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COURT OF APPEALS DIV. I  
STATE OF WASHINGTON

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

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In re the Detention of:

HAROLD BROWN,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. STATEMENT OF THE CASE

On April 1, 2005, the State filed a sexually violent predator (SVP) petition seeking the involuntary civil commitment of Harold Brown pursuant to RCW 71.09 *et seq.* CP 206-69. Brown has an extensive history of engaging in nonconsensual sexual acts with young girls.

In 1991, Brown was convicted of two counts of child molestation in the first degree<sup>1</sup> involving the molestation of two sisters, ages 5 and 8. Ex. 1, 2, 3; 3RP 104-05.<sup>2</sup> Brown was sexually attracted to the girls and started grooming them in order to molest them. 3RP 108-15, 154-55; Ex. 29, p. 1-3.<sup>3</sup> Brown molested the 8-year-old girl on numerous occasions. 3RP 112-19; Ex. 30. On one of these occasions, Brown became frustrated and angry when she became very resistant, told him to stop, and repeatedly moved his hand off of her. Ex. 29, p. 2; 4RP 295; 3RP 116-18. Brown became more forceful and pushed her to the ground while trying to force his hand inside her pants. 4RP 295; 3RP 117-18. When she started to cry, Brown knew she was going to tell someone and stopped. 4RP 295-96; Ex. 29, p.2.

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<sup>1</sup> Child molestation in the first degree is a sexually violent offense within the meaning of RCW 71.09.020(15).

<sup>2</sup> For the Court's convenience, the State will use the Verbatim Report of Proceedings citation system utilized by Appellant as outlined in Brief of Appellant at page 2, footnote 3.

<sup>3</sup> Grooming is the manipulation of others in order to establish a situation in order to molest a victim. 4RP 337-38. The State's expert, Dr. Packard, testified in detail about Brown's grooming behaviors. 4RP 267-68, 294-96, 337-40.

Brown initially told the police that the 8-year-old girl was his only victim. 3RP 127-28; Ex. 30. However, he eventually admitted to molesting her 5-year-old sister. 3RP 127-28. After Brown pled guilty to these offenses, he was released into the community and evaluated for a Special Sex Offender Sentencing Alternative (SSOSA), which allows for a significantly lesser sentence and treatment in the community. 3RP 128-29.

While Brown was being evaluated for the SSOSA, he met a 13-year-old girl, D.K., and groomed her into having a sexual relationship with him. 3RP 128-33; Ex. 29, p. 3-5. Brown met D.K. through a computer bulletin system he set up. 3RP 129-31. He engaged in sexual intercourse with D.K. nearly every day over a several month period, eventually getting her pregnant. 3RP 131-32. Brown hid this relationship from everyone, including the treatment provider evaluating him for the SSOSA. 3RP 131, 134-36.

Based on the sexual assault of D.K., Brown's release was revoked and he was returned to jail. 3RP 134. The court did not give him a SSOSA for the child molestation convictions and sentenced him to 85 months in prison. 3RP 134; Ex. 3. Brown was also convicted of rape of a child in the second degree<sup>4</sup> for the sexual offense involving D.K. Ex. 4, 6a, 7; 3RP 142. In March 1992, the court sentenced Brown to 130 months in prison,

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<sup>4</sup> Rape of a child in the second degree is a sexually violent offense within the meaning of RCW 71.09.020(15).

concurrent to his other sentence. Ex. 7.

While incarcerated for these convictions, Brown participated in sex offender treatment where he admitted to molesting and raping more than 20 girls between the ages of 4 and 13.<sup>5</sup> 3RP 142-43, 147-49, 154; Ex. 32; 6RP 146. Although Brown had disclosed some of these victims during his SSOSA evaluation, he did not make a full disclosure. 3RP 141-42.

Not only did Brown molest numerous young girls, but he later masturbated to orgasm while fantasizing about the molestations. 4RP 288. Brown admitted to masturbating while fantasizing about young girls thousands of times over the years. 3RP 171.<sup>6</sup> This reinforced his association of sexual pleasure with children and his deviant sexual interest. 4RP 288-89, 416.

In July 2002, Brown was released into the community and placed on community supervision. 6RP 78; 3RP 156. For several months after Brown's release, his community corrections officer (CCO) and sex offender treatment provider would not allow him to have access to a computer because of his history. 3RP 157-58; 6RP 70-71. However, after making numerous requests for computer access, Brown eventually persuaded them

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<sup>5</sup> Brown testified in detail about some of these victims at trial. 3RP 136-37, 139-43, 149-54.

<sup>6</sup> Brown admitted that at different points in his life, he masturbated to the point of orgasm four times a day. Most of his fantasies during these periods were of having sexual contact with children. 4RP 297.

to allow him to have computer access only at work. 6RP 70-73; 3RP 157-62. Despite meeting regularly with his CCO and treatment provider, Brown was caught the following year in possession of child pornography. 6RP 61-63, 68-69; 3RP 104, 156-57. He had downloaded the child pornography from his work computer. 3RP 162-64.

Brown downloaded multiple photographs of child pornography on multiple occasions over a several month period. 3RP 162-66. He took home photographs of the young girls and fantasized while masturbating to them. 3RP 164. Although this had been going on for months, Brown did not tell either his CCO or his treatment provider that he was having problems with sexual deviance. 3RP 157, 165-66. Brown later admitted that he was clearly in his offense cycle at the time. 3RP 164, 166.

Brown's offense cycle starts with him viewing adult pornography, then "barely legal" pornography, and finally child pornography. 3RP 166-67. He views images of nude children prior to targeting an actual child. 3RP 167. Furthermore, Brown admitted to Dr. Packard, the State's expert, that at the time he was viewing this child pornography, he had lost the ability to self-intervene:

Q. (by State): Did Mr. Brown make any specific admissions to you regarding his ability to control himself when he was out in the community regarding the child pornography incident?

A. (by Dr. Packard): Right, yes, he did. He talked about he

had acquired images of children depicting minors engaged in sexual behavior or something. It was child porn. And when asking him about that and why he did not tell his therapist that he's having problems controlling this, that he's feeling the urge to engage in this and collecting and acquiring this information, he had therapists and CCOs and all these people that he could have gone to to help intervene, but he didn't do that. **He said by that time he had lost the capacity to self-intervene. That it was going to require something external to stop him. So that tells me that he was having great difficulty controlling those fantasies and urges, and indeed the behavior of acquiring the child porn.**

4RP 331.<sup>7</sup> (emphasis added).

Dr. Packard explained the meaning of losing the ability to self-intervene:

...[t]hat means that somebody else was going to have to do something. He was not going to be able to stop himself. That it was going to take a therapist, a CCO, a police officer, somebody outside of him to put the brakes on and stop the chain of events, stop that offense cycle.

4RP 332. The defense expert, Dr. Plaud, agreed that possession of pornography was part of Brown's offense cycle. 6RP 151. Although Dr. Plaud testified that this doesn't definitively mean a person will reoffend, he said "[i]t may be part of a cycle that could ultimately end up in a hands-on or contact-based offense." 6RP 151-52.

Dr. Packard testified at trial that there are four preconditions to

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<sup>7</sup> Dr. Packard interviewed Brown on three separate occasions: August 7, 2006, August 10, 2006, and June 16, 2008. 4RP 262. Although Brown testified at trial that the ability to self-intervene at that point was "very difficult," he told Dr. Packard that he was "past the point at which he was capable of self-intervention." 3RP 167; 4RP 422.

sexual offending: (1) motivation to offend; (2) overriding internal barriers to offending; (3) eliminating external barriers to offending; and (4) availability of a victim. 4RP 428-32. All of these factors were present when Brown was arrested for possessing child pornography. 4RP 432-34.<sup>8</sup>

When confronted by his CCO, Brown initially denied viewing *any* pornography. 6RP 73. However, Brown eventually told his CCO that he had viewed an adult pornographic DVD. 6RP 73-74. It wasn't until Brown's CCO informed him that he was going to search Brown's residence, that Brown admitted to having several pictures of nude children. 6RP 74-75.<sup>9</sup> The child pornography was discovered during a search of Brown's residence.<sup>10</sup> 6RP 75; 3RP 167-68. On August 4, 2004, a jury convicted Brown of seven counts of possession of depictions of a minor engaged in sexually explicit conduct. Ex. 9, 10a; 3RP 167. Brown was incarcerated for these convictions at the time the State filed the SVP petition in 2005. CP 207; 3RP 167.

Based in part on Brown's extensive history of sexual offending and his sexual deviance, he has been diagnosed as suffering from Pedophilia

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<sup>8</sup> Dr. Packard testified that the first three conditions were clearly present. Although there is no information indicating that Brown was actively targeting a victim, his victim type (girls aged 5 to 15) was "certainly out in the community." 4RP 434.

<sup>9</sup> Dr. Packard's testimony regarding Brown's offense cycle and his possession of child pornography is located at 4RP 418-28.

<sup>10</sup> The search also revealed legal pornography, including a DVD entitled "Raw X Little Pink Pussies." 3RP 168. Viewing any pornography was a violation of Brown's community supervision. 6RP 97.

and Paraphilia Not Otherwise Specified (NOS) (Hebephilia). 4RP 279-318. Dr. Plaud, the defense expert, agreed that Brown suffered from Pedophilia. 6RP 144. Brown also admitted that he's a pedophile and testified at trial that he was still currently sexually attracted to young girls. 3RP 171, 176. Brown's Pedophilia and Hebephilia cause him to have serious difficulty controlling his sexually violent behavior and make him likely to engage in predatory acts of sexual violence unless he is confined in a secure facility. 4RP 330-32, 437-38.

Prior to the civil commitment trial, the State requested a hearing pursuant to *In re Detention of Marshall*, 156 Wn.2d 150, 125 P.3d 111 (2005) in order for the trial court to determine whether Brown's convictions for possessing child pornography constitute a recent overt act under RCW 71.09.020(10). Supp. CP 350-60. The evidentiary hearing on this issue was held on August 6, 2008. Supp. CP 323, 350. At the hearing, the court considered extensive briefing, evidence, and oral argument from both parties. Supp. CP 351-459; CP 70-110; RP 2-25. Brown never requested a fact-finding hearing, nor did he dispute facts argued at the hearing. CP 70-110; RP 2-22. The trial court ruled as a matter of law that Brown's convictions for possessing child pornography constitute a recent overt act and that the State need not prove a recent overt act beyond a reasonable doubt at trial. CP 67; RP 22-25.

The civil commitment trial was held in August 2008. After hearing several days of testimony, the jury returned a unanimous verdict finding beyond a reasonable doubt that Brown is a sexually violent predator. CP 9. The trial court subsequently entered an order committing Brown to the care and custody of the Department of Social and Health Services. CP 7-8.

## II. ISSUES PRESENTED

- A. **Whether the trial court correctly determined as a matter of law that Brown's convictions for child pornography constitute a recent overt act where Brown was incarcerated for the convictions when the State filed the SVP petition.**
- B. **Where there were no disputed facts, and Brown failed to request a fact-finding hearing, did the trial court correctly apply the *Marshall* ruling to determine that Brown's convictions constitute a recent overt act?**

## III. ARGUMENT

- A. **The Trial Court Properly Determined That Brown's 2004 Convictions For Possession Of Depictions Of A Minor Engaged In Sexually Explicit Conduct Are A Recent Overt Act**

Brown argues that the trial court erred in determining that his 2004 convictions for possession of depictions of a minor engaged in sexually explicit conduct constitute a recent overt act. Specifically, he claims that the trial court should have made this determination using a clear and convincing standard of proof. He is incorrect.

Brown's argument confuses the standard of proof applicable to the ultimate factual issue for the jury - whether Brown is currently dangerous

and a sexually violent predator - with the preliminary legal issue of whether current dangerousness must be proven at trial by a particular type of evidence, a recent overt act. The trial court properly determined that Brown's convictions for possessing child pornography constitute a recent overt act.

**1. The State Is Not Required To Plead And Prove A Recent Overt Act Because Brown Was Incarcerated For An Offense That Constituted A Recent Overt Act When The SVP Petition Was Filed**

At an SVP civil commitment trial, the State must prove beyond a reasonable doubt that the individual is a sexually violent predator.<sup>11</sup> RCW 71.09.060(1); *In re Young*, 122 Wn.2d 1, 13, 857 P.2d 989 (1993). "The Washington sexually violent predator statute is premised on a finding of the present dangerousness of those subject to commitment." *Detention of Henrickson v. State*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000). The statute's definition of "mental abnormality" is tied directly to present dangerousness. *Id.*<sup>12</sup>

In order to civilly commit an individual as a sexually violent

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<sup>11</sup> A sexually violent predator is "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." RCW 71.09.020(16).

<sup>12</sup> A mental abnormality is defined as "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." RCW 71.09.020(8).

predator, due process requires that the individual be both mentally ill and dangerous. *Marshall*, 156 Wn.2d at 157. In some circumstances, such as when a person is not incarcerated when the SVP petition is filed, due process requires the State to prove dangerousness at trial through evidence of a recent overt act. *Id.* A recent overt act is “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.” RCW 71.09.020(10).

The State is not required to prove a recent overt act in every case. If the person is living in the community on the day the State files the SVP petition, the State must prove at trial beyond a reasonable doubt that the person had committed a recent overt act. RCW 71.09.060(1); *In re Young*, 122 Wn.2d at 31. However, if on the day the State files the SVP petition, the person is incarcerated for a sexually violent offense or for an act that would itself qualify as a recent overt act, the State is not constitutionally or statutorily required to prove a recent overt act at the commitment trial. *Marshall*, 156 Wn.2d at 157, citing *Henrickson*, 140 Wn.2d at 695.

The rationale for this rule is that for incarcerated individuals, a requirement of a recent overt act under the SVP statute would create a standard which would be impossible to meet. *Young*, 122 Wn.2d at 41.

“[D]ue process does not require that the absurd be done before a compelling state interest can be vindicated.” *Id.*

Rather, when an individual is incarcerated on the day the State files the SVP petition, the question is whether the confinement is for a sexually violent act or an act that itself qualifies as a recent overt act. *Marshall*, 156 Wn.2d at 158. The inquiry as to whether an individual is incarcerated for an act that qualifies as a recent overt act is a question for the court, not a jury. *Id.* The *Marshall* court, relying on a recent decision by this Court, described the analysis that must be done:

[F]irst, an inquiry must be made into the factual circumstances of the individual’s history and mental condition; second, a legal inquiry must be made as to whether an objective person knowing the factual circumstances of the individual’s history and mental condition would have a reasonable apprehension that the individual’s act would cause harm of a sexually violent nature.

*Id.*, citing *State v. McNutt*, 124 Wn. App. 344, 350, 101 P.3d 422 (2004).

In *McNutt*, the trial court did not require the State to plead and prove a recent overt act at trial because McNutt was incarcerated for an act that constituted a recent overt act when the State filed the SVP petition.<sup>13</sup> McNutt argued that whether the crime he was incarcerated for constituted a recent overt act was a factual question that must be decided by the jury.

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<sup>13</sup> In *McNutt*, the State filed an SVP petition while McNutt was incarcerated for a conviction for communicating with a minor for immoral purposes, which is not a sexually violent offense. McNutt had previously been convicted of a sexually violent offense.

This Court rejected McNutt's argument and held that *Henrickson* supports the conclusion that the trial court, not the jury, decides whether a person's act resulting in incarceration qualifies as a recent overt act. *McNutt*, 124 Wn. App. at 350.

Thus, the trial court decides as a matter of law, using a mixed question of law and fact analysis, whether the State is required to plead and prove a recent overt act to the jury:

A factual inquiry is necessary - McNutt is correct to that extent **-but because it is a mixed question of law and fact regarding McNutt's history, that inquiry is for the court and not the jury.** See, e.g., *Henrickson*, 140 Wn.2d 689, 691, 695-96 (appellate court reviewed offenders' histories and nature of charges leading to incarceration to determine whether convictions would qualify as recent overt acts.) The factual inquiry determines the factual circumstances of McNutt's history and mental condition, and the legal inquiry determines whether an objective person knowing those factual circumstances would have a reasonable apprehension of harm of a sexually violent nature resulting from the act in question.

*Id.* (emphasis added).

Brown argues that but for "one narrow exception," due process requires dangerousness to be shown by a recent overt act. Brief of Appellant, at 18, citing, *Harris*, 98 Wn.2d at 284. Brown claims that "the single exception to the requirement occurs when the respondent is incarcerated for a sexually violent offense when the commitment petition is filed." Brief of Appellant, at 18, citing, *Henrickson*, 140 Wn.2d at 689.

This is a misstatement of the law. *Henrickson* explicitly held that “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 *or an act that by itself would have qualified as a recent overt act.*” *Henrickson*, 140 Wn.2d at 689 (citations to statute omitted; emphasis added).

Moreover, Brown’s reliance on *Harris* is misplaced. *Harris* involved RCW 71.05 (a short-term mental illness detention statute), not RCW 71.09 (the SVP statute). In fact, the SVP statute, including the statutory definition of recent overt act, did not exist at the time of the *Harris* decision.<sup>14</sup> Brown also appears to imply that the *Young* decision reads a recent overt act requirement into SVP cases. Brief of Appellant, at 18. However, *Young* draws a clear distinction between individuals who are incarcerated at the time an SVP petition is filed and those who are living in the community. *Young* concluded that “where the individual is currently incarcerated no evidence of a recent overt act is required.” *Young*, 122 Wn.2d at 41.

**2. The Clear And Convincing Evidence Standard Is Inapplicable To The Preliminary Legal Determination Of Whether Current Dangerousness Must Be Proven By**

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<sup>14</sup> Washington’s SVP statute was enacted in 1990.

### **Evidence Of A Recent Overt Act**

An evidentiary hearing was held in this case before the trial court on August 6, 2008. Supp. CP 323, 350. The purpose of the hearing was for the trial court to determine as a matter of law whether Brown's 2004 convictions for possessing child pornography, which he was incarcerated for at the time the State filed the SVP petition, constitute a recent overt act. RP 2-4; Supp. CP 351-60. The trial court's oral ruling at the evidentiary hearing was reflected in its written order entered the same day. In that order, the court concluded:

That Harold Browns' August 4, 2004 convictions for possession of depictions of a minor engaged in sexually explicit conduct constitutes a recent overt act, and the Petitioner is relieved of the burden of proving a recent overt act at the civil commitment trial.

CP 67.

Brown argues that the trial court should have made this finding by clear and convincing evidence. His argument is without merit. Brown confuses the standard of proof applicable to the ultimate factual issue of current dangerousness with the legal issue of whether current dangerousness must be proven at trial, in part, by evidence of a recent overt act. Due process does not require the trial court to use a clear and convincing evidence standard when making a preliminary determination of whether an act constitutes a recent overt act.

*Marshall* and *McNutt* set forth and illustrate the analysis a trial court must engage in to decide whether the act resulting in confinement is a recent overt act. There is nothing in either *Marshall* or *McNutt* to suggest that the preliminary question of whether an act constitutes a recent overt act should be made using a clear and convincing standard of proof. In fact, Brown does not cite to any actual authority for this claim. The few cases that Brown appears to rely on deal with the burden of proof applicable at the commitment trial, not for a preliminary legal issue. See Brief of Appellant, at 17. Thus, Brown's reliance on these cases is misplaced.

The United States Supreme Court has held that in order to civilly commit a mentally ill person, due process requires proof by at least clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979). However, this standard of proof applies to the ultimate factual issue at the civil commitment *trial*. Individual states are free to adopt the more strict, criminal standard of proving facts at trial beyond a reasonable doubt. *Addington*, 441 U.S. at 430-31. In Washington, the burden of proof at trial in SVP cases is beyond a reasonable doubt. RCW 71.09.060(1); *In re Detention of Thorell*, 149 Wn.2d 724, 744-45, 72 P.3d 708 (2003).

Similarly, Brown's reliance on *Foucha v. Louisiana*, 504 U.S. 71, 75-76, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992) is also misplaced. Similar

to *Addington*, *Foucha* also refers to the ultimate factual issue of current dangerousness, which is a question for the jury. This is entirely different from the preliminary legal issue of whether the State should be required to prove the factual issue of current dangerousness through proof of a recent overt act at trial. The Supreme Court in *Marshall* held that this preliminary legal issue is one for the court. *Foucha* and *Addington*, which describe the burden of proof at trial on the factual issue of dangerousness, are simply inapplicable to the legal determination of whether the ultimate factual issue must be proven by a recent overt act. These cases do not address any aspect of the SVP statute, nor do they address how a recent overt act is to be established.

Brown's true argument appears to be an attempt to have this Court reverse the holdings in *Henrickson*, *Marshall*, and *McNutt*. These cases clearly hold that in certain factual contexts, such as is present in our case, the State is not required to prove dangerousness at trial through proof of a recent overt act, and that the determination of whether the State would be required to prove a recent overt act at trial should be made by the trial court. Brown's argument seeks to undermine *Henrickson*, *Marshall*, and *McNutt* by imposing on the State, at the time the preliminary legal determination is made, the obligation to prove by a high standard of proof (clear and convincing evidence) a recent overt act. His argument would effectively

eliminate the distinction that *Marshall* draws between what the State must prove when a person is incarcerated at the time a petition is filed, and what the State must prove when the person is living in the community. This Court should reject Brown's arguments.

Although Brown argues that a clear and convincing standard of proof should have applied to this mixed question of law and fact, he cites to no actual authority for this claim. Brown appears to rely on *In re the Detention of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002) for his argument that this Court should adopt a clear and convincing standard of proof. Brief of Appellant, at 24-25. His reliance on this case is misplaced. First, *Albrecht* makes no reference to the use of a clear and convincing standard of proof at any stage of the proceeding. Second, this case involves a significantly different fact pattern than Brown's case.

In *Albrecht*, Albrecht violated his community placement conditions after his release from prison for a child molestation conviction. *Albrecht*, 147 Wn.2d at 4-5. Albrecht was arrested and served a 120-day jail sentence for violating his community placement conditions. *Id.* at 5.<sup>15</sup>

The *Albrecht* court declined to relieve the State of due process obligations to prove a recent overt act merely because an offender is in jail

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<sup>15</sup> Albrecht was arrested for offering two boys 50 cents to follow him. However, the record does not indicate which of the terms and conditions of release he violated. Albrecht accepted the 120-day jail sentence and the court signed the order modifying community supervision to impose the sentence. *Albrecht*, 147 Wn.2d at 5.

for a violation of the conditions of community placement. *Id.* at 10-11. In explaining its rationale, the Court stated, “Albrecht could have easily been jailed for consuming alcohol, going to a park, or moving without permission, each of which would have been a violation of the terms of his community placement but none of which would amount to a recent overt act as defined by the sexually violent predator statute.” *Id.* at 11.

Despite the *Albrecht* court’s ruling that the State had to prove a recent overt act, the court went to great lengths to leave the *Henrickson* holding intact. In response to the dissent, the *Albrecht* court stated:

*Henrickson* remains good law. Our opinion speaks only to the *limited situation* where the State files a sexually violent predator petition on an offender (1) who has been released from confinement (2) but is incarcerated on the day the petition is filed (3) *on a charge that does not constitute a recent overt act.*

*Id.* at 11, n. 11 (emphasis added).

Contrary to Brown’s efforts to read the opinion more expansively, the essential issue in *Albrecht* was whether the *Henrickson* due process framework applied to individuals incarcerated on a community placement violation when the SVP petition is filed. The key to the *Albrecht* holding was that the act of violating community placement conditions did not, in itself, constitute a recent overt act. The burden of proof at a violation hearing is preponderance of the evidence, unlike the beyond a reasonable doubt standard at criminal and SVP trials. *In re Detention of Davis*, 109

Wn. App. 734, 744-45, 37 P.3d 325 (2002).

Brown's case is distinguishable from *Albrecht* and simply does not fit into the "limited situation" described by the *Albrecht* court – where a person is incarcerated for a brief period of time on a *community supervision* violation. Unlike *Albrecht*, Brown was incarcerated after being *convicted* of possessing child pornography. This trial provided Brown with the opportunity to contest this factual allegation, and the jury determined, beyond a reasonable doubt, that Brown possessed the child pornography. This is the specific act that the State alleged, and the trial court found, constitutes a recent overt act. Therefore, the concerns expressed by the *Albrecht* court are simply not present in Brown's case. Because the State filed the petition while Brown was incarcerated after having been found guilty beyond a reasonable doubt of possessing child pornography, *Albrecht* is not implicated.

**3. A De Novo Review Of The Record Supports The Trial Court's Ruling That Brown's Possession Of Child Pornography Constitutes A Recent Overt Act**

A trial court's determination of whether a person is incarcerated for an act that constitutes a recent overt act is a mixed question of law and fact. *Marshall*, 156 Wn.2d at 158; *see also, McNutt*, 124 Wn. App. at 350. Thus, the court determines whether the facts are sufficient, as a matter of law. An appellate court reviews trial court decisions on mixed questions of law and

fact using the error of law standard. *Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586, 596, 49 P.3d 894 (2002). This standard gives deference to the trial court's factual findings. *Id.* Challenged factual findings will be upheld if there is sufficient evidence to persuade a rational person of the truth of the facts. *In re Davis*, 152 Wn.2d 647, 679-80, 101 P.3d 1 (2004).

The party challenging a factual finding bears the burden of proving that it is not supported by substantial evidence. *Id.* at 680. Unchallenged factual findings are verities on appeal. *Id.* at 679. An appellate court reviews issues of law de novo. *Evergreen Freedom Foundation*, 111 Wn. App. at 596.

In Brown's case, the trial court found as a matter of law that the offense Brown was incarcerated for constitutes a recent overt act. CP 67.

In its oral ruling, the trial court concluded:

The State made the comment about history of lying and, then, when confronted, admitting. That's exactly what happened in this case. He took the polygraph, didn't pass it, was confronted, and then kind of started piecemealing out information that led to a search, that led to the discovery of pornography, and a conviction for seven counts. **So in this Court's opinion, I do believe that the possession of child pornography in this case does constitute a recent overt act because of the nature of how it happened and the prominence of deception.** Maybe this is a good way of summing this up. You don't use deception unless you have an intent to do something that doesn't stand the test of the light of day. I think that that is an indicator of the necessary trigger in terms of the analysis of whether this is an overt act

or not.

RP 24-25. Even if the trial court had not engaged in a factual analysis on the record regarding the recent overt act issue, this Court may do so for the first time on appeal:

Although the trial court did not engage in a factual analysis on the record for this appeal, we conclude from the record that only one conclusion is reasonable: McNutt's acts at the time of the crime for which he remained incarcerated create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows the history and mental condition of the person engaging in the act, as required under RCW 71.09.020(10).

*McNutt*, 124 Wn. App. at 350-51; *see also, Henrickson*, 140 Wn.2d at 695-96 (appellate court reviewed offenders' histories and nature of charges leading to incarceration to determine whether convictions would qualify as recent overt acts).

Notwithstanding the fact that Brown's possession of child pornography was proven beyond a reasonable doubt, there is substantial evidence in the trial record that Brown's offense constitutes a recent overt act. As noted, Brown has an extensive history of committing sexual offenses against young girls. This is reflected in his 1991 convictions for child molestation in the first degree involving two young girls and his 1992 conviction for rape of child in the second degree involving another young girl. Ex. 1, 2, 3; 3RP 104-05; Ex. 4, 6a, 7; 3RP 142. He committed the latter sex offense while being evaluated for a SSOSA sentence and hid this

from the treatment provider. 3RP 128-36.

Brown has been diagnosed as suffering from Pedophilia and Paraphilia Not Otherwise Specified (NOS) (Hebephilia). 4RP 279-318. Brown admits that he's a pedophile and testified at trial that he was still currently sexually attracted to young girls. 3RP 171, 176. He has admitted to molesting and raping more than 20 girls between the ages of 4 and 13. 3RP 142-43, 147-49, 154; Ex. 32; 6RP 146. He has also masturbated to orgasm thousands of times while fantasizing about young girls, thereby reinforcing his sexual deviancy. 4RP 288-89, 416; 3RP 171.

Shortly after Brown's release from prison, he was arrested for possessing child pornography. He lied to his CCO and treatment provider about his sexual deviancy and hid the fact that he had been masturbating to the child pornography. The question of whether this behavior constituted a recent overt act was answered by Brown's own statements during trial. Brown admitted that he was clearly in his offense cycle at the time and that he views child pornography prior to the targeting of an actual child. 3RP 164, 166-67. In addition, Brown admitted that at that point he had lost the ability to self-intervene:

Q. (by State): Did Mr. Brown make any specific admissions to you regarding his ability to control himself when he was out in the community regarding the child pornography incident?

A. (by Dr. Packard): Right, yes, he did. He talked about he

had acquired images of children depicting minors engaged in sexual behavior or something. It was child porn. And when asking him about that and why he did not tell his therapist that he's having problems controlling this, that he's feeling the urge to engage in this and collecting and acquiring this information, he had therapists and CCOs and all these people that he could have gone to to help intervene, but he didn't do that. **He said by that time he had lost the capacity to self-intervene. That it was going to require something external to stop him.** So that tells me that he was having great difficulty controlling those fantasies and urges, and indeed the behavior of acquiring the child porn.

4RP 331. Because Brown was lying to his CCO and therapist about his escalating sexual deviance, there were no external barriers to stop him from reoffending.

This testimony easily satisfies the recent overt act definition. Brown's actions of masturbating to child pornography - a behavior that Brown admits is part of his offense cycle prior to targeting a child - would clearly cause "reasonable apprehension...in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." RCW 71.09.020(10). The trial court properly considered the circumstances of the crime together with other factual circumstances of Brown's history and mental condition in order to conclude that his possession of child pornography constitutes a recent overt act.

**B. Due Process Was Satisfied When The Court Held An Evidentiary Hearing Pursuant To *In Re Marshall***

Brown argues that the trial court erred "when it failed to resolve the

disputed factual issue through a full evidentiary hearing.” Brief of Appellant, at 25. This argument is without merit. First, the trial court held an evidentiary hearing with oral argument regarding the recent overt act issue. Second, Brown never requested the trial court hold a separate hearing to resolve what he now claims are disputed factual issues. He is not entitled to raise this argument for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Finally, Brown fails to indicate which facts were allegedly in dispute at the hearing. The facts of the case, as they pertained to the recent overt act issue, were simply not in dispute.

**1. Brown Failed To Preserve Any Alleged Error And Consequently Cannot Raise This Issue For The First Time On Appeal**

Brown’s argument that the trial court erred by not resolving disputed factual issues through a full evidentiary hearing is without merit. First, the trial court did hold an evidentiary hearing prior to trial to resolve the recent overt act issue. The State filed a note for motion for a ruling on the recent overt act issue, which the trial court subsequently heard on August 6, 2008. Supp. CP 323, 350; RP 2-29. The purpose of the hearing was for the trial court to determine whether Brown’s possession of child pornography constituted a recent overt act.

At the evidentiary hearing, the trial court considered extensive

briefing, with attached exhibits, and heard oral argument from both parties. RP 2-29; Supp. CP 351-459; CP 70-110.<sup>16</sup> The facts of the case were not in dispute at the hearing. Rather, the dispute involved whether knowledge of the facts would cause an objective person to have reasonable apprehension that Brown would cause harm of a sexually violent nature. Thus, the issue at the hearing was how the court should engage in the *legal* analysis, as opposed to what the facts were. The trial court ruled as a matter of law that Brown's possession of child pornography constitutes a recent overt act.

Second, Brown neither disputed facts alleged by the State nor requested a fact-finding hearing prior to trial. He raises this claim of the existence of disputed facts for the first time on appeal. Consequently, Brown has failed to preserve this issue for appeal and has not shown any manifest constitutional error such that this Court should consider this issue for the first time on appeal. *See In re Detention of Audett*, 158 Wn.2d 712, 725-26, 729, 147 P.3d 982 (2006) (holding that the preservation of error doctrine applies to SVP cases).

RAP 2.5(a) states that the appellate court may refuse to review any claim of error which was not raised in the trial court. The rule does,

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<sup>16</sup> The trial court had numerous exhibits and documents for its consideration as part of the recent overt analysis, including: (1) court documents of Brown's convictions for child molestation in the first degree, rape of child in the second degree, and possession of child pornography; (2) Brown's sex offender treatment program summary; and (3) evaluation reports from both the State and defense experts.

however, allow a party to raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). Aside from these limited exceptions, the general rule is that appellate courts will not consider issues raised for the first time on appeal. *Kirkman*, 159 Wn.2d at 926.

The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This rule reflects a policy of encouraging the efficient use of judicial resources. *Id.* Failure to object deprives the trial court of the opportunity to prevent or cure the error. *Kirkman*, 159 Wn.2d at 926, 935.

The only applicable exception that would allow Brown to raise this issue for the first time on appeal is if he can show a manifest constitutional error. *See* RAP 2.5(a); *see also*, *Scott*, 110 Wn.2d at 687-88. Brown must identify a constitutional error and show how the alleged error actually affected his rights at trial. *Kirkman*, 159 Wn.2d at 926-27. A showing of actual prejudice is required. *Id.* at 927, 935.<sup>17</sup> "Essential to this determination is a plausible showing by the defendant that the asserted error

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<sup>17</sup> "Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. *Kirkman*, 159 Wn.2d at 935.

had practical and identifiable consequences in the trial of the case.” *Id.* at 935.

Not all trial errors that implicate a constitutional right are reviewable under RAP 2.5(a)(3). *Id.* at 934-35. Exceptions to the rule must be construed narrowly. *Id.*; *see also, Scott*, 110 Wn.2d at 687 (stating that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). If error is found, appellate courts review the effect the error had on the person’s trial according to the harmless error standard. *Scott*, 110 Wn.2d at 687-88.

Failure to hold a separate fact-finding hearing as to facts that were not in dispute does not constitute manifest constitutional error. Brown has not shown how a “fact-finding” hearing would be any different from the evidentiary hearing the court held, nor has he shown, or even addressed, how the lack of an additional hearing actually affected his rights at the subsequent trial. Brown has not shown that he was prejudiced by not having a hearing he never requested, nor has he shown that this was error that had “practical and identifiable consequences” at trial. *See Kirkman*, 159 Wn.2d at 935. The trial record reveals that Brown’s history and mental condition, including the *facts* surrounding the recent overt act, were not in dispute.

**2. There Were No Facts In Dispute At the Evidentiary Hearing.**

It is unclear what facts Brown believes should have been resolved at a fact-finding hearing, as he fails to address any such facts in his brief. *See* Brief of Appellant, at 25-26. Brown also never indicated any objection at the evidentiary hearing to the facts as summarized by the parties. The State's review of the record reveals no actual facts that the parties disputed regarding the recent overt act issue. Rather, where the parties diverged was how the court should apply the law to the facts, and Brown was given an opportunity to fully brief and argue this issue. Brown fails to cite any authority that a further fact-finding evidentiary hearing was required under the circumstances of this case.

A fact-finding hearing was unnecessary as the act the State alleged constituted a recent overt act, Brown's possession of child pornography, had already been proven beyond a reasonable doubt at a jury trial. This underlying jury trial provided Brown with the opportunity to contest this factual allegation. The trial court properly considered this conviction, together with other factual circumstances of Brown's history and mental condition, in order to conclude that the possession of child pornography constituted a recent overt act as a matter of law. *Marshall* confirms that this is a legal question properly left to the trial court and the trial court did not violate Brown's due process rights when it ruled on the issue.

Not only was Brown's possession of child pornography proven beyond a reasonable doubt at a previous trial, but Brown admitted during his SVP trial to possessing the nude images of the young girls. 3RP 162-68. Moreover, he admitted at trial to essentially all facts relating to the recent overt act issue, including: (1) committing all of his adjudicated sexual offenses; (2) molesting and/or raping more than 20 young girls; (3) being a pedophile; (4) being currently sexually attracted to young girls; (5) being in his offense cycle at the time he possessed the child pornography; and (6) being past the point of self-intervention. 3RP 104-05, 142-43, 147-49, 154, 164, 166-67, 171, 176; *see also*, 4RP 331, 422. These facts simply were not in dispute.

That facts were not in dispute at the evidentiary hearing is further evidenced by the argument of Brown's counsel at the hearing:

Mr. Brown was in possession of pornography. He was arrested and incarcerated. ... The State's entire argument today is based upon information that the State and Dr. Packard would not know but for Mr. Brown openly telling them. In other words, he's the one who told his therapist and Dr. Packard and the State the contents of his offense cycle. He's the one who told his CCO that he had the pornography. The circumstances of that are he denied it and there was some coercion and he was told they searched the house. But he did not have to tell the CCO, Dr. Packard, or anyone else that he was masturbating to these things. These things came from his mouth. He is the one who honestly told Dr. Packard, yes, I was in cycle. ... Mr. Brown is diagnosed with pedophilia by Dr. Plaud and by Dr. Packard. That is unrefuted. That is not the issue. He suffers from pedophilia. In layman's terms, pedophilia means Mr. Brown is sexually

attracted to children.”

RP 15, 17, 19. Consequently, Brown was not prejudiced by the lack of a separate fact-finding hearing, in addition to the evidentiary hearing that was held, to resolve factual issues that were simply not in dispute.

#### IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Brown’s commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 15th day of June, 2009.



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WASHINGTON STATE COURT OF APPEALS, DIVISION I

DECLARATION OF  
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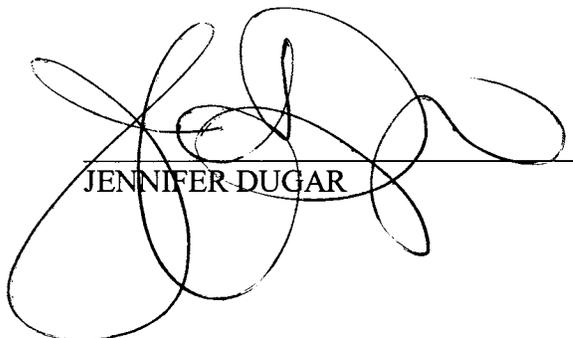
I, Jennifer Dugar, declare as follows:

On this 15th day of June, 2009, I deposited in the United States mail true and correct cop(ies) of Brief Of Respondent and Declaration Of Service, postage affixed, addressed as follows:

JENNIFER WINKLER AND ERIC NIELSEN  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of June, 2009, at Seattle, Washington.

  
JENNIFER DUGAR