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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering Conclusion of

**Law 10:**

**Although the Petitioner pled a recent overt act, pursuant to RCW 71.09.030(2) the Petitioner was not required to prove a recent overt act because Respondent was in total confinement on the day the petition initiating this matter was filed.**

**The trial court was required to prove a recent overt act.**

2. The trial court erred in entering Conclusion of

**Law 11:**

**[T]his Court concludes that the Petitioner proved Respondent committed a recent overt act, as defined in RCW 71.09.020(10), with evidence that Respondent was masturbating to deviant themes including sexual activity with children and non-consenting persons five to seven times daily, and also with evidence of Respondent's admission that he was going to re-offend against a minor male if released into the community.**

**There was insufficient evidence that LaBaum committed a recent overt act.**

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. **After completing his juvenile sentence for attempted rape of a child in the first degree, LaBaum was released to a home for developmentally disabled persons in Olympia. While in the home, LaBaum committed acts of assault and harassment. LaBaum pled guilty to the crimes and was incarcerated at the Thurston County Jail. Because LaBaum acted out at the jail**

**and was still on juvenile parole, his parole was violated and he was returned to Maple Lane school where he was served with the state's sexually violent predator (SVP) petition. When the specific basis for the parole violation is unknown, is the state relieved of its burden to prove that LaBaum committed a recent overt act simply because LaBaum was in custody when served with the petition? (Assignment of Error 1)**

- 2. Assuming the state is not relieved of its burden to prove a recent overt act (ROA), did LaBaum commit a ROA by frequently masturbating while fantasizing about having sex with children? (Assignment of Error 2)**

## **C. STATEMENT OF THE CASE**

### **1. Procedural History.**

On July 1, 2007, in Cowlitz County Superior Court, the attorney general's office filed a petition requesting that Appellant James LaBaum be committed as a sexually violent predator (SVP) pursuant to RCW 71.09.030.<sup>1</sup> CP 1-2. A sexually violent predator

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<sup>1</sup> RCW 71.09.030 provides: When it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement on, before, or after July 1, 1990; (2) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement on, before, or after July 1, 1990; (3) 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 on, before, or after July 1, 1990, pursuant to RCW 10.77.086(4); (4) 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 on, before, or after July 1, 1990, pursuant to RCW \*10.77.020(3), 10.77.110 (1) or (3), or 10.77.150; or (5) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act; and it appears that the person may be a sexually violent

is defined in RCW 71.09.020(16) as "any person who has been convicted 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." The state's petition alleged that LaBaum had been convicted of two sexually violent offenses, as that term is defined in RCW 71.09.020(15).<sup>2</sup> CP 1-2. Specifically, the petition alleged that LaBaum was convicted of indecent liberties with forcible compulsion on December 16, 1999, and of attempted first degree rape of a child on December 27, 2001. CP 1. Both convictions are from Cowlitz County Juvenile

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predator, 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.

<sup>2</sup> (15) "Sexually violent offense" means an act committed on, before, or after July 1, 1990, that is: (a) An act defined in Title 9A RCW as rape in the first degree, rape in the second degree by forcible compulsion, rape of a child in the first or second degree, statutory rape in the first or second degree, indecent liberties by forcible compulsion, indecent liberties against a child under age fourteen, incest against a child under age fourteen, or child molestation in the first or second degree; (b) a felony offense in effect at any time prior to July 1, 1990, that is comparable to a sexually violent offense as defined in (a) of this subsection, or any federal or out-of-state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this subsection; (c) an act of murder in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, kidnapping in the first or second degree, burglary in the first degree, residential burglary, or unlawful imprisonment, which act, either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been sexually motivated, as that term is defined in RCW 9.94A.030; or (d) an act as described in chapter 9A.28 RCW, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the felonies designated in (a), (b), or (c) of this subsection.

Court. CP 1. The state's petition also alleged that LaBaum suffers from two mental abnormalities that make him likely to engage in predatory acts of sexual violence if not confined in a secure facility. CP 2.

On April 25, 2008, the state filed a motion to amend its original petition. By its motion, the state asked that it be required to prove that LaBaum committed a "recent overt act" (ROA). CP 49. An ROA is "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." RCW 71.08.020(15). In the state's petition, it acknowledged that although LaBaum was in custody on a parole violation when the SVP petition was filed, LaBaum had also spent a period of time in the community after having served approximately 175 weeks in juvenile custody on the attempted rape of a child conviction. CP 49-56.

The court heard the motion on May 2. The state argued that it was a necessary amendment because of the state supreme

court's acceptance of review of State v. Fair, 139 Wn. App. 532, 161 P.3d 466 (2007).<sup>3</sup> LaBaum was concerned about the late amendment and objected to it. RP 14. The court allowed the amendment. RP 14.

Also at the May 2 hearing, LaBaum waived his right to have a jury hear his case. RP 1-6. Although the state originally filed a demand for a jury, it did not object to the jury waiver. CP 3; RP 1-6.

The matter proceeded to trial on May 5. LaBaum was represented by counsel and also had a court-appointed guardian

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<sup>3</sup> In Fair, this Court held the SVP statutes did not require proof of a recent overt act if the subject of an SVP petition had been previously released to the community, reincarcerated on the same sex offense, and completed his sentence on the sex offense prior to the filing of the SVP petition but while still incarcerated on a non-sex offense. The state Supreme Court, at its website, lists the issue it accepted review on as:

Whether the State, in seeking to commit a detainee as a sexually violent predator, had to prove the detainee committed a recent overt act when, at the time the State filed the commitment petition, the detainee was serving a sentence for robbery and had completed a concurrent prison sentence for child molestation that he began serving after his special sex offender sentencing alternative was revoked.

See [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues). Fair was argued October 23, 2008, but an opinion has yet to be issued.

ad litem to look out for his best interest. RP 20. LaBaum was found to meet the criteria of an SVP and committed to the Special Commitment Center. RP 392-96; CP 79-85. The trial court later entered written findings of fact and conclusions of law on its verdict. CP 79-85.

## **2. Trial testimony.**

James LaBaum, born August 21, 1986, is mildly retarded. RP 212; Ex. 3. When he was 10 or 12 years old, he was sexually victimized by a male cousin. RP 377. LaBaum, subsequent to his own victimization, victimized others and was held criminally liable for doing so. Exs. 3, 6. In 1999, while at middle school, LaBaum took advantage of another student while that student was escorting LaBaum to the nurse's office. RP 36. The other student had spina bifida and was in a wheelchair. RP 35-36. While in an elevator together, LaBaum tried to reach inside the other student's pants and touch his penis. RP 36-37. LaBaum got on top of the student and tried to go up and down on him. RP 37-38. The two were groin to groin. RP 39. LaBaum prevented the student from reaching the elevator button and the student could not open the elevator door. RP 38. This happened three of four times before the student told somebody. RP 39. LaBaum was convicted of

indecent liberties with forcible compulsion and unlawful imprisonment. Ex 3. He received a manifest injustice sentence upward of 104 months. Ex 3.

After being released, in 2001, LaBaum had sexual contact with his eight year-old cousin. RP 44. LaBaum attempted penile-vaginal intercourse with the cousin in a barn. RP 45. The act was an "attempt" because LaBaum's penis was too large to penetrate the cousin's vagina. RP 45-46. LaBaum was convicted of attempted rape in the first degree and sentenced to a manifest injustice sentence upward of 175 weeks in a juvenile facility. Ex 5, 7.

While in custody, LaBaum had major behavioral issues and required intensive management from staff. RP 85. Of course, since he was mildly retarded, LaBaum was teased and made fun of by the other inmates. RP 86. Occasionally, LaBaum would be sexually attracted to other inmates. RP 88. At times, LaBaum could be sexually aggressive toward other inmates and staff had to intervene to prevent what they feared would be a sexual assault on another youth. RP 91-92. LaBaum would masturbate using stuffed animals. RP 92-93. At times, LaBaum would masturbate near other inmates seemingly in an effort to sexually arouse the

other inmates. RP 94-95. LaBaum would masturbate and fantasize about sexual contact. RP 98. There was an instance when LaBaum, while incarcerated at Echo Glen, assaulted a female staff person. He was later convicted of attempted custodial assault for this incident. RP 96; Exs. 9, 10. There was another instance where LaBaum and another male inmate had consensual anal and oral sex in a bathroom. RP 108. LaBaum had sexual urges for young boys. RP 66.

LaBaum was released from Echo Glenn in April 2005. RP 83. He was released to a Citizen Access Residential Resource home (CARR home) in Olympia. RP 53-54. In that program, LaBaum was the only youth in a home and had one-on-one supervision around the clock. RP 55. RP 55. LaBaum had some problems in this facility. He would get frustrated and become aggressive toward staff. RP 60. He did not follow rules well. RP 61. He repeatedly called 911. RP 61. LaBaum received several parole violations and short terms of incarceration related to his behavior in the home. RP 61. Eventually, LaBaum was convicted of misdemeanor assaults and harassment against the CARR's staff. Exs. 11-16. He was incarcerated at the Thurson County Jail. Ex. 16; RP 63. After being released from jail, the CARR's program

would not take LaBaum back. RP 64. LaBaum's juvenile parole was again revoked. RP 65. In essence, LaBaum was incarcerated at Maple Lane until it could be decided what to do with him. RP 65. The basis for the revocation is unclear from the record. RP 65.

In December 2006, Dr. Brian Judd, a licensed psychologist evaluated LaBaum at the state's request to see if LaBaum fit the criteria for an SVP. RP 137-47. In concluding that LaBaum did fit the criteria as an SVP, Dr. Judd diagnosed LaBaum with a mental abnormalities to include pedophilia with attraction to both males and females, and paraphilia not otherwise specified. RP 158. He also concluded that LaBaum engaged in malingering and had a borderline personality disorder and an anti-social personality disorder. RP 159-60. During a plethysmograph (or "PPG"), LaBaum showed his most significant arousal to the rape of a male child. RP 191-92. While being given a PPG, LaBaum masturbated while hearing an auditory depiction of a minor female. RP 192. LaBaum admitted to masturbating 5-7 times daily and engaging in fantasies to include raping children and killing people. RP 204-05. LaBaum at times engaged in exhibitionism while incarcerated at juvenile facilities. He would masturbate knowing that staff would

see him. RP 206. LaBaum has masturbated using his feces to enhance his arousal. RP 208.

Using the SORAG (Sex Offender Risk Appraisal Guide) actuarial tool, Dr. Judd assessed LaBaum at 100% likely to re-offend. RP 242-43, 255. LaBaum told Dr. Judd that he felt he was at a high risk to re-offend as he cannot control his thoughts. RP 256-57. Dr. Brett Trowbridge, testifying as a defense expert agreed that LaBaum would likely engage in predatory sex offenses if not supervised. RP 347.

In his own testimony before the court, LaBaum denied taking any action on his fantasies although he implied that he has had sexual opportunities while being held at the state's Sexual Offender Unit. RP 377-78.

#### **D. ARGUMENT**

- 1. EVEN THOUGH LABAUM WAS INCARCERATED WHEN SERVED WITH THE SVP PETITION, THE STATE WAS STILL OBLIGED TO PROVE THAT LABAUM COMMITTED A RECENT OVERT ACT. TO DO OTHERWISE, DEPRIVED LABAUM DUE PROCESS OF LAW.**

Relieving the state of its burden to prove LaBaum committed a recent overt act (ROA) denies LaBaum due process under the

Fifth<sup>4</sup> and Fourteenth<sup>5</sup> Amendments of the United States Constitution and Article I, Section 3<sup>6</sup> of the Washington State Constitution. Because LaBaum was released into the community to live in a CARRs home, proof of an ROA was constitutionally and statutorily required before he could be committed as a SVP even though LaBaum was incarcerated when he was served with the SVP petition.

No person may be deprived of life, liberty, or property without due process of law. U.S. CONST. Amends. V, XIV; Wash. CONST. Art. I, § 3. "Commitment for any reason constitutes a significant deprivation of liberty triggering due process protection."

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<sup>4</sup> U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>5</sup> U.S. CONST. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>6</sup> Wash. CONST. art. I, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law."

In re the Detention of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003). An SVP statute satisfies due process if it “couples proof of dangerousness with proof of an additional element, such as ‘mental illness,’ because the additional element limits confinement to those who suffer from an impairment ‘rendering them dangerous beyond their control.’ ” Id. at 731-32 (quoting Kansas v. Hendricks, 521 US. 346, 358, 117 S. Ct. . 2072, 138 L.Ed.2d 501 (1997)).

The purpose of relieving the State of the burden of proving a recent overt act, when the offender has been continuously incarcerated since conviction, is that such a requirement would create an impossible burden for the state to meet. State v. Hendrickson, 140 Wn.2d 686, 695, 2 P.3d 473 (2000). But such are not the facts of LaBaums’s case. LaBaum’s case is factually equivalent to the facts on In re the Detention of Albrecht, 147 Wn.2d 1, 51 P.3d 73 (2002).

Albrecht had a long history of sexual offenses, including two that were classified as sexually violent offenses. In 1976, he pleaded guilty to one count of indecent liberties. The court deferred sentencing and committed Albrecht for evaluation as a sexual psychopath. Then in 1992, Albrecht entered a guilty plea to second degree child molestation. Albrecht was sentenced to 48 months of

confinement followed by a period of community supervision. In 1996, after serving the 48 months, he was released to community placement. Similar to LaBaum, Albrecht was then released into the community following his incarceration, albeit under some supervision. Albrecht violated the terms of his community supervision shortly after being released into the community. Albrecht was later served with an SVP petition while in custody and under total confinement. Although Albrecht was confined when served with the SVP petition, that did not resolve his due process challenge.

Albrecht held that due process in SVP cases requires a showing of current dangerousness. *Id.* at 7. Its conclusion was supported by the plain meaning of the statute. In short, RCW 71.09.030(5), which permits the State to file a sexually violent predator petition where “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.*” (Emphasis added.) The same act does not require a recent overt act if an offender “is about to be released from total confinement.” RCW 71.09.030(1). Thus, the relevant statutes relieve the State of the burden of proving a recent overt act before

the offender is released from total confinement. However, to relieve the State of the burden of proving a recent overt act because an offender is in jail for a violation of the conditions of community placement would subvert due process. *Id.* at 10. An individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous. As the court noted, Albrecht could have easily been jailed for consuming alcohol, going to a park, or moving without permission, each of which would have been a violation of the terms of his community placement but none of which would amount to a recent overt act as defined by the sexually violent predator statute.

In LaBaum's case, although he was in custody on a parole violation when the SVP petition was served, there was no proof offered as to what the basis was for the violation. There was some testimony that LaBaum had some problems while incarcerated in the Thurston County Jail for his assault and harassment conditions. But nothing in the record establishes that the vague problems at the jail proved LaBaum dangerous and relieved the state of its burden to prove an ROA. In fact, the record suggests that LaBaum's

parole was revoked merely to house LaBaum while Dr. Judd evaluated LaBaum to see if he qualified for an SVP filing.

As such, the trial court misapplied the law in determining that no ROA was required in LaBaum's case merely because he was incarcerated when the SVP petition was filed. Due process required the state to prove a recent overt act.

**2. THE RECORD DOES NOT SUPPORT THE FINDING OF THE COURT THAT LABAUM COMMITTED AN ACT THAT CAUSED HARM OF A SEXUALLY VIOLENT NATURE OR COULD CREATE REASONABLE APPREHENSION OF SUCH HARM IN THE MIND OF AN OBJECTIVELY REASONABLE PERSON KNOWING LABAUM'S HISTORY AND MENTAL CONDITION.**

In order to commit a non-incarcerated person as a sexually violent predator, the state must prove beyond a reasonable doubt that the individual has committed a recent overt act (ROA), thus establishing the individual's status as a sexually violent predator. RCW 71.09.030; 71.09.060. If the individual is in custody the day the petition is filed, the statute literally does not require proof of a recent overt act. RCW 71.09.030(5); 71.09.060. The holding in Albrecht, as noted under Issue I, has clarified, however, that in cases such as LaBaum's, a ROA still must be proven. A recent overt act is "any act or threat that has either caused harm of a

sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(10).

The Supreme Court’s holding in Albrecht requires reversal of the trial court’s finding of commitment in the absence of proof of an ROA. LaBaum submits that the evidence of an ROA presented at trial was insufficient for the court to determine that he committed an act sufficient to trigger application of the statute, as alleged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); In re Winship, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071, 25 Led.2d 368 (1970). The sufficiency of the evidence is a constitutional question that can be raised for the first time on appeal. Baeza, 100 Wm.2d at 488, RAP 2.5(a). In reviewing a challenge to the sufficiency of the evidence, the court looks at the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993). When the insufficiency of the evidence is challenged, all reasonable inferences from the evidence must be

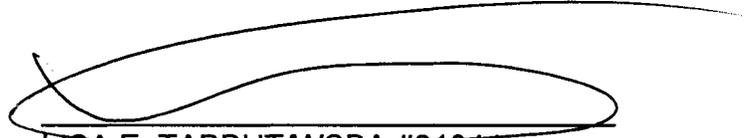
drawn in favor of the State and interpreted most strongly against the appellant. Joy, 121 Wn.2d at 338-39. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any inference reasonably drawn therefrom. State v. Gear, 30 Wn. App. 307, 310, 633 P.2d 930, review denied, 96 Wn.2d 1021 (1981); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L.Ed2d 560 (1979).

Under LaBaum's facts, the recent overt act alleged by the state was that LaBaum masturbated while fantasizing about having sex with children. RP 261-65. This does not qualify as a recent overt act. LaBaum is a young man. Masturbation is normal. Fantasizing while masturbating is also normal. Both masturbation and fantasy are legal acts. Mere thoughts, under our jurisprudence are typically not subject to punishment. Moreover, even though LaBaum has had the opportunity to engage in sexual activity with other persons while at SCC, he has declined to do so.

#### **E. CONCLUSION**

The granting of LaBaum's SVP petition should be reversed and his case remanded for further action if requested by the state.

Respectfully submitted this 10<sup>th</sup> day of April, 2009.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

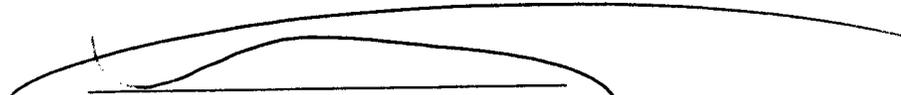
LISA E. TABBUT/WSBA #21344  
Attorney for Appellant



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

Dated this 10<sup>th</sup> day of April 2009, in Longview, Washington.

  
\_\_\_\_\_  
Lisa E. Tabbut, WSBA No. 21344  
Attorney for Appellant