

**NO. 43153-0-II**

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

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**In re the Detention of Joe L. Todd,**

IN STATE OF WASHINGTON,

Respondent,

v.

JOE L. TODD,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Rich Melnick, Judge

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. In the absence of substantial evidence to support it, the trial court erred in entering Finding of Fact 8 such that it is more probable than not that Mr. Todd will engage in predatory acts of sexual violence if not confined in a secure facility.

2. Contrary to Findings of Fact 11, 12, and 13, Mr. Todd's case is distinguishable from *In Re Detention of Broten* and *In R.e Detention of Aston*.

3. In the absence of substantial evidence to support it, the trial court erred in entering Finding of Fact 20, to the extent that Mr. Todd's recent acts signify his dangerousness.

4. To the extent that it may be construed as a finding of fact, and in absence of substantial evidence to support it, the trial court erred in entering Conclusions of Law 6.

5. To the extent that it may be construed as a finding of fact, and in absence of substantial evidence to support it, the trial court erred in entering Conclusions of Law 7.

6. Contrary to Conclusion of Law 8, Mr. Todd did not commit a recent overt act.

7. Contrary to Conclusion of Law 9, there was insufficient evidence to prove beyond a reasonable doubt that Mr. Todd is a sexually violent predator.

8. Mr. Todd's continued confinement under RCW 71.09 is an illegal detention.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Was there proof beyond a reasonable doubt that Joe Todd committed a recent overt act such that he should be civilly committed?

**C. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS**

**1. Mr. Todd's early years were difficult.**

Joe Todd grew up in a cruel home. His father abused him physically and emotionally. As he grew up, he developed a bad body odor. He was a bed-wetter. He was picked on by other kids all the time. He was shorter and markedly skinnier than other boys. He essentially had no friends. He had not skills to develop normal social relationships. He learned to draw in on himself. He hoped that he was invisible. A good day for Joe Todd was when he did not have to talk to anybody. RP 3B at 698-700.

When Mr. Todd was young, a neighbor, an older man, molested him. Young Mr. Todd believed the bad touch felt pretty good. RP 3B at 710-11. When the molesting neighbor was found out, Mr. Todd's dad

threatened that if he ever touched another guy again, he would nail young son's "nuts to the floor with a sixteen penny nail." RP 3B at 715. Mr. Todd was conflicted. He found he was sexually attracted to men but at the same time hated the thought of homosexuality. RP 3B at 715.

Mr. Todd did not have same-age friends. RP 3B at 698-99. He sought younger children for friendship because they were accepting of him. RP 1A at 104. But these friendships took inappropriate turns when Mr. Todd took inappropriate actions.

**2. Mr. Todd was convicted and incarcerated three times for committing sex crimes with child victims.**

At age fifteen, Mr. Todd walked to his sister's school and escorted her home at the end of the day. His path took him past the home of a four year old boy. Mr. Todd and the boy played together. But it progressed to Mr. Todd touching the boy's genitals and eventually putting his mouth on the boy's penis. After being found out, Mr. Todd was charged and pleaded guilty to indecent liberties with a child less than fourteen years old. Mr. Todd spent a few weeks in custody and had to attend treatment. RP 1A at 52-66; RP 3B at 696.

At sixteen, Mr. Todd found himself attracted to the eight year old brother of a friend. There was an instance when he was in a church bathroom with the 8 year old. Mr. Todd became aroused. He invited the

eight year old to touch his erect penis. Some time later, he was at the child's home. The child invited him into a hiding area under the stairs. This aroused Mr. Todd. He masturbated and put the child's hand on his penis. Although Mr. Todd denied any oral-genital contact with the child, he was charged and convicted of rape of a child in the first degree. Mr. Todd received a 20 month sentence. He served the sentence though the Juvenile Rehabilitation Authority (JRA) at Naselle where he took part in sex offender treatment. He continued his treatment at a group home once released from Naselle. RP 1A at 82-90; RP 3B at 696, 700.

After his release Mr. Todd lived in Oregon. RP 1A at 94. In 1997, at age twenty-two, he made a Christmas visit to his mother in Washougal. RP 3B at 696. On the road to Washougal, he wanted sex. He stopped at an adult video store hoping to find a willing male adult partner, but he found the store closed. He was frustrated and continued onto his mother's home.

While staying with his mother, Mr. Todd's old pattern of being sexually aroused by children returned. In one instance, he masturbated an eight year old boy in his home and offended against the same child the next day. After being aroused by his contact with the eight year old, he pulled a six year old boy onto his lap in a nearby park and fondled the boy's penis. That boy told an adult. A police investigation ensued.

Without specifically admitting guilt, Mr. Todd told the police, “I need help and I need it bad.” RP 1A at 93-106.

Mr. Todd later pleaded guilty to child molestation in the first degree. RP 1A at 93. He told the corrections officer who investigated and wrote the pre-sentence investigation that he had been caught molesting about twelve children between the ages of two and eight. RP 1B at 149. His first sex was with dogs and horses at age 11. RP 1B at 149. He had his first experience with another child at age twelve. In the years since he had been out of custody after his second conviction, he diverted himself from molesting children by instead having oral sex with men, sometimes include multiple partners in an just an hour. RP 1B at 150.

### **3. Mr. Todd willfully engaged in sex offender treatment.**

While serving his prison sentence, Mr. Todd willfully engaged in all the sex offender treatment offered. RP 1B at 161, RP 3B at 698-700. He learned to identify his risk factors. Those factors included (1) getting depressed, (2) not setting adequate boundaries, (3) being around children, (4) pornography, and (5) allowing himself to feel ashamed for being gay. RP 1B at 163-64.

At Monroe’s Twin Rivers in 2007 and 2008, Mr. Todd completed a full year of sex offender treatment. He made steady progress. RP 3A at

606-13. He came to truly understand that by touching children inappropriately, he was victimizing them. RP 3B at 710-13. He came to understand children were never acceptable sex partners. RP 3B at 711. He identified certain unhealthy environments he should avoid including parks, swimming pools, public restrooms, and adult video stores. RP 3A at 630-31.

While in DOC custody, he had two consensual gay relationships with cell mates. Although the relationships were technically forbidden by DOC policy, they were healthy for Mr. Todd in the sense that he finally experienced and enjoyed a physical and emotional relationship with an adult who shared his homosexual preference. RP 3B at 678, 687, 716-19.

**4. Mr. Todd finished his DOC sentence and moved into the community.**

When Mr. Todd finished his prison sentence in 2009, he moved to Clark County and classified as a Level Three sex offender. With the help of his community corrections officer, Anthony Shaver, he found housing. Community Corrections Specialist Mark Chapman also had a hand in Mr. Todd's supervision. He provided sex offender after care to Mr. Todd. RP 1B at 166-174; RP at 2A 322-41.

As a Level Three sex offender, Mr. Todd received close monitoring. Upon his release from DOC he had multiple restrictions

related to his crime and the risk factors identified in his earlier treatment. RP 1B at 166175; RP 2A at 322-335.

Mr. Todd attended his sex offender group therapy sessions. RP 1B at 174. He contacted both Chapman and Shaver frequently. RP 1B at 175; RP 2A at 337-38. He revealed inappropriate behavior. RP 1B at 183-231; RP 2A at 344-370. He took polygraphs as directed. RP 2A at 269, 303. Wanting sexual contact from men, he masturbated in a Target store bathroom and dropped his pants to the floor in a bathroom stall to signal his interest in sex with men. RP 1B at 183. The Target store incident violated his condition that he only use single-person locked bathrooms and only for when nature called. RP 1B at 184. At one point he went to GI Joe's to buy biking rain gear. There were lots of children in the store. He had feelings of arousal so he left the store. RP 1B at 191. While on a bus, he saw a young man wearing low slung pants that exposed his underwear. This triggered arousal so he got off the bus. RP 1B at 191. Another time on the bus, he heard children's voices. To avoid arousal, he bit his tongue to distract himself. RP 1B at 195. He went swimming in a swimming hole frequented by minors but he avoided any contact with them. RP 1B at 349-52. Each of these incidents caused concern for Mr. Todd's supervisors.

**5. Mr. Todd was twice violated and put in custody for violating conditions of his community custody.**

Mr. Todd's first violation was in November 2009. RP 2A at 363. He was sanctioned to 20 days in custody. The violation was for looking at inappropriate websites. RP 2A at 360.

The second violation was in January 2010. Mr. Todd took a polygraph. He admitted to looking at websites featuring men engaged in sexual activity and another website featuring adult men posed to look like young teens. RP 2A at 299-309. Mr. Todd received a 200 days sanction on the second violation. RP 2A at 366-370. The 200 day sanction automatically triggered the filing of a Recent Overt Act Referral (ROAR) which led into the filing of the civil commitment petition. RP 2A at 370-71.

**6. The state sought Mr. Todd's civil commitment under RCW 71.09.**

On May 17, 2010, the state filed a RCW 71.09 civil commitment petition. CP 1-2. After consulting with his counsel, Mr. Todd waived his right to a jury trial. CP 3. Mr. Todd's trial was heard on several days in October and November 2011. Both the state and the defense retained experts. RP 2B at 4331 RP 4 at 781. Both experts agreed that Mr. Todd was a pedophile. RP 2B at 442-44; RP 4 at 803. The experts disagreed,

however, on the likelihood that Mr. Todd would reoffend. RP 2B at 488-552. RP 4 at 852-57

After hearing all of the testimony, the court took the case under advisement and later issued a memorandum decision finding civil commitment appropriate beyond a reasonable doubt. CP 4-10. The court's memorandum opinion was revised and filed as findings of fact, conclusions of law, and order of commitment. CP at 11-18.

Mr. Todd appeals the court's findings and conclusions. CP 19.

#### **D. ARGUMENT**

##### **THERE IS NO LEGAL BASIS TO CIVILLY COMMIT MR. TODD UNDER RCW 71.09 BECAUSE THERE IS INSUFFICIENT PROOF MR. TODD COMMITTED A RECENT OVERT ACT.**

Because the evidence at trial was insufficient to prove Mr. Todd committed a recent overt act, his civil commitment under RCW 71.09 must be reversed and the civil commitment petition dismissed.

Civil Commitment is a "massive curtailment of liberty." *In re Harris*, 98 Wn.2d 276, 279, 654 P.2d 109 (1982) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)). Laws abridging liberty interests violate due process unless they are narrowly tailored to further a compelling state interest. U.S. Const. Amend XIV; *In re Detention of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

To involuntarily commit a person under RCW 71.09, commonly referred to as “the sexually violent predator act,” the state must prove that the person is a sexually violent predator. *In re Detention of Fair*, 167 Wn.2d 357, 363, 219 P.3d 89 (2009) (citing RCW 71.09.060(1)). To be subject to commitment under RCW 71.09, a person must fit must be “any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18).

In criminal cases, the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Washington law likewise requires the state to prove each element required for civil commitment of sexually violent predators beyond a reasonable doubt. *In re Detention of Turay*, 139 Wn.2d 379, 407, 986 P.2d 790 (1999); RCW 71.09.060(1).

Mr. Todd does not contest having prior convictions for sexually violent offenses as that term is defined at RCW 71.09.020(17).

Additionally, at trial there was sufficient evidence which the court could and did rely on to find Mr. Todd suffers from a mental abnormality. To determine whether the jury's verdict in a RCW 71.09 case is based on

sufficient evidence, the evidence is viewed in the light most favorable to the state to determine if it is sufficient to persuade a fair minded rational person that the state has proven beyond a reasonable doubt that the respondent is a sexually violent predator. *In re Detention of Aston*, 161 Wn.App. 824, 829-830, 251 P.3d 917 (2011), *review denied*, 173 Wn.2d 1031 (2012)

“Mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others. RCW 79.090.020(8). The state’s expert, Dr. Judd, testified that Mr. Todd had the mental abnormality of paraphilia. RP 2B at 443. Paraphilia is defined as “recurrent, intense, sexually-arousing fantasies, sexual urges or behaviors generally involving (1) non-human objects, (2) the suffering or humiliation of one’s self or one’s partner or (3) children or other non-consenting person that occur over a period of at least six months. RP 2B at 443. There are eight categories of paraphilia. Of those eight categories, Mr. Todd was diagnosed with “pedophilis, sexually attracted to males, non-exclusive type.” RP 2B at 443-44. Pedophilia means that for a period of at least six months, a person experiences recurrent, intense, sexually-arousing fantasies, sexual urges or behaviors which generally involve a

prepubescent child. Prepubescent generally means thirteen years of age or younger. In addition, the person has acted on the sexual urges or the sexual urges or fantasies have caused them marked distress or interpersonal difficulty. And finally, that the person is at least sixteen years old and at least five years older than the child or children. RP 2B at 445-46. The defense expert, Dr. Wollert, agreed Mr. Todd suffered from pedophilia but disagreed that it was necessarily a mental abnormality. RP 4 at 803.

In addition to the sexually violent offense and mental abnormality elements of RCW 71.09, the United States Supreme Court held that a person must be both mentally ill and dangerous for a civil commitment to be permissible under the due process clause of the U.S. Constitution. *Addington v. Texas*, 441 U.S. 418, 426, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). In 1995, the legislature amended RCW 71.09.020 to provide that proof that a person was likely to engage in predatory acts of sexual violence “must be evidenced by a recent overt act if the person is not totally confined at the time the petition is filed under RCW 71.09.030.” Laws of 1995, ch. 216, § 1.

A RCW 71.09 commitment is predicated on current dangerousness. *Albrecht*, 147 Wn.2d at 7. Consequently, a 71.09 petition can be filed against a person “who at any time previously has been

convicted of a sexually violent offense and has since been released from total confinement” only where he has committed a recent overt act. RCW 71.09.030(1)(e); *Albrecht*, 147 Wn.2d at 7-8. A recent overt act is defined as “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.” RCW 71.09.020(12).

Mr. Todd’s conduct while released on community custody, whether taken individually or cumulatively, does not constitute a recent overt act.

The two RCW 71.09 cases relied upon by the trial court in finding Mr. Todd committed a recent overt act are distinguishable from Mr. Todd’s fact. See *In re Detention of Aston*, 161 Wn. App. 824, 251 P.3d 917 (2011), *review denied*, 173 Wn.2d 1031 (2012) and *In re Detention of Broten*, 130 Wn. App. 326, 122 P.3d 942 (2005), *review denied*, 158 Wn.2d 1010 (2006).

Aston was released from custody after serving his sentence for first degree rape of a child. First degree rape of a child is a sexually violent offense and Aston did not deny having a mental abnormality. The appellate court found Aston committed a recent overt act on the following

facts. Aston told his DOC community custody officer that he would offend reoffend if given the opportunity and that he wrote out fantasies about sexually abusing children and masturbated to the fantasies.

Like *Aston*, Broten did not challenge having a conviction for a sexually violent offense against a child (i.e., first degree rape of a child) or having mental abnormality. Broten violated his release conditions by making weekly visits to park to watch children dating another sex offender, and having contact with his girlfriend's 15-month-old daughter, and by possessing photos of his own daughter. During a polygraph, Broten also admitted to masturbating while thinking of possible new victims including 5 year-old girls.

Unlike *Aston*, Mr. Todd never made any direct or unequivocal threat to engage in predatory acts of sexual violence. Unlike *Broten*, Mr. Todd did date a person who put him in direct contact with a minor, or make weekly visits to parks where he could masturbate to visions of his intended future victims.

Instead, Mr. Todd sought to engage in consensual sex with homosexual men, his partners of choice. At times, his movements around the community naturally took him to place where minors could have been – and sometimes – where, such as on a city bus or at a local swimming hole. Although he might was inadvertently aroused by minor at times, he

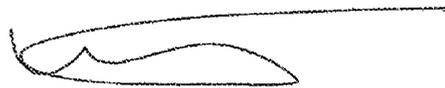
did not act on his arousal. And although he viewed some gay-oriented website with what appeared to be young teens performing sex acts, Mr. Todd did not act on what he saw.

Viewed in the light most favorable to the state, Mr. Todd's acts did not amount to recent overt acts beyond a reasonable doubt. The trial court erred in finding *Aston* and *Brotten* comparable to Mr. Todd's activities and erred in finding Mr. Todd guilty beyond a reasonable doubt. The RCW 71.09 petition should be dismissed.

**E. CONCLUSION**

For the above stated reasons, Mr. Todd's civil commitment under RCW 71.09 should be reversed and the petition dismissed.

Dated this 9<sup>th</sup> day of November 2012.



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Attorney for Joe L. Todd

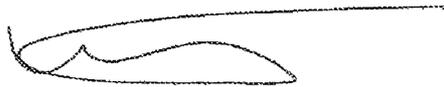
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant (1) Assistant Attorney General Malcolm Ross at malcolmr@atg.wa.gov, (2) the Court of Appeals, Division II, and (3) I mailed a copy to Joe L. Todd, Special Commitment Center, PO Box 88600, Steilacoom, Washington 98388.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THIS FOREGOING IS TRUE AND CORRECT.

Signed November 9, 2012, in Longview, Washington.



Lisa E. Tabbut, WSBA No, 21344  
Attorney for Joe L. Todd

# COWLITZ COUNTY ASSIGNED COUNSEL

**November 09, 2012 - 4:51 PM**

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