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Division II  
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NO. 52791-0

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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In re the Detention of G.R.,

Respondent,

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**APPELLANTS' RELY BRIEF**

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## I. INTRODUCTION

Despite the civil commitment petition specifically alleging that G.R. committed acts constituting a violent felony, and despite the trial court's express finding that G.R. committed acts constituting the felony of arson in the first degree, the trial court failed to take the legally required next step of concluding that first degree arson constitutes a violent offense under RCW 9.94A.030. This result was mandatory under RCW 71.05.280(3)(b), which directs the court to determine whether the acts it found G.R. committed constituted a violent offense.

G.R. does not dispute that acts constituting first degree arson were proved below, or that those acts for purposes of RCW 71.05.280(3)(b) constitute a violent offense. Instead, G.R.'s position is that the Petitioners were required to have raised the violent offense definition issue during the civil commitment hearing, and that denial of new argument in a reconsideration motion is within the trial court's discretion. Response Br. at 5. This argument ignores the fact that RCW 71.05.280(3)(b) imposed an affirmative duty on the trial court to make a violent offense determination in this case

This Court should conclude that the trial court had a statutory duty to make the violent offense determination at the conclusion of G.R.'s

hearing, and erred as a matter of law by failing to recognize that first degree arson is a violent offense.

## II. ARGUMENT IN REPLY

G.R. mischaracterizes the issue on appeal. The issue is not whether the trial court abused its discretion by denying the Petitioners' motion for reconsideration. Resp't Br. at 5-6. The issue, as originally identified by the Petitioners, is whether the trial court erred by failing to conclude that first degree arson is a violent felony in its July 16, 2018 order after making the factual determination that G.R. committed acts constituting first degree arson. Op. Br. at 1-2.<sup>1</sup> This failure amounts to clear legal error that should be corrected by this Court.

As argued, the trial court's failure to make the violent offense determination here amounted to reversible error. Op. Br. at 3-5. This is true regardless of whether the Petitioners highlighted the existence of RCW 71.05.280(3)(b) during the civil commitment hearing, because that statute imposes a mandatory duty on the trial court to make the determination at the hearing's conclusion.

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<sup>1</sup> Regardless, the trial court did abuse its discretion by denying the Petitioners' reconsideration motion because, as argued in that motion and this appeal, its underlying decision was contrary to law. *Singleton v. Naegeli Reporting Corp.*, 142 Wn. App. 598, 612, 175 P.3d 594 (2008) (refusal to correct legal error raised in motion for reconsideration constitutes an abuse of discretion).

The Washington Supreme Court reached the same conclusion when construing a similarly-worded parental rights termination statute. *In Matter of K.J.B.*, the court held that the factors listed in RCW 13.34.180(1)(f) must be considered by the trial court before terminating the parental rights of an incarcerated parent because the statute stated that the trial court “shall consider” them. *In Matter of K.J.B.*, 187 Wn. 2d 592, 602-03, 387 P.3d 1072 (2017). It concluded that the statute’s use of the word “shall” imposed a mandatory duty upon the trial court, *id.* at 603, and remanded for consideration of the factors despite the fact that the parties did not mention the factors at trial, *id.* at 604-06.

The same conclusion follows here in respect to RCW 71.05.280(3)(b). This statute provides that when a person is civilly committed under RCW 71.05.280(3) after a violent felony charge has been dismissed, “the court shall determine whether the acts the person committed constitute a violent offense under RCW 9.94A.030.” Like *Matter of K.J.B.*, it is immaterial whether the parties raised the violent offense issue at trial – the trial court was simply required by the statute to answer the question.

G.R. rightly does not dispute that the trial court answered the violent offense question incorrectly. First degree arson is unquestionably categorized as a violent offense. RCW 9.94A.030(55)(a)(i); RCW 9A.48.020(2). After the trial court made the factual determination

that G.R. committed acts constituting first degree arson, CP 18, it was legally required to conclude that the acts G.R. committed constituted a violent offense.

Contrary to the trial court's belief that some form of additional argument or evidence was required before it could make a violent offense finding, CP 28, whether the facts found by the trial court satisfy a legal standard presents a question of law. *C.f. State v. Kipp*, 179 Wn. 2d 718, 728, 317 P.3d 1029 (2014) (holding that review of whether a particular communication is private under the privacy act is a question of law, regardless of "whether ... the facts are undisputed, or whether review of the facts as found by the trial court are the focus."); *Mueller v. Wells*, 185 Wn. 2d 1, 9, 367 P.3d 580 (2016) (concluding that "[w]hether the facts rise to the level of undue influence that is sufficient to invalidate a will is a question of law that we review de novo.")

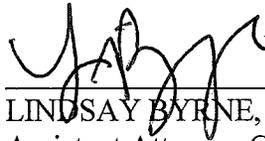
Indeed, no substantive evidence could have assisted the trial court in deciding whether the acts it found G.R. committed constituted a violent offense. As RCW 71.05.280(3)(b) itself explains, only RCW 9.94A.030(55) could answer that question. The trial court needed only consult another statute to make the determination that G.R.'s conduct constituted a violent offense. It either failed to do so here or answered the question incorrectly.

### III. CONCLUSION

The trial court found that G.R. committed acts constituting first degree arson, a crime listed as a violent felony under RCW 9.94A.030(55). After making that finding, RCW 71.05.280(3)(b) required the trial court to enter a violent offense finding as a matter of law, regardless of whether the Petitioners pointed out its obligation to do so. This Court should partially vacate G.R.'s commitment order and remand with instructions to enter a violent offense finding.

RESPECTFULLY SUBMITTED this 6th day of May, 2019.

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**CERTIFICATE OF SERVICE**

I, *Malai Malawo*, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I certify that on May 6, 2019, I served a true and correct copy of this **APPELLANTS' REPLY BRIEF** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

Eric J. Nielsen  
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1908 East Madison Street  
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By E-Mail PDF: [nielsene@nwattorney.net](mailto:nielsene@nwattorney.net); [KochD@nwattorney.net](mailto:KochD@nwattorney.net)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 6th day of May 2019, at Tumwater, Washington.



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MALAI MALAWO  
Legal Assistant

**SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE**

**May 06, 2019 - 11:34 AM**

**Transmittal Information**

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