No. 42573-4-II

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

IN RE: DETENTION OF JACK LECK II

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent,

v.

JACK LECK II,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State filed a petition alleging Jack Leck II should be committed indefinitely pursuant to chapter 71.09 RCW. The petition alleged Mr. Leck had a mental abnormality but not a personality disorder. But at the commitment trial, the jury was instructed it could commit Mr. Leck if it found he suffered from *either* a mental abnormality *or* a personality disorder. Because the jury was instructed on an alternative means that was not alleged in the petition, and because it is likely the jury relied upon the uncharged alternative, the commitment order must be reversed.

In addition, Mr. Leck's constitutional right to be present was violated when he was not allowed to attend the hearing at which the court found he committed a "recent overt act." His constitutional right to cross-examination was also violated when the State's expert relayed a highly prejudicial out-of-court statement but Mr. Leck never had an opportunity to cross-examine the declarant.

Finally, the State acted without statutory authority and violated Mr. Leck's constitutional right to due process when it filed its petition in Kitsap County but Mr. Leck was never convicted of a sexually violent offense in Washington State.

B. ASSIGNMENTS OF ERROR

1. Mr. Leck's due process and statutory right to notice was violated when the jury was instructed on an alternative statutory means that was not alleged in the petition.

2. Mr. Leck's due process right to be present was violated when the court held a hearing and made a "recent overt act" finding without allowing Mr. Leck to be present at the hearing.

3. Mr. Leck's due process right to cross-examination was violated when the State's expert relayed a highly prejudicial out-of-court statement but Mr. Leck never had an opportunity to cross-examine the declarant.

4. The State lacked statutory authority to file the petition.

5. Mr. Leck's constitutional right to due process was violated when the court found he committed a recent overt act.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 71.09.030 requires the State to file a petition "stating sufficient facts" to support its allegation that a person is a "sexually violent predator." In addition, individuals in chapter 71.09 RCW proceedings are entitled to the same fundamental due process protections as defendants in criminal trials. In a criminal trial, a

defendant's due process right to notice is violated if the jury is instructed on a statutory alternative means that is not alleged in the information. Was Mr. Leck's statutory and due process right to notice violated when the jury was instructed on an alternative means that was not alleged in the petition?

2. A person in a chapter 71.09 RCW proceeding has a constitutional due process right to be present. Was Mr. Leck's right to be present violated when the court found, based on disputed facts, that he committed a "recent overt act," but Mr. Leck was not allowed to be present at the hearing?

3. A person in a chapter 71.09 RCW proceeding has a constitutional due process right to cross-examine witnesses against him. Was Mr. Leck's constitutional right to cross-examination violated when the State's expert relayed a highly prejudicial out-of-court statement but Mr. Leck never had an opportunity to cross-examine the declarant?

4. Did the State act without statutory authority when it filed a petition in Kitsap County but Mr. Leck was never convicted of a sexually violent offense in Washington State?

5. Was Mr. Leck's constitutional right to due process violated where the court found he committed a recent over act based upon an act that occurred several years before the State filed its petition?

D. STATEMENT OF THE CASE

1. Background facts.

Jack Leck II was born in December 1951. CP 16. In 1984 he was convicted in Alaska of "sexual abuse of a minor in the second degree" and "attempted sexual abuse of a minor in the second degree." CP 142-50. Those convictions amount to "sexually violent offenses" for purposes of chapter 71.09 RCW. CP 765.

The convictions arose out of encounters Mr. Leck had with five boys between the ages of 11 and 16.[1] CP 172-77. A search of Mr.

[1] One boy told police Mr. Leck performed fellatio on him once and took photographs of him another time, while he was sleeping and fully clothed. CP 173-74. Another boy testified Mr. Leck took nude photos of him and touched him "in an offensive manner." CP 175. A third boy testified he went to Mr. Leck's apartment, where he was given alcohol. CP 175. Once, Mr. Leck touched the boy's penis while masturbating. CP 175. Another time, the boy fell asleep and woke up nude while Mr. Leck was penetrating his anus with his penis. CP 175. A fourth boy testified he went to Mr. Leck's apartment, where Mr. Leck took several photographs of him, including nude photographs, then put his hand on the boy's penis and tried to masturbate him. CP 176. The fifth boy testified he went to Mr. Leck's apartment on two occasions. Once, Mr. Leck put his hand on the front of the boy's pants but the boy slapped his hand away. CP 177. Another time, Mr. Leck masturbated beside the boy. CP 177.

Leck's apartment had also uncovered a photo album containing photographs of nude adolescent boys. CP 172.

Mr. Leck was incarcerated on the convictions until July 1996, when he was released on parole. CP 190. He remained in the community until August 1997, when he was arrested for parole violations involving contact with children and failing to register. CP 381-84. Mr. Leck was seen throwing a frisbee to a boy eight to ten years of age who lived across the street from him. CP 382. A woman reported Mr. Leck was inside her apartment where her eight-year-old son was present. CP 382. A 16-year-old boy told police he had visited Mr. Leck's home for dinner and to watch television, and had ridden in his van. CP 382. Mr. Leck also reportedly had contact with two girls, aged seven and 13, and possessed order forms for photographs of children, some nude. CP 384. But there was no evidence Mr. Leck had sexual contact with any of the children or possessed any pornography.

Mr. Leck was next released to parole in July 2001. CP 386-88. About two weeks later, he was arrested for accessing "a number of sexually related web sights [sic]" on a state-owned computer while searching for employment at the Juneau Employment Service. CP 388.

Mr. Leck was unconditionally released in September 2002. CP 191. In April 2003, an employee at the YMCA in Bremerton, Washington, contacted police and told them Mr. Leck had applied for membership. CP 191. Police contacted the address Mr. Leck provided to the YMCA, which was for "World Peace Ambassadors," a charitable organization. CP 192. A man there said Mr. Leck had begun working at the organization about one week earlier and had access to one of the computers. CP 390-91. A search of the computer uncovered several images of minors engaged in sexually explicit conduct and "extensive records of internet searches for preteen girls and boys" conducted during the week Mr. Leck used the computer. CP 391. Mr. Leck was ultimately convicted in Kitsap County of 46 counts of possession of depictions of a minor engaged in sexually explicit conduct. CP 152-63.

2. Chapter 71.09 RCW petition and motion to dismiss.

On July 24, 2008, the Attorney General filed a petition in Kitsap County alleging Mr. Leck was a "sexually violent predator."[2] CP 1-2.

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[2] The petition stated:
Petitioner alleges Respondent is a sexually violent predator, as that term is defined in RCW 71.09.020(16), given the following:

1. Respondent has been convicted of the following sexually violent offenses, as that term is defined in RCW 71.09.020(15)(b) and (d):

The State alleged, among other things, that Mr. Leck currently suffered from a "mental abnormality," namely pedophilia. CP 1-2. The petition did not allege Mr. Leck suffered from antisocial personality disorder or any other personality disorder.

Mr. Leck filed a motion to dismiss the petition for want of jurisdiction and probable cause. CP 67-113. He asserted the State was without statutory authority to file the petition in Kitsap County because he was never convicted of a "sexually violent offense" in Washington

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> a. On or about January 15, 1985, in the Superior Court of Alaska, Fourth District, in Fairbanks, Cause No. 4FA-S-84-1241CR, Respondent was convicted of one count of Attempted Sexual Abuse of a Minor in the Second Degree, in violation of AS 11.41.436, AS 11.31.100; and
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> b. On or about June 21, 1984 in the Superior Court of Alaska, Third Judicial District, in Anchorage, Cause No. 3An-S84-3245 CR, Respondent was convicted of on count of Sexual Abuse of a Minor in the Second Degree, in violation of AS 11.41.436(a)(1).
>
> These offenses are sexually violent offenses as they are comparable to felony offenses in Washington that are sexually violence offenses. RCW 71.09.020(15)(b). This is demonstrated in the Certification for Determination of Probable Cause filed in this matter.
>
> 2. Respondent currently suffers from:
>
> a. A mental abnormality, as that term is defined in RCW 71.09.020(8), specifically, Pedophilia, Sexually Attracted to Males, Nonexclusive Type.
>
> 3. Respondent's Pedophilia causes him to have serious difficulty controlling his sexually violent behavior and makes him likely to engage in predatory acts of sexual violence unless confined to a secure facility.

CP 1-2.

State. Id. He also argued he had been unlawfully detained beyond the five-year statutory maximum for his possession of child pornography convictions, and therefore the State was required to prove he committed a "recent overt act." CP 71.

After a hearing, the court found the State had authority to file the petition in Kitsap County and Mr. Leck was not unlawfully detained.[3] The court found the State filed its petition in Thurston County on April 10, 2007, before the statutory maximum on the Kitsap County convictions expired on April 16, 2008. 3/10/09RP 33-34; CP 239. Mr. Leck stipulated to probable cause[4] and at that point was not eligible for release. 3/10/09RP 33-34; CP 239.

3. Recent overt act hearing.

The State filed a motion arguing it need not prove to a jury that Mr. Leck committed a "recent overt act" because he was incarcerated at the time the petition was filed. CP 293-502. The State asked the court

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[3] A copy of the court's written findings and conclusions on the motion to dismiss is attached as appendix A.

[4] Even if Mr. Leck stipulated to probable cause in Thurston County, he did not stipulate to probable cause when the State re-filed its petition in Kitsap County. As stated, probable cause was contested and the court entered a new order determining the existence of probable cause. CP 67-113, 214-37, 238-45.

to find, as a matter of law, that Mr. Leck's Kitsap County convictions for possession of child pornography were a recent overt act. CP 297.

In support of the motion, the State submitted an evaluation of Mr. Leck by its expert, Dr. Dale Arnold. CP 349-79. Dr. Arnold diagnosed Mr. Leck with pedophilia and antisocial personality disorder. CP 356. But the State never amended its petition to allege Mr. Leck suffered from antisocial personality disorder.

The defense submitted the evaluation of its own expert, Dr. Richard Wollert. Sub #204.[5] Like Dr. Arnold, Dr. Wollert diagnosed Mr. Leck with antisocial personality disorder. Id. at 32. But Dr. Wollert disputed Dr. Arnold's diagnosis of pedophilia. Id. at 35. He also disputed that Mr. Leck met most of the other criteria for civil commitment. Id. at 36-42.

The court held a hearing on the State's motion. Counsel requested the hearing be continued so Mr. Leck could be present. 1/14/11RP 2-3. The court denied the motion, finding the issues presented were purely legal and therefore Mr. Leck had no right to be present.[6] 1/14/11RP 4.

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[5] A supplemental designation of clerk's papers has been filed for this document.

[6] Mr. Leck was permitted to listen in by telephone. 1/14/11RP 2-3.

The court found Mr. Leck's 2003 convictions for possession of child pornography were a recent overt act.[7] CP 765-69. Mr. Leck disputed many of the relevant facts. Most important, he disputed that he had a "mental condition" that predisposed him to commit acts of sexual violence. Specifically, he disputed Dr. Arnold's diagnosis of pedophilia. The court attempted to avoid this dispute by making no finding regarding Mr. Leck's "mental condition." CP 765-69.

Mr. Leck disputed other facts on which the court relied. For example, the court found significant that Mr. Leck violated parole in 2002 by accessing pornography sites on a state-owned computer. CP 767. But Mr. Leck had explained to Dr. Wollert he did not actually access any pornography sites but instead submitted a resume to a site called "gaytruckers.com." Sub #204 at 25. "The word 'gay' flagged pop-ups," which were only about adults, not children. Id.

The court also found significant that in 2003, when Mr. Leck traveled to Bremerton, he applied for membership at the YMCA. CP 767. But Mr. Leck had explained to Dr. Wollert that he and his former partner Al often stayed at the YMCA when they traveled around the country in the 1970s, because "[m]ost YMCAs have large gay

[7] A copy of the court's written findings and conclusions following the recent overt act hearing is attached as appendix B.

contingencies. That's why we stayed there or at the bathhouses." Sub #204 at 19.

Finally, the court found significant that, when Mr. Leck was arrested in 2003 at World Peace Ambassadors, police found a printed picture of a partially-nude boy torn into pieces in the trash can, and Mr. Leck told police he "had a problem" and was "trying so hard to stay away from this." CP 767. But Mr. Leck had explained to Dr. Wollert he tore up the picture because he had printed it by mistake; he "didn't want to have anything like that in my possession because I knew that physical possession of child pornography was illegal." Sub #204 at 27. He did not understand at the time that looking at the images on the computer was a crime; he thought only *physically possessing* the images was a crime. Id. at 26. In regard to his statement to police, Mr. Leck told Dr. Wollert his "intention was to let the officer know that I had been trying to stay away from all contact with law enforcement officers—it had nothing to do with the computer images." Id.

4. Commitment trial.

After a first trial resulted in a hung jury, a second trial was held in August 2011. Dr. Arnold testified he diagnosed Mr. Leck with pedophilia and antisocial personality disorder. 8/08/11RP 230. He

explained Mr. Leck's pedophilia was "nonexclusive" in that he was attracted to both children and adults. 8/08/11RP 239-40. A person attracted to both children and adults is more likely to benefit from treatment and is probably a lower risk to reoffend. 8/08/11RP 241.

Dr. Arnold based his diagnosis of pedophilia on Mr. Leck's sexual contact with several children from 1978 to the early 1980s; his possession of child pornography; his statement to Dr. Arnold that he would probably have a sexual interest in children for the rest of his life; his sexual contact with his sister as an adolescent; the fact he "groomed" the boys he molested, meaning he formed relationships with them and introduced sex slowly into the relationships; the fact he orally copulated the boys, which shows he was sexually aroused by the children and not simply by the sexual act itself; and the fact he had requested chemical castration in the past in order to help manage his urges.[8] 8/08/11RP 244-66. Dr. Arnold acknowledged that Mr. Leck's admission that he would probably have sexual urges toward children for the rest of his life is a significant step toward successful treatment, which is all about managing urges. 8/08/11RP 259, 269.

[8] The information about Mr. Leck relayed by Dr. Arnold was admitted only to evaluate the credibility of the doctor's opinion and not for the truth of the matters asserted. 8/08/11RP 242-43.

Dr. Arnold based his diagnosis of antisocial personality disorder on Mr. Leck's failure to abide by the law and numerous arrests over the years for various property and other nonviolent crimes; his difficulty complying with parole conditions; his indiscriminate untruthfulness; his impulsivity and irresponsibility; his reckless disregard for the safety of himself and others; and his lack of remorse. 8/08/11RP 275-81.

Dr. Arnold testified Mr. Leck's pedophilia created the urge to molest children and his antisocial personality disorder interfered with the ability to resist the urge. 8/08/11RP 287-88. Both disorders together predisposed Mr. Leck to commit criminal sexual acts. 8/08/11RP 288. Therefore, Mr. Leck had *both* a mental abnormality *and* a personality disorder that caused him serious difficulty controlling his behavior. 8/08/11RP 289-91.

In Dr. Arnold's opinion, Mr. Leck was more likely than not to reoffend. 8/08/11RP 291-83, 337-38. The doctor acknowledged Mr. Leck's scores on the actuarial tools would go down when he reached the age of 60 in a few months. 8/08/11RP 332. But even then, Mr. Leck would be more likely than not to reoffend. 8/08/11RP 332.

Mr. Leck admitted he had sexual contact with several children in the late 1970s and early 1980s. 8/09/11RP 557, 563. But most of

his sexual experience had been with other men; he had several homosexual relationships, including one that lasted several years. 8/09/11RP 555-58, 563-64. Mr. Leck did not understand at the time he had sexual contact with children that it harmed them. 8/09/11RP 566. Once he realized that, he vowed to have no more sexual contact with children. 8/09/11RP 567. He no longer had strong urges that made him feel compelled to molest children. 8/10/11RP 635-37. He had not had sexual contact with a child since the early 1980s; if released, he would have no sexual contact with children. 8/10/11RP 638.

Consistent with Mr. Leck's testimony, the record contains no evidence he had any sexual contact with a child since the early 1980s.

Mr. Leck also acknowledged he searched for child pornography on the computer at World Peace Ambassadors in 2003. 8/09/11RP 583-84. He knew it was against the law to "possess" physical images of children in sexually explicit poses but did not realize it was a crime to view such images on the internet. 8/09/11RP 583-84. Although he participated in sex offender treatment in the 1990s, the subject of child pornography never came up. 8/09/11RP 605; 8/10/11RP 711. He did not think there was a connection between viewing child pornography and the risk of reoffense. 8/09/11RP 606. But now he understood that

possession of child pornography is not a victimless crime. 8/10/11RP 635-36. If released, he would not search for child pornography. 8/10/11RP 635-36. The parties stipulated that, although Mr. Leck's room at the Special Commitment Center was searched many times, he was never caught with pornography. CP 912-13.

Dr. Wollert, Mr. Leck's expert, testified Mr. Leck did not have a "mental abnormality" for purposes of the statute but did have antisocial personality disorder. 8/10/11RP 753. He probably had pedophilia in the 1980s but no longer had that disorder because he no longer had intense urges regarding children and had no contact sex offenses since the early 1980s. 8/10/11RP 756-57. Possession of child pornography is not correlated in the scientific literature with contact sex offenses. 8/10/11RP 757. Finally, Dr. Wollert explained Mr. Leck's advanced age put him at a lower risk of reoffense. 8/10/11RP 761. Mr. Leck was not more likely than not to reoffend if released. 8/10/11RP 782.

Dr. Arnold testified in rebuttal to Dr. Wollert's testimony. Dr. Arnold testified that in 2003 when Mr. Leck viewed sexually explicit images of children on the internet, he was in the fantasy stage of the "reoffense cycle," moving toward possible reoffense. 8/15/11RP 1043. After the fantasy stage comes the opportunity stage. 8/15/11RP 1043.

Dr. Arnold explained that Mr. Leck's application to the YMCA was significant because he had met boys there before 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." 8/15/11RP 1043. At that point, counsel objected, arguing the evidence was inadmissible hearsay and overly prejudicial. 8/15/11RP 1044-45. Outside the presence of the jury, the court ruled the sister's out-of-court statement was admissible because Dr. Arnold relied upon it to form his opinion. 8/15/11RP 1045. But the court did not instruct the jury when it returned on the limited purpose of the evidence. 8/15/11RP 1045-46. Dr. Arnold then elaborated that Mr. Leck's sister had predicted he would apply to the YMCA when he moved to Bremerton. 8/15/11RP 1046.

In the "to commit" instruction, the jury was instructed one of the "elements" the State had to prove beyond a reasonable doubt was that Mr. Leck "suffers from a mental abnormality *or* personality disorder which causes serious difficulty controlling his sexually violent behavior."[9] CP 1580 (emphasis added).

[9] The "to commit" instruction, number 4, provided:

The jury found Mr. Leck was a "sexually violent predator" and the court ordered him committed indefinitely. CP 1598-99.

E. ARGUMENT

1. MR. LECK'S STATUTORY AND DUE PROCESS RIGHT TO NOTICE WAS VIOLATED WHEN THE JURY WAS INSTRUCTED ON AN ALTERNATIVE MEANS NOT ALLEGED IN THE PETITION

a. Detainees in chapter 71.09 RCW civil commitment trials have a statutory and due process right to notice of every element of the "sexual violent predator" designation.

The entire proceeding leading to a determination that a person is a "sexually violent predator" under chapter 71.09 RCW is initiated by and made dependent upon the filing of a petition. The statute requires the State to file a petition "alleging that [the] person is a sexually

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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 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. . .

CP 1580.

violent predator and stating sufficient facts to support such allegation." RCW 71.09.030(1). In other words, the statute requires the State to file a petition setting forth every element of the "sexually violent predator" designation.

"RCW 71.09.025 and RCW 71.09.030 establish the mandatory and exclusive procedure whereby a prosecuting attorney commences a sexually violent predator commitment proceeding." In re Det. of Martin, 163 Wn.2d 501, 507, 182 P.3d 951 (2008). Before the State may commit a person indefinitely under chapter 71.09 RCW, the State must "fully comply[] with the statute." Id. at 516.

Detainees in chapter 71.09 RCW proceedings are also entitled to the protections of the Due Process Clause. In re Det. of Halgren, 156 Wn.2d 795, 807-08, 132 P.3d 714 (2006); In re Pers. Restraint of Young, 122 Wn.2d 1, 48, 857 P.2d 989 (1993); Specht v. Patterson, 386 U.S. 605, 608, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967); U.S. Const. amend. XIV; Const. art. I, § 3. The person is "entitled to a full judicial hearing" and "the full panoply of the relevant protections which due process guarantees in state criminal proceedings," including "all those safeguards which are fundamental rights and essential to a fair trial." Specht, 386 U.S. at 609-10.

Central to the rights guaranteed by the Due Process Clause is the right to full and fair notice. In criminal trials, the due process right to notice entails the right to be informed, in writing, of the elements of the crime. State v. Kjorsvik, 117 Wn.2d 93, 107, 812 P.2d 86 (1991). "The primary goal of the 'essential elements' rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." Id. at 101. Criminal "defendants are entitled to be fully informed of the nature of the accusation against them *so that they can prepare an adequate defense*." Id. A charging document that fails to set forth the essential elements of the crime in such a way that the defendant is notified of both the illegal conduct and the crime with which he or she is charged is constitutionally defective and must be dismissed. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992).

The Due Process Clause guarantees detainees in civil commitment proceedings these same safeguards. Specht, 386 U.S. at 609-10; Young, 122 Wn.2d at 48. Just as due process requires a charging document set forth every element of the crime, due process similarly requires a civil commitment petition set forth every "element" of the "sexually violent predator" designation.

b. Mr. Leck's statutory and constitutional right to notice was violated because the jury was instructed on a statutory alternative means that was not set forth in the petition.

Fundamental to the constitutional right to notice in a criminal case is the principle that the defendant cannot be tried for an offense not charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). When a statute sets forth alternative means by which a crime can be committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives charged are not repugnant to one another. State v. Noltie, 116 Wn.2d 831, 842, 809 P.2d 190 (1991). But if the information alleges a particular alternative, it is error for the factfinder to consider uncharged alternatives, regardless of the range of evidence presented at trial. State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); State v. Doogan, 82 Wn. App. 185, 188-90, 917 P.2d 155 (1996) (holding trial court committed prejudicial error when it instructed jury on uncharged alternative means of committing second degree prostitution); State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988) (prejudicial error where jury instructed on uncharged alternative means of committing forgery).

A jury instruction that is erroneous because it includes a statutory alternative not charged in the information is a "manifest error affecting a constitutional right" that may be challenged for the first time on appeal. State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); RAP 2.5(a)(3).

In chapter 71.09 RCW civil commitment cases, the statutory terms "mental abnormality" and "personality disorder" are two alternative means of establishing the mental illness element. In re Det. of Halgren, 156 Wn.2d 795, 810-11, 132 P.3d 714 (2006). The statute defines a "sexually violent predator" as "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 order to prove a person is a "sexually violent predator," the State must prove beyond a reasonable doubt the person suffers from *either* a "mental abnormality" *or* a "personality disorder." In re Det. of Pouncy, 168 Wn.2d 382, 391, 229 P.3d 678 (2010).

Here, the jury was instructed on an alternative means that was not set forth in the petition. The petition alleged Mr. Leck suffered

from "[a] mental abnormality, . . . specifically, Pedophilia." CP 1-2. The petition did *not* allege Mr. Leck suffered from a "personality disorder." But the jury was instructed it could find Mr. Leck was a "sexually violent predator" if it found he suffered "from a mental abnormality *or* personality disorder." CP 1580 (emphasis added).

Because the jury was instructed on an alternative means not set forth in the petition, Mr. Leck's statutory and constitutional right to notice was violated. Martin, 163 Wn.2d at 516; Severns, 13 Wn.2d at 548; Doogan, 82 Wn. App. at 188-90; Bray, 52 Wn. App. at 34.

c. The commitment order must be reversed.

The error in the jury instruction is presumed prejudicial and requires reversal unless it affirmatively appears the error was harmless. Bray, 52 Wn. App. at 34-35. An error in offering an uncharged alternative means as a basis for conviction is prejudicial if it is possible the jury might have convicted the defendant under the uncharged alternative. Doogan, 82 Wn. App. at 189.

Here, the error is not harmless because it is possible—indeed likely—the jury relied on the alternative that was not set forth in the petition. The State presented evidence that Mr. Leck suffered from *both* a "mental abnormality" *and* a "personality disorder." Dr. Arnold

testified he diagnosed Mr. Leck with both pedophilia and antisocial personality disorder. 8/08/11RP 230. He testified at length about why he thought Mr. Leck suffered from each disorder. 8/08/11RP 230-87. He also specifically opined the two disorders *together* predisposed Mr. Leck to commit criminal acts: his pedophilia created the urge to offend and his antisocial personality disorder interfered with his ability to resist the urge. 8/08/11RP 288. The assistant attorney general reiterated this theme in closing argument. 8/15/11RP 1093-1100.

Because it is possible the jury relied on Dr. Arnold's opinion that Mr. Leck had an antisocial personality disorder in order to find he was a "sexually violent predator," the commitment order must be reversed. Doogan, 82 Wn. App. at 189; Bray, 52 Wn. App. at 34-35.

2. MR. LECK'S CONSTITUTIONAL DUE PROCESS RIGHT TO BE PRESENT WAS VIOLATED WHEN HE WAS NOT ALLOWED TO ATTEND THE "RECENT OVERT ACT" HEARING WHERE THE COURT CONSIDERED DISPUTED FACTS

a. A detainee in a chapter 71.09 RCW proceeding has a due process right to be present at any hearing where his presence might reasonably contribute to his ability to defend against the charge.

As stated, detainees in chapter 71.09 RCW proceedings are entitled to the protections of the Due Process Clause, including "all

those safeguards which are fundamental rights and essential to a fair trial." Specht, 386 U.S. at 608; Young, 122 Wn.2d at 48; U.S. Const. amend. XIV; Const. art. I, § 3.

In a criminal case, a defendant has a constitutional due process right to be present at any proceeding where "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The right to be present applies not only to those proceedings where evidence is taken or witnesses testify. Id. at 106. It also applies to proceedings, such as the examination of jurors or the summing up of counsel, where "it will be in [the defendant's] power, if present to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." Id. On the other hand, the defendant does not have a constitutional right to be present "when [his] presence would be useless, or the benefit but a shadow." Id. at 106-07. The constitutional right to be present applies "to the extent that a fair and just hearing would be thwarted by his absence." Id. at 107-08.

The standard set forth by the United States Supreme Court in Snyder for determining whether a criminal defendant has a constitutional due process right to be present at a particular proceeding applies equally to civil commitment trials under chapter 71.09 RCW. See In re Det. of Morgan, 161 Wn. App. 66, 74, 253, P.3d 394 (2011).

Civil detainees in chapter 71.09 RCW proceedings do not have a constitutional right to be present "'during in-chambers or bench conferences between the court and counsel on legal matters.'" Id. (quoting In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998)). In Morgan, this Court held a civil detainee did not have a constitutional right to be present at a chambers meeting between the judge and counsel "where purely legal questions about the process of deciding a forced medication motion were discussed." 161 Wn. App. at 74. The transcript of the meeting showed

> the meeting included a discussion of the legal standard that the trial court should apply when ruling on the involuntary medication motion and whether the trial court had adequate information to rule on the motion. No ruling was made during the meeting, and Morgan's presence would not have influenced the ultimate outcome of the matters discussed at the meeting.

Id. Thus, "Morgan's rights were represented fully and not violated by his lack of attendance at the meeting." Id. at 74-75.

By contrast, at a proceeding where the court makes factual findings and considers disputed facts, the detainee's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder, 291 U.S. at 105-06. He therefore has a constitutional right to be present at such a proceeding. Id.

b. Mr. Leck had a constitutional right to be present at the "recent overt act" hearing because the court made factual findings and considered disputed facts.

Due process requires an individual be both mentally ill and presently dangerous before he or she may be indefinitely committed. Foucha v. Louisiana, 504 U.S. 71, 77, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); In re Det. of Marshall, 156 Wn.2d 150, 157, 125 P.3d 111 (2005). If a person is not incarcerated at the time a chapter 71.09 RCW petition is filed, the State must show present dangerousness by proving the person committed a "recent overt act." Young, 122 Wn.2d at 41. A "recent overt act" is "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).

If the person is incarcerated at the time the petition is filed, this standard may be impossible to meet. Young, 122 Wn.2d at 41. In that circumstance, the State can meet the present dangerousness requirement by showing the individual is incarcerated for a "sexually violent offense" as defined by the statute, or for an act that would itself qualify as a recent overt act. In re Det. of Henrickson, 140 Wn.2d 686, 695, 2 P.3d 473 (2000). Only if the State can make that showing is it excused from proving at trial that "a further overt act occurred between arrest and release from incarceration." Id.

Here, at the time the State filed its petition, Mr. Leck was incarcerated on his 2003 convictions for possession of depictions of a minor engaged in sexually explicit conduct. That is not a "sexually violent offense" for purposes of the statute. See RCW 71.09.020(17). Therefore, the State was required to show Mr. Leck's convictions were for an act that qualified as a "recent overt act." Henrickson, 140 Wn.2d at 695.

The inquiry whether an individual is incarcerated for an act that qualifies as a recent overt act is for the court, not a jury. Marshall, 156 Wn.2d at 158. The court applies a two-step analysis. Id. First, the court inquires into the factual circumstances of the individual's history

and mental condition; second, the court decides, as a matter of law, whether an objective person knowing the factual circumstances of the individual's history and mental condition would have a reasonable apprehension that the individual's act would cause harm of a sexually violent nature. Id.

In many cases, the court will consider only undisputed facts in making the recent overt act determination, including those established in the record of the conviction resulting in incarceration. In re Detention of Brown, 154 Wn. App. 116, 124-25, 225 P.3d 1028 (2010). "In other words, the original proceeding provided [the detainee] with an opportunity to contest the factual allegations supporting the conviction, and the recent overt act inquiry is not meant to afford [him] a second opportunity to litigate those facts." Id.

But in other cases, the court will have to consider contested facts in order to find the individual's conduct qualifies as a recent overt act. The court must consider not only the facts underlying the conviction, which were established in the prior proceeding, but also whether those facts create a reasonable apprehension of harm of a sexually violent nature 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); Marshall, 156 Wn.2d at 158. In other words, the court must consider facts related to the person's history and mental condition. In many cases, those facts will be contested.

Here, Mr. Leck disputed that he had a "mental condition" that predisposed him to commit acts of a sexually violent nature. Dr. Wollert opined that Mr. Leck did *not* have pedophilia and did not have intense sexual urges toward children that were difficult for him to control. Sub #204 at 35.

In addition, Mr. Leck disputed many of the facts about his history. He disputed that he had been searching for pornography sites on a state-owned computer in 2002. Sub #204 at 25. He disputed that he applied for membership at the YMCA in Bremerton in order to meet children. Id. at 19. He claimed that when he told police at the time of his arrest that he "had a problem" and was "trying so hard to stay away from this," he did not mean he had a problem staying away from child pornography. Id. at 27. Instead, he meant he had been trying to stay away from contact with law enforcement officers. Id. at 26.

In sum, Mr. Leck had a constitutional right to be present at the recent overt act hearing because the court considered disputed facts and made factual findings. Many of those facts were within the unique

knowledge of Mr. Leck. Therefore, "his presence ha[d] a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder, 291 U.S. at 105-06. The proceeding was not merely an in-chambers or bench conference on purely legal matters. See Morgan, 161 Wn. App. at 74. Because a fair and just hearing was "thwarted by his absence," Mr. Leck's constitutional right to be present was violated. Snyder, 291 U.S. at 107-08.

3. MR. LECK'S DUE PROCESS RIGHT TO CROSS-EXAMINATION WAS VIOLATED WHEN THE STATE'S EXPERT WITNESS RELAYED A HIGHLY PREJUDICIAL OUT-OF-COURT STATEMENT MADE BY MR. LECK'S SISTER WITHOUT ANY OPPORTUNITY TO CROSS-EXAMINE HER

In rebuttal, Dr. Arnold testified, over objection, that Mr. Leck's sister told police Mr. Leck would probably apply for membership at the YMCA when he moved to Bremerton because that is how he had met many of his victims in the past. 8/15/11RP 1043, 1046. Dr. Arnold testified "that's how [Mr. Leck] 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." 8/15/11RP 1043. But Mr. Leck never had an opportunity to cross-examine his sister about the statement.

This violated Mr. Leck's constitutional right to cross-examination because the statement was highly prejudicial, cross-examination could have brought out the witness's biases and prejudices, the limiting instruction given was not capable of erasing the prejudice, and the State did not have a compelling need for the evidence.

a. Detainees in chapter 71.09 RCW proceedings have a constitutional due process right to cross-examine the witnesses against them.

A detainee in a civil commitment proceeding under chapter 71.09 RCW has a constitutional due process right to "confront and cross-examine the witnesses against him." Specht, 386 U.S. at 609-10; In re Det. of Stout, 159 Wn.2d 357, 368-69, 150 P.3d 86 (2007); U.S. Const. amend. XIV; Const. art. I, § 3.

It is well-settled that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Cross-examination serves the important function of not only "test[ing] the witness' perceptions and memory," but also provides an opportunity to "impeach, i.e., discredit, the witness." Id. The United States Supreme Court "recognize[s] that the exposure of a

witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id. at 316-17.

b. Mr. Leck's constitutional right to cross-examination was violated because he never had an opportunity to test his sister's motive and bias through the mechanism of cross-examination.

ER 703 allows experts to base their opinion testimony on facts or data that are not admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Also, ER 705 provides that an "expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise." Together, these rules permit a trial court to allow an expert to relate otherwise inadmissible out-of-court statements to the jury in order to explain the reasons for his or her opinion. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice, § 705.5, at 293-94 (5th ed. 2007).

But "it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible

evidence." Marshall, 156 Wn.2d at 162. Regardless of whether the evidence is admissible under the Rules of Evidence, constitutional due process still requires the proceeding be fair. Stout, 159 Wn.2d at 370.

To determine whether admission of an out-of-court statement violated a detainee's due process right to cross-examination, the Court applies the three-factor Mathews v. Eldridge test. Stout, 159 Wn.2d at 370 (citing Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). The Court considers (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. Applying the factors here demonstrates Mr. Leck's due process rights were violated.

First, it is well-established that the first factor weighs heavily in Mr. Leck's favor. Id. "There is no dispute that [Mr. Leck] has a significant interest in his physical liberty." Id.

Second, the risk of erroneous deprivation created by the procedure employed is substantial. Dr. Arnold essentially told the jury Mr. Leck's sister had predicted Mr. Leck would apply for membership

at the YMCA in Bremerton. 8/15/11RP 1043, 1046. Ms. Leck reportedly said this was his "pattern" of procuring young victims in the past. Id. Thus, the out-of-court statement portrayed Mr. Leck as a predator and was highly prejudicial.

Mr. Leck denied that he applied for membership at the YMCA, either in 2003 or earlier, in order to meet child victims. He testified he and his partner Al would often stay at the YMCA when they traveled around the country in the 1970s because it was known as a place that welcomed gay men. 8/09/11RP 558-59. He also testified he applied for membership at the YMCA in 2003 because it was familiar to him and he needed a place to shower. 8/09/11RP 581. He was staying in the office at World Peace Ambassadors and did not have access to a shower. 8/09/11RP 581. His sister's out-of-court statement seriously undermined the credibility of Mr. Leck's testimony. Mr. Leck should have been able to test her motives for making the statement.

Because of the potential for unfair prejudice created by the out-of-court statement, Mr. Leck should have had an opportunity for cross-examination. In Stout, the court held Mr. Stout was not denied his constitutional right to cross-examination when the trial court admitted the victim's deposition testimony in lieu of live testimony because each

of the goals of cross-examination was accomplished without live confrontation. 159 Wn.2d at 371. The victim was deposed under oath, Mr. Stout had an opportunity to impeach her at a subsequent deposition, and the jury was able to observe her demeanor when a videotape of the deposition was played at trial. Id. But none of those protections was present in this case. Ms. Leck did not make her statement under oath, Mr. Leck never had an opportunity to impeach her, and the jury never observed her demeanor.

There is undeniable reason to question Ms. Leck's motives and biases. Mr. Leck molested her on at least two occasions when he was an adolescent. 8/10/11RP 711. At the first trial, Mr. Leck testified his sister was jealous of his relationship with their father. 2/22/11RP 740. She had told their father he was "no good." 2/22/11RP 74. Plainly, there was bad blood between the siblings. Ms. Leck lived in the Bremerton area and was contacted by the State when Mr. Leck was released from prison in Alaska. 2/14/11RP 228, 271. She called Bremerton police and told them she was afraid he would come into the Kitsap County community. 2/14/11RP 192. She was motivated to see him confined.

Moreover, the court's limiting instruction was not sufficient to cure the unfair prejudice of Ms. Leck's out-of-court statement. Near the beginning of Dr. Arnold's direct testimony, the court told the jury, "Dr. Arnold is about to testify regarding information contained in file records he reviewed about Mr. Leck, which is part of the basis for his opinion. You may consider this testimony only in deciding what credibility and weight should be given to Dr. Arnold's opinion." 8/08/11RP 243. It is unlikely the jury remembered this instruction seven days later when the doctor testified in rebuttal, or understood from it that they should not consider Ms. Leck's out-of-court statement for the truth of the matter asserted.

Similarly, the court's written limiting instruction was unlikely to cure any unfair prejudice. The court instructed the jury,

> When Dr. Arnold/Dr. Wollert testified, I informed you that some information was admitted as part of the basis for his opinions, but may not be considered for other purposes. You must not consider this testimony as proof that the information relied upon by the witness is true. You may use this testimony only for the purpose of deciding what credibility or weight to give the witness's opinion.

CP 1579. The instruction refers only generally to "some information" contained in Dr. Arnold's testimony. It is unlikely the jury understood

from the instruction they should not consider Ms. Leck's out-of-court statement for the truth of the matter asserted.

Case law recognizes that even if a court tells the jury that evidence is admitted for a limited purpose, this does not necessarily cure a violation of the constitutional right to cross-examination. If the jury is likely to rely on the evidence as proof of the matters asserted, a limiting instruction may have little curative effect. See Bruton v. United States, 391 U.S. 123, 129-30, 129 n.4, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (agreeing it is "impossible realistically" to believe jury did not succumb to "the nigh irresistible temptation" to refer to the information ostensibly provided for a limited purpose when assessing the accused's guilt) (citation omitted); Richardson v. Marsh, 481 U.S. 200, 208, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 78 L. Ed. 196 (1933) (rejecting notion that jury could properly apply limiting instruction to evidence accusing defendant of criminal conduct as, "[d]iscrimination so subtle is a feat beyond the compass of ordinary minds."); State v. Parr, 93 Wn.2d 95, 107, 606 P.2d 263 (1980) (limiting instruction did not alleviate prejudice from statement accusing defendant of prior violent acts and threats improperly admitted for complainant's state of mind).

In the context of criminal trials, at least one commentator has argued that even if an out-of-court statement that is otherwise subject to the requirements of the Confrontation Clause is relevant for a nonhearsay purpose, courts should not admit such evidence absent an opportunity for cross-examination, unless: (1) the court finds the prosecution has a real and genuine need for the evidence for the nonhearsay purpose; and (2) the evidence is limited or redacted to blunt the risk of improper use while still accommodating the prosecution's legitimate need. See Jeffrey L. Fisher, The Truth About the "Not for Truth" Exception to Crawford, 32 Feb Champ 18 (Jan./Feb. 2008).

Here, the State did not have a real and genuine need for the evidence for a nonhearsay purpose. The State generally has an interest in protecting the community from sex offenders who pose a risk of reoffending. Stout, 159 Wn.2d at 371. But in this case, the State did not have a real and genuine need for Ms. Leck's out-of-court statement that was of questionable reliability. Dr. Arnold's opinion was amply supported by other evidence that was not nearly as objectionable.

In sum, Mr. Leck's due process rights were violated by admission of the out-of-court statement without an opportunity for cross-examination.

4. THE STATE ACTED WITHOUT STATUTORY AUTHORITY AND VIOLATED MR. LECK'S DUE PROCESS RIGHTS BY FILING A PETITION AGAINST HIM

a. Under the law in effect in 2008, the State did not have authority to file a petition against Mr. Leck.

In 1984 Mr. Leck was convicted of two "sexually violent offenses" in Alaska. CP 142-50. On July 24, 2008, the State filed the present petition against him in Kitsap County. CP 1-2. Mr. Leck moved to dismiss the petition arguing, in part, the State lacked the statutory authority to file the petition. CP 67-113.

At the time the Stated filed its petition, former RCW 71.09.030(5) (1995) provided,

> When it appears that . . . [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; and it appears that the person may be a sexually violent predator, the prosecuting attorney *of the county where the person was convicted or charged* or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is a "sexually violent predator" and stating sufficient facts to support such allegation.

(emphasis added).

In re Detention of Martin, 163 Wn.2d 501, 501, 182 P.3d 951 (2008), requires the petition be dismissed. Like Mr. Leck, Mr. Martin

was convicted of "sexually violent offenses" in another state. Id. at 505. While he was incarcerated in Washington for other offenses that did not qualify as "sexually violent offenses," the State filed a petition in Thurston County. Id. The supreme court held the petition must be dismissed because, according to the statute, only the prosecuting attorney "of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney" had authority to file the petition. Id. at 508. Because Mr. Martin's sexually violent offenses occurred in another state, the State did not have authority to file the petition in any Washington county. As in Martin, the State was without statutory authority to file the petition against Mr. Leck and it must be dismissed.

b. Retroactive application of RCW 71.09.030 would deny Mr. Leck due process.

After Martin was decided, the legislature rewrote RCW 71.09.030, effective May 2009, which provides in part:

> (1) A petition may be filed alleging that a person is a sexually violent predator . . . when it appears that: (1) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement . . . .
>
> (2) The petition may be filed by: (a) The prosecuting attorney of a county in which . . . (iii) The person committed a recent overt act, or was charged or convicted of a criminal offense that would qualify as a

> recent overt act, if the only sexually violent offense charge or conviction occurred in a jurisdiction other than Washington . . . .

Unlike former RCW 71.09.030, the amended statute authorizes the State to file a petition against an individual who committed a sexually violent offense outside of Washington. But the amendment cannot be applied retroactively to Mr. Leck.

Statutes are generally presumed to be prospective only. In re F.D. Processing, Inc., 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). The presumption against retroactive application of an amended statute "is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 384 (1999) (quoting Lance v. Mathis, 519 U.S. 433, 439, 117 S. Ct. 89, 137 L. Ed. 2d 63 (1997)). The presumption against retroactivity is expressed in several provisions of the United States Constitution, including the Ex Post Facto Clauses and the Due Process Clause. Landgraf v. USI Film Prods., 511 U.S. 244, 266, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); U.S. Const. art. I, §§ 9, 10; U.S. Const. amend. XIV. The Due Process

Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." Landgraf, 511 U.S. at 266.

Despite the presumption against retroactive application, a statutory amendment may apply retroactively if the legislature so intended, if it is curative, or if it is remedial. Cruz, 139 Wn.2d at 191. But even if one of these rules provides for retroactive application, the amendment will not be applied retroactively if doing so violates due process. F.D. Processing, Inc., 119 Wn.2d at 460.

Here, the amended version of RCW 71.09.030 cannot be applied retroactively because the amendment was not curative or remedial and there was no clear legislative intent to apply it retroactively.

Barring any constitutional prohibition, a statute may apply retroactively if the legislature so intended. Cruz, 139 Wn.2d at 191. To determine the legislature's intent, courts look to a statute's "purpose, language, legislative history, and legislative bill reports" in determining whether it applies retroactively. Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 537, 39 P.3d 984 (2002).

The Act's general application provision, Laws of 2009, ch. 409 § 15 provides: "This act applies to all persons currently committed or awaiting commitment under chapter 71.09 RCW either on, before, or

after May 7, 2009, whether confined in a secure facility or on conditional release." Although the provision states the Act must be applied retroactively, the legislature's intent as to whether RCW 71.09.030 was to be retroactive is ambiguous. First, other amendments of the Act were also passed under Laws 2009, ch. 409. See RCW 71.09.025 (prosecuting agency's authority to obtain records); RCW 71.09.040 (authority to house an inmate at the local jail pending a decision at a probable cause hearing). More significant, the legislature is silent as to how RCW 71.09.030 is to be applied in cases where individuals are already committed based on petitions that were filed without statutory authority. It does not state whether the prior unlawful petitions will be automatically deemed lawful or whether the petitions must be dismissed and re-filed under the amended statute.

Because of this ambiguity, the Court should not apply RCW 71.09.030 retroactively. At best, the language of the statute and its general application provision create doubt as to the legislature's intended meaning. They do not establish the clear and unequivocal demand for retroactive application.

A statutory amendment that is curative may act retroactively. Cruz, 139 Wn.2d at 191. But "an amendment is curative only if it

clarifies or technically corrects an ambiguous statute." F.D. Processing, Inc., 119 Wn.2d at 461. "Ambiguity exists when a law can be reasonably interpreted in more than one way." McGee Guest Home, Inc. v. Dep't of Soc. and Health Servs., 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (internal quotation omitted).

In Martin the supreme court held that former RCW 71.09.030 is not ambiguous. Indeed, the court held the statute "exclusively authorizes a specific county prosecutor to commence the proceedings. This language *is not ambiguous*, and we assume the legislature means exactly what it says." Martin, 163 Wn.2d at 508 (emphasis added). Therefore, as the amendment to the statute cannot be characterized as clarifying, it is not curative and cannot be applied retroactively.

The statute is also not remedial. "A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantial or vested right." Miebach v. Colarsudo, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984). As for "the word 'procedural,' it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." Collins v. Youngblood, 497 U.S. 37, 45, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

The 2009 amendment to RCW 71.09.030 was not merely procedural. Rather, it affected a vested right of a class of individuals. Prior to the amendment, individuals who committed predicate offenses outside Washington could not be subject to civil commitment proceedings. Martin, 163 Wn.2d 501. The amendment granted prosecutors authority to file civil commitment petitions against these individuals. Because these individuals, such as Mr. Leck, would not otherwise be subject to civil commitment based on former RCW 71.09.030, the amendment affects a substantive and vested right.

Martin held RCW 71.09.030 is not merely procedural and relates to a person's substantial rights. 163 Wn.2d at 511. The court dismissed the civil commitment petition because, under RCW 71.09.030, the Thurston County prosecutor lacked authority to commence proceedings where the prosecutor never charged or convicted Mr. Martin. Id. at 516. In so holding the court found: "[W]e believe civil incarceration that is noncompliant with the process due under the statute which authorizes civil incarceration affects a person's substantial rights, namely depriving basic liberty without the process due." Id. at 511 (citing state and federal Due Process Clause).

Retroactive application of RCW 71.09.030 interferes with Mr. Leck's vested rights.

The State filed its petition against Mr. Leck in July 2008, before the current version of RCW 71.09.030 came into effect. Martin made clear the State did not have authority to file the petition because he was not convicted of any sexually violent offense in Washington. Because the amended version of the statute cannot be categorized as curative or remedial and it lacked clear legislative intent to apply retroactively, RCW 71.09.030 cannot be applied retroactively against Mr. Leck.

Because In re Detention of Durbin, 160 Wn. App. 414, 248 P.3d 124 (2011), review denied, 172 Wn.2d 1007, 259 P.3d 1108 (2011), contravenes these principles, this Court should not follow it.

c. Mr. Leck was denied due process where he was civilly committed without the State proving present dangerousness.

Mr. Leck was convicted of possession of depictions of a minor engaged in sexually explicit conduct for an incident that occurred in 2003. Five years later, the State filed the petition for which Mr. Leck is currently held. The trial court found the 2003 convictions amounted to a "recent overt act." But because the event was not "recent," Mr. Leck's constitutional right to due process was violated.

As stated, "[t]he constitution requires that a person shall not be deprived of life, liberty or property without due process of law." Young, 122 Wn.2d at 26; U.S. Const. amend. XIV; Const. art. I, § 3. Due process requires an individual be both mentally ill and presently dangerous before he or she may be indefinitely committed. Foucha, 504 U.S. at 77; Marshall, 156 Wn.2d at 157. If a person is incarcerated at the time the petition is filed, the State can meet the present dangerousness requirement only by showing the individual is incarcerated for a "sexually violent offense" or for an act that would itself qualify as a recent overt act. Henrickson, 140 Wn.2d at 695.

In Marshall, the State filed a chapter 71.09 RCW petition against Mr. Marshall while he was incarcerated for third degree rape, which is not a "sexually violent offense." 156 Wn.2d at 156. The supreme court upheld the trial court's determination that the act for which Mr. Marshall was convicted was a recent overt act. Id. at 159. But Marshall is distinguishable because Mr. Marshall was lawfully confined at the time the State filed its petition. Here, by contrast, Mr. Leck was not lawfully confined when the State filed its petition because the State had erroneously filed the petition in Thurston County, and because Mr. Leck had been detained beyond the statutory maximum for

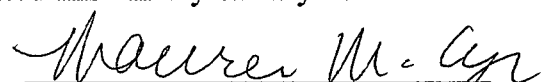
the possession of child pornography convictions when the Kitsap County petition was filed.

F. CONCLUSION

Mr. Leck's statutory and due process right to notice was violated when the jury was instructed on an alternative statutory means not alleged in the petition. His constitutional right to be present was violated when the court held a hearing and found he committed a recent overt act without permitting Mr. Leck to be present at the hearing. His constitutional right to cross-examination was violated when the State's expert relayed an out-of-court statement that was highly prejudicial but Mr. Leck never had an opportunity to cross-examine the declarant. For these reasons, the commitment order must be reversed and remanded for further proceedings.

Alternatively, the State acted without statutory authority and violated Mr. Leck's due process rights when it filed its petition. For this reason, the commitment order must be reversed and the petition dismissed with prejudice.

Respectfully submitted this 4th day of May 2012.



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APPENDIX A

STATE OF WASHINGTON
KITSAP SUPERIOR COURT

In re the Detention of: JACK LECK II, Respondent.	NO. 08-2-01852-2 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS RE: PROBABLE CAUSE, CUSTODIAL EVALUATION AND MOTION TO DISMISS

THIS MATTER came before the Court on March 10, 2009, on Petitioner's Motion for Order Affirming the Existence of Probable Cause and Directing the Custodial Detention and Evaluation of Respondent, and Respondent's Motion to Dismiss for Want of Jurisdiction and Probable Cause. Petitioner was represented by Assistant Attorney General Elizabeth A. Baker. Respondent was present in person and represented by attorney Robert Naon. The Court considered the motions, responses and replies, as well as the files and records herein and the argument of counsel. After full consideration, the Court enters the following:

I. FINDINGS OF FACT

1. In 2003, Mr. Leck was convicted of 46 counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct in Kitsap County, Washington. Mr. Leck has been totally confined since that conviction was entered.

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2. While Mr. Leck was still incarcerated on the 2003 Kitsap County criminal case, Dr. Dale Arnold, Ph.D., evaluated him to determine whether Mr. Leck met the RCW 71.09.020 criteria as a sexually violent predator (SVP).

3. Dr. Arnold authored two reports, dated January 25, 2006, and January 27, 2007. Dr. Arnold concluded that Mr. Leck suffers from a mental abnormality or personality disorder that causes him to have serious difficulty controlling his dangerous behavior. Dr. Arnold also concluded that Mr. Leck's mental abnormality or personality disorder makes him more likely than not to engage in predatory acts of sexual violence if not committed to a secure facility.

4. On April 10, 2007, before the projected end of Mr. Leck's incarceration on his 2003 Kitsap County criminal case, Petitioner filed a sexually violent predator (SVP) action against Mr. Leck in Thurston County, Washington.

5. On September 21, 2007, Mr. Leck stipulated to a finding that there is probable cause to believe he is a sexually violent predator in the Thurston County SVP case.

6. After Mr. Leck stipulated to probable cause in the Thurston County SVP case, the Washington Supreme Court issued its ruling in *In re Detention of Martin*, 163 Wn.2d 501, 182 P.3d 951 (2008). The mandate was issued July 2, 2008.

7. In response to *Martin*, Petitioner determined the SVP action against Mr. Leck should have been filed in Kitsap County. Consequently, Petitioner filed this action in Kitsap County and dismissed the Thurston County SVP case, without prejudice.

8. Kitsap County Superior Court Judge Costello promptly conducted a preliminary probable cause determination pursuant to RCW 71.09.040(1), found probable cause exists to believe Mr. Leck is a sexually violent predator, and set the matter for a contested probable cause hearing within 72 hours of Mr. Leck's arrest on this petition. Mr. Leck waived his right to have the contested probable cause hearing held within 72 hours of his arrest.

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9. Before the probable cause hearing was held, Respondent filed a Motion to Dismiss for Want of Jurisdiction and Probable Cause. This motion and the contested probable cause hearing were set for March 10, 2009.

10. On January 26, 2009, the court issued a briefing schedule, giving the parties the opportunity to file all documents they wished the Court to consider, in advance of the March 10, 2009 hearing. Before the hearing, the Court reviewed all of the pleadings submitted by the parties, including: Respondent's Motion to Dismiss for Want of Jurisdiction and Probable Cause; Petitioner's Response to Respondent's Motion; Respondent's Reply to Petitioner's Response; Declaration of Dr. Robert Halon; Declaration of Dr. Jacqueline Waggoner; Declaration of Dr. Brian R. Abbott; Declarations of Dr. Richard Wollert; Petitioner's Memorandum Re: Probable Cause Hearing; Petitioner's Response to Respondent's Additional Materials; Dr. Dale Arnold's reports dated January 25, 2006, and January 27, 2007; and Petitioner's Motion for Order Affirming the Existence of Probable Cause and Directing the Custodial Detention and Evaluation of Respondent.

11. Before the hearing, the Court advised the parties by letter that, based on a review of the documents submitted under the briefing schedule, no oral testimony would be taken at the hearing. At the hearing, the Court gave the parties an opportunity to challenge that decision. Mr. Leck challenged that decision. After hearing arguments of counsel, the Court affirmed its prior ruling on that issue.

12. At the March 10, 2009 hearing, Mr. Leck confirmed his full name as Jack Leck II, DOB 12/6/51. Mr. Leck stipulated that he is the person named in the Petition and Certification for Determination of Probable Cause and the subject of this action.

13. The Court reviewed the Judgment and Sentence from Mr. Leck's Alaska convictions for Sexual Abuse of a Minor in the Second Degree, and for Attempted Sexual Abuse of a Minor in the Second Degree.

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14. Under *In re the Detention of Ward*, 125 Wn. App. 381, 104 P.3d 747 (2005) and *In re Detention of Peterson*, 145 Wn.2d 789, 796, 42 P.2d 952 (2002), for this Court to rely on Dr. Arnold's conclusions, those conclusions must be factually supported. For this reason, the Court carefully examined Dr. Arnold's reports and the declarations submitted by the various experts on Mr. Leck's behalf, and considered the arguments of counsel.

15. When forming his opinions in this case, Dr. Arnold relied on the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM IV-TR). Using the DSM IV-TR, Dr. Arnold diagnosed Mr. Leck with Pedophilia.

16. Dr. Arnold's analysis of Mr. Leck's likelihood to engage in predatory acts of sexual violence included use of the Static-99, an actuarial instrument used in sexually violent predator cases. The Court recognizes that professionals in the field disagree on certain issues concerning that actuarial instrument. However, as noted on pages 36-42 of Dr. Arnold's January 25, 2006, report, the Static-99 was only one of the tools Dr. Arnold used in his analysis. Dr. Arnold also used the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R), and a number of other predictive indicators, including static and dynamic factors, which would tend to support the conclusion that Mr. Leck is more likely to reoffend than not. Those factors include dropping out of treatment, general criminal lifestyle, intimacy deficits, lack of sexual self-restraint (which is amply demonstrated by Mr. Leck's history), failure to cooperate with supervision, inability to engage in meaningful self-regulation, and predatory grooming.

17. Between January 11, 1985, when Mr. Leck was convicted on his two prior sexually violent offenses, and the present time, Mr. Leck has been out in the community approximately one year, seven months and 24 days. Each time Mr. Leck has been out of custody, with extraordinary rapidity, he engaged in conduct directly related to

pedophilia. This conduct is highly predictive of future offenses. Mr. Leck's history is a very powerful indicator of his likelihood to sexually reoffend.

18. Part of Mr. Leck's modus operandi when he committed his sexually violent offenses in Alaska was to affiliate himself with the YMCA. According to Mr. Leck's records, one of the first things he did when he moved to Washington was to apply to join the YMCA. He also, in a relatively short time, downloaded child pornography on the computer belonging to the non-profit agency where he volunteered.

19. The facts recited in Dr. Arnold's reports factually supported the conclusions he reached concerning Mr. Leck in this case.

II. CONCLUSIONS OF LAW

1. When Petitioner filed the Thurston County SVP action against Mr. Leck in April, 2007, that filing decision was proper and correct under the then-existing Washington Court of Appeals decision in *In re Detention of Martin*, 133 Wn.App. 450 (2006), construing RCW Chapter 71.09.

2. Mr. Leck has been subject to RCW Chapter 71.09 proceedings since the April 10, 2007, filing of the SVP petition in Thurston County.

3. Under RCW 71.09.040(3), as a result of Mr. Leck's September 21, 2007, stipulation to a finding that there is probable cause to believe he is a sexually violent predator, and from that point on, Mr. Leck was precluded from lawful release before trial on the merits of Petitioner's SVP petition.

4. Under the Washington Supreme Court's ruling in *In re Detention of Martin*, 163 Wn.2d 501, 182 P.3d 951 (2008), it was necessary for Petitioner to dismiss the Thurston County SVP case and to file a new SVP petition against Mr. Leck in Kitsap County.

5. When Petitioner filed this SVP action in Kitsap County, Mr. Leck was still being lawfully detailed pursuant to the Thurston County SVP action, as he had stipulated to probable cause in that case and that action had not yet been dismissed.

6. Under RCW 71.09.030(5) and *In re Keeney*, 141 Wn. App. 318, 330, 169 P.3d 852 (2007), this Court did not lose jurisdiction or the authority to hear the State's SVP petition in this case. This Court relies on the language in *Keeney*, which held that the Court does not lose its power to process a civil sexually violent predator petition just because of an unlawful detention under a criminal proceeding, especially if there is no indication of bad faith in the way the matter was processed.

7. Mr. Leck has been afforded, both in the Thurston County SVP action and in the Kitsap County SVP action, every process required under Chapter 71.09.

8. Dr. Dale Arnold is a professionally qualified person under WAC 388-880-033 and clearly qualified to offer conclusions as to the second and third elements of RCW 71.09.020(16).

9. Mr. Leck's Alaska convictions are sexually violent offenses as defined in RCW 71.09.020(15).

10. There is probable cause to believe that Mr. Leck suffers from a mental abnormality or personality disorder that causes him to have serious difficulty controlling his dangerous behavior. In making this determination, the Court relied in part on the reports of Dr. Arnold submitted in this case. As detailed in those reports, Mr. Leck's history amply supports Dr. Arnold's DSM-IV pedophilia diagnosis of Mr. Leck.

11. There is probable cause to believe that Mr. Leck's mental abnormality or personality disorder makes him more likely than not to engage in predatory acts of sexual violence if not confined to a secure facility. In reaching this conclusion, the Court relies in part on the reports of Dr. Arnold submitted in this case. As detailed in those reports, Mr. Leck's history amply supports Dr. Arnold's conclusion that Mr. Leck is

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predisposed to sexually acting out and has great difficultly controlling his sexual behavior.

12. After a review of the facts of Mr. Leck's 2003 offense, and his 20-year sexual offense history, Mr. Leck's 2003 Kitsap County conviction for 46 counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct constitute a recent overt act (ROA) as that term is defined in RCW 71.09.020(10).

13. The Court adopts Page 26, lines 5-15 of Petitioner's Response To Respondent's Motion To Dismiss For Want Of Jurisdiction And Probable Cause, which states: "Under *Marshall*, the legal inquiry is as follows: Given Respondent's diagnosis of pedophilia, his nearly 20-year history of possessing photographs of nude adolescent males, his history of sexual crimes against adolescent males and of photographing his victims (sometimes while they were nude and asleep in his bed), and his repeated possession of pornographic images of adolescent males even after being released from prison and in violation of parole, would his conduct of again possessing pornographic images depicting sexual acts between prepubescent children, and between prepubescent children and adult males, leading to convictions for 46 counts of to Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows of Respondent's mental condition and criminal history? 156 Wn.2d at 158. The only reasonable answer is yes."

14. As a matter of law, a reasonable person would conclude that Mr. Leck meets the sexually violent predator criteria set forth in RCW 71.09.020(16).

15. There is probable cause to believe Mr. Leck is a sexually violent predator as that term is defined in RCW 71.09.020(16).

Having made the foregoing findings, and concluding that there is no basis for granting Respondent's Motion To Dismiss For Want Of Jurisdiction And Probable Cause, and there is

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a basis to grant Petitioner's Motion for Order Affirming the Existence of Probable Cause and Directing the Custodial Detention and Evaluation of Respondent, the Court enters the following:

III. ORDER

IT IS HEREBY ORDERED: That Petitioner's Motion for Order Affirming the Existence of Probable Cause and Directing the Custodial Detention and Evaluation of Respondent is granted.

IT IS FURTHER ORDERED: That Respondent's Motion To Dismiss For Want Of Jurisdiction And Probable Cause is denied.

DATED THIS 13 day of MAY, 2009.

THE HONORABLE RUSSELL W. HARTMAN
Judge of the Superior Court

Presented by:

ROBERT M. MCKENNA
Attorney General

ELIZABETH A. BAKER, WSBA #31364
Assistant Attorney General
Attorneys for Petitioner

Copy received; Approved as to Form:

ROBERT NAON, WSBA #10262
Attorney for Respondent

APPENDIX B

STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

In re the Detention of: JACK LECK, II, Respondent.	NO. 08-2-01852-2 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON RECENT OVERT ACT

THIS MATTER came before the Court pursuant to the State's motion for a ruling on a recent overt act. The Petitioner, State of Washington, was represented by Assistant Attorney General TRICIA S. BOERGER. The Respondent was represented by his counsel, ROBERT NAON. The motion was noted for hearing on November 5, 2010, at which time the Court heard oral argument from the parties. The Court reserved ruling and on November 30, 2010, declined to find a recent overt act. Petitioner filed a timely motion for reconsideration. The Court ordered Respondent to file responsive pleadings and the motion was heard on January 14, 2011.

The Court has considered the pleadings filed by the parties, the attachments thereto, the argument of counsel and the records and file herein. Based upon this, the Court enters the following findings of fact, conclusions of law and order:

I. FINDINGS OF FACT

1. The Respondent has been convicted of two sexually violent offenses as that term is defined in RCW 71.09.020(17). Specifically, on or about January 15, 1985, Respondent was

convicted of one count of Attempted Sexual Abuse of a Minor in the Second Degree, in the Superior Court of Alaska, Fourth District, in Fairbanks, Cause No. 4FA-S84-1241 CR. On or about June 21, 1984, in the Superior Court of Alaska, Third Judicial District, in Anchorage, Cause No. 3AN-S84-3245 CR, Respondent was convicted of one count of Sexual Abuse of a Minor in the Second Degree. These offenses are comparable to the Washington offenses of Attempted Indecent Liberties Against a Child Under Age Fourteen and/or Child Molestation in the Second Degree.

2. Respondent retained and was interviewed by his own forensic psychologist in this case, Dr. Richard Wollert, Ph.D. After interviewing Respondent on numerous occasions, Dr. Wollert prepared a detailed report, including statements made to him by Respondent. Respondent submitted Dr. Wollert's report for consideration in conjunction with this motion.

3. Dr. Wollert's report indicates that Respondent admits to molesting at least eight boys between the ages of eleven and fifteen dating back to 1978. Respondent also admitted to molesting his sister on at least two occasions in his adolescence. Respondent told Dr. Wollert that his attraction to young boys on a scale of 1 to10 was a 7 to 9 at the time of his 1984 conviction. He told Dr. Wollert that his attraction to children currently was a 1 or 2. Respondent also told Dr. Wollert that he masturbated to the images of children that he viewed on the internet in 2003.

4. In May 2010, when interviewed by the State's forensic psychologist, Respondent told Dr. Arnold that he would masturbate while looking at nude photographs of the victims of his 1984 convictions. Respondent referred to these photographs as "trophies" or memorabilia of having sex.

5. Respondent was released from prison in July 1996 and within a year of his release, Respondent violated his parole conditions by having contact with three boys. This contact including biding riding with the adolescent boys and having them over to his apartment and drank beer and smoked marijuana. Respondent's parole violation report indicates that he had pictures and order forms for photographs of children, including some nude and in compromising

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positions. Respondent admitted to Dr. Wollert that he corresponded with the North American Man-Boy Love Association ("NAMBLA") following his release from prison in 1996. Respondent was returned to prison for nearly three years and released in July 2001.

6. Shortly after his release from prison in July 2001, Respondent violated his parole conditions again by accessing pornographic websites on a state-owned computer. His parole was revoked and he was returned to prison in Alaska until September 2002.

7. In April 2003, Bremerton police learned that Respondent had traveled to Bremerton and had applied for a membership at a local YMCA. When Bremerton police officers investigated the address Respondent provided to the YMCA, they found a local charitable organization where Respondent had been volunteering for about a week. The officers were advised that Respondent had access to one of the company's computers and an authorized search of the computer revealed images of child pornography, including images of young girls and boys engaged in sexually explicit conduct. Police also found a printed picture of a partially-nude boy torn into pieces in a trash can in the office that Respondent was using. When confronted by police officers, Respondent spontaneously stated that "he had a problem" and that he had been "trying so hard to stay away from this."

8. On or about June 30, 2003, Respondent was convicted of 46 counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct in Kitsap County Superior Court Cause No. 03-1-00591-4.

9. Respondent was totally confined for his conviction of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct when the State filed a sexually violent predator petition, and had not been released to the community since he was incarcerated for that charge in April 2003.

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II. CONCLUSIONS OF LAW

1. The Court has subject matter and personal jurisdiction in this matter.

2. Respondent was convicted of Attempted Sexual Abuse of a Minor in the Second Degree in 1985, and Sexual Abuse of a Minor in the Second Degree in 1984, which offenses are comparable to Washington offenses that are sexually violent offenses as that term is defined in RCW 71.09.020(17).

3. Respondent's most recent conviction in 2003 for Possession of Depictions of Minors Engaged in Sexually Explicit Conduct is not a sexually violent offense as that term is defined in RCW 71.09.020(17).

4. "Recent overt act" means any act, threat, or a 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).

5. The State does not need to prove a respondent's current dangerousness in SVP cases through proof of a recent overt act when, on the date the petition is filed, the respondent is totally confined for an offense that is either a sexually violent offense, or an act that itself meets the statutory definition of a recent overt act. *In re Detention of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 111 (2005).

6. The inquiry whether an individual is incarcerated for an act that qualifies as a recent overt act is a mixed question of law and fact for the court, not the jury. *Marshall*, 156 Wn.2d at 158.

7. Based on the record in this case and materials filed in support of Petitioner's motion, the facts of Respondent's conviction in 2003 constitute an act or acts that could create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows of the history and mental condition of the Respondent. Thus, the Respondent's

conviction for Possession of Depictions of Minors Engaged in Sexually Explicit Conduct constitutes a recent overt act as that term is defined in RCW 71.09.020(12).

III. ORDER

IT IS HEREBY ORDERED that the Court's ruling on November 30, 2010 denying Petitioner's Motion for Ruling on Recent Overt Act is VACATED;

IT IS FURTHER ORDERED that Petitioner's Motion for Reconsideration is GRANTED; and

IT IS FURTHER ORDERED that the act(s) leading to Respondent's June 30, 2003, conviction for Possession of Depictions of Minors Engaged in Sexually Explicit Conduct qualifies as a recent overt act, and as such the Petitioner is thereby relieved of the burden of proving a recent overt act at the civil commitment trial in this matter.

DATED this 9 day of February, 2011.

THE HONORABLE RUSSELL HARTMAN
Judge of the Superior Court

Presented by:

ROB MCKENNA
Attorney General

TRICIA S. BOERGER, WSBA #38581
GRADY LEUPOLD, WSBA #31836
Assistant Attorneys General
Attorneys for Petitioner

Approved as to form:

ROBERT NAON, WSBA #10262
Attorney for Respondent

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

IN RE THE DETENTION OF	)	
	)	
	)	
JACK LECK II,	)	NO. 42573-4-II
	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 4TH DAY OF MAY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JACK LECK II SPECIAL COMMITMENT CENTER PO BOX 88600 STEILACOOM, WA 98388	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF MAY, 2012.

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