

No. 91385-4

No. 45000-3

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

In Re The Detention of John C. Anderson

STATE OF WASHINGTON, Respondent

v.

JOHN C. ANDERSON, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JOHN MCCARTHY

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
509.939.3038

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I. ASSIGNMENTS OF ERROR

- A. The court lacked subject matter jurisdiction to try Mr. Anderson under RCW 71.09.
- B. The State failed to prove beyond a reasonable doubt that Mr. Anderson committed a recent overt act, an essential element.
- C. The State failed to show beyond a reasonable doubt that Mr. Anderson suffers from a mental abnormality or personality disorder that makes him currently dangerous.
- D. The State did not prove beyond a reasonable doubt that Mr. Anderson should be committed under RCW 71.09.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. An RCW 71.09 petition may be filed on 5 classes of individuals. Where the legislature has distinguished between commission of a sexually violent offense by a juvenile and an adult conviction for a sexually violent offense, does the Court have authority to try an individual who was found to have committed a sexually violent offense as a juvenile, but has since been released from total confinement?
- B. Personal liberty and freedom of association are fundamental constitutional rights that guarantee individuals may enter into and maintain certain intimate human relationships. Where an individual

engages in legal consensual homosexual activity, can those activities later be presented by the State as recent overt acts as defined in RCW 71.09.020(12)?

C. Did the State prove beyond a reasonable doubt a recent and overt act?

D. Did the State present sufficient evidence to sustain a finding that Mr. Anderson has a mental abnormality or personality disorder which makes him currently dangerous?

E. Did the State prove beyond a reasonable doubt that Mr. Anderson should be confined under RCW 71.09?

III. STATEMENT OF FACTS

A. Procedural History

The State filed a petition for commitment under RCW 71.09 on John Anderson on February 25, 2000¹. *In re Det. of Anderson*, 134 Wn.App. 309, 139 P.3d 396 (2006). After a 2004 bench trial, Mr. Anderson was committed to the Special Commitment Center. On review, the Division 2 appellate court was split as to whether the State had proved a recent overt act beyond a reasonable doubt. *Id.* at 326. The matter was

¹ In its opinion, the Washington Supreme Court mistakenly wrote “Prior to Anderson’s release [in 1990 from JRA], the State filed a petition to involuntarily commit him as an SVP”. *In re Det. of Anderson*, 166 Wn.2d at 546. A petition was not filed on Mr. Anderson until February 2000. (12/3/12 RP 78).

reversed and remanded on the basis that Mr. Anderson was entitled to appointment of a defense expert witness. *Id.* at 322.

Both parties sought review to the Washington Supreme Court. *In re Det. of Anderson*, 166 Wn.2d 543, 211 P.3d 994 (2009). The Court reviewed whether Mr. Anderson was entitled to appointment of a defense expert witness and whether his purported conduct amounted to recent overt acts. *Id.* at 549. The Court affirmed the Division 2 ruling on the expert opinion issue. In a sharply divided opinion, (5/4), the Court ruled the acts relied upon by the State could amount to a recent overt act. *Id.* at 550. The Court held that on remand, “Whether or not Anderson’s conduct amounted to a recent overt act, as with the other elements of the State’s case, will have to be proved at that new trial.” *Id.* at 552. Mr. Anderson was retried four years later in 2013; that trial is the subject of this appeal.

B. Pretrial Rulings

In pretrial hearings, the defense filed a motion to dismiss based on (1) lack of subject matter jurisdiction; (2) Mr. Anderson’s consensual sexual activity was a protected constitutional right while he was a voluntary patient at Western State Hospital and did not amount to a recent overt act; and (3) The statutory term “recent” is vague. (12/3/12 RP 53; 73; CP 144-180). The court denied the motions. (12/3/12 RP 133; CP 433-435).

C. Factual History

In 1988, seventeen-year-old John Anderson pleaded guilty to statutory rape in the first degree. He was sentenced to 100 weeks commitment in Juvenile Rehabilitation. *In re Detention of John Anderson*, 166 Wn.2d 543, 546, 211 P.3d 994 (2009). At trial in 2004 and 2013, the State relied on Mr. Anderson's 1988 adjudication to establish that he had committed a crime of sexual violence.

As part of his treatment at Maple Lane Mr. Anderson participated in sex offender cognitive and behavioral therapy, which required, among other things, a full disclosure of other unprosecuted sexual offenses against children, as well as his sexual fantasies and urges. (Vol. 8 RP 512-513). In July 1989, while still at Maple Lane, Mr. Anderson exposed himself to a staff member and served 45 days in Thurston County jail for public indecency, a misdemeanor. (CP 665).

Upon his release from Maple Lane in June 1990, Mr. Anderson, then nineteen years old, immediately entered Western State Hospital (WSH) as an involuntary patient. (RP 701;1309). He remained as a voluntary patient for ten years. (RP 461; CP 668). He was assigned to the sex offender unit and participated in treatment five days per week, one to two hours per day for approximately ten years. The goals of treatment included learning to eliminate or minimize deviant desires and enhance

consensual relationship skills. (RP 478; 779). He learned his offending patterns, was able to identify his high-risk situations to reoffend, completed a detailed prevention plan, and learned about the coping responses necessary to stay offense free. (RP 702-03).

By 1993, Mr. Anderson had earned grounds privileges and over time was granted approximately 145 authorized leaves for the day, night, or a long weekend, all without incident. (RP 920). There were no reports or complaints that Mr. Anderson did anything sexually inappropriate while on authorized leaves. (RP 834). He also obtained employment at the hospital. (RP 800-803;920).

At trial, Dr. Larry Arnholt, a treating psychologist at WSH, testified that both voluntary and involuntary patients at WSH maintained their civil rights. (RP 786-87). The WSH policy on sexual contact between patients in effect during the years of Mr. Anderson's stay held:

“WSH patients retain all personal, legal, civil and human rights by law which they are capable of exercising. WSH patients do establish close interpersonal relationships and those relationships may, on occasion, involve sexual intimacy. The human need for intimacy, warmth, affection, and sexual expression is universal. Patients admitted to a psychiatric setting continue to have universal human needs for sexual expression and the capacity to exercise this expression responsibly under many circumstances.

In this connection, the hospital's responsibilities are:

- A. Prevent the exploitation of sexually vulnerable patients.
- B. Provide the knowledge and the means to prevent sexually transmitted diseases and unwanted pregnancies.

- C. Assist patients to acquire the skills to make reasoned and sound decisions regarding the management of their sexual behavior, while at the same time ensuring a safe environment.
- D. Provide an environment conducive to discussion of issues concerning sexuality.

(Exhibit R-28).

He testified, “There was no expectation that there would be no sexual contact between patients.” (RP 786;464). The policy provided that if “abstinence or alternative methods of sexual expression and monogamy are not chosen, then safe sex guidelines should be provided. Prevention recommendation should be based on the sexual behaviors practiced by the individual.” (RP 786). Patients, including Mr. Anderson, could and did obtain prophylactics such as condoms from the nursing staff. (RP 783-85).

According to Dr. Arnholt’s testimony, if a developmentally disabled patient engaged in sex with another patient, and there was concern about capacity to consent, the staff psychiatrist was to be informed, and an incident report filed. (RP 796). The hospital staff (psychiatrist) was responsible to determine whether a developmentally disabled individual had the capability to consent to sexual activity. (RP 796). Considered mandatory reporters, the staff at WSH were also obligated to notify local law enforcement if there was a complaint about or an incident amounting to sexual assault. (RP 794-796).

1. Alleged Recent Overt Acts

At trial, the State relied on four relationships Mr. Anderson had with patients at WSH between the years of 1990 and 1999 to establish the element of a recent overt act. Mr. Anderson disclosed to his treatment providers that in 1990, when he first entered WSH, he had sexual relations 3 or 4 times with a fellow patient on the unit named “Darryl.” Darryl was 17 years his senior with a history of pedophilia and a diagnosis of moderate mental retardation. (RP 468; CP 670). Darryl was sexually promiscuous and believably boasted that he had had sex with everyone on the sex offender ward. (RP 642). Mr. Anderson was instructed to end the relationship and he eventually complied. (RP 469).

Mr. Anderson reported to treatment providers that in 1994 he twice had sexual relations with “Curtis”. (RP 470; 630). Curtis was a large man, mildly retarded, who “was kind of a bully” and used his size to get his own way. (RP 471). Housed on the same unit, he was promiscuous, and often made “sexually suggestive, very crude comments to others.” (RP 470-71).

He also reported some instances of sexual activity with “Bobby,” a developmentally delayed patient in the unit in 1994. (RP 630). The treating psychologist described him as “a rather hypersexual individual, promiscuous.” (RP 469-170).

Between 1992 or 1993 and 1999, Mr. Anderson had a sexual relationship with “Rory”. A patient on the same ward, Rory had a diagnosis of borderline personality disorder. (RP 828; CP 668). Dr. Arnholt testified Rory was very promiscuous and there were “very few individuals on the ward that he likely did not have sex with” and concluded “he (Rory) had control and knew what he was doing- but was vulnerable in the sense that he had borderline personality disorder.” (RP 466).

Mr. Anderson was counseled that because his partners were at a lower level of intellectual or emotional functioning there was concern about their vulnerability. (RP 469; 472). However, the State presented no evidence establishing the mental age of any of Mr. Anderson’s partners. Dr. Arnholt also testified there was no evidence that Mr. Anderson ever used physical coercion or bribery to engage in sexual activity with any of his partners, rather, they each wanted to have sex with Mr. Anderson. (RP 471; 793). There were no incident reports by WSH staff (per the protocol) alleging Mr. Anderson’s partners lacked the capacity to consent to sexual activity. (RP 469;793;797).

2. Expert Witness Testimony

Maureen Saylor, a certified sex offender treatment provider conducted a penile plethysmograph (PPG) assessment on Mr. Anderson in

1991 at WSH. (RP 681;684). At that time, Mr. Anderson had significant arousal to almost all of the stimuli he heard regarding children. (RP 686). The *lowest* level of arousal was to stimuli of sadism with a minor male, at 29 percent. She provided specific behavioral treatments to assist him in decreasing his arousal to the deviant material. (RP 687). She believed he had complied with the behavioral treatment, but heard through another party that he had somehow sabotaged the procedure. (RP 689).

She performed a second evaluation at his request in 1998. (RP 689). In this PPG, seventeen audiotapes depicting a variety of sexual themes were used. (RP 695). Mr. Anderson produced significant arousal to all scenarios, including consenting adult sexual activity and ten tapes describing sexual behavior with children and one tape describing a female adult rape. (RP 520;695) One of the goals for his treatment was to lower arousal to abnormal sexual stimuli. (RP 516-18). When asked to suppress to two high arousal scenarios, he suppressed his arousal to one scenario to four percent and zero on the highest arousal scenario. (RP 695; 706).

Dr. Amy Phenix, a State's witness, evaluated Mr. Anderson in 2001 and again in 2010. (RP 497-498). She diagnosed him as suffering from pedophilia, and stated, "We can't cure pedophilia, but we can help people to manage it, so they don't act out on it." (RP 501; 512). She defined pedophilia as follows:

“Over a period of at least six months, the individual experiences recurrent, intense, sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children generally 13 years or younger. Furthermore, the person has acted on these sexual urges or the sexual urges or fantasies cause marked distress or interpersonal difficulty. To have this diagnosis, the person must be at least 16 years of age and at least five years older than the child or children referenced in the initial criteria.” (RP 502-503).

She also diagnosed Mr. Anderson as suffering from sexual sadism.

(RP 501). She defined sexual sadism as follows:

“Over a period of six months, the person experiences recurrent, intense sexually arousing fantasies, sexual urges or behaviors, involving acts which can be real or not simulated in which the psychological or physical suffering, including humiliation of the victim, is sexually exciting to the person. And the person has acted on these sexual urges with a nonconsenting person or the sexual urges or fantasies cause marked distress or interpersonal difficulty.” (RP 527-28).

She remarked that two offenses in Mr. Anderson’s history, the rape of two-year-old boys which caused physical suffering, caused her to believe there was evidence of sadism because he maintained a state of arousal while the child was so distressed. (RP 529-30). She believed that meant he was sexually aroused to the pain, humiliation, and harm. (RP 530). She relied on treatment notes from 1990 describing his demeanor during a retelling of the acts to conclude that he detached from the child’s pain, concluding “after he molested them...he was nice to them, but he didn’t really care about the pain that happened to them during the actual act, indicating a sexually sadistic arousal.” (RP 532). She also cited

some of the fantasies he disclosed when he was 19 -21 years old to substantiate the diagnosis. (RP 536-37).

Dr. Phenix acknowledged that in the 20-25 years of evaluations and assessments by psychologists and psychiatrists she was the only one who diagnosed Mr. Anderson with sexual sadism; after her diagnosis, it appeared two other times in his SCC file, the last time in 2009. (RP 639;896). Additionally she agreed that since 1987 or 1988 Mr. Anderson had not committed any acts consistent with sexual sadism. (RP 640).

Dr. Phenix was aware that Mr. Anderson's last offense, a simple misdemeanor, occurred when he was 18 years old. When questioned about the concept of "victim substitution²," that is, sexual activity with the four men in lieu of children that the State considered recent overt acts, Dr. Phenix testified:

"Yeah, let me clarify that. I don't think he thought they were children. I don't think that he believed that they were two-year-old boys. I think that in terms of approaching who he's having sex with and who he chooses to engage in sex with, we just – I just need to make sure that it doesn't – it doesn't have the same kind of aspects as his offending did, in other words, that he should not be engaging in sex with vulnerable patients, even if they are willing." (RP 667).

² The only other case which uses the concept of "victim substitution" is *State v. Marshall*, 156 Wn.2d 150, 125 P.3d 3111 (2005), which will be addressed and distinguished in the argument section of this brief.

She diagnosed Mr. Anderson with a catchall category of “personality disorder not otherwise specified,” stating he had traits of antisocial, borderline, and narcissistic personality disorder, rather than that he met the necessary criteria for a specific personality disorder. (RP 538). She did testify which, if any, psychological instruments she used to make her diagnosis.

In forming her opinions about risk, Dr. Phenix used several instruments. On the Static 99-R, Mr. Anderson scored a 5 out of 12, translating into an associated probability of sexual reoffense of 25.2% in 5 years and 35.5% in 10 years. (RP 569-70). Using the Static 2002-R test, she assessed he had a 41.6% change of reconviction (rather than a sexual reoffense) in 5 years and 52.3% in 10 years. (RP 579). She also administered an SRA-FV and determined his score was a 1.74

In 2001 and 2010 she used the Hare Psychopathy Checklist as an evaluation instrument. In 2001, Mr. Anderson scored 27.5, leading her to conclude he was *not* at a significantly increased risk for sexual reoffense. (RP 637-38). In 2010, she scored him as a 32.5 on the test, with a score of 30 to 40 evidencing the presence of psychopathy. (RP 580). She agreed that in the 12 or 13 years since he began living at SCC he has not exhibited any antisocial personality traits or symptoms, has only had 2

behavior management reports (BMR) once in 2007 and 2009, and is considered respectful, polite and friendly. (RP 665).

Dr. Luis Rosell, an expert for the defense, interviewed Mr. Anderson and reviewed his records. Dr. Rosell observed that Mr. Anderson, as a man who has spent his 30's and early 40's at SCC showed that he was able to exercise control over his behavior. (RP 893).

He disagreed with the State's expert witness that Mr. Anderson's relationships with fellow patients at WSH was a sign of pedophilia. (RP 897). Diagnostically, pedophilia is sexual arousal to individuals who do not have secondary sexual characteristics, that is, children who are prepubescent. (RP 898). The relationships Mr. Anderson had were with adult men. His review revealed no indication that Mr. Anderson displayed any active symptoms of pedophilia either at WSH or SCC. He stated that individuals in confined settings who are acting out their pedophilia often have child pornography, write stories about having sex with children, draw pictures of children in sexual positions, collect pictures of children from catalogs or newspaper clippings. (RP 895). The PPG administered in 1998 showed arousal to deviant scenarios, but also evidenced that he was able to successfully control and suppress the arousal, one of the goals of his treatment. (RP 898;904).

He also disagreed that Mr. Anderson met the criteria for a diagnosis of sexual sadism. He explained that sexual sadism is quite rare, even in the sex offender population, and a true sadist's arousal is driven by and requires the humiliation, pain and suffering of another to achieve arousal. (RP 896-97). After reviewing Mr. Anderson's past offenses and adult history, he concluded there was no evidence that the diagnosis was applicable to him. (RP 897).

Dr. Rosell administered some of the same tests as Dr. Phenix, and testified about Mr. Anderson's test scores. Like Dr. Phenix, he scored Mr. Anderson as a "5" on the Static-99R. This score meant that of all of the individuals who scored a "5" on the Static 99-R, 18% reoffended. If the score were evaluated against a high risk/high needs subsample, 25% reoffended within a 5-year period and 35% in a 10-year period. If the score was evaluated against a 'preselected for treatment' subset, the rate was 22% in a 10-year period. (RP 908).

In contrast to Dr. Phenix's score of 32.75, he scored Mr. Anderson as a 20 on the PCL-R checklist. (RP 912). He also took exception to the use of the SRA-FV because of a sample size that skewed the scores, questions about whether the factors were related to sexual recidivism, and the fact that the instrument has not been peer reviewed. (RP 910-11).

The jury found the State proved beyond a reasonable doubt that Mr. Anderson was a sexually violent predator. (CP 772). Mr. Anderson filed this timely appeal. (CP 787).

IV. ARGUMENT

A. The Court Erred When It Did Not Dismiss for Lack Of Subject Matter Jurisdiction.

An appellate court reviews de novo a motion to dismiss for lack of subject matter jurisdiction. *Wells Fargo Bank, N.A. v. Dept. of Revenue*, 166 Wn. App. 342, 271 P.3d 268; *corrected, rev. denied* 175 Wn.2d 1009, 285 P.3d 885 (2012).

The legislature has set forth by statute detailed procedures addressing when the State may file a petition to civilly commit a person.

An RCW 71.09 petition may be filed on 5 classes of individuals:

(a) A person who has been *convicted* of a sexually violent offense who is about to be released from total confinement; (b) A person found to have *committed* a sexually violent offense as a juvenile is about to be released from total confinement; (c) A person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial is about to be released, or has been released pursuant to RCW 10.77.086; (d) A person who has been found not guilty by reason of insanity is about to be released, or has been released, pursuant to RCW 10.77.020, .110, or .150; or (e) A person who at any time previously has been

convicted of a sexually violent offense and has since been released from confinement and committed a recent overt act. (Emphasis added).

The language of the statute limits the classes of persons subject to commitment as a sexually violent predator. Statutes that involve a deprivation of liberty must be strictly construed. *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010)(internal citations omitted). When interpreting a statute, the court looks first to its plain language; if there is only one interpretation, the inquiry ends, if there are multiple interpretations, then the statute is deemed ambiguous. *State v. Armendariz*, 160 Wn.2d 106,110, 156 P.3d 201 (2007); *In re Martin*, 163 Wn.2d 501, 508, 182 P.3d 951 (2008). Here, the statute as written is unambiguous. Jurisdiction is conferred on the court under RCW 71.09 only if an individual is within the five classes of people subject to its reach.

The statute here unambiguously draws a distinction between persons who are *convicted* of sexually violent offenses as adults and persons who are found to have *committed* offenses as juveniles. RCW 71.09.030(1)(a),(b). RCW 13.04.240 provides an order of court adjudging a child a juvenile offender under the provisions of this chapter shall in no case be deemed a conviction of a crime. RCW 13.04.011 provides

adjudication has the same meaning as conviction but only for purposes of sentencing under RCW 9.94A.

Case law distinguishes the purposes for which juvenile adjudications are considered convictions in adult proceedings. In *Weaver*, the petitioner had been charged in juvenile court with two counts of child rape. *In re Weaver*, 84 Wn.App. 290, 929 P.2d 445 (1996). He was found not guilty by reason of insanity and relying on RCW 10.77, was hospitalized until age 21. He was transferred at age 21 to WSH. The Court granted his petition in which he argued he was not subject to commitment under RCW 10.77. The Court held his juvenile offense was not a felony and the statute authorizing commitment of defendants acquitted of a felony by reason of insanity did not authorize commitment of a juvenile who had been acquitted in juvenile court of first-degree child rape by reason of insanity. *Id.* at 295.

By contrast, the court held that adult defendants' prior juvenile adjudications were properly included in their criminal history at sentencing. *State v. Johnson*, 118 Wn.App. 259, 76 P.3d 265 (2003). The question there was whether the defendant's prior juvenile adjudications were convictions at all. They contended that because a juvenile adjudication should not be treated as a conviction, they were eligible for a DOSA. The court reasoned that a juvenile statute is properly concerned

with preventing an adjudication of guilt from being considered a crime while one is still a juvenile, because it furthers rehabilitative purposes. On the other hand, an adult statute allows consideration of the adjudications at sentencing because the adult has committed a crime as an adult and the SRA is concerned with punishing adult offenders with the same criminal history to the same extent. *Id.* at 264-265.

Similarly, a juvenile disposition can serve as a predicate offense in prosecution of felon in possession of a firearm. The statute specifically states that it applies to persons who have previously as juveniles been adjudicated of a crime of violence or of a felony in which a firearm was used. *State v. Cheatham*, 80 Wn.App. 269, 273, 908 P.2d 381 (1996).

Here, a petition may be filed on adults who have been *convicted* and are about to be released from confinement, or persons who have been *convicted* previously, have since been released from total confinement and have committed a recent overt act. RCW 71.09.030(1)(b)(e). A petition may only be filed on an individual found to have *committed* a sexually violent offense as a juvenile who is about to be released from confinement. The statute does not reach persons, like Mr. Anderson, who *committed* a sexually violent offense as a juvenile, but have since been released from total confinement.

A court does not have the authority to rewrite a statute even if it believes the legislature intended something else but failed to adequately express it. *In re Det. of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008). If the legislature has enacted a statute with a perceived omission, here a class of individuals like Mr. Anderson, the Court may not correct it unless the entire statute is rendered absurd or meaningless. *State v. Delgado*, 148 Wn.2d 723, 730-31, 63 P.3d 792 (2003). Here, the omission does not undermine the effectiveness of the entire statute; at most, it may have kept a purpose of the statute from being comprehensively effectuated. *In re Det. of Martin*, at 512-13.

In an analogous case, the Court held it would not rewrite a statute even if it reasoned the legislature may have intended to include but inadvertently omitted a category of persons subject to it. *State v. S.M.H.*, 76 Wn.App. 550, 887 P.2d 903 (1995). There, the statute did not require juveniles to register as sex offenders under RCW 9A.44.130 following a finding of sexual motivation under RCW 13.40.135. *Id.* at 559-60. The Court reasoned that a statute that defines a criminal offense, such as a sex offense, must be strictly construed. *Id.* at 556 (*internal citations omitted*). The statute on its face read “any sex offense”, however, to add the juvenile sexual motivation to the definition of sex offense would be to impermissibly create an offense by judicial construction. *Id.* The plain

language of the statute was subject to only one meaning: all juveniles who had committed a sex offense were required to register, and a sex offense does not include committing a felony with sexual motivation under the juvenile statute. *Id.*

Similarly, here the statute is intended to reach a small but extremely dangerous group of sexually violent predators with either a personality disorder or mental abnormality, who are generally unamenable to treatment, and as a result of these conditions, are rendered likely to engage in sexually violent behavior. RCW 71.09.010. The statute explicitly and exclusively defines the persons subject to possible lifetime commitment: individuals who committed offenses as a juvenile and who have been released from total confinement are not included. A court cannot add words or clauses to an unambiguous statute when the legislature has not chosen to include that language; the court must assume the legislature means exactly what it says. *State v. Delgado*, 148 Wn.2d at 727. The court here overstepped its authority and erred when it did not dismiss for lack of subject matter jurisdiction. Mr. Anderson is not within the class of people subject to the statute. His confinement must be reversed.

B. The State Failed To Prove Beyond A Reasonable Doubt That Mr. Anderson Committed A Recent Overt Act, An Essential Element.

Mr. Anderson challenges the sufficiency of the evidence supporting the jury's finding that he committed a recent overt act on three grounds: As a matter of first impression, consensual adult homosexual activity has never been defined as a recent overt act; Second, the concept of "victim substitution" that allows for adult consensual activity to be classified as an act consistent with pedophilia that creates a reasonable apprehension of sexually violent harm is nonexistent in case law and does not rise to the level necessary to qualify as a recent overt act; Third, some of the purported recent overt acts took place over 20 years ago. Even if the timeline began when the petition was filed, now, over 13 years later, the passage of time has rendered them inadequate to establish current dangerousness. Absent a recent overt act there is no justification for committing Mr. Anderson under RCW 71.09, as his sole adjudication for a sexually violent offense occurred 25 years ago.

1. The State Did Not Prove An Overt Act Beyond A Reasonable Doubt.

The requirement to plead and prove a recent overt act finds its basis in due process concerns. *In re Pers. Restraint of Young*, 122 Wn.2d

1,41, 857 P.2d 989 (1993). Whether an act is both recent and overt is a mixed question of law. *In re Det. of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005). To resolve a mixed question of law and fact, on review the court applies legal principles to the facts *de novo*. *Id.* Further, the application of constitutional due process of law is subject to *de novo* review. *In re Det. of Fair*, 167 Wn.2d 357, 362, 219 P.3d 89 (2009).

Here, because Mr. Anderson had been released from juvenile detention and was not totally confined during his stay at WSH, the State was required to prove he had committed a recent overt act beyond a reasonable doubt. *In re Det. of Albrecht*, 147 Wn.2d 1, 51 P.3d 73 (2002). The statute defines a recent overt act as: “Any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(12).

The freedom to engage in private, adult, consensual sexual conduct without the interference of government is rooted in the fundamental right to freedom of association and the right to privacy protected by the due process clause of the Fourteenth Amendment. *Griswold v. Connecticut*, 381 U.S. 479, 484-85, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *State v. Clinkenberd*, 130 Wn.App. 552, 561-62, 123 P.3d 872 (2005).

The Supreme Court's ruling in *Lawrence v. Texas*, invalidated a Texas statute that made it a crime for individuals of the same sex to engage in private consensual sexual acts. *Lawrence v. Texas*, 539 U.S. 558, 578-79, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Adult persons may decide how to conduct their private lives in matters pertaining to sex. *Id.* at 572. As a matter of first impression, no previous case in Washington has held that homosexual activity between consenting adults meets the definitional requirements of recent overt act under RCW 71.09.

The law explicitly states that people who are civilly committed still retain certain rights, including the right to dispose of property, sign contracts, and all rights not denied under RCW 71.05. RCW 71.05.360(1)(a). All patients, whether voluntarily or involuntarily committed to the hospital have the same rights as one another. RW 71.05.380. RCW 71.05 does not forbid any committed patients from engaging in consensual sexual activity. Moreover, the statute provides: "No person shall be presumed incompetent as a consequence of receiving an evaluation or voluntary or involuntary treatment for a mental disorder; Competency shall be determined or withdrawn except under the provisions of 10.77 or 11.88 RCW." RCW 71.05.360(1)(b).

In a footnote in its ruling, the Supreme Court wrote: "Anderson claims these relationships were consensual but that claim ignores the fact

that most people adjudicated to be mentally ill are legally unable to consent.” *In re Det. of Anderson*, 166 Wn.2d 543, FN. 2. However, the State presented no evidence that any of the individuals who engaged in sexual activity with Mr. Anderson had been declared incompetent under RCW 11.88 or 10.77.

WSH recognized its patients retained all personal, legal, civil and human rights by law, which they were capable of exercising. The hospital philosophy allowed for meeting the needs for intimacy and sexual expression in the hospital confines, and indeed was required to provide safe sex education, the means to prevent sexually transmitted diseases, and to assist patients in acquiring skills to make reasoned judgments about sexual behavior. (Respondent’s Exhibit 28). It was also tasked with the ongoing responsibility to prevent exploitation of sexually vulnerable patients.

Dr. Arnholt stated the staff psychiatrist was to determine whether individual patients could consent to sexual activity. Here, the evidence established that Mr. Anderson’s partners had been active sexually with numerous, if not all, residents on the ward. No evidence was presented that any of them had previously or since been recognized as incapable of consent. In the 10 years Mr. Anderson lived at WSH there were no internal incident reports about or investigations into the sexual activity

between him and his partners. Moreover, if the psychiatrist had found any of the individuals were incapable of consent because of developmental disability, staff was obligated to report a crime to law enforcement. No such report was ever made. As noted in his charts, Mr. Anderson was even given condoms by medical staff.

As a voluntary patient, Mr. Anderson was required to comply with treatment: there was no evidence suggesting that his sexual behavior with others was of such concern that WSH staff felt revoking his stay at the hospital was appropriate to protect others. While WSH staff counseled the involved parties to end the relationship, no one testified the sexual relationships were anything but consensual.

Dr. Phenix suggested that Mr. Anderson was taking sexual partners in a type of “victim substitution.” She clarified her concern was “...that I just need to make sure that it doesn’t – it doesn’t have the same kind of aspects as his offending did, in other words, that he should not be engaging in sex with vulnerable patients, even if they are willing.” (RP 667).

A diagnosis of pedophilia by definition requires arousal to a prepubescent body. Dr. Phenix acknowledged none of Mr. Anderson’s partners have the type of body that would be arousing to a pedophile.

Further, neither she nor Dr. Arnholt characterized his partners as having the developmental ages of children.

In a footnote, the Court noted that it had previously decided that sex with a developmentally disabled person may have a nexus to child sex, citing *Marshall. In re Det. of Anderson*, 166 Wn.2d at FN 6. However, in *Marshall*, the facts and evidence were markedly different. Marshall had a history of committing sex offenses on children ages 6-11 years old. He was incarcerated and released on at least three occasions for various offenses. Some 8 years after his first conviction, he was convicted of third degree rape while in the community. The rape was of an adult developmentally disabled woman *with the approximate functioning level of a 10-12 year old child. In re Marshall*, 156 Wn.2d at 154. (Emphasis added). Dissimilar to Mr. Anderson's case, there it was nonconsensual, it was rape; additionally, unlike here, there was evidence of her developmental functioning level.

A recent overt act requires a causal relationship between the person's diagnosed mental abnormality or personality disorder and his conduct, as it establishes the rational basis for the apprehension of sexually violent harm. *Kansas v. Crane*, 534 U.S. 407, 412, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002); *In re Det. of Albrecht*, 147 Wn.2d at 11. Washington case law provides numerous examples of that necessary

relationship to establish the act as overt. In *Brotten*, the court found a recent overt act where the respondent had a diagnosis of pedophilia and a history of sexually violent crimes. *In re Det. of Brotten*, 130 Wn.App. 326, 122 P.3d 942 (2005). Brotten violated his release conditions when he was found at a park in his car watching children play. *Id.* at 330. That event, taken with his mental history, numerous release violations, and patterns of deception constituted a recent overt act because he was actively engaging in the build-up phase of his offense cycle. *Id.* at 332-33.

The court found the evidence sufficient to establish a recent overt act in *Robinson*. There, the court considered the combination of Robinson's history of child rape, his mental condition, and the discovery of him in a locked bedroom with a minor established a recent overt act. *In Re Det. of Robinson*, 135 Wn.App. 772, 784-85, 146 P.3d 451 (2006).

The relationships between Mr. Anderson and his partners may have been opportunistic on the part of all parties, but it did not produce a reasonable apprehension of sexually violent harm. Even assuming the diagnosis of pedophilia, sadism, and personality traits were accurate, and taking into account Mr. Anderson's offense of child rape and indecent exposure, there was no causal relationship between the diagnoses and his sexual conduct to establish a rational basis for the apprehension of sexually violent harm.

The State failed to prove an overt act beyond a reasonable doubt. Mr. Anderson's verdict should be reversed and dismissed.

2. The State Did Not Prove A Recent Act Beyond A Reasonable Doubt.

The Federal and State Constitutions require a person shall not be deprived of life, liberty or property without the due process of law. U.S. Const. amends. 5, 14; Const. art. 1§3. When a State's law impinges on fundamental rights such as liberty, the law is Constitutional only if it furthers compelling State interests and is narrowly tailored to further that interest. Such a statute must be strictly construed. *In re Det. of Albrecht*, 147 Wn.2d at 7.

RCW 71.09.020 provides the definition of a recent overt act. The constitutional requirement for civil commitment under the statute is current dangerousness caused by mental illness and for someone not incarcerated at the time of the filing of the petition, a recent overt act. "The recency of the acts upon which the State bases its commitment petition may be a significant factor in determining whether the individual is presently dangerous as recognized by both statute and due process." *In re Det. of Hendrickson*, 140 Wn.2d 686, 697, 2 P.3d 473 (2000). (*internal citations omitted*).

Washington courts, with no bright line rulings, have considered the word “recent” on several occasions. In *Marshall*, the State brought a petition five years after the “recent overt act”; the Court held it was recent. *Marshall*, 156 Wn.2d at 152,159. In *Henrickson*, the State filed a petition about three years after the alleged act and it was held to be recent. *Henrickson*, 140 Wn.2d at 691, 693. However, in both cases, the individuals were incarcerated at the time the State filed its petition- there was no more recent opportunity to prove present dangerousness.

Here, the question of recent is of a different pallor. The four acts the State relied on at the time the petition was filed in 2000 occurred in 1990, 1991, 1994, and 1999. At trial, the State argued that the recency of an act was to be measured by the date of the filing of the petition. At the time the petition was filed, the acts ranged from 10 years to several months previous.

To reach back 10, 9, and 6 years to bring acts into the ambit of recent is a long stretch, and an unprecedented length of time. This is especially significant in light of the fact that Mr. Anderson was not in total confinement, as in *Henrickson* and *Marshall*. The purpose of showing a recent act is to establish current dangerousness. *In re Det. of Harris*, 98 Wn.2d 276, 284-85, 654 P.2d 109 (1982). Without conceding the point, even assuming the relationship that ended in 1998/99 was with an

individual who was unable to meaningfully consent, the relationship ended several months before the petition was filed.

Mr. Anderson has been confined to the SCC since 2000. Even by the standard of *Henrickson* and *Marshall*, some of the relationships are over 20 years old, and the most arguably recent took place almost 15 years ago. There is no showing of current dangerousness.

The State failed to prove a recent overt act. The verdict should be reversed and dismissed.

C. The State Did Not Prove Beyond A Reasonable Doubt That Mr. Anderson Has A Mental Abnormality Or Personality Disorder That Makes Him Currently Dangerous.

The indefinite commitment of sexually violent predators is a severe curtailment on the fundamental right of liberty. *In re Det. of Thorell*, 149 Wn.2d 724, 731-32, 72 P.3d 708 (2003). Individuals who are involuntarily committed are entitled to procedural and substantive safeguards. The civil commitment of an individual under RCW 71.09 satisfies due process “if the statute couples proof of dangerousness with proof of an additional element, such as ‘mental impairment’ rendering them dangerous beyond their control.” *Id.* at 732. The State must produce some proof that the individuals against whom petitions are brought have a serious lack of control over their behavior. *Crane*, 534 U.S. at 413. The

serious difficulty controlling behavior must derive from a mental illness that distinguishes the individual from the “typical recidivist in an ordinary criminal case.” *Id.*

Here, Mr. Anderson had been diagnosed with pedophilia and sexual sadism. The question is not whether he had been diagnosed with the disorders, the issue rather is whether those disorders caused him serious difficulty in controlling his behavior.

At the time of the 2013 trial, Mr. Anderson had been at WSH for 10 years, and SCC for 13 years. The experts agreed there was no evidence that he acted out any sexually sadistic behavior at any point during his entire stay at WSH. Neither was there any evidence that he was sexually inappropriate with a child, even though the opportunity was available when he was authorized leave. As the State’s expert testified, “We can’t cure pedophilia, but we can help people to manage it, so they don’t act out on it.” Such was the case for Mr. Anderson.

By contrast, in *Thorell*, the State presented extensive evidence demonstrating that Thorell had serious difficulty controlling his behavior. During his confinement, and continuing up to the time of his SVP hearing, Thorell continued to “promote his sexual fantasies involving children by modifying children's pictures to make pornography, writing pornographic

stories featuring children, and concealing store advertisements featuring children (prohibited to him under the SVP treatment program).”

In re Detention of Thorell, 72 P.3d at 727.

Maureen Saylor administered a PPG in 1991 to assess Mr. Anderson’s arousal to sexual scenarios and evaluate his ability to manage and control his arousal. At that time, even though he was not acting on his fantasies, he was unable to manage his arousal. By 1998, he experienced arousal to all the scenarios, but was able to successfully control and manage it.

Mr. Anderson met the treatment goal of controlling and managing his arousal. He did not engage in any acts that could even be considered sexual sadistic since 1987 or 1988, and there was no evidence he was sexually inappropriate with children. The ascribed mental abnormalities did not cause Mr. Anderson serious difficulty in controlling his behavior.

D. The Evidence Was Insufficient To Prove Beyond A Reasonable Doubt That Mr. Anderson Should Be Confined Under RCW 71.09.

In reviewing a sufficiency challenge, the evidence is viewed in the light most favorable to the State to determine if it could permit a rational trier of fact to find the essential elements beyond a reasonable doubt.

State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A claim of

insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To establish Mr. Anderson was a sexually violent predator, the State was required to prove each of the following beyond a reasonable doubt: that Mr. Anderson had been convicted of a crime of sexual violence; that he suffers from a mental abnormality or personality disorder that causes serious difficulty in controlling his sexually violent behavior; that the mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined to a secure facility; and lastly, that he has committed a recent overt act.

Based on the previous arguments, no rational trier of fact could find the essential elements were proved beyond a reasonable doubt.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Anderson respectfully requests this Court to order dismissal.

Dated this 15th day of January 2014.

Respectfully submitted,

Marie Trombley, WSBA 41410
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for John Anderson, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on January 15, 2014, that a true and correct copy of the Brief of Appellant was mailed, by USPS first class, postage prepaid to:

John C. Anderson
PO Box 88600
Steilacoom, WA 98338-0647

Malcolm Ross
Office of the Attorney General
800 5th Ave Suite 2000
Seattle, WA 98104

Marie Trombley, WSBA 41410
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

TROMBLEY LAW OFFICE

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