

34399-1-II
NO. 34388-1-H

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

In re the Detention of:

DAVID T. FAIR,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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RESPONDENT'S OPENING BRIEF

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I. STATEMENT OF ISSUES

- A. **Whether the State is required to prove a recent overt act where the offender has been continuously confined since revocation of his SSOSA sentence, imposed following conviction for a sexually violent offense?**
- B. **Whether the evidence was sufficient to support Fair's commitment as a Sexually Violent Predator?**

II. STATEMENT OF THE CASE

The State accepts Fair's statement of the case except as otherwise noted below.

III. ARGUMENT

- A. **The State is not required to prove a recent overt act in this case.**

Fair argues that the trial court erred in denying Fair's Motion to Dismiss based on the State's failure to allege a recent overt act (ROA). App.Br. at 26-27. He appears to argue that, because Fair's 20-month sentence for child molestation had expired at the time the State filed its petition, and he was being held only on his 87-month robbery sentence, Fair was not confined for a sexually violent offense at the time of the petition's filing, and proof of an ROA is required. He also appears to argue that, because Fair was temporarily released into the community on a SSOSA following sentencing for Child Molestation, proof of an ROA is constitutionally required. As authority for these propositions, he cites

In re the Detention of Albrecht, 147 Wn.2d 1, 51 P.3d 73 (2002), as well as dissents from a variety of sex predator cases.

Fair's arguments are without merit, and should be rejected by this Court. Fair ignores the direct controlling authority of *In re Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000) by suggesting that this case is controlled by *Albrecht*. His position is untenable. *Albrecht* itself makes it clear that *Henrickson* remains good law and that *Albrecht* applies only to the unique circumstance of an RCW 71.09 filing while a person is serving a short jail term for violation of conditions of community supervision. 147 Wn.2d at 11 n.11. The *Albrecht* decision is unique to the unusual circumstance created by a *community supervision* violation and does not even apply where a person is returned to serve an underlying sexually violent offense due to a parole violation. Fair provides no reason for this court to revisit the substantial authority supporting the trial court's decision that the State need not plead and prove a recent overt act when Fair has been continuously incarcerated *on a sexually violent offense* for over twelve years prior to initiation of RCW 71.09 civil commitment proceedings.

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1. The Statute does not require proof of an ROA in this situation.

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

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

140 Wn.2d at 476-77. As a result, any requirement that the State plead and prove a recent overt act must arise from the due process clause. Fair has not demonstrated that due process requires proof of an ROA in this case.

2. Due Process does not require proof of an ROA.

a. Fair's release to the community during his SSOSA does not require the State to prove an ROA .

Although it is not entirely clear, Fair appears to argue that, because of his release to the community during his SSOSA, the State is required to prove an ROA during that time period. App. Br. at 18-35. As authority for

this proposition he cites *In re the Detention of Albrecht*, 147 Wash.2d 1, 51 P.3d 73 (2002), as well as dissents from a variety of sex predator cases. *Albrecht*, however, neither applies to nor controls this case. Unlike *Albrecht*, Fair was not in jail on a short incarceration for a minor community placement violation at the time the State filed its SVP petition. Instead, when the State filed its petition, Fair had been imprisoned for twelve years following revocation of his SOSSA, imposed after his conviction for Child Molestation. As such, his case is controlled by *Henrickson*.

In *Henrickson*, the appellant – like Fair – had been convicted of a sexual offense but was released on bond in the community for three years while appealing his exceptional sentence. *Henrickson*, 140 Wn.2d at 689. On remand, the trial court sentenced him to 50 months for attempted kidnapping in the first degree and communication with a minor for immoral purposes. In *Henrickson's* companion case, *In re Halgren*¹, the appellant had been convicted in 1996 for unlawful imprisonment involving a prostitute. He was free in the community for three months prior to receiving a 60-month exceptional sentence. *Id.* at 691.

On appeal, both *Henrickson* and *Halgren* argued that, although incarcerated on the date of their respective petitions' filings, due process required that the State be required to prove a recent overt act because each

¹ *In re Detention of Halgren*, 122 Wn. App. 660, 98 P.3d 981 (2004)

had been living in the community after his most recent arrest. The *Henrickson* court rejected this argument:

We hold no proof of a recent overt act is constitutionally or statutorily required when, on the day the petition is filed, an individual is incarcerated for a sexually violent offense, RCW 71.09.020(6), or an act that by itself would have qualified as a recent overt act, RCW 71.09.020(5).

Id. at 688-89. To require proof of an ROA, the court wrote, “would elevate Henrickson's and Halgren's periods of temporary release during the disposition of their criminal cases over the sexually related criminal acts that actually gave rise to their extensive periods of confinement. This would lead to absurd results because, in effect, any post-arrest supervised release for whatever reason would provide the opportunity to circumvent the distinctions of the statute. ‘[D]ue process does not require that the absurd be done before a compelling state interest can be vindicated’.”

Id. at 696 (internal citations omitted).

This case falls squarely within the rule of *Henrickson*. When the State filed its petition, Fair was incarcerated for child molestation in the second degree after revocation of his SSOSA. Child molestation in the second degree is a sexually violent offense pursuant to RCW 71.09.020(15). Thus, just as in *Henrickson*, Fair had been “previously released into the community but [was] incarcerated on the day a sexually violent predator petition [was] filed,” following his conviction

for a sexually violent offense or an act that by itself would have qualified as a recent overt act. *Id.* at 688-89. While Fair is correct that, unlike Mr. Henrickson, Fair's sentence for that sexual offense had technically expired on the date of the SVP petition's filing, this is a distinction without a difference. Fair was continuously confined from the time of his SSOSA revocation to the time of his release on the robbery conviction. To hold that the fact of one sentence's expiration prior to the other's, in the absence of an intervening release to the community, prevents the State from filing a petition would be to reach an absurd result.

Appellate courts of this state addressing cases involving revocation of parole have reached a similar result. In such cases, the offender is released on parole, violates some condition of his parole, and is then returned to DOC custody on his underlying sentence. For example, In *re the Detention of Paschke*, 121 Wn. App. 614, 90 P.3d 74 (2004), Division III rejected the argument that the State was required to prove a recent overt act where the offender had lived in the community for two years prior to being returned to prison for violating the conditions of his parole. Paschke had been convicted of one count of second degree rape in 1979, and was paroled in May of 1987. 121 Wn. App. at 616. Two years later, in June 1989, his parole was revoked based on an allegation that he had made obscene phone calls, and he was returned to prison to serve out

the remainder of his sentence. Prior to his anticipated release from prison in 1994, the State filed a petition alleging that he was an SVP, and he was later committed.

On appeal, Paschke argued that, because he had lived in the community for over two years while on parole prior to the State's filing its SVP petition, *Albrecht* required the State to prove he had committed an ROA. *Id.* at 621. The court rejected the argument, holding that *Albrecht* did not govern Paschke's case, and that, under the facts presented, the State was not required to prove a ROA. *Id.* at 625. Noting that Paschke's case "falls somewhere between *Henrickson* and *Albrecht*," the court held that to require proof of an ROA where nearly five years had lapsed between Paschke's return to incarceration and the filing of the petition, "would be absurd." *Id.*, citing *Henrickson*, at 696.

The court also reasoned that the due process concerns that necessitated proof of an ROA in *Albrecht* were not present in Paschke's case:

The *Albrecht* court grounded its holding on a concern that the State could get around the recent overt act requirement by jailing an alleged SVP for non-sexual, non-overt conduct such as "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" and then, a short while later, filing a SVP petition as the person was

about to be released. That concern is not present here; the State did not file the petition until Mr. Paschke had spent nearly an additional five years serving out the remaining sentence on his underlying sexually violent offense.

Id. at 623-24. Similarly, any concern that the State might have circumvented the requirements of the statute by a pretext revocation is clearly absent here, where Fair had been continuously incarcerated for more than twelve years at the time of the petition's filing.

The issue of parole was again considered by Division I in *In re Hovinga*, 132 Wn. App. 16, 130 P.3d 830 (2006). *Hovinga* involved an offender who had been sentenced in 1981 on a charge of statutory rape in the first degree of a nine year old girl.² He was paroled in 1988, but his parole was revoked in April of 1992 after he admitted that he had followed young girls around in a department store while fondling himself. 132 Wn. App. at 19. The State filed an SVP petition shortly before his scheduled release in 2003. *Id.*

Rejecting his argument that, under *Albrecht*, the State was required to plead and prove a recent overt act, Division I noted that *Albrecht*, having violated the terms of his community placement, was sent

² Statutory rape in the first degree is a sexually violent offense pursuant to RCW 71.09.020(15).

to prison,³ “not to complete his original prison sentence on the sexually violent crime, but on violation of the terms of community placement.” *Id.* at 22-23. Hovinga, in contrast, “was released on parole in lieu of serving his full sentence.” *Id.* at 23. Expanding on this distinction, the court noted that “community placement involves post release supervision and begins either when an offender completes his term of confinement or when he is transferred to community custody in lieu of early release. RCW 9.94A.030(7).” *Id.* In contrast, the court noted that “parole pertains to ‘that portion of a person’s sentence for a crime committed before July 1, 1984, served on conditional release in the community subject to board controls and revocation.’” RCW 9.95.0001(5). Thus Hovinga “was incarcerated for a sexually violent offense when the petition was filed,” and no proof of an ROA was required. *Id.*

Only two months later, Division I again considered a recent overt act case involving parole. In *In re Kelley*, 133 Wn. App 289, 135 P.3d 554 (2006), Division I affirmed the commitment of an offender who had received a 20-year suspended sentence following his conviction for statutory first degree rape in 1980. Kelley’s suspended sentence was revoked after he assaulted his girlfriend, was found in possession of a

³ Although the court’s decision refers to Mr. Albrecht’s having been sent to “prison,” he was in fact sent to the county jail for 120 days following revocation of his community placement. *Albrecht*, 147 Wn.2d at 5.

bayonet, and was determined to have left the county without permission. He was returned to prison to serve out the remainder of his original 20-year sentence for first degree statutory rape. 133 Wn. App. at 291.

Rejecting Kelley's argument that the State was required to prove a recent overt act to the jury, the court held that:

[p]roof of a recent overt act under these circumstances is not required. "Periods of temporary release after arrest and prior to extensive confinement do not modify the statute's unambiguous directive that the State need not prove a recent overt act when the subject of a sexually violent predator petition is incarcerated on the day the petition is filed." It would also be an impossible standard for the State to meet because total confinement prevents such acts from occurring, and Kelley has been confined since 1983. To require the State to prove an overt act in Kelley's case would write the word "recent" out of the statute.

Id. at 294. The court concluded by noting that Kelley's 20-year confinement "was not a penalty for choking his girlfriend or possessing a bayonet. It was for first degree rape, a sexually violent offense. That offense was proved beyond a reasonable doubt, so due process is satisfied." *Id.*

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

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

The facts of Fair's case are nearly identical to the facts of *Paschke*, *Hovinga* and *Kelley* in every critical way: (1) all had been previously convicted of a sexually violent offense, (2) all were released at some point to serve their sentences in the community, (3) all were released into the community subject to probationary conditions, (4) all had their sentences revoked after committing a violation of their conditional release, and (5) following their revocations, all served lengthy prison sentences prior to the filing of the SVP petition. Just as no proof of an ROA was required in their cases, none is required here.

b. Prior expiration of Fair's sentence for child molestation is irrelevant.

Fair argues that, because his sentence for child molestation expired prior to the expiration of his sentence for robbery, the State is required to prove an ROA. This argument is without merit. When the State initiated RCW 71.09 proceedings, Fair had been in continuous incarceration since 1992 completing his sentence for both the 1988 child molestation and the 1989 robbery. For due process purposes, which sentence expired first should not matter. Because Fair had been continuously confined since

revocation of his SSOSA in 1992, due process does not require the State to plead and prove a recent overt act.

Moreover, this argument is absurd on its face. Such an approach would reward Fair for his robbery conviction and sentence, and, according to his logic, would effectively preclude the State from ever filing an SVP petition where the offender is serving concurrent sentences in which the sentence for the non-sexual offense is longer than the sentence for the sexual offense. This case illustrates precisely the catch-22 Fair attempts to create: Had the State attempted to file its petition at the expiration of Fair's child molestation sentence, it would have been filing long before the offender's actual release date, and would have been in violation of RCW 71.09.030(1).⁴ On the other hand, if the State waits until the expiration of the longer sentence and the prospect of actual release into the community, as it did here, it would, according to Fair, be required to prove an ROA because the offender is no longer confined for a sexually violent offense or an act that would constitute a recent overt act. Such a rule is absurd on its face and would undermine the State's compelling interest in protecting the community from dangerous sex offenders. "[D]ue process does not require

⁴ RCW 71.09.030 states in pertinent part: When it appears that (1) a person who at any time previously has been convicted of a sexually violent **offense is about to be released from total confinement**...the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation (emphasis added).

that the absurd be done before a compelling state interest can be vindicated.” *In re Young*, 122 Wn. 2d 1, 41, 857 P.2d 989 (1993), *reconsideration denied* (1993).

3. Due Process Does Not Require the Absurd -- Proof of a Recent Overt Act that Lacks Recency

It should be noted that Fair is asking that the State be required to plead and prove the impossible: that he committed a "recent" overt act manifesting his danger during a temporary release twelve years prior to the filing of the petition. In essence, this court could not grant relief without entirely thwarting the State's compelling interest to protect the public from individuals like Fair.

In this situation, the purposes of the due process recent overt act doctrine are not served because Fair's last foray into the community cannot be termed "recent." Forcing the State to plead and prove a particular act from twelve years ago would do little to enhance the overall danger assessment and would merely impose an absurd requirement that would hamper the State's compelling interest to civilly commit sexually violent predators. As noted in *Henrickson*, forcing proof of a recent overt act in this situation would "elevate . . . periods of temporary release . . . over the sexually related criminal acts that actually gave rise to [the

offenders'] extensive periods of confinement." 140 Wn.2d at 696. This would be an "absurd result." *Id.*

B. Sufficient evidence supports Findings of Fact 8 and 71-81, the disputed Conclusions of Law, and the trial court's order of commitment.

Fair argues that there was insufficient evidence to support Findings of Fact (FF) Nos. 8, 71, 72, 73, 74, 75, 76, 77, and 78, that the trial court erred when it entered Conclusions of Law (CL) Nos. 3, 4, 5, 6, and 7, and that there was insufficient evidence to support entry of the Order of Commitment. App. Br. at 2.⁵ He bases his argument on the claim that testimony from the State's experts should be discounted and contrary evidence from the defense experts should carry the day. In making this argument, Fair ignores the narrow standard of review applicable to sufficiency of the evidence challenges under RCW 71.09.

The criminal standard of review applies to sufficiency of the evidence challenges under the sexually violent predator statute. *In re Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). Under this standard, "when viewed in the light most favorable to the State, there must be sufficient evidence" to allow a rational trier of fact to conclude that the person is a sexually violent predator. *Id.* When the record contains conflicting testimony, the verdict favoring one side based on

⁵ Fair does not take issue with Findings of Fact 1-7, and 9-70. As such, they are verities on appeal. *Ambrose v. Ambrose*, 67 Wn.App 103, 105, 834, P.2d 101 (1992).

various credibility determinations will not be disturbed. *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). Because the evidence regarding Fair's deviant sexuality and personality disorder presented at trial was overwhelming, this Court should affirm his commitment.

1. Findings of Fact 71 and 76 are supported by sufficient evidence, and the court did not err in entering Conclusions of Law 3 and 4.

Findings of fact 71 and 76 read as follows:

71. The Court finds that the Respondent suffers from the mental disorder of Pedophilia, and from the personality disorder of Antisocial Personality disorder.

76. The Court finds that Dr. [sic] Respondent is sexually deviant.

Conclusions of Law 3 and 4 read as follows:

3. Pedophilia, sexually attracted to females, nonexclusive, from which the Respondent suffers, is a mental abnormality as that term is used in RCW 71.09.020(8) and (16).

4. Antisocial Personality disorder, from which the Respondent suffers, is a personality disorder, as that term is used in RCW 71.09.020(16).

The evidence of Fair's Pedophilia and Antisocial Personality Disorders presented at trial was overwhelming. Fair plead guilty to one count of child molestation in the second degree in September of 1988. Exhibit A. While this conviction was based on sexual contact with one girl, Fair had actually had sexual contact with three girls, a twelve year old

and two thirteen-year-old twins. 3RP at 251. After giving the girls alcohol, Fair put his hand between the legs of the twelve year old and touched her vaginal area. Fair said that, although he was attracted to the twins, he kept coming back to the twelve year old because he found her particularly attractive. 3RP at 251-252.

After revocation of his SSOSA and his return to prison in Washington State, Fair was an inmate at the Department of Corrections (DOC) in Washington from June 1992 to June 2004. Ex. 7; CP at 1-2. During that time, he admitted to having committed numerous unadjudicated sexual offenses against children. For instance, he described to therapists at the Sex Offender Treatment Program (SOTP) at Monroe how he had touched the genitals of a four-year-old girl as she urinated, licked her vagina, had her urinate on his genitals, and rubbed his penis against her until he ejaculated. FF 11; CP at 187.⁶ He also told them that, when he was in the Air Force, he kissed and tried to touch the breasts and vulva of a fourteen-year-old girl named Petra. In addition, he kissed her twelve-year-old sister Sara, had her stroke his penis, performed oral sex on her, and rubbed his penis between her thighs. CP 189. Fair reported to SOTP staff that he had had sexual intercourse with a fourteen-year-old girl

⁶ At trial, the videotape of Fair's deposition was introduced as an exhibit at trial. The transcript of that deposition, along with the attached exhibits, was made a part of the court file. CP 140-284.

while he was in England, had masturbated a disabled seventeen-year-old male while he was working as a caretaker at a nursing home, and had performed oral sex on a two-year-old boy he was babysitting. FF 11; CP at 194-196. Fair also admitted to having committed sexual offenses as a teenager, such as peeping on girls and encouraging them to expose themselves. CP at 198.

On October 21, 2000, Fair wrote a letter to his counselor at SOTP, Sonja Dewitt. CP at 199; Ex. 29. In that letter, Fair recounted a dream he had had about murdering and raping two girls. Ex. 29; CP at 203; 256-259. He described crushing one of the girls' throats, laying her next to the naked body of the second victim whose genitalia he had mutilated, and then violently raping the murder victim. *Id.* Fair wrote in the letter that he felt "both aroused and troubled by the dream." Ex. 29; CP at 205. He expressed concern that, under the stress of release to the community, he would "[find] a young girl to abduct, molest and rape for a short or long period of time, then abandon when I kill myself to prevent arrest." Ex 29, CP at 256-259.

While in prison Fair also wrote "book reports" in which he quoted passages from books and then wrote reflections following each passage. In his report on *Childhood and Society*, dated November 22, 2002, Fair proposed that children are sexual beings who should be introduced to

sexuality through both verbal and physical instruction. Ex. 30; CP 260-265. In his report on *Why Does He Do That? Inside the Minds of Angry and Controlling Men* written in 2002, Fair noted that he had wanted to be helpful to families with daughters to whom he was attracted “to give the parents reasons to not want to confront me if they became suspicious; that they might doubt I could be a child molester because of how helpful I am, or they might minimize their suspicions because they really like how much I help out, and don’t want to lose that.” Ex. 32; CP 240-245; 276-277.

Fair also reviewed *The Sex Offender: Corrections, Treatment and Legal Practice* and *Webster’s Dictionary*, and noted that “not all (or even the majority) of instances of sexual activity between an adults and a child are forced, assaultive, abusive, or even molestation.” Ex. 33; CP at 245-246. He wrote that, according to the actual definition of molestation, only one of the four girls he had sexual contact with was actually “molested” – that is, annoyed—by him, while the other three victims had had no objection or had enjoyed it. Fair mocked the idea that he caused a four-year-old girl with whom he had had sex any harm, explaining that the only potential harm would be caused by society “convincing her she was victimized, rather than acknowledging that it was harmless fun.” Ex. 33; CP 245-247, 278-284.

In addition to considering Fair's deposition, the trial court heard testimony from Lisa Dandesku, Fair's primary treatment provider at SOTP. 1RP at 36. Ms. Dandesku testified that Fair discussed both the acts that led to his child molestation conviction, as well as the assaults of girls for which he was not convicted. According to Ms. Dandesku, Fair minimized his acts and blamed his victims, claiming that the victims of the 1988 assault were being flirtatious, had asked him for beer, and were asking to have sexual contact with him. 1RP at 39. Ms. Dandesku testified that, during treatment, Fair admitted to having sexually victimized seventeen victims between the ages of two and seventeen, as well as two adults. 1RP at 40-41. The sexual acts he committed against his child victims included fondling, sexual intercourse, kissing, intercural sex, cunnilingus, having a victim masturbate him, rubbing his penis against the victim until he ejaculated, and having a victim urinate on him. 1RP at 40. One of the adults Fair admitted to having victimized was developmentally disabled; the other was physically disabled. Fair was a caretaker to these adults. 1RP at 41.

During his treatment in 2003 and 2004, Fair reported frequent deviant arousal and masturbation to thoughts of minors for hours at a time. 1RP at 44. Fair showed Ms. Dandesku a collection of pictures of children taken from magazines which he would use as visual aids to enhance his masturbation, and acknowledged to Ms. Dandesku that he did not enjoy masturbating to adults as much as he enjoyed masturbating to minors. 1RP at 45.

Ms. Dandesku explained that the treatment team tried to convince Fair that he needed to stop masturbating to thoughts of children in that this would serve to reinforce his deviant arousal. Fair, however, was not interested in pursuing this goal. On March 9, 2004, one week prior to learning he was being considered for civil commitment, Fair reported that he was continuing to masturbate to fantasies about children. 1RP 49. Ms. Dandesku testified that Fair did not see anything wrong with having sex with children, and never made any real commitment to change his deviant patterns. 1RP 49-50. At the completion of treatment, the treatment team assessed Fair's risk of re-offense as high. 1RP at 49.

The trial court also heard the testimony of Dr. Dennis Doren. Dr. Doren is a forensic psychologist who specializes in sex offender diagnostic and risk assessment evaluations. 3RP at 200; FF 12. Dr. Doren has assessed, evaluated or treated hundreds of sex offenders since the early 1980s, and has assessed over 200 for possible civil commitment. 3RP at 203-204. Dr. Doren has trained over seventy-five groups of professionals in the assessment and evaluation of sex offenders, and has had approximately two dozen of his articles published in scientific journals. 3RP at 204-205.

Dr. Doren reviewed several thousand pages of materials relating to Fair. FF 14. These materials were of the type typically relied on by mental health professionals in conducting sexually violent predator evaluations. 3RP at 212-213; FF 14. On May 24, 2004, Dr. Doren conducted a four-and-a-quarter hour interview with Fair. Prior to

interviewing him, Dr. Doren explained the nature and purpose of the interview to Fair. 3RP at 213-215; FF 15.

During the interview, Fair acknowledged that he had molested three children during the incident which formed the basis for his conviction for one count of child molestation in the second degree. 3RP at 227. Fair also admitted that he had sexually offended against sixteen unadjudicated victims. The victims ranged from a very young boy up to a young adult, with most victims being in the eight-to twelve-year-old range. 3RP at 223. Fair described to Dr. Doren having put his mouth over the penis of a two to three-year-old boy he was babysitting, having fondled the breasts and touched the vaginal areas of twelve-year-old girls, and having masturbated a developmentally delayed eighteen-year-old man. 3RP 223-224. Fair also described having had anal sex with another inmate, but stated he had had to fantasize about young girls in order to ejaculate. Fair also described fantasizing about girls and using urine during sexual activities with his wife. 3RP at 258. Dr. Doren testified that the disclosures Fair made to him were consistent with disclosures he had made to others according to the records he had reviewed. 3RP at 225.

Fair explained that he had frequently written about deviant matters in order to stimulate his sexual desires. 3RP at 259. When asked by Dr. Doren what sort of person would be most at risk from him, Fair responded that he found most children to be attractive, and that while his

preferred age was eight to twelve, he would look for four to sixteen year olds if he were going to reoffend. 3RP at 262.

Dr. Doren learned that following his interview of Fair, Fair had retracted his admissions to self-reported victims and claimed that he had made them up in order to get into treatment at what he perceived to be a better Department of Corrections facility. Dr. Doren testified that Fair's retractions did not change his opinion that Fair met criteria for commitment as a sexually violent predator, explaining that his diagnoses were not dependent on Fair's admissions. 3RP at 231-234.

Dr. Doren diagnosed Fair with Pedophilia (sexually attracted to females, non-exclusive), Paraphilia Not Otherwise Specified, Urophilia, Alcohol Dependence in a Controlled Environment, Cannabis Abuse, and Antisocial Personality Disorder. 3RP at 246-247; FF 24. Dr. Doren concluded that only the Pedophilia and the Antisocial Personality Disorder predispose Fair to the commission of sexually violent acts. 3RP at 273, 277-278, 282, 291-296; FF 33.

Dr. Doren explained that a person who suffers from Pedophilia has recurrent, intense, sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children, generally age thirteen or younger. 3RP at 249; FF 28. To support his diagnosis, Dr. Doren chronicled Fair's lengthy history of both having such urges and fantasies as well as acting on them. 3RP at 249-260. Records reviewed by Dr. Doren included a report from Fair's wife in 1988 that he had expressed interest in having sex with a young girl, and

his account of having engaged in fondling, cunnilingus, and vaginal intercourse with a twelve-year-old girl in England while he was in the military. 3RP at 253-255. Dr. Doren also considered information from a presentence interview for his 1989 child molestation conviction in which Fair was reported to have stated that he was “sick” and “need[ed] help.” Dr. Doren also described a mental health report in 1999 that documented Fair’s having written nearly a full box of fantasy stories, and reported that “Fair feels he is one of the most dangerous types of pedophiles because he is so subtle.” 3RP at 255-256. That report indicated that, that same year, Fair reported that ninety-five to ninety-eight percent of his fantasies were deviant. 3RP at 256. Dr. Doren considered Fair’s admission, in July of 2003, that he had had twenty victims, as well as his March of 2005 report while at the SCC that he enjoyed masturbatory fantasies involving children. 3RP at 263. Dr. Doren testified that records reporting this lengthy history were consistent with Fair’s statement to Dr. Doren that he had held onto his sexual deviance for sixteen years. 3RP at 260.

Dr. Doren also testified about Fair’s Antisocial Personality Disorder. 3 RP 283-294. He explained that antisocial personality disorder is characterized by a disregard for and the violation of the rights of others. 3RP at 292; FF 30. Dr. Doren explained that Fair’s pattern represents his ongoing way of interacting with the world, and that, for him, this involves both sexual and non-sexual offending. 3RP at 292-293. Dr. Doren testified that Fair’s Pedophilia and Antisocial Personality

Disorder, both standing alone and combined, make him likely to engage in predatory acts of sexual violence if not confined to a secure facility. 3RP at 273, 291-293; FF 34. Discussing how these two disorders interact, Dr. Doren explained that Fair's personality disorder makes it more likely that he will act on his pedophilic urges, because his personality disorder means that he lacks the internal controls that keep most people from acting on urges that harm others. 3RP at 296.

2. Finding of Fact 72 is supported by sufficient evidence.

Finding of Fact 72 reads as follows:

72. The Court finds that the respondent's Pedophilia is a congenital or acquired condition, that it affects the Respondent's emotional or volitional capacity, and that it predisposes him to the commission of criminal sexual acts to the degree constituting him a menace to the health and safety [sic] of others.

Dr. Doren testified that pedophilia is a mental abnormality as defined by law. 3 RP at 272-73; FF 27. He then went on to explain how it affects emotional and volitional capacity. 3 RP at 272-274.

3. Finding of Fact 73 is supported by sufficient evidence.

Finding of Fact 73 and Conclusion of Law 5 read as follows:

73. The Court finds that the Respondent's Pedophilia and Antisocial Personality disorder, independently and in combination with each other, cause him serious difficulty in controlling his sexually violent behavior.

Conclusion of Law 5 reads as follows:

5. The Respondent's mental abnormality and personality disorder cause him serious difficulty controlling his sexually violent behavior.

Dr. Doren testified that Fair's Antisocial Personality Disorder, in conjunction with his paraphilia/sexual deviancy, cause him to have serious difficulty controlling his sexual behavior. 3 RP at 291-94; 342-44.

4. Findings of Fact 74, 75, 77, and 78, and Conclusion of Law 6 are supported by sufficient evidence.

Finding of Fact 74, 75, 77, and 78 read as follows:

74. The Court finds that the Respondent, as a result of his mental abnormality and/or personality disorder, is likely to engage in predatory acts of sexual violence if not confined in a secure facility.

75. The court finds that Dr. Doren's scoring of the PCL-R is reliable and that the Respondent is a psychopath.

77. The Court finds that the Respondent's sexual deviance combined high [sic] PCL-R score, places him at a very high risk to engage in predatory acts of sexual violence if not confined to a secure facility.

78. The court finds that Respondent is more likely than not to reoffend in a sexually violent manner if he is not confined to a secure facility.

Conclusion of Law 6 reads as follows:

6. The respondent's mental abnormality and personality disorder, both independently and in combination, make(s) him likely to engage in predatory acts of sexual violence if not confined in a secure facility .

Dr. Doren testified that his risk assessment of Fair consisted of three components: An actuarial risk assessment, an examination of so-called “protective factors” operating in Fair’s case, and an analysis of factors unique to Fair that impact his risk of recidivism. 3RP at 297-298.

Actuarials, he explained, are a list of factors that research has shown to be correlated with future risk. 3RP at 298. Dr. Doren utilized three actuarial instruments. He testified that the results of those instruments were mixed, and therefore did not allow him to draw a conclusion, based only on those instruments, regarding Fair’s risk of reoffense. 3RP at 316-317; FF 43. He considered whether there were any “protective factors”—that is, factors that can reduce a person’s risk to reoffend, such as age or treatment participation—at play, but concluded that none of these worked to reduce Fair’s risk. 3 RP 335, 339; FF 52, 53. He also discussed the relationship of psychopathy to sexual reoffense. A psychopath, Dr. Doren explained, is a person who lacks the capacity for emotional connection to other people. 3RP at 320; FF 48. Psychopathy is measured by administering the Hare Psychopathy Checklist, a psychological test rather than an actuarial instrument. 3RP at 318; FF 44. Dr. Doren explained that normal adults typically have scores that range from four to six on this test, and that people who score thirty or higher are considered to be psychopaths. 3RP at 320; FF 46. A score of

twenty-five or more is characterized as a high degree of psychopathy, and is the threshold used in research that examines psychopathy in combination with sexual deviance. FF 46.

Fair's score on the Hare Psychopathy Checklist test was a thirty, thereby placing him in the highest degree of psychopathy and well above the threshold used in sexual deviance studies. 3RP at 320; FF 47. (Dr. Donaldson agreed that Fair was a psychopath. 2RP at 142-43; 183; 187; FF 60.) Fair thus met the criteria for sexual deviancy in the studies analyzing its role in combination with psychopathy because he is a diagnosed pedophile. 3RP at 322-323. Dr. Doren emphasized that, even without Fair's self-reports of unadjudicated victims, which he now retracts, he would still find that Fair meets the criteria for sexually deviance as the terms is used in these studies.

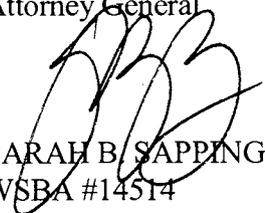
Dr. Doren explained that research has established that people who exhibit both high psychopathy and sexual deviancy recidivate sexually at a very high rate. 3RP at 318; FF 49. Indeed, he testified that the combination of high psychopathy and sexual deviance is the highest risk combination known to exist, and concluded that this level of risk clearly puts Fair above the threshold of more likely than not to commit acts of sexual violence if he were not confined in a secure facility. 3RP at 333; FF 50.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that Fair's commitment be affirmed.

DATED this 30 day of November, 2006.

ROB MCKENNA
Attorney General



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WSBA #14514
Senior Counsel
Attorneys for Petitioner

NO. 34399-1-II

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

In re the Detention of:

DAVID T. FAIR,

Petitioner-Appellant.

DECLARATION OF
SERVICE

LISA SCHAEFER declares as follows:

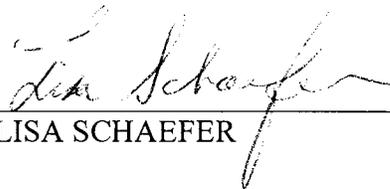
On November 30, 2006, I deposited in the United States Mail
postage prepaid addressed as follows:

JAMES REESE, III
ATTORNEY AT LAW
612 SIDNEY AVENUE
PORT ORCHARD, WA 98366

a copy of the following documents: RESPONDENT'S OPENING BRIEF
and DECLARATION OF SERVICE.

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

SIGNED this 30th day of November, 2006.



LISA SCHAEFER

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DIVISION II
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