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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Detention of:

DAVID FAIR,

Petitioner.

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**STATE OF WASHINGTON'S RESPONSE TO PETITION FOR  
REVIEW**

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ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ISSUE PRESENTED FOR REVIEW.....1

III. STATEMENT OF THE CASE.....2

IV. REASONS WHY REVIEW SHOULD BE DENIED .....8

    A. The Court of Appeals Used a Straightforward Application of the Law to the Record in Correctly Concluding That No Proof of a Recent Overt Act Is Required.....8

    B. The Court of Appeals Correctly Applied Well-Settled Law in Determining that Due Process Does Not Require Proof of a Recent Overt Act.....9

        1. Mr. Fair’s release to the community during his SSOSA does not require the State to prove a recent overt act. ....9

        2. The claim that prior expiration of Mr. Fair’s sentence for child molestation requires proof of a recent overt act is incorrect.....14

    C. Sufficient Evidence Supports Finding of Fact No. 8 and Conclusion of Law No. 7.....16

        1. Finding of Fact No. 8 is supported by the record. ....16

        2. Conclusion of Law No. 7 is supported by the record. ....17

V. CONCLUSION .....19

## TABLE OF AUTHORITIES

### Cases

<i>Fair v. State</i> , 139 Wn. App 532, 161 P.3d 466 (2007).....	7, 12, 16
<i>In re Detention of Halgren</i> , 122 Wn. App. 660, 98 P.3d 981 (2004).....	10, 11
<i>In re Henrickson</i> , 140 Wn.2d 686, 2 P.3d 473 (2000).....	passim
<i>In re Hovinga</i> , 132 Wn. App. 16, 130 P.3d 830 (2006).....	12, 13
<i>In re Kelley</i> , 133 Wn. App. 289, 135 P.3d 554 (2006).....	12
<i>In re the Detention of Albrecht</i> , 147 Wn.2d 1, 51 P.3d 73 (2002).....	9, 13
<i>In re the Detention of Paschke</i> , 121 Wn. App. 614, 90 P.3d 74 (2004).....	12
<i>In re Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	17
RCW 71.09.020(16).....	17
<i>State v. Keller</i> , 98 Wn.2d 725, 657 P.2d 1384 (1983).....	16

### Statutes

RCW 9.94A.030(7).....	13
RCW 9.94A.120(7).....	13
RCW 9.94A.634(3)(c) .....	14

RCW 9.95.0001(5).....	13
RCW 71.09 .....	passim
RCW 71.09.020(15).....	11
RCW 71.09.030 .....	15
RCW 71.09.030(1).....	15
RCW 71.09.060(5).....	8, 14

**Rules**

RAP 13.4(b)(1) .....	19
RAP 13.4(b)(2) .....	19
RAP 13.4(b)(3) .....	2, 19
RAP 13.4(b)(4) .....	2, 19

## I. INTRODUCTION

David Fair seeks review of the Court of Appeals, Division II decision affirming his civil commitment as a Sexually Violent Predator (SVP). Mr. Fair's argument that the Court of Appeals misinterpreted the Due Process Clause of the Federal and State Constitutions ignores well-established law, as well as the consistent decisions of the appellate courts of this state. The assertion that the State must allege and prove a recent overt act simply because Mr. Fair's sentence for a sexually violent offense expired prior to his sentence for a violent non-sexual offense departs from both the law and common sense, and would reward sex offenders for committing additional, non-sexual violent offenses by effectively precluding the State from filing an SVP petition. Consistent with the decisions of this Court, the Court of Appeals correctly concluded that neither the statute nor the Federal or State Constitutions require the State to prove a recent overt act prior to release from incarceration.

## II. ISSUE PRESENTED FOR REVIEW

1. Is review by this Court appropriate where the Court of Appeals' decision in this case correctly applied the law established by this Court's ruling in *In re Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000)?

2. Does the Court of Appeals' affirmation of Finding of Fact No. 8, that Mr. Fair was incarcerated on two concurrent convictions on the

date of SVP filing, present an issue of substantial public interest meriting review pursuant to RAP 13.4(b)(4)?

3. Does the Court of Appeals' affirmation of Conclusion of Law No. 7, wherein the trial court concluded Mr. Fair meets the SVP criteria under RCW 71.09, present a significant question of law meriting review pursuant to RAP 13.4(b)(3)?

### **III. STATEMENT OF THE CASE**

The Kitsap County Superior Court committed Mr. Fair as a sexually violent predator (SVP) on May 18, 2006, following a bench trial. CP at 427-428. On September 27, 1988, Mr. Fair pled guilty to one count of child molestation second degree for the molestation of a twelve-year-old girl to whom he gave alcohol, and then kissed and fondled her breasts and buttocks. CP at 6-7. The facts of that case involved the sexual touching of three different girls, ages twelve and thirteen, after providing them with alcohol. *Id.* On February 15, 1989, he was sentenced to a Special Sex Offender Sentencing Alternative (SSOSA) sentence. *Id.* The SSOSA included a suspended sentence of 600 days confinement with credit for 137 days served. CP at 70. On November 1, 1989, the State moved to revoke the SSOSA based on Mr. Fair's failure to maintain sex offender treatment and his failure to report to the Department of Corrections. CP at 7.

On November 10, 1989, Mr. Fair met an acquaintance, whom he attacked and from whom he stole both money and a vehicle. CP at 123. Mr. Fair then absconded to New Mexico where he robbed an elderly couple at gunpoint. *Id.* While fleeing the scene, he ran through a road block and struck another vehicle, injuring the occupants. CP at 124. Mr. Fair was arrested, convicted and sentenced to serve 90 months in a New Mexico prison. *Id.*

Mr. Fair was extradited to Washington and on June 10, 1992, the Kitsap County Superior Court sentenced him to 87 months for robbery in the first degree for the events of November 10, 1989, to run consecutive to the New Mexico sentence. CP at 123. The Kitsap County Superior Court also revoked Mr. Fair's SSOSA, returning him to prison to serve 20 months on the child molestation second degree conviction, concurrent with the 87 month sentence for robbery. CP at 122. Mr. Fair was scheduled to be released from prison on June 28, 2004. CP at 11. On June 23, 2004, the State filed a petition to commit him as a SVP. CP at 1-2. Between April 24, 1990 and June 23, 2004, Mr. Fair was continuously incarcerated and was incarcerated on the date the petition was filed. CP at 11, 81. Mr. Fair had been in the community for only nine months, between February 15, 1989 and November 10, 1989, serving his SSOSA sentence, prior to committing a violent felony, absconding to

New Mexico, and being re-incarcerated. CP at 69-77, 81, 90. Mr. Fair waived his right to a jury trial on the SVP petition and the case proceeded to a bench trial. CP at 139, 416.

At trial, Lisa Dandesku, Mr. Fair's primary treatment provider at the Department of Correction Sexual Offender Treatment Program, testified that Mr. Fair completed the twelve-month treatment program in March 2004. CP at 418; VRP at 37. During treatment, Mr. Fair admitted to having had sexual contact with 19 different individuals, including 17 child victims. VRP at 41. Mr. Fair also minimized his violent, non-sexual offenses. VRP at 44. During treatment, Mr. Fair reported sexual arousal and masturbation to thoughts of minor girls. VRP at 48. Ms. Dandesku testified that Mr. Fair "did not want to stop masturbating to minors" and did not think there was anything wrong with having sex with children. *Id.* At the conclusion of treatment, the clinical team assessed Mr. Fair as a high risk to reoffend. *Id.*

Dr. Dennis Doren, a psychologist, also testified for the State. CP at 418. Dr. Doren testified that Mr. Fair admitted offending against 16 individuals, generally in the 8 to 12-year-old age range. VRP at 223. Mr. Fair admitted having sexual fantasies about children and that he enjoyed those fantasies and was reluctant to give them up. VRP at 229. Dr. Doren testified that sexual interest in children highly correlated with

sexual reoffending in convicted sex offenders. CP at 418-419. Dr. Doren diagnosed Mr. Fair with pedophilia, paraphilia (with a descriptor of urophilia), alcohol dependence, cannabis abuse, and antisocial personality disorder. *Id.*

Dr. Doren concluded that Mr. Fair's pedophilia was a mental abnormality that predisposed him to commit criminal sexual acts to a degree that made him a menace to the health and safety of others. *Id.* Dr. Doren opined that Mr. Fair's antisocial personality disorder caused him to have "serious difficulty controlling his sexually violent behavior" and that Mr. Fair was likely to commit predatory acts of sexual violence if not confined in a secure facility. CP at 419; VRP at 291.

In evaluating Mr. Fair's likelihood to reoffend, Dr. Doren relied on several actuarial instruments, but because the test results were mixed, Dr. Doren could not reach a conclusion about Mr. Fair's likelihood to reoffend based solely on those instruments. CP at 419; VRP at 321. Dr. Doren therefore considered other risk factors, specifically, whether Mr. Fair had a high degree of psychopathy coupled with sexual deviance. VRP at 321. Dr. Doren used the Psychopathy Checklist Revised (PCL-R), a psychological test used "to assess the degree to which people have a certain type of personality structure" to assess Mr. Fair's psychopathy. VRP at 318. Under this testing method, the highest score measuring

whether someone is a "prototypic psychopath" is 40. VRP at 320. Mr. Fair scored 30, which ranked him as having a high degree of psychopathy. *Id.* Dr. Doren testified that even without sexual deviancy, a high degree of psychopathy correlated with a higher degree of sexual recidivism. VRP at 321.

Dr. Doren also testified that Mr. Fair met the criteria for sexual deviance based on his pedophilia diagnosis. VRP at 323. Dr. Doren testified that even without Mr. Fair's self-reports of additional victims, he would conclude that Mr. Fair met the criteria for sexual deviancy based on his repeated reports of sexually fantasizing about "something other than consenting adults." VRP at 325.

At trial, Mr. Fair testified that he fabricated fantasies and offenses in order to get into a treatment program instead of serving his time in the general prison population. VRP at 471-472, 475-478. Mr. Fair presented the testimony of Dr. Theodore Donaldson, a psychologist, in his defense. CP at 419. Dr. Donaldson believed that Mr. Fair had a 36 percent probability of recidivism over a fifteen-year period based on his score of four on the Static-99, one of that actuarial instruments administered by Dr. Doren. VRP at 103. According to Dr. Donaldson, Dr. Doren's recidivism calculation was too high because he should not have included the unverified incidents that Mr. Fair reported. VRP at 116-117.

Dr. Donaldson testified that he agreed with Dr. Doren in that a person who has both sexual deviancy and high psychopathy is at a very high risk to sexually reoffend. VRP at 183. Dr. Donaldson testified that he also agreed with Dr. Doren's scoring of the PCL-R and that Mr. Fair is a psychopath. *Id.*

The trial court found that Dr. Doren's testimony was more persuasive and credible than Dr. Donaldson's. CP at 420. It concluded beyond a reasonable doubt that Mr. Fair suffered from a mental abnormality and was likely to engage in sexually violent acts if not confined. *Id.* Mr. Fair appealed this decision to Division II of the Court of Appeals. CP at 426. In a decision published in part, the Court of Appeals affirmed the finding that Mr. Fair is a SVP. The court also stated,

We conclude that the expiration of one sentence, without an intervening release to the community, does not prevent the State from filing a SVP petition while a defendant is still incarcerated, so long as one of the offenses leading to the incarceration meets the definitions of RCW 71.09.020(15) or RCW 71.09.020(10). Thus, we affirm the trial court's decision and hold that neither the SVP statute nor due process requires that an ROA be proven under these circumstances.

*Fair v. State*, 139 Wn. App 532, 542, 161 P.3d 466 (2007) (internal citations omitted). Mr. Fair filed a timely petition for review.

**IV. REASONS WHY REVIEW SHOULD BE DENIED**

**A. THE COURT OF APPEALS USED A STRAIGHTFORWARD APPLICATION OF THE LAW TO THE RECORD IN CORRECTLY CONCLUDING THAT NO PROOF OF A RECENT OVERT ACT IS REQUIRED.**

Under RCW 71.09.060(5), the State is required to plead and prove a recent overt act to the finder of fact only “if, on the date that the petition is filed, the person was living in the community after release from custody.” Mr. Fair was in total confinement on the day that the State initiated RCW 71.09 proceedings and thus has no statutory right to require the State to plead and prove a recent overt act prior to committing him. As this Court held in *Henrickson*:

Periods of temporary release after arrest and prior to extensive confinement do not modify the statute's unambiguous directive that the State need not prove a recent overt act when the subject of a sexually violent predator petition is incarcerated on the day the petition is filed.

140 Wn.2d at 476-77. As a result, any requirement that the State plead and prove a recent overt act must arise from the due process clause. The Court of Appeals correctly concluded that, considering Mr. Fair's facts, the State is not required to allege nor prove a recent overt act. This conclusion comports with this Court's previous opinions. Therefore, review of this well-settled issue should be denied.

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**B. THE COURT OF APPEALS CORRECTLY APPLIED WELL-SETTLED LAW IN DETERMINING THAT DUE PROCESS DOES NOT REQUIRE PROOF OF A RECENT OVERT ACT.**

**1. Mr. Fair's Release To The Community During His SSOSA Does Not Require The State To Prove A Recent Overt Act.**

Mr. Fair argues that, because he was serving his SSOSA sentence in the community, the State is required to prove a recent overt act during that time period. Pet. at 9-16. As authority for this proposition he cites *In re the Detention of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002), as well as dissents from a variety of sex predator cases. *Albrecht*, however, neither applies to nor controls this case. The Court of Appeals' decision in this case is not in conflict with this Court's decision in *Albrecht* as that case applies only to the unique circumstance of an RCW 71.09 filing while a person is serving a short jail term for violation of conditions of community supervision. *Albrecht*, 147 Wn.2d at 11, n. 11. The *Albrecht* decision is unique to the unusual circumstance created by a *community supervision* violation and does not apply where a person is returned to serve an underlying sexually violent offense due to a parole violation. Rather, the facts of this case fit squarely within this Court's decision in *Henrickson*, as argued above. The *Albrecht* decision makes it clear that *Henrickson* remains good law. Unlike Mr. Albrecht, Mr. Fair was not in jail on a short incarceration for a

minor community placement violation at the time the State filed its SVP petition. Instead, when the State filed its petition, Mr. Fair had been imprisoned for twelve years following revocation of his SSOSA, imposed after his conviction for child molestation. As such, his case is controlled by *Henrickson*.

In *Henrickson*, the appellant, like Mr. Fair, had been convicted of a sexual offense but was supervised in the community, having been conditionally released on bond, for three years while appealing his exceptional sentence. *Henrickson*, 140 Wn.2d at 689. On remand, the trial court sentenced him to 50 months for attempted kidnapping in the first degree and communication with a minor for immoral purposes. In *Henrickson's* companion case, *In re Halgren*, the appellant had been convicted in 1996 for unlawful imprisonment involving a prostitute. He was in the community, being supervised, for three months prior to receiving a 60-month exceptional sentence. *Id.* at 691; *In re Detention of Halgren*, 122 Wn. App. 660, 98 P.3d 981 (2004).

On appeal, both Mr. Henrickson and Mr. Halgren argued that, although incarcerated on the date of their respective petitions' filings, due process required that the State prove a recent overt act because each had been living in the community after his most recent arrest. This Court rejected the argument, stating:

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).

*Id.* at 688-89. Requiring proof of a recent overt act, the Court cautioned,

would elevate Henrickson's and Halgren's periods of temporary release during the disposition of their criminal cases over the sexually related criminal acts that actually gave rise to their extensive periods of confinement. This would lead to absurd results because, in effect, any post-arrest supervised release for whatever reason would provide the opportunity to circumvent the distinctions of the statute. “[D]ue process does not require that the absurd be done before a compelling state interest can be vindicated.”

*Id.* at 696 (internal citations omitted).

This case falls squarely within the rule of *Henrickson*. When the State filed its petition, Mr. Fair was incarcerated for child molestation in the second degree after revocation of his SSOSA. Child molestation in the second degree is a sexually violent offense pursuant to RCW 71.09.020(15). Thus, just as in *Henrickson*, Mr. Fair had been living in the community “but [was] incarcerated on the day a sexually violent predator petition [was] filed,” following his conviction for a sexually violent offense or an act that by itself would have qualified as a recent overt act. *Id.* at 688-89. While Mr. Fair is correct that, unlike Mr. Henrickson, Mr. Fair’s sentence for that sexual offense had

technically expired on the date of the SVP petition's filing, this is a distinction without a difference. Mr. Fair was continuously confined from the time of his SSOSA revocation to the time of his release on the robbery conviction. To hold that the fact of one sentence's expiration prior to the other's, in the absence of an intervening release from custody into the community, prevents the State from filing a petition would lead to an absurd result. This is consistent with Division II's statement in this case that:

Here, Fair's interpretation of the SVP statute would lead to the absurd result of allowing Fair to escape SVP commitment procedures merely because he committed another serious crime while briefly released into the community. We do not believe that this was the legislature's intent when enacting RCW 71.09.030.

*Fair*, 139 Wn. App. at 542.

There is no conflict in the case law. Appellate courts of this state addressing cases involving revocation of parole have reached a consistent result. See *In re the Detention of Paschke*, 121 Wn. App. 614, 90 P.3d 74 (2004); and *In re Kelley*, 133 Wn. App. 289, 135 P.3d 554 (2006). An illustrative example is provided by the Court of Appeal's decision in *In re Hovinga*, 132 Wn. App. 16, 130 P.3d 830 (2006). *Hovinga* involved an offender who had been sentenced in 1981 for statutory rape of a nine year old girl, a sexually violent offense. Mr. Hovinga was paroled in

1988. His parole was revoked in April of 1992, after he admitted to following young girls in a department store while fondling himself. 132 Wn. App. at 19. The State filed an SVP petition shortly before his scheduled release in 2003. *Id.*

The Court of Appeals rejected Mr. Hovinga's argument that under *Albrecht*, the State must prove a recent overt act. The Court noted that "community placement involves post release supervision and begins either when an offender completes his term of confinement or when he is transferred to community custody in lieu of early release. RCW 9.94A.030(7)." *Id.* In contrast, "parole pertains to '*that portion of a person's sentence* for a crime committed before July 1, 1984, served on conditional release in the community subject to board controls and revocation.'" *Id.* citing RCW 9.95.0001(5). Thus Mr. Hovinga "was incarcerated for a sexually violent offense when the petition was filed," and no proof of a recent overt act was required. *Id.*

Like an offender on parole, an offender serving a SSOSA sentence in the community is actually serving out his underlying sentence. If that suspended sentence is revoked, he is returned to total confinement on the underlying criminal conviction for whatever period remains on the underlying sentence. RCW 9.94A.120(7). This is entirely distinct from the case of an offender who is released on a standard sentence and subject

to community custody: Such an offender can receive no more than a sixty day sanction for violating his probation. RCW 9.94A.634(3)(c).

All of the Courts of Appeals' decisions, and the decision here, have been consistent with *Henrickson* in every critical way. Just as no proof of a recent overt act was required in their cases, none is required here. There is no conflict among the appellate courts as to how these SVP cases are decided. Therefore, review by this Court is not warranted.

2. **The Claim That Prior Expiration Of Mr. Fair's Sentence For Child Molestation Requires Proof Of A Recent Overt Act Is Incorrect.**

Mr. Fair argues that, because his sentence for child molestation expired prior to the expiration of his sentence for robbery, the State is required to prove a recent overt act. This argument is without merit. When the State initiated RCW 71.09 proceedings, Mr. Fair had been in continuous incarceration since 1990 completing his sentence for both the 1988 child molestation and the 1989 robbery. For due process purposes, which sentence expired first should not matter. Because Mr. Fair had never been released into the community, RCW 71.09.060(5) does not apply. To conclude that Mr. Fair's time in the community on his SSOSA sentence in 1989 requires proof of a recent overt act in 2004 would directly contradict this Court's conclusion in *Henrickson* that "[D]ue

process does not require that the absurd be done before a compelling state interest can be vindicated.” 140 Wn.2d at 696 (internal citations omitted).

Moreover, this argument is absurd on its face. Such an approach would reward Mr. Fair for his robbery conviction and sentence. It would effectively preclude the State from filing an SVP petition where the offender is serving concurrent sentences in which the sentence for the non-sexual offense is longer than the sentence for the sexual offense. Had the State attempted to file its petition at the expiration of Mr. Fair’s child molestation sentence, it would have been filing long before the offender’s actual release date, and would have been in violation of RCW 71.09.030(1).<sup>1</sup> On the other hand, if the State waits until the expiration of the longer sentence and the prospect of actual release into the community, as it did here, it would, according to Mr. Fair, be required to prove a recent overt act because the offender is no longer confined for a sexually violent offense or an act that would constitute a recent overt act. Such a rule is absurd on its face and would undermine the State’s compelling interest in protecting the community from dangerous sex offenders. The Court of Appeals correctly applied this Court’s statement that a statute should not be interpreted “to

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<sup>1</sup> RCW 71.09.030 states in pertinent part: 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**...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 (emphasis added).

lead to strained or absurd results.” *Fair*, 139 Wn. App. at 542, citing *State v. Keller*, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983).

**C. SUFFICIENT EVIDENCE SUPPORTS FINDING OF FACT NO. 8 AND CONCLUSION OF LAW NO. 7.**

**1. Finding Of Fact No. 8 Is Supported By The Record.**

Mr. Fair challenges Finding of Fact No. 8, not because it is not supported by the record, but rather because he believes it “purports to imply” that Mr. Fair was serving a concurrent sentence when RCW 71.09 proceedings were initiated. Finding of Fact No. 8 is clearly supported by the record, stating:

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.

Whatever implication Mr. Fair may purport to glean from this finding of fact is irrelevant. As articulated above, Mr. Fair was incarcerated under the concurrent sentences imposed for his SSOSA revocation and robbery on June 10, 1992. The fact that the SSOSA sentence expired in 2000 or 2001 does not negate the fact that he was serving the same prison term on June 23, 2004, at the time of the RCW 71.09 filing, to which he was sentenced on June 10, 1992. CP at 47, 90-103, 105-109. As such, the trial court’s finding of fact is supported by the record. This case-specific, factual issue does not raise an issue meriting review.

**2. Conclusion Of Law No. 7 Is Supported By The Record.**

Mr. Fair argues that there was insufficient evidence to support

Conclusion of Law No. 7. Conclusion of Law No. 7 states:

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.

Mr. Fair bases his argument that this conclusion is incorrect solely on the claim that the State was required to prove a recent overt act beyond a reasonable doubt and that, absent such proof, the trial court could not have found the essential elements of RCW 71.09.020(16) beyond a reasonable doubt. Petition at 17-20. As argued above, the Court of Appeals and the trial court correctly concluded that the State is not required to allege or prove a recent overt act in Mr. Fair's circumstances.

Mr. Fair correctly notes that the criminal standard of review applies to sufficiency of the evidence challenges under the sexually violent predator statute. *In re Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). Under this standard, "when viewed in the light most favorable to the State, there must be sufficient evidence" to allow a rational trier of fact to conclude that the person is a sexually violent predator. *Id.* Mr. Fair seems to argue that the use of the word "further" in the following passage requires the State to prove a recent overt act:

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 overt act, due process does not require the State to prove a *further* overt act occurred between arrest and release from incarceration.

*Henrickson*, 140 Wn.2d at 697 (emphasis added). This is a misreading of

*Henrickson's* holding:

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).

*Id.* at 688-89. To require proof of a recent overt act, the Court wrote,

...would lead to absurd results because, in effect, any post-arrest supervised release for whatever reason would provide the opportunity to circumvent the distinctions of the statute. “[D]ue process does not require that the absurd be done before a compelling state interest can be vindicated.”

*Id.* at 696 (internal citations omitted). To require the State to prove a recent overt act where Mr. Fair had been continuously incarcerated since the 1992 revocation of his SSOSA simply because, on the date of filing, the sentence for the sexually violent offense had expired and he was serving time for a brutal crime committed after having absconded from Washington State would be absurd. Conclusion of Law No. 7 is supported by the record and does not present a significant question of law, therefore, review by this Court should be denied.

V. CONCLUSION

The Court of Appeals properly concluded that the State is not required to prove a recent overt act when an individual is incarcerated on the date of RCW 71.09 filing, even when the sentence for the sexually violent offense leading to the incarceration has expired. This decision is consistent with this Court's decision in *Albrecht* and decisions of the courts of appeal, does not present a significant question of law or issue of substantial public interest, and is supported by the record; therefore, review is not appropriate under RAP 13.4(b)(1), (2), (3), or (4). Review should be denied.

RESPECTFULLY SUBMITTED October 29, 2007.

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STATE OF WASHINGTON

**CERTIFICATE OF SERVICE**

2007 OCT 29 P 3:40

I certify that I served a copy of the foregoing ~~STATE OF~~  
BY RONALD S. APPENTER

**WASHINGTON'S RESPONSE TO PETITION FOR REVIEW** on all

parties and/or their counsel of record as follows:

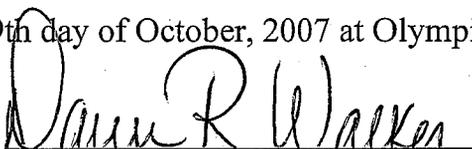
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TO:

JAMES LEWIS REESE, III  
ATTORNEY AT LAW  
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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 29th day of October, 2007 at Olympia, WA.

  
DAWN R. WALKER