NO. 45000-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of John Anderson:

STATE OF WASHINGTON,

Respondent,

v.

JOHN ANDERSON,

Appellant.

BRIEF OF RESPONDENT

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A. Whether an SVP petition can be filed against an individual, in order to enforce the intent of the SVP statute, where the sexually violent offense occurred when he was a juvenile, and (1) the statute is unambiguous, and (2) the legislature intended the statute to apply to those circumstances.

B. Whether the state has proved a recent over act, pursuant to RCW 71.09.020, when Anderson engaged in sexual relationships with four vulnerable patients who suffered from various mental disorders while at Western State Hospital.

C. Whether sufficient evidence proved that Anderson suffers from a mental abnormality that makes him likely to commit future acts of predatory sexual violence, if not confined to a secure facility, where an expert using generally accepted methods (1) opined Anderson suffered from a mental abnormality; (2) linked it to his dangerousness; (3) conducted a risk assessment indicating Anderson was at high risk for re-offense; and (4) provided a basis for each of her opinions

II. STATEMENT OF THE CASE

A. Procedural History

In February 2000, the State filed a petition to civilly commit Anderson as a sexually violent predator pursuant to RCW 71.09. *In re Detention of Anderson*, 134 Wn. App. 309, 315, 139 P.3d 396 (2006) (*Anderson* I). The petition was tried to the court in April 2004, and Anderson was civilly committed. *Id.* at 315-18. This Court reversed the commitment, holding that the trial court had abused its discretion when denying Anderson a second expert prior to trial. *Id.* at 321-22. Both parties sought review and the Supreme Court affirmed this Court. *In re*

Detention of Anderson, 166 Wn.2d 543, 211 P.3d 994 (2009) (*Anderson* II). On remand, the petition was tried to a jury in May 2013, Anderson was civilly committed, and he timely appealed.

B. Substantive History

1. Anderson's Sexually Violent Offense

John Anderson was born in December 1970, and is now 43 years old. RP 419. He has been convicted of a sexually violent offense, as that term is defined in RCW 71.09.020. On June 29, 1988, he was convicted of Statutory Rape in the First Degree. Exs. 2, 3.

On April 18, 1988, when he was 17 years old, Anderson anally raped B.H. a two-and-a-half-year-old boy. Ex. 2. B.H. had been left alone with Anderson. Ex. 8 at 22; Ex. 9 at 13.[1] Anderson pulled the child's pants down, laid him face down on the bed, and fully penetrated B.H's anus with his penis. Ex. 8 at 22. B.H screamed and bled from his anus. Ex. 8 at 22.

Anderson pled guilty to Statutory Rape in the First Degree on May 27, 1988, and was sentenced to 100 weeks in the Division of Juvenile Rehabilitation. Exs. 2, 3. The sentencing court found a manifest injustice based upon the brutality of the crime, the vulnerability of the victim, and

[1] Citations to page numbers in Exhibits 8 and 9, which are transcripts of Anderson's videotaped deposition testimony played for the jury, are to the sequential page numbers, not the actual transcript page numbers.

the danger Anderson posed to the community. Ex. 3. Following completion of his sentence, Anderson voluntarily committed himself to Western State Hospital (WSH), arriving in June 1990. Ex. 8 at 31. He remained there for a decade and the State filed the SVP petition in February 2000 when Anderson sought to leave. Ex. 8 at 33, Ex. 191; RP 798-99, 853, 874; *Anderson* II, 166 Wn.2d at 547-48.]

2. Anderson's Sexual Offense History

When Anderson was 13 years old, he manipulated his cousin into fellating him. Ex. 8 at 7. Also at the age of 13, he sexually fantasized about his five-year-old neighbor. Ex. 8 at 9. Anderson attempted to lure a different five-year old girl to a park to rape her. Ex. 8 at 10. When he was 15 years old, he had anal sex with a 13-year-old neighbor. Ex. 8 at 15. The boy told Anderson to stop; but Anderson did not. Ex. 8 at 15.

At the age of 15, Anderson raped a two-and-a-half-year-old boy he was babysitting.[2] Ex. 8 at 16. Anderson removed the child's diaper, laid him face down on his mother's bed, and inserted his penis into the screaming child's anus. Ex. 8 at 16-17. Anderson went on to rape the child as many as 12 to 13 times. Ex. 8 at 18. On one occasion Anderson covered the toddler's head with a pillow to muffle his screams, and

[2] This is a different victim than B.H., the victim in the crime of which Anderson was convicted in 1988.

ejaculated inside him. Ex. 8 at 18-19. In between the rapes, Anderson fantasized about sexually assaulting the child. Ex. 8 at 20.

While confined at Maple Lane School for his conviction for the rape of B.H., Anderson exposed his penis on several occasions to a female staff member. Ex. 8 at 24-25. On September 15, 1989, Anderson pled guilty to Public Indecency for exposing himself at Maple Lane and was sentenced to 90 days in the Thurston County Jail. Exs. 4, 5.

After Anderson arrived at WSH in June 1990, he engaged in sexual contact with other patients, some of whom were developmentally disabled or delayed. Ex. 8 at 31-36; *Anderson* II, 166 Wn.2d at 547.

3. Dr. Larry Arnholt

The State presented expert testimony from Dr. Larry Arnholt, a licensed psychologist and certified sex offender treatment provider. RP 454-55. Dr. Arnholt began working with Anderson in July 1994. RP 457. He worked consistently with Anderson between 1994 and 1998, and again around 2000. RP 457.

Dr. Arnholt testified that Anderson was voluntarily committed to WSH, which meant that he could have requested to leave the hospital at any point. RP 458. However, if the physicians believed that he was not ready, the county-designated mental health professional would have been contacted to detain him. RP 458; *See* RCW 71.05.050.

Dr. Arnholt described Anderson's authorized leaves from WSH. RP 461. A doctor or psychiatrist at WSH issues an order allowing certain individuals to be out of hospital grounds, to a specific place for a specific amount of time. RP 461, 462. During his leaves, Anderson was not allowed to have any contact with minors, or to use drugs and alcohol. RP 462-63. Additionally, he was never allowed to leave on his own—he had to be chaperoned by his mother. RP 463.

Dr. Arnholt recalled that Anderson had sexual contact with four WSH patients: R.W., D.P., B.B., and C.S.[3] RP 465-70. R.W. was a vulnerable, emotionally unstable individual with borderline personality disorder. RP 466-67. D.P. was a vulnerable, moderately retarded individual, with an IQ of45. RP 469. B.B. was moderately retarded. RP 470. C.S. was at least mildly retarded and had an IQ around the 60 or 70 range. RP 470-71.

4. Dr. Amy Phenix

The State presented expert testimony from Dr. Amy Phenix, a licensed psychologist. RP 491. Dr. Phenix specializes in sex offender risk evaluation and assessment. RP 491. She has conducted evaluations in numerous states, including Washington, California, Arizona, Illinois,

[3] These victims are identified by their initials only to protect their privacy consistent with RCW 71.05.385(3) and .390(19).

Michigan, Minnesota, New Hampshire, Massachusetts, North Carolina and Florida, as well as for the federal government. RP 495. She was responsible for training SVP evaluators in California and Washington, and for conducting quality reviews of evaluation reports in both states. RP 493-95.

After the State filed the SVP petition, the Attorney General asked Dr. Phenix to evaluate Anderson, in 2001 and again in 2011. RP 497-98. She reviewed extensive records about Anderson, including criminal history, school history, and institutional and mental health records, all of which are of the type commonly relied upon by experts who evaluate SVPs. RP 499. Dr. Phenix also interviewed Anderson on two occasions. RP 498-99.

Dr. Phenix described the four vulnerable WSH patients with whom Anderson had sexual contact. RP 627-33. From her review of the information, she described them as developmentally delayed, vulnerable, child-like and simplistic. RP 628-29.

Dr. Phenix diagnosed Anderson with sexual sadism, and with pedophilia, sexually attracted to males and females, non-exclusive type. RP 501. She also diagnosed a personality disorder not otherwise specified, with antisocial, borderline and narcissistic traits. RP 538. Dr. Phenix opined that these disorders qualify as a mental abnormality.

RP 553-555. She testified that Anderson was likely to engage in predatory acts of sexual violence if not confined in a secure facility. RP 561.

Dr. Phenix reached these conclusions based on a risk assessment that utilized actuarial instruments and research factors that aggravate or mitigate an offender's recidivism risk. 635-36. Actuarial instruments are tools that assess an offender's recidivism risk compared to other offenders with similar characteristics. RP 567. They are known to under-predict overall risk. RP 578. Dr. Phenix utilized the Static 99R and the Static 2002R. RP 567. Anderson received a score of 5 on the Static 99R, placing him in the medium high level for reoffending. RP 569.

Anderson received a score of 9 on the Static 2002R. RP 577. That score placed Anderson in the high risk range, with a 41.6 percent chance of reconviction in the next five years, and 52.3 percent chance in the next 10 years. RP 569-70. Dr. Phenix also measured Anderson's psychopathy using the Hare Psychopathy Checklist – Revised (PCL-R). RP 581. Anderson scored 32.2 out of 40, which indicated the presence of psychopathy. RP 580.

Finally, Dr. Phenix analyzed protective factors that could reduce Anderson's risk of sexual re-offense, if they were present. RP 620. These included: (1) Whether he had lived in the community for 10 years without offending; (2) whether he has 15 or less years of lifetime expectancy due

to illness or physical conditions; (3) whether he is of advanced age; and (4) whether he received sexual deviancy treatment. RP 620-21. After considering these factors as they related to Anderson, Dr. Phenix opined that he continued to have a high risk to reoffend. RP 636.

5. Maureen Saylor

The State also presented expert testimony from Maureen Saylor, a licensed Sex Offender Treatment Provider. RP 681. To obtain the license, Ms. Saylor had to meet educational and professional requirements, including having at least 2,000 hours of face-to-face contact with sex offenders or with individuals with sexual behavior problems. RP 681; WAC 246-930-020, -030, -040, -065. Ms. Saylor began working with sex offenders in 1973. RP 681.

Anderson was referred to Ms. Saylor in 1990 by the adult psychiatric unit where he had been admitted. RP 684. She saw him almost weekly while he was in the observation ward at WSH. RP 684. Ms. Saylor performed the first penile plethysmograph (PPG) testing of Anderson in 1991. RP 684-85. He showed significant arousal to almost all of the stimuli he heard and probably at least 70 percent of the slides that he viewed. RP 686. Significant arousal is identified at 20 percent of full arousal or greater. RP 686. Anderson showed 94 percent arousal to

rape of a minor male, and 29 percent arousal to sadism with a minor male. RP 687.

Ms. Saylor conducted another PPG in 1998. RP 689-690. Anderson showed 100 percent arousal to rape of a minor female, 87 percent to minor female sadism and 44 percent to a tape depicting just physical aggression. RP 695. When asked to suppress his urges he was able to reduce the arousal to 4 percent. RP 696. His ability to reach the level of arousal was particularly surprising because Anderson was on Depo-Provera, a drug specifically designed to decrease arousal. RP 696.

III. ARGUMENT

Anderson argues that the order civilly committing him as an SVP should be reversed because the trial court lacked subject matter jurisdiction, the State failed to establish that he had committed a recent overt act, the state failed to establish he had a mental abnormality and there was insufficient evidence to establish beyond a reasonable doubt that Anderson is SVP. His arguments are without merit. The trial court had subject matter jurisdiction under RCW 71.09.030, which specifically provides for the filing of a petition in a case such as this. The State also established an extensive history of sexual acts with vulnerable persons that qualified as recent overt acts. The State produced substantial evidence at

trial that Anderson is an SVP. Anderson's civil commitment as an SVP should be affirmed.

A. The Unambiguous Language of RCW 71.09.030 and Related Provisions Clearly Indicate Legislative Intent to Permit an SVP Petition to Be Filed in a Case Such as This

Anderson argues that the trial court lacked subject matter jurisdiction because RCW 71.09 does not permit a petition to be filed where a person has committed a sexually violent offense as a juvenile and then commits a recent overt act after release from confinement. Brief of Appellant at 15-20. His foundational premise is that juveniles cannot be "convicted" of offenses and the legislature's use of that term in RCW 71.09.030(1)(e) shows intent to preclude petitions under facts such as those in this case. Anderson is incorrect. While juveniles cannot be considered to be convicted of crimes or felonies, they can be convicted of "offenses;" or, in this case, of a "sexually violent offense." A plain reading of the statute in the context of related provisions and the statutory scheme as a whole indicates that the legislature intended to permit the filing of sexually violent predator petitions under facts such as are presented here.

1. Standard of Review

Questions of statutory interpretation are reviewed de novo. *In re Detention of Mines*, 165 Wn. App. 112, 120, 266 P.3d 242 (2011). When

interpreting a statute, a court's fundamental objective is to ascertain and carry out the legislature's intent. *Id.* Where a statute's meaning is plain on its face, a reviewing court must give effect to that plain meaning to carry out legislative intent. *Id.* Plain meaning is derived not only from the ordinary meaning of the statute's language, but also from the context of the statute in which a specific provision is found, related provisions, and the statutory scheme as a whole. *Id.*

2. Juveniles Can Be "Convicted" of "Offenses"

RCW 71.09 targets a small group of sexual predators who suffer from a mental disease or defect that makes them dangerous. RCW 71.09.010. A sexually violent predator is a 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(18). The term "sexually violent offense" includes a number of sexual crimes identified in RCW 71.09.020(17). Additionally, if the person is living in the community when the petition is filed, the State must show the person to be currently dangerous by proving he has committed a "recent overt act." RCW 71.09.020(12), .060(1).

RCW 71.09.030(1) provides that a petition "may be filed" when one of the following five circumstances are present: a) a person has

previously been convicted of a sexually violent offense and is about to be released; b) a person who committed a sexually violent offense as a juvenile is about to be released; c) a person found incompetent to stand trial for a sexually violent offense is about to be released; d) a person found not guilty by reason of insanity of a sexually violent offense is about to be released; or e) a person previously convicted of a sexually violent offense who has been released has committed a recent over act.[4]

Anderson argues that the term "convicted" in RCW 71.09.030(1)(e) indicates the Legislature intended to apply that provision only to those who committed a predicate offense as an adult. He asserts that juveniles cannot be convicted of crimes, relying on RCW

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[4] RCW 71.09.030(1) provides (emphasis added):

> **A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that:** (a) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement; **(b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement;** (c) a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released, pursuant to RCW 10.77.086(4); (d) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released, pursuant to RCW 10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or **(e) 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.**

13.04.240.[5] From this premise, he next asserts that juveniles cannot be considered to have been convicted of a "sexually violent offense" as that term is defined in RCW 71.09.020(17) and used in RCW 71.09.030(1)(e). RCW 13.04.240, however, does not compel the interpretation Anderson suggests. There is no statutory prohibition on considering a person having been convicted as a juvenile of an "offense."

The distinction between a juvenile being convicted of a crime or felony, as opposed to being convicted of an offense, is explained in *State v. Michaelson*, 124 Wn.2d 364, 878 P.2d 1206 (1994). In *Michaelson*, a juvenile charged with taking a motor vehicle without permission entered into a diversion, then sought to prevent a record of the case from being sent to the Department of Licensing. Relying on *In re Frederick,* 93 Wn.2d 28, 30, 604 P.2d 953 (1980), the State responded that the statute at issue, RCW 13.50.200, was ambiguous, making the same argument made here by Anderson – that "[t]he adjudication of a juvenile for an offense which if committed by an adult would be a crime is not a conviction." *Id.* at 336 (emphasis omitted). *Michaelson* distinguished *Frederick* as having differentiated between "felonies and juvenile offenses" and rejected the State's argument: "While a juvenile cannot be convicted of a *felony*, he or

[5] RCW 13.04.240 provides: "An order of court adjudging a child a juvenile offender or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime."

she can be convicted of an *offense* as contemplated by RCW 46.20.270(4)." *Id.* at 367 (emphasis added).[6] The Court also cited JuCR 7.12(c) and (d), which recognize that a juvenile, if found guilty, is "convicted" of an offense. *Id. Michaelson* concluded, "Since juveniles can receive convictions, there is no apparent conflict between RCW 13.50.200 and RCW 46.20.270." 124 Wn.2d at 367. Juveniles can be convicted of "offenses." *See, e.g., State v. McKinley*, 84 Wn. App. 677, 681, 929 P.2d 1145 (1997) ("The term "offense" applies equally to adult and juvenile crimes.") (citing *In re A, B, C, D, E*, 121 Wn.2d 80, 87, 847 P.2d 455 (1993)).

3. Because Juveniles Can Be Convicted of Offenses, the Plain Language of RCW 71.09.030 Indicates the Legislature's Intent to Permit the Filing of a Petition in Cases Such as This One

Where the plain language of a statute leads to only one interpretation, that interpretation controls. *In re Detention of Danforth*, 173 Wn.2d 59, 67, 264 P.3d 783 (2011). The plain language of

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[6] Former RCW 46.20.270(4) (1994) provided, in pertinent part:

> For the purposes of Title 46 RCW the term "conviction" means a final conviction in a state or municipal court or by any federal authority having jurisdiction over offenses substantially the same as those set forth in Title 46 RCW which occur on federal installations in this state . . . ."

Contemplated offenses included, among others, vehicular homicide, vehicular assault and "[a]ny felony in the commission of which a motor vehicle is used." *See* former RCW 46.20.285 (1994).

RCW 71.09 shows that the legislature intended to authorize the filing of petitions against individuals whose predicate offenses were committed when they were juveniles. First, its notification procedures explicitly include juvenile offenders in the class of those whose imminent release from confinement requires a referral to a prosecuting attorney. RCW 71.09.025(1)(a)(ii).[7] Second, RCW 71.09.030(1)(b) explicitly includes juvenile offenders who are about to be released from confinement in the group of individuals against whom petitions can be filed.[8] "The Legislature has included juvenile sex offenders in the group subject to commitment as sexually violent predators." *Dependency of Q.L.M. v. State, Dep't of Soc. & Health Servs.*, 105 Wn. App. 532, 536-37, 20 P.3d 465 (2001) (citing RCW 71.09.030). Finally, as shown above, because persons adjudicated to have committed offenses as juveniles can be considered to have been "convicted" of an offense, the Legislature

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[7] RCW 71.09.025 provides, in pertinent part (emphasis added):

> (1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in RCW 71.09.020(16), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county in which an action under this chapter may be filed pursuant to RCW 71.09.030 and the attorney general, three months prior to: . . . (ii) **The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile[.]**

[8] RCW 71.09.030(1) provides: "A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that: . . . **(b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement**[.]

included in RCW 71.09.030(1)(e) offenders who were "convicted" of a sexually violent offense as a juvenile and who later commit a "recent overt act." The plain language of the statute compels this conclusion.

Anderson correctly acknowledges that a juvenile offender who has committed a sexually violent offense and is about to be released from a juvenile facility can be involuntarily and indefinitely committed as a sexually violent predator. RCW 71.09.030(1)(b). However, he interprets RCW 71.09.030(1)(e) as prohibiting the filing of a petition where that same person has been released and now as a juvenile or adult commits a "recent overt act" that demonstrates current dangerousness by causing harm of a sexually violent nature or foreshadowing such harm.[9] This Court does not interpret statutes in a way that would lead to such strained or absurd results. *Fair v. State*, 139 Wn. App. 532, 542, 161 P.3d 466 (2007). Under Anderson's interpretation, no matter how many recent overt acts such a person committed, the State could not file a petition until after he had been convicted of another sexually violent offense. The Legislature did not intend this result, and Anderson's reliance on an

[9] RCW 71.09.020(12) defines "recent overt act" as "any act, threat, or combination thereof 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 or behaviors.

argument that has been rejected by Washington courts for two decades is an insufficient basis for inferring any such alternative intent.

4. Even if the Statute Is Considered Ambiguous, Statutory Construction Must Produce the Same Result

If a statute can be interpreted in more than one way, the Court may resort to statutory construction. *State v. Donaghe*, 172 Wn.2d 253, 262, 256 P.3d 1171 (2011). The goal remains to ascertain and carry out legislative intent. *In re Detention of Durbin*, 160 Wn. App. 414, 426, 248 P.3d 124 (2011). "The primary purpose of chapter 71.09 RCW is to protect the public." *In re Detention of Kistenmacher*, 163 Wn.2d 166, 173, 178 P.3d 949 (2008); RCW 71.09.010. RCW 71.09.030 must therefore be construed in a manner consistent with public safety. Construing it in the manner Anderson urges would exclude persons convicted of one or more sexually violent offenses while a juvenile who exhibit continued dangerousness through the commission of recent overt acts. That interpretation would lead to the release of dangerous individuals like Anderson and is contrary to the primary goal of protecting the public.

In construing a statute a court may also consider "the entire sequence of all statutes relating to the same subject matter." *State v. Monfort*, 179 Wn.2d 122, ___, 312 P.3d 637, 641 (2013) (citing *State v.*

Morales, 173 Wn.2d 560, 567, 269 P.3d 263 (2012)). "More broadly, we consider all statutes relating to the same subject matter, pursuant to the principle of reading statutes in pari materia." *Id.* The Washington Supreme Court has noted that, in the context of other juvenile justice statutes, the legislature often uses the term "conviction" to apply to both juvenile and adult offenses. *Matter of Juveniles A, B, C, D, E,* 121 Wn.2d 80, 87-88, 847 P.2d 455 (1993) (statute mandating HIV testing for sexual offenders applies to juvenile sex offenders). The Court noted that "the Legislature's use of 'conviction' in statutes to refer to juveniles appears to be endemic." *Id.* at 87.[10]

Taking these other statutes into account, it is clear the Legislature frequently uses the term "convicted" to refer to juvenile adjudications. The "endemic" use of the term therefore makes clear that the Legislature did not intend to exclude those with juvenile predicate offenses when it

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[10] *See Juveniles A, B, C, D, E,* 121 Wn.2d at 87-88:

> Numerous other statutes, including sections of the Sentencing Reform Act of 1981, RCW 9.94A, and the Juvenile Justice Act of 1977, RCW 13.40, use "convicted" to reference both adult and juvenile offenders. *See, e.g.,* RCW 9.94A.030(9) ("'Conviction' means an adjudication of guilt".); RCW 9.94A.030(12)(b) ("Criminal history" includes a defendant's prior convictions in juvenile court.); RCW 13.40.280(4) (refers to the "convicted juvenile"); RCW 43.43.830(4) ("Conviction record" includes crimes committed while either an adult or juvenile.); RCW 46.20.342(2) (refers to the "conviction" of a juvenile); RCW 74.13.034(2) (refers to "convicted juveniles"). In fact, several statutes use "convicted" specifically to reference juvenile sexual offenders. RCW 9.94A.360; RCW 9A.44.130(3)(a) ("the term 'conviction' refers to adult convictions and juvenile adjudications").

adopted RCW 71.09.030(1)(e). Anderson's argument should be rejected and his civil commitment order affirmed.

B. The State Presented Substantial Evidence That Anderson Committed A Recent Overt Act

Anderson challenges the sufficiency of the evidence supporting the jury's finding that he committed a recent overt act.[11] He argues that "consensual adult homosexual activity" cannot constitute a recent overt act, that sexual activity with adults cannot be a recent overt act where the person suffers from pedophilia, and that the overt acts were not recent.

These questions, however, were already raised and rejected by this Court and the Supreme Court, and those holdings are the law of this case. On remand from the Supreme Court, the State's burden was to produce sufficient evidence that the acts occurred. The jury found beyond a reasonable doubt that they did, and that they constituted recent overt acts. Both Dr. Phenix and Dr. Arnholt opined that Anderson's prolific sexual contact with vulnerable WSH patients were consistent with ongoing arousal to children and paralleled his criminal behavior in the community.

1. Standard of Review

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[11] RCW 71.09.020(12) defines "recent overt act" as follows:

"Recent over act" means any act, threat, or combination thereof 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 or behaviors.

Whether an act is a recent overt act is a mixed question of law and fact. *In re Detention of Brown*, 154 Wn. App. 116, 121, 225 P.3d 1028 (2010) (citing *In re Det. of Marshall,* 156 Wn.2d 150, 158, 125 P.3d 111 (2005)). *De novo* review would normally apply. *Anderson* II, 166 Wn.2d at 549. However, the Supreme Court has ruled that Anderson's sexual acts with vulnerable WSH patients can constitute recent overt acts, as a matter of law. *Id.* at 550. Consequently, the legal question has been answered and Anderson can challenge only the factual question – the sufficiency of the evidence.

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re the Detention of Thorell,* 149 Wn.2d 724, 744, 72 P. 3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Additionally, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against Anderson. *In Re Detention of Audett,* 158 Wn.2d 712, 727, 147 P. 3d 982 (2006). An appellate court does not second-guess the credibility determinations of the fact-finder. *In re the Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *In re the Detention of Davis,* 152

Wn.2d 647, 680, 101 P.3d (2004) ("A trial court's credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence."). The reviewing court defers to the trier of fact regarding conflicting testimony and the persuasiveness of the evidence. *In re the Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005).

2. Substantial Evidence Proved Anderson Committed Recent Overt Acts

Anderson argues that what he characterizes as "consensual adult homosexual activity" cannot constitute a recent overt act. It is the law of this case, however, that Anderson's sexual predation of vulnerable WSH patients can in fact do so. *Anderson* II, 166 Wn.2d at 550 ("Anderson's sexual activities at WSH could constitute overt acts."). *Anderson* II also addressed the use of vulnerable adults as victim proxies by confined pedophiles. *Id.* at n.6 ("This court has previously decided that sex with a developmentally disabled person may have a nexus to child sex.") (citing *Marshall,* 156 Wn.2d at 159).

In order to civilly commit an individual as a sexually violent predator, due process requires 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.*; RCW 71.09.020(12). Here, Anderson has been confined either in the juvenile justice system or at WSH since being convicted of his sexually violent offense. Nevertheless, because he had grounds privileges and escorted leaves from WSH, the State conceded it must prove a recent overt act. *Anderson* I, 134 Wn. App. at 322-23.

The State produced substantial evidence that Anderson's sexual relationships with four vulnerable and mentally disabled WSH patients constituted recent overt acts. Dr. Phenix opined that Anderson had committed recent overt acts. RP 634. His sexual acts with vulnerable patients with low IQs, occurring from 1990 through 1999, were the acts she reviewed and considered as qualifying. RP 627-28. She testified it was not an unusual occurrence, as recognized by professionals in her field of expertise, that persons with pedophilia sometimes turn towards other types of victims when children are not available. RP 632. A key link is that children are vulnerable, and so were the WSH patients. RP 629. Dr. Phenix testified:

> So there is a parallel of taking advantage of vulnerable people that you can have control over and recognizing that they are really immature and child-like, similar to the kinds of victims that he had in the community.

RP 629. In fact, a major goal of sex offender treatment is to stop the person from targeting people who are child-like and vulnerable due to mental disability. RP 632-33. Dr. Phenix discussed her knowledge of each of the four men Anderson targeted, why their disabilities made them vulnerable and why these acts led her to believe that Anderson was currently dangerous. RP 628-32.

Dr. Arnholt also testified about the vulnerabilities of the four men with whom Anderson had sexual contact and his concern about Anderson's behaviors. RP 466-71. He and Anderson's treatment team tried to get Anderson to stop having sex with vulnerable patients; they made it clear to him that it was similar to his offending against children. RP 817. Dr. Arnholt testified:

> Yes, there were many occasions when it was pointed out to Mr. Anderson that the developmentally disabled individuals are in many ways child-like in their emotional and intellectual development, and there were some parallels.

RP 817. Anderson understood what they were telling him. RP 818. He was quite intelligent and had a "cognitive emotional power differential" with the vulnerable residents. RP 818. That is to say, his high functioning gave him a position of power on the unit. RP 818. Yet, he told Dr. Arnholt that he sometimes "felt powerless" to stop having sex with a vulnerable patient. RP 819. At one point, Anderson told Dr. Arnholt

there had been an "improvement" in his relations with a vulnerable patient because, instead of having the patient fellate him, Anderson had the patient anally penetrate him. RP 819-20. That patient immediately afterward decompensated and regressed in his treatment. RP 820. Dr. Arnholt also acknowledged an incident in August 1999, when WSH staff intervened because Anderson was circling a tub in which a patient was bathing, while holding his erect penis in his hand. RP 823.

Also in 1999, which was the year before the State filed the SVP petition, Anderson acknowledged that he still had sexual fantasies about children. RP 812. One month later, he admitted they were continuing and included fantasies of his past victims. RP 813. At the same time, he had become much less involved in his relapse prevention group. RP 814. In his last year at WSH he participated minimally in treatment, reclining with his eyes closed, and continued to minimize the impact of his sexual acts with vulnerable patients. RP 824.

At trial, a juror submitted a question asking Anderson why he had sex with other WSH patients if he knew it was wrong. Anderson testified he was a "horny individual" who did it because he "felt like it." RP 876.

Anderson's contention that he merely engaged in consensual sexual activity with adults disregards the true significance of this evidence. Whether or not the sexual activity between Anderson and the

four men could be described as "consensual" is immaterial. It was predatory behavior against vulnerable, child-like individuals that demonstrated his continuing dangerousness. The fact that it was directed at child-like adults, that it was prolific, that he continued after being told to stop it, and that it occurred in confinement, strongly suggests that Anderson continues to present a serious risk of reoffending against his preferred child victims if released from confinement. The State produced substantial evidence proving Anderson committed recent overt acts.

3. "Victim Substitution"

Anderson next argues that what he calls "victim substitution" cannot apply to him.[12] He asserts there is no nexus between the vulnerable patients and his mental state because pedophilia "requires arousal to a prepubescent body." Brief of Appellant at 25. His argument lacks merit because the law of this case holds that Anderson's sexual acts at WSH can constitute recent overt acts, and because the State's evidence proved the connection between the sexual acts and Anderson's disorders.

As shown above, Anderson's sexual acts with vulnerable WSH patients can constitute overt acts, as a matter of law. *Anderson* II, 166

[12] The term "victim substitution" was actually used by Anderson's trial counsel. Dr. Phenix did not use the term in the trial below. *See* RP 641, 666-67. Dr. Phenix further clarified that she was not opining that Anderson thought the vulnerable patients were children, but that there were similar aspects to his offending because of the patients' vulnerabilities and Anderson's ability to control them. RP 667.

Wn.2d at 550; *see* pp. 19-22 above. His assertion that there is no case law addressing this issue is also incorrect. This Court previously concluded that Anderson's sexual acts with WSH patients constituted recent overt acts. *Anderson* I, 134 Wn. App. at 323-24. So did our Supreme Court. *Anderson* II, 166 Wn.2d at 550. Other cases have made the same conclusions. *See Marshall,* 156 Wn.2d at 159 (sexual contact with developmentally disabled person may have a nexus to child sex); *Froats v. State*, 134 Wn. App. 420, 439, 140 P.3d 622 (2006) (unwanted touching of inmate who had developmental age of five was consistent with pedophilia diagnosis).

Dr. Phenix provided ample testimony about the nexus between sex with a child and sex with mentally disabled adults. She described the WSH patients as child-like, simplistic and "vulnerable like children can be." RP 629. She opined that "there is a parallel of taking advantage of vulnerable people that you can have control over and recognizing that they are really immature and child-like, similar to the kinds of victims that he [Anderson] had in the community." RP 629. Dr. Arnholt and Anderson's treatment team had the same outlook. RP 817.

Because of the law of this case, and the substantial evidence that Anderson's sexual behavior at WSH demonstrates ongoing dangerousness

towards vulnerable, child-like victims, the Court should reject Anderson's argument.

4. The State Proved Anderson's Overt Acts Were "Recent"

Anderson asserts that the overt acts alleged by the State cannot be considered "recent" because they occurred from 1990 through 1999 and can therefore have no bearing on his current dangerousness. He again raises an issue which is controlled by the law of this case and must be rejected. Furthermore, his argument fails to recognize that acts committed while in confinement are highly probative of dangerousness. Substantial evidence proved that Anderson's sexual acts with vulnerable WSH patients were "recent" for purposes of RCW 71.09.

It is the law of this case that "Anderson's overt acts were recent." *Anderson* II, 166 Wn.2d 543, 550, 211 P.3d 994 (2009). The passage of time since *Anderson* II is irrelevant, because Anderson was confined continuously at the Special Commitment Center awaiting his retrial, and there is no obligation for the State to prove that a recent overt act occurred while he was confined there. The question is, therefore, were Anderson's overt acts at WSH "recent" at the time the State filed the SVP petition? *Anderson* II answered this question in the affirmative, and the State met its burden by producing evidence at the re-trial that the acts occurred.

Ordinarily, the State is not required to prove that a confined person has committed a recent overt act because such a requirement would be "impossible to meet" and "absurd." *Froats*, 134 Wn. App. at 438 (quoting *In re Detention of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993)). This case is unusual because, prior to the filing of the SVP petition in 2000, Anderson was confined since 1988 in the juvenile justice system or at WSH. Recognizing, however, that he had enjoyed grounds privileges and escorted leaves while at WSH, the State conceded that it would have to prove that element. *Anderson* I, 134 Wn. App. at 322-23. Doing so, however, entails the difficulties contemplated by *Froats*, and the evidence must be considered taking those difficulties into account.

Anderson's overt acts must be viewed in light of his WSH confinement. "[I]n considering whether an overt act, evidencing dangerousness, satisfies the recentness requirement, it is appropriate to consider the time span in the context of all the surrounding relevant circumstances." *In re Pugh*, 68 Wn. App. 687, 695-96, 845 P.2d 1034 (1993). In *Pugh*, the appellant – like Anderson – was incarcerated for the statutory rape of young children and had been diagnosed with pedophilia. 68 Wn. App. at 689-90. And like Anderson, following his release from incarceration he was committed to WSH under RCW 71.05. *Id.* In October 1990, the State petitioned for an additional 180 days of

involuntary confinement, which was granted. *Id.* at 690. Pugh appealed, arguing in part that there was no proof of a recent overt act. *Id.* at 694. This Court, explaining why Pugh's confinement had to be considered, found sufficient evidence of a recent overt act in his past crimes and diagnosis, and its reasoning is directly on point:

> The absence of overt acts in the last 5 years might be sufficient to discount the diagnosis and prediction of dangerousness were Pugh then living in the typical community. Pugh, however, has been institutionalized since 1986; isolated from children towards whom he has a predilection to cause harm. The absence of more recent overt acts during confinement is readily explainable as a lack of opportunity to offend rather than a demonstration of improvement so as to negate the showing that he presents a substantial risk of physical harm. We are satisfied that his earlier offenses resulting in convictions when considered with his confinement and current diagnosis satisfy the requirement that his future dangerousness be evidenced by a recent overt act.

Id. at 696. Thus, acts that were five years old were considered "recent" due to a diagnosis paired with confinement that made victims unavailable.

Pugh's recognition that confinement affects the "recency" of an overt act is also reflected in this Court's decision in *Froats*, 134 Wn. App. at 420. Froats – like Anderson – was alleged to have committed a recent overt act while confined. As this Court explained:

> [A]n individual's conduct during incarceration is not necessarily probative of current dangerousness given the relative difficulty, if not impossibility, of committing an offense during incarceration. Thus, the *lack* of a recent

> overt act does not negate a finding of current dangerousness as evidenced by other relevant, probative evidence. But if an individual commits a recent overt act, notwithstanding the restrictive conditions of confinement, the State may present it as evidence of current dangerousness.

134 Wn. App. at 439 (emphasis in original).

Froats recognized the difference between committing an act while free in the community and committing it while confined. *Id.* at 438 ("Evidence of an offender's conduct during incarceration is likely to be more relevant and probative of current dangerousness than conduct that occurred during an earlier period of release."). Like Anderson, Froats was diagnosed with pedophilia. *Id.* at 425. He had also engaged in an unwanted touching of a developmentally delayed fellow inmate, when he touched the inmate's "head, neck, and shoulders in a sexual manner that made him uncomfortable." *Id.* at 427. Similarly to this case, Mr. Froats' behavior constituted a recent overt act:

> The trial court did not err in finding that Froats's unwanted touching of a developmentally-delayed inmate was a recent overt act. Although the inmate was an adult, not a child, he had a developmental age of five. Froats's conduct was consistent with his diagnosed pedophilia and long history of sexual offenses against children.

Furthermore, it is the law of this case that, in determining whether Anderson's overt acts were recent, relevant periods of confinement and whether he had access to victims may be considered. That was the trial

court's instruction to the jury, and Anderson has not challenged that instruction. *See* CP at 761. Taking into account the law of this case, and viewing the evidence in light of Anderson's confinement and lack of access to child victims, the overt acts proved by the State must be considered recent at the time the State filed the SVP petition.

C. The State Presented Substantial Evidence That Anderson Meets the Definition of a Sexually violent Predator

An SVP is an individual "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality[13] or personality disorder which makes the person more likely to engage in predatory acts of sexual violence if not confined in a secure facility."[14] RCW 71.09.020(10). Additionally, the "mental abnormality" or "personality disorder" coupled with the person's history of sexually predatory acts, must support the conclusion that the person has serious difficulty controlling his behavior. *Thorell,* 149 Wn.2d at 742. Substantial evidence of each of those elements was presented at trial. Viewing that evidence in a light most favorable to the State, a rational jury

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[13] "Mental Abnormality" means "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a ménage to the health and safety of others." RCW 71.09.020(8).

[14] "Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that "the person more probably than not will engage in such acts" if unconditionally released. RCW 71.09.020(7).

could have found the State proved each element beyond a reasonable doubt.

Anderson argues that the State did not prove these elements beyond a reasonable doubt. Brief of Appellant at 30. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences must be drawn in favor of the State. *Audett,* 158 Wn.2d at 727. Dr. Phenix testified extensively about Anderson's mental disorders. RP 501-561. She also testified at length about her risk assessment. RP 567-636. Dr. Phenix opined to a reasonable degree of psychological certainty that Anderson (1) suffers from a mental abnormality; and, (2) is likely to commit predatory acts of sexual violence if not confined in a secure facility. RP 501, 561. Viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, a rational trier of fact would have easily found that both of these elements are satisfied in Anderson's case.

1. Substantial Evidence Proved Anderson Suffers from Mental Abnormalities and a Personality Disorder.

The evidence established that Anderson suffers from a mental abnormality. Anderson argues the evidence was insufficient, for three reasons. Brief of Appellant at 32. First, he asserts he has not engaged in any acts that could be considered sexually sadistic since 1987 or 1988.

Second, he claims a lack of evidence that he has been sexually inappropriate with children. Third, he claims he has met the treatment goal of controlling and managing his arousal. The jury rejected Anderson's contentions and instead believed Dr. Phenix's conclusion that Anderson suffers from a mental abnormality. Other evidence at trial, including testimony from two other experts, supported this conclusion.

A paraphilia is a sexual abnormality. A person with a paraphilia has, over a period of at least six months, intense, recurrent sexually arousing fantasies, sexual urges, or behaviors directed towards nonliving things, children, or nonconsenting persons. RP 500-01. The diagnostic criteria are found in the Diagnostic and Statistical Manual of Mental Disorders IV-TR (DSM), the standardized diagnostic manual used by psychologists in the United States. RP 500. Dr. Phenix used the DSM to diagnose Anderson with sexual sadism, with pedophilia, sexually attracted to males and females, non-exclusive type, and with a personality disorder. RP 500-01, 538.

a. Sexual Sadism

A person with sexual sadism experiences, over a period of at least six months, recurrent intense sexually arousing fantasies, sexual urges or behaviors, involving real acts in which the psychological or physical suffering, including humiliation of the victim, is sexually exiting to the

person. RP 528. The individual must act on the sexual urges with a nonconsenting person or the sexual urges or fantasies must cause marked distress or interpersonal difficulty. RP 528. Sexual sadism is similar to a sexual orientation that a person has throughout their life. RP 528.

Dr. Phenix determined that Anderson met all of the criteria of sexual sadism. RP 528. She considered Anderson's behaviors, statements and physiological testing. RP 536.

Anderson's behaviors indicate he suffers from sexual sadism. RP 528. They include anally raping two two-year-old boys. RP 529. The anal rape of one child resulted in an injury to the child, causing him to go to the hospital. RP 529. During the act, Anderson recalled the child was crying and screaming in pain. RP 529. Dr. Phenix opined that no normal person would be able to tolerate causing that kind of pain to a child. RP 529. The second two-year-old child that Anderson raped screamed during the assault. Anderson was still able to maintain an erection and ejaculate into the victim. RP 530, 531. Dr. Phenix opined that no normal person would be able to maintain an erection during this sort of injury to a child, and Anderson displayed complete tolerance and sexual arousal during the incident. RP 530

Dr. Phenix also considered the records from Maple Lane School. RP 531. They indicated that Anderson seemed to enjoy hurting his

victims. He showed no emotion when discussing his crimes and became sexually aroused and erect when describing his actions. RP 531. He wrote about shooting staples through a Maple Lane Supervisor's breasts, inserting a large object into her anus and then cutting off her breasts. RP 533. He also had fantasies of raping and killing his supervisor. RP 533.

Finally, Doctor Phenix relied upon penile plethysmograph (PPG) data to form her diagnostic conclusions. RP 536. The PPG is commonly used in her profession to identify arousal patterns, as well as to identify how well an offender learns through treatment to lower their arousal to abnormal stimuli. RP 517. In 1990, 1991 and 1998, Anderson showed arousal to sexual sadism, with 100 percent arousal in 1998. RP 536. Substantial evidence supported the diagnosis of sexual sadism.

b. Pedophilia; sexually attracted to males and females and not exclusive type

Pedophilia is a paraphilia in which the individual experiences recurrent, intense, sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children, generally 13 years or younger. RP 502. These fantasies, urges, or behaviors must span at least 6 months. RP 502. Pedophilia non-exclusive type means that the individual is also attracted to adults. RP 518. Pedophilia is like a sexual orientation that a person has throughout their life. RP 528.

Dr. Phenix determined that Anderson met all of the criteria to be diagnosed with Pedophilia, sexually attracted to males and females, non-exclusive type. RP 503-04. She considered Anderson's behaviors, statements, and physiological testing. RP 504.

Anderson's criminal behaviors indicate pedophilia. RP 505. He raped two different two-year-old boys when he was a teenager. RP 505. In treatment at Maple Lane, Anderson disclosed sexual fantasies about boys. RP 512. At WSH, he reported sexual fantasies about children on various occasions. RP 513. As late as 1999 at WSH he reported increasing fantasies towards children. RP 513-14. And, sexual contacts with vulnerable, child-like adults at WSH were consistent with pedophilia. RP 629, 817.

Finally, Dr. Phenix again relied on the PPG. RP 515. Anderson's three PPG tests, performed over a period of nine years, demonstrated very high deviant arousal to male and female children. RP 517.

Taking all of that information into account, Dr. Phenix found that Anderson had exhibited sexually arousing fantasies, urges or behaviors over a sustained period of time, towards children. RP 521. He had acted upon his urges and fantasies. RP 522. Anderson met the age criterion for pedophilia because he was age 17 when he raped the pre-pubescent boys. RP 523-24.

c. Personality Disorder

A Personality Disorder is an enduring pattern of inner-experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has its onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment. RP 538. Dr. Phenix diagnosed Anderson with a personality disorder not otherwise specified with antisocial, borderline, and narcissistic traits. RP 538.

Antisocial traits are associated with a person, who, among other things, violates the rights of others, is impulsive, who is aggressive and irritable to others, is irresponsible, and lacks remorse for what they do. RP 540. Anderson was diagnosed with conduct disorder as a juvenile in custody, because at age three he began setting fires. RP 540. He was particularly aggressive and had a history of fighting. RP 540. He continued to have significant rule-breaking as an adult at WSH. He engaged in sexual activity and broke other rules on the unit. RP 542.

A person with Borderline Personality disorder has extreme difficulties in their interpersonal relationships and their relationships with other people. RP 543. Psychological testing revealed to Dr. Phenix that Anderson had numerous borderline traits. RP 544-45. The tests indicated

an unstable self-image, poor self-esteem, depression, and impulsive acting out. RP 545.

The essential elements of a narcissistic personality disorder are that the person is self-focused and selfish. RP 549. He or she will exploit others to meet his or her own needs; they focus solely on themselves. RP 549. Dr. Phenix opined that Anderson took over and ruled treatment groups, was condescending to others, and interpersonally exploitive, all of which are signs of narcissistic tendencies. RP 550.

Based on this evidence, a rational jury could have easily found that Anderson suffers from mental abnormalities and a personality disorder.

2. Substantial Evidence Supported the Jury's Finding that Anderson is Likely to Commit a Future Sexually Violent Crime if Released

The State produced substantial evidence that Anderson is more likely than not to commit predatory acts of sexual violence unless confined to a secure facility. Anderson argues that he has met the treatment goal of controlling and managing his arousal. Brief of Appellant at 32. He asserts that, because he has not engaged in acts that could be considered sexually sadistic since 1987 or 1988, and there was no evidence of being inappropriate with children, he cannot be shown to have serious difficulty controlling his behavior. *Id.* Dr. Phenix relied on an array of information, including actuarial assessment, psychological testing,

a records review and interviews of Anderson, to support her opinion that Anderson is likely to reoffend if released. Substantial evidence supported her opinion and the jury's finding.

a. The Actuarial Instruments Show That Anderson is Likely to Reoffend

Dr. Phenix opined that Anderson was likely to engage in predatory acts of sexual violence if not confined to a secured facility. RP 561. She conducted a risk assessment utilizing accepted methods in her profession. RP 562. For example, she considered actuarial instruments that measured Anderson's static risk factors. RP 563. Using actuarial instruments increases the reliability of a risk assessment. RP 565. Dr. Phenix used more than one instrument to increase the accuracy of her assessment. RP 568. Actuarial instruments are known to under-predict overall risk. RP 578.

The Static 99R is a list of 10 well-established static risk factors. RP 567. It has been cross-validated, or tested on groups of sex offenders other than those on which it was developed. RP 567. It is designed to be scored in any jurisdiction and is the most widely used instrument. RP 568. Anderson scored in the medium-high range on the Static 99R. RP 569.

The Static 2002R also consists of a list of well-established risk factors. RP 571-577. Anderson received a score of 9, which placed his

relative risk in the high range. RP 577. Anderson's likelihood of reconviction within five years was documented at 41.6 percent and for 10 years 52.3 percent. RP 578.

b. Other Risk Factors Corroborated Anderson's High Risk

Psychopathy is a collection of personality traits and historical characteristics that, when present, increase the risk of future nonsexual violence, criminality and future sexual violence. RP 579. The presence of psychopathy and sexual deviance increases the risk of future sexual re-offense. RP 579. Dr. Phenix conducted a structured interview of Anderson, and reviewed his records to examine his particular personality traits and historical criminal traits. RP 580. Utilizing the PCL-R[15], Dr. Phenix scored Anderson at 32.2, which indicated the presence of psychopathy. RP 580-81. Dr. Phenix opined that an individual with a score of 30 and above is more likely than not to commit future sexual and nonsexual offenses. RP 583.

Dr. Phenix used the Structured Risk Assessment - Forensic Version (SRA-FV) to measure Anderson's dynamic, or changeable, risk factors. She also considered Anderson's protective factors when assessing his risk. RP 620. These included: (1) Whether he had lived in the

[15] The PCL-R is widely used in essentially all of forensic psychology to determine the level of a person's psychopathic traits. RP 581.

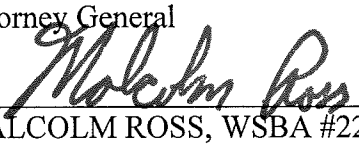
community for 10 years without offending; (2) whether he has 15 or less years of lifetime expectancy due to illness or physical conditions; (3) whether he is of advanced age; and (4) whether he received sexual deviancy treatment. RP 620-21. After considering these factors as they related to Anderson, Dr. Phenix opined that he continued to have a high risk to reoffend. RP 636. Having considered all of this information—the results of the actuarial instruments used to assess static risk, the results of standard tests for psychopathy, the results of standard assessment tools to determine dynamic risk, and considering pertinent protective factors—Dr. Phenix opined that Anderson was likely to reoffend in a predatory, sexually violent manner if released. Her opinions were well-supported by the information she considered and constitute substantial evidence supporting the jury's verdict.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 3rd day of March, 2014.

ROBERT W. FERGUSON
Attorney General



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NO. 45000-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: JOHN CHARLES ANDERSON, Appellant.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On March 3, 2014, I sent via electronic mail, true and correct copies of Brief of Respondent, and Declaration of Service, addressed as follows:

Marie Trombley
marietrombley@comcast.net

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of March, 2014, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON

WASHINGTON STATE ATTORNEY GENERAL

March 04, 2014 - 11:31 AM

Transmittal Letter

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