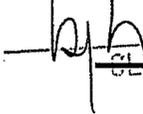


RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2008 MAY 5 P 3:19

BY RONALD R. CARPENTER

NO. 80498-2

  
CLERK

---

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

DAVID T. FAIR,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

---

**SUPPLEMENTAL BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

TODD BOWERS  
Assistant Attorney General  
WSBA # 25274  
800 Fifth Avenue, Ste. 2000  
Seattle, WA 98104-3188  
(206) 389-2028

ANNE EGELER  
Deputy Solicitor General  
WSBA #20258  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100

**TABLE OF CONTENTS**

I. STATEMENT OF ISSUES ..... 1

II. STATEMENT OF THE CASE ..... 1

    A. Procedural History Through the Filing of the SVP Action. .... 1

    B. Evidence of Mr. Fair’s Mental Illness and Risk of Recidivism..... 2

    C. The SVP Action and Subsequent Appeal. .... 5

III. Argument ..... 8

    A. The Plain Language of the SVP Statute Clearly States a ROA is Not  
        Required if the Individual is in Total Confinement on the Date the  
        SVP Petition is Filed. .... 8

    B. Due Process Does Not Require the State to Prove that an Individual  
        Committed a ROA Where the Person is in Custody When the Petition  
        is Filed and Has Not Been in the Community Since Serving His  
        Sentence For His Most Recent Sexually Violent Offense ..... 10

        1. Appellate authority demonstrates that a ROA is not required in this  
            case..... 10

        2. The Court of Appeals correctly held that since Mr. Fair had not  
            been in the community since serving his sentence for his most  
            recent sexually violent offense and was confined when the petition  
            was filed, proof of a ROA was not required. .... 17

    C. The Trial Judge Properly Weighed the Testimony and Evidence, and  
        Found Sufficient Evidence Showed that Mr. Fair is Currently  
        Dangerous ..... 19

IV. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

### Cases

<i>Beasley v. Molett</i> , 95 S.W.3d 590 (Tex.App. 2002).....	9
<i>Colyar v. Third Judicial District Court for Salt Lake County</i> , 469 F.Supp. 424 (D.Utah 1979).....	9
<i>Commonwealth v. Rosenberg</i> , 573 N.E.2d 949 (Mass.Sup.Jud.Ct. 1991).....	9
<i>Fisk v. Letterman</i> , 501 F.Supp.2d 505 (S.D.N.Y. 2007).....	9
<i>In re Commitment of Bush</i> , 283 Wis.2d 90, 699 N.W.2d 80 (2005).....	10
<i>In re Detention of Albrecht</i> , 147 Wn.2d 1, 51 P.3d 73 (2002).....	14, 16, 17
<i>In re Detention of Broten</i> , 115 Wn. App. 252, 62 P.3d 514 (2003).....	15
<i>In re Detention of Davis</i> , 109 Wn. App. 734, 37 P.3d 325 (2002).....	15
<i>In re Detention of Fair</i> , 139 Wn. App. 532, 161 P.3d 466 (2007).....	8, 17
<i>In re Detention of Gonzales</i> , 658 N.W.2d 102 (Iowa 2006).....	10
<i>In re Detention of Henrickson</i> , 140 Wn.2d 686, 2 P.3d 473 (2000).....	12, 13, 14
<i>In re Detention of Kelley</i> , 133 Wn. App. 289, 135 P.3d 554 (2006).....	13, 14

<i>In re Detention of Lewis,</i> __Wn.2d __, 177 P.3d 708 (2008).....	15
<i>In re Detention of Marshall,</i> 156 Wn.2d 150, 125 P.3d 111 (2005).....	10, 15
<i>In re Detention of Martin,</i> No. 78963-1, slip op. at 4 (2008).....	9
<i>In re Detention of McGary,</i> 128 Wn. App. 467, 116 P.3d 415 (2005).....	15
<i>In re Detention of Paschke,</i> 121 Wn. App. 614, 90 P.3d 74 (2004).....	13, 14, 16
<i>In re Detention of Paschke,</i> 136 Wn. App. 517, 150 P.3d 586 (2007).....	13
<i>In re Detention of Thorell,</i> 149 Wn.2d 724, 72 P.3d 708 (2003).....	20
<i>In re Detention of Young,</i> 122 Wn.2d 1, 857 P.2d 989 (1993).....	passim
<i>In re Hovinga,</i> 132 Wn. App.16, 130 P.3d 1266 (2006).....	13, 14
<i>In re L.R.,</i> 497 A.2d 753 (Ver.S.Ct. 1985).....	10
<i>In re McNutt,</i> 124 Wn. App. 344, 101 P.3d 422 (2004).....	15
<i>In re Slabaugh,</i> 475 N.E.2d 497 (OhioCt.App. 1984).....	9
<i>In the Matter of Salem,</i> 228 S.E.2d 649 (N.C.App. 1976).....	9
<i>Matter of Albright,</i> 836 P.2d 1 (Kan.Ct.App. 1992).....	9

<i>Matter of Giles,</i> 657 P.2d 285 (UtahS.Ct. 1982).....	10
<i>Matter of Maricopa County Cause No. MH-90-00566,</i> 840 P.2d 1042 (Ariz.Ct.App. 1992).....	9
<i>Matter of Snowden,</i> 423 A.2d 188 (D.C. 1980) .....	9
<i>Matter of Sonsteng,</i> 573 P.2d 1149 (Mont.S.Ct. 1977).....	9
<i>People v. Sansone,</i> 309 N.E.2d 733 (Ill.App. 1974).....	9
<i>People v. Stevens,</i> 761 P.2d 768 (Colo.S.Ct. 1988).....	9
<i>Project Release v. Prevost,</i> 722 F.2d 960 (2 <sup>nd</sup> Cir. 1983).....	9
<i>Scopes v. Shah,</i> 398 N.Y.S.2d 911 (1977).....	9
<i>State v. Mannering,</i> 150 Wn.2d 277, 75 P.3d 961 (2003).....	19
<i>State v. Robb,</i> 484 A.2d 1130 (N.H.S.Ct. 1984) .....	9
<i>United States ex rel. Mathew v. Nelson,</i> 461 F.Supp. 707 (N.D.Ill. 1978).....	9
<i>United States v. Sahhar,</i> 917 F.2d 1197 (9 <sup>th</sup> Cir. 1990) .....	9

///

///

**Statutes**

RCW 71.09.010 .....	18
RCW 71.09.020( 7).....	8, 9
RCW 71.09.020( 8).....	7
RCW 71.09.020(10).....	8
RCW 71.09.020(16).....	8, 10
RCW 71.09.030 .....	11, 19
RCW 71.09.060( 1).....	8, 9, 11

## I. STATEMENT OF ISSUES

1. The sexually violent predator statute unambiguously states that a recent overt act is not required to be shown if the individual is confined at the time a petition for civil commitment is filed. Since Mr. Fair was incarcerated at the time the petition for commitment was filed, did the Court of Appeals correctly hold that a recent overt act was not required to be shown?
2. Appellate authority has repeatedly held that proof of a recent overt act is not constitutionally required where the person is totally confined on the date the commitment action is filed and has not been free in the community since serving the sentence for his most recent sexually violent offense. Since Mr. Fair was incarcerated when the petition was filed and has not been free since serving his sentence for his most recent sexually violent offense, did the Court of Appeals correct hold that a recent overt act was not required to be shown?
3. There must be sufficient evidence, viewed in the light most favorable to the State, to support a trial court's commitment decision. Did the trial court correctly determine the State proved Mr. Fair meets the definition of a sexually violent predator?

## II. STATEMENT OF THE CASE

### A. Procedural History Through the Filing of the SVP Action.

Mr. Fair is a convicted child molester who in July 1988 fondled the vagina of a 12 year old girl after providing her with alcohol. 1RP 38-39; 3RP 236-37, 251-52; CP 69. He also fondled two 13 year old girls who were present. *Id.*

Mr. Fair pled guilty to second-degree child molestation for the assault on the 12 year old and received a Special Sex Offender Sentencing Alternative (SSOSA). CP 69. This included a suspended 20 month prison term;

placement on community supervision for 10 years, and the requirement that he abide by various conditions, including that he attend outpatient sex offender treatment. CP 69-75.

Approximately nine months later, in November 1989, the State moved to revoke the SSOSA because Mr. Fair failed to attend treatment and report to the Department of Corrections (DOC) as required. CP 78-79. When Mr. Fair learned of the motion, he brutally beat an acquaintance and stole his truck. CP 84-88, 173-75. He drove the stolen truck to New Mexico, robbed an elderly couple, and was arrested after a high speed car chase, which ended when Mr. Fair slammed into a car, seriously injuring the occupants. CP 84-88, 173-78; 3RP 241-42; 5RP 465, 487-89.

In April 1990, New Mexico sentenced Mr. Fair to seven and a half years in prison. CP 81. Washington later revoked his SSOSA status and imposed the 20 month sentence for child molestation. CP 105-09. In addition, he was convicted in Washington of first-degree robbery of the truck, and was sentenced to an additional 87 months. CP 90, 94. The Washington sentences were served concurrently, but consecutive to the New Mexico sentence. CP 94, 107.

**B. Evidence of Mr. Fair's Mental Illness and Risk of Recidivism.**

From 1989 through 2004, Mr. Fair has repeatedly and consistently admitted to treatment providers and psychologists that he has sexually

assaulted 16 to 20 victims ranging from age 2 to 18.<sup>1</sup> 3RP 214, 223-27, 253-58. One of the offenses to which he has admitted is the molestation of a four year old girl while he was in the community in 1989 on the SSOSA. Mr. Fair's treatment provider testified at trial regarding Mr. Fair's admissions, stating "one that stands out is 4 years old, which was the one that he offended while on SSOSA." 1RP 36-40, 50-52. It was not until after the SVP petition was filed that Mr. Fair began to deny all but his adjudicated offense, claiming he made up the other crimes in order to stay out of the general prison population. 3RP 141; 5RP 489-90, 493-94.

Mr. Fair's admitted molestation of the 4 year old, and 16 to 20 other young victims, is consistent with his expressed belief that sexual contact with children is positive. For example, he wrote in 2002:

[C]hildren *are* sexual beings, but their sexuality is diverted into non-genital expression by the refusal of the parents (and others) to stimulate the child genitally when prompted by the child, and to allow the child to do the same for the parent (or others).

CP 260-61 (emphasis in original). He subsequently wrote to explain the positive aspects of sexual contact with young girls:

The 4-yr-old believed it was fun, a game, and suffered no trauma, physical or emotional. (I know, the argument is, "she *has* suffered emotionally, because I "sexualized" her, "stole her innocence," or caused her to feel guilt, shame or whatever. On the contrary:

---

<sup>1</sup> Pedophiles typically have far more victims than they are convicted of molesting. 2RP 156-57; 3RP 231-32; Abel et al., *Self-Reported Crimes of Nonincarcerated Paraphiliacs*, 2 Journal of Interpersonal Violence 3, 22 (1987) ("many sex crimes are not reported, so arrest records provide on an incomplete picture of the paraphiliac.").

*society* causes these problems, by convincing her that she was victimized rather than acknowledging that it was harmless fun, as she believe until (if) society got involved.

CP 283-82 (emphasis in original).

Mr. Fair has continued to be sexually aroused by pedophilic fantasies while in prison. For example, as recently as January 2005, Mr. Fair admitted he continued to masturbate to fantasies of fondling “unblemished” young girls, performing oral sex on them and having them urinate on him. 2RP 159-62; 3RP 258. He explained he is not plagued by masturbatory fantasies involving children; he enjoys them. 3RP 263.

Mr. Fair also created pedophilic masturbatory material while in prison. In a search of his cell, prison officials found approximately 100 magazine photos of young girls, along with Mr. Fair’s pornographic stories about the children in the photos. 2RP 166, 168; 3RP 252, 255-56.

Mr. Fair recognized that possessing the photos and stories fuels his risk of reoffending. In the SVP action, he told an evaluating psychologist that having “imagery” of young girls “would put me at high risk” to reoffend. 3RP 262. When asked how people would know he is at risk of reoffending, he stated, “I guess if I had catalogs, magazines, books, movies with young girls on them, recorded TV shows, commercials with young girls, collections of imagery.” 3RP 262.

Similarly, Mr. Fair admitted in a 2001 letter to his counselor the link between his pedophilic fantasies and arousal, and his corollary risk of reoffending, describing a recent dream involving two prepubescent girls:

I immediately grabbed her and, lifting her bodily off the floor by the neck, slowly crushed her throat. Then I lay her body beside that of the first victim, and they were both suddenly naked. Somehow I had cut off the flesh of the first girl's *labia majoris*, and held it in my hand. Then I put this carefully back in place, and began sucking on the second girl's still-warm genitals. Even though she was dead, yet still she was speaking in a detached voice, commenting on how much her her (sic) flesh I was able to suck into my mouth. This dream ended with my grabbing the second (not cold and blue) murder victim's body and violently raping it. Upon awakening, I felt both aroused and troubled by the dream. . . .

[I]t is indicative of the potential for violence – as was the urge to destroy my cell's contents last night – which might be released under inordinate amounts of stress upon release. Not that I would...I wonder if...

No, I know that if I reached a point in life where I felt frustrated beyond endurance, such as loss of job, friends, and family, bleak future prospects, etc. (all circumstances surrounding the violent robbery which I committed in 1989 to end up here), and convinced myself that it would be better to “have one last fling” then end it, *I know without a doubt that I would be capable – and I've already had many such fantasies – of finding a young girl to abduct, molest and rape for a short or long period of time, then abandon when I kill myself to prevent arrest.*

CP 256-7 (emphasis added).

### C. The SVP Action and Subsequent Appeal.

Mr. Fair has not been released into the community since his 1989 arrest in New Mexico. He was transferred to prison in Washington after his New Mexico sentence expired and, after the sentence for the child molestation

expired in 2001, Mr. Fair continued to be held on the robbery sentence. CP 52-56. An SVP petition was filed in June 2004, as Mr. Fair was finishing the last days of this sentence. CP 1, 56.

Mr. Fair waived his right to a jury and at the bench trial testified in his own behalf. CP 139; 5RP 460-505. In addition, he presented expert testimony that there is less than a 50% likelihood that he will reoffend if released. His expert, Dr. Donaldson, concluded that Mr. Fair does not suffer from a mental disorder that qualifies him for commitment. 2RP 76, 87, 91, 95, 97-99.

The State presented the testimony of Lisa Dandescu, Mr. Fair's treatment provider in 2003-4. 1RP 37. She testified that during treatment Mr. Fair admitted numerous additional victims, minimized his responsibility for those offenses, and continued to masturbate to fantasies of children. She concluded that despite a year in treatment, he remains at high risk to sexually reoffend because he never made a commitment to change his deviant arousal patterns. 1RP 40-41, 44-45, 49-50.

Dr. Dennis Doren, a psychologist with extensive expertise in SVP cases examined Mr. Fair, reviewed over 1,000 pages of material related to Mr. Fair's criminal and social history and testified at trial. 3RP 200-205, 212-15. Dr. Doren diagnosed Mr. Fair as suffering from several mental disorders, including Pedophilia and Antisocial Personality Disorder. 3RP 246-47.

Mr. Fair's Pedophilia is a "mental abnormality" within the meaning of the commitment statute. *Id.* at 272; RCW 71.09.020(8).

Either of these mental disorders alone or together cause Mr. Fair serious difficulty in controlling his sexually violent behavior. 3RP 273, 291, 342-43. Because of these disorders, there is greater than a 50% risk that Mr. Fair will engage in predatory acts of sexual violence if not confined. 3RP 333. Dr. Doren testified that this recidivism risk is based on a statistical assessment, the combination of Mr. Fair's high level of psychopathy and sexual deviance, and the fact that sex offender treatment did not, according to Mr. Fair's treatment team, have an appreciable impact upon him. 1RP 49; 3RP 298, 316-333, 335.

After four days of trial, the court found the evidence proved beyond a reasonable doubt that Mr. Fair is a SVP. CP 420. The trial judge concluded that "the testimony of Dr. Doren is more persuasive and credible than that of Dr. Donaldson." *Id.* The judge observed that Mr. Fair did not disavow his prior statements and writings regarding his continued sexually deviant urges, beliefs and behavior. *Id.* The judge noted that even Dr. Donaldson testified that if Mr. Fair committed the acts he confessed to, "it's likely he is a sexually violent predator." CP 419.

Mr. Fair's appeal from the commitment order was rejected by the Court of Appeals. *In re Detention of Fair*, 139 Wn. App. 532, 161 P.3d 466

(2007). The court closely adhered to the decisions of this Court and concluded that proof of Mr. Fair's current dangerousness did not need to include evidence of a "recent overt act."<sup>2</sup> *Id.* at 538-42.

### III. ARGUMENT

Proof of a ROA is not required where, as here, the petition is filed while the person is totally confined and has not been released into the community since serving the complete sentence for his most recent sexually violent offense.

**A. The Plain Language of the SVP Statute Clearly States a ROA is Not Required if the Individual is in Total Confinement on the Date the SVP Petition is Filed.**

In order to civilly commit a person as a SVP, the State must prove the person meets the statutory definition of a sexually violent predator. RCW 71.09.060(1). The State must prove *inter alia* that the person is "likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(16). This phrase is itself further defined and, regarding the ROA requirement, provides:

Such likelihood must be evidenced by a recent overt act *if the person is not totally confined at the time the petition [for commitment] is filed* under RCW 71.09.030."

RCW 71.09.020(7) (emphasis added).

---

<sup>2</sup> A "recent overt act" is "any act or threat that either causes harm of a sexually violent nature or creates reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." RCW 71.09.020(10).

The plain language of RCW 71.09.020(7) is reinforced by RCW 71.09.060(1), which states:

If, on the date the petition is filed, the person was living in the community after release from custody, the state must also prove beyond a reasonable doubt that the person had committed a recent overt act.

Mr. Fair asks the Court to ignore the Legislature's unambiguous statement that a ROA is not required if the person is totally confined when the petition is filed. This argument must be rejected because, as this Court recently reiterated, the rules of statutory construction are not necessary when a law is unambiguous and the Court will not rewrite the statute "even if we believe the legislature intended something else but failed to express it adequately."<sup>3</sup> *In re Detention of Martin*, No. 78963-1, slip op. at 4 (2008).

---

<sup>3</sup> There is no reason to believe the Legislature intended the ROA requirement to apply to any persons other than those living in the community when the petition is filed. Indeed, the requirement of a ROA is not found in the vast majority of other civil commitment statutes (including SVP statutes) and almost all courts have held the constitution does not require that proof of current dangerousness include evidence of a ROA. *See e.g., Project Release v. Prevost*, 722 F.2d 960, 972-75 (2<sup>nd</sup> Cir. 1983) ("we are not convinced that, as a practical matter, the addition of a recent overt act requirement would serve to reduce erroneous commitments."); *United States v. Sahhar*, 917 F.2d 1197 (9<sup>th</sup> Cir. 1990); *Fisk v. Letterman*, 501 F.Supp.2d 505, 523-24 (S.D.N.Y. 2007); *Colyar v. Third Judicial District Court for Salt Lake County*, 469 F.Supp. 424, 434-35 (D.Utah 1979) ("[T]here is no scientific evidence that the [ROA] requirement decreases the chance of error in predicting dangerousness."); *United States ex rel. Mathew v. Nelson*, 461 F.Supp. 707, 709-12 (N.D.Ill. 1978); *Matter of Maricopa County Cause No. MH-90-00566*, 840 P.2d 1042, 1049 (Ariz.Ct.App. 1992); *People v. Stevens*, 761 P.2d 768, 771-774 (Colo.S.Ct. 1988); *Matter of Snowden*, 423 A.2d 188, 192 (D.C. 1980); *People v. Sansone*, 309 N.E.2d 733, 739 (Ill.App. 1974); *Matter of Albright*, 836 P.2d 1, 5-6 (Kan.Ct.App. 1992); *Commonwealth v. Rosenberg*, 573 N.E.2d 949, 958-59 (Mass.Sup.Jud.Ct. 1991); *Matter of Sonsteng*, 573 P.2d 1149, 1155 (Mont.S.Ct. 1977); *State v. Robb*, 484 A.2d 1130, 1134 (N.H.S.Ct. 1984); *Scopes v. Shah*, 398 N.Y.S.2d 911, 913 (1977); *In the Matter of Salem*, 228 S.E.2d 649, 652 (N.C.App. 1976); *In re Slabaugh*, 475 N.E.2d 497, 500 (OhioCt.App. 1984); *Beasley v. Molett*, 95 S.W.3d 590, 599 (Tex.App. 2002)(SVP case); *Matter of Giles*, 657 P.2d 285, 287-

**B. Due Process Does Not Require the State to Prove that an Individual Committed a ROA Where the Person is in Custody When the Petition is Filed and Has Not Been in the Community Since Serving His Sentence For His Most Recent Sexually Violent Offense.**

Mr. Fair's argument that, even if the statute does not require proof of a ROA due process does, is also without merit. As appellate authority demonstrates, proof of a ROA is not necessary where a person is totally confined when the SVP petition is filed and has not been released since serving the entire sentence for their most recent sexually violent offense.

**1. Appellate authority demonstrates that a ROA is not required in this case.**

A person may be civilly committed as an SVP if the person has been convicted of a sexually violent offense and currently suffers from a mental disorder which makes the person more likely than not to commit predatory acts of sexual violence if the person is not confined to a secure facility for treatment. RCW 71.09.020(16). The requirements of a current mental disorder, present dangerousness, and a causal link between the two are constitutional prerequisites to commitment rooted in due process. *In re Detention of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 111 (2005).

---

88 (UtahS.Ct. 1982); *In re L.R.*, 497 A.2d 753, 756 (Ver.S.Ct. 1985); *In re Commitment of Bush*, 283 Wis.2d 90, 95-96, 699 N.W.2d 80 (2005)(SVP case). It appears the only other state that requires a ROA in certain circumstances is Iowa. *In re Detention of Gonzales*, 658 N.W.2d 102 (Iowa 2006).

The State must, as with all elements of the SVP action, establish current dangerousness by proof beyond a reasonable doubt. RCW 71.09.060(1). This Court has concluded that, in certain limited circumstances, due process requires that the proof of current dangerousness must include evidence of a ROA.

The Court addressed the ROA issue in the first SVP case it considered. *In re Detention of Young*, 122 Wn.2d 1, 39-42, 857 P.2d 989 (1993). The Court held that a ROA is required only if the person “has been released from confinement on a sex offense (as referenced in RCW 71.09.030) and lives in the community *immediately prior to* the initiation of sex predator proceedings.” *Id.* at 41 (emphasis added).

Proof of a ROA is not required where the person is totally confined on the date the SVP petition is filed and has not been released into the community immediately before the filing of the petition. The rationale for this rule is clear. Not only is the State still required by due process to prove a person’s current dangerousness beyond a reasonable doubt, but:

In many cases, sexually violent predators are incarcerated prior to commitment. For incarcerated individuals, a requirement of a recent overt act under the Statute would create a standard which would be impossible to meet. Other jurisdictions have rejected the precise argument made by petitioners because it creates an impossible condition for those currently incarcerated. We agree that “[d]ue process does not require that the absurd be done before a compelling state interest can be vindicated.”

*Id.* at 41 (citations omitted).

The ROA requirement was further refined in *In re Detention of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000), which involved two men committed as SVPs who had lived in the community for three months and three years, respectively, after committing their most recent sex offense, but before serving several years in prison for the crimes. *Id.* at 689-91. They were in custody for the offenses when the SVP action was filed, and had not been released from custody after serving their entire sentence. *Id.*

This Court held that a ROA was not required in their cases, stating:

When, at the time the [SVP] petition is filed, an individual is incarcerated for a sexually violent offense, or for an act that itself would have constituted a recent overt act, due process does not require the State to prove a further overt act occurred between arrest and release from incarceration.

*Id.* at 697.

The court reasoned that imposing the ROA requirement:

Would elevate Henrickson's and Halgren's periods of temporary release during the disposition of their criminal cases over the sexually related criminal acts that actually gave rise to their extensive periods of confinement. This would lead to absurd results because, in effect, any post-arrest supervised release for whatever reason would provide the opportunity to circumvent the distinctions of the statute.

*Id.* at 696.

Both *Young* and *Henrickson* demonstrate that proof of a ROA is not required in Mr. Fair's case. Mr. Fair was totally confined on the date the

petition was filed and had not been released from confinement nor lived in the community “immediately prior” to the filing of the SVP action. *In re Detention of Young*, 122 Wn.2d at 41. Indeed, Mr. Fair had not lived in the community for over 15 years before the filing of the petition. Mr. Fair’s period of extensive confinement post-dated his temporary and short-lived time in the community on the SSOSA.

Not requiring proof of a ROA in this case is also consistent with other factually similar cases that have been decided since *Young* and *Henrickson*. In these cases, the courts have held a ROA is not required where an offender was paroled on the most recent sexually violent offense many years before the SVP petition is filed, was returned to custody for violating parole, and is in custody on the underlying offense when the petition is filed. *In re Detention of Kelley*, 133 Wn. App. 289, 293-94, 135 P.3d 554 (2006); *In re Hovinga*, 132 Wn. App.16, 20-24, 130 P.3d 1266 (2006); *In re Detention of Paschke*, 121 Wn. App. 614, 621-24, 90 P.3d 74 (2004), *aff’d by*, *In re Detention of Paschke*, 136 Wn. App. 517, 150 P.3d 586 (2007).

The rationale for the holdings in these cases applies with equal force to Mr. Fair. First, like *Henrickson* and *Halgren*, in the parole cases the persons lived in the community before serving their entire sentences and were returned to custody to serve the remainder of the underlying sexually violent offense.

*See e.g., In re Kelley*, 133 Wn. App. at 293-94; *In re Hovinga*, 132 Wn. App. at 22-23.

In addition, imposing the ROA requirement in these cases, where parole to the community was many years before the SVP petition was filed, would not serve the purpose of the doctrine, which is to provide evidence of current dangerousness. *See e.g., In re Paschke*, 121 Wn. App. at 623 (“there is nothing ‘recent’ or ‘current’ about 1987 to 1989, the period of Mr. Paschke’s parole prior to the 1994 petition.”). Indeed, requiring proof of recent behavior in these cases would be impossible because so many years have passed since the person has been in the community on parole. *See e.g., In re Paschke*, 121 Wn. App. at 623; *In re Kelley*, 133 Wn. App. at 294 (requiring ROA would be an “impossible standard for the State to meet because total confinement prevents such acts from occurring, and Kelley has been confined since 1983.”).

Mr. Fair ignores *Young*, *Henrickson* and the parole cases and relies instead on cases discussing the one factual context in which the courts have required proof of a ROA: Where the person has been released to the community after serving the full sentence for the most recent sexually violent offense and is in custody on the day the SVP action is filed for violating the terms of post-release supervision. *In re Detention of Albrecht*, 147 Wn.2d 1, 10-11, 51 P.3d 73 (2002); *In re Detention of Broten*, 115 Wn. App. 252, 62

P.3d 514 (2003); *In re Detention of Davis*, 109 Wn. App. 734, 37 P.3d 325 (2002). Mr. Fair's reliance on these cases is misplaced as they are clearly distinguishable.<sup>4</sup>

In these cases, the courts imposed the ROA requirement because, unlike *Henrickson* and *Halgren*, persons on post-release supervision have already served the entire prison term for their most recent sex offense and are only in custody for violating the terms of their supervision when the petition is filed. *See e.g., In re Albrecht*, 147 Wn.2d at 9. They have been, consistent with *Young*, in the community "immediately prior to the initiation" of the SVP action. *In re Detention of Young*, 122 Wn.2d at 41.

In addition, the rationale for not requiring the State to prove a ROA is absent in cases where the person is in custody when the petition is filed only for violating a supervision condition. *Albrecht*, *Davis*, and *Brotten* had been free after serving their sentences for their most recent sexually violent offense, could have engaged in ROA behavior and, as a result, it was appropriate to

---

<sup>4</sup> It should be noted that the requirement of proof of a ROA has been considered and rejected in factual contexts other than the parole and post-release supervision cases. For example, no ROA is required where the offender is in custody for a new sex offense that does not rise to the level of a predicate sexually violent offense because the sex offense itself is a ROA. *In re Marshall*, 156 Wn.2d at 154-158; *In re McNutt*, 124 Wn. App. 344, 346-51, 101 P.3d 422 (2004). In addition, courts have not required a ROA in cases where the release to the community did not provide the person with an opportunity to commit a ROA. *In re Detention of Lewis*, \_\_ Wn.2d \_\_, 177 P.3d 708 (2008) (momentary release to community corrections officer provided no opportunity to commit ROA); *In re Detention of McGary*, 128 Wn. App. 467, 473-79, 116 P.3d 415 (2005) (detention in mental hospital did not provide opportunity to commit ROA).

impose the ROA requirement on the State in those cases. *See e.g., Albrecht*, 147 Wn.2d at 10.

Finally, the courts expressed concern in the factual context of these cases that a person could be committed even after serving the full term for the sex offense solely on the basis of a violation of post-release supervision rules which do not establish the person's current dangerousness. *Id.* at 10-11. As the Court of Appeals noted, "the *Albrecht* court grounded its holding on a concern that the State could get around the [ROA] requirement by jailing an alleged SVP for non-sexual, non-overt conduct . . . and then, a short while later, filing a SVP petition." *In re Detention of Paschke*, 121 Wn. App. at 623-24.

*Albrecht* and similar cases are, however, distinguishable from Mr. Fair's. Unlike Mr. Fair, the offenders in those cases had all served the full sentence for their most recent sexually violent offense, had only then been released into the community on post-release supervision, and were in custody for short periods of time for violating conditions of supervision before the SVP petition was filed. Mr. Fair had served none of his prison term when he was most recently in the community on his SSOSA, was not on post-release supervision when he was returned to custody and was in confinement for over 15 years before the SVP petition was filed.

Additionally, and perhaps even more importantly, the danger voiced in *Albrecht* of SVP filings being bootstrapped onto post-release supervision violations is absent in this case. There is no evidence here that the State sought 20 years ago to gin up a reason to revoke Mr. Fair's parole so it could then file the SVP action, nor does Mr. Fair even make this argument. Indeed, that would have been difficult to do since the SVP statute was not enacted until after Mr. Fair's return to custody in 1989.

2. **The Court of Appeals correctly held that since Mr. Fair had not been in the community since serving his sentence for his most recent sexually violent offense and was confined when the petition was filed, proof of a ROA was not required.**

Mr. Fair's primary argument is that the State should be required to provide proof of a ROA during the time he was imprisoned between the expiration of his child molestation sentence in 2001 and that of his robbery sentence in 2004. He also argues in a somewhat contradictory fashion that the State should be required to prove the commission of a ROA during the brief period of time he was on a SSOSA 15 years before the SVP action was filed. Both of these arguments are without merit.

Imposing a ROA requirement in this case would be, as the Court of Appeals stated, "absurd." *In re Detention of Fair*, 139 Wn. App. at 541. Mr. Fair was never released from prison between the expiration of the child molest sentence and that of the robbery term. To require proof of a ROA

during this period of continuous confinement would create an impossible standard for the State to meet because of the difficulty of engaging in ROA behavior while incarcerated. Indeed, such a requirement would essentially reward Mr. Fair for having committed a serious offense while on his SSOSA that resulted in a sentence for the robbery that is even longer than that which he received for his child molestation conviction.

Requiring proof of a ROA during Mr. Fair's SSOSA almost 20 years ago would also be absurd, but for a different reason. Although he was at least living in the community at that time, under no definition of the term can Mr. Fair's release in 1989 be said to be "recent." Since the Court has tied the ROA requirement to the time frame "immediately prior" to the filing of the SVP petition (because the Court deemed that only recent behavior, where such evidence is available because the person has lived in the community, is relevant on the issue of current dangerousness), it makes no sense to require proof of a ROA under these facts.

In addition, the State has a compelling interest in treating mentally disordered, high risk sex offenders, an interest that the legislature designed the SVP commitment scheme to serve. *In re Detention of Young*, 122 Wn.2d at 26; RCW 71.09.010. This compelling interest would be undermined and the legislature's intent thwarted by requiring a ROA either during the SSOSA release almost 20 years ago or during Mr. Fair's recent incarceration. This is

especially true where Mr. Fair's SSOSA release was so long ago, was very brief, and during which time he committed a serious crime before serving the full sentence on the underlying sex offense.

Finally, Mr. Fair's argument, if accepted, would lead to a violation of the statutory scheme. The State is only permitted pursuant to file an SVP action when a person is "about to be released from total confinement." RCW 71.09.030. If the Court were to adopt Mr. Fair's argument, the State would have been required to file the SVP action against him in late 2001 when his child molestation sentence was about to expire, but while he still had several more years in custody to serve for the robbery. Courts should avoid reading statutes in a way that leads to strained or absurd results such as that advocated by Mr. Fair. *State v. Mannering*, 150 Wn.2d 277, 282, 75 P.3d 961 (2003).

**C. The Trial Judge Properly Weighed the Testimony and Evidence, and Found Sufficient Evidence Showed that Mr. Fair is Currently Dangerous.**

The State was not obligated to include in its proof of Mr. Fair's current dangerousness evidence of a ROA. As such, Mr. Fair's sufficiency of the evidence argument, which is predicated on his assertion that such evidence was required, fails.

The evidence the State did present at trial, when viewed in the light most favorable to the State as required, was sufficient to persuade any rational

trier of fact that Mr. Fair is more than 50% likely continue to act out this cycle, and commit predatory acts of sexual violence if released into the community. *In re Detention of Thorell*, 149 Wn.2d 724, 744-45, 72 P.3d 708 (2003). The expert testimony regarding the severity and enduring nature of Mr. Fair's Pedophilia and Antisocial Personality Disorder was illustrated by Mr. Fair's confessed molestation of 16 to 20 additional children, his written beliefs that sexual stimulation of children is "harmless fun," creation of extensive pedophilic masturbatory materials while in prison, written and orally expressed fantasies and urgings, actuarial risk scores, and the lack of any ameliorative effect of treatment. This evidence overwhelmingly supports the judge's conclusion that a sufficiency of the evidence demonstrates the clear and present danger Mr. Fair presents to the community unless he is confined for treatment.

#### IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm Mr. Fair's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of May, 2008.

ROBERT M. MCKENNA  
Attorney General



TODD BOWERS, WSBA #25274  
Assistant Attorney General

**FILED AS ATTACHMENT  
TO E-MAIL**