. Doren's actual opinion was stated in terms of more of likely than not to commit "criminal sexual acts" rather than as found "to reoffend in a sexually violent manner." III RP 343-44.

David T. Fair, age 38, testified that he currently resided at the Special Commitment Center on McNeil Island and had been there since July 2004. V RP 460-1. Before that he had be incarcerated at the Twin Rivers Correctional Facility for "[a]pproximately 4 years" in the Special Offender Center "for approximately a year." V RP 461. He testified that he spent 10 years in New Mexico prisons before being transferred in 1999.

Fair testified that he was out of custody for about 6 to 6 and a half months after spending some time in the work release program in 1989. RP 461-2. During this period of time he did not sexually offend anyone. RP 463. He testified; "...I did 5 months in the county jail until by plea bargain was accepted, and I did 5 months in the work release program." id.

After getting out of the military he spend 2 to 2 and a half years prior to his arrest in 1988 working as a nurses aid. He was 22 years old at the time he committed Child Molestation in the second degree. RP 464.

During most of his 10 year incarceration period in New Mexico he was in protective custody. V RP 466. It was during this period of time he learned that he would probably be confined at Walla Walla upon his transfer to Washington State. V RP 468. He discovered that he probably would not qualify for sex offender treatment programs in Washington based on a single conviction for Child Molestation of a 13 year old. id..

For the next seven years he read materials, including the DSM-III R, "on psychology, especially dealing with sex offenders." V RP 470. Then he started talking to his counselors and therapists. He testified:

> "I was also deliberately putting things out there for these therapists to get feedback on and to test the feasability of and to get it into the formal record. I started creating fictional offenses. I started creating fantasies based on some of the stuff that I had read, and because I was in a protective custody population, I knew several other sex offenders, and I talked to them about what their thinking processes were and I would talk to them about what I would read in the books and they would – some of them would talk about their fantasies, things like that. I would sit down and write out some of those fantasies, and present those as my own." V RP 472.

After being transferred from New Mexico to the Shelton Correction Facility and being placed in the main population, it was soon

discovered that Fair was a sex offender and his life was threatened. V RP 473. He was again advised that the nature of his sex conviction "...probably wasn't gong to get me into the treatment program." V RP 474. Fair was eventually transferred to the Special Sex Offender Center for evaluation for a mental condition as he continued to disclose "...a lot of unadjudicated stuff...." V RP 474; CP 445, ff. 67. From there he was transferred to the Twin Rivers Facility. V RP 475.

Fair testified that while in the sex offender treatment program he portrayed himself as "...that I was concerned about getting in the treatment so I could resolve these issues and get out and be safe, you know, portraying myself as a sex offender, as much as I believed that was – from what my studies indicated on sex offenders...." V RP 478.

At the conclusion of the trial the court found beyond a reasonable doubt that the petition filed by the State should be granted. CP 414. On January 5, 2006 an Order of Commitment was filed. CP 422. On January 13, 2006 the respondent filed a notice of appeal. CP 424.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S PRE-TRIAL MOTION TO DISMISS.

The Respondent's adult criminal history consists of a February 15, 1989 sentence for Second Degree Child Molestation alleged to have

occurred on July 23, 1988. CP 69; Ex. A. Fair had served 137 days in confinement. He was granted a Special Sex Offender Sentencing Alternative, placed on work release and then released to the community.

On November 10, 1989 he committed First Degree Robbery in Kitsap County. CP 89; Ex. E. After absconding from Washington State and within the next five days he committed the crimes of Receiving a Stolen Vehicle or Motor Vehicle, two counts of Receiving Stolen Property and committing Great Bodily Injury by Vehicle- when he tried to run a roadblock- and two counts of armed robbery. By November 15, 1989 he began his current period of incarceration in New Mexico. CP 81; Ex. C.

The New Mexico sentence totaled 90 months or 7 ½ years. He was sentenced for the 1989 Kitsap County Robbery on June 10, 1992 and given an 87 month sentence, consecutive to the New Mexico sentence. CP 93; Ex. E. He was given 59 days credit for time served. His release date was June 23, 2004 for the robbery charge. CP 47, 53-6

On June 25, 1992 an order was entered revoking his second degree child molestation suspended sentence. He was sentenced to a term of 20 months concurrent with the Kitsap County robbery conviction and given credit for 137 days previously served.

Prior to trial on July 29, 2005 the defendant filed and argued a motion to dismiss. CP 29; VI RP 1. The defense argued that based on

In re the Detention of Albrecht, 147 Wn.2d 7, 51 P.3d 73 (2002) the state has to prove "current dangerousness." *id.* at 7. The defense argued: "You have to say if you're out in the community and don't do anything bad, they have to show that you're currently dangerous." VI RP 2. It was stated in the respondent's motion: "Thus, the Petition filed on June 25, 2004, predated Mr. Fair's release date on the Robbery conviction (June 28, 2004) but postdated his release date for the sexually violent offense (August 30, 2000). Moreover, as noted, the Petition does not address the time Mr. Fair spent in the community on community custody pursuant to the SOSSA sentence." CP 47.

The defense further argued orally to the court:

> "It's our position you have to be incarcerated for the sexually violent offense and there cannot be any period of release to the community in between the two, and that's the real bottom line of this issue. If you're out in the community, you don't do anything – he did something bad, he committed a robbery. If you don't do anything sexually bad, sexually violent offense, that the state should have to prove or be put to prove overt act. The Albrecht case is I think abundantly clear that Mr. Fair should require that." VI RP 4.

Mr. Cross argued: "That recent, overt act, entire phrase, has to apply to the last time a person was in the community, or doesn't make any sense." VI RP 14. The defense's argument was that release into the community , without sexual re-offense, would negate proof of a recent, overt act. RP 5.

Justice Sander's argued in part in his dissenting opinion in *In re Detention of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000):

> "Washington courts have previously held "in considering whether an overt act, evidencing dangerousness, satisfies the recentness requirement, it is appropriate to consider the time span in the context of all the surrounding relevant circumstances. *In re Detention of Pugh*, 68 Wn. App. 687, 695, 845 P.2d 1034 (1993). If an individual has spent time in the community following his most recent sex offense, at minimum, due process and the statute require the State to prove an overt act during that period of release before the individual may be committed for the rest of his life. If he truly is a sex predator, an overt act during this most recent period of release will be there. But if it is not there, the State's proof fails to cross the most minimal threshold of reliability which our constitutional process requires because, in theory, a sex predator is one who will inevitably reoffend and be unable to volitionally control his supposed predisposition. FN And we are imprisoning men outside the criminal process who do not meet the statutory criteria for "civil" imprisonment.."

In re Detention of Henrickson, at 711-12 (footnote omitted).

The state argued that it filed its petition at the only time that they could have filed it. VI RP 11. By written order, and without explanation except for the comment of "..finding no basis upon which to grant the Respondent's Motion to Dismiss...." the trial court denied the respondent's motion. CP 109. The trial court erred. The standard of review is de novo review. According to *Rettkowski v. Department of Ecology*, 128 Wn.2d

508, 515, 910 P.2d 462 (1996) interpretation of a statute is a question of law and subject to de novo review.

RCW 71.09.030 states in part:

> "When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to re released from total confinement... or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation."

Former RCW 71.09.020(5); now RCW 71.09.020(10) states:

> "(10) "Recent overt act" means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knew of the history and mental condition of the person engaging in the act."

In re the Detention of Albrecht, 98 Wn.App. 426, 989 P.2d 1204 (1999) the Court of Appeals reversed the trial court. The trial court had granted the State's motion to amend a civil commitment petition and to delete an allegation of a recent overt act manifesting dangerousness by the respondent. The Court of Appeals held that the state was required to allege and to prove a recent overt act manifesting dangerousness in a civil commitment petition.

According to the Court of Appeals in *Albrecht:*

> " RCW 71.09.030 states when the State is authorized to file a sexual predator petition, and RCW 71.09.060 states what the State must allege and prove in order to commit a sexual predator. The first statute distinguishes between a person "about to be released from total confinement." and a person who "has since been released from total confinement." The latter statute abandons these terms and instead requires proof of a "recent overt act" for a person "living in the community after release from custody." *id.* At 429.

Fair was convicted of Child Molestation on September 27, 1988. CP 446, CL 2. He was then released from total confinement and placed on the SOSSA program. He lived in the community until his arrest in New Mexico on November 15, 1989. CP 81.

The facts of *Albrecht* were that he was convicted of second degree child molestation in 1992. He had two previous convictions for indecent liberties. *id.* at 430. On July 22, 1996 he was released from prison and placed on community placement. "One of the terms of his community placement was that he refrain from any direct or indirect contact with children." *id.* He violated and was sentenced to 120 days in jail.

The State then filed a petition alleging that he was a sexually violent predator and that he had committed a "recent overt act" and requested that he be committed. Later, the State moved to amend the petition to delete the allegation of the "recent overt act", which was based

on the community supervision violation. According to the opinion: "The trial court granted this motion, finding that Mr. Albrecht was "totally confined" at the time the original petition was filed and the petition could be amended to reflect that the State need not prove a "recent overt act." *id.*

The Court of Appeals, in a unanimous opinion, reversed. The court held that RCW 71.09.030 and RCW 71.09.060 must be consistent with one another. The court ruled that when Mr. Albrecht was placed in jail he was not sentenced to a term of "total confinement to the custody of the department of corrections." "Rather, Mr. Albrecht's community placement was continued and was in effect on the day that the sexual predator petition was filed." *id.*

The Court of Appeals decision was affirmed by the State Supreme Court, supra , 147 Wn.2d 1. The State Supreme Court ruled that the State is only relieved of proving a "recent overt act" if the defendant is, at the time the petition is filed, serving the original sentence imposed upon conviction for the predicate offense. 147 Wn.2d at 10-11. Justice Chambers, writing the majority opinion, stated:

> "The State asks us to extend *Henrickson* to hold that when an offender is released into the community and is later totally incarcerated, no proof of a recent at is required. We decline to do so. To relieve the State of the burden or proving a recent overt act because an offender is in jail for a violation of the conditions of community placement would subvert due process.

> An individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous." *id.*

In the case at bench the State did not allege in its petition that David Fair had committed a recent overt act manifesting dangerousness. CP 1-2. The respondent argued in its Memorandum:

> "RCW 9.94A.670(4)(a) provides that a offender sentenced under SSOSA is placed on community custody. Under this SSOSA sentence, Mr. Fair was released to community custody. He was not returned to confinement until his arrest for Robbery. Under these circumstances, the state should be required to plead and prove a recent overt act as an element of its proof for commitment." CP 47.

See the test set forth Justice Owens' dissenting opinion in *In re Detention of Albrecht*, 147 Wn.2d at 13:

> "Because Albrecht would not have been subject to community placement conditions (and the incarceration upon violating those conditions) *but for* the 1992 conviction for child molestation, his incarceration at the time of the sexual predator petition was "for"–that is "because of" or "on account of"–the original sexually violent offense for which he was convicted in 1992. *Webster's Third New International Dictionary* 886 (1976)." *id.* (court's italics).

Recent Overt Act Doctrine

The "recent overt act doctrine" is set forth in *In re Detention of Paschke*, 121 Wn.App. 614, 90 P.3d 74 (2004) and in *In re Detention of Henrickson,* supra, where the court held:

> "We hold no proof of a recent overt act is constitutionally or statutorily required when, on the day the petition is filed, an individual is incarcerated for a sexually violent offense, RCW 71.09.020(6), or an act that by itself would have qualified as a recent overt act, RCW 71.09.020(5)."

140 Wn.2d 686, 689 (2000).

In the case at bench, Fair argues that his sentence for a sexually violent offense had been served by August 30, 2000 and at the latest by February 3, 2001. This was before the state filed its petition in June 2004 seeking the his involuntary commitment. CP 1. By the time the petition was filed Mr. Fair was serving the last days of a sentence for a robbery conviction. This crime does not meet the statutory definition of "a recent overt act." as stated in *Henrickson*: "an act that by itself would have qualified as a recent overt act, RCW 71.09.020 (5)." *id.* at 689; VI RP 4.

In *In re Detention of Henrickson*, the respondent had a long history of sexual assaults on young girls. "In 1986 Henrickson plead guilty to statutory rape in the first degree of a four-year old girl and was sentenced to 36 months in prison. He was released in 1989. Then, in 1990 Henrickson abducted a six year old girl and showed her a pornographic picture; he was convicted of attempted kidnaping in the first degree and communication with a minor for immoral purposes." *id.* at 689.

Pending appeal of his 1990 conviction, Henrickson was free on bail for three years. On the day before his scheduled release of August 30,

1996 the State filed a petition to have him committed as a sexually violent predator. He stipulated to the commitment but reserved appeal of the trial court's finding that the State did not need to prove a recent overt act because he was incarcerated on the day the petition was filed.

The Court of Appeals affirmed his commitment. The court held "[b]ecause Henrickson was under constant strict supervision after his arrest for the 1990 kidnaping, due process did not require the State to prove a more recent overt act as a manifestation of his dangerousness." *id.* at 864.

Henrickson established the following rule:

> "When , on the day a sexually violent predator petition is filed, an individual is incarcerated for a sexually violent offense, RCW 71.09.020(6), or for an act that would itself qualify as a recent overt act. RCW 71.09.020(5), due process does not require the State to prove a further overt act occurred between arrest and release from incarceration." *id.* at 695.

Former RCW 71.09.020(6) now RCW 71.09.020(15) defines "Sexually violent offense" as including child molestation in the first or second degree." However in the case at bench, on June 23, 2004 Mr. Fair had long since served his sentence for child molestation in the second degree that occurred on July 23, 1988. As stated above, according to the Department of Corrections records this 20 month sentence was slated to be served either on August 30, 2000 or at the end of the maximum term on

February 3, 2001. CP 47.

On the date the State filed its petition seeking to commit the respondent as a sexually violent predator, the respondent was serving the last few days of his conviction for Robbery in the First Degree. That crime occurred when the respondent assaulted a male, with whom he had been drinking and shooting pool, when they were alone. The respondent beat him with an object and stole his 1984 pick-up truck. CP 84-5.

Robbery in the first degree is not included in the definition of sexually violent offense". [1] *Albrecht* noted that the definition of "a recent overt act" was, according to RCW 71.09.020(5): "any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm." *id.* at 431. This must be supported by proof beyond a reasonable doubt. Neither does it qualify as a "recent overt act". Additionally, the crime of first degree robbery occurred on November 10, 1989, was not sexually motivated, and was certainly not "recent" since it occurred 15 years before the State's petition was filed.

Another case discussed during the respondent's motion to dismiss was *In re Detention of Paschke*, supra, 121 Wn.App. 614 (2004). There,

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[1] "The statute is concerned only with sexually violent behavior, rather than nonsexual violence. 44" (citing RCW 71.09.020(4)); Robert M. Wettstein, M.D., *A Psychiatric Perspective on Washington's Sexually Violent Predator Statute*, 15 U. Puget Sound L. Rev.605 (1992).

the State filed a SVP petition against Paschke in 1994. This was two days before his anticipated release from a five year imprisonment for a parole violation based on an underlying conviction for second degree rape. He was granted parole in 1987 but was revoked in 1989.

The Court of Appeals decided that the "recent overt act" requirement would not apply in Paschke's situation because (1) he was serving the remainder of his sentence based on a sexually violent offense and (2) he was revoked because of the overt act of making a series of obscene telephone calls threatening to rape that victim. This act at least met the definition of "recent overt act" at the time because it was sexual in nature. *id.* at 623. The court stated: "Thus, to require a "recent overt act" under these circumstances would be absurd. *Henrickson,* 140 Wn.2d at 696." *id.*

The facts of the case at bench should distinguish Mr. Fair's case from Mr. Paschke. Paschke was convicted of one count of abduction and one count of carnal knowledge in 1972. According to the trial testimony: "...Mr. Paschke (1) broke into T.H.'s house and forced her to perform oral intercourse in 1971 when she was 12 years old, (2) later forced T.H. to perform oral and vaginal intercourse, (3) threatened E.C. during obscene telephone calls in 1989, (3) attempted to break into M.P.'s house in 1979, and (5) broke into P.B.'s house and raped her repeatedly in 1979. Mr.

Paschke disputed other sexual allegations related to his wife." *id.* At 617.

By comparison, Mr. Fair was convicted of a 1988 child molestation in the second degree charge in 1989. He testified at his commitment trial:

> "Q."...What did you do with these girls?
> A. What I did with the girl was I kissed her, gave Her some beer and fondled her breasts under Her shirt.
> Q. Anything else?
> A. No." V RP 484.

Dr. Doren described these acts as involving: "... kissing, as well as attempts at French kissing, involved touching a girl's breasts and putting his hand inside of her pants, and involved touching a girl's buttocks...also touching one girl's thigh, inner thigh, up to her vagina area.." III RP 236-7.

Another distinction between the Paschke case and Mr. Fair's case is that when the SVP petition was filed in the latter case Mr. Paschke was serving the remainder of his sentence for rape in the second degree. By contrast, and as stated above, Mr. Fair was given a 20 month sentence for his only sex conviction. Mr. Fair's release date was August 30, 2000. CP 47. His counselor/cco's notation on a Department of Corrections form dated November 30, 2000 stated: "This conviction *has* expired and was running concurrent with current conviction (Both J&S attached) 90-1-00498-6." CP 54 (italics mine).

At the time the state filed its petition against Mr. Fair he was serving the remaining sentence for a first degree robbery conviction. This conviction was not sexually motivated. It did not meet the definition of "recent overt act" because it was not sexual in nature.

The trial court erred when it denied Fair's motion to dismiss because his rights to due process guaranteed by Wash. Const. Art. 1, sec. 3 and by the Fifth and Fourteenth Amendments to the U.S. Constitution were violated when the state was excused from alleging and proving a "recent overt act." The rule is stated in *Henrickson:*

> "We simply hold that when, at the time the petition is filed, an individual is incarcerated for a sexually violent offense, or for an act that itself would have constituted a recent over act, due process does not require the State to prove a further overt act occurred between arrest and release from incarceration.".

id. at 697. Since Fair was being held for a Robbery in the first degree conviction- that happened 15 years before- this does not authorize the state to obtain an Order of Commitment without alleging and proving beyond a reasonable doubt a "recent overt act" as that term is defined in RCW 71.09.020(10).

Because this rule was circumvented, the respondent's due process rights have been violated. It was stated in *Morrissey v. Brewer,* 408 U.S. 471, 481, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972): "[D]ue process is flexible

and calls for such procedural protections as the particular situation demands."

In *In re Harris*, 98 Wn.2d 276, 284, 654 P.2d 109 (1982) the petitioner claimed that the summons procedure for involuntary civil commitment to a mental hospital in a nonemergency situation under RCW 71.05.150 violated the due process clause of the U.S. Constitution. The State Supreme Court agreed. The Court rejected the petitioner's claim that dangerousness must be "imminent" but did agree that dangerousness should be based on a "recent' overt act to justify involuntary detention:

> "Many courts have required "a recent overt act" to justify a finding of dangerousness. *See, e.g., Suzuki v. Alba,* 438 F. Supp. 1106, 1110 (D. Hawaii 1977), *affid in part, rev'd in part sub nom. Suzuki v. Yuen* [citations omitted]... RCW 71.05.020 does not explicitly require that evidence of behavior be recent, although such evidence must be recent to be meaningful. We thus interpret RCW 71.05.020 as requiring a showing of substantial risk of physical harm as evidenced by a recent overt act. This act may be one which has caused harm or creates a reasonable apprehension of dangerousness. So construed, we believe the standard of dangerousness contained in RCW 71.05.150 provides a constitutional basis for detention." Harris, 98 Wn.2d at 284-5.

The State's Argument

Undoubtedly, the State will argue and will quote from *Young*: "For incarcerated individuals, a requirement of a recent overt act under

the Statute would create a standard which would be impossible to meet." *id.* at 41. That broad statement presupposes, as do most other cases, that the respondent is incarcerated at the time a petition for civil commitment is filed for a crime that is sexual in nature or sexually motivated.

That statement in *Young,* adopted by the State, must be considered in reference to the sexual, criminal history of both Young and co-petitioner Cunningham:

> "Young's first series of known rapes occurred in the fall of 1962, when he broke into the respective homes of four different women, forcing them to engage in sexual intercourse. On at least two of these occasions, Young threatened his victims with a knife. In another incident, he raped a young mother with a 5-week old infant nearby. Young, was convicted in October 1963 on four counts of first degree rape, with two deadly weapon findings.
>
> Less than a year later, while free on an appeal bond for his 1963 convictions, young entered the home of another woman. With her child present, he exposed himself, threatened to hurt the child, and threatened to rape and kill the woman. Fortunately, he was frightened away. Young was charged with attempted rape, but was never tried for his offense because he was found incompetent.
>
> Young was released on parole in January of 1972. After roughly 5 years of freedom, Young was again convicted of rape. As with the previously known offenses, he raped this woman after illegally entering her home in the early morning hours. Young pleaded guilty to third degree rape.
>
> He was released from prison in 1980. In 1985 he raped another woman, again forcing his way into her apartment. Three small children were present. Young was convicted of first degree rape."

In re Personal Restraint of Young, 122 Wn.2d at 14.

> Cunningham was convicted of assault as a juvenile at age 15 where he was armed with a knife and admitted he attacked the woman along with her three children in order "to force the woman to commit oral sex upon him." *id.* At 16.
>
> In 1984, Cunningham raped a woman hitchhiker to whom he had offered a ride. Cunningham threatened to kill his victim, struck her several times, forced her to the ground, and then raped her. Cunningham pleaded guilty to second degree rape, and was sentenced to 31 months in prison.
>
> Only 3 months after his release in November 1986, Cunningham committed his next rape. He grabbed the victim around the throat, and then forced her to have anal intercourse with him. Two months later, in April 1987, Cunningham assaulted another woman in a similar manner, forcing her to engage in additional acts of intercourse. For these actions, a jury found him guilty of second degree rape." *id.* at 16-7.

In light of this history the *Young* court found:

> "Here, petitioners Young and Cunningham were diagnosed with mental disorder and share a lengthy criminal history of violent rape. Other individuals encompassed under the commitment law share similar profiles. In such circumstances, the Court has consistently upheld civil commitment schemes. *See Addington v. Texas,* supra...."

Young at 27 (citing *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

The *Addington v. Texas* decision reversed the Texas Supreme Court. That court had held that in civil commitment proceedings the

"preponderance of the evidence" standard satisfied due process. The Texas Supreme Court had reversed their Court of Civil Appeals that had held the standards for commitment violated substantive due process if they were less than that required for criminal convictions, i.e., proof beyond a reasonable doubt. The U.S. Supreme Court upheld the trial court's standard of proof based on clear, unequivocal and convincing evidence and held that a burden of proof based on the "clear and convincing standard" satisfied due process guarantees. 99 S.Ct. at 1813.

The *Addington* court noted:

> "This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *id.* 99 S.Ct. at 1809.

See also J. Sanders' dissenting opinion in *Henrickson:*

> "The consequence of all this is the mere fact of incarceration at the moment a petition is filed, as the majority now holds, allows the State to dispense with the *constitutional* requirement of showing an overt act to prove its case."

(*id.* at 708, (italics his).

Another case that was cited by the defense in the case at bench was *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). CP 48. The United States Supreme Court applied due process considerations to a Louisiana statute that allowed continued confinement

on the basis of an antisocial personality disorder even after a hospital review committee had found no evidence of mental illness and had recommended discharge. Referring to due process the court quoted: *Jones v. United States*, 463 U.S. 354, 361, 103 S.Ct. 3043, 3048, 77 L.Ed.2d 694 (1983) as follows:

> "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."

See also Justice Utter's unanimous opinion in *In re Harris*, supra at 285: "Though the summons authorizes detention for only 72 hours, commitment for such a short period of time still constitutes a "massive curtailment of liberty."

Still another argument that supports the respondent' motion to dismiss the petition because it did not allege a "recent overt act" was the position of Justice Sanders' dissenting opinion in *Henrickson,* which was argued by the defense in the case at bench:

> "But Justice Sanders, in his dissent, puts it succinctly. Albrecht held that the mere fact of incarceration is now insufficient. Release into the community preceding current incarceration, requires proof of a recent overt act. That's as clear as well to me."
> VI RP 5.

Justice Sanders' dissent begins and encapsulates respondent's arguments:

> ""We have previously held "proof of a recent overt act is necessary to satisfy due process concerns when an individual

> has been released into the community." *In re Personal Restraint of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993) (citing *In re Harris*, 98 Wn.2d 276, 284, 654 P.2d 109 (1982)). To embody this constitutional requirement the Washington State Legislature subsequently amended the statute at issue to require proof of a recent overt act as a precondition to incarcerating "a person who at any time previously has been convicted of a sexually violent pre offense and has since been released from total confinement ...." RCW 71.09.030. Unfortunately, the majority reduces this overt act requirement to a meaningless inquiry into the physical location of an individual on the day a sexually violent predator petition is filed. Moreover, the majority reaches out to make its point in a case not even subject to our jurisdiction."

In re Detention of Henrickson, 140 Wn.2d at 698.

As indicated above, after serving 137 days the respondent was convicted of Child Molestation in the Second Degree. After spending time on work release[2] he was then released into the community pursuant to a SSOSA sentence. From New Mexico records it appears he was incarcerated from November 15, 1989. CP 81, ex. C. During this period of time he committed multiple offenses. However, none of the crimes he committed when he was released were alleged to have been sexually motivated. RCW 71.09.020(15).

II. THE TRIAL COURT ERRED WHEN IT ENTERED FINDING OF FACT NUMBER EIGHT.

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[2] The respondent testified that he served 5 months in the work release program. V RP 464.

According to the memorandum of law in support of respondent's motion to dismiss: "The Department of Corrections calculated that Mr. Fair's release date on the child molestation conviction as August 30, 2000 (max. term February 3, 2001) (See Appendix A). His release date for Robbery was June 28, 2004. (See Appendix B)." CP 47, 53-6; Kitsap County cause numbers 88-1-00362-7 and. 90-1-00498-6 respectively.

Finding of Fact 8 states that Fair's release date was June 28, 2004:.

> "8. On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and 88-1-00362-7." CP 435.

Mr. Fair was given a 20 month sentence for his only sex conviction: Child Molestation in the Second Degree. CP 105. Mr. Fair's release date was August 30, 2000. CP 47. Thus, his counselor/cco's notation on a Department of Corrections form dated November 30, 2000 stated:: "This conviction has expired and was running concurrent with current conviction (Both J&S attached) 90-1-00498-6." CP 54. At the time the state filed its petition against Mr. Fair he was serving the remaining sentence for a robbery in the first degree conviction. CP 90.

According to *State v. Thetford,* 109 Wn. 2d 392, 396, 745 P.2d 496 (1987): "...a trial court's findings of fact will be upheld on appeal so long as they are supported by substantial evidence." See also, *State v. Black,*

100 Wn.2d 793, 802, 676 P.2d 963 (1984). According to *State v. Hashman,* 115 Wn.2d 217, 222, 797 P.2d 477 (1986): "Substantial evidence is evidence of sufficient quantum to persuade a fair minded person of the truth of the declared premise. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994): enough evidence to persuade a fair-minded, rational person of the truth of the finding.

Instead of entering a conclusion of law that stated Mr. Fair was in prison for a sexually violent offense at the time the civil commitment petition was filed, the trial court evaded that issue and entered another conclusion of law. The trial court's second conclusion of law states:

> "2. The crime of Child Molestation in the Second Degree, for which the Respondent was convicted of on September 27, 1988[3], is a sexually violent offense, as that term is used in RCW 71.09.020(15) and (16)." CP 446.

Justice Sanders stated with regard to the issue of release::

> "Notwithstanding, the State is unwilling or unable to allege, much less prove, the commission or an overt act during that period of release from total confinement. This failure of proof raises the horrendous specter that these men are not "sexual predators" as that term is defined by the act but are nevertheless imprisoned after the payment of their debt to society as measured by completion of a maximum term in prison." FN

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[3]The alleged offense occurred on July 23, 1988. The defendant plead guilty on September 27, 1988. The judgment and sentence were entered on February 15, 1989. CP 69.

In re Detention of Henrickson, 140 Wn.2d at 703 (footnote omitted).

In the case at bench the State has only proved one, single sexually violent offense. In actuality, there was no physical violence involving the minor child.. The defendant was not given an exceptional sentence for multiple victims or for breach of trust. Rather, a twenty month sentence. was imposed. The circumstances surrounding his on sex conviction were: "... kissing, as well as attempts at French kissing, involved touching a girl's breasts and putting his hand inside of her pants, and involved touching a girl's buttocks...also touching one girl's thigh, inner thigh, up to her vagina area.." III RP 236-7

The conclusion is inescapable that either the State is now seeking to punish Mr. Fair because he received what some state official considers to be a "light" sentence- since three girls ages 12-13 were involved -or Mr. Fair is actually being committed as a violent sex offender because of his self-reported and unverified encounters.

III. THERE WAS NOT SUFFICIENT EVIDENCE TO WARRANT THE CONCLUSION THAT THE RESPONDENT WAS A SEXUALLY VIOLENT PREDATOR.

"The Washington sexually violent predator statute is premised on a finding of the present dangerousness of those subject to commitment." *In re Detention of Henrickson,* supra at 692. According to the sexually violent predator statutes the State must prove beyond a reasonable doubt:

> (1) the Respondent has been convicted of or charged with a crime of sexual violence; and
>
> (2) the Respondent suffers from a mental abnormality or personality disorder which causes him serious difficulty in controlling his sexually violent behavior; and
>
> (3) That such mental abnormality or personality disorder makes the Respondent likely to engage in predatory acts of sexual violence if not contained in a secure facility.

RCW 71.09.020(8),(15),(16); CP 414-15. Surrounding this statute are due process protections of Wash. Const. Art. 1, sec. 3 and of the Fifth and Fourteenth Amendments to the United States Constitution. *In re Personal Restraint Petition of Young,* 122 Wn.2d at 26 (citing *Addington v. Texas,* 411 U.S. at 426, supra.)

The State is required to establish that a respondent meets the criteria for commitment as a sexually violent predator by presentation of proof beyond a reasonable doubt. *In re Detention of Turay*, 139 Wn.2d 379,407-08, 986 P.2d 790 (1999). In reviewing the sufficiency of the evidence presented by the State, the Court should use the standard provided for criminal cases. There proof beyond a reasonable doubt is also required. Failure to meet the constitutional standard of sufficiency as to any required element of proof should result in reversal and dismissal of the petition against the respondent. *State v. Green*, 94 Wn.2d 216, 618 P.2d 628 (1980).

"The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Bingham*, 105 Wn.2d 820,823, 719 P.2d 109 (1986) (*quoting, Jackson v. Virginia*, 443 U.S. 307,319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)). Applied to this case, the State's proof is clearly deficient.

If there is substantial evidence, then appellate review determines whether the findings support the conclusions of law and judgment. *Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Appellate courts review issues of law de novo. *State v. Johnson,* 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (citing *State v. Ford,* 125 Wn.2d 919, 923, 891 P.2d 712 (1995)).

Justice Johnson wrote the dissenting opinion in *Young:*

> "The sexually violent predator statute, RCW 71.09 (hereinafter Statute) is a well-intentioned attempt by the Legislature to keep sex predators off the streets. However, by authorizing the indefinite confinement in mental facilities of persons who are not mentally ill, the Statute threatens not only the liberty of certain sex offenders, but the liberty of us all. By committing individuals based solely on perceived dangerousness, the Statute in effect sets up an Orwellian "dangerousness court", a technique of social control fundamentally incompatible with our system of ordered liberty guaranteed by the constitution and contrary to the recent United States Supreme Court decision in *Foucha v.*

> *Lousiana*, 504 U.S. 71, 118 L.Ed.2d 437, 112 S.Ct. 1780 (1992)."

In the case at bench the trial court essentially acted as a "dangerousness court" in light of the fact that Mr. Fair's only sexual crime of any nature was a 1988 conviction for Child Molestation in the second degree. He was given a SSOSA sentence initially. This was ultimately revoked and he was administered a 20 month sentence with credit of four months previously served.

The trial court erred when it entered findings of fact 71 and 72 when it found that there was sufficient evidence that the respondent suffered from pedophilia. CP 445-6. "Dr. Doren testified that ... Respondent suffers from..Pedophilia...." CP 438-9. The trial court erred when it entered conclusions of law 3 and stated:

> "3. Pedophilia, sexually attracted to females, non-exclusive, from which the Respondent suffers is a mental abnormality as that term is used in RCW 71.09.020(8) and (16)." CP 446.

On the contrary, Dr. Donaldson testified: "...his actual criminal history that we know about would not even come close to diagnose pedophilia." II RP 87. This was so because "He had one set of victims, on

one day. So we don't get the 6 month criteria." id.[4]

Dr. Donaldson believed that there was "grossly insufficient evidence" that Fair was a pedophile. II RP 91; CP 444; ff. 60. He also testified that there was insufficient evidence for a DSM-IV-TR diagnosis of paraphilia. II RP 93. That was based on his inability to ascertain the veracity of any of Fair's self-reported victims. The court erred by entering findings of fact 76 that found that Fair was a sexual deviant. According to Donaldson no plethysmograph was administered. (See CP 444-45, ff. 64.)

With regard to Mr. Fair's disclosure about other victims or unadjudicated offenses, Dr. Doren testified "...the diagnostic findings that I had for him were not dependent on the admissions. They are, for instance, related to his having offended in the past." III RP 232. He testified that Fair's one conviction "...would still be sufficient for the diagnosis of pedophilia, which is what I diagnosed, so the other information in that sense is just more of the same, but not needed information. III RP 232-3; CP 438, ff. 22-3.

The trial court erred when it entered conclusion of law 4 as it

---

[4] According to the Diagnostic and Statistical Manual, Fourth edition, Text Revision (DSM-IV-TR) and as stated in finding of fact 28: "...the cardinal qualities of a Paraphilia are that the person experiences, intense, sexually arousing fantasies, sexual urges, or behaviors involving nonhuman objects, the suffering of oneself or one's partner, or children or other nonconsenting persons for more than six months." CP 439-40.

relates to the respondent:

> "4. Anitsocial Personality Disorder, from which the Respondent suffers, is a personality disorder, as that term is used in RCW 71.09.020(16)." CP 446.

Dr. Doren testified that Fair's antisocial personality disorder was based on "...his pattern involves sexual offending, very likely involved sexual offending on an on-going or at least repetitive basis, as well as offending of a non-sexual nature...." III RP 292. His diagnosis was based on the crimes Fair committed in 1988 and 1989 and not on any institutional behavior or even on any risk assessments, which he ultimately disregarded. III RP 232-3; CP 438, ff. 23. The court erred when it entered findings of fact 71: Respondent suffers from personality disorder. CP 445.

The trial court erred when it entered Conclusion of law 5:

> "5. The Respondent's mental abnormality and personality disorder cause him serious difficulty controlling his sexually violent behavior." CP 447.

According to the State's theory, when Mr. Fair fondled his victim in 1988 he had no control of his actions. This incident was described as: "... kissing, as well as attempts at French kissing, involved touching a girl's breasts and putting his hand inside of her pants, and involved touching a girl's buttocks...also touching one girl's thigh, inner thigh, up to her vagina area.." III RP 236-7. There is no other record of Mr. Fair losing control and acting sexually violent or dangerous during the 15 years he has

been imprisoned or during the non-sexual crime spree of November 1989. There was not substantial evidence to support findings of fact 73: Fair had "...serious difficulty in controlling his sexually violent behavior." CP 446.

The trial court erred when it entered Conclusion of law 6:

> "The Respondent's mental abnormality and personality disorder, both independently and in combination, make(s) him likely to engage in predatory acts of sexual violence if not confined in a secure facility." CP 447.

Dr. Doren testified that he used three actuarial instruments to determine the likelihood that Mr. Fair would re-offend. He employed the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR), the Static-99 and the Minnesota sex Offender Screening Tool-Revised (MnSOST-R) instruments. III RP 301; CP 440, ff. 35. See finding No. 43:

> "43. "Dr. Doren testified that Respondent's actuarial scores were mixed. He testified that these mixed scores led him to draw the opinion, to a reasonable degree of scientific certainty, that Respondent cannot be clearly viewed as being of a "more likely than not" degree of sexual recidivism risk solely on the basis of these actuarial results, i.e., he could not draw a conclusion either way. He concluded that other factors needed to be considered."[5] CP 441, ff. 43; RP 316-7.

---

[5]Compare the trial court's Memorandum Decision: "Based on the scores obtained from Respondent on these assessment tools, Dr. Doren concluded to a reasonable degree of professional certainty that the Respondent's mental abnormality and personality disorder made him likely to engage in predatory acts of sexual violence if not confined to a secure facility." CP 417.

Instead of using actuarial scores to predict recidivism, Dr. Doren testified that he had to rely on the Psychopathy Check List Revised (PCLR). This was a psychological test that was not designed to be a risk assessment. III RP 318. It was a test used "...to assess the degree to which people have a certain type of personality structure." III RP 318. Thus, there is not sufficient evidence to support findings of fact 75 and 77.

Dr. Doren testified "...it's a very consistent outcome that sexual interests in children is one of the best single pieces of information indicating future sexual re-offending." III RP 230. That is why Mr. Fair was committed; because of the problems he was having not giving up masturbating to sexual fantasies involving children. III RP 229. There was not substantial evidence to support findings of fact 74 and 78. They found respectively that Fair should be confined in a secure facility because he might engage in predatory acts or he might re-offend. CP 445.

The trial court erred when it entered Conclusion of law 7:

> "The evidence presented at Respondent's trial
> proved beyond a reasonable doubt that
> Respondent is a sexually violent predator
> as that term is used in chapter RCW 71.09." CP 447.

The trial court also erred when it entered an Order of Commitment on January 5, 2006. CP 422. This order committed respondent to the Department of Social and Health Services until released or discharged.

The order was based on the finding that the respondent was a SVP. *id.*

There was reasonable doubt in the case at bench based on the circumstances of Fair's continual confinement extending from November 15, 1989 to three days beyond the date the civil commitment was filed until June 28, 2004: his scheduled release date. CP 434, ff. 8.

The state did not prove a "recent overt act" beyond a reasonable doubt in this case. As argued above, it was held in *Henrickson*:

> "We simply hold that when, at the time the petition is filed, an individual is incarcerated for a sexually violent offense, or for an act that itself would have constituted a recent over act, due process does not require the State to prove a *further* overt act occurred between arrest and release from incarceration.".

id. at 697. *(*emphasis added.) The use of the word "further" to describe another potential overt act indicates that the facts leading to the respondent's incarceration could be used to overcome the constitutional due process requirement of "proof of current dangerousness". *In re Turay*, 150 Wn.2d 71, 74 P.3d 1194 (2003), *Young*, 122 Wn.2d at 40-2. Since Fair's robbery conviction involved taking another male's pickup by force does not qualify as a "sexually violent offense" or as a "recent overt act", the state did not meet its burden of production or burden of proof.

The "recent overt act" requirement is imposed by the demands of due process protections as a means of demonstrating present dangerous-

ness. Without this proof at the time of trial of a "recent overt act", the State has failed to prove that Mr. Fair is dangerous to the degree necessary to make it constitutionally permissible to commit him indefinitely.

The State and Dr. Doren are attempting to use Fair's 1988 conviction to satisfy the constitutional requirement of present dangerousness by attempting to prove beyond a reasonable doubt that the facts leading to Fair's 20 month confinement constituted a predicate offense or that it satisfies the definition of "recent overt act." The State did not prove- and the court did not find beyond a reasonable doubt- that Mr. Fair committed a "recent overt act". Pursuant to the authorities discussed above, the Court could not find that Mr. Fair was a sexually violent predator.

Dr. Doren focused on the respondent's conduct with "a 12 year old and a pair of twins who were 13 year olds. He essentially spent all day with them, off and on, along with other people...." III RP 236. "...he had sexual contact with all three of the girls, the 12 year old and two 13 year olds during that date." III RP 251.

Further, finding of fact 23 states with regard to self-reporting:

> "23. Dr. Doren testified that had the Respondent not made any reports of child victims during the forensic interview, he still would have given him the same diagnosis and still would have reached all the same conclusions, including the ultimate conclusion that

he meets the definition of SVP." CP 438.

Justice Sanders wrote in his dissenting opinion in *Henrickson:*

> " This connection between mental illness and dangerousness has led to the following observation:
>
> Necessarily one who simply commits a violent sexual act through volitional choice is outside the statute. Such an individual is what the criminal law is made for. But in theory the person who does this because his "mental abnormality" or "personality disorder" *"makes"* him do it is not a person acting by his free will and, consequently, not one who can be held accountable for his choices.
>
> Therefore evidence is necessary to distinguish between those who volitionally act of their free will and those who don't.

In re Detention of Campbell, 139 Wn.2d 341, 373, 986 P.2d 771 (1999)."

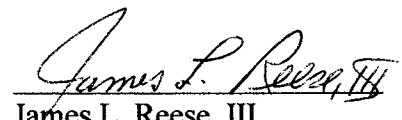
Henrickson, (Sanders, J., dissenting) at 700-01.

D. Conclusion

This court should reverse the trial court decision and order that the defendant should be released from secured confinement to community supervision.

Dated this 30th day of August 2006.

Respectfully Submitted,



James L. Reese, III
WSBA #7806
Court Appointed Attorney

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2006 MAY 18 PM 4:38
DAVID W. PETERSON

STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

In re the Detention of: DAVID FAIR, Respondent.	NO. 04-2-01554-7 FINDINGS OF FACT AND CONCLUSIONS OF LAW

A trial was held in this matter pursuant to chapter 71.09 RCW, from October 24 to October 27, 2005, to determine whether the Respondent, DAVID FAIR, is a sexually violent predator. The Respondent waived his right to a jury trial and elected to have the case tried to the Honorable Leonard Costello. Petitioner, State of Washington, was represented by Assistant Attorney General MELANIE TRATNIK. Respondent was present and was represented by JOHN CROSS. The Court, having heard the testimony of Ms. Lisa Dandescu, Dr. Dennis Doren, Dr. Theodore Donaldson, and the Respondent, having reviewed the exhibits admitted into evidence and viewed the video deposition of the Respondent, and having heard the evidence presented by the parties and the arguments of counsel, hereby determines that the Respondent is a sexually violent predator as that term is defined in RCW 71.09.020(16).

I. FINDINGS OF FACT

1. Respondent was born on May 31, 1966.

2. On September 27, 1988, Respondent plead guilty to one count of Child Molestation in the Second Degree, under cause number 88-1-00362-7. On February 15, 1989, he was sentenced to a Special Sex Offender Sentencing Alternative (SOSSA) sentence.

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3. On November 1, 1989, the State filed a Motion and Affidavit for Order Revoking the SOSSA, based on Respondent's failure to maintain sex offender treatment and his failure to report to the Department of Corrections. Respondent absconded.

4. On April 24, 1990, Respondent was sentenced in New Mexico under cause number CR-89-00097, to 18 months for one count of Receiving a Stolen Vehicle, 18 months for one count of Receiving Stolen Property, three years for one count of Great Bodily Injury by Vehicle, and 18 months for another count of Receiving Stolen Property, all sentences to be served consecutively.

5. On August 10, 1990, the State filed a Motion and Affidavit for Warrant of Arrest under Kitsap County cause number 90-1-00498-6 for First Degree Robbery, Second Degree Assault, First Degree Theft, Second Degree Theft, and Taking a Motor Vehicle Without Owner's Permission, alleged to have been committed on November 10, 1989. Respondent was transferred from New Mexico back to Washington State under the Agreement on Detainers Act.

6. On June 10, 1992, Respondent was sentenced for one count of Robbery in the First Degree under Kitsap County cause number 90-1-00498-6, to 87 months to run consecutively to the sentence under New Mexico cause number CR-89-00097.

7. On June 25, 1992, Respondent's SOSSA sentence under Kitsap County cause number 88-1-00362-7 was revoked for failure to continue treatment, failure to report to DOC, failure to pay legal financial obligations, failure to notify DOC of a change of address and employment, and subsequent law violations leading to convictions. Respondent was sentenced to 20 months to run concurrent with the 87 month sentence imposed on Kitsap County cause number 90-1-00498-6.

8. On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and 88-1-00362-7.

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9. On June 23, 2004, the State filed a petition seeking to commit Respondent as a Sexually Violent Predator (SVP).

10. Between June 10, 1992, and June 23, 2004, Respondent has been continuously incarcerated and was incarcerated on the date the Petition was filed.

11. Lisa Dandescu testified on behalf of the Petitioner. Dandescu was Respondent's primary treatment provider at the Department of Correction's Sexual Offender Treatment Program (SOTP) for about fourteen months beginning in January 2003. Respondent completed that treatment, and Dandescu wrote a treatment summary in May 2004. Dandescu testified that during treatment Respondent admitted to sexually offending against approximately nineteen different individuals. The ages of these victims were between four and twenty-five. Three of these reported victims were adults over the age of eighteen. Two of the adults were females who were disabled and in a nursing home. The third was a prison inmate whom Respondent manipulated into allowing him to perform anal sex on in exchange for protection from other prisoners. Respondent's self-reported child victims were male and female, and encompassed both strangers and persons known to him. His offenses against children included acts of fondling, sexual intercourse, intercural sex, cunnilingus, having a victim masturbate him and engaging in kissing and French kissing. One such victim was a four-year old girl whom Respondent reported offending against while in the community during his SOSSA sentence. This offense involved having the victim urinate on him, and rubbing his penis against her vagina until he ejaculated. Another self-reported victim was a two-year old male he performed fellatio on. Dandescu testified that when Respondent discussed the facts of his Child Molestation conviction he minimized his involvement, and stated the girls were flirtatious with him and were asking for beer. Similarly, Dandescu stated that when Respondent discussed his non-sexual convictions he also minimized the events in terms of his actions and harm to the victims. Dandescu testified that during treatment Respondent reported a great deal of deviant arousal, and that common themes of his sexual fantasies involved minor

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females flirting with him, him broaching the idea of sex, and then engaging in sex with them. Respondent acknowledged to Dandescu that he used photos of children cut out of magazines to enhance his masturbatory fantasies. Dandescu testified that the treatment team expressed concern to Respondent about his continued masturbation towards deviant fantasies, but he was unwilling to stop these behaviors. Dandescu testified that Respondent minimized the harm he had caused his child victims, maintaining that he was sexually satisfying them. Dandescu testified that at the conclusion of treatment the treatment team assessed Respondent's risk to sexually reoffend as high.

12. Dr. Doren, a psychologist with considerable experience in the evaluation, diagnosis, and treatment of sex offenders beginning in the early 1980's, was called to testify by the Petitioner.

13. Dr. Doren has testified as an expert in Sexually Violent Predator trials in numerous states, including Washington, and is familiar with RCW chapter 71.09.

14. Dr. Doren testified that, in conducting his evaluation of the Respondent, he reviewed several thousand pages of documents, including Department of Correction records, court documents, police reports, administrative records, and prior psychological records. He testified that these materials were of the type upon which he and other professionals who conduct such evaluations commonly rely upon, and that he did rely upon them in conducting his evaluation of the Respondent.

15. Dr. Doren further testified that he conducted a forensic interview of the Respondent for 4.25 hours on May 24, 2004.

16. Dr. Doren testified that since completing his evaluation of the Respondent on May 31, 2004, he had reviewed the Respondent's deposition and his Special Commitment Center records.

17. Dr. Doren testified that these materials did not change his opinions formulated during his initial evaluation, but that some of the Special Commitment Center records substantiated

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opinions he already had. For example, Dr. Doren noted that these records revealed that since Respondent began residing at the SCC in June 2004, he has continued to admit to having sexual fantasies about minors.

18. Dr. Doren testified that his records review revealed that Respondent has consistently self-reported having sexually offended against fifteen or more minors.

19. Dr. Doren testified that during the forensic interview, Respondent admitted to having offended against fifteen or more minor children, and to having ongoing sexual fantasies about children. Dr. Doren testified that during the forensic interview Respondent provided great detail about his sexual offending.

20. Dr. Doren testified that since his evaluation he had learned that Respondent now retracts all his sexual offenses against minors except for the one he was convicted of. Dr. Doren noted that these retractions did not begin until after the State filed a SVP petition, and that records show that Respondent has made consistent self-reports of offending against children over many years, including times when such admissions did not benefit him.

21. Dr. Doren testified that Respondent's recent retraction of unadjudicated child victims does not change the opinions he made when he wrote his evaluation on May 31, 2004, and that he still believes Respondent meets the criteria of a SVP.

22. Dr. Doren testified that even if all of Respondent's self-reports of unadjudicated victims were false he would still hold all the same opinions as he did when he wrote his report on May 31, 2004, and to which he testified to in court.

23. Dr. Doren testified that had the Respondent not made any reports of child victims during the forensic interview, he still would have given him the same diagnosis and still would have reached all the same conclusions, including the ultimate conclusion that he meets the definition of a SVP.

24. Dr. Doren testified that, in his professional opinion and to a reasonable degree of scientific certainty, Respondent suffers from several disorders which are classified in the

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Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR): Paraphilia Not Otherwise Specified, Urophilia, Alcohol Dependence in a controlled environment, Cannabis Abuse, Pedophilia, sexually attracted to females, nonexclusive, and Antisocial Personality Disorder.

25. Dr. Doren noted that while Respondent's urophilia reportedly influenced his behavior in the victimization of one child, the behavioral enactment of this sexual interest does not necessarily imply illegal behavior. Dr. Doren testified that an opinion could not be drawn to a reasonable degree of professional certainty in this regard, and that he therefore concluded that that the Respondent's Urophilia may or may not predispose the Respondent to the commission of sexual acts in a degree constituting him a menace to the health and safety of others.

26. Dr. Doren explained that he diagnosed Respondent with Alcohol Dependence and Cannabis Abuse, because Respondent has demonstrated a lack of control over the consumption of these substances to the point that it had negatively affected his life. Although these conditions represent standard mental disorders, Dr. Doren concluded that neither of these disorders predisposes the Respondent to the commission of criminal sexual acts in a degree constituting him a menace to the health and safety of others. However, he noted that while these disorders may not by themselves predispose an individual to engage in criminal sexual acts, the decreased inhibitions and decreased self-control associated with these disorders may have played a role in Respondent's past offending.

27. Dr. Doren testified that Respondent's Pedophilia constitutes a mental abnormality, as that term is defined in RCW 71.09.020(8), that is, (a) it is either congenital or acquired, (b) it affects the Respondent's emotional or volitional capacity, and, (c) it predisposes the Respondent to the commission of predatory criminal sexual acts to the degree constituting him a menace to the health and safely of others.

28. Dr. Doren explained that Pedophilia is a type of Paraphilia, and that the cardinal qualities of a Paraphilia are that the person experiences intense, sexually arousing fantasies,

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sexual urges, or behaviors involving nonhuman objects, the suffering of oneself or one's partner, or children or other nonconsenting persons for more than six months.

29. Dr. Doren testified that Paraphilias are chronic, lifelong, and by their nature, compromise volitional control and emotional capacity.

30. Dr. Doren testified that the essential feature of Antisocial Personality Disorder is that it involves the pervasive disregard for and violation of the rights of others.

31. Dr. Doren testified that, consistent with a diagnosis of Antisocial Personality Disorder Respondent has a history of failure to conform to social norms, aggressiveness, reckless disregard for the safety of self or others and lack of remorse. Dr. Doren noted that this pattern includes Respondent's sexually assaultive behaviors.

32. Dr. Doren concluded that Respondent's Antisocial Personality Disorder predisposes him to the commission of predatory criminal sexual acts in a degree constituting him a menace to the health and safety of others.

33. Dr. Doren testified that Respondent's Pedophilia and Antisocial Personality Disorder, both independently and in combination, cause him serious difficulty controlling his sexually violent behavior.

34. Dr. Doren testified that, in his professional opinion, Respondent's mental abnormality and personality disorder, both independently and in combination, make(s) him likely to commit predatory acts of sexual violence if not confined in a secure facility.

35. Dr. Doren testified that he used three actuarial instruments; the Static-99, the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R), the Rapid Risk Assessment for Sex Offense Recidivism (RRASOR), and the Psychopathy Checklist – Revised (PCL-R), to assess Respondent.

36. Dr. Doren testified that these instruments are widely used and relied upon among psychologists in his field, that he uses and relies upon them in his practice, and that he used and relied upon them in this case.

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37. Dr. Doren testified that Respondent's score on the Static-99 was at least a 5, possibly a 6. Dr. Doren testified that persons with a score of 6 and above are in the highest risk group for sexually reoffending measured by this instrument.

38. Dr. Doren testified that of the offenders in the Static-99 development sample who scored a 5, 40% of them were reconvicted of a new hands on sex offense within 15 years of their release, and that of those who scored a 6 or above, 52% of them were reconvicted of a new hands on sex offense within 15 years of their release.

39. Dr. Doren testified that Respondent's score on the RRASOR was a 2.

40. Dr. Doren testified that of the offenders in the RRASOR development sample who scored a 2, 31% of them were reconvicted of a new sex offense within 17 years of their release.

41. Dr. Doren testified that Respondent's score on the MnSOST-R of +13 puts him in the highest risk range measured by this instrument.

42. Dr. Doren testified that 78% of the offenders studied by the MnSOST-R who had a score of +13 were rearrested for a new physical contact sexual offense within 6 years of their release.

43. Dr. Doren testified that Respondent's actuarial scores were "mixed." He testified that these mixed scores led him to draw the opinion, to a reasonable degree of scientific certainty, that Respondent cannot be clearly viewed as being of a "more likely than not" degree of sexual recidivism risk solely on the basis of these actuarial results, i.e., he could not draw a conclusion either way. He concluded that other factors needed to be considered.

44. Dr. Doren testified that he scored Respondent on the Hare Psychopathy Checklist - Revised (PCL-R). The PCL-R is a psychological test, not an actuarial instrument.

45. Dr. Doren was certified to administer the PCL-R by Dr. Robert Hare, the creator of this psychological test.

46. Dr. Doren explained that scores of 25 or higher on the PCL-R indicate a high degree of psychopathy, and that a score of 30 and above indicates the person is a psychopath.

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47. Dr. Doren testified that Respondent's score of 30 on the PCL-R indicates that he meets the criteria for classification as a Psychopath.

48. Dr. Doren explained that the concept of psychopathy comes down to the idea that the person does what he wants, when he wants to, and does it, in part, because he doesn't have an emotional connection to others.

49. Dr. Doren testified that research has repeatedly demonstrated that when psychopathy is found in combination with sexual deviance, it is associated with a particularly high risk for sexual recidivism. Specifically, persons who have both sexual deviancy and high psychopathy sexually recidivate more quickly, and more drastically, than those who do not have both these characteristics.

50. Dr. Doren testified that Respondent has both sexual deviancy and high psychopathy, and that he therefore falls into the very high risk category for sexual reoffending.

51. Dr. Doren cited four studies on offenders deemed to have sexual deviance in combination with high psychopathy. In these four studies, the criminal sexual recidivism rates were 54% reconviction rate in 10 years, 83% reconviction rate in 17 years, 50% rearrest rate in 4 years, and 75% rearrest rate in 6 years. Dr. Doren testified that the consistency across sample pools shows that these findings are robust.

52. Dr. Doren testified that he also considered other clinical risk factors in assessing Respondent's risk of sexual reoffending, including the Respondent's treatment history, period of supervision following release, and his current age of 39. Dr. Doren opined that Respondent obtained very little benefit from his sex offender treatment, that his history of compliance with supervision was very poor, and that his current age does not reduce his risk of sexual reoffending. In summary, Dr. Doren concluded that none of these factors constituted protective factors which would decrease Respondent's risk for future sexual offending.

53. Dr. Doren testified that to a reasonable degree of scientific and professional certainty, that the Respondent is more likely than not to reoffend in a sexually violent manner if not

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confined in a secure facility.

54. Dr. Doren testified that even if he did not consider the actuarial risk assessment instruments, it would still be his opinion to a reasonable degree of scientific and professional certainty, that the Respondent is more likely than not to reoffend in a sexually violent manner if not confined in a secure facility.

55. Dr. Theodore Donaldson, a psychologist who also has considerable experience in the evaluation of sex offenders, testified as an expert on behalf of the Respondent.

56. In conducting his evaluation, Dr. Donaldson reviewed the same discovery materials as Dr. Doren did, and conducted a two hour forensic interview of the Respondent on January 5, 2005.

57. Dr. Donaldson testified that as of September 30, 2005, he had conducted 33 evaluations of persons in Washington who had already been found by prior evaluators to meet the criteria as a Sexually Violent Predator.

58. Dr. Donaldson testified that of the 33 persons he has evaluated he found that none of them met the criteria for civil commitment under RCW chapter 71.09.

59. Dr. Donaldson testified that when he interviewed the Respondent on January 5, 2005, he admitted to having had sexual contact with three minor girls while he was an adult, one of which was twelve and two of whom were thirteen. One of these acts led to Respondent's conviction for one count of Child Molestation in the Second Degree. Respondent admitted that contact with these three girls included fondling of bare breasts, kissing, fondling of a clothed vagina, intercourse and oral sex. Dr. Donaldson asked Respondent about his prior admissions to sixteen additional unadjudicated victims, and Respondent stated he made those up so he could get into sex offender treatment in prison in what he believed to be a better Department of Corrections (DOC) facility than the one he was initially placed in. Respondent also admitted during the interview that he had a sexual preference for eight to twelve-year-old girls because they are "unblemished," and that he enjoyed writing about sex between adults

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and children. Respondent also told Dr. Donaldson that at the time of the interview up to forty percent of his fantasies involved sex with children, and that these fantasies involved touching children, orally copulating them, and having them urinate on him. Dr. Donaldson testified that when he interviewed the Respondent on January 5, 2005, he admitted to having written many prior accounts of sexual contact with minors and writings advocating that other adults engage in this behavior, but that those writings were also made up for the purpose of getting into sex offender treatment at the DOC.

60. Dr. Donaldson opined that Respondent does not suffer from Pedophilia. Dr. Donaldson testified that if Respondent did not now state that his prior admissions to sex with minors were made up, then he would most likely diagnosis him with Pedophilia. Dr. Donaldson stated that because Respondent now states that those admissions were fabrications, there is insufficient information upon which to diagnose him with Pedophilia.

61. Dr. Donaldson testified that he agreed with Dr. Doren that the Respondent has Antisocial Personality Disorder. However, Dr. Donaldson opined that the Respondent's Antisocial Personality Disorder does not predispose him to the commission of crimes of sexual violence. Dr. Donaldson testified that, in his opinion, there are no personality disorders which predispose a person to the commission of crimes of sexual violence.

62. Dr. Donaldson testified that he agreed with Dr. Doren that a person who has both sexually deviancy and high psychopathy is at a very high risk to sexually reoffend. Dr. Donaldson testified that if a person has these two things then it is "inescapable" that they will sexually reoffend.

63. Dr. Donaldson testified that he agreed with Dr. Doren's scoring of the Respondent on the Hare Psychopathy checklist, and agrees that the Respondent is a psychopath.

64. Dr. Donaldson testified that in his opinion there was insufficient evidence that the Respondent was sexually deviant. He based this opinion on the fact that the Respondent was never given a plethysmograph (PPG), and that he now denies his prior admissions to sexually

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deviant acts and fantasies involving minors.

65. Respondent was deposed on September 15, 2005. The Court viewed the video of his deposition. Respondent also testified at trial.

66. Respondent confirmed that he was convicted of Child Molestation in the Second Degree, and admitted to sexual contact with the victim named in that conviction. Respondent also admitted to sexual contact with another thirteen-year-old for whom he was initially charged at the same time.

67. Respondent admitted to having made numerous admissions to sexual contact with minors throughout his incarceration, but testified that he had fabricated all those contacts in order to increase his chances of being placed in sex offender treatment away from the general prison population.

68. Respondent admitted to having composed numerous written materials describing his sexual contacts with children and advocating for sex between adults and children. He testified that the descriptions of sex with children were fabricated, that the other writings did not reflect his actual beliefs, and that all these writings were composed in order to increase his chances of being placed in sex offender treatment at the DOC.

69. The Court finds Dr. Doren to be a well-qualified expert with considerable experience in performing SVP evaluations, and finds that his testimony is more persuasive, reliable, and credible than that of Dr. Donaldson.

70. The Court finds it of particular import that the Respondent did not deny his previous statements regarding sexually inappropriate behavior and previous writings to Dr. Doren, who met with Respondent for the explicit purpose of determining whether he was a sexually violent predator.

71. The Court finds that the Respondent suffers from the mental disorder of Pedophilia, and from the personality disorder of Antisocial Personality Disorder.

72. The Court finds that the Respondent's Pedophilia is a congenital or acquired condition,

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that it affects the Respondent's emotional or volitional capacity, and that it predisposes him to the commission of criminal sexual acts to the degree constituting him a menace to the health and safely of others.

73. The Court finds that the Respondent's Pedophilia and Antisocial Personality Disorder, independently and in combination with each other, cause him serious difficulty in controlling his sexually violent behavior.

74. The Court finds that the Respondent, as a result of his mental abnormality and/or personality disorder, is likely to engage in predatory acts of sexual violence if not confined in a secure facility.

75. The Court finds that Dr. Doren's scoring of the PCL-R is reliable and that the Respondent is a psychopath.

76. The Court finds that Dr. Respondent is sexually deviant.

77. The Court finds that the Respondent's sexual deviance combined high PCL-R score, places him at a very high risk to engage in predatory acts of sexual violence if not confined to a secure facility.

78. The court finds that Respondent is more likely than not to reoffend in a sexually violent manner if he is not confined to a secure facility.

II. CONCLUSIONS OF LAW

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

2. The crime of Child Molestation in the Second Degree, for which the Respondent was convicted of on September 27, 1988, is a sexually violent offense, as that term is used in RCW 71.09.020(15) and (16).

3. Pedophilia, sexually attracted to females, nonexclusive, from which the Respondent suffers, is a mental abnormality as that term is used in RCW 71.09.020(8) and (16).

4. Antisocial Personality Disorder, from which the Respondent suffers, is a personality disorder, as that term is used in RCW 71.09.020(16).

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5. The Respondent's mental abnormality and personality disorder cause him serious difficulty controlling his sexually violent behavior.

6. The Respondent's mental abnormality and personality disorder, both independently and in combination, make(s) him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

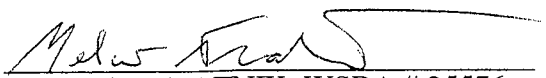
7. The evidence presented at Respondent's trial proved beyond a reasonable doubt that Respondent is a sexually violent predator as that term is used in chapter RCW 71.09.

DATED this 18 day of ~~March~~ May, 2006.

THE HONORABLE LEONARD COSTELLO
Judge of the Superior Court

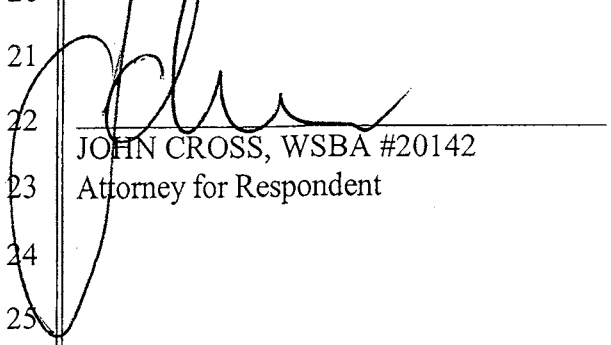
Presented by:

ROB MCKENNA
Attorney General



MELANIE TRATNIK, WSBA # 25576
Assistant Attorney General
Attorneys for Petitioner

Copy received; Approved as to Form;
Notice of Presentation Waived:



JOHN CROSS, WSBA #20142
Attorney for Respondent

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DAVID W. PETERSON

STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

In re the Detention of: DAVID T. FAIR, Respondent.	NO. 04 2 01554 7 PETITION

COMES NOW the Petitioner, State of Washington, by and through Christine O. Gregoire, Attorney General, and Melanie Tratnik, Assistant Attorney General, and submits this petition seeking the involuntary civil commitment of the Respondent, David T. Fair, as a sexually violent predator pursuant to RCW 71.09 *et seq*. Specifically, the Petitioner alleges the Respondent is a sexually violent predator, as that term is defined in RCW 71.09.020(16), given the following:

1. Respondent has been convicted of a sexually violent offense, as that term is defined in RCW 71.09.020(15). On or about September 27, 1988, in the Superior Court of the State of Washington, Kitsap County, the Respondent was convicted of Child Molestation in the Second Degree.

2. Respondent currently suffers from:

a) A mental abnormality, as that term is defined in RCW 71.09.020(8), specifically: Pedophilia, sexually attracted to females, nonexclusive; and

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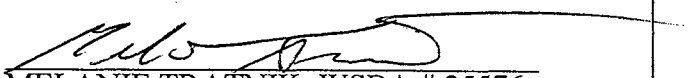
b) A personality disorder, specifically: Antisocial Personality Disorder.

3. Respondent's mental abnormality and personality disorder cause him serious difficulty in controlling his dangerous behavior and make him likely to engage in predatory acts of sexual violence unless confined to a secure facility.

Based upon the foregoing, the Respondent should be committed to the custody of the Department of Social and Health Services for placement in a secure facility for control, care, and treatment until such time as the Respondent's condition has so changed that he no longer meets the definition of a sexually violent predator, or conditional release to a less restrictive alternative is in the best interest of the Respondent and conditions can be imposed that would adequately protect the community.

DATED this 23rd day of June, 2004.

CHRISTINE O. GREGOIRE
Attorney General



MELANIE TRATNIK, WSBA # 25576
Assistant Attorney General
Attorneys for Petitioner

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RCW 71.09.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Department" means the department of social and health services.

(2) "Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.

(3) "Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.

(4) "Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).

(5) "Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).

(6) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.

(7) "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.

(8) "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(9) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.

(10) "Recent overt act" means any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.

(11) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW 71.09.315. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.

(12) "Secretary" means the secretary of social and health services or the secretary's designee.

(13) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.

(14) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW 71.09.250(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.

(15) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second

degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

(16) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(17) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the secretary.

[2006 c 303 § 10. Prior: 2003 c 216 § 2; 2003 c 50 § 1; 2002 c 68 § 4; 2002 c 58 § 2; 2001 2nd sp.s. c 12 § 102; 2001 c 286 § 4; 1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

RCW 71.09.030

Sexually violent predator petition — Filing.

When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released on, before, or after July 1, 1990, pursuant to *RCW 10.77.090(3); (4) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released on, before, or after July 1, 1990, pursuant to RCW **10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent predator, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

[1995 c 216 § 3; 1992 c 45 § 4; 1990 1st ex.s. c 12 § 3; 1990 c 3 § 1003.]

STATE CONSTITUTION OF WASHINGTON

ARTICLE 1, ss. 3. Personal Rights

No person shall be deprived of life, liberty, or property, without due process of law.

AMENDMENT [V]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (XIV)

ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY_____
DEPUTY

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington over the age of eighteen years, not a party to the above-entitled action and competent to be a witness herein.

That on the 31st day of August, 2006, he hand delivered for filing, the original and one (1) copy of Appellant's Brief in In re the Detention of: David T. Fair, No. 34399-1-II, to the office of David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402; shipped via United Parcel Service (1) copy of the same to Melanie Tratnik, Attorney Generals Office/CJ Division, Msc Tb-14, 900 4th Avenue, Ste. 2000, Seattle, WA 98164-1012 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, David T. Fair, at his last known address: David T. Fair, Special Commitment Center, P.O. Box 88600, Steilacoom, WA 98388.

James L. Reese, III

James L. Reese, III

Signed and Attested to before me this 31st day of August, 2006 by James L. Reese, III.

Julia T. Reese

Notary Public in and for the State of Washington, residing at Port Orchard.
My Appointment Expires: 04/04/09