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STATE OF WASHINGTON

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COUNSEL

No. 39454-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

In re Detention of

DAVID DURBIN,

Respondent.

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

APPELLANT'S REPLY BRIEF

CAROLYN MORIKAWA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

pin 6-7-10

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A. ASSIGNMENT OF ERROR.

1. The Court erred in entering Conclusion of Law 4¹.

B. ARGUMENT IN REPLY

In 1987, the appellant, David Durbin, was convicted of sexual assault in Montana. CP 306. In 1989, he was convicted of sexual assault in the third degree in Wyoming. CP 306. Mr. Durbin has never been convicted of a sexual violent offense in Washington.

On August 11, 2003, Mr. Durbin plead guilty to attempted residential burglary and assault in the third degree based on an incident that occurred in Clark County in June 2003. CP 306. He was sentenced to confinement based on this conviction. CP 306.

On June 14, 2004, the day Mr. Durbin was about to be released for the Clark County conviction, the State filed a civil commitment petition against him in Thurston County. CP 306. Mr. Durbin was thereafter transferred to the Special Commitment Center where he has since been held.

On May 21, 2008, the Washington Supreme Court issued its decision in In re Martin, 163 Wn.2d 501, 182 P.3d 951 (2008).

Almost three months later on July 23, 2008, the State filed the

¹ Mr. Durbin is simultaneously filing a motion to amend the Assignments of Error of his opening brief.

present petition in Clark County and subsequently dismissed the Thurston County petition. CP 306-07.

In his opening brief, Mr. Durbin argued the express language of former RCW 71.09.030 does not grant authority to the State to file a petition when the predicate offenses occurred outside Washington. Br. App. at 5-6. The State concedes that pursuant to In re Martin, 163 Wn.2d 501, 182 P.3d 951 (2008), it did not have the authority to file the initial 2004 petition against Mr. Durbin in Thurston County. Br. Resp. at 12. However, State argues the Supreme Court concluded that RCW 71.09 petitions may be filed in a county where an individual was convicted of “some offense” citing to Martin, 163 Wn.2d at 512. Br. Resp. at 11. The State’s analysis of Martin is incorrect.

In analyzing the language of RCW 71.09.030, the Supreme Court concluded the lack of filing authority when the predicate offense occurs outside Washington was a legislative omission creating an inconsistency. Martin, 163 Wn.2d at 513-14. Where a statute contains an inconsistency, but remains rational as a whole, the Court does not supply the omitted language. Id. at 512-13. The absence of authority to file a petition where the predicate

offenses occur out-of-state is a legislative concern and will not be imposed by the Court:

Without some declaration that the legislature intended the Thurston county (or every county) prosecutor to file the commitment petition when the predicate offense occurs out-of-state, we cannot sanction such an unfettered grant of authority considering the express grant of authority contained in RCW 71.09.030.

Id. at 514.

Thus, under former RCW 71.09.030 and Martin, the civil commitment of Mr. Durbin must be dismissed because the State lacked the authority to file the petition where his predicate offenses occurred outside Washington.

C. CONCLUSION.

As argued above and in his opening brief, Mr. Durbin has been civilly committed since June 14, 2004 based on an unlawful petition filed by the State. Moreover, because the State did not prove present dangerousness as the conduct it alleged to be a “recent overt act” was not recent enough to satisfy due process requirements of finding present dangerousness. Mr. Durbin respectfully requests this Court to reverse the order of commitment and remand the proceedings with instructions to dismiss the petition.

Respectfully submitted this 9th day of June, 2010

Maurer M. Cyr (28724) for

Carolyn Morikawa (WSBA 24974)
Washington Appellate Project - 91052
Attorneys for Appellant

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DIVISION TWO**

IN RE THE DETENTION OF)

DAVID DURBIN,)

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 9TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **REPLY 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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SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF JUNE, 2010.

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Washington Appellate Project
701 Melbourne Tower
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Seattle, Washington 98101
☎(206) 587-2711