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STATE OF WASHINGTON

NO. 34399-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF: DAVID T. FAIR

STATE OF WASHINGTON,

Respondent,

vs.

DAVID T. FAIR,

Petitioner:

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]

PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
A. IDENTITY OF PETITIONER	1
B. COURT OF APPEALS DECISION	1
C. ISSUES PRESENTED FOR REVIEW	1
D. STATEMENT OF THE CASE	2
<i>Trial Testimony</i>	4
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	9
I. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION TO DISMISS SHOULD BE ACCEPTED FOR REVIEW BASED ON RAP 13.4(b)(1),(2),(3) and (4).	9
<i>Recent Overt Act Doctrine</i>	13
II. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED ENTRY OF FINDING OF FACT NUMBER EIGHT.	16
III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED ENTRY OF CONCLUSION OF LAW NO. 7 BASED ON LACK OF PROOF BEYOND A REASONABLE DOUBT.	17
F. CONCLUSION	20
G. APPENDIX	
Court of Appeals Decision	A
Findings of Fact and Conclusions of Law	B
Petition	C
RCW 71.09.020	D
RCW 71.09.030	E

Wash. Const. Art. 1, sec. 3	F
Fifth Amendment	G
Fourteenth Amendment	H

TABLE OF AUTHORITIES

TABLE OF CASES

<i>In re Detention of Albrecht</i> , 147 Wn.2d 7, 51 P.3d 73 (2002)	9,10
<i>In re Detention of Albrecht</i> , 98 Wn.App. 426, 989 P.2d 1204 (1999)	11,15
<i>In re Detention of Henrickson</i> , 140 Wn.2d 686, 2 P.3d 473 (2000)	12,13 ,14,18,19
<i>In re Detention of Paschke</i> , 121 Wn.App. 614, 90 P.3d 74 (2004)	13
<i>In re Detention of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999)	18
<i>In re Personal Restraint of Young</i> , 122 Wn.2d 1, 857 P.2d 989 (1993)	18
<i>In re Turay</i> , 150 Wn.2d 71, 74 P.3d 1194 (2003)	20
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986)	19
<i>State v. Black</i> , 100 Wn.2d 793, 676 P.2d 963 (1984)	17
<i>State v. Green</i> , 94 Wn.2d 216, 618 P.2d 628 (1980)	19
<i>State v. Hashman</i> , 115 Wn.2d 217, 797 P.2d 477 (1986)	17

State v. Hill, 123 Wn.2d 641,
870 P.2d 313 (1994) 17

State v. Thetford, 109 Wn.2d 392,
745 P.2d 496 (1987) 17

Addington v. Texas, 441 U.S. 418,
99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) 18

Jackson v. Virginia, 443 U.S. 307,
61 L.Ed.2d 560, 99 S.Ct. 2781 (1979) 19

CONSTITUTIONAL PROVISIONS

Fifth Amendment 10,17,18
Fourteenth Amendment 10,17,18
Wash. Const. Art. 1, sec. 3 10,17,18

STATUTES

RCW 9.94A.670(4)(a) 13
RCW 71.09 19
Former RCW 71.09.020(5) now RCW 71.09.020(10) 10,11
RCW 71.09.020(5) 13,15
RCW 71.09.020(6) 13,14
RCW 71.09.020(7),(10),(15) 1
RCW 71.09.020(8),(15),(16) 18
RCW 71.09.020(15) 10,15
RCW 71.09.030 11
RCW 71.09.060 11

RULES AND REGULATIONS

RAP 13.4(b)(1),(2),(3) and (4) 9,10
RAP 13.4(b)(3) 17

A. IDENTITY OF PETITIONER

David T. Fair asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals decision filed July 3, 2007. This decision affirmed the trial court's decision that the petitioner should be committed to the Special Commitment Center as a sexually violent predator. A copy of the decision is in the Appendix at A 1-16.

C. ISSUES PRESENTED FOR REVIEW

1. A petition seeking the civil commitment of the defendant was filed just prior to his release from total confinement while serving a non-sexually violent sentence. Whether the due process clauses of the state and federal constitutions and RCW 71.09.020(7),(10), (15) require the Attorney General to allege and to prove a recent, overt act of sexual violence during the period of time that a respondent was living in the community, before the state may be allowed to obtain an Order of Civil Commitment?
2. Petitioner was sentenced to 20 months confinement on June 25, 1992- when his SOSSA sentence was revoked based on a conviction in 1988 for Child Molestation in the Second Degree. This sentence was run concurrent

with a conviction for Robbery in the First Degree entered on June 10, 1992 where petitioner was sentenced to 87 months in prison.

Whether the trial court erred when it entered findings of fact 8:

“On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and 88-1-00362-7.”

3. Whether the trial court erred as a matter of law when it entered Conclusion of Law No. 7- based on proof beyond a reasonable doubt - where no “recent overt act” was alleged or proved?

“The evidence presented at Respondent’s trial proved beyond a reasonable doubt that Respondent is a sexually violent predator as that term is used in chapter RCW 71.09.”

D. STATEMENT OF THE CASE

Statement of Procedure

The petitioner, David T. Fair, was convicted of child molestation in the second degree in 1989. Later, while serving a SOSSA sentence and released on community supervision he committed robbery in the first degree in Kitsap County. He then absconded to New Mexico. There he was convicted of numerous non-sexual crimes in November 1989 and served time in prison. He was returned to Washington where he was sentenced to prison for twenty months for the sex offense, after his SOSSA sentence was revoked, and 87 months concurrent on the robbery

conviction. VI RP 2, 11. He was scheduled to be released in 2004. He is age 38 and has been in prison since 1989.

More particularly, the following appears in the Findings of Fact:

"2. On September 27, 1988, Respondent plead guilty to one count of Child Molestation in the Second Degree, under cause number 88-1-00362-7. On February 15, 1989, he was sentenced to a special Sex Offender Sentencing Alternative (SOSSA) sentence." CP 434. This incident occurred on July 23, 1988...the respondent was given credit for 137 days that he had served in custody." CP 70.

"3. On November 1, 1989, the State filed a Motion and Affidavit for Order Revoking the SOSSA, based on Respondent's failure to maintain sex offender treatment and his failure to report to the Department of Corrections. Respondent absconded." CP 435. The record shows that on November 10, 1989 the respondent assaulted and robbed Steven D. Slagle of his pick-up truck in Kitsap County, Washington. CP 122.

"4. On April 24, 1990, Respondent was sentenced in New Mexico under cause number CR-89-00097, to 18 months for one count of Receiving a Stolen Vehicle, 18 months for one count of Receiving Stolen Property, three years for one count of Great Bodily Injury by Vehicle, and 18 months for another count of Receiving Stolen Property, all sentences to be served consecutively." CP 435.

The respondent was incarcerated in New Mexico as of the date of the arrest on November 15, 1989. CP 81. "Respondent was transferred from New Mexico back to Washington State under the Agreement on Detainers Act." CP 435.

"6. On June 10, 1992, Respondent was sentenced for one count of Robbery in the First Degree under Kitsap County cause number 90-1-00498-6, to 87 months to run consecutively to the sentence under New Mexico cause number CR-89-00097." CP 435.

"7. On June 25, 1992, Respondent's SOSSA sentence under Kitsap County cause number 88-1-00362-7 was revoked...Respondent was sentenced to 20 months to run concurrent with the 87 month sentence imposed on Kitsap County cause number 90-1-00498-6." CP 435.

Respondent's release date was June 28, 2004. CP 435. "9. On June 23, 2004, the State filed a petition seeking to commit Respondent as a Sexually Violent Predator (SVP)." CP 436.

Trial Testimony

Lisa Dandesku testified she "...was Respondent's primary treatment provider at the Department of Correction's Sexual Offender Treatment Program (SOTP). She testified that Mr. Fair completed that 12 month treatment program in March 2004 . I RP 37. During treatment Fair admitted to having sexual contact with nineteen different individuals, including 17 child victims. I RP 41; CP 436, ff 11. "

Ms. Dandesku testified: "Mr. Fair minimized the aggressiveness, violence, continued to say really he wasn't a violent person, which was something we talked about quite a bit in group. He just didn't really see it as anything outside of what any person is capable of." *id.* He also minimized his violent, non-sexual offenses. I RP 44.

During treatment Fair frequently reported sexual arousal and of masturbating to thoughts of minor girls mostly. Ms. Dandesku reported that he "...did not want to stop masturbating to minors." I RP 48. At the conclusion of treatment, the clinical team assessed Mr. Fair a high risk to re-offend. I RP 49; ff 11.

Theodore Donaldson testified that he was a clinical psychologist with a specialty in forensic psychology. II RP 71. After reviewing 2200

pages of discovery, he interviewed Mr. Fair over a two hour period in January 2005. II RP 74; CP 443, ff. 59. He composed a written evaluative report. Ex. 36. He was asked: "Does Mr. Fair suffer from mental abnormality or personality disorder?" His answer was no.

Dr. Donaldson was informed by Mr. Fair with regard to reported contact with multiple victims "going back to his own childhood, while he was in Europe...he told me he made it all up." II RP 89. He testified:

"And so that was sort of consistent with his making up. He said he read this material, so he would know how to fake a mental disorder. Then he told me at one point, he was at Twin Rivers, and his therapist Sonja, didn't seem to buy it. And so he wrote her a letter, just describing all kinds of bizarre dreams and violence and sex and so forth because he wanted to convince her he wanted to stay in treatment." II RP 90.

According to him, Dr. Doren reached the high levels of recidivism percentage by factoring in the sexual encounters that Mr. Fair made up and self-reported. II RP 105. He was asked his opinion of Dr. Doren's conclusions: "A. Well, the diagnosis of deviancy or the assessment of deviancy, based upon the history, is based upon the self-reports of unknown validity. II RP 117.

Dr. Dennis Mitchell Doren testified for the State. Fair admitted to 16 other victims in the 8 to 12 year range, except for a young adult prisoner. III RP 223; CP 438, ff. 18-19.

Specifically, Fair admitted to putting his mouth over a 3 year old boy he was babysitting "...basically to see what it was like." *id.* He further admitted to "touching the breasts of young girls and touching the vaginal area of girls." *id.* He had anal intercourse with the adult male inmate. And he reported masturbating an 18 year old retarded male. III RP 224.

Dr. Doren was asked: Q. "And are you aware, doctor, that since your interview with him, he now states he only made up the prior victims in hopes of doing softer time at Twin Rivers, versus say a different DOC facility. A. I came to learn that, yes." III RP 225.

Another incident from the Fair's records indicated a 12 year old girl that he had sexual contact with in England when in was in the military. III RP 226. In addition, Fair reported that there were three different victims during the 1988 incident. III RP 227. Also, he disclosed that he masturbated when he had sexual fantasies involving children. III RP 229.

Dr. Doren's diagnosis was pedophilia, sexually attracted to females, non-exclusive. III RP 246. "The second condition is called paraphilia, not otherwise specified, including urophilia. The third condition was alcohol dependence. The fourth was cannabis abuse and the fifth was antisocial personality disorder. III RP 247.

It was Dr. Doren's professional opinion that the respondent suffered from recurrent, intense, sexually arousing fantasies, sexual urges

or behaviors involving sexual activity with prepubescent children, generally age 13 years or younger. III RP 249.

Dr. Doren also had the opinion based on a reasonable professional certainty that the respondent's pedophilia constituted a mental abnormality. III RP 272. He believed that Fair's condition of pedophilia predisposed him to commit criminal sexual acts to a degree that constituted him a menace to the health and safety of others." III RP 273; CP 439, ff 27.

Dr. Doren testified: " I believe that Mr. Fair has an antisocial personality disorder." III RP 284. He also testified "...that Fair was likely to engage in predatory acts of sexual violence if not confined to a secure facility." Op. at 4; III RP 291.

Instead of using actuarial scores to predict recidivism, Dr. Doren testified that he had to rely on the Psychopathy Check List Revised (PCLR). This was a psychological test that was not designed to be a risk assessment. III RP 318. It was a test used "...to assess the degree to which people have a certain type of personality structure." III RP 318.

Dr. Doren testified that he concluded that Mr. Fair was never tested with a penile plethysmograph (PPG). III RP 323. He testified that even without Mr. Fair's self-reports of additional victims he would still find that Fair met the criteria for sexual deviancy. III RP 325. However, he did base his opinion on Mr. Fair's self-reporting of fantasies and his preferred

sexual interest in something other than consenting adults.

Dr. Doren testified that in his opinion Mr. Fair's high degree of psychopathy in combination with sexual deviancy resulted in a "risk for sexually re-offending [that] is quite high." III RP 333; CP 442, ff 50. Dr. Doren believed that Fair was more likely than not to re-offend, even if there were no actuarials at all. III RP 334.

David T. Fair, age 38, testified that he was out of custody for 6 months after spending some time in the work release program in 1989. RP 461-2. During this period of time he did not sexually offend anyone. RP 463. He testified; "...I did 5 months in the county jail until by plea bargain was accepted, and I did 5 months in the work release program." id.

During most of his 10 year incarceration period in New Mexico he was in protective custody. V RP 466. For seven years he read materials, including the DSM-III R, "on psychology, especially dealing with sex offenders." V RP 470. Then he started talking to his therapists. He stated:

"I was also deliberately putting things out there for these therapists to get feedback on and to test the feasibility of and to get it into the formal record. I started creating fictional offenses. I started creating fantasies based on some of the stuff that I had read, and because I was in a protective custody population, I knew several other sex offenders, and I talked to them about what their thinking processes were and I would talk to them about what I would read in the books and they would – some of them would talk about their fantasies, things like that. I would sit

down and write out some of those fantasies, and present those as my own.” V RP 472.

Fair testified that while in the sex offender treatment program at Twin Rivers Facility he portrayed himself as “...that I was concerned about getting in the treatment so I could resolve these issues and get out and be safe, you know, portraying myself as a sex offender, as much as I believed that was – from what my studies indicated on sex offenders....” V RP 478.

At the conclusion of the trial the court found beyond a reasonable doubt that the petition filed by the State should be granted. CP 414.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I.. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE TRIAL COURT’S DENIAL OF THE PETITIONER’S MOTION TO DISMISS SHOULD BE ACCEPTED FOR REVIEW BASED ON RAP 13.4 (b)(1),(2),(3) and (4).

The Court of Appeals erred when it affirmed the trial court’s denial of the petitioner’s pre-trial motion to dismiss. The defense argued at the trial court level that based on *In re the Detention of Albrecht*, 147 Wn.2d 7, 51 P.3d 73 (2002) the state has to prove “current dangerousness.” *id.* at 7. It was stated in the petitioner’s motion: “Thus, the Petition filed on June 25, 2004, predated Mr. Fair’s release date on the Robbery conviction (June 28, 2004) but postdated his release date for the sexually violent offense (August 30, 2000). Moreover, as noted, the Petition does not address the time Mr. Fair spent in the community on

community custody pursuant to the SOSSA sentence.” CP 47.

Mr. Cross further argued: “That recent, overt act, entire phrase, has to apply to the last time a person was in the community, or doesn’t make any sense.” VI RP 14. The argument was that release into the community, without sexual re-offense, would negate proof of a recent, overt act. RP 5.

The Court of Appeals affirmed the trial court and stated:

“We conclude that the expiration of one sentence, without an intervening release to the community, does not prevent the State from filing a SVP petition while a defendant is still incarcerated, so long as one of the offenses leading to the incarceration meets the definitions of RCW 71.09.020 (15) FN or RCW 71.09.020(10). FN.” Op. at 10; (FN omitted).

This court should accept review of this petition because the Court of Appeals decision is in conflict with *Albrecht*, with decisions of the Court of Appeals, because a significant question of law under the due process clauses of Wash. Const. Art. 1, sec .3 and both the 5th and 14th Amendments of U.S. Constitution is involved. and the petition involves as issue of substantial public interest. RAP 13.4((b),(1),(2)(3) and (4)).¹

Former RCW 71.09.020(5); now RCW 71.09.020(10) states:

¹ RAP 13.4(b) sets forth considerations governing acceptance of Review: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the U.S. is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Court.

“(10) “Recent overt act” means 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 knew of the history and mental condition of the person engaging in the act.”

In re the Detention of Albrecht, 98 Wn.App. 426, 989 P.2d 1204

(1999) the Court of Appeals reversed the trial court. The trial court had granted the State’s motion to amend a civil commitment petition and to delete an allegation of a recent overt act manifesting dangerousness by the respondent. The Court of Appeals held that the state was required to prove a recent overt act manifesting dangerousness in a civil commitments.

According to the Court of Appeals in *Albrecht*:

“ RCW 71.09.030 states when the State is authorized to file a sexual predator petition, and RCW 71.09.060 states what the State must allege and prove in order to commit a sexual predator. The first statute distinguishes between a person “about to be released from total confinement.” and a person who “has since been released from total confinement.” The latter statute abandons these terms and instead requires proof of a “recent overt act” for a person “living in the community after release from custody.” *id.* At 429.

The facts of *Albrecht* were that he was convicted of second degree child molestation in 1992. He had two previous convictions for indecent liberties. *id.* at 430. On July 22, 1996 he was released from prison and placed on community placement. “One of the terms of his community placement was that he refrain from any direct or indirect contact with

children.” *id.* He violated and was sentenced to 120 days in jail.

The State then filed a petition alleging that he was a sexually violent predator and that he had committed a “recent overt act” and requested that he be committed. Later, the State moved to amend the petition to delete the allegation of the “recent overt act”, which was based on the community supervision violation. According to the opinion: “The trial court granted this motion, finding that Mr. Albrecht was “totally confined” at the time the original petition was filed and the petition could be amended to reflect that the State need not prove a “recent overt act.” *id.*

The Court of Appeals reversal was affirmed by the State Supreme Court, *supra*, 147 Wn.2d 1. The State Supreme Court ruled that the State is only relieved of proving a “recent overt act” if the defendant is, at the time the petition is filed, serving the original sentence imposed upon conviction for the predicate offense. 147 Wn.2d at 10-11. Justice Chambers stated:

“The State asks us to extend *Henrickson* to hold that when an offender is released into the community and is later totally incarcerated, no proof of a recent act is required. We decline to do so. 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. 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.” *id.*

In the case at bench the State did not allege in its petition that

David Fair had committed a recent overt act manifesting

dangerousness. CP 1-2. The respondent argued in its Memorandum:

“RCW 9.94A.670(4)(a) provides that a offender sentenced under SSOSA is placed on community custody. Under this SSOSA sentence, Mr. Fair was released to community custody. He was not returned to confinement until his arrest for Robbery. Under these circumstances, the state should be required to plead and prove a recent overt act as an element of its proof for commitment.” CP 47.

Recent Overt Act Doctrine

The “recent overt act doctrine” is set forth in *In re Detention of Paschke*, 121 Wn.App. 614, 90 P.3d 74 (2004) and in *In re Detention of Henrickson*, supra at 140 Wn.2d 689, where that court held:

“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).”

In the case at bench, Fair argues that his sentence for a sexually violent offense had been served by August 30, 2000 and at the latest by February 3, 2001. This was before the state filed its petition in June 2004 seeking his involuntary commitment. CP 1. By the time the petition was filed Mr. Fair was serving the last days of a sentence for a robbery conviction. This crime does not meet the statutory definition of “a recent overt act.” as stated in *Henrickson*: “an act that by itself would have qualified as a recent overt act, RCW 71.09.020 (5).” *id.* at 689; VI RP 4.

The Court of Appeals in the case at bench relied on *Henrickson* in part. Op. at 6-10. In that case the respondent had a long history of sexual assaults on young girls. "In 1986 Henrickson plead guilty to statutory rape in the first degree of a four-year old girl and was sentenced to 36 months in prison. He was released in 1989. Then, in 1990 Henrickson abducted a six year old girl and showed her a pornographic picture; he was convicted of attempted kidnaping in the first degree and communication with a minor for immoral purposes." *id.* at 689.

Pending appeal of his 1990 conviction, Henrickson was free on bail for three years. On the day before his scheduled release of August 30, 1996 the State filed a petition to have him committed as a sexually violent predator. He stipulated to the commitment but reserved appeal of the trial court's finding that the State did not need to prove a recent overt act because he was incarcerated on the day the petition was filed.

The Court of Appeals affirmed his commitment. The court held "[b]ecause Henrickson was under constant strict supervision after his arrest for the 1990 kidnaping, due process did not require the State to prove a more recent overt act as a manifestation of his dangerousness." *id.* at 864. *Henrickson* established the following rule:

"When, on the day a sexually violent predator petition is filed, an individual is incarcerated for a sexually violent offense, RCW 71.09.020(6), or for an act that would

itself qualify as a recent overt act. RCW 71.09.020(5), due process does not require the State to prove a further overt act occurred between arrest and release from incarceration.” *id.* at 695.

Former RCW 71.09.020(6) now RCW 71.09.020(15) defines “Sexually violent offense” as including child molestation in the first or second degree.” However in the case at bench, on June 23, 2004 Mr. Fair had long since served his sentence for child molestation in the second degree that occurred on July 23, 1988. As stated above, according to the Department of Corrections records this 20 month sentence was slated to be served either on August 30, 2000 or at the end of the maximum term on February 3, 2001. CP 47.

On the date the State filed its petition seeking to commit the respondent as a sexually violent predator, the respondent was serving the last few days of his conviction for Robbery in the First Degree. CP 84-5.

Robbery in the first degree is not included in the definition of sexually violent offense”. *Albrecht* noted that the definition of “a recent overt act” was, according to RCW 71.09.020(5): “any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm.” *id.* at 431. This must be supported by proof beyond a reasonable doubt. Neither does it qualify as a “recent overt act”. Additionally, the crime of first degree robbery occurred on November 10,

1989, was not sexually motivated, and was certainly not “recent” since it occurred 15 years before the State’s petition was filed.

II. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED ENTRY OF FINDING OF FACT NUMBER EIGHT.

Review because this decision involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

According to the memorandum of law in support of respondent’s motion to dismiss: “The Department of Corrections calculated that Mr. Fair’s release date on the child molestation conviction as August 30, 2000 (max. term February 3, 2001) (See Appendix A). His release date for Robbery was June 28, 2004. (See Appendix B).” CP 47, 53-6; Kitsap County cause numbers 88-1-00362-7 and 90-1-00498-6 respectively.

Finding of Fact 8 states that Fair’s release date was June 28, 2004:

“8. On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and 88-1-00362-7.” CP 435.

Mr. Fair was given a 20 month sentence for his only sex conviction: Child Molestation in the Second Degree. CP 105. Mr. Fair’s release date was August 30, 2000. CP 47. Thus, his counselor/cco’s notation on a Department of Corrections form dated November 30, 2000 stated: “This conviction has expired and was running concurrent with current conviction (Both J&S attached) 90-1-00498-6.” CP 54. At the time

the state filed its petition against Mr. Fair he was only serving the remaining sentence for a robbery in the first degree conviction. CP 90.

According to *State v. Theiford*, 109 Wn..2d 392, 396, 745 P.2d 496 (1987): "...a trial court's findings of fact will be upheld on appeal so long as they are supported by substantial evidence." See also, *State v. Black*, 100 Wn.2d 793, 802, 676 P.2d 963 (1984). According to *State v. Hashman*, 115 Wn.2d 217, 222, 797 P.2d 477 (1986): "Substantial evidence is evidence of sufficient quantum to persuade a fair minded person of the truth of the declared premise. See also, *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Op. at 11.

The trial court's finding of fact No. 8 is erroneous insofar as it purports to imply that the petitioner was serving a concurrent sentence as of the date a civil commitment petition was filed on June 28, 2004. As shown above, the petitioner had finished serving his only sexually violent offense on August 30, 2000.

III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED ENTRY OF CONCLUSION OF LAW NO. 7. BASED ON LACK OF PROOF BEYOND A REASONABLE DOUBT.

Review should be accepted because this decision involves a significant question of law under the art. 1, sec. 3 of the Constitution of the State of Washington and under the Fifth and Fourteenth Amendments of the U.S. Constitution. RAP 13.4(b)((3)).

“The Washington sexually violent predator statute is premised on a finding of the present dangerousness of those subject to commitment.”

In re Detention of Henrickson, supra at 692. According to the sexually violent predator statutes the State must prove beyond a reasonable doubt:

- (1) the Respondent has been convicted of or charged with a crime of sexual violence; and
- (2) the Respondent suffers from a mental abnormality or personality disorder which causes him serious difficulty in controlling his sexually violent behavior; and
- (3) That such mental abnormality or personality disorder makes the Respondent likely to engage in predatory acts of sexual violence if not contained in a secure facility.

RCW 71.09.020(8),(15),(16); CP 414-15. Surrounding this statute are due process protections of Wash. Const. Art. 1, sec. 3 and of the Fifth and Fourteenth Amendments. *In re Personal Restraint Petition of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993) (citing *Addington v. Texas*, 411 U.S. 418, 426, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

The State is required to establish that a respondent meets the criteria for commitment as a sexually violent predator by presentation of proof beyond a reasonable doubt. *In re Detention of Turay*, 139 Wn.2d 379,407-08, 986 P.2d 790 (1999). In reviewing the sufficiency of the evidence, the Court should use the standard provided for criminal cases. There proof beyond a reasonable doubt is also required. Failure to meet the constitutional standard of sufficiency as to any required element of

proof should result in reversal and dismissal of the petition against Mr. Fair. *State v. Green*, 94 Wn.2d 216, 618 P.2d 628 (1980).

“The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Bingham*, 105 Wn.2d 820,823, 719 P.2d 109 (1986) (*quoting*, *Jackson v. Virginia*, 443 U.S. 307,319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)). Applied to this case, the State’s proof is clearly deficient.

The trial court erred when it entered Conclusion of Law 7:

“The evidence presented at Respondent’s trial proved beyond a reasonable doubt that Respondent is a sexually violent predator as that term is used in chapter RCW 71.09.” CP 447.

There was reasonable doubt in the case at bench based on the circumstances of Fair’s continual confinement extending from November 15, 1989 to three days beyond the date the civil commitment was filed until June 28, 2004: his scheduled release date. CP 434, ff. 8.

The state did not prove a “recent overt act” beyond a reasonable doubt in this case. As argued above, it was held in *Henrickson*:

“We simply hold that when, at the time the petition is filed, an individual is incarcerated for a sexually violent offense, or for an act that itself would have constituted a recent over act, due process does not require the State to prove a *further* overt act occurred

between arrest and release from incarceration.”.

id. at 697. (emphasis added.) The use of the word “further” to describe another potential overt act indicates that the facts leading to the respondent’s incarceration could be used to overcome the constitutional due process requirement of “proof of current dangerousness”. *In re Turay*, 150 Wn.2d 71, 74 P.3d 1194 (2003), *Young*, 122 Wn.2d at 40-2. Since Fair’s robbery conviction involved taking another male’s pickup by force does not qualify as a “sexually violent offense” or as a “recent overt act”, the state did not meet its burden of production or burden of proof.

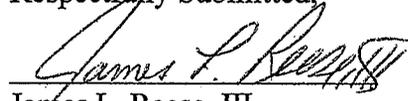
The “recent overt act” requirement is imposed by the demands of due process protections as a means of demonstrating present dangerousness. Without this proof at the time of trial of a “recent overt act”, the State has failed to prove that Mr. Fair is dangerous to the degree necessary to make it constitutionally permissible to commit him indefinitely.

F. CONCLUSION:

This court should accept review of this petition.

Dated this 29th day of July 2007.

Respectfully Submitted,


James L. Reese, III
WSBA #7806
Court Appointed Attorney
For Petitioner

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY lp
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Detention of:

DAVID T. FAIR,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

No. 34399-1-II

PUBLISHED IN PART

Van Deren, A.C.J. - David T. Fair appeals his commitment as a sexually violent predator (SVP) under Chapter 71.09 RCW, arguing that the due process clauses of the state and federal constitutions required the State to allege and prove a recent overt act (ROA) and that the evidence was insufficient to support a finding that he is a SVP. Because Fair has been incarcerated continuously for both a sex offense and a non-sex offense, and the evidence is sufficient to support the conclusion that he should be committed to the Special Commitment Center as a SVP, we affirm.

FACTS

In 1988, Fair pleaded guilty to one count of second degree child molestation. The trial court imposed a special sex offender sentence under former RCW 9.94A.120(7) (1988), the

special sex offender sentencing alternative (SSOSA).¹ The SSOSA included a suspended sentence of 600 days' confinement with credit for 137 days served. It also required him to spend 180 days on work release, 10 years under community supervision, and to complete sex offender treatment.

On November 1, 1989, the State moved to revoke the SSOSA based on Fair's failure to remain in sex offender treatment and report to the Department of Corrections.² On November 10, 1989, Fair met an acquaintance, Steven Slagle, in a restaurant in Kitsap County. The two left the restaurant together with Fair driving Slagle's pickup. "At some point Slagle got out of his truck, and [Fair] hit him on the back of the head." Clerk's Papers (CP) at 122. He continued to beat Slagle and, when Slagle escaped into the brush, Fair drove away in Slagle's truck. Five days later Fair was in New Mexico, where he robbed an elderly couple of \$600 at gunpoint. While fleeing the scene, he ran through a road block and struck another vehicle, injuring the

¹ Former RCW 9.94A.120 (1988), provided that an offender is eligible for the special sex offender sentencing alternative "when an offender [has been] convicted of a sex offense other than a violation of RCW 9A.44.040 or RCW 9A.44.050 and has no prior convictions for a sex offense or any other felony sexual offenses in this or any other state, the sentencing court, . . . may order an examination to determine whether the defendant is amenable to treatment." Former RCW 9.94A.120(7)(a). The SSOSA was recodified to RCW 9.94A.670 in 2000. See Laws of 2000, ch. 28, § 5, 20.

² Under the SSOSA sentence the trial court could order execution of Fair's sentence if the State showed that: (1) he had contact with the victim or other female children, (2) he had contact with children under 18 years of age, handicapped persons, or victims of sexual abuse or rape without his probation officer's approval and proper supervision, (3) he used intoxicants or allowed the use of illicit substances on his premises, (4) he failed to undergo routine drug and alcohol screening, (5) he failed to undergo sex offender treatment for up to four years, (6) he failed to maintain a residence or employment as his community corrections officer (CCO) required, (7) he failed to notify his CCO of any change in address or employment, (8) he failed to report to the court and to his CCO as required, (9) he possessed or viewed pornographic material, (10) he failed to submit to polygraph and plethysmograph evaluations, (11) he failed to pay the financial obligations outlined in his judgment and sentence, (12) he failed to obey all laws, orders and

occupants. As a result of these events, a New Mexico court sentenced Fair to serve 90 months in prison.

Fair was extradited to Washington where the trial court sentenced him to 87 months for the 1989 Kitsap County robbery, consecutive to the New Mexico sentence. The trial court also revoked his SSOSA and required that he serve 20 months in prison on the child molestation conviction concurrent with the 87month robbery sentence.

Fair was scheduled to be released from prison on June 28, 2004. On June 23, 2004, the State filed a petition to commit him as a SVP. Fair waived his right to a jury trial and the case proceeded to a bench trial.

Lisa Dandesku, Fair's primary treatment provider at the Department of Corrections Sexual Offender Treatment Program (SOTP), testified that Fair completed the twelve-month treatment program in March 2004. During his treatment, Fair admitted to having had sexual contact with 19 different individuals, including 17 child victims. Dandesku testified that Fair "couldn't really see how his sexual offending had negatively impacted anybody." Report of Proceedings (RP) at 44. Fair also minimized his violent, non-sexual offenses.

During treatment, Fair frequently reported sexual arousal and masturbation to thoughts of minor girls. Dandesku testified that Fair "did not want to stop masturbating to minors," and did not think there was anything wrong with having sex with children. RP at 48. At the conclusion of treatment, the clinical team assessed Fair as a high risk to reoffend.

Dr. Dennis Doren, a psychologist, also testified for the State. Doren testified that Fair admitted offending against 16 individuals, generally in the 8 to 12-year-old range. Although Fair

rules of the State, Court, and work release, and (13) he committed any sex related offenses or crimes involving alcohol or drugs.

admitted having sexual fantasies about children, he enjoyed the fantasies and was reluctant to give them up. Doren testified that with convicted sex offenders, sexual interest in children highly correlated with sexual reoffending. He diagnosed Fair with pedophilia, paraphilia (with a descriptor of urophilia),³ alcohol dependence, cannabis abuse, and antisocial personality disorder.

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

To predict the likelihood that Fair would reoffend, Doren relied on several actuarial risk assessment instruments. Because the tests produced mixed results, Doren could not reach a conclusion about Fair's likelihood of reoffending based solely on the actuarial instruments. Accordingly, Doren considered other risk factors, specifically, whether Fair had a high degree of psychopathy coupled with sexual deviance.

To assess Fair's psychopathy, Doren relied on the Psychopathy Check List Revised (PCL-R), a psychological test used "to assess the degree to which people have a certain type of personality structure." RP at 318. Under this testing method, the highest score measuring whether someone is a "prototypic psychopath" is 40. RP at 320. Fair scored 30, which ranked him as having a high degree of psychopathy. Doren testified that even without sexual deviancy, a high degree of psychopathy correlated with a higher risk of sexual recidivism.

³ Doren described paraphilia as recurrent sexual fantasies involving something other than a consenting adult that lasts at least six months and urophilia as sexual fantasies involving urine.

Doren also concluded that Fair met the criteria for sexual deviance based on his pedophilia diagnosis. Fair was not tested with a penile plethysmograph (PPG),⁴ but Doren testified that Fair's unwillingness to give up his fantasies and his ambivalence about them could easily substitute for what a PPG would measure. Doren testified that even without Fair's self-reports of additional victims, he would conclude that Fair met the criteria for sexual deviancy based on his repeated reports of sexually fantasizing about "something other than consenting adults." RP at 325.

In his defense, Fair testified that he fabricated fantasies and offenses in order to get into a treatment program instead of serving his time in the general prison population. Theodore Donaldson, a specialist in forensic clinical psychology, testified on Fair's behalf. Donaldson believed that Fair had a thirty-six percent probability of recidivism over a fifteen year period based on his score of four on the "Static-99" recidivism test, one of the actuarial instruments that Doren also administered. According to Donaldson, Doren's recidivism calculation was too high because he should not have included the unverified incidents that Fair reported.

The trial court found that Doren's testimony was more persuasive and credible than Donaldson's. It concluded beyond a reasonable doubt that Fair suffered from a mental abnormality and was likely to engage in sexually violent acts if not confined. Accordingly, the trial court granted the State's petition and ordered Fair committed as a SVP on January 5, 2006. Fair appeals.

⁴ A PPG is "a physiological test of a man's sexual arousal." RP at 332.

ANALYSIS

I. RECENT OVERT ACT

Fair argues that the trial court erred in denying his motion to dismiss based on the State's failure to allege a ROA⁵ and claims that he was denied due process under the Fifth⁶ and Fourteenth⁷ Amendments of the United States Constitution and Article I, Section 3⁸ of the Washington State Constitution. Fair contends that that because the trial court temporarily released him into the community on a SSOSA, proof of a ROA was constitutionally and

⁵ RCW 71.09.020(10) provides:

"Recent overt act" means 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.

⁶ 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.

⁷ 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.

⁸ Wash. CONST. art. I, § 3 provides: "No person shall be deprived of life, liberty, or property, without due process of law."

statutorily required before he could be committed as a SVP. He further contends that because his sentence for child molestation had expired by the time the State filed its petition and he was held only on his robbery sentence, an ROA was required before the State could show that he was a SVP. We disagree.

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.” *In the Matter of 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.’” *Thorell*, 149 Wn.2d at 731-32 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 358, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)).

Although chapter 71.09 RCW excuses the State from proof of a ROA when a petition is filed against an incarcerated individual, the commitment at issue must still satisfy due process. See RCW 71.09.020(7) (likelihood to engage in predatory acts of sexual violence if not confined in a secure facility “must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed”); *Thorell*, 149 Wn.2d at 731-32. Our Supreme Court has held that due process does not require proof of a ROA “when, on the day the petition is filed, an individual is incarcerated for a sexually violent offense.” *In re Henrickson*, 140 Wn.2d 686, 689, 2 P.3d 473 (2000).

In *Henrickson*, the two defendants were briefly released into the community pending sentencing and appeal. 140 Wn.2d at 689, 691. They argued that due process required the State

to prove a ROA because they had spent time in the community after committing the current offenses. *Henrickson*, 140 Wn.2d at 693. 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, [former] RCW 72.09.020(6) [2000], or an act that by itself would have qualified as a recent overt act, [former] RCW 71.09.020(5) [2000].

Henrickson, 140 Wn.2d at 689.

More recently, Division I of this court affirmed the SVP commitment of an offender who was serving a 20-year suspended sentence following his conviction for first degree statutory rape in 1980. *In the Matter of the Detention of Kelley*, 133 Wn. App. 289, 135 P.3d 554 (2006). The trial court revoked Kelley's suspended sentence and returned him to prison to serve the remainder of his sentence "after he assaulted his girlfriend, was found possessing a bayonet, and left the county without permission." *Kelley*, 133 Wn. App. at 291. Rejecting Kelley's argument that the State had to prove a ROA, the court stated:

"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 [the defendant] has been confined since 1983. To require the State to prove an overt act in [the defendant's] case would write the word "recent" out of the statute.

Kelley, 133 Wn. App. 289 at 294 (footnotes omitted).

In all relevant respects, Fair's case is indistinguishable from *Henrickson* and *Kelley*.

When the State filed its petition, Fair was incarcerated after revocation of the community treatment portion of his SSOSA. He had remained in continuous custody on the robbery conviction following expiration of the 20-month sentence for second degree child molestation, which is a sexually violent offense under RCW 71.09.020(15). As in *Henrickson*, Fair was

“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. *Henrickson*, 140 Wn.2d at 688-89.

While Fair correctly points out that, unlike *Henrickson*, Fair’s sentence for the sexual offense had expired before the State filed its SVP petition, this difference is not relevant. Fair was in continuous confinement from the time he returned to prison on the second degree child molestation conviction until his scheduled release date on the first degree robbery conviction. He was not released into the community between the incarceration for the sexually violent offense and the robbery sentence and, thus, he had no opportunity to commit a ROA in the community. Requiring proof of a ROA under these circumstances would be absurd. *See Henrickson*, 140 Wn.2d at 695.

Fair’s argument would effectively preclude the State from filing a SVP petition when an offender serves concurrent sentences and the non-sexual offense sentence exceeds the sentence for the sexually violent offense. For instance, if the State filed its petition at the expiration of Fair’s child molestation sentence, the filing would have preceded Fair’s actual release date by a considerable amount of time and Fair may have complained that the filing violated RCW 71.09.030.⁹ Generally, we will not interpret a statute to lead to strained or absurd results. *State*

⁹ RCW 71.09.030 states in relevant 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 on, before or after July 1, 1990; . . . and it appears that the person may be a sexually violent 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.

v. Keller, 98 Wn.2d 725, 728, 657 P.2d 1384 (1983). Here, Fair's interpretation of the SVP statute would lead to the absurd result of allowing Fair to escape SVP commitment procedures merely because he committed another serious crime while briefly released into the community. We do not believe that this was the legislature's intent when enacting RCW 71.09.030. Fair's argument undermines the State's compelling interest in protecting the community from dangerous sex offenders.

We conclude that the expiration of one sentence, without an intervening release to the community, does not prevent the State from filing a SVP petition while a defendant is still incarcerated, so long as one of the offenses leading to the incarceration meets the definitions of RCW 71.09.020(15)¹⁰ or RCW 71.09.020(10).¹¹ See *Henrickson*, 140 Wn.2d at 688-89. Thus, we affirm the trial court's decision and hold that neither the SVP statute nor due process requires that a ROA be proven under these circumstances.

A majority of the panel having determined that the remainder of this opinion lacks precedential value and will not be printed in the Washington Appellate Reports but will be filed for public record in accord with RCW 2.06.040, it is so ordered.

II. SUFFICIENCY OF THE EVIDENCE

Fair next argues that the evidence was insufficient to support several findings of fact and conclusions of law, as well as the entry of the order for commitment. He contends that the evidence was not sufficient to warrant the conclusion that he was a SVP.

¹⁰ RCW 71.09.020(15) defines a sexually violent offense.

¹¹ RCW 71.09.020(10) defines a recent overt act.

We will affirm a trial court's findings if substantial evidence supports those findings after analyzing the evidence and all inferences that we can reasonably draw in favor of the trial court's findings. *State v. Hill*, Wn.2d 641, 644, 870 P.2d 313 (1994). The criminal "reasonable doubt" standard applies in our review of SVP proceedings. *Thorell*, 140 Wn.2d at 744. "[T]he 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 SVP status] beyond a reasonable doubt." *Thorell*, 140 Wn.2d at 744. When the record contains conflicting testimony, we will not disturb the trier of fact's credibility determinations. *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005).

Fair challenges findings of fact 8, 71, 72, 73, 74, 75, 76, 77, and 78.¹² Finding of fact 8 states:

8. On June 28, 2004, Respondent was due to be released from confinement for the concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and 88-1-00362-7.

CP at 435.

Fair contends that this finding lacks substantial evidence to support it because his sentence on the child molestation charge expired on August 30, 2000. Accordingly, he argues that he was serving time on the robbery charge only between August 30, 2000 and June 28, 2004. The record shows that the court sentenced Fair to twenty months' confinement on June 25, 1992, in case No. 88-1-00362-7, when the court revoked his SOSSA sentence for second degree child molestation. The court ordered this sentence to run concurrently with the 87 month sentence in case No. 90-1-00498-6 for first degree armed robbery. These facts sufficiently support finding of fact 8.

¹² Fair does not appeal findings of fact 1-7 and 9-70, thus they are considered verities on appeal. *State v. Hunnel*, 52 Wn. App. 380, 383, 760 P.2d 947 (1988).

Findings of fact 71, 72 and 76 state:

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

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.

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

CP at 445-46.

Fair argues that the findings are erroneous because Doren based his diagnoses on Fair's 1988 and 1989 offenses. We disagree. Doren diagnosed Fair with pedophilia and antisocial personality disorder. He based his evaluation on a variety of records and reports from the Department of Corrections, as well as an interview that lasted over four hours. Doren also testified that Fair's pedophilia constituted sexual deviance and explained how it affects emotional and volitional capacity. This evidence was sufficient to support the trial court's findings that Fair suffers from pedophilia, antisocial personality disorder, and sexual deviancy, as described in findings of fact 71 and 76. We do not review the trial court's determination that Doren's testimony was more credible than Donaldson's. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Finding of fact 73 states:

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.

CP at 445-46.

Fair argues that this finding is erroneous because the only evidence that he lacked control was the child molestation incident. But Doren testified that Fair's antisocial personality disorder caused him serious difficulty in controlling his sexually violent and deviant behavior. This testimony adequately supports finding of fact 73.

Findings of fact 74 and 78 state:

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.

.....

78. The Court finds that Respondent is more likely than not to re-offend in a sexually violent manner if he is not confined to a secure facility.

CP at 446.

Fair argues that these findings are unfounded because the only evidence he was likely to reoffend was his reluctance to stop fantasizing sexually about minors. But Fair overlooks Doren's testimony that a high degree of psychopathy, coupled with sexual deviance, creates a very high risk of sexual reoffense. Doren relied on the PCL-R to assess the degree of Fair's psychopathy and concluded that Fair had a "high degree of psychopathy." RP at 320. Doren explained that research has established that people such as Fair, who score high in psychopathy and sexual deviancy, recidivate sexually at a very high rate. Doren testified that Fair had "the highest risk combination" and concluded that Fair was more likely than not to commit acts of sexual violence unless confined in a secure facility. RP at 333. This evidence is sufficient to support findings of fact 74 and 78.

Findings of fact 75 and 77 state:

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.

CP at 446.

Fair argues that these findings lack substantial evidence because the PCL-R was not designed as a risk assessment tool. While Doren admitted that the PCL-R is not a risk assessment instrument, he testified that a high degree of psychopathy increases the risk of sexual recidivism in sex offenders when coupled with sexual deviance. Fair's score on the PCL-R placed him in the highest category of psychopathy. His pedophilia constitutes sexual deviance. The evidence is sufficient to support both findings.

Fair also argues that the court's findings of fact do not support the trial court's conclusions of law 3, 4, 5, 6, and 7. Conclusion of law 3 states:

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).

CP at 446.

Fair contends that the conclusion is unsupported because Donaldson testified that a diagnosis of pedophilia was inappropriate without verifying Fair's self-reported sexual contacts. But findings of fact 24 and 27 support the trial court's conclusion. Finding of fact 24 established that Doren found Fair to suffer from "[p]edophilia, sexually attracted to females, nonexclusive"; and finding of fact 27 established that "[p]edophilia constitutes a mental abnormality." CP at 439. Fair does not challenge those factual findings.

Conclusion of law 4 states:

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

CP at 446.

Fair asserts that the conclusion is erroneous because Doren's diagnosis was unfounded. But in unchallenged finding of fact 32, the trial court found that Doren diagnosed Fair with antisocial personality disorder and that this condition predisposed him to commit predatory criminal sexual acts to "such a degree constituting him a menace to the health and safety of others." CP at 440. This finding is sufficient to support conclusion of law 4.

Conclusion of law 5 states:

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

CP at 447.

Fair challenges this conclusion on the grounds that the evidence was insufficient to support it. But Doren's testimony that Fair's mental afflictions cause him serious difficulty in controlling his sexually violent behavior is sufficient to support conclusion of law 5.

Conclusion of law 6 states:

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.

CP at 447.

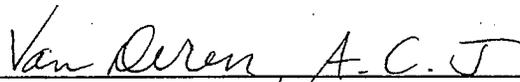
Fair contends that this conclusion is erroneous because Doran's risk assessment was invalid. But Doren testified that sex offenders with a high degree of psychopathy and sexual deviance are highly likely to reoffend and that Fair fulfilled both requirements. The trial court found this testimony credible and it is sufficient to support conclusion of law 6.

Conclusion of law 7 states:

7. The evidence presented at Respondent's trial proved beyond a reasonable doubt that Respondent is a sexually violent predator as that term is used in chapter 71.09.

CP at 447. Fair asserts that there is reasonable doubt that he is a SVP because the State did not prove a ROA. But, as we discussed above, proof of a ROA is not necessary in this case where Fair was continuously incarcerated for both a sex offense and a non-sex offense.

We hold that the trial court's findings of fact support its conclusions of law and the totality of the evidence satisfies the requirements of the SVP statute. We affirm the trial court's ruling that the State proved beyond a reasonable doubt that Fair is a sexually violent predator as defined by chapter 71.09 RCW and that the State was not required to prove a recent overt act due to Fair's long incarceration preceding filing of the State's petition. Thus, we affirm the trial court's entry of the commitment order.

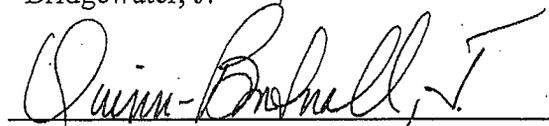


Van Deren, A.C.J.

We concur:



Bridgewater, J.



Quinn-Brintnall, J.

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DAVID W. PETERSON

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STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

9 In re the Detention of:

NO. 04-2-01554-7

10 DAVID FAIR,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

11 Respondent.

12 A trial was held in this matter pursuant to chapter 71.09 RCW, from October 24 to
13 October 27, 2005, to determine whether the Respondent, DAVID FAIR, is a sexually violent
14 predator. The Respondent waived his right to a jury trial and elected to have the case tried to the
15 Honorable Leonard Costello. Petitioner, State of Washington, was represented by Assistant
16 Attorney General MELANIE TRATNIK. Respondent was present and was represented by
17 JOHN CROSS. The Court, having heard the testimony of Ms. Lisa Dandescu, Dr. Dennis Doren,
18 Dr. Theodore Donaldson, and the Respondent, having reviewed the exhibits admitted into
19 evidence and viewed the video deposition of the Respondent, and having heard the evidence
20 presented by the parties and the arguments of counsel, hereby determines that the Respondent is a
21 sexually violent predator as that term is defined in RCW 71.09.020(16).

22 **I. FINDINGS OF FACT**

- 23 1. Respondent was born on May 31, 1966.
- 24 2. On September 27, 1988, Respondent plead guilty to one count of Child Molestation in the
25 Second Degree, under cause number 88-1-00362-7. On February 15, 1989, he was sentenced to
26 a Special Sex Offender Sentencing Alternative (SOSSA) sentence.

1 3. On November 1, 1989, the State filed a Motion and Affidavit for Order Revoking the
2 SOSSA, based on Respondent's failure to maintain sex offender treatment and his failure to
3 report to the Department of Corrections. Respondent absconded.

4 4. On April 24, 1990, Respondent was sentenced in New Mexico under cause number
5 CR-89-00097, to 18 months for one count of Receiving a Stolen Vehicle, 18 months for one
6 count of Receiving Stolen Property, three years for one count of Great Bodily Injury by
7 Vehicle, and 18 months for another count of Receiving Stolen Property, all sentences to be
8 served consecutively.

9 5. On August 10, 1990, the State filed a Motion and Affidavit for Warrant of Arrest under
10 Kitsap County cause number 90-1-00498-6 for First Degree Robbery, Second Degree Assault,
11 First Degree Theft, Second Degree Theft, and Taking a Motor Vehicle Without Owner's
12 Permission, alleged to have been committed on November 10, 1989. Respondent was
13 transferred from New Mexico back to Washington State under the Agreement on Detainers
14 Act.

15 6. On June 10, 1992, Respondent was sentenced for one count of Robbery in the First
16 Degree under Kitsap County cause number 90-1-00498-6, to 87 months to run consecutively to
17 the sentence under New Mexico cause number CR-89-00097.

18 7. On June 25, 1992, Respondent's SOSSA sentence under Kitsap County cause number
19 88-1-00362-7 was revoked for failure to continue treatment, failure to report to DOC, failure to
20 pay legal financial obligations, failure to notify DOC of a change of address and employment,
21 and subsequent law violations leading to convictions. Respondent was sentenced to 20 months
22 to run concurrent with the 87 month sentence imposed on Kitsap County cause number 90-1-
23 00498-6.

24 8. On June 28, 2004, Respondent was due to be released from confinement for the
25 concurrent sentences he was serving under Kitsap County cause numbers 90-1-00498-6 and
26 88-1-00362-7.

1 9. On June 23, 2004, the State filed a petition seeking to commit Respondent as a
2 Sexually Violent Predator (SVP).

3 10. Between June 10, 1992, and June 23, 2004, Respondent has been continuously
4 incarcerated and was incarcerated on the date the Petition was filed.

5 11. Lisa Dandescu testified on behalf of the Petitioner. Dandescu was Respondent's
6 primary treatment provider at the Department of Correction's Sexual Offender Treatment
7 Program (SOTP) for about fourteen months beginning in January 2003. Respondent
8 completed that treatment, and Dandescu wrote a treatment summary in May 2004. Dandescu
9 testified that during treatment Respondent admitted to sexually offending against
10 approximately nineteen different individuals. The ages of these victims were between four and
11 twenty-five. Three of these reported victims were adults over the age of eighteen. Two of the
12 adults were females who were disabled and in a nursing home. The third was a prison inmate
13 whom Respondent manipulated into allowing him to perform anal sex on in exchange for
14 protection from other prisoners. Respondent's self-reported child victims were male and
15 female, and encompassed both strangers and persons known to him. His offenses against
16 children included acts of fondling, sexual intercourse, intercultural sex, cunnilingus, having a
17 victim masturbate him and engaging in kissing and French kissing. One such victim was a
18 four-year old girl whom Respondent reported offending against while in the community during
19 his SOSSA sentence. This offense involved having the victim urinate on him, and rubbing his
20 penis against her vagina until he ejaculated. Another self-reported victim was a two-year old
21 male he performed fellatio on. Dandescu testified that when Respondent discussed the facts of
22 his Child Molestation conviction he minimized his involvement, and stated the girls were
23 flirtatious with him and were asking for beer. Similarly, Dandescu stated that when
24 Respondent discussed his non-sexual convictions he also minimized the events in terms of his
25 actions and harm to the victims. Dandescu testified that during treatment Respondent reported
26 a great deal of deviant arousal, and that common themes of his sexual fantasies involved minor

1 females flirting with him, him broaching the idea of sex, and then engaging in sex with them.
2 Respondent acknowledged to Dandescu that he used photos of children cut out of magazines to
3 enhance his masturbatory fantasies. Dandescu testified that the treatment team expressed
4 concern to Respondent about his continued masturbation towards deviant fantasies, but he was
5 unwilling to stop these behaviors. Dandescu testified that Respondent minimized the harm he
6 had caused his child victims, maintaining that he was sexually satisfying them. Dandescu
7 testified that at the conclusion of treatment the treatment team assessed Respondent's risk to
8 sexually reoffend as high.

9 12. Dr. Doren, a psychologist with considerable experience in the evaluation, diagnosis,
10 and treatment of sex offenders beginning in the early 1980's, was called to testify by the
11 Petitioner.

12 13. Dr. Doren has testified as an expert in Sexually Violent Predator trials in numerous
13 states, including Washington, and is familiar with RCW chapter 71.09.

14 14. Dr. Doren testified that, in conducting his evaluation of the Respondent, he reviewed
15 several thousand pages of documents, including Department of Correction records, court
16 documents, police reports, administrative records, and prior psychological records. He
17 testified that these materials were of the type upon which he and other professionals who
18 conduct such evaluations commonly rely upon, and that he did rely upon them in conducting
19 his evaluation of the Respondent.

20 15. Dr. Doren further testified that he conducted a forensic interview of the Respondent for
21 4.25 hours on May 24, 2004.

22 16. Dr. Doren testified that since completing his evaluation of the Respondent on May 31,
23 2004, he had reviewed the Respondent's deposition and his Special Commitment Center
24 records.

25 17. Dr. Doren testified that these materials did not change his opinions formulated during
26 his initial evaluation, but that some of the Special Commitment Center records substantiated

1 | opinions he already had. For example, Dr. Doren noted that these records revealed that since
2 | Respondent began residing at the SCC in June 2004, he has continued to admit to having
3 | sexual fantasies about minors.

4 | 18. Dr. Doren testified that his records review revealed that Respondent has consistently
5 | self-reported having sexually offended against fifteen or more minors.

6 | 19. Dr. Doren testified that during the forensic interview, Respondent admitted to having
7 | offended against fifteen or more minor children, and to having ongoing sexual fantasies about
8 | children. Dr. Doren testified that during the forensic interview Respondent provided great
9 | detail about his sexual offending.

10 | 20. Dr. Doren testified that since his evaluation he had learned that Respondent now
11 | retracts all his sexual offenses against minors except for the one he was convicted of.
12 | Dr. Doren noted that these retractions did not begin until after the State filed a SVP petition,
13 | and that records show that Respondent has made consistent self-reports of offending against
14 | children over many years, including times when such admissions did not benefit him.

15 | 21. Dr. Doren testified that Respondent's recent retraction of unadjudicated child victims
16 | does not change the opinions he made when he wrote his evaluation on May 31, 2004, and that
17 | he still believes Respondent meets the criteria of a SVP.

18 | 22. Dr. Doren testified that even if all of Respondent's self-reports of unadjudicated
19 | victims were false he would still hold all the same opinions as he did when he wrote his report
20 | on May 31, 2004, and to which he testified to in court.

21 | 23. Dr. Doren testified that had the Respondent not made any reports of child victims
22 | during the forensic interview, he still would have given him the same diagnosis and still would
23 | have reached all the same conclusions, including the ultimate conclusion that he meets the
24 | definition of a SVP.

25 | 24. Dr. Doren testified that, in his professional opinion and to a reasonable degree of
26 | scientific certainty, Respondent suffers from several disorders which are classified in the

1 Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR): Paraphilia
2 Not Otherwise Specified, Urophilia, Alcohol Dependence in a controlled environment,
3 Cannabis Abuse, Pedophilia, sexually attracted to females, nonexclusive, and Antisocial
4 Personality Disorder.

5 25. Dr. Doren noted that while Respondent's urophilia reportedly influenced his behavior
6 in the victimization of one child, the behavioral enactment of this sexual interest does not
7 necessarily imply illegal behavior. Dr. Doren testified that an opinion could not be drawn to a
8 reasonable degree of professional certainty in this regard, and that he therefore concluded that
9 that the Respondent's Urophilia may or may not predispose the Respondent to the commission
10 of sexual acts in a degree constituting him a menace to the health and safety of others.

11 26. Dr. Doren explained that he diagnosed Respondent with Alcohol Dependence and
12 Cannabis Abuse, because Respondent has demonstrated a lack of control over the consumption
13 of these substances to the point that it had negatively affected his life. Although these
14 conditions represent standard mental disorders, Dr. Doren concluded that neither of these
15 disorders predisposes the Respondent to the commission of criminal sexual acts in a degree
16 constituting him a menace to the health and safety of others. However, he noted that while
17 these disorders may not by themselves predispose an individual to engage in criminal sexual
18 acts, the decreased inhibitions and decreased self-control associated with these disorders may
19 have played a role in Respondent's past offending.

20 27. Dr. Doren testified that Respondent's Pedophilia constitutes a mental abnormality, as
21 that term is defined in RCW 71.09.020(8), that is, (a) it is either congenital or acquired, (b) it
22 affects the Respondent's emotional or volitional capacity, and, (c) it predisposes the
23 Respondent to the commission of predatory criminal sexual acts to the degree constituting him
24 a menace to the health and safety of others.

25 28. Dr. Doren explained that Pedophilia is a type of Paraphilia, and that the cardinal
26 qualities of a Paraphilia are that the person experiences intense, sexually arousing fantasies,

1 sexual urges, or behaviors involving nonhuman objects, the suffering of oneself or one's
2 partner, or children or other nonconsenting persons for more than six months.

3 29. Dr. Doren testified that Paraphilias are chronic, lifelong, and by their nature,
4 compromise volitional control and emotional capacity.

5 30. Dr. Doren testified that the essential feature of Antisocial Personality Disorder is that it
6 involves the pervasive disregard for and violation of the rights of others.

7 31. Dr. Doren testified that, consistent with a diagnosis of Antisocial Personality Disorder
8 Respondent has a history of failure to conform to social norms, aggressiveness, reckless
9 disregard for the safety of self or others and lack of remorse. Dr. Doren noted that this pattern
10 includes Respondent's sexually assaultive behaviors.

11 32. Dr. Doren concluded that Respondent's Antisocial Personality Disorder predisposes
12 him to the commission of predatory criminal sexual acts in a degree constituting him a menace
13 to the health and safety of others.

14 33. Dr. Doren testified that Respondent's Pedophilia and Antisocial Personality Disorder,
15 both independently and in combination, cause him serious difficulty controlling his sexually
16 violent behavior.

17 34. Dr. Doren testified that, in his professional opinion, Respondent's mental abnormality
18 and personality disorder, both independently and in combination, make(s) him likely to commit
19 predatory acts of sexual violence if not confined in a secure facility.

20 35. Dr. Doren testified that he used three actuarial instruments; the Static-99, the Minnesota
21 Sex Offender Screening Tool – Revised (MnSOST-R), the Rapid Risk Assessment for Sex
22 Offense Recidivism (RRASOR), and the Psychopathy Checklist – Revised (PCL-R), to assess
23 Respondent.

24 36. Dr. Doren testified that these instruments are widely used and relied upon among
25 psychologists in his field, that he uses and relies upon them in his practice, and that he used
26 and relied upon them in this case.

1 37. Dr. Doren testified that Respondent's score on the Static-99 was at least a 5, possibly a

2 6. Dr. Doren testified that persons with a score of 6 and above are in the highest risk group for
3 sexually reoffending measured by this instrument.

4 38. Dr. Doren testified that of the offenders in the Static-99 development sample who
5 scored a 5, 40% of them were reconvicted of a new hands on sex offense within 15 years of
6 their release, and that of those who scored a 6 or above, 52% of them were reconvicted of a
7 new hands on sex offense within 15 years of their release.

8 39. Dr. Doren testified that Respondent's score on the RRASOR was a 2.

9 40. Dr. Doren testified that of the offenders in the RRASOR development sample who
10 scored a 2, 31% of them were reconvicted of a new sex offense within 17 years of their release.

11 41. Dr. Doren testified that Respondent's score on the MnSOST-R of +13 puts him in the
12 highest risk range measured by this instrument.

13 42. Dr. Doren testified that 78% of the offenders studied by the MnSOST-R who had a
14 score of +13 were rearrested for a new physical contact sexual offense within 6 years of their
15 release.

16 43. Dr. Doren testified that Respondent's actuarial scores were "mixed." He testified that
17 these mixed scores led him to draw the opinion, to a reasonable degree of scientific certainty,
18 that Respondent cannot be clearly viewed as being of a "more likely than not" degree of sexual
19 recidivism risk solely on the basis of these actuarial results, i.e., he could not draw a conclusion
20 either way. He concluded that other factors needed to be considered.

21 44. Dr. Doren testified that he scored Respondent on the Hare Psychopathy Checklist -
22 Revised (PCL-R). The PCL-R is a psychological test, not an actuarial instrument.

23 45. Dr. Doren was certified to administer the PCL-R by Dr. Robert Hare, the creator of this
24 psychological test.

25 46. Dr. Doren explained that scores of 25 or higher on the PCL-R indicate a high degree of
26 psychopathy, and that a score of 30 and above indicates the person is a psychopath.

1 47. Dr. Doren testified that Respondent's score of 30 on the PCL-R indicates that he meets
2 the criteria for classification as a Psychopath.

3 48. Dr. Doren explained that the concept of psychopathy comes down to the idea that the
4 person does what he wants, when he wants to, and does it, in part, because he doesn't have an
5 emotional connection to others.

6 49. Dr. Doren testified that research has repeatedly demonstrated that when psychopathy is
7 found in combination with sexual deviance, it is associated with a particularly high risk for
8 sexual recidivism. Specifically, persons who have both sexual deviancy and high psychopathy
9 sexually recidivate more quickly, and more drastically, than those who do not have both these
10 characteristics.

11 50. Dr. Doren testified that Respondent has both sexual deviancy and high psychopathy,
12 and that he therefore falls into the very high risk category for sexual reoffending.

13 51. Dr. Doren cited four studies on offenders deemed to have sexual deviance in
14 combination with high psychopathy. In these four studies, the criminal sexual recidivism rates
15 were 54% reconviction rate in 10 years, 83% reconviction rate in 17 years, 50% rearrest rate in
16 4 years, and 75% rearrest rate in 6 years. Dr. Doren testified that the consistency across
17 sample pools shows that these findings are robust.

18 52. Dr. Doren testified that he also considered other clinical risk factors in assessing
19 Respondent's risk of sexual reoffending, including the Respondent's treatment history, period
20 of supervision following release, and his current age of 39. Dr. Doren opined that Respondent
21 obtained very little benefit from his sex offender treatment, that his history of compliance with
22 supervision was very poor, and that his current age does not reduce his risk of sexual
23 reoffending. In summary, Dr. Doren concluded that none of these factors constituted
24 protective factors which would decrease Respondent's risk for future sexual offending.

25 53. Dr. Doren testified that to a reasonable degree of scientific and professional certainty,
26 that the Respondent is more likely than not to reoffend in a sexually violent manner if not

1 confined in a secure facility.

2 54. Dr. Doren testified that even if he did not consider the actuarial risk assessment
3 instruments, it would still be his opinion to a reasonable degree of scientific and professional
4 certainty, that the Respondent is more likely than not to reoffend in a sexually violent manner
5 if not confined in a secure facility.

6 55. Dr. Theodore Donaldson, a psychologist who also has considerable experience in the
7 evaluation of sex offenders, testified as an expert on behalf of the Respondent.

8 56. In conducting his evaluation, Dr. Donaldson reviewed the same discovery materials as
9 Dr. Doren did, and conducted a two hour forensic interview of the Respondent on January 5,
10 2005.

11 57. Dr. Donaldson testified that as of September 30, 2005, he had conducted 33 evaluations
12 of persons in Washington who had already been found by prior evaluators to meet the criteria
13 as a Sexually Violent Predator.

14 58. Dr. Donaldson testified that of the 33 persons he has evaluated he found that none of
15 them met the criteria for civil commitment under RCW chapter 71.09.

16 59. Dr. Donaldson testified that when he interviewed the Respondent on January 5, 2005,
17 he admitted to having had sexual contact with three minor girls while he was an adult, one of
18 which was twelve and two of whom were thirteen. One of these acts led to Respondent's
19 conviction for one count of Child Molestation in the Second Degree. Respondent admitted
20 that contact with these three girls included fondling of bare breasts, kissing, fondling of a
21 clothed vagina, intercourse and oral sex. Dr. Donaldson asked Respondent about his prior
22 admissions to sixteen additional unadjudicated victims, and Respondent stated he made those
23 up so he could get into sex offender treatment in prison in what he believed to be a better
24 Department of Corrections (DOC) facility than the one he was initially placed in. Respondent
25 also admitted during the interview that he had a sexual preference for eight to twelve-year-old
26 girls because they are "unblemished," and that he enjoyed writing about sex between adults

1 and children. Respondent also told Dr. Donaldson that at the time of the interview up to forty
2 percent of his fantasies involved sex with children, and that these fantasies involved touching
3 children, orally copulating them, and having them urinate on him. Dr. Donaldson testified that
4 when he interviewed the Respondent on January 5, 2005, he admitted to having written many
5 prior accounts of sexual contact with minors and writings advocating that other adults engage
6 in this behavior, but that those writings were also made up for the purpose of getting into sex
7 offender treatment at the DOC.

8 60. Dr. Donaldson opined that Respondent does not suffer from Pedophilia. Dr. Donaldson
9 testified that if Respondent did not now state that his prior admissions to sex with minors were
10 made up, then he would most likely diagnosis him with Pedophilia. Dr. Donaldson stated that
11 because Respondent now states that those admissions were fabrications, there is insufficient
12 information upon which to diagnose him with Pedophilia.

13 61. Dr. Donaldson testified that he agreed with Dr. Doren that the Respondent has
14 Antisocial Personality Disorder. However, Dr. Donaldson opined that the Respondent's
15 Antisocial Personality Disorder does not predispose him to the commission of crimes of sexual
16 violence. Dr. Donaldson testified that, in his opinion, there are no personality disorders which
17 predispose a person to the commission of crimes of sexual violence.

18 62. Dr. Donaldson testified that he agreed with Dr. Doren that a person who has both
19 sexually deviancy and high psychopathy is at a very high risk to sexually reoffend.
20 Dr. Donaldson testified that if a person has these two things then it is "inescapable" that they
21 will sexually reoffend.

22 63. Dr. Donaldson testified that he agreed with Dr. Doren's scoring of the Respondent on
23 the Hare Psychopathy checklist, and agrees that the Respondent is a psychopath.

24 64. Dr. Donaldson testified that in his opinion there was insufficient evidence that the
25 Respondent was sexually deviant. He based this opinion on the fact that the Respondent was
26 never given a plethysmograph (PPG), and that he now denies his prior admissions to sexually

1 deviant acts and fantasies involving minors.

2 65. Respondent was deposed on September 15, 2005. The Court viewed the video of his
3 deposition. Respondent also testified at trial.

4 66. Respondent confirmed that he was convicted of Child Molestation in the Second
5 Degree, and admitted to sexual contact with the victim named in that conviction. Respondent
6 also admitted to sexual contact with another thirteen-year-old for whom he was initially
7 charged at the same time.

8 67. Respondent admitted to having made numerous admissions to sexual contact with
9 minors throughout his incarceration, but testified that he had fabricated all those contacts in
10 order to increase his chances of being placed in sex offender treatment away from the general
11 prison population.

12 68. Respondent admitted to having composed numerous written materials describing his
13 sexual contacts with children and advocating for sex between adults and children. He testified
14 that the descriptions of sex with children were fabricated, that the other writings did not reflect
15 his actual beliefs, and that all these writings were composed in order to increase his chances of
16 being placed in sex offender treatment at the DOC.

17 69. The Court finds Dr. Doren to be a well-qualified expert with considerable experience in
18 performing SVP evaluations, and finds that his testimony is more persuasive, reliable, and
19 credible than that of Dr. Donaldson.

20 70. The Court finds it of particular import that the Respondent did not deny his previous
21 statements regarding sexually inappropriate behavior and previous writings to Dr. Doren, who
22 met with Respondent for the explicit purpose of determining whether he was a sexually violent
23 predator.

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

26 72. The Court finds that the Respondent's Pedophilia is a congenital or acquired condition,

1 that it affects the Respondent's emotional or volitional capacity, and that it predisposes him to
2 the commission of criminal sexual acts to the degree constituting him a menace to the health
3 and safety of others.

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

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

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

12 76. The Court finds that Dr. Respondent is sexually deviant.

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

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

18 II. CONCLUSIONS OF LAW

19 1. This Court has jurisdiction of the subject matter and the Respondent in this case.

20 2. The crime of Child Molestation in the Second Degree, for which the Respondent was
21 convicted of on September 27, 1988, is a sexually violent offense, as that term is used in
22 RCW 71.09.020(15) and (16).

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

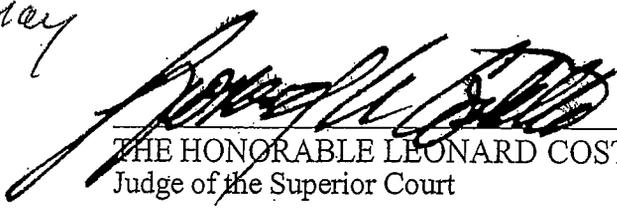
25 4. Antisocial Personality Disorder, from which the Respondent suffers, is a personality
26 disorder, as that term is used in RCW 71.09.020(16).

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

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

6 7. The evidence presented at Respondent's trial proved beyond a reasonable doubt that
7 Respondent is a sexually violent predator as that term is used in chapter RCW 71.09.

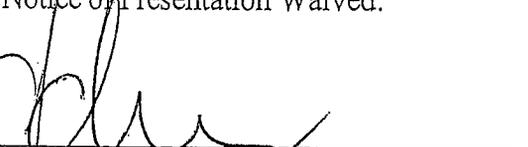
8 DATED this 18 day of ~~March~~ May, 2006.

9
10 
11 THE HONORABLE LEONARD COSTELLO
12 Judge of the Superior Court

13 Presented by:
14 ROB MCKENNA
15 Attorney General

16 
17 MELANIE TRATNIK, WSBA # 25576
18 Assistant Attorney General
19 Attorneys for Petitioner

20 Copy received; Approved as to Form;
21 Notice of Presentation Waived:

22 
23 JOHN CROSS, WSBA #20142
24 Attorney for Respondent
25
26

FILED
KITSAP COUNTY CLERK
2004 JUN 25 AM 10:42
DAVID W. PETERSON

STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

In re the Detention of:

DAVID T. FAIR,

Respondent.

NO.

04 2 01554 7

PETITION

COMES NOW the Petitioner, State of Washington, by and through Christine O. Gregoire, Attorney General, and Melanie Tratnik, Assistant Attorney General, and submits this petition seeking the involuntary civil commitment of the Respondent, David T. Fair, as a sexually violent predator pursuant to RCW 71.09 *et seq.* Specifically, the Petitioner alleges the Respondent is a sexually violent predator, as that term is defined in RCW 71.09.020(16), given the following:

1. Respondent has been convicted of a sexually violent offense, as that term is defined in RCW 71.09.020(15). On or about September 27, 1988, in the Superior Court of the State of Washington, Kitsap County, the Respondent was convicted of Child Molestation in the Second Degree.

2. Respondent currently suffers from:

a) A mental abnormality, as that term is defined in RCW 71.09.020(8), specifically: Pedophilia, sexually attracted to females, nonexclusive; and

RCW 71.09.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Department" means the department of social and health services.
- (2) "Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.
- (3) "Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.
- (4) "Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).
- (5) "Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).
- (6) "Less restrictive alternative" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions set forth in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.
- (7) "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 released unconditionally from detention on the sexually violent predator petition. Such likelihood must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.
- (8) "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 menace to the health and safety of others.
- (9) "Predatory" means acts directed towards: (a) Strangers; (b) individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or (c) persons of casual acquaintance with whom no substantial personal relationship exists.
- (10) "Recent overt act" means 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.
- (11) "Risk potential activity" or "risk potential facility" means an activity or facility that provides a higher incidence of risk to the public from persons conditionally released from the special commitment center. Risk potential activities and facilities include: Public and private schools, school bus stops, licensed day care and licensed preschool facilities, public parks, publicly dedicated trails, sports fields, playgrounds, recreational and community centers, churches, synagogues, temples, mosques, public libraries, public and private youth camps, and others identified by the department following the hearings on a potential site required in RCW 71.09.315. For purposes of this chapter, "school bus stops" does not include bus stops established primarily for public transit.
- (12) "Secretary" means the secretary of social and health services or the secretary's designee.
- (13) "Secure facility" means a residential facility for persons civilly confined under the provisions of this chapter that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096.
- (14) "Secure community transition facility" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under this chapter. A secure community transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include but are not limited to the facility established pursuant to RCW 71.09.250(1)(a)(i) and any community-based facilities established under this chapter and operated by the secretary or under contract with the secretary.
- (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.

(16) "Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(17) "Total confinement facility" means a secure facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a total confinement facility by the secretary.

[2006 c 303 § 10. Prior: 2003 c 216 § 2; 2003 c 50 § 1; 2002 c 68 § 4; 2002 c 58 § 2; 2001 2nd sp.s. c 12 § 102; 2001 c 286 § 4; 1995 c 216 § 1; 1992 c 145 § 17; 1990 1st ex.s. c 12 § 2; 1990 c 3 § 1002.]

RCW 71.09.030

Sexually violent predator petition — Filing.

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 10.77.090(3); (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 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.

[1995 c 216 § 3; 1992 c 45 § 4; 1990 1st ex.s. c 12 § 3; 1990 c 3 § 1003.]

STATE CONSTITUTION OF WASHINGTON

ARTICLE 1, ss. 3. Personal Rights

No person shall be deprived of life, liberty, or property, without
due process of law.

AMENDMENT [V]

**Capital crimes; double jeopardy; self-incrimination; due process;
just compensation for property**

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.

AMENDMENT (XIV)

ss. 1. Citizenship rights not be abridged by states

Section 1. 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.

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

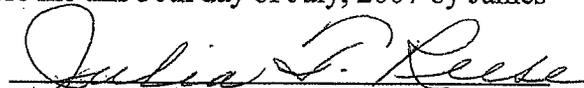
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington over the age of eighteen years, not a party to the above-entitled action and competent to be a witness herein.

That on the 30th day of July, 2007, he deposited in the mails of the United States of America, postage prepaid, the original Petition for Review in Re the Detention of: David T. Fair, No. 34399-1-II, addressed to the office of David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402; deposited in the mails of the United States of America, postage prepaid (1) copy of the same to Melanie Tratnik, Attorney Generals Office/CJ Division, Msc Tb-14, 900 4th Avenue, Ste. 2000, Seattle, WA 98164-1012 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, David T. Fair, at his last known address: David T. Fair, Special Commitment Center, P.O. Box 88600, Steilacoom, WA 98388.


James L. Reese, III

Signed and Attested to before me this 30th day of July, 2007 by James L. Reese, III.


Notary Public in and for the State of
Washington, residing at Port Orchard.
My Appointment Expires: 04/04/09