

COURT OF APPEALS
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STATE OF WASHINGTON
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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 OPENING BRIEF

CAROLYN MORIKAWA
Attorney for Appellant

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

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT.....3

 1. UNDER THE LAW IN EFFECT IN 2008, AS
 ESTABLISHED IN MARTIN, THE STATE DID NOT
 HAVE THE AUTHORITY TO FILE A PETITION
 AGAINST MR. DURBIN.....3

 2. RETROACTIVE APPLICATION OF RCW
 71.09.030 WOULD DENY MR. DURBIN
 OF HIS RIGHT TO DUE PROCESS.....6

 a. The language of RCW 71.09.030 does not clearly
 and unequivocally demand retroactive application.....8

 b. The amended statute is not curative because the
 former statute was not ambiguous.....10

 c. The amended statute is not remedial.....13

 3. MR. DURBIN WAS DENIED DUE PROCESS WHERE
 HE WAS CIVILLY COMMITTED WITHOUT THE STATE
 PROVING PRESENT DANGEROUSNESS.....15

 a. The conduct the State relies upon as a recent overt
 act occurred over five years prior to the filing of the
 petition.....15

 b. Due process requires the State to prove present
 dangerousness.....16

c. Mr. Durbin's conduct does is not recent in time to find
present dangerousness..... 18

E. CONCLUSION.....20

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Barstad v. Stewart Title Guaranty Co., Inc.</u> , 145 Wn.2d 528, 39 P.3d 984 (2002).....	9
<u>In re Det. of Albrecht</u> , 147 Wn.2d 1, 51 P.3d 73 (2002).....	16, 19
<u>In re Det. of Marshall</u> , 156 Wn.2d 150, 125 P.3d 111(2005)	17, 19
<u>In re F.D. Processing, Inc.</u> , 119 Wn.2d 452, 832 P.2d 1303 (1992).....	7, 8, 10
<u>In re Martin</u> , 163 Wn.2d 501, 182 P.3d 951 (2008)	3, 4, 5, 6, 14, 15
<u>In re Pers. Restraint of Young</u> , 122 Wn.2d 1, 857 P.2d 989 (1993).....	16, 17
<u>McGee Guest Home, Inc. v. Department of Social and Health Services</u> , 142 Wn.2d 316, 325, 12 P.3d 144 (2000).....	10
<u>Miebach v. Colarsudo</u> , 102 Wn.2d 170, 685 P.2d 1074 (1984).....	13
<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995).....	18
<u>State v. Cruz</u> , 139 Wn.2d 186, 985 P.2d 384 (1999)	7, 8, 9, 10
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	18
<u>State v. Salavea</u> , 151 Wn.2d 133, 86 P.3d 125 (2004).....	11, 13
<u>Vashon Island Committee for Self-Government v. Washington State Boundary Review Board for King County</u> , 127 Wn.2d 759, 903 P.2d 953 (1995).....	10
<u>Zachman v. Whirlpool Fin. Corp.</u> , 123 Wn.2d 667, 896 P.2d 1078 (1994)	18

Court of Appeals Decisions

<u>In re Det. of Pashchke</u> , 121 Wn.App. 614, 90 P.3d 74 (2004).....	19
<u>State v. Ramirez</u> , 140 Wn.App. 278, 165 P.3d 61(2007)	11, 13

Statutes

RCW 13.04.030(1)(e)(5)	11, 12
RCW 71.09.025	9
RCW 71.09.030	4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
RCW 71.09.040	9
RCW 71.09.090	18

Const. amends. V.....	16
U.S. CONST. amend. XIV, § 1.....	15
Wash. Const. art. I, § 3.	15
XIV; Washington Const. art. I, § 3.....	16

U.S. Supreme Court Decisions

<u>Addington v. Texas</u> , 441 U.S. 418, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979).....	16
<u>Collins v. Youngblood</u> , 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).....	14
<u>Foucha v. Louisiana</u> , 504 U.S. 71, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992)).....	16
<u>Lance v. Mathis</u> , 519 U.S. 433, 439, 117 S.Ct. 89, 137 L.Ed.2d 63 (1997).....	8
<u>Landgraf v. USI Film Products</u> , 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)	8

Washington Laws

Laws of 1995, ch. 216, § 3.....	17
Laws of 2009, ch. 409 § 15	9

Other Authorities

The American Heritage Dictionary, 1993	18
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A. ASSIGNMENT OF ERROR.

1. The trial court erred in denying Mr. Durbin's motion to dismiss the petition for civil commitment under RCW 71.09 because the State lacked statutory authority to file the petition.

2. The trial court erred in finding Mr. Durbin committed a recent overt act.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Did the State have the authority to file a civil commitment petition against Mr. Durbin under former RCW 71.09.030 in effect at the time the petition was filed where he had committed what the State alleged as a "recent overt act" in Washington but had never been convicted of a sexually violent offense in Washington?

Assignment of Error 1.

2. Whether the filing provision of RCW 71.09.030 retroactively applies to individuals who were subject to a civil commitment petition prior to the date on which RCW 71.09.030 became law. Assignment of Error 2.

3. Mr. Durbin had been held in confinement under an unlawful 71.09 civil commitment before the State filed the present petition. Does an act that occurs five years before the State file its petition satisfy due process requirements of finding current

dangerousness before committing an individual? Assignment of Error 2.

C. STATEMENT OF THE CASE.

On June 14, 2004, the day Mr. Durbin was about to be released for a Clark County conviction, the State filed a civil commitment petition against him in Thurston County. CP 306. Attached as Appendix A. He had been totally confined since the day of his arrest for an incident that had taken place in Clark County. CP 306. At that time RCW 71.09.030 did not permit the State to file a 71.09 petition based upon out of state convictions.

In 1987, the appellant, David Durbin was convicted of sexual assault in Montana. CP 306. In 1989, he was convicted in Wyoming for sexual assault in the third degree. CP 306. On August 11, 2003, he plead guilty to attempted residential burglary and assault in the third degree based on the incident that occurred in Clark County in June 2003. CP 306. He was sentenced to confinement based on this conviction. CP 306.

After the petition was filed, Mr. Durbin on September 30, 2004, was then transported to the Special Commitment Center where he has since been held.

After the petition was filed, Mr. Durbin on September 30, 2004, was then transported to the Special Commitment Center where he has since been held.

On May 1, 2008, the Washington Supreme Court issued its decision in In re Martin, 163 Wn.2d 501, 182 P.3d 951 (2008) holding the petition was invalid as the prosecutor in the county where he was convicted must file the petition. In response to the decision and after the mandate, the State filed the present petition in Clark County on July 23, 2008 and subsequently dismissed the Thurston County petition. CP 306-07.

Mr. Durbin filed a pre-trial motion to dismiss the petition relying, in part, on Martin. CP 63-67. The trial court denied his motion. CP 294.

The trial court subsequently found Mr. Durbin was a sexually violent predator. CP 311-12. He appeals. CP 313.

Additional relevant facts are included in the pertinent sections below.

D. ARGUMENT

1. UNDER THE LAW IN EFFECT IN 2008, THE STATE DID NOT HAVE THE AUTHORITY TO FILE A PETITION AGAINST MR. DURBIN.

In 1987 Mr. Durbin was convicted of a sexual assault in Montana. On July 23, 2008, the State filed the present petition against Mr. Durbin alleging his August 2003 conviction for attempted burglary was a recent overt act. Mr. Durbin moved to dismiss the petition arguing, in part, the prosecutor lacked the statutory authority to file the petition. CP 63-67.

At the time the State filed its petition against Mr. Durbin, RCW 71.09.030 provided, in part:

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 on, before, or after July 1, 1990;..... or (5) 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).

Martin, 163 Wn.2d 501, 182 P.3d 951 (2008) requires that the petition be dismissed. The issue here was precisely the same as in Martin. Martin was convicted in Vancouver of burglary in the second degree with sexual motivation and indecent exposure. Id. at 505. Pending sentencing, he was released on bail and was

subsequently convicted of two sexually violent offenses in Oregon. Id. He was returned to Washington and sentenced to 30 months confinement to be served consecutively after the Oregon sentence. Id. Near the end of his sentence, the State filed a civil commitment petition at the request of the Thurston County Prosecutor. Id.

The trial court denied Martin's motion to dismiss the petition, ruling RCW 71.09.030 did not limit the prosecutor's authority to file civil commitment petitions in the county where the sexually violent offense occurred. Id. at 505-06. The Court of Appeals affirmed the order. Id. at 506.

The Supreme Court reversed the Court of Appeals decision holding the Thurston County prosecutor did not have the statutory authority to file the petition because "the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney' cannot be interpreted to mean anything but exactly what it says." Id. at 508.

Here, Mr. Durbin's case is precisely the same as Martin and therefore, requires dismissal of the petition. After dismissing the petition in Thurston County, the state re-filed the petition in Clark County. This was apparently because he was convicted in Clark County for the alleged recent overt act. Former RCW 71.09.030

does not grant authority to the State to file a petition when the sexually violent offenses occurred outside Washington. Indeed, the

Martin court found:

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, the express language of RCW 71.09.030 and our Supreme Court decision in Martin demands reversal of the civil commitment proceeding because the State lacked the statutory authority to file the petition.

2. RETROACTIVE APPLICATION OF RCW 71.09.030 WOULD DENY MR. DURBIN OF HIS RIGHT TO 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 and stating sufficient facts to support such allegation when it appears that: (a) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement;or (e) a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.

(2) The petition may be filed by:

(a) The prosecuting attorney of a county in which:

(i) The person has been charged or convicted with a sexually violent offense;

(ii) A recent overt act occurred involving a person covered under subsection (1)(e) of this section; or

(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; or

(b) The attorney general, if requested by the county prosecuting attorney identified in (a) of this subsection.

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. That change cannot be applied retroactively to Mr. Durbin.

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, 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 U.S. Constitution, including the Ex Post Facto Clauses Article I, §§ 9, 10 and the Due Process Clause. Landgraf v. USI Film Products, 511 U.S. 244, 266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). The Due Process Clause “protects the interests in fair notice and repose that may be compromised by retroactive legislation.” Id.

Despite the presumption against retroactive application, a statutory amendment may act retroactively if the legislature so intended, it is curative, or it is remedial. Cruz, 139 Wn.2d at 191. However, even if one of these rules provides for retroactive application, the amendment will not be retroactive if doing so violates provisions of 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. Moreover, there was no clear legislative intent to apply this legislation retroactively.

a. The language of RCW 71.09.030 does not clearly and unequivocally demand retroactive application. Barring any constitutional prohibition, a statute may act retroactively if it was so

intended by the legislation. Cruz, 139 Wn.2d at 191. Courts may look to a statute's "purpose, language, legislative history, and legislative bill reports" in determining whether it applies retroactively. Barstad v. Stewart Title Guaranty Co., Inc., 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 significantly, 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, this Court should not generally 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.

b. The amended statute is not curative because the former statute was not ambiguous. A statutory amendment that is curative may act retroactively. Cruz, 139 Wn.2d at 191. However, "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. Department of Social and Health Services, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) citing Vashon Island Committee for Self-Government v. Washington State Boundary Review Board for King County, 127 Wn.2d 759, 771, 903 P.2d 953 (1995).

However, our Supreme Court has held that former RCW 71.09.030 is not ambiguous. Therefore, any amendment to the statute cannot be characterized as clarifying.

In State v. Ramirez, 140 Wn.App. 278, 165 P.3d 61(2007), this Court considered the same issue Mr. Durbin raises in his appeal – whether a statute “clarifying” an unambiguous statute can be applied retroactively. There, in October 2002, the State charged the sixteen-year-old defendant as an adult with four counts of rape of a child in the first degree committed when he was between eleven and fifteen years old. The State filed the charges under former RCW 13.04.030(1)(e)(5) (1998) (“automatic decline statute”), which provided that the adult court had jurisdiction over juveniles sixteen or seventeen years old alleged to have committed first degree rape of a child. In December 2002, under a plea agreement, the defendant pleaded guilty to a reduced charge of one count of rape of a child in the first degree. The adult court sentenced the defendant to 160 month confinement, which it suspended when it imposed a Special Sex Offender Sentencing Alternative (SSOSA). In July 2006, the trial court revoked the defendant’s SSOSA for violations of its terms and sentenced him to 123 months of confinement.

In 2005, prior to the revocation hearing, the Legislature amended RCW 13.04.030(1)(e)(5) in response to State v. Salavea, 151 Wn.2d 133, 86 P.3d 125 (2004), which reaffirmed its holding

that the former automatic decline statute applied to juveniles sixteen or seventeen years old when the State charged them with first degree rape of a child. The amendment changed the automatic juvenile court decline triggering event from the juvenile's age at the time of the proceeding to the juvenile's age at the time he committed the offense. Consequently, under the 2005 amended statute, the adult court has exclusive jurisdiction over juveniles who are sixteen or seventeen years old when they commit certain offenses, including first degree rape of a child.

The defendant appealed the SSOSA revocation arguing that the 2005 amended RCW 13.04.030(1)(e)(5) was curative and therefore retroactively provides adult jurisdiction only over juveniles who were sixteen or seventeen years old at the time of the offense. Therefore, the adult court did not have subject matter jurisdiction to accept his plea and therefore, the court erred in denying his motion to withdraw his guilty plea.

This Court rejected the defendant's proposition holding that, despite the Legislature's characterization of the bill as "clarifying," the amendment was not curative where the Washington Supreme Court held former RCW 13.04.030(1)(e)(5) "*unambiguously* refers to [the offender's] age at the time of the proceedings." Citing State

v. Salavea, 151 Wn.2d at 144. Because the former statute was not ambiguous, the amendment was not curative and therefore, could not be applied retroactively.

Like the automatic decline statute in Ramirez, former RCW 71.09.030 was not ambiguous. So any amendment to it is not clarifying. Indeed, our Supreme 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.” (emphasis added) Martin, 163 Wn.2d at 508. Thus, as this Court reasoned in Ramirez, even if the legislative history describes the bill as “clarifying,” the “Supreme Court’s characterization of the statute as unambiguous, before it was amended, controls. Ramirez, 140 Wn.App at 288. Therefore, the amendment is not curative and cannot be applied retroactively.

c. The amended statute is not remedial. “A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.” Miebach v. Colarsudo, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984).

[T]he 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. Durbin, 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 that RCW 71.09.030 is not merely procedural and relates to a person's substantial rights. 163 Wash.2d at 511. As argued above, the Court dismissed the civil commitment petition because, under RCW 71.09.030, the Thurston County prosecutor lacked the 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. See U.S. CONST. amend. XIV, § 1; Wash. Const. art. I, § 3.

Id. at 511.

Retroactive application of RCW 71.09.030 interferes with Mr. Durbin's vested right.

The State filed its 71.09 petition against Mr. Durbin in July 2008, prior to the current version of RCW 71.09.030 came into effect. Martin made clear that the State did not have the authority to file the petition because he was not convicted of any sexually violent offenses in Washington. Because the amended version cannot be categorized as curative or remedial and it lacked the clear legislative intention to apply retroactively, RCW 71.09.030 cannot be applied retroactively against Mr. Durbin.

3. MR. DURBIN WAS DENIED DUE PROCESS WHERE HE WAS CIVILLY COMMITTED WITHOUT THE STATE PROVING PRESENT DANGEROUSNESS.

a. The conduct the State relies upon as a recent overt act occurred over five years prior to the filing of the petition.

Mr. Durbin plead guilty to attempted burglary and assault in the third degree for an incident that occurred in June 2003. Five years after the incident, the State filed the petition for which Mr. Durbin is

currently held in July 2008. The State alleged, and the trial court found, the attempted burglary conviction constituted a recent overt act. The State did not allege nor was there any evidence of subsequent conduct that could constitute a recent overt act.

b. Due process requires the State to prove present dangerousness. “The constitution requires that a person shall not be deprived of life, liberty or property without due process of law.” In re Pers. Restraint of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993) (citing Const. amends. V, XIV; Washington Const. art. I, § 3). Before a person can be civilly committed as a sexually violent predator, due process requires proof that he or she is both mentally ill and presently dangerous. Addington v. Texas, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979); Young, 122 Wn.2d at 27 (citing Addington and Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992)). The Young court held that due process requires the State to demonstrate a substantial risk of physical harm as evidenced by a recent overt act if the offender is not incarcerated when the State files its petition. Young, 122 Wn.2d at 41-42. Proof of a recent overt act establishes the due process requirement of present dangerousness. In re Det. of Albrecht, 147 Wn.2d 1, 11, 51 P.3d 73 (2002).

The Legislature amended the civil commitment statute to incorporate the requirements of Young. See Laws of 1995, ch. 216, § 3. A RCW 71.09 petition can now be filed against “a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement” only where he or she has committed a recent overt act. RCW 71.09.030(5).

The Washington Supreme Court has continued to require an individual to be currently dangerous before he or she is civilly committed. In re Det. of Marshall, 156 Wn.2d 150, 125 P.3d 111(2005). In Marshall, the Court held where the individual is incarcerated on the day a petition is filed, “the question is whether the confinement is for a sexually violent act or an act that itself qualifies as a recent overt act.” Marshall, 156 Wn.2d at 158.

Thus, Young and Marshall held that the State must prove present dangerousness before indefinitely committing an individual under RCW 71.09. Here, the act which the State alleged constituted a “recent overt act” occurred over five years before it filed the present petition. This is not sufficiently recent in time to prove *present* dangerous.

c. Mr. Durbin's conduct does is not recent in time to

find present dangerousness. RCW 71.09.090 provides:

“Recent overt act” means any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

The term “recent” is not defined in the statute. However, “recent” must be construed to mean something describing the “overt act” as the Legislature does not include superfluous words in a statute.

State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005)

(“statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous” (internal cites omitted)).

When a term is not statutorily defined, the term is given its ordinary or common law meaning. State v. Alvarez, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). Ordinary dictionary definitions may be used to determine the ordinary meaning of a word. See Zachman v. Whirlpool Fin. Corp., 123 Wn.2d 667, 671, 896 P.2d 1078 (1994).

“Recent” means as “of or belonging to the present period or the very near past .” Webster’s Third New International Dictionary The American Heritage Dictionary, 1993, pg 1894. An act that

occurred five years before the filing of the petition is not recent to the filing. Division Three found that conduct that occurred seven years prior was too old to be considered “recent.” See In re Det. of Pashchke, 121 Wn.App. 614, 623, 90 P.3d 74 (2004), published in part, (Conduct occurring seven years prior was not recent.)

In Marshall, the petitioner appealed his civil commitment. There, the State filed a petition against him while he was incarcerated for a conviction of rape in the third degree. 156 Wn.2d at 154. The petitioner argued the State was required to prove a recent overt act because he was not incarcerated as a sexually violent offense when the petition was filed. 156 Wn.2d at 156. The State countered it was not required to prove a recent overt act because he was being held for a crime that itself would have qualified as a recent overt act when the petition was filed and therefore was not required to prove a recent overt act. Marshall is distinguishable from this case because there, the petitioner was lawfully confined when the State filed its petition. Id. Here, Mr. Durbin had been unlawfully confined for a little over five years before the State filed the present petition.

Current dangerousness is a bedrock principle underlying the 71.09 civil commitment. In re Det. of Albrecht, 147 Wash.2d 1, 7, 51

P.3d 73 (2002). Here, Mr. Durbin was totally confined for a little over five years before the State filed its petition under which he is presently committed. Five years is not a "recent" act which can support a finding of current dangerousness as required by due process.

F. CONCLUSION.

As argued above, 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 5th day of January 2010
~~December, 2009~~



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

APPENDIX A

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FILED

JUN 10 2009

21:24
Sherry W. Parker, Clerk, Clark Co.

**STATE OF WASHINGTON
CLARK COUNTY SUPERIOR COURT**

In re the Detention of:

NO. 08-2-04645-5

DAVID DURBIN,

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER OF COMMITMENT

Respondent.

A trial was held in this matter pursuant to RCW 71.09.060 over four days in May 2009. Throughout the course of trial, the Petitioner, State of Washington, was represented by Assistant Attorney General ELIZABETH A. BAKER. The Respondent was present in person during the entire trial in this matter and was represented throughout trial in this case by his attorney, STEVEN J. RUCKER.

The parties waived their rights to a jury trial and chose to have the matter tried to the Court. The Court heard testimony from the following witnesses on the following dates:

Witness	Dates of Testimony
Lisa Buttrum (State)	May 11, 2009 (Case-in-chief)
Shena Ercanbrack (State)	May 11, 2009 (Case-in-chief)
Eduviges Villa (State)	May 11, 2009 (Case-in-chief)
Virginia Villa (State)	May 11, 2009 (Case-in-chief)
Marla Flores (State)	May 11, 2009 (Case-in-chief)
Officer William O'Meara (State)	May 11, 2009 (Case-in-chief)
Respondent David Durbin (State)	May 11, 2009 (Case-in-chief)
Respondent David Durbin (Deposition)	May 11, 2009 (Case-in-chief)
Dr. Brian Judd (State)	May 12, 2009 (Case-in-chief) May 14, 2009 (Rebuttal)
Dr. Richard Wollert (Respondent)	May 13-14, 2009 (Case-in-chief)
Respondent David Durbin (Respondent)	May 14, 2009 (Case-in-chief)

1 The Court, having heard the evidence presented and the argument of counsel, issued a
2 Memorandum of Decision on May 19, 2009, finding that the State has proven beyond a
3 reasonable doubt that the Respondent is a sexually violent predator (SVP). This written
4 decision forms the basis of these findings of fact, conclusions of law, and order of civil
5 commitment and is incorporated herein by reference.

6 **I. FINDINGS OF FACT**

7 1. All of the foregoing facts contained in these findings of fact were proven beyond
8 a reasonable doubt at trial in this matter.

9 2. The Respondent, DAVID DURBIN, was born on July 16, 1962. He is now 46
10 years old.

11 3. On or about August 28, 1987, the Respondent was convicted in Lewis and Clark
12 County, Montana, of Sexual Assault, for conduct he committed in July 1987, against a 5-year-old
13 girl, S.E.

14 4. On or about June 26, 1989, the Respondent was convicted in Sheridan County,
15 Wyoming, of Sexual Assault in the Third Degree, for conduct he committed in November 1986,
16 against his 10-year-old niece, L.B.

17 5. On or about August 11, 2003, the Respondent was convicted in Clark County,
18 Washington, of Attempted Residential Burglary and Assault in the Third Degree, for conduct he
19 committed in June 2003.

20 6. On or about June 14, 2004, the State filed an SVP action against the Respondent in
21 Thurston County, Washington. On that date, the Respondent was about to be released from total
22 confinement on his 2003 Clark County, Washington conviction (see ¶15, above). He had been
23 totally confined for that crime since his arrest the day of the offense.

24 7. On or about May 1, 2008, the Washington Supreme Court issued its decision in
25 *In re Detention of Martin*, 163 Wn.2d 501, 182 P.3d 951 (2008). In response to the holding of
26

1 that case and after the mandate issued in that matter, the State filed this SVP action against the
2 Respondent in Clark County, Washington on July 23, 2008. The State subsequently dismissed
3 without prejudice the Thurston County SVP action against Respondent. The Respondent has been
4 totally confined since his incarceration for the 2003 Clark County offense referenced in ¶5 above.

5 8. Dr. Brian Judd, Ph.D., was retained by the Joint Forensic Unit of the Departments
6 of Corrections and Social and Health Services to evaluate the Respondent pursuant to
7 RCW 71.09.025 and .040. The Petitioner called Dr. Judd as its expert witness at trial. The
8 Respondent retained Dr. Richard Wollert, Ph.D., as his expert witness. Dr. Wollert also testified
9 at trial.

10 9. Dr. Brian Judd diagnosed the Respondent as currently suffering from Pedophilia,
11 Fetishism, and Substance Dependence.

12 10. Dr. Judd's diagnosis of the Respondent was based on a review of the Respondent's
13 criminal, sexual, social, incarceration, supervision, treatment, and other records, and on his
14 interview with the Respondent. This information is of the kind generally used by other mental
15 health experts to render diagnoses in SVP cases.

16 11. The methodology used by Dr. Judd in rendering his diagnoses of the Respondent,
17 including the use of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition,
18 Text Revision (DSM-IV-TR), is generally accepted by other mental health professionals who
19 evaluate and assess sex offenders, including those offenders subject to commitment as SVPs.

20 12. Over a period of at least 6 months, the Respondent had recurrent, intense sexually
21 arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child
22 or children, generally age 13 years or younger. The Respondent's sexual fantasies or urges cause
23 him marked distress or interpersonal difficulty. When the Respondent sexually offended, he was
24 at least age 16 years and at least 5 years older than the children against whom he offended.
25
26

1 13. The Respondent admitted to acting on his sexual urges and to engaging in
2 behaviors involving sexual activity with prepubescent children under the age of 13. The
3 Respondent admitted to sexually assaulting his 10-year-old niece while he was staying with her
4 family in Wyoming in November 1986. The Respondent admitted he sexually assaulted four
5 minor females unknown to him, including S.E., in Montana in 1987. The Respondent admitted
6 that he pursued children who were alone and that he picked some of them up and carried them to
7 rooms before sexually offending against them. The Respondent admitted to "peeping" on
8 children, to pressing his penis against a child, and to ejaculating while attempting anal intercourse
9 with a child.

10 14. Dr. Judd's diagnosis of the Respondent's mental disorders, including his
11 Pedophilia, was based not only on the Respondent's behaviors, but also on his admissions of
12 intense, recurring, sexually arousing thoughts and feelings regarding sexual contact with children.

13 15. The Respondent admitted having recurrent, intense sexually arousing fantasies and
14 sexual urges involving prepubescent children. The Respondent admitted he has been sexually
15 attracted to prepubescent children since he was about 18 years old. He admitted having sexual
16 fantasies regarding several children of relatives and friends. He admitted being aroused by
17 children and that his arousal turned into an "obsession." He admitted that on several occasions, he
18 had gone into school and church bathrooms, watched the children in the bathrooms (sometimes
19 from inside the next stall), that he was aroused to thoughts of the children he watched in the
20 bathrooms, and that he masturbated to sexual thoughts of the children he had watched. In 1987,
21 the Respondent admitted that when school let out for the summer, he began frequenting churches,
22 hoping to find children there. He told the evaluator "this was all I thought about." He admitted
23 that, at times, he masturbated up to four times per day to sexual thoughts of children. The
24 Respondent admitted he used diapers, baby blankets and other items associated with children, to
25 aid his masturbation. He admitted connecting good thoughts to nurseries and other places where
26

1 children were found. After offending, he admitted fantasizing about, and masturbating to
2 thoughts of, his victims.

3 16. In 1987, the Respondent admitted to an evaluator that he had a deviant fantasy in
4 which he removed a child's clothing, hugged the child, and whispered into the child's ear "I love
5 you" or "I want to have sex with you." He would then remove his own clothing, feel the child's
6 body, "snuggle" up to the child, and insert his penis into the child's anus. The Respondent said
7 that in these fantasies, the children reacted hurt but he did not think about that.

8 17. In 2003, the Respondent was seen outside a ground-floor apartment, watching
9 four children, ages 10 and under, playing inside. Despite the attempts of the children's mother
10 to get the Respondent to leave, the Respondent was later seen touching the windows of the
11 children's bedroom. When arrested, the Respondent claimed ownership of a backpack
12 containing numerous children's toys, candy, and condoms. In 2003, after participating in in-
13 patient and out-patient sex offender treatment, the Respondent admitted to an evaluator that
14 possibly 40% of his sexual fantasies included children. In 2007, the Respondent admitted to
15 masturbating 3-4 times per week to thoughts of "all kinds of girls."

16 18. Dr. Wollert's conclusions with regard to the diagnostic issue in this case are not
17 consistent with the evidence presented regarding the Respondent.

18 19. The Respondent has serious difficulty controlling his dangerous, sexually
19 predatory behavior. In 1987, the Respondent told an evaluator that he sexually offended against
20 children because he had no close friends and felt frustrated all the time about wanting sex but not
21 having a partner. The Respondent admitted he knew his offending was wrong, that he could have
22 stopped after his first offense, but that he continued offending because "it felt good." He said he
23 justified his behavior by telling himself that he wasn't hurting anyone. He admitted he did not try
24 to stop sexually offending until he was arrested for his last contact offense. The Respondent
25 admitted that he only stopped sexually offending against children because he was arrested.
26

1 2. Each of the findings of fact enumerated herein has been proven beyond a
2 reasonable doubt.

3 3. The Respondent's Montana Sexual Assault against S.E. (see ¶3, above) is a
4 sexually violent offense as that term is defined in RCW 71.09.020(17).

5 4. The conduct resulting in the Respondent's Washington Attempted Residential
6 Burglary conviction (see ¶5, above) constitutes a recent overt act (ROA) as that term is defined in
7 RCW 71.09.020(12).

8 5. The Respondent's Pedophilia is a mental abnormality as that term is defined in
9 RCW 71.09.020(8).

10 6. The Respondent's Pedophilia causes him serious difficulty controlling his sexually
11 violent behavior.

12 8. The Respondent's Pedophilia makes him likely to engage in predatory acts of
13 sexual violence unless he remains confined to a secure facility, consistent with
14 RCW 71.09.020(7).

15 9. The evidence presented at the Respondent's trial proves beyond a reasonable
16 doubt that the Respondent is a sexually violent predator, as that term is defined by
17 RCW 71.09.020(18).¹

18 Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters
19 the following:

20 ///

21 ///

22 ///

23 _____
24
25 ¹ Prior to May 7, 2009, the definition of sexually violent predator was found in RCW 71.09.020(16).
26

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2 ///

3
4 **III. ORDER**

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent,
6 DAVID DURBIN, is a sexually violent predator as defined in RCW 71.09.020(18). Having so
7 found, the Court therefore ORDERS that the Respondent be committed to the custody of the
8 Department of Social & Health Services for placement in a secure facility for control, care, and
9 treatment until further order of this Court.

10 DATED this 10 day of June, 2009.



11 THE HONORABLE ROBERT L. HARRIS
12 Judge of the Superior Court

13 Presented by:

14 ROBERT M. McKENNA
15 Attorney General



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



19 STEVEN J. RUCKER, WSBA #20407
20 Attorney for the Respondent

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

IN RE THE DETENTION OF)

DAVID DURBIN,)

APPELLANT.)

NO. 39454-5-II

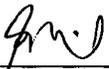
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 29TH DAY OF DECEMBER, 2009, 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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CRIMINAL JUSTICE DIVISION
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SEATTLE, WA 98104-3188

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF DECEMBER, 2009.

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STATE OF WASHINGTON

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 39454-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for **respondent Sarah Sappington – Assistant Attorney General-CJD**, **appellant**, and/or **other party**, at the regular office or residence as listed on ACORDS, or drop-off box at the prosecutor's /attorney general's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 5, 2010