

NO. 91385-4

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of John Anderson:

STATE OF WASHINGTON,

Respondent,

v.

JOHN ANDERSON,

Appellant.

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STATE OF WASHINGTON
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**SUPPLEMENTAL BRIEF OF RESPONDENT
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I. INTRODUCTION

For almost 13 years, through a trial and appeals to the Court of Appeals and this Court, Anderson never challenged the trial court's jurisdiction over the State's RCW 71.09 sexually violent predator (SVP) petition. Then in November 2012, Anderson challenged subject matter jurisdiction at his second trial and later in his third appeal. In this, his fourth appeal, Anderson now concedes subject matter jurisdiction but raises a new issue—whether the State had authority to file the SVP petition.

The Court of Appeals correctly held that Anderson's arguments were precluded by the law of the case doctrine because he failed to challenge the petition until after many years and several proceedings. Should it reach Anderson's statutory authority issue, this Court should conclude that the Legislature intended to protect the public from dangerous sexual predators like Anderson who begin offending at an early age and demonstrate continuing dangerousness after release from a juvenile facility.

Anderson also claims there was insufficient evidence proving he committed a recent overt act. In its first review of this case this Court held that Anderson's ongoing predation of childlike and mentally compromised adults at Western State Hospital can meet the definition of a "recent overt act." This Court should now conclude that the State presented substantial evidence of those acts at Anderson's second trial and affirm.

II. STATEMENT OF THE CASE

In February 2000, the State filed a petition to civilly commit Anderson as an SVP pursuant to RCW 71.09. *In re Detention of Anderson*, 134 Wn. App. 309, 315, 139 P.3d 396 (2006) (*Anderson I*). The petition was tried to the court in April 2004 and Anderson was civilly committed. *Id.* at 315-18. The Court of Appeals reversed, holding that the trial court abused its discretion by denying Anderson a second expert prior to trial. *Id.* at 321-22. Both parties sought review and this Court affirmed. *In re Detention of Anderson*, 166 Wn.2d 543, 211 P.3d 994 (2009) (*Anderson II*). On remand, the petition was tried to a jury in May 2013, Anderson was civilly committed, and his appeal therefrom was denied. *In re Detention of Anderson*, 2015 WL 422973 (Wash. Ct. App. 2015) (*Anderson III*). Anderson's criminal sexual history and other substantive facts of the case are set out in these cases and the State's Brief of Respondent filed below.

III. ARGUMENT

A. **The Statute Authorizes Filing A Petition When A Juvenile Offender Is Released From A Sexually Violent Offense And Then Commits A Recent Overt Act**

Anderson argued in both the trial court and the Court of Appeals that the trial court lacked subject matter jurisdiction, claiming that RCW 71.09 does not permit an SVP petition to be filed where a person has committed a sexually violent offense as a juvenile and then commits a

recent overt act after release from confinement. Br. of App. at 15-20; *Anderson III*, 2015 WL 422973 at 3-4. The Court of Appeals concluded that the trial court had subject matter jurisdiction and Anderson now concedes that issue. *Id.* at 4; Pet. for Rev. at 3.

Anderson raises a new issue in this Court, claiming the trial court lacked statutory authority. Pet. for Rev. at 3. But the Court of Appeals correctly held that the law of the case doctrine prevents Anderson from raising new issues after he failed to do so in a previous trial and two completed appeals. *Anderson III* at 4. In any event, a plain reading of RCW 71.09 in the context of related provisions and the statutory scheme as a whole shows that the Legislature intended to permit the filing of petitions under facts such as are presented here.

1. Standard Of Review

Questions of statutory interpretation are reviewed de novo. *In re Detention of Mines*, 165 Wn. App. 112, 120, 266 P.3d 242 (2011). When interpreting a statute, a court's fundamental objective is to ascertain and carry out the Legislature's intent. *Id.* Where a statute's meaning is plain on its face, a reviewing court must give effect to that plain meaning to carry out legislative intent. *Id.* Plain meaning is derived not only from the ordinary meaning of the statute's language, but also from the context of the statute in which a specific provision is found, related provisions, and the statutory scheme as a whole. *Id.*

2. The Law Of The Case Doctrine Should Preclude Anderson From Raising A New Issue After Failing To Do So In His First Trial And Two Appeals

The law of the case doctrine provides in part that an appellate court ruling controls in all subsequent stages of the same litigation. *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (citing *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). Anderson argues he can now challenge the State's statutory authority to file the SVP petition because no prior appellate court addressed that issue. Pet. for Rev. at 4-5. But the doctrine precludes not only issues previously ruled upon, but also those "which might have been determined had they been presented[.]" *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)). Anderson could have raised the issue he raises in this Court prior to his first trial or in either of his two previous appeals but did not. The doctrine therefore applies to his current argument, although its application is within the discretion of an appellate court. RAP 2.5(c).

Between the filing of the SVP petition in February 2000 and his motion to dismiss (CP at 144-53) in November 2012, Anderson litigated a full trial and two appeals, but never challenged the State's statutory authority to file the SVP petition. *Anderson III* at 4. After he challenged subject matter jurisdiction at his second SVP trial and on appeal, the Court of Appeals held that other challenges to the petition were precluded

because "[Anderson] has offered no other justification for asking us, or the trial court, to consider this issue after more than 13 years, 2 trials, and 2 appeals." *Id.* The Court of Appeals' application of the doctrine was appropriate and just given Anderson's failure to raise the issue after repeated opportunities to do so over many years. The Court of Appeals decision should be affirmed.

3. If Anderson's Statutory Authority Challenge Is Considered, It Is Inconsistent With The Statute's Plain Language And The Legislature's Intent To Protect The Public From Mentally Ill And Dangerous Sexual Predators

a. Anderson's Reading Of RCW 71.09 Is Inconsistent With Its Plain Language And Legislative Intent Because Juveniles Can Be "Convicted" Of "Offenses"

RCW 71.09 targets a small group of sexual predators who suffer from a mental disease or defect that makes them dangerous. RCW 71.09.010. An SVP has been convicted of a predicate offense and suffers from a mental disorder that makes him likely reoffend in a predatory way if released from total confinement. RCW 71.09.020(18). If the person is living in the community when the petition is filed, the State must show the person to be currently dangerous by proving he has committed a "recent overt act." RCW 71.09.020(12), .060(1).

The statute provides, in pertinent part, that a petition "may be filed" when a person previously convicted of a sexually violent offense

has been released and then commits a recent over act. RCW 71.09.030(1)(e).¹ Anderson argues that the term “convicted” indicates the Legislature intended to apply that provision only to those who committed a predicate offense as an adult. He notes that juveniles cannot be convicted of crimes. RCW 13.04.240.² But he then asserts that juveniles cannot be considered to have been convicted of a “sexually violent offense” as that term is defined in RCW 71.09.020(17) and used in RCW 71.09.030(1)(e). RCW 13.04.240, however, does not compel Anderson's interpretation. There is no statutory prohibition against finding a juvenile to have been convicted of an “offense.”

This Court explained the distinction between a juvenile being convicted of a crime or felony, as opposed to being convicted of an offense, in *State v. Michaelson*, 124 Wn.2d 364, 878 P.2d 1206 (1994). In *Michaelson*, a juvenile charged with taking a motor vehicle without permission entered into a diversion, then sought to prevent a record of the case from being sent to the Department of Licensing. Relying on

¹ RCW 71.09.030(1) provides (emphasis added):

A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that:

....

(e) 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.

² RCW 13.04.240 provides: “An order of court adjudging a child a juvenile offender or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime.”

In re Frederick, 93 Wn.2d 28, 30, 604 P.2d 953 (1980), the State responded that the statute at issue, RCW 13.50.200, was ambiguous, making the same argument made here by Anderson—that “[t]he adjudication of a juvenile for an offense which if committed by an adult would be a crime is not a conviction.” *Michaelson*, 124 Wn.2d at 366 (emphasis omitted).

Michaelson distinguished *Frederick* as having differentiated between “felonies and juvenile offenses” and rejected the State’s argument: “While a juvenile cannot be convicted of a *felony*, he or she can be convicted of an *offense* as contemplated by RCW 46.20.270(4).” 124 Wn.2d at 367 (emphasis added).³ The Court also cited JuCR 7.12(c) and (d), which recognize that a juvenile, if found guilty, is “convicted” of an offense. *Id.* *Michaelson* concluded, “Since juveniles can receive convictions, there is no apparent conflict between RCW 13.50.200 and RCW 46.20.270.” *Id.* Juveniles can be convicted of “offenses.” *See State v. McKinley*, 84 Wn. App. 677, 681, 929 P.2d 1145 (1997)

³ Former RCW 46.20.270(4) (1994) provided, in pertinent part:

For the purposes of Title 46 RCW the term “conviction” means a final conviction in a state or municipal court or by any federal authority having jurisdiction over offenses substantially the same as those set forth in Title 46 RCW which occur on federal installations in this state”

Contemplated offenses included, among others, vehicular homicide, vehicular assault and “[a]ny felony in the commission of which a motor vehicle is used.” *See* former RCW 46.20.285 (1994).

(“The term ‘offense’ applies equally to adult and juvenile crimes.”) (citing *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 87, 847 P.2d 455 (1993)).

b. Because Juveniles Can Be Convicted of Offenses, The Plain Language Of RCW 71.09.030 Confirms The Legislature’s Intent To Permit The Filing Of A Petition In Cases Such As This

Where the plain language of a statute leads to only one interpretation, that interpretation controls. *In re Detention of Danforth*, 173 Wn.2d 59, 67, 264 P.3d 783 (2011). The plain language of RCW 71.09 shows that the Legislature authorized the filing of petitions against individuals whose predicate offenses were committed when they were juveniles.

First, its notification procedures include juvenile offenders in the class of those whose imminent release from confinement requires a referral to a prosecuting attorney. RCW 71.09.025(1)(a)(ii).⁴

Second, RCW 71.09.030(1)(b) explicitly includes juvenile offenders who are about to be released from confinement in the group of

⁴ RCW 71.09.025 provides, in pertinent part (emphasis added):

(1)(a) When it appears that a person may meet the criteria of a sexually violent predator as defined in RCW 71.09.020(16), the agency with jurisdiction shall refer the person in writing to the prosecuting attorney of the county in which an action under this chapter may be filed pursuant to RCW 71.09.030 and the attorney general, three months prior to: . . . (ii) **The anticipated release from total confinement of a person found to have committed a sexually violent offense as a juvenile[.]**

individuals against whom petitions can be filed.⁵ “The Legislature has included juvenile sex offenders in the group subject to commitment as sexually violent predators.” *Dependency of Q.L.M. v. State, Dep’t of Soc. & Health Servs.*, 105 Wn. App. 532, 536-37, 20 P.3d 465 (2001) (citing RCW 71.09.030).

Finally, as shown above, because persons found to have committed juvenile offenses can be considered to have been “convicted” of an offense, the Legislature clearly intended to include them in RCW 71.09.030(1)(e) when it included offenders “convicted” of a sexually violent offense and who later commit a “recent overt act.” The plain language of the statute compels this conclusion.

Anderson interprets RCW 71.09.030(1)(e) to prohibit the filing of an SVP petition where the person has been released and then as a juvenile or adult commits a “recent overt act.”⁶ But this Court does not interpret statutes in a way that would lead to such strained or absurd results. *Fair v. State*, 139 Wn. App. 532, 542, 161 P.3d 466 (2007). Under

⁵ RCW 71.09.030(1) provides (emphasis added):

A petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation when it appears that: . . . **(b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement[.]**

⁶ RCW 71.09.020(12) defines “recent overt act” as “any act, threat, or combination thereof 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 or behaviors.”

Anderson's interpretation, no matter how many recent overt acts such a person committed, the State could not file a petition until after he had been convicted of another sexually violent offense. The Legislature did not intend that result and this Court should reject Anderson's argument.

c. Even If The Statute Is Considered Ambiguous, Statutory Construction Produces The Same Result

If a statute can be interpreted in more than one way, the Court may resort to statutory construction. *State v. Donaghe*, 172 Wn.2d 253, 262, 256 P.3d 1171 (2011). The goal remains to ascertain and carry out legislative intent. *In re Detention of Durbin*, 160 Wn. App. 414, 426, 248 P.3d 124 (2011). "The primary purpose of chapter 71.09 RCW is to protect the public." *In re Detention of Kistenmacher*, 163 Wn.2d 166, 173, 178 P.3d 949 (2008); RCW 71.09.010. RCW 71.09.030 must therefore be construed in a manner consistent with protecting public safety. Construing it in the manner Anderson urges would exclude persons convicted of one or more sexually violent offenses while a juvenile, and who then exhibit continued dangerousness through the commission of recent overt acts. His construction would lead to the release of dangerous individuals like Anderson and is contrary to the primary goal of protecting the public.

In construing a statute this Court may also consider "the entire sequence of all statutes relating to the same subject matter." *State v. Monfort*, 179 Wn.2d 122, 130, 312 P.3d 637, 641 (2013) (citing

State v. Morales, 173 Wn.2d 560, 567, 269 P.3d 263 (2012)). “More broadly, we consider all statutes relating to the same subject matter, pursuant to the principle of reading statutes in pari materia.” *Id.* This Court has noted that, in the context of other juvenile justice statutes, the Legislature often uses the term “conviction” to apply to both juvenile and adult offenses. *Juveniles A, B, C, D, E*, 121 Wn.2d at 87-88 (statute mandating HIV testing for sexual offenders applies to juvenile sex offenders). The Court noted that “the Legislature’s use of ‘conviction’ in statutes to refer to juveniles appears to be endemic.” *Id.* at 87.⁷

The Legislature frequently uses the term “convicted” to refer to juvenile adjudications. This “endemic” use of the term shows the Legislature did not intend to exclude those with juvenile predicate offenses when it adopted RCW 71.09.030(1)(e). Anderson’s argument should be rejected and his civil commitment order affirmed.

⁷ See *Juveniles A, B, C, D, E*, 121 Wn.2d at 87-88:

Numerous other statutes, including sections of the Sentencing Reform Act of 1981, RCW 9.94A, and the Juvenile Justice Act of 1977, RCW 13.40, use “convicted” to reference both adult and juvenile offenders. See, e.g., RCW 9.94A.030(9) (“‘Conviction’ means an adjudication of guilt”); RCW 9.94A.030(12)(b) (“Criminal history” includes a defendant’s prior convictions in juvenile court.); RCW 13.40.280(4) (refers to the “convicted juvenile”); RCW 43.43.830(4) (“Conviction record” includes crimes committed while either an adult or juvenile); RCW 46.20.342(2) (refers to the “conviction” of a juvenile); RCW 74.13.034(2) (refers to “convicted juveniles”). In fact, several statutes use “convicted” specifically to reference juvenile sexual offenders. See, e.g., RCW 9.94A.360; RCW 9A.44.130(3)(a) (“the term ‘conviction’ refers to adult convictions and juvenile adjudications”).

B. The State Presented Substantial Evidence That Anderson Committed a Recent Overt Act

Anderson challenges the sufficiency of the evidence supporting the jury's finding that he committed a recent overt act.⁸ He argues that "consensual adult homosexual activity" cannot constitute a recent overt act, that sexual activity with adults cannot be a recent overt act where the person suffers from pedophilia, and that the overt acts were not recent.

These legal questions were already raised to and rejected by this Court and those holdings are the law of this case. On remand, the State's burden was to produce sufficient evidence that the acts occurred. The jury found beyond a reasonable doubt that they did and that they constituted recent overt acts. Two experts opined that Anderson's prolific sexual contact with vulnerable WSH patients were consistent with ongoing arousal to children and paralleled his criminal behavior in the community.

1. Standard Of Review

Whether an act is a recent overt act is a mixed question of law and fact. *In re Detention of Brown*, 154 Wn. App. 116, 121, 225 P.3d 1028 (2010) (citing *In re Detention of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005)). *De novo* review would normally apply. *Anderson II*,

⁸ RCW 71.09.020(12) defines "recent overt act" as follows:

"Recent over act" means any act, threat, or combination thereof 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 or behaviors.

166 Wn.2d at 549. However, this Court has already held that Anderson's sexual acts with vulnerable WSH patients can constitute recent overt acts as a matter of law. *Id.* at 550. Consequently, Anderson can challenge only the factual question—the sufficiency of the evidence.

The criminal standard of review applies to sufficiency of the evidence challenges under the SVP statute. *In re the Detention of Thorell*, 149 Wn.2d 724, 744, 72 P. 3d 708 (2003). “Under this approach, the 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 the crime beyond a reasonable doubt.” *Id.*

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against Anderson. *In re Detention of Audett*, 158 Wn.2d 712, 727, 147 P. 3d 982 (2006). An appellate court does not second-guess the credibility determinations of the fact-finder. *In re the Detention of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006); *In re the Detention of Davis*, 152 Wn.2d 647, 680, 101 P.3d 1 (2004) (“A trial court’s credibility determinations cannot be reviewed on appeal, even to the extent there may be other reasonable interpretations of the evidence.”). The reviewing court defers to the trier of fact regarding conflicting testimony and the persuasiveness of the evidence. *In re the Detention of Broten*, 130 Wn. App. 326, 335, 122 P.3d 942 (2005).

2. Substantial Evidence Proved Anderson Committed Recent Overt Acts

Anderson argues that what he characterizes as “consensual adult homosexual activity” cannot constitute a recent overt act. It is the law of this case, however, that Anderson’s sexual predation of vulnerable WSH patients can in fact do so. *Anderson II*, 166 Wn.2d at 550 (“Anderson’s sexual activities at WSH could constitute overt acts.”). *Anderson II* also addressed the use of vulnerable adults as victim proxies by confined pedophiles. *Id.* at n.6 (“This court has previously decided that sex with a developmentally disabled person may have a nexus to child sex.”) (citing *Marshall*, 156 Wn.2d at 159). *See also Froats v. State*, 134 Wn. App. 420, 439, 140 P.3d 622 (2006) (unwanted touching of inmate who had developmental age of five was consistent with pedophilia diagnosis).

In order to civilly commit an individual as an SVP, due process requires that he be both mentally ill and dangerous. *Marshall*, 156 Wn.2d at 157. When a person is not incarcerated when the SVP petition is filed, due process requires the State to prove dangerousness at trial through evidence of a recent overt act. *Id.*; RCW 71.09.020(12). Here, Anderson has been confined either in the juvenile justice system or at WSH since being convicted of his sexually violent offense. Nevertheless, because he enjoyed grounds privileges and escorted leaves from WSH, the State

conceded it must prove a recent overt act. *Anderson I*, 134 Wn. App. at 322-23.

The State produced substantial evidence that Anderson's sexual relationships with four vulnerable and mentally disabled WSH patients constituted recent overt acts. One of the State's expert witnesses, Dr. Amy Phenix, opined that Anderson had committed recent overt acts. RP 634. She relied on his sexual acts with vulnerable patients of low IQ that occurred from 1990 through 1999. RP 627-28. She testified that experts in her field recognized that persons with pedophilia sometimes access other types of victims when children are unavailable. RP 632. A key link was that children are vulnerable, and so were the WSH patients. RP 629. Dr. Phenix testified to the "parallel" in Anderson's behaviors. RP 629. In fact, a major goal of sex offender treatment is to stop the person from targeting people who are child-like and vulnerable due to mental disability. RP 632-33. Dr. Phenix discussed her knowledge of each of the four men Anderson targeted, why their disabilities made them vulnerable and why his acts led her to believe that Anderson was currently dangerous. RP 628-32.

Another of the State's experts, Dr. Larry Arnholt of WSH, also testified about the other patients' vulnerabilities and his concern about Anderson's behaviors. RP 466-71. He and Anderson's treatment team tried to get Anderson to stop having sex with vulnerable patients; they

made it clear to him there were "parallels" to his offending against children because the other patients were "child-like." RP 817. Anderson understood what they were telling him. RP 818. He was quite intelligent and had a "cognitive emotional power differential" with the vulnerable residents. RP 818. That is to say, his high functioning gave him a position of power on the unit. RP 818. Yet he told Dr. Arnholt that he sometimes "felt powerless" to stop having sex with a vulnerable patient. RP 819. At one point, Anderson told Dr. Arnholt there had been an improvement in his relations with a vulnerable patient because, instead of having the patient fellate him, Anderson had the patient anally penetrate him. RP 819-20. That patient immediately afterward decompensated and regressed in his treatment. RP 820. Dr. Arnholt also acknowledged an incident in August 1999, when WSH staff intervened when Anderson, holding his erect penis, circled a tub in which another patient was bathing. RP 823.

Also in 1999—the year before the State filed the SVP petition—Anderson acknowledged he still had sexual fantasies about children. RP 812. One month later, he admitted they were continuing and included fantasies of his past victims. RP 813. At the same time, he had become much less involved in his relapse prevention group. RP 814. In his last year at WSH he participated minimally in treatment, reclining with his

eyes closed, and failed to recognize the harm he had caused through his sexual acts with vulnerable patients. RP 824.

Anderson's contention that he merely engaged in consensual sexual activity with adults disregards the true significance of this evidence. Whether the sex acts could be described as "consensual" is immaterial. The evidence showed they were predatory behavior against vulnerable, child-like individuals that demonstrated Anderson's continuing dangerousness. The fact that he targeted child-like adults, that the behavior was prolific, that he continued it after being told to stop, and that it occurred in confinement, established that Anderson continues to present a serious risk of reoffending against his preferred child victims if released from confinement.

Under the law of the case, and considering the evidence in a light most favorable to the State, there was sufficient evidence proving Anderson committed recent overt acts.

3. The State Proved Anderson's Overt Acts Were "Recent"

Anderson asserts that the overt acts alleged by the State cannot be considered "recent" because they occurred from 1990 through 1999 and can therefore have no bearing on his current dangerousness. He again raises an issue which is controlled by the law of this case and must be rejected. Furthermore, his argument fails to recognize that acts committed

while in confinement are highly probative of dangerousness. Substantial evidence proved that Anderson's sexual acts with vulnerable WSH patients were "recent" for purposes of RCW 71.09.

It is the law of this case that "Anderson's overt acts were recent." *Anderson II*, 166 Wn.2d 543, 550, 211 P.3d 994 (2009). The passage of time since *Anderson II* is irrelevant, because Anderson was confined continuously at the Special Commitment Center awaiting his retrial, and there is no obligation for the State to prove that a recent overt act occurred while he was confined there. The question is, were Anderson's overt acts at WSH "recent" at the time the State filed the SVP petition. *Anderson II* answered this question in the affirmative, and the State met its burden by producing evidence at the re-trial that the acts occurred.

Ordinarily, the State is not required to prove that a confined person has committed a recent overt act because such a requirement would be "impossible to meet" and "absurd." *Froats*, 134 Wn. App. at 438 (quoting *In re Detention of Young*, 122 Wn.2d 1, 41, 857 P.2d 989 (1993)). This case is unusual because, prior to the filing of the SVP petition in 2000, Anderson was confined since 1988 in the juvenile justice system or at WSH. Because he had enjoyed grounds privileges and escorted leaves while at WSH, however, the State conceded that it would have to prove that element. *Anderson I*, 134 Wn. App. at 322-23. Doing so, however,

entails the difficulties contemplated by *Froats*, and those difficulties must be taken into account in considering the evidence.

Anderson's overt acts must be viewed in light of his WSH confinement. "[I]n considering whether an overt act, evidencing dangerousness, satisfies the recentness requirement, it is appropriate to consider the time span in the context of all the surrounding relevant circumstances." *In re Pugh*, 68 Wn. App. 687, 695-96, 845 P.2d 1034 (1993). In *Pugh*, the appellant—like Anderson—was incarcerated for the statutory rape of young children and had been diagnosed with pedophilia. *Id.* at 689-90. And like Anderson, following his release from incarceration he was committed to WSH under RCW 71.05. *Id.* The State petitioned for an additional 180 days of involuntary confinement, which was granted. *Id.* at 690. *Pugh* appealed, arguing in part that there was no proof of a recent overt act. *Id.* at 694. The *Pugh* court held that, even though *Pugh* had not committed a recent overt act during confinement, his acts prior to confinement were relevant because he had had no access to victims during confinement. *Id.* at 696. Thus, acts that were five years old were considered "recent" due to a diagnosis paired with confinement that made victims unavailable.

Furthermore, it is the law of this case that, in determining whether Anderson's overt acts were recent, relevant periods of confinement and whether he had access to victims may be considered. That was the trial

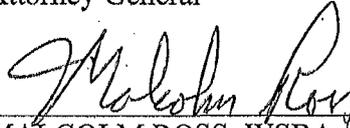
court's instruction to the jury, and Anderson has not challenged that instruction. *See* CP at 761. Taking into account the law of this case, and viewing the evidence in light of Anderson's confinement and lack of access to child victims, the overt acts proved by the State must be considered recent at the time the State filed the SVP petition.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 12th day of August, 2015.

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MALCOLM ROSS, WSBA #22883
Senior Counsel
Attorneys for Respondent

NO. 91385-4

WASHINGTON STATE SUPREME COURT

In re the Detention of:

JOHN CHARLES ANDERSON,

Appellant.

DECLARATION OF
SERVICE

I, Joslyn Wallenborn, declare as follows:

On August 12, 2015, I sent via electronic mail, per service agreement, a true and correct copy of Supplemental Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Marie Trombley
marietrombley@comcast.net

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

DATED this 12th day of August, 2015, at Seattle, Washington.


JOSLYN WALLENBORN

OFFICE RECEPTIONIST, CLERK

To: Wallenborn, Joslyn (ATG); marietrombley@comcast.net
Cc: Ross, Malcolm (ATG)
Subject: RE: In re the Det. of John C. Anderson, WSSC no. 91385-4

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Good Afternoon,

Attached for filing and service is the Supplemental Brief of Respondent and Declaration of Service in the above-entitled case.

Filed on behalf of:

MALCOLM ROSS
WSBA #22883, OID #91094

Thank you,

Joslyn Wallenborn

Legal Assistant to Assistant Attorneys General Malcolm Ross, Fred Wist, and Farshad Talebi

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