NO. 90361-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

JACK LECK II,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. DECISION BELOW

Jack Leck is a compulsive pedophile with a history of sexual offenses against young males. He seeks review of a March 4, 2014 decision by the Court of Appeals, *In re the Detention of Jack Leck II,* 179 Wn. App. 1044, 2014 WL 866123 (Wash. App. Div. II) (hereinafter "*Leck*"). Because his case does not meet any of the criteria for review set forth in RAP 13.4(b), this Court should deny review.

II. COUNTERSTATEMENT OF ISSUES

As explained below, this Court should deny review because this case presents no issues that warrant review under RAP 13.4(b). However, if the Court were to accept review, the following issues would be presented:

A. **Where Leck neither proposed jury instructions of his own, nor objected to those adopted by the trial court, and where he had at least 11 months actual notice that the State alleged the presence of a personality disorder, and where his own expert agreed that he suffered from an Antisocial Personality Disorder, were Leck's rights to due process violated by inclusion of a jury instruction referencing "mental abnormality or personality disorder"?**

B. **Where Leck was telephonically present at a hearing involving purely legal matters, did the trial court abuse its discretion where it denied Leck's last-minute motion to continue that hearing to allow Leck to be physically present?**

C. **Where an expert is permitted to testify as to the basis of that expert's opinion, did the trial court abuse its discretion in permitting Dr. Arnold to testify to hearsay to explain the significance of Leck's application for membership in the YMCA?**

D. **Where Leck was convicted of 46 counts of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in Kitsap**

County, did the State properly file a sex predator petition against him in that county?

III. COUNTERSTATEMENT OF THE FACTS

Leck's criminal sexual history, as set forth by the Court of Appeals, is as follows:

> Leck was convicted in 1984 in Alaska of second degree sexual abuse of a minor and second degree attempted sexual abuse of a minor. For purposes of Washington's SVP laws at chapter 71.09 RCW, these two convictions amount to "sexually violent offenses." Leck was released on parole for these offenses in July 1996. After being in and out of confinement for various parole violations, Leck was unconditionally released in September 2002.
>
> In April 2003, Leck applied for a membership at the YMCA in Bremerton, Washington. A YMCA employee, aware that Leck was a sex offender in Alaska, contacted Bremerton police. Having been informed by Leck's family when Leck was released in 2002 that he might try to enter the Bremerton YMCA, the police contacted the address Leck had left there; the address was for a charitable organization at which Leck had begun volunteering a week earlier. The police searched the organization's computer to which Leck had had access during that week, discovering numerous images downloaded during that time of minors engaged in sexually explicit conduct. Leck was arrested and later convicted in Kitsap County Superior Court of 46 counts of possession of depictions of a minor engaged in sexually explicit conduct.

Leck at *1.

Following his release on the Kitsap County Possession of Depictions conviction, this Sexually Violent Predator (SVP) civil commitment action against Jack Leck was initiated in Thurston County. After issuance of this Court's decision in *In re Martin*, 163 Wn.2d 501, 182 P.2d 951 (2008), the

State moved to dismiss the Thurston County case and re-filed the case in Kitsap County, where Leck had been convicted of 46 counts of Possession Of Depictions Of A Minor Engaged In Sexually Explicit Conduct. CP at 3-56. The State's Petition was supported by the 2006 report of Dr. Dale Arnold, in which Dr. Arnold determined that Leck suffered from a mental abnormality (Pedophilia) and indicated that, in the absence of a clinical interview, he could not assign a diagnosis of a personality disorder. CP at 28, 49. Dr. Arnold submitted a second report in September of 2010. This time, with the benefit of a personal interview, he was able to diagnose a personality disorder in addition to Pedophilia. CP at 356. The State's Petition was not amended to reflect this change.

Prior to his first trial,[1] Leck moved to dismiss, arguing that the State lacked the statutory authority to file its petition in Kitsap County. CP at 67-113. The trial court denied his motion. CP at 238-245.

In October of 2010, the State moved for a ruling that, as a matter of law and pursuant to *In re Detention of Marshall*, 156 Wn.2d 150, 1125 P.3d 111(2005), Leck's 2003 convictions for Possession of Depictions qualified as a recent overt act pursuant to RCW 71.09.020(12). CP at 293-502. The trial court initially issued an oral ruling denying the State's motion, whereupon the State requested reconsideration, arguing that the court had applied the incorrect legal standard. CP at 1649-1659. A hearing on the State's reconsideration

[1] The first trial, held in February of 2011, ended in a mistrial. The second trial began in August of 2011.

motion took place on January 14, 2011, at which Leck appeared telephonically. RP 1/14/2011 at 2. At that hearing Leck, through counsel, moved for a continuance of the hearing in order to be permitted to appear physically, which the trial court denied. *Id.* at 4. After hearing argument, the trial court vacated its earlier ruling and determined that Leck's 2003 conviction qualified as a recent overt act. *Id.* at 30; CP at 765-769.

At trial, the jury heard extensive testimony from the State's expert, Dr. Dale Arnold, that Leck suffered from both a mental abnormality (Pedophilia) and a personality disorder. RP 8/8/11 at 221-288. Leck's expert, Dr. Richard Wollert agreed that Leck suffered from a personality disorder. RP 8/10/1 at 753; RP 8/11/11 at 838-41; 903-04, 923-28, 944-45, 065-67. The "to commit" instruction, submitted by the State and to which Leck did not take exception, referenced both a mental abnormality and personality disorder. CP at 1580, Appendix A.

A unanimous jury determined that Leck was a sexually violent predator, and he was committed to the care of the Department of Social and Health Services to be placed at the Special Commitment Center, where he remains today. CP at 1598-1599.

On appeal, Leck argued that his rights to due process were violated when 1) the jury was instructed on an alternative means of proving his SVP status that was not alleged in the petition; 2) he was not allowed to appear in person at a reconsideration hearing addressing the recent overt act requirement; and 3) the State's expert witness was allowed to refer to hearsay in expressing

his opinion about Leck's SVP status. In addition, Leck argued that the State had no authority to file an SVP petition against him in 2008, and violated his due process rights when they re-filed against him in Kitsap County in 2009. *Leck* at *1. His commitment was initially reversed. *In re Leck*, 176 Wn. App. 371, 309 P.3d 603(2013). Upon motion by the State, the Court of Appeals granted reconsideration, withdrew its initial opinion,[2] and issued a new opinion, this time affirming Leck's commitment and holding that 1) the State had authority to file the petition under both the 2008 and the 2009 version of RCW 71.09; 2) the jury instruction alleging that Leck suffered from a personality disorder did not constitute manifest constitutional error allowing Leck to raise this issue for the first time on appeal; 3) the trial court did not err by refusing to continue a reconsideration hearing addressing an issue of law; and 4) the State's expert appropriately referred to the evidence supporting his opinion. *Leck* at *1.[3] Leck now seeks review.

IV. REASONS REVIEW SHOULD BE DENIED

Leck argues that the issue related to jury instructions conflicts with a decision of this Court. RAP 13.4(b)(1); Petition ("Pet.") at 2. He argues that this issue, as well as that of his presence at a reconsideration hearing, involves

[2] *In re Leck,* COA No. 42573–4–II, Order Granting Reconsideration; Withdrawing opinion; And Setting As A Non-Oral Argument dated November 19, 2013

[3] The revised decision, issued on March 4, 2014, has been ordered published. *In re Leck,* COA No. 42573–4–II, Order Granting Motion To Publish dated April 24, 2014. Because Westlaw's online service does not reflect this, citations to the operative opinion in the State's Answer will refer to the unpublished version of the March 4, 2014 Opinion.

significant questions of constitutional law. RAP 13.4(b)(3). *Id.* He does not identify the specific basis for review of the remaining issues. Because the Court of Appeals' decision does not conflict with any decision of this Court, and does not raise any significant constitutional issues, this Court should deny review.

A. The Court of Appeals' Decision Regarding The Jury Instructions Is Consistent With Established Precedent

Leck argues that, because the jury instructions involve the "elements" the jury was required to find in order to commit him, this Court must apply a criminal, rather than civil, analysis. Pet. at 5-10. The Court of Appeals properly rejected this argument. First, it is well established that the SVP law is civil in nature, and that, as such, the civil rules apply to these proceedings. Second, under CR 15(b), the State's Petition is deemed amended because Leck did not contest, and in fact offered, testimony related to a personality disorder. Third, because Leck cannot demonstrate that this issue, raised for the first time on appeal, involves a manifest error of constitutional magnitude, the issue is not properly before the Court. Finally, even if this issue were analyzed under a criminal standard and Leck were permitted to raise it for the first time on appeal, Leck suffered no prejudice as a result of the term's inclusion in the jury instructions and review is not merited.

1. The SVP Statute Is Civil

The SVP statute is civil in nature. *In re Pers. Restr. of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993); *In re Det. of Petersen*, 138 Wn.2d 70,

91, 980 P.2d 1204 (1999); *In re Det. of Williams,* 147 Wn.2d 476, 488, 55 P.3d 597 (2002); *In re Det. of Strand*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). Washington courts have repeatedly refused to confer upon SVP respondents the same rights as criminal defendants. *See, e.g., In re Det. Of Stout,* 159 Wn.2d 357, 369, 150 P.3d 86(2007) (Sixth Amendment right to confrontation); *Peterson*, 138 Wn.2d at 91 (Fifth and Sixth Amendment rights); *Young*, 122 Wn.2d at 24-25 (ex post facto and double jeopardy clauses); *In re Det. of Ticeson*, 159 Wn. App. 374, 380-81, 246 P.3d 550 (2011), *abrogated on other grounds by State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012)(Article I, section 22 of the Washington State Constitution).

2. Leck's Rights To Due Process Were Not Violated

The Court of Appeals correctly determined that, because Leck is not afforded the rights of criminal defendants under the Sixth Amendment and article I, section 22, "he must rely on the guaranty of 'fundamental fairness' provided by the due process clause." *Leck* at *4, citing *Strand,* 167 Wn.2d at 191. Thus, in order to raise his claim of instructional error for the first time on appeal, he must show that the alleged error "violated the due process guaranty of fundamental fairness and that he was prejudiced as a result." *Id.* (citing RAP 2.5(a)(3); *State v. Gordon,* 172 Wn.2d 671, 676, 260 P.3d 884 (2011)). Due process is a flexible concept and to determine what process is due in a particular context, courts apply the balancing test set forth in in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d (1976). *Stout*, 159 Wn.2d

at 370. The *Mathews* factors include: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest including costs and administrative burdens of additional procedures. *Id.* The Court of Appeals, while noting Leck's "significant" interest in his physical liberty, correctly rejected Leck's argument that "trying Leck on that personality disorder alternative risked an erroneous deprivation of that liberty." *Leck* at *5.

In reaching this conclusion, the court looked in part to the Civil Rules, which, except as otherwise provided in CR 81, govern SVP procedures. *Williams*, 147 Wn. 2d at 488. SVP proceedings are "special proceedings" within the meaning of CR 81 (*Id.*) but RCW 71.09.030, which governs the information that must be included in an SVP petition, does not address amendment of petitions.[4] As such, amendment is governed by CR 15(b), which provides that, when issues not raised by the pleadings are tried by express or implied consent of the parties, "they shall be treated in all respects as if they had been raised in the pleadings." While amendment of the pleadings "as may be necessary to cause them to conform to the evidence" is permitted, "failure so to amend does not affect the result of the trial of these issues." CR 15(b). This provision of the Rules is designed to avoid "the

[4] RCW 71.09.030 provides in pertinent part as follows: "[a] petition may be filed alleging that a person is a sexually violent predator and stating sufficient facts to support such allegation. . . ."

tyranny of formalism" that characterized former practice. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766, 733 P.2d 530 (1987).

Based on the record in this case, the Court of Appeals correctly determined that the State's failure to formally amend did not risk an erroneous deprivation of Leck's liberty. *Leck* at *5. Leck's claim that he did not have notice of the State's intention to present evidence regarding a personality disorder is based entirely upon the fact that, in the petition filed in 2008, the State did not include an allegation that he suffered from a personality disorder. Pet. at 10. The record, however, is replete with evidence that Leck had actual notice of the State's intention to present testimony on his personality disorder, and indeed Leck presented testimony from his own expert to that effect.

As noted, there were two trials in this matter: The first, in February 2011, resulted in a mistrial (*Leck* at at *2); the second occurred six months later, in August of 2011. In its Trial Memorandum prior to the first trial in February 2011, the State alleged that it would prove that Leck suffered from a mental abnormality *and/or* a personality disorder. CP at 525, 529. Leck's expert, Dr. Wollert, assigned a diagnosis of Antisocial Personality Disorder in his November 4, 2010 report, at least three months prior to the first trial. CP at 1636, 1646. Dr. Wollert then testified extensively regarding that diagnosis at trial. RP 8/10/11 at 753; RP 8/11/11 at 838-41, 903-04, 923-28, 944-45, 965-67.

The State submitted proposed jury instructions prior to trial that included an instruction stating that in order to commit Leck the jury must find that he suffered from a mental abnormality or a personality disorder, and Leck did not object to these jury instructions. CP at 1574-97; RP 8/15/11 at 1073, 1079. Nor did Leck at any point object to being tried on the issue of a personality disorder. Leck vigorously cross-examined the State's expert about whether his personality disorder caused him to offend sexually (RP 8/8/11 at 371-83), using his own expert's testimony to support his theory that, although he suffered from a personality disorder, it did not cause him to offend sexually. RP 8/11/11 at 838-43, 903-04, 923-28, 943-46, 965-67; RP 8/15/11 at 1125-27,1133. There was no risk, based on this record, that the State's failure to formally amend its pleadings placed Leck at risk of an erroneous deprivation of liberty.

Finally, the Court of Appeals was correct in its determination that the third *Mathews* factor also weighs in favor of the State. *Leck* at 12. Not only would third trial be "costly and burdensome," but, the court noted, it would be "meaningless... to give Leck a third opportunity to raise the same defense he used in the prior two trials." *Leck* at *7.

Because Leck cannot demonstrate that his rights to due process were violated, the Court of Appeals correctly determined that he cannot demonstrate "manifest error affecting a constitutional right" such that he is permitted to raise this issue for the first time on appeal pursuant to RAP 2.5(a)(3). An error

is "manifest" if it either (1) results in actual prejudice to Leck, or (2) Leck makes a plausible showing that the error had practical and identifiable consequences. *Gordon,* 172 Wn.2d at 676. Leck has made no attempt to satisfy his burden of showing that the error resulted in actual prejudice or had practical and identifiable consequences and indeed, for the reasons identified above, it did not.

Ignoring the well-established precedent discussed above, Leck argues that this Court has "consistently applied standards developed in criminal cases" when matters related to the "elements" of the State's case are involved, and appears to argue that no showing of prejudice is required. Pet. at 5. This argument fails. First, the term "element" is not confined to criminal law, and its use to refer to those things the State must prove at trial in no way implicates the criminal law. Black's Law Dictionary defines the term "element" as "a constituent part of a claim that must be proved for the claim to succeed," and, by way of illustration, offers examples of "elements" drawn from tort and patent law. *Black's Law Dictionary*, Abridged Seventh Edition, 2000, at 424. Nor do the cases cited by Leck help him. Leck cites to this Court's use of the term "elements" in *In re Pouncy,* 168 Wn.2d 382, 229 P.3d 678 (2010). Pet. at 7-8. The trial court had rejected Pouncy's request to submit a jury instruction defining the term "personality disorder." 168 Wn. 2d at 391-92. This Court reversed. In so doing, however, this Court relied on both criminal and civil cases (*See Pouncy* at 390-391) and nothing in the opinion suggests that the

decision hinged on criminal law. Nor does *In re Post*, 170 Wn.2d 302,241 P.3d 1234 (2010) support Leck's argument: While the term "element" is used to refer to those things the State must prove (170 Wn.2d at 309-10), there is no suggestion that this terminology triggers a criminal analysis, and in fact the case contains no reference to the criminal law whatsoever.

Finally, even if, as Leck argues, this Court were required to apply the line of cases beginning with *State v. Severns*, 13 Wn.2d 542, 125 P.2d 659 (1942), his argument fails. *Severns* stands for the proposition that it is error for a trial court to instruct the jury on an uncharged alternative means in a criminal case and that, on appeal, it is the State's burden to prove that the error was harmless. *In re Personal Restraint of Brockie*, 178 Wn.2d 532, 309 P.3d 498 (2013). Even under *Severns,* any error is plainly harmless, as Leck had notice of the State's allegation that he suffered from a personality disorder eleven months in advance of trial and defended fully against the allegation in the August 2011 trial without objection.

B. The Trial Court Properly Refused To Continue The Reconsideration Hearing

Leck argues that reversal is required because the trial court denied his last-minute motion to continue a hearing on the State's Motion for Reconsideration in order to permit him to be physically, rather than telephonically, present. Pet. at 10-16. Attempting to elevate this issue to one of constitutional magnitude, Leck argues that the question of "whether a

detainee has a constitutional right to be present at a recent overt act hearing," is "an issue of first impression," and hence "a significant question of constitutional law" pursuant to RAP 13.4(b)(3). Pet. at 11.

The Court of Appeals correctly rejected this argument, determining that Leck did not show that his presence was required where the trial court considered only undisputed facts, and where Leck "had the opportunity to speak during the hearing and to offer additional evidence following argument." *Leck* at *9. In reaching this result, the court looked to in *In re Det. of Morgan,* 161 Wn. App. 66, 74, 253 P.3d 394 (2011), *review denied* 177 Wn.2d 1001 (2013). There, Division II, appearing to analogize to the criminal law, noted that a respondent in an SVP matter "has the right to be present at proceedings where his or her presence has a reasonably substantial relation `to the ful[l]ness of his opportunity to defend against the charge.'"(citing *In re Pers. Restraint of Lord,* 123 Wn.2d 296, 306, 868 P.2d. 835, *cert. denied,* 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994)) but "`does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters.'" *Id.,* 123 Wn.2d at 306.

Even applying this criminal analysis, the court below correctly found that Leck's physical, as opposed to telephonic, presence at a hearing at which undisputed evidence was considered in order to resolve a purely legal issue would have added nothing to the hearing on reconsideration. Repeatedly mischaracterizing the reconsideration hearing as "a recent overt act hearing,"

(Pet. at 10, 11, 13), Leck argues that it "was akin to a pretrial hearing at which a court determines whether the State may cross-examine a testifying defendant about his prior crimes." Pet. at 13.

This is incorrect in two respects: First, the hearing in question was not the "recent overt act hearing." That hearing had occurred almost two months earlier. RP 11/5/2010. Leck was not present at that hearing, did not indicate through counsel that he wished to be present, and does not complain of his absence on appeal. *Id.* Nor was the hearing "akin to a pretrial hearing..." Pet. at 13. Rather, the hearing at issue was a hearing on the State's motion for reconsideration of the trial court's recent overt act ruling, in which the State argued that the trial court had erroneously applied the incorrect legal standard to the recent overt act analysis. CP at 1649-1659. In rejecting Leck's last-minute request for a continuance in order to be able to physically attend the hearing, the trial court noted that it would make its decision "based on the paper record that's presented to the Court," that it was "not something that I can take testimony on," and that it would consider any request by Leck's attorney to submit additional materials at the conclusion of argument. RP 1/14/11 at 4. Nor, as Leck argues, would Leck's presence have helped "to ensure that the court's determination will not be predicated on the prosecutor's unrebutted view of the facts." Pet. at 14, citing *People v. Dokes*, 79 N.Y.2d 565, 661, 595 N.E.2d 836 (1992). The trial court noted that, in making its ruling, it would rely only on those facts that were not controverted (*Id.* at 8, 28-

29) and, in making certain of its findings, explicitly relied in large part on facts as set forth in the report of Leck's expert based on Leck's admissions to that expert. CP at 766, Nos. 2, 3; CP at 1605-1646. Leck's physical, as opposed to telephonic, presence at a hearing at which undisputed evidence was considered in order to resolve a purely legal issue would have added nothing to the hearing on reconsideration.

Even if the trial court's denial of his motion to continue was error, it was harmless. Leck fails to show that his failure to be physically present at the hearing made any difference, and thus has not shown prejudice. By arguing that the court's consideration of "disputed facts" required his physical presence, he appears to argue that he was somehow prevented from presenting evidence that he might have presented had he attended the argument in person. He has, however, failed to demonstrate this. An error in the admission or exclusion of evidence that is harmless, *i.e.*, an error that poses no substantial likelihood that it affected the verdict, is not grounds for reversal. *Carnation Co. v. Hill,* 115 Wn.2d 184, 186, 796 P.2d 416 (1990). Leck cannot demonstrate that the fact that he was not physically present at the reconsideration prejudiced his case in any way.

C. The State's Expert's Witness Properly Testified Regarding Leck's Sister's Report to Law Enforcement.

Leck next argues that his "constitutional right to cross examination" was violated when the State's expert relayed an out-of-court statement made

by Leck's sister where he had no opportunity to cross examine her. Pet. at 16. The Court of Appeals properly rejected Leck's attempt to elevate an issue regarding the admission or exclusion of evidence to one of constitutional significance.

On rebuttal, the State asked Dr. Arnold to explain the significance of Leck's having applied for membership at the YMCA. Dr. Arnold responded, saying:

> One reason is because it's very clear that he had obtained victims for child molestation in the past at the YMCA. And the other reason I think it's particularly important, is because that's how he was really caught in 2003 is because his sister knew that he had this pattern of contacting YMCAs, and she informed local law enforcement to watch out for him.

RP 8/15/11 at 1043. Counsel for Leck objected on hearsay grounds, conceding that Leck had met a previous victim at the YMCA, but objecting to the use of the term "pattern." *Id.* His objection was overruled. *Id.* at 1044. Leck now argues that this testimony violated his constitutional right to cross examination because he never had an opportunity to cross-examine his sister about the statement. Pet. at 16. Leck's argument fails. First, the testimony was proper under ER 703 and 705, and it was within the broad discretion of the trial court to permit such testimony. Second, even if there was error, there was no prejudice.

Trial court rulings on admissibility of evidence are generally reviewed under an abuse of discretion standard. *Brouillet v. Cowles Pub'g Co.,* 114 Wn.2d 788, 801, 791 P.2d 526 (1990). A trial court abuses its discretion when its decision

is manifestly unreasonable or based upon untenable grounds. *In re Marriage of Kovacs,* 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Because Dr. Arnold's opinion regarding the significance of Leck's having attempted to join the YMCA was clearly relevant, his testimony was properly admitted. In addition, the rules of evidence permit Dr. Arnold to explain the basis of his opinion, which included reference to Leck's sister's call to law enforcement: ER 703 permits an expert to base his or her opinion on facts not otherwise admissible "if of a type reasonably relied upon by experts in the particular field." A limiting instruction was read to the jury during expert testimony (RP 8/8/11 at 243) and again at the conclusion of the case with all other jury instructions. CP at 1579. In SVP cases, expert witnesses are permitted to testify regarding the underlying facts that form the basis of their opinions. *Marshall,* 156 Wn.2d at 162. Here, Dr. Arnold's reference to Leck's sister's report to law enforcement was offered for the limited purpose of explaining why he attached importance to Leck's application for membership in the YMCA. As such, it forms part of the basis for his expert opinion and was properly permitted.

Nor did this testimony prejudice Leck. Critical for Dr. Arnold's purposes was not that his sister had offered this information, but that Leck, having "saturate[d] himself in child pornography," was "placing himself in a position to have access to a child." RP 8/8/11 at 262. This issue does not merit review.

D. *Martin* Does Not Require Dismissal Of The State's Kitsap County Proceeding Against Leck

Finally, Leck argues that the Kitsap County case against him must be dismissed pursuant to *Martin,* urging that, because Leck's sexually violent offenses were committed outside of Washington State, the State does not have authority to file the petition in any Washington county. Pet. at 18-20.

The Court of Appeals properly rejected this argument based on *In re Durbin,* 160 Wn. App. 414, 248 P.3d 124 (2011); *review denied* 172 Wn.2d 1007, 259 P.3d 1108 (2011). Durbin had been convicted in Montana of what would be considered a sexually violent offense in Washington and was released from custody before being convicted of attempted residential burglary in Clark County in 2003. The State initially filed an SVP petition in Thurston County in 2004 but, after issuance of the *Martin* decision in 2008, re-filed in Clark County. Durbin argued, as does Leck here, that, pursuant to *Martin,* former RCW 71.09.030 did not permit the case to be re-filed in Clark County. Rejecting those arguments, Division II determined that the State "had statutory authority to file the petition in Clark County under former RCW 71.09.030 (2008) because Durbin had been convicted of a sexually violent offense, he had formerly been released to the community, he was currently confined for an act that allegedly constituted a recent overt act, and he was about to be released." 160 Wn. App at 429. The Durbin Court also rejected the argument—identical to that of Leck—that those amendments could not be applied to

Durbin retroactively, holding that "[r]etroactive application of RCW 71.09.030(2)(a)(iii) and RCW 71.09.030(2)(b) (2009), which expressly authorize the county prosecutor (or attorney general on request) to file a petition under the same circumstances as those in *Martin* and under former RCW 71.09.030 (2008), does not contravene our Supreme Court's interpretation of the process due each person who is the subject of an SVP petition." *Id.* at 431. Leck, while acknowledging *Durbin* and making no attempt to distinguish the facts of that case from his own, suggests only that, because that decision "contravenes" his argument, this Court "should not follow it." Pet. at 20. Leck's argument, like that of Durbin, fails.

V. CONCLUSION

Leck has not demonstrated that this case merits review pursuant to RAP 13.4(b). This case involves a well-settled issue of law, does not conflict with any decisions of this Court or any other appellate court, and does not present a significant question of law under the Constitution. For the foregoing reasons, the State respectfully requests that this Court deny review.

RESPECTFULLY SUBMITTED this 24TH day of July, 2014.

ROBERT W. FERGUSON
Attorney General

SARAH B. SAPPINGTON, WSBA #14514
Senior Counsel, OID # 91094

APPENDIX A

INSTRUCTION NO. 4

To establish that Jack Leck, II is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

(1) That Jack Leck, II has been convicted of a crime of sexual violence, namely the Alaska offense of Sexual Abuse of a Minor in the Second Degree and/or Attempted Sexual Abuse of a Minor in the Second Degree;

(2) That Jack Leck, II suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior; and

(3) That this mental abnormality or personality disorder makes Jack Leck, II likely to engage in predatory acts of sexual violence if not confined to a secure facility.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that Jack Leck, II is a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that Jack Leck, II is not a sexually violent predator.

NO. 90361-1

WASHINGTON STATE SUPREME COURT

In re the Detention of: JACK LECK II, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On July 24TH, 2014, I sent via electronic mail and United States mail true and correct cop(ies) of Answer to Petition for Review and Declaration of Service, postage affixed, addressed as follows:

Maureen M. Cyr
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
maureen@washapp.org

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

DATED this 24TH day of July, 2014, at Seattle, Washington.

Allison Martin
ALLISON MARTIN

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, July 24, 2014 4:10 PM
To: 'Martin, Allison (ATG)'
Subject: RE: In re Detention of Leck 90361-1

Rec'd 7-24-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Martin, Allison (ATG) [mailto:AllisonM1@ATG.WA.GOV]
Sent: Thursday, July 24, 2014 4:07 PM
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Attached for filing in the above entitled case please find Answer to Petition for Review.

Filed on behalf of

Sarah Sappington, WSBA #14514
OID # 91094

Allison Martin | Legal Assistant to
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