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NO. 79364-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

DAVID JAMES LEWIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE OF WASHINGTON'S SUPPLEMENTAL BRIEF

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ORIGINAL

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I. INTRODUCTION

This appeal challenges a trial court order that committed David Lewis (aka Roy Eaker) as a sexually violent predator (SVP) under RCW 71.09. The Court of Appeals affirmed the order of commitment, and Mr. Lewis petitioned this Court for review. This Court accepted review, but limited its review to “the incarceration issue.” This refers to issue Number 2 in Mr. Lewis’s Petition for Review and his arguments concerning that issue:

2. Petitioner was being held in custody pending trial on a charge of Rape of a Child in the First Degree when the petition was filed. Because Petitioner was not “about to be released” when the petition was filed and no “recent overt act” was plead [sic] or proved, does his commitment violate due process?

Pet. at 1-2.

When the State filed an SVP petition against Mr. Lewis in July of 2003, he was being held in the Walla Walla County jail, awaiting a retrial on criminal charges following remand of his case by the Court of Appeals. He had been continuously confined since 1992, when he was convicted of two counts of child molestation in the first degree, a sexually violent offense,¹ for the rape of his six-year-old step-sister. The record confirms that when the State filed its SVP petition in 2003, he was facing release to

¹ Sexually violent offenses are set forth in RCW 71.09.020(15)

the community within two weeks. As such, he was “about to be released” and the filing of the petition was clearly authorized by statute.

Mr. Lewis’s alternative argument that the State should have pled and proved a recent overt act is without merit because he was never released to the community, which is the statutory (and logical) trigger for requiring the State to prove a recent overt act. For similar reasons, this application of the statute is consistent with all requirements of due process regarding proof of recent overt acts.

This Court should affirm the order of commitment.

II. STATEMENT OF THE CASE

The facts of this case are accurately described by the Court of Appeals. *In re Detention of Lewis*, 134 Wn. App. 896, 899-900, 143 P.3d 833 (2006). The facts related below concern the issue and arguments before this Court.

David James Lewis pled guilty to two counts of child molestation in the first degree in Columbia County in 1992. *Lewis*, 134 Wn. App. at 899. He was sentenced to 68 months on count 1 and 89 months on count 2, to be served concurrently. *Id.*

Mr. Lewis had a release date of August 5, 1999, but he was not released for failure to provide an approved address. *Id.* He was instead held in the Columbia County jail, where he was confined when the

Attorney General's Office filed an SVP petition on August 6, 1999. *Id.* On May 24, 2000, before the SVP petition went to trial, Mr. Lewis was charged with rape of a child first degree in Walla Walla County. *Id.* The SVP petition was withdrawn without prejudice on June 30, 2000. *Id.*

The 2000 criminal charge was based on acts alleged to have occurred between 1988 and 1991 against his eight-year-old half brother. *Id.* at 899, citing *State v. Eaker*, 113 Wn. App. 111, 113, 53 P.3d 37 (2002). Mr. Lewis was found guilty on November 1, 2000, but the Court of Appeals reversed his conviction and remanded for a new trial in August 2002. *Lewis*, 134 Wn. App. at 899. A new trial on the criminal charges was set for July 14, 2003. *Id.* at 900.

While Mr. Lewis was awaiting retrial, the SVP Unit of the Attorney General's Office (the AGO) received notification that the criminal case relating to the rape of his brother had been reversed. CP 34 at 207.² In a subsequent conversation between the Walla Walla county prosecutor and the AGO, the prosecutor indicated that, were Mr. Lewis to be retried and re-sentenced, he would in all likelihood receive no additional prison time, and would be determined to have served his complete sentence. *Id.*; *Lewis*, 134 Wn. App. at 904. Based on this

² The first number refers to the next index number assigned to the document by the Columbia County Clerk's Office. The second number refers to the page number assigned to the document by the Clerk's Office.

information, the AGO determined that, as a practical matter, Mr. Lewis was “about to be released,” and immediate filing was appropriate. *Id.*

The Attorney General’s Office filed the instant SVP petition in Columbia County on July 1, 2003. *Lewis*, 134 Wn. App. at 900; CP 26 at 1-2. After filing the SVP petition, and as previously anticipated, the Prosecuting Attorney dropped the Walla Walla County criminal charges on July 11, 2003. *Lewis*, 134 Wn. App. at 900.

Mr. Lewis moved to dismiss the SVP petition, arguing that he was not “about to be released from total confinement” at the time of the filing of the petition. CP 28 at 23, quoting RCW 71.09.030(1). The trial court denied the motion, reaffirmed its probable cause finding, and ordered Mr. Lewis's commitment and evaluation. *Lewis*, 134 Wn. App. at 900. On April 29, 2005, after a one-week trial, a unanimous jury determined beyond a reasonable doubt that Mr. Lewis was a sexually violent predator. CP 31 at 199. The court subsequently entered an order committing Mr. Lewis to the care and custody of DSHS. CP 23 at 202-204.

III. ARGUMENT

A. Summary of Argument

Mr. Lewis argues that the court lacked jurisdiction over his commitment trial because he was not “about to released.” Pet. at 14. He relies on RCW 71.09.030, which permits filing of an SVP petition against

an incarcerated person only where that person is “about to be released from total confinement,” and argues that it does not apply to persons who, like him, are being held pending retrial on criminal charges. Pet. at 15. This strained reading of the words “about to be released” should be rejected.

The phrase “about to be released” should not be construed to preclude an SVP petition against Mr. Lewis. The record here shows that Mr. Lewis was in fact about to be released as a result of the legitimate decision not to retry a case,³ and as such clearly falls within the statute’s purview.

Mr. Lewis also argues that, because he was not “about to be released,” the State was obligated to prove also that he had committed a recent overt act. His petition is extremely vague when making this argument, not clearly tying it to either statutory construction or to a constitutional theory. Rather, he merely cites to this Court’s requirement that the State prove a recent overt act when seeking the commitment of a person who has been released from total confinement and has been living in the community. See *In re Detention of Albrecht*, 147 Wn.2d 1, 7,

³ At the Court of Appeals, Mr. Lewis argued that it was significant that the State “elected to file the SVP petition rather than retrying him on the criminal charges.” *In re Det. of Lewis*, 134 Wn. App. at 900. The Court of Appeals properly held that “prosecutors have the discretion to retry a case—or not to retry a case—overturned on appeal.” *Id.*, citing *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990).

51 P.3d 73 (2002) (addressing constitutional due process obligation to prove a recent overt act by person who had been released). As shown in part C and D, below, neither RCW 71.09 nor due process requires proof of a recent overt act in this case.

B. The Statutory Language Allows An SVP Petition Against Mr. Lewis Because He Was Previously Convicted Of A Sexually Violent Offense And He Was About To Be Released From Total Confinement.

To address Mr. Lewis's argument relating to the phase "about to be released," we start with the statute. The court's fundamental objective in construing a statute is to ascertain and carry out the intent of the Legislature. *E.g. State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). Nothing in the statutory language or scheme suggests that the Legislature intended to preclude SVP petitions against a person, previously convicted of a sexually violent offense and in total confinement, who was about to be released as a result of the resolution of criminal charges that had caused him to remain confined.

1. The Requirements of RCW 71.09.030

RCW 71.09.030 provides in pertinent part as follows:

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; . . . 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 . . . or the attorney general . . . may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

RCW 71.09.030.⁴

In total, RCW 71.09.030 describes five general scenarios for an SVP petition. One scenario readily applies to Mr. Lewis. The other scenario concerns persons who, unlike Mr. Lewis, have been released from confinement.

Subsection (1) describes Mr. Lewis, because it speaks of a person who "has been convicted of a sexually violent offence" and who is "about to be released from total confinement." Subsection (5), on the other hand, describes a person who "previously has been convicted of a sexually violent offence and *has been released* from total confinement and has committed a recent overt act." (Emphasis added). Thus, the statute distinguishes a person who is "about to be released" from a person who "has since been released from total confinement."

⁴ The other three categories for filing SVP petitions describe certain juveniles, certain persons incompetent to stand trial, and certain persons not guilty by reason of insanity. These three categories are not relevant to Lewis's argument.

2. The Record Confirms That Lewis Was “About To Be Released.”

The record confirms that Mr. Lewis falls within the category of persons encompassed by RCW 71.09.030(1) because, at the time the petition was filed, he was about to be released from complete confinement and had not previously been released into the community.

Mr. Lewis was convicted of a sexually violent offense in 1992.⁵ He had been in continuous confinement since that conviction, either with the Department of Corrections, the Department of Social and Health Services, or the Columbia County jail.⁶

As noted above, following remand by the Court of Appeals, the State was informed that the local prosecutor did not intend to retry Mr. Lewis. *See Lewis*, 134 Wn. App. at 904. As Mr. Lewis approached his trial date and faced no trial, he was, then, actually facing release – he was under no sentence and no other criminal proceeding was pending. Accordingly, when the AGO filed the SVP petition, Mr. Lewis fell into the category of a person who was “about to be released from total

⁵ Child molestation first degree is specifically identified as a “sexually violent offense” in RCW 71.09.020(15).

⁶ In passing, the petition implies that Mr. Lewis was released at some point. *See* Pet. at 2 (putting the term released into quotation marks). This Court should not mistakenly believe that Mr. Lewis was in fact ever released. Rather, he was continuously confined by the State after his initial conviction in 1992, first after having been sentenced for two counts of child molestation first degree, then pursuant to the filing of an SVP petition in 1999, then pending trial on the charge of rape of a child first degree, then pursuant to his conviction in 2000, and then, finally, pending retrial after the Court of Appeals’ remand in 2002.

confinement.” In sharp contrast, he clearly is not a person who “had since been released from total confinement.”

3. Mr. Lewis’s Statutory Construction Leads To Absurd Results.

Mr. Lewis argues that he is within a category of persons not contemplated by the Legislature, which he calls “those who are awaiting trial on criminal charges.” Pet. at 16. Citing the principle of *expressio unius est exclusion alterius*, he contends that the Legislature intended to preclude filing of SVP petitions against such persons.

As a threshold matter, Mr. Lewis’s argument that the statute excludes him is simply an incorrect reading of statutory language. As shown above, he fits readily into the plain meaning of statutory language in that he was “about to be released.” As the record here illustrates, a person awaiting retrial on criminal charges can, as a practical matter, be a person who is “about to be released from total confinement.” That is possible because courts and prosecutors can drop criminal charges against such persons, which in turn would lead, absent an SVP petition, to release.

Second, Mr. Lewis’s argument overlooks a far more logical construction of the statutory language. The statute uses a general, procedural phrase that describes a practical step: When a person is “about to be released” from total confinement and appears to be a SVP, the State

may initiate the SVP petition under subsection (1). The phrase “about to be released from total confinement” serves no purpose other than to explain how, as a practical matter, subsection (1) is implemented. Nowhere does the statute suggest that there is a narrow and technical meaning to the words “about to be released” precluding its application here.

The Court of Appeals’ decision is also consistent with the purposes of the statute. The statutory language shows that the Legislature was concerned with confining and treating persons who are shown, beyond a reasonable doubt, to meet the definition of a sexually violent predator. *See* RCW 71.09.020(15) (defining sexually violent predator); RCW 71.09.060 (defining procedures in an SVP commitment case). The Legislature has made clear that its overarching purpose in enacting the SVP law is to protect the public from “a small but extremely dangerous group of sexually violent predators” who do not qualify for treatment or incapacitation under the general civil commitment law, RCW 71.05.” RCW 71.09.010. These purposes are defeated if RCW 71.09.030(1) is read to preclude the filing of an SVP petition against a dangerous offender who has been continuously confined simply because he is being released in lieu of retrial on a matter for which he was previously convicted by a

unanimous jury, as opposed to being released at the end of his criminal sentence.⁷

Finally, the result argued by Mr. Lewis is inconsistent with case law. This Court had recognized that the State has a “compelling” interest in protecting the public from sexually violent predators. *In re Young*, 122 Wn.2d 1, 41, 857 P.2d 989(1993). Those interests are defeated by Mr. Lewis’s pointless distinction between persons released at the end of a criminal sentence for a sexually violent offense, and persons released because they will not be retried on criminal charges initiated following completion of such a sentence.

Both the Legislature’s broad words and the purposes of the statute confirm that Mr. Lewis falls within the category of a person who was “about to be released.” He was therefore subject to an SVP petition under RCW 71.09.030(1). It is irrelevant that Mr. Lewis, in the absence of the prosecutor’s stated intention not to retry the case, might have faced a possible criminal trial. Mr. Lewis was totally confined at the time the SVP petition was filed.⁸ He had been in total confinement since his

⁷ No person would be continually held based on subsequent criminal charges without the substantial involvement of the criminal courts. The courts would be involved at charging and bail setting. The defendant would, of course, then have all the constitutional rights belonging to the accused, including the right to counsel.

⁸ Mr. Lewis was being held at the county jail at the time of the petition’s filing. Such confinement clearly constitutes “total confinement” pursuant to RCW 9.94A.030(47)(1996). *See also Albrecht*, 147 Wn.2d at 9.

sentencing for a sexually violent offense in 1992. In the absence of the State's filing of an SVP petition, Mr. Lewis would have been released from total confinement.

C. Nothing in RCW 71.09 Requires The State to Plead or Prove a Recent Overt Act By Lewis.

Mr. Lewis argues that, because he was not "about to be released" from total confinement, the State is required to plead and prove a recent overt act (ROA). Pet. at 15. He is factually wrong in this regard. As noted above, Mr. Lewis's argument should be rejected based on the statutory language in RCW 71.09.030(5), which requires proof of a recent overt act only where the person, previously convicted of a sexually violent offense, "has since been released" from total confinement. Therefore, the clear language of the statute encompasses Mr. Lewis's circumstances.

RCW 71.09.060, addressing commitment procedures in an SVP case, confirms this conclusion. RCW 71.09.060(1) provides in pertinent part as follows:

(1) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.

...

If, on the date that the petition is filed, the person was living in the community after release from custody, the state

must also prove beyond a reasonable doubt that the person had committed a recent overt act . . . ^[9]

This statute confirms what is shown by RCW 71.09.030(1) and (5): there is no statutory requirement to prove a recent overt act unless the person, prior to the petition's filing, had been released from custody. Mr. Lewis cannot credibly contend that he had been released. Therefore, under both RCW 71.09.030 and .060(1), the Court of Appeals correctly determined that no proof of a recent overt act was required by statute. *Lewis*, 134 Wn. App. at 903.

D. Due Process Does Not Require Proof Of A Recent Overt Act.

At the time of the petition's filing, Mr. Lewis had been continuously incarcerated since 1992, when he was sent to prison for two counts of child molestation first degree, a sexually violent offense, based on his assault of his six-year-old step-sister. Because he was not "living in the community" at any time since conviction for this sexually violent offense, the clear language of the statute does not require proof of a recent overt act. Any obligation to prove an ROA under these circumstances, then, must arise from due process. Due process, however, does not require any showing of an ROA under the circumstances presented here.

⁹ RCW 71.09.020(10), a "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.

1. Lewis Provides No Constitutional Argument That Warrants Response By This Court.

As a threshold matter, Mr. Lewis provides no meaningful analysis of the due process clause or how it applies to his case. He explicitly limits his due process argument regarding a recent overt act to his (mistaken) theory that the state failed to prove that Mr. Lewis was “about to be released” from custody. Pet. at 17. For example, he confirms that he is arguing that *Albrecht* stands only for the proposition that a recent overt act is required for a person “*who has been released from confinement... but is incarcerated the day the petition is filed... on a charge that does not constitute a recent overt act.*” Pet. at 15 (quoting *Albrecht*, 147 Wn.2d at 11, n. 11) (emphasis added). Elsewhere, he confirms that he argues only that *Albrecht* applies to “[a]n individual *who has recently been free in the community* and is subsequently incarcerated.” Pet. at 15-16 (quoting *Albrecht*, 147 Wn.2d at 11) (emphasis added). As shown above, however, Mr. Lewis has never been free in the community since his conviction for a sexually violent offense in 1992, and the SVP petition was filed when he was about to be released from total confinement.

In contrast to these arguments using the false premise that he has been released to or was free in the community, Mr. Lewis makes no argument that due process requires proof of a recent overt act by persons

who, like he, were totally confined when the petition was filed and who had been totally confined since conviction on a sexually violent offence.

Accordingly, Mr. Lewis's due process claim fails because it depends entirely on one of two faulty premises: (1) that he was not "about to be released" when the petition was filed; or (2) that he had somehow been released prior to the time of the filing of the SVP petition. The Court should not reach any other due process issues because no other theories have been not raised or briefed.

2. The Due Process Clause Does Not Require Proof Of A Recent Overt Act For A Person In Total Confinement.

Civil commitment is constitutionally permissible only if the State can demonstrate that the person who is the subject of the commitment action is mentally disordered and, as a result of that disorder, is a danger to others. *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct.1780, 118 L.Ed 2d 437 (1992); *Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L.Ed 2d 296 (1986)); *In re Detention of Henrickson*, 140 Wn.2d 686, 694, 2 P.3d 473 (2000); *In re Detention of Albrecht*, 147 Wn.2d at 7; *In re Marshall*, 156 Wn.2d 150, 156-57, 125 P.3d 111 (2005). In certain cases, this Court has determined that due process requires that dangerousness be proven, at least in part, by evidence of recent behavior demonstrating the person's

dangerousness – a recent overt act. *Young*, 122 Wn. 2d at 41; *Albrecht*, 147 Wn. 2d at 10. The rationale for the rule appears to be that the accuracy of a finding of current dangerousness can be enhanced if the evidence of current dangerousness includes recent behavior demonstrating that dangerousness. See, *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D. Wis. 1972), cited by *In re Harris*, 98 Wn.2d 276, 284, 654 P.2d 109 (1982), relied upon by *Young*, 122 Wn.2d at 39-40.¹⁰

Therefore, if the person is free in the community on the day the State files the SVP petition, the State is obligated to include a recent overt act as part of its proof of current dangerousness. *In re Young*, 122 Wn.2d at 41; RCW 71.09.060(1). If, however, on the day the State files the SVP action, the offender is incarcerated for a sexually violent offense or for an act that would itself constitute a recent overt act, the State is not constitutionally or statutorily obligated to prove a

¹⁰ Before the court considers expanding the recent overt act doctrine beyond the statutory requirements, it should note that most jurisdictions have either abandoned or rejected the doctrine outright. See e.g. *Scopes v. Shah*, 398 N.Y.S.2d 911, 913 (1977) (proof of a recent overt act is “too restrictive and not necessitated by substantive due process. The lack of any evidence of a recent overt act . . . does not necessarily diminish the likelihood that the individual poses a threat of substantial harm to himself or others.”); *In the Matter of Salem*, 228 S.E.2d 649, 652 (N.C. App. 1976) (“An overt act may be clear, cogent and convincing evidence which will support a finding of imminent danger, but we cannot agree that there must be an overt act to establish imminent dangerousness.”); *In re Slabaugh*, 475 N.E.2d 497, 500 (Ohio Ct. App. 1984) (“We do not believe, as contended by appellant, that a mentally ill person can be said to be dangerous only if there is evidence that the person recently committed a dangerous overt act or threatened one.”). Based on recent review of case law, the only jurisdiction, other than Washington, that continues to hold on to the ROA rule is Iowa. *Matter of Mohr*, 383 N.W.2d 539 (Iowa S. Ct. 1986).

recent overt act at the commitment trial. *In re Henrickson*, 140 Wn.2d at 695.

Where, however, a person “*has been released from confinement...* but is incarcerated the day the petition is filed... on a charge that does not constitute a recent overt act,” this Court has determined that due process requires proof of an ROA. *Albrecht*, 147 Wn.2d at 11, n. 11. In asserting that his case controlled by *Albrecht*, Mr. Lewis implies that being held pending retrial on a criminal matter (where a jury had previously determined, beyond a reasonable doubt, that he was guilty) is akin to Mr. Albrecht’s being held on a violation of community placement. Pet. at 2-3. He appears to suggest, paradoxically, that the *failure* of the DOC to release him in 1999 in the absence of a release address places him in the same category as the Mr. Albrecht, who was in fact released. Pet. at 2.

Both arguments fail, in that Mr. Albrecht’s case bears no resemblance to that of Mr. Lewis. Mr. Albrecht, after serving a sentence for child molestation second degree, a sexually violent offense, was released from prison to community placement. *Albrecht*, 147 Wn. 2d at 4. *While living in the community*, Mr. Albrecht violated a condition of his community placement and was sentenced for 120 days in jail. He was incarcerated on that community placement violation when the SVP petition was filed. *Id.* at 5. This Court held that, “once the offender is

released into the community, as Albrecht was, due process requires a showing of current dangerousness.” Id. at 10 (emphasis added).

In stark contrast, at Mr. Lewis was being held pending retrial on a different child rape charge and he had never been released into the community since 1992. CP 26 at 1-2; CP 1 at 8. The distinctions that Mr. Lewis identifies have no demonstrated constitutional significance. Due process has never required the State to plead or prove a recent overt act under circumstances where a person was never released to the community.

This Court has avoided constitutional requirements that would create impossible or “absurd” burdens for the State. For instance, in *Henrickson*, the Court held that, as a general principle, the State does not need to prove an ROA where the individual is confined at the time the petition is filed, because such a requirement would impose an absurd burden on the State. 140 Wn.2d at 696. The rationale for this latter rule is that, “for incarcerated individuals, a requirement of a recent overt act under the statute [RCW 71.09] would create a standard which would be impossible to meet. . . . Due process does not require that the absurd be done before a compelling state interest can be vindicated.” *Id.*, citing *Young*, 122 Wn.2d at 41 (quoting *People v. Martin*, 107 Cal.App.3d 714, 725, 165 Cal Rptr. 773 (1980)). A prisoner’s movements are restricted

and supervised; lacking access to his or her victim pool, the person's ability to offend is substantially reduced.¹¹ Thus, as correctly noted by the Court of Appeals, "[b]ecause Mr. Lewis was incarcerated for a sexually violent offense and not released, the State was not required to plead or prove a recent overt act." *Lewis*, 134 Wash. App. at 903.

IV. CONCLUSION

The State of Washington respectfully requests that the Order of Commitment of the trial court be affirmed.

Respectfully submitted this 9th day of October 2007.



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¹¹ *See also In re Pugh* where the Court of Appeals recognized that, "[t]he absence of more recent overt acts during confinement is readily explainable as a lack of opportunity to offend rather than a demonstration of improvement." 68 Wn. App. 687, 696, 845 P.2d 1034 (1993)(emphasis added).