Supreme Court No. 90361-1
COA No. 42573-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: DETENTION OF JACK LECK II

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

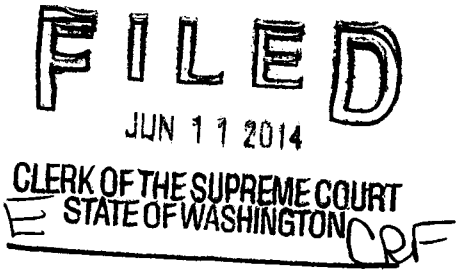
Respondent,

v.

JACK LECK II,

Petitioner.

PETITION FOR REVIEW



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A. IDENTITY OF PETITIONER/DECISION BELOW

Jack Leck requests this Court grant review pursuant to RAP 13.4 of the Court of Appeals' opinion in In re Detention of Leck, No. 42573-4-II, filed March 4, 2014. A copy of the opinion is attached as Appendix A. A copy of the Court of Appeals' April 24, 2014, order granting the State's motion to publish is attached as Appendix B.

The opinion in Appendix A is the second opinion issued by the Court of Appeals in this case. The first opinion, which was published, is attached as Appendix C. After the State filed a motion to reconsider, the Court of Appeals ordered the parties to submit additional briefing. That order is attached as Appendix D. The Court of Appeals' order granting the State's motion to reconsider and withdrawing the court's first opinion is attached as Appendix E.

B. ISSUES PRESENTED FOR REVIEW

1. In a criminal trial, a manifest constitutional error occurs when the jury is instructed on a statutory alternative means of committing the crime that is not alleged in the charging document. In a line of cases, this Court has held that the "alternative means" doctrine developed in criminal cases applies equally to proceedings under chapter 71.09 RCW. Does the Court of Appeals' opinion holding that

no manifest constitutional error occurred when the jury was instructed on an alternative means not alleged in the petition conflict with this line of cases and present a significant question of constitutional law warranting review? RAP 13.4(b)(1), (3).

2. Does the Court of Appeals' conclusion that Mr. Leck did not have a right to be present at the recent overt act hearing present a significant question of constitutional law?

3. Was Mr. Leck's constitutional right to cross-examination violated when the State's expert relayed a prejudicial out-of-court statement but Mr. Leck never had an opportunity to cross-examine?

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

C. STATEMENT OF THE CASE

In 1984, Jack Leck was convicted in Alaska of two crimes that amount to "sexually violent offenses" for purposes of chapter 71.09 RCW. CP 142-50, 765. He was released from prison in 2002 and moved to Bremerton, Washington. CP 191. In April 2003, a search of a computer that Mr. Leck used at work uncovered several images of minors engaged in sexually explicit conduct. CP 391. He was

convicted in Kitsap County of 46 counts of possession of depictions of a minor engaged in sexually explicit conduct. CP 152-63.

On July 24, 2008, the Attorney General filed a petition in Kitsap County alleging Mr. Leck was a "sexually violent predator." CP 1-2. The State alleged Mr. Leck suffered from a "mental abnormality," namely pedophilia, but did not allege he suffered from antisocial personality disorder or any other personality disorder. CP 1-2. The State never amended its petition to allege a personality disorder.

The State filed a motion asking the court to find that Mr. Leck's Kitsap County convictions for possession of child pornography were a "recent overt act." CP 297. The court held a hearing on the State's motion and denied Mr. Leck's motion to be present at the hearing. 1/14/11RP 4. The court found Mr. Leck's 2003 convictions for possession of child pornography were a recent overt act. CP 765-69.

After a first trial resulted in a hung jury, a second trial was held in August 2011. The State's expert Dr. Arnold testified he had diagnosed Mr. Leck with both pedophilia and antisocial personality disorder, and that both disorders together caused Mr. Leck serious difficulty in controlling his behavior. 8/08/11RP 230, 289-91. The jury was instructed it may commit Mr. Leck if it found beyond a

reasonable doubt that he suffered from *either* a mental abnormality *or* a personality disorder, although the State never amended its petition to allege that Mr. Leck suffered from a personality disorder. CP 1580.

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

Mr. Leck appealed, arguing: (1) a manifest constitutional error occurred when the jury was instructed on an alternative means not alleged in the petition; (2) his constitutional right to be present was violated when he was not allowed to attend the "recent over act" hearing; (3) his constitutional right to cross-examination was violated when the State's expert relayed a highly prejudicial out-of-court statement made by Mr. Leck's sister without any opportunity to cross-examine her; and (4) the State acted without statutory authority and violated Mr. Leck's due process rights by filing the petition.

Initially, the Court of Appeals issued a published opinion agreeing with Mr. Leck that a manifest constitutional error occurred when the jury was instructed on the personality disorder because it was not alleged in the petition. Appendix C. After the State filed a motion to reconsider, the Court of Appeals ordered the parties to submit additional briefing addressing this Court's recent decision in In re

Personal Restraint of Brockie, No. 86241-9. Appendix D. After receiving additional briefing, the court granted the State's motion to reconsider and withdrew its opinion. Appendix E. It issued a new opinion holding that the error in instructing the jury on an alternative means not alleged in the petition was not a manifest constitutional error that Mr. Leck could challenge for the first time on appeal and rejected Mr. Leck's other arguments. Appendix A.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS' CONCLUSION THAT NO MANIFEST CONSTITUTIONAL ERROR OCCURRED WHEN THE JURY WAS INSTRUCTED ON AN ALTERNATIVE MEANS NOT ALLEGED IN THE PETITION CONFLICTS WITH A LINE OF CASES FROM THIS COURT AND PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW

Beginning with In re Personal Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993), Washington courts have consistently applied standards developed in criminal cases that are natural and logical components of the State's constitutionally-mandated burden to prove beyond a reasonable doubt the "elements" of the SVP designation in chapter 71.09 RCW proceedings.

Before the State may detain a person indefinitely pursuant to chapter 71.09 RCW, constitutional due process requires the State to prove the detainee is currently mentally ill and dangerous. Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); U.S. Const. amend. XIV. In Young, this Court held Washington's statute satisfies due process because it requires the State to prove, beyond a reasonable doubt, that the detainee suffers from a current mental illness that renders him a present danger to the community. Young, 122 Wn.2d at 37-39.

The State's constitutionally-mandated burden to prove current mental illness and dangerousness beyond a reasonable doubt carries with it a number of procedural protections that chapter 71.09 RCW proceedings share with criminal trials. For instance, the Young Court concluded that a necessary component of the State's burden of proof is the requirement that the jury be unanimous. Young, 122 Wn.2d at 47-48. The Court reasoned the Legislature's use of the "beyond a reasonable doubt" standard "suggests an acute awareness of the need for heightened procedural protections in these proceedings." Id.

In cases subsequent to Young, Washington courts have consistently treated the State's burden to prove the SVP designation

beyond a reasonable doubt as akin to the State's burden in criminal cases to prove the "elements" of a crime. This Court consistently labels the essential facts the State must prove in chapter 71.09 RCW proceedings as "elements." See, e.g., In re Det. of Post, 170 Wn.2d 302, 309-10, 241 P.3d 1234 (2010) (in order to find detainee is SVP, jury must find State proved three "elements"); In re Det. of Pouncy, 168 Wn.2d 382, 391-92, 229 P.3d 678 (2010) (term "personality disorder" must be defined for jury because it implicates an "element" of State's case); In re Det. of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006) (terms "mental abnormality" and "personality disorder" are two distinct means of establishing mental illness "element").

One "element" the State must prove beyond a reasonable doubt is that the respondent "suffers from a mental abnormality or personality disorder." Post, 170 Wn.2d at 309-10; RCW 71.09.020(18).

As in criminal cases, the "elements" the State must prove in chapter 71.09 RCW proceedings may encompass alternative statutory means. In Halgren, this Court held the mental illness "element" encompasses the two alternative means of "personality disorder" and "mental abnormality." Halgren, 156 Wn.2d at 811.

In In re Detention of Sease, 149 Wn. App. 66, 77-78, 201 P.3d 1078 (2009), the Court of Appeals extended Halgren to hold that, as in criminal cases, each alternative means cannot itself be divided into "means within a means." The Court applied several criminal cases to conclude the jury need only have unanimously found Sease suffered from a "personality disorder"; they did not need to agree unanimously as to which personality disorder he suffered from. Id. at 78-79.

Washington courts also consistently look to the criminal law in determining how the jury must be instructed regarding the statutory "elements" in chapter 71.09 RCW cases. In Halgren, the Court concluded the jury need not be instructed it must be unanimous as to which alternative means it found, as long as substantial evidence supports each alternative alleged. Halgren, 156 Wn.2d at 812.

Similarly, in Pouncy, the Court concluded the jury must be instructed on the definition of "personality disorder" because the term is beyond the experience of the average juror and "implicate[s] an element of the State's case." Pouncy, 168 Wn.2d at 391.

Thus, Washington courts have uniformly adopted standards derived from the alternative means doctrine developed in the criminal law to chapter 71.09 RCW proceedings.

A well-established component of the alternative means doctrine is that the jury may not be instructed on an alternative means that was not alleged in the charging document, 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); State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). This Court recently reaffirmed this line of cases in In re Personal Restraint of Brockie, 178 Wn.2d 532, 536-37, 309 P.3d 498 (2013).

It is well-settled that when the jury is instructed on an uncharged alternative means, a manifest error of constitutional magnitude occurs that may be challenged for the first time on appeal. State v. Laramie, 141 Wn. App. 332, 342, 169 P.3d 859 (2007); State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); RAP 2.5(a)(3).

The standards regarding how the jury must be instructed that have developed in the Severns line of cases derive from the alternative means doctrine. See Severns, 13 Wn.2d at 548; Bray, 552 Wn. App. at 34. The rule that the jury may not be instructed on an uncharged alternative means rests on the fundamental principle that "[t]he manner of committing a crime is an element" that must be properly charged, and "[o]ne cannot be tried for an uncharged offense." Bray, 552 Wn.

App. at 34. This Court should grant review and hold that this fundamental component of the alternative means doctrine applies equally to chapter 71.09 RCW proceedings. The Court of Appeals' holding to the contrary conflicts with this body of case law.

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, a manifest constitutional error occurred that Mr. Leck may challenge for the first time on appeal. Severns, 13 Wn.2d at 548; Doogan, 82 Wn. App. at 188-90; Bray, 52 Wn. App. at 34.

2. WHETHER MR. LECK'S CONSTITUTIONAL RIGHT TO BE PRESENT WAS VIOLATED WHEN HE WAS NOT ALLOWED TO ATTEND THE "RECENT OVERT ACT" HEARING IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW

A detainee in a chapter 71.09 RCW case 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); In re Det. of Morgan, 161 Wn. App. 66, 74, 253, P.3d 394 (2011). Whether a detainee has a constitutional right to be present at a recent overt act hearing is an issue of first impression. The Court of Appeals' holding that Mr. Leck did not have a right to be present raises a significant question of constitutional law. RAP 13.4(b)(3).

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." Morgan, 161 Wn. App. at 74 (internal quotation marks and citation omitted). Thus, a civil detainee does not have a right to be present at a chambers meeting "where purely legal questions about the process of deciding a forced medication motion were discussed." Id.

In contrast, a detainee has a right to be present at a recent overt act hearing because it does not involve "purely legal questions."

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, 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).

Here, at the time the State filed its petition, Mr. Leck was incarcerated 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.

In deciding whether an individual is incarcerated for an act that qualifies as a recent overt act, the court applies a two-step analysis. Marshall, 156 Wn.2d at 158. 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.

The recent overt act hearing in this case was akin to a pretrial hearing at which a court determines whether the State may cross-examine a testifying defendant about his prior crimes. In People v. Dokes, 79 N.Y.2d 656, 660, 595 N.E.2d 836 (1992), the New York court concluded the defendant had a right to be present at a pretrial conference between the judge and the attorneys on the defendant's motion to preclude the People from cross-examining him about his prior crimes.[1] The court explained, "[i]n determining whether a defendant has a right to be present during a pretrial proceeding, a key factor is whether the proceeding involved factual matters about which defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the People's position." Id. Even if the facts regarding the prior crimes are undisputed, the court

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[1] This Court cited Dokes with approval in In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

must still weigh "the nature of the conduct, its similarity to the pending charges, the extent to which it bears on the defendant's credibility, the age of the defendant at the time, the disposition of the charges and many other factors." Id. at 661. The defendant has a right to be present because he "is in the best position to point out errors in the [criminal history] report, to controvert assertions by the prosecutor with respect to uncharged acts and to provide counsel with details about the underlying facts of both charged and uncharged acts." Id. In short, "the defendant's presence will help to ensure that the court's determination will not be predicated on the prosecutor's unrebutted view of the facts." Id. (footnote, quotation marks and citation omitted).

The purpose of the hearing in this case was to determine whether "an objective person knowing the factual circumstances of [Mr. Leck's] history and mental condition would have a reasonable apprehension that [the act for which he was incarcerated] would cause harm of a sexually violent nature." Marshall, 156 Wn.2d at 158. As at the hearing in Dokes, the court had to weigh the nature of the conduct, its similarity to the current charge, Mr. Leck's age at the time, and many other factors, including Mr. Leck's mental condition. Mr. Leck was in the best position to controvert factual assertions by the

prosecutor and provide counsel with details about the underlying facts. Therefore, he had a constitutional right to be present.

The recent overt act hearing is markedly different from the kinds of proceedings—regarding purely legal and ministerial matters—at which a defendant does not have a constitutional right to be present. See, e.g., In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (no right to be present at hearing on motion for continuance); In re Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994) (no right to be present at hearings at which court deferred ruling on ER 609 motion, granted counsel's motion for funds to get defendant haircut and clothing for trial, settled on wording of jury questionnaires and pretrial instructions, set time limit on testing of certain evidence, announced its rulings on evidentiary matters that had previously been argued, ruled that jurors could take notes, and directed State to provide defense with summaries of its witnesses' testimonies); Morgan, 161 Wn. App. at 74-75 (no right to be present at chambers meeting where purely legal questions about process of deciding forced medication motion were discussed but court made no ruling).

In contrast to those proceedings, the proceeding here presented an opportunity to rebut the State's view of the facts and defend against

the charge. Mr. Leck therefore had a right to be present. Snyder, 291 U.S. at 105-06; Lord, 123 Wn.2d at 306; Dokes, 79 N.Y.2d at 661.

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 he would probably apply for membership at the YMCA when he moved to Bremerton because that is how he met 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. Mr. Leck's constitutional right to cross-examination was violated because he never had an opportunity to cross-examine his sister about the statement.

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." 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).

Because of the potential for unfair prejudice created by the out-of-court statement, Mr. Leck should have had 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

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 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.

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 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. State v. Cruz, 139 Wn.2d

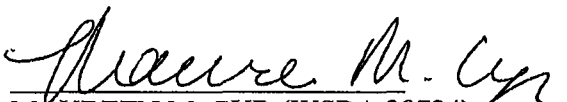
186, 191, 985 P.2d 384 (1999). But even if one of these rules provides for retroactive application, the amendment will not be applied retroactively if doing so violates due process. F.D. Processing, Inc., 119 Wn.2d at 460.

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. Retroactive application of RCW 71.09.030 interferes with Mr. Leck's vested rights. Because In re Detention of Durbin, 160 Wn. App. 414, 248 P.3d 124, review denied, 172 Wn.2d 1007, 259 P.3d 1108 (2011), contravenes these principles, this Court should not follow it.

E. CONCLUSION

For the reasons given, this Court should grant review and reverse the commitment order.

Respectfully submitted this 27th day of May, 2014.



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APPENDIX A

FILED
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DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of:

JACK LECK II,

Petitioner.

No. 42573-4-II

UNPUBLISHED OPINION

PENOYAR, J.P.T.[1] — Jack Leck II appeals a jury verdict determining him to be a sexually violent predator (SVP). Leck contends that his right to due process was violated when (1) the jury was instructed on an alternative means of proving his SVP status that was not alleged in the petition, (2) he was not allowed to appear in person at a reconsideration hearing addressing the recent overt act requirement, and (3) the State's expert witness was allowed to refer to hearsay in expressing his opinion about Leck's SVP status. Leck also argues that the State had no authority to file an SVP petition against him in 2008 under the law then in effect and that applying the 2009 law retroactively violated his right to due process. We hold that the State had authority to file the petition under both versions of the law, as explained in *In re Detention of Durbin*, 160 Wn. App. 414, 248 P.3d 124, *review denied*, 172 Wn.2d 1007 (2011). We hold further that the jury instruction alleging that Leck suffered from a personality disorder did not constitute manifest constitutional error enabling Leck to raise this issue for the first time on appeal, that the trial court did not err by refusing to continue a reconsideration hearing addressing an issue of law, and that the State's expert appropriately referred to the evidence supporting his opinion. We affirm Leck's SVP commitment.

[1] Judge Joel Penoyar is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

FACTS

I. FACTUAL BACKGROUND

Leck was convicted in 1984 in Alaska of second degree sexual abuse of a minor and second degree attempted sexual abuse of a minor. For purposes of Washington's SVP laws at chapter 71.09 RCW, these two convictions amount to "sexually violent offenses."[2] Leck was released on parole for these offenses in July 1996. After being in and out of confinement for various parole violations, Leck was unconditionally released in September 2002.

In April 2003, Leck applied for a membership at the YMCA in Bremerton, Washington. A YMCA employee, aware that Leck was a sex offender in Alaska, contacted Bremerton police. Having been informed by Leck's family[3] when Leck was released in 2002 that he might try to enter the Bremerton YMCA, the police contacted the address Leck had left there; the address was for a charitable organization at which Leck had begun volunteering a week earlier. The police searched the organization's computer to which Leck had had access during that week, discovering numerous images downloaded during that time of minors engaged in sexually explicit conduct. Leck was arrested and later convicted in Kitsap County Superior Court of 46 counts of possession of depictions of a minor engaged in sexually explicit conduct.

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[2] RCW 71.09.020(17) defines "sexually violent offense."

[3] Leck's family lived in the Bremerton area at this time.

I. PROCEDURAL BACKGROUND

In April 2007, shortly before Leck completed serving his sentence for the Kitsap County convictions, the State filed a petition in Thurston County alleging that Leck was an SVP.[4] Leck was transported first to the Thurston County jail and then, after a probable cause finding under RCW 71.09.040, to the Special Commitment Center on McNeil Island to await his commitment trial.

In May 2008, before Leck's trial, the Washington Supreme Court held that an SVP petition was improperly filed in Thurston County where the alleged SVP had committed sexually violent offenses outside Washington as well as offenses that were not sexually violent in Clark County, Washington. *In re Det. of Martin*, 163 Wn.2d 501, 504–05, 182 P.3d 951 (2008). In view of *Martin*, the State moved to dismiss the Thurston County petition against Leck and—at the request of the Kitsap County prosecutor—filed a petition against Leck in Kitsap County in July 2008.[5]

[4] "'Sexually violent predator' means 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). This definition has remained unchanged since 1995. *See* LAWS OF 1995, ch. 216, §1.

[5] RCW 71.09.030 governs filing SVP petitions. The 1995 version of the statute was in effect when the State filed the petition against Leck in Thurston County. The legislature amended this version of the statute in 2008, but this amendment merely made one technical correction to the statute that is immaterial to our analysis here. *See* LAWS OF 1995, ch. 216, § 3; LAWS OF 2008, ch. 213, § 12. The 2008 version of the statute was in effect when the State refiled its petition against Leck in Kitsap County. The current version of the statute reflects the legislature's substantive amendments in 2009. *See* LAWS OF 2009, ch. 409, § 3.

The Kitsap County petition was based on consulting psychologist Dale Arnold's 2006 evaluation of Leck in which Arnold diagnosed Leck with pedophilia.[6] As grounds for filing the petition, the State alleged that Leck had a mental abnormality—namely, pedophilia—but did not allege any personality disorder.

Leck moved to dismiss the petition in December 2008 for lack of jurisdiction and probable cause, arguing that he was unlawfully detained at the time the State filed the petition in Kitsap County. Relying on *In re Detention of Keeney*, 141 Wn. App. 318, 330, 169 P.3d 852 (2007), the trial court concluded that an unlawful detention under a criminal proceeding does not divest the court of its power to process an SVP petition, and so the court denied Leck's motion in May 2009.

Then, in October 2010, the State moved for a ruling that, as a matter of law, Leck's 2003 convictions for possession of depictions of minors engaged in sexually explicit conduct qualified as a recent overt act, which would relieve the State of its burden to prove a recent overt act at trial. Attached to the State's motion was an update to Arnold's evaluation based on his personal interview with Leck in September 2010. In the updated evaluation, Arnold diagnosed Leck with a personality disorder that predisposed him to commit criminal sexual acts. At no point, however, did the State amend the petition to include this personality disorder as grounds for the petition.

[6] Leck refused an interview with Arnold in 2005 for purposes of Arnold's initial evaluation of Leck; as a result, Arnold based his evaluation on a review of records alone.

Treating the State's recent-overt-act motion as one for partial summary judgment, the trial court denied the motion, pointing to conflicting expert opinion on Leck's mental condition. The State moved for reconsideration. At the reconsideration hearing, with Leck present telephonically, the trial court vacated its previous ruling and granted the State's motion, ruling that Leck's 2003 conviction qualified as a recent overt act.

After Leck's first trial ended in a mistrial, he was retried. At the end of that second trial, the court instructed the jury as follows:

> To establish that Jack Leck, II is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:
>
> (1) That Jack Leck, II has been convicted of a crime of sexual violence, namely the Alaska offense of Sexual Abuse of a Minor in the Second Degree and/or Attempted Sexual Abuse of a Minor in the Second Degree;
>
> (2) That Jack Leck, II suffers from a mental abnormality *or personality disorder* which causes serious difficulty in controlling his sexually violent behavior; and
>
> (3) That this mental abnormality or personality disorder makes Jack Leck, II likely to engage in predatory acts of sexual violence if not confined to a secure facility.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that Jack Leck, II is a sexually violent predator.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that Jack Leck, II is not a sexually violent predator.

Clerk's Papers (CP) at 1580 (emphasis added). Additional instructions defined both "mental abnormality"[7] and "personality disorder."[8] Leck did not object to any of these instructions.

After the jury returned a verdict finding that the State had proved beyond a reasonable doubt that Leck was an SVP, the court ordered him committed to the Special Commitment Center. Leck appeals.

ANALYSIS

I. AUTHORITY TO FILE THE PETITION

Leck first argues that the State did not have authority to file a petition against him under the law in effect in 2008. Leck further argues that retroactively applying the law as amended in 2009—under which the State would have had authority to file the petition—would deny him due process. But in a recent case with analogous facts, we held that the State had authority under the 2008 law to file the SVP petition in question. *Durbin*, 160 Wn. App. at 429. We also held in *Durbin* that applying the 2009 law retroactively, which the legislature had clearly intended, did

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[7] Instruction 6 read:

> "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit criminal sexual acts to a degree that makes the person a menace to the health and safety of others.
> "Volitional capacity" means the power or capability to choose or decide.

CP at 1582.

[8] Instruction 7 read:

> "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment.

CP at 1583.

not violate due process. 160 Wn. App. at 431. Accordingly, the State was not precluded from filing the petition against Leck under either version of the law.

II. INSTRUCTION ON UNCHARGED ALTERNATIVE

Leck argues next that his statutory and due process right to notice was violated because the trial court instructed the jury on an alternative means (personality disorder) not mentioned in the petition alleging that Leck was an SVP. The State responds that Leck waived this argument by not challenging instruction 4, the "to commit" instruction, at trial. Leck argues that he may raise this issue for the first time on appeal under *In re Personal Restraint of Brockie*, 178 Wn.2d 532, 309 P.3d 498 (2013).

In *Brockie*, the Supreme Court explained that failing to properly notify a defendant of the nature and cause of the accusation of a criminal charge is a constitutional violation. 178 Wn.2d at 536 (citing U.S. CONST. amend VI; WASH. CONST. art. I, § 22; *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)). The *Brockie* court explained further that when a defendant claims for the first time on appeal that the jury was instructed on an uncharged alternative means of committing a crime, the reviewing court should apply the line of cases beginning with *State v. Severns*, 13 Wn.2d 542, 125 P.2d 659 (1942). *Brockie*, 178 Wn.2d at 537. This case law stands for the proposition that it is error for a trial court to instruct the jury on an uncharged alternative means in a criminal case and that, on appeal, it is the State's burden to prove that the error was harmless. *Brockie*, 178 Wn.2d at 536 (citing *Severns*, 13 Wn.2d at 548; *State v. Bray*, 52 Wn. App. 30, 34-35, 756 P.2d 1332 (1988)). The error of offering an uncharged means as a basis for a criminal conviction is presumed prejudicial and is harmless only "if 'in subsequent instructions the crime charged was clearly and specifically defined to the jury.'" *Bray*, 52 Wn. App. at 34-35 (quoting *Severns*, 13 Wn.2d at 549); *see also State v. Doogan*, 82 Wn. App. 185, 189, 917 P.2d

155 (1996) (error of offering uncharged means as a basis for conviction is prejudicial if the jury might have convicted the defendant under the uncharged alternative).

To commit a person as an SVP, the State must prove that he suffers from a mental abnormality or personality disorder. *In re Det. of Post*, 170 Wn.2d 302, 309-10, 241 P.3d 1234 (2010) (citing RCW 71.09.020(18)). "'[M]ental abnormality' and 'personality disorder' are two distinct means of establishing the mental illness element in SVP cases." *In re Det. of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006). Here, the State did not allege in the SVP petition that Leck suffered from a personality disorder, but instruction 4 informed the jury that it could find that Leck was an SVP if it found that he suffered from a mental abnormality or a personality disorder.

While tacitly conceding that error occurred, the State argues that neither *Brockie* nor the *Severns* line of cases applies here. As stated, those cases describe the rights of criminal defendants in criminal prosecutions. *Brockie* relied on the Sixth Amendment as well as article I, section 22 and the *Kjorsvik* decision in stating that failing to properly notify a defendant of the nature and cause of the accusation of a criminal charge is a constitutional violation. 178 Wn.2d at 536-37. The Sixth Amendment and article I, section 22, expressly refer to criminal prosecutions, and *Kjorsvik* stands for the proposition that all essential elements of a crime must be included in a charging document. 117 Wn.2d at 97.

Washington courts have repeatedly held that SVP proceedings are civil and not criminal, and they have added that the rights afforded to criminal defendants under the Sixth Amendment and article I, section 22 do not attach to SVP petitioners. *In re Det. of Strand*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009); *In re Det. of Ticeson*, 159 Wn. App. 374, 377, 246 P.3d 550 (2011), *abrogated on other grounds, State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012). Instead, SVP

petitioners must rely on the guaranty of "fundamental fairness" provided by the due process clause. *Strand*, 167 Wn.2d at 191.

Consequently, to raise his claim of instructional error for the first time on appeal, Leck must show that the error violated this due process guaranty of fundamental fairness and that he was prejudiced as a result. RAP 2.5(a)(3); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Due process is a flexible concept, requiring "'such procedural protections as the particular situation demands.'" *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995) (quoting *Mathews v. Eldrige*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). At its core is the right to notice and the opportunity to be heard, but its minimum requirements depend on what is fair in a particular context. *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007); *Sherman*, 128 Wn.2d at 184. In determining what process is due in a given context, particularly where SVP proceedings are concerned, courts employ the *Mathews* test, which balances: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Mathews*, 424 U.S. at 335; *Stout*, 159 Wn.2d at 373.

As stated, Leck argues that the instruction informing the jury that it could find he was an SVP based on the uncharged "personality disorder" alternative violated his due process right to notice. In applying the *Mathews* test to this claim, we recognize that Leck has a significant interest in his physical liberty. As to the second factor, we do not see that trying Leck on the personality disorder alternative risked an erroneous deprivation of that liberty.

We are guided to this conclusion, in part, by CR 15(b), which provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The rule adds that the failure to formally amend the pleadings "does not affect the result of the trial of these issues." CR 15(b); *Green v. Hooper*, 149 Wn. App. 627, 636, 205 P.3d 134 (2009). Under CR 15(b), "[w]here evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof." *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766-67, 733 P.2d 530 (1987).

The civil rules "govern the procedure in the superior court in all suits of a civil nature," with the exceptions set out in CR 81. CR 1; *In re Det. of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002); *In re Det. of Cherry*, 166 Wn. App. 70, 74, 271 P.3d 259 (2011). CR 81(a) states that "[e]xcept where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings." Proceedings under chapter 71.09 RCW are special proceedings within the meaning of CR 81. *Cherry*, 166 Wn. App. at 74 (citing *In re Det. of Mathers*, 100 Wn. App. 336, 340, 998 P.2d 336 (2000)).

RCW 71.09.030 governs the information that must be contained in an SVP petition, but there is no statute in chapter 71.09 RCW that discusses the amendment of such petitions. Consequently, our review of whether Leck consented to and thereby had notice of his trial on an uncharged alternative is governed by CR 15. *See In re Det. of McLaughlin*, 100 Wn.2d 832, 849, 676 P.2d 444 (1984) (applying CR 15 to involuntary commitment proceeding). In determining whether the parties consented to the trial of an unpleaded issue, we consider the record as a whole. *Mukilteo Ret. Apartments, LLC v. Mukilteo Investors L.P.*, 176 Wn. App. 244, 257, 310 P.3d 814 (2013).

During closing argument in Leck's first trial, the State informed the jury that it had to find that Leck suffered from a mental abnormality or a personality disorder to determine that he was an SVP. The State asserted that Leck suffered from a mental abnormality and added that "the other diagnosis that's not in dispute in this case is antisocial personality disorder." 2/28/11 Report of Proceedings (RP) (Feb. 28, 2011) at 1232. The defense conceded that the evidence showed that Leck "may have an antisocial personality disorder" and asserted that the "big issue" was whether Leck suffers from a mental abnormality or personality disorder. RP (Feb. 28, 2011) at 1253.

During Leck's second trial, the State sought to allow its expert, Dale Arnold, to refer to information regarding Leck's molestation of his sister and her daughter to support the diagnosis of antisocial personality disorder and pedophilia. The defense responded that there was no disagreement about the personality disorder diagnosis, since both Arnold and Richard Wollert, the defense expert, agreed that Leck suffers from antisocial personality disorder. Defense counsel referred to the jury in adding that "[t]he diagnosis has been made. . . . They're going to learn that he has an antisocial personality disorder." RP (Aug. 1, 2011) at 161. After the trial court observed that both experts had clearly concluded that Leck has an antisocial personality disorder, it limited Arnold's testimony about his sister's allegations.

During his testimony, the State questioned Arnold about the "mental abnormalities and personality disorders" part of the SVP definition. RP (Aug. 8, 2011) at 221. Arnold responded that Leck suffers from the mental disorders of pedophilia and antisocial personality disorder, with both conditions supporting his commitment as an SVP. On cross examination, Leck's attorney asked about the personality disorder diagnosis, and Arnold replied, "[W]hen I say antisocial personality disorder and pedophilia, that's the mental abnormality and the personality

disorder that drive the behavior." RP (Aug. 8, 2011) at 374. Defense counsel then asked whether a personality disorder would compel a person to commit a crime.

Wollert testified for the defense that the fact that Leck suffers from antisocial personality disorder does not mean that he has a mental abnormality.

During closing argument, the State asserted that the diagnosis that "everybody agrees with" is antisocial personality disorder. RP (Aug. 15, 2011) at 1097. Defense counsel responded that while Leck might have antisocial personality disorder, he was not incapable of making choices about whether to commit additional crimes. On rebuttal, the State again explained that the case was about whether Leck has a mental abnormality or personality disorder that causes him serious difficulty in controlling his sexually violent behavior.

There were no objections to the testimony or arguments cited above. Leck clearly received notice of the State's intent to allege that he suffered from a mental abnormality or a personality disorder; indeed, he conceded the latter allegation in an attempt to limit unfavorable testimony. As a result, the State's failure to formally amend its petition to include the personality disorder alternative did not risk an erroneous deprivation of Leck's liberty. The pleadings were deemed amended when Leck defended against the allegation that he suffers from a personality disorder without objection. There would be no value in retrying the case following a formal amendment of the petition. The second *Mathews* factor clearly weighs in the State's favor.

The third *Mathews* factor also favors the State, which has a substantial interest in protecting the community from sexual predators. It would be costly and burdensome, as well as meaningless, to give Leck a third opportunity to raise the same defense he used in the prior two trials. Under the due process clause, notice must be "reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The purpose of notice having been served in this case, we see no due process violation. Accordingly, we decline to address Leck's claim of instructional error further.[9]

III. RECENT OVERT ACT RECONSIDERATION HEARING

Leck argues here that the trial court violated his due process right to be present when it denied his motion to continue the recent overt act reconsideration hearing so that he could attend the hearing in person.

Due process requires that, before indefinitely committing a person to a secure facility, a jury must find beyond a reasonable doubt that he is both mentally ill and presently dangerous. *In re Det. of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 111 (2005). When a person is not incarcerated at the time the State files the commitment petition, due process requires the State to prove present dangerousness with evidence of a recent overt act. *In re Det. of Lewis*, 163 Wn.2d 188, 193-94, 177 P.3d 708 (2008). 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."[10] RCW 71.09.020(12).

The due process requirement of proving dangerousness may be satisfied by the person's prior conviction when the petition is filed while the offender is incarcerated for a prior act that

[9] Leck's claim that his statutory right to notice was violated is also waived under RAP 2.5(a).

[10] The minor changes made to this definition after the State filed its petition against Leck do not affect our analysis here. *See* former RCW 71.09.020(10) (2006); *Durbin*, 160 Wn. App. at 426.

would itself qualify as a recent overt act. *In re Det. of Hendrickson*, 140 Wn.2d 686, 695, 2 P.3d 473 (2000). Whether the act resulting in a conviction underlying the alleged SVP's confinement is a recent overt act is a question of law for the trial court, not a question of fact to be decided by the jury. *Marshall*, 156 Wn.2d at 158.

The trial court initially denied the State's motion to treat Leck's 2003 convictions for possession of child pornography, for which he was confined when the SVP petition was filed, as a recent overt act as a matter of law. When the State moved for reconsideration, the court held a hearing at which Leck was present telephonically. Defense counsel moved for a continuance because Leck wanted to attend the hearing in person, but the trial court denied that motion after explaining that its decision would be based on the existing record and not additional testimony. The court added that if Leck wanted to submit further information, it would consider that request at the end of argument.

The State argues that the trial court did not err by denying Leck's motion to continue a hearing at which purely legal issues were considered. *See State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974) (whether to grant continuance is within trial court's discretion; denial is disturbed only if accused has been prejudiced and/or result likely would have differed had continuance been granted). A defendant has the right to be present at proceedings where his presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. *In re Det. of Morgan*, 161 Wn. App. 66, 74, 253 P.3d 394 (2011), *review denied*, 177 Wn.2d 1001 (2013). A defendant does not have a right to be present during a discussion of purely legal matters, or where his presence would be useless. *Morgan*, 161 Wn. App. at 74.

The trial court must determine whether an individual is incarcerated for an act that qualifies as a recent overt act. *Marshall*, 156 Wn.2d at 158. When the act resulting in confinement has not caused harm of a sexually violent nature, an adjudication of the recent overt act question requires both a factual and legal inquiry. *Marshall*, 156 Wn.2d at 158; *State v. McNutt*, 124 Wn. App. 344, 350, 101 P.3d 422 (2004). The factual inquiry determines the circumstances of the alleged SVP's history and mental condition, and the legal inquiry determines whether an objective person knowing those factual circumstances would reasonably apprehend that the act resulting in his current confinement would cause harm of a sexually violent nature. *Marshall*, 156 Wn.2d at 158. The court's role under the factual inquiry prong is not that of a fact finder; the court need only review facts already established, including those established in the record of the conviction resulting in incarceration. *In re Det. of Brown*, 154 Wn. App. 116, 125, 225 P.3d 1028 (2010). The original criminal proceeding provides an individual with an opportunity to contest the factual allegations supporting the conviction, and the recent overt act inquiry is not meant to provide a second opportunity to litigate those facts. *Brown*, 154 Wn. App. at 125.

The trial court noted here that a motion for reconsideration is generally decided on the basis of the motion submitted. The court requested argument, however, because it had questions about how to apply the two-part test outlined in *Marshall* to the record before it. Following argument, the court noted that it was relying only on uncontroverted facts in making its ruling. The trial court concluded that based on the record in the case and the material filed in support of the motion for reconsideration, the facts of Leck's 2003 conviction constituted 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 Leck's history and mental condition.

Leck now argues that the trial court relied on disputed facts in granting reconsideration of its recent overt act ruling, including the fact that he had a mental condition that predisposed him to commit acts of a sexually violent nature, that he was searching for pornography sites on a state-owned computer in 2001, and that he applied for membership at the Bremerton YMCA to meet children. Leck alleges further that when he made statements to the police at the time of his 2003 arrest to which the court's findings referred (i.e., 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. CP at 767.

Assuming that the issues were as Leck now frames them,[11] he does not show that his presence was required at the hearing or that the trial court erred by denying his motion to continue that hearing. Leck had the opportunity to speak during the hearing and to offer additional evidence following argument at the hearing. Although he consulted with his attorney during the hearing, he offered no additional materials. The trial court did not err by denying the motion for a continuance and by holding the reconsideration hearing while Leck was present telephonically.

III. BASIS FOR EXPERT OPINION

Finally, Leck claims that his due process right to cross examination was violated when Arnold relayed a prejudicial out-of-court statement from Leck's sister without Leck having the opportunity to cross examine her about her motive and bias.

[11] It does not appear that the trial court considered anything but the undisputed facts before it: Leck's access to pornographic websites, his YMCA application, and his statements to the police at his arrest.

During Arnold's testimony, and before he referred to facts from the record, the court orally instructed the jury as follows:

> 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. You may not consider it as evidence that the information relied upon by the witness is true or that the events described actually occurred.

RP (Aug. 8, 2011) at 243.

Arnold then testified about Leck coming to Bremerton after his 2002 release and accessing child pornography on the internet.

> And after doing that for a couple days and saturating himself in the child pornography, he then went to get a membership at the YMCA. That's really important to me because that's how he found his last victim was at the YMCA in Anchorage.

RP (Aug. 8, 2011) at 263.

Leck testified during his direct and redirect testimony that he applied to the Bremerton YMCA so he could use its shower facilities. On rebuttal, Arnold answered as follows when asked about the significance of Leck's application to the Bremerton YMCA:

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

RP (Aug. 15, 2011) at 1043. Leck's attorney made a hearsay objection, and the trial court excused the jury so that it could hear argument on the objection. The State argued that the court had given a limiting instruction about Arnold's testimony and that he was entitled to rely on facts in the record to support his opinion about the significance of Leck's YMCA application. Leck's

attorney responded that the testimony was too prejudicial, but the court overruled the objection because the fact at issue was part of the basis for Arnold's expert opinion.

The trial court later gave the jury a written limiting instruction stating in part as follows:

> 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 at 1579.

ER 703 permits an expert to base his opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field. *Marshall*, 156 Wn.2d at 162. "Thus, the rule allows expert opinion testimony based on hearsay data that would otherwise be inadmissible in evidence." *Marshall*, 156 Wn.2d at 162. In addition, ER 705 grants the trial court discretion to allow the expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for his expert opinion, subject to appropriate limiting instructions. *Marshall*, 156 Wn.2d at 163; 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE §§ 705.4, 705.5 (5th ed. 2007).

In an SVP trial, experts may rely on psychological reports and the criminal history of an SVP detainee in testifying. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 58, 857 P.2d 989 (1993). In referring to Leck's sister's statement, Arnold was drawing from information in the 2003 Kitsap County presentence report to which he had referred in evaluating Leck in 2006.

Arnold testified appropriately, and the trial court gave a limiting instruction to which the defense did not object. We reject Leck's attempt to transform this evidentiary issue into one of constitutional magnitude. Furthermore, we observe that during the deposition played for the

jury, Leck admitted to molesting his sister when she was a child, stated that she had wrongfully accused him of molesting her children, and added that she was jealous of his relationship with their father. This testimony provided ample basis for Leck to argue that his sister was biased and had a motive to lie. We see no error in the court's ruling regarding the scope of Arnold's testimony.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.P.T.

We concur:

Worswick, C.J.

Bjorgen, J.

APPENDIX B

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STATE OF WASHINGTON
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DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of:

JACK LECK II,

Petitioner.

No. 42573-4-II

ORDER GRANTING MOTION TO PUBLISH

Respondent State of Washington filed a motion to publish our March 4, 2014 opinion in this matter. Appellant Jack Leck filed a response opposing this motion. After review of the records and files herein, we grant the motion.

It is ORDERED that the final paragraph that reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted.

It is further ORDERED that the opinion is now published.

DATED: this 24TH day of APRIL, 2014.

PANEL: Jj. Penoyar, Worswick, Bjorgen.

FOR THE COURT:

Worswick CJ

Chief Judge

APPENDIX C

FILED
COURT OF APPEALS
DIVISION II

2013 SEP -4 AM 10:13
STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of:

JACK LECK, II,

Petitioner.

No. 42573-4-II

PUBLISHED OPINION

PENOYAR, J. — Jack Leck II appeals a jury verdict determining him to be a sexually violent predator (SVP). In 1984, Leck was convicted in Alaska of crimes that are considered sexually violent offenses under Washington's SVP laws. After his release for these crimes, Leck was convicted in 2003 in Kitsap County, Washington, for possession of depictions of a minor engaged in sexually explicit conduct.

In 2008, the State filed a petition in Kitsap County to have Leck committed as an SVP. In the petition, the State alleged that Leck had a mental abnormality that predisposed him to commit sexually violent acts in the future. At Leck's commitment trial, the jury was instructed that it could find that Leck was an SVP based either on this mental abnormality or on a personality disorder not mentioned in the petition. The jury found that Leck was an SVP, and the court ordered him committed.

Leck appeals, arguing that the State had no authority to file a petition against him under the law in effect in 2008. Leck further argues that retroactive application of the law as amended in 2009, which clearly gave the State authority to file a petition in situations like Leck's, would deny him due process. Here we follow *In re Detention of Durbin*, 160 Wn. App. 414, 248 P.3d 124, *review denied*, 172 Wn.2d 1007 (2011), a case involving analogous facts, in which we held

that the State had authority to file an SVP petition under the 2008 law and that retroactive application of the 2009 law did not violate due process. Leck also argues, however, that his due process right to notice was violated when the jury was instructed on the personality disorder. Because the petition against Leck cannot be construed even liberally to include the personality disorder element as a charged element and thus satisfy due process, we reverse and remand. On remand, the State may either file a new SVP petition against Leck or amend the 2008 petition for a new commitment proceeding.

FACTS

I. FACTUAL BACKGROUND

Leck was convicted in 1984 in Alaska of second degree sexual abuse of a minor and second degree attempted sexual abuse of a minor. For purposes of Washington's SVP laws at chapter 71.09 RCW, these two convictions amount to "sexually violent offenses."[1] Leck was released on parole from confinement for these offenses in July 1996. After being in and out of confinement for various parole violations, Leck was unconditionally released from confinement in September 2002.

In April 2003, Leck applied for a membership at the YMCA in Bremerton, Washington. A YMCA employee, aware that Leck was a sex offender in Alaska, contacted Bremerton police. Having been informed by Leck's family[2] when Leck was released in 2002 that he might try to enter the Bremerton YMCA, the police contacted the address Leck had left there; the address was for a charitable organization at which Leck had begun volunteering a week earlier. The police searched the organization's computer to which Leck had had access during that week,

[1] RCW 71.09.020(17) defines "sexually violent offense."

[2] Leck's family lived in the Bremerton area at this time.

discovering numerous images downloaded during that time of minors engaged in sexually explicit conduct. Leck was arrested and later convicted in Kitsap County Superior Court of 46 counts of possession of depictions of a minor engaged in sexually explicit conduct.

II. PROCEDURAL BACKGROUND

In April 2007, shortly before Leck completed serving his sentence for the Kitsap County conviction, the State filed a petition[3] in Thurston County alleging that Leck was an SVP.[4] Leck was transported first to the Thurston County jail and then, after a probable cause finding under RCW 71.09.040, to the Special Commitment Center on McNeil Island to await his commitment trial.

In May 2008, before Leck's trial, the Washington Supreme Court issued *In re Detention of Martin*, holding that an SVP petition was improperly filed in Thurston County where Martin, the alleged SVP, had committed sexually violent offenses outside Washington and offenses that were not sexually violent in Clark County, Washington. 163 Wn.2d 501, 504-05, 182 P.3d 951 (2008). In view of *Martin*, the State moved to dismiss the Thurston County petition against Leck

[3] RCW 71.09.030 governs filing SVP petitions. The 1995 version of the statute was in effect when the State filed the petition against Leck in Thurston County. The legislature amended this version of the statute in 2008, but this amendment merely made one technical correction to the statute that is immaterial to our analysis here. *See* LAWS OF 1995, ch. 216, § 3; LAWS OF 2008, ch. 213, § 12. The 2008 version of the statute was in effect when the State refiled its petition against Leck in Kitsap County. The current version of the statute reflects the legislature's substantive amendments in 2009. *See* LAWS OF 2009, ch. 409, § 3.

[4] "'Sexually violent predator' means 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). The previous version of RCW 71.09.020 in force when the State filed its petitions against Leck in Thurston and Kitsap Counties provided this same definition of "sexually violent predator." *See* former RCW 71.09.020(16) (2006).

and—at the request of the Kitsap County prosecutor—filed a petition against Leck instead in Kitsap County in July 2008.

The Kitsap County petition was based on consulting psychologist Dale Arnold's 2006 evaluation of Leck in which Arnold diagnosed Leck with pedophilia.[5] As grounds for filing the petition, the State alleged that Leck had a mental abnormality—namely, pedophilia—but did not allege any personality disorder.[6]

Leck moved to dismiss the petition in December 2008 for lack of jurisdiction and probable cause, arguing that he was unlawfully detained at the time the State filed the petition in Kitsap County. Relying on *In re Detention of Keeney*, 141 Wn. App. 318, 330, 169 P.3d 852 (2007), the trial court concluded that an unlawful detention under a criminal proceeding does not divest the court of its power to process an SVP petition, and so the court denied Leck's motion in May 2009.

[5] Leck refused an interview with Arnold in 2005 for purposes of Arnold's initial evaluation of Leck; as a result, Arnold based his evaluation on a review of records alone.

[6] Although the SVP definition included the term "personality disorder" as early as 2006, the legislature did not include a definition for "personality disorder" in RCW 71.09.020 until 2009. *See* LAWS OF 2009, ch. 409, § 1. When the State filed its SVP petitions against Leck in 2007 and 2008, however, the definition of "sexually violent predator" already included "personality disorder" as an alternative precondition to establishing a person's status as an SVP. *See* RCW 71.09.020(16) (2006).

Then, in October 2010, the State moved for a ruling that, as a matter of law, Leck's 2003 conviction for possession of depictions of minors engaged in sexually explicit conduct qualified as a recent overt act,[7] which would relieve the State of its burden to prove a recent overt act at trial.[8] Attached to the State's motion was an update to Arnold's evaluation based on Arnold's face-to-face interview with Leck in September 2010. In the updated evaluation, Arnold diagnosed Leck with a personality disorder that predisposed him to commit criminal sexual acts. At no point, however, did the State amend the petition to include this personality disorder as grounds for the petition.

Treating the State's recent-overt-act motion as one for partial summary judgment, the trial court denied the motion, pointing to conflicting expert opinion on Leck's mental condition. The State moved for reconsideration. At the reconsideration hearing, with Leck present

[7] "'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." RCW 71.09.020(12). The previous version of RCW 71.09.020 in force when the State filed its petitions against Leck in Thurston and Kitsap Counties provided a substantially similar definition of "recent overt act." *See* former RCW 71.09.020(10) (2006). The minor changes made to this definition in 2009 do not affect our analysis here. *See Durbin*, 160 Wn. App. at 426.

[8] Due process requires showing that the alleged SVP, if released into the community, is currently dangerous; showing a recent overt act satisfies this dangerousness element. *In re Det. of Albrecht*, 147 Wn.2d 1, 10-11, 51 P.3d 73 (2002). The State does not need to show a recent overt act to prove current dangerousness, however, when, on the day the State files the petition, the alleged SVP is confined for an act that meets the statutory definition of a recent overt act. *In re Det. of Marshall*, 156 Wn.2d 150, 157, 125 P.3d 111 (2005). "[T]he 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.

telephonically, the trial court vacated its previous ruling and granted the State's motion, ordering that Leck's 2003 conviction qualified as a recent overt act.[9]

At trial, the court gave the following jury instruction on finding whether Leck was an SVP:

> To establish that Jack Leck, II is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:
>
> (1) That Jack Leck, II has been convicted of a crime of sexual violence, namely the Alaska offense of Sexual Abuse of a Minor in the Second Degree and/or Attempted Sexual Abuse of a Minor in the Second Degree;
>
> (2) That Jack Leck, II suffers from a mental abnormality *or personality disorder* which causes serious difficulty in controlling his sexually violent behavior; and
>
> (3) That this mental abnormality or personality disorder makes Jack Leck, II likely to engage in predatory acts of sexual violence if not confined to a secure facility.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that Jack Leck, II is a sexually violent predator.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that Jack Leck, II is not a sexually violent predator.

Clerk's Papers (CP) at 1580 (emphasis added). The court further instructed the jury with definitions on "mental

[9] Leck argues that his due process right to be present was violated when he was not allowed to be physically present for this reconsideration hearing. Because we reverse and remand for the petition's failure to give Leck adequate notice of the basis for the petition, we do not reach the issue of whether due process required that Leck have had the opportunity to be physically present at this hearing.

abnormality"[10] and "personality disorder."[11] Leck made no objections to these instructions.

The jury returned a verdict that the State had proved beyond a reasonable doubt that Leck was an SVP. The court ordered Leck be committed to the Special Commitment Center. Leck timely appeals.

ANALYSIS

I. AUTHORITY TO FILE THE PETITION

Leck first argues that the State did not have authority to file a petition against him under the law in effect in 2008. Leck further argues that retroactively applying the law as amended in 2009—under which the State would have had authority to file the petition—would deny him due process. But in *Durbin*, a recent case with facts analogous to those here, we held that the State had authority under the 2008 law to file the SVP petition in question. 160 Wn. App. at 429. We

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[10] Instruction 6 read:

> "Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit criminal sexual acts to a degree that makes the person a menace to the health and safety of others.
>
> "Volitional capacity" means the power or capability to choose or decide.

CP at 1582. This definition of "mental abnormality" substantially follows the language of the statutory definition at RCW 71.09.020(8). The statutory definition has been constant since the legislature first enacted Washington's SVP laws. *Compare* LAWS OF 1990, ch. 3, § 1002, *with* LAWS OF 2009, ch. 409, § 1 (reflecting the most recent version of RCW 71.09.020).

[11] Instruction 7 read:

> "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment.

CP at 1583. This definition of "personality disorder" reflects verbatim the language of the statutory definition at RCW 71.09.020(9). The legislature added this definition to RCW 71.09.020 in 2009. *See* LAWS OF 2009, ch. 409, § 1.

also held in *Durbin* that applying the 2009 law retroactively, which the legislature clearly had intended, did not violate due process. 160 Wn. App at 431. Accordingly, the State was not precluded here from filing the petition against Leck under either version of the law.

II. DUE PROCESS RIGHT TO NOTICE

Leck next argues that his statutory and due process right to notice was violated when the trial court instructed the jury on an alternative means (personality disorder) not mentioned in the petition alleging that Leck was an SVP. The State responds that Leck waived this argument by not challenging the instructions at trial. But instructing the jury on an alternative means not alleged in the petition is a manifest constitutional error that Leck may raise for the first time on appeal. We review such challenges raised for the first time on appeal more strictly against the challenger, liberally construing the petition to see whether the apparently missing element can be implied from the petition's language. Here, the missing alternative means (personality disorder) cannot be implied from the petition even under the most liberal of constructions. Evidence that Leck had a personality disorder was presented to the jury, and the jury was instructed that it could use the existence of this condition to find a necessary element of the State's case—that Leck had a mental illness. All necessary elements of the case, however, must appear in the SVP petition to satisfy the due process requirement of notice. Because the State did not include the personality disorder alternative to the mental illness element in its petition against Leck, we must reverse and remand.

A. RIGHT TO NOTICE IN AN SVP PROCEEDING

When the State files an SVP petition, the petition must "alleg[e] that a person is a sexually violent predator and stat[e] sufficient facts to support such allegation." RCW

71.09.030(1).[12] And although SVP proceedings are civil, a person who is the subject of this kind of proceeding is nonetheless entitled to certain due process protections guaranteed by the Fourteenth Amendment. *Specht v. Patterson*, 386 U.S. 605, 608-10, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967); *In re Det. of Stout*, 159 Wn.2d 357, 369, 150 P.3d 86 (2007).[13] The right to notice is an essential requirement of due process that applies to civil as well as criminal proceedings. *See Downey v. Pierce County*, 165 Wn. App. 152, 164, 267 P.3d 445 (2011) (essential principle of due process is right to notice and a meaningful opportunity to be heard) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)), *review denied*, 174 Wn.2d 1016 (2012). "To ensure due process, the State must give pretrial notice with all necessary elements of the charge." *In re Pers. Restraint of Benavidez*, 160 Wn. App. 165, 171, 246 P.3d 842 (2011) (citations omitted). The existence of a mental abnormality or personality disorder from which a person suffers is an element the State must prove beyond a reasonable doubt if that person is to be committed as an SVP. *In re Det. of Post*, 170 Wn.2d 302, 309-10, 241 P.3d 1234 (2010). "'Mental abnormality' and 'personality disorder' are two distinct means of establishing the mental illness element in SVP cases." *In re Det. of Halgren*, 156 Wn.2d 795, 811, 132 P.3d 714 (2006). Accordingly, if the State seeks to commit a person as an SVP on grounds that he has a personality disorder, the State must allege that personality disorder in the petition.

[12] Former RCW 71.09.030 (2008), under which the State filed its petition against Leck in Kitsap County, had this same requirement.

[13] "These commitment proceedings [of sex offenders] whether denominated civil or criminal are subject . . . to the Due Process Clause." *Specht*, 386 U.S. at 608.

Leck clearly has a right to have pretrial notice in the petition of the necessary elements of the State's SVP allegation. The State must allege in the petition whether Leck has a mental abnormality, a personality disorder, or both because the existence of such a condition is a necessary element in an SVP case. If the State failed to allege the existence of a personality disorder in the petition, the State was not entitled to an instruction on personality disorder. If the trial court instructed the jury that it could find that Leck was an SVP based upon a non-alleged personality disorder, the court clearly violated Leck's due process right to know of and prepare to defend himself against this allegation.

B. CHALLENGE FOR THE FIRST TIME ON APPEAL

A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a). Because a challenge to the sufficiency of a charging document—including, as here, an SVP petition—involves the constitutional due process right to notice, a party may initially make the challenge to this court. *See State v. Leach*, 113 Wn.2d 679, 691, 782 P.2d 552 (1989). When a party first challenges a charging document's sufficiency on appeal, we review the challenge more strictly against that party by liberally construing the document in favor of its validity. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). Included within this heightened standard of review are an essential-elements prong and an actual-prejudice prong. *Kjorsvik*, 117 Wn.2d at 105. Under the essential-elements prong, we review the document for language from which we can imply the allegedly missing element; if we cannot find any such language, the challenging party prevails. *Kjorsvik*, 117 Wn.2d at 106. If we do find such language, but it is vague or inartful, then the challenging party, under the actual-prejudice prong, has a second chance at prevailing if this language prevented the party from receiving actual notice of the missing element. *Kjorsvik*, 117 Wn.2d at 106.

Because Leck's argument is that his constitutional due process right to notice was violated when the court instructed the jury on a personality disorder—an element not included in the petition—Leck may raise this issue for the first time on appeal.[14] We review the issue by, first, liberally construing the petition for language that may imply this missing element.

C. ALTERNATIVE MEANS MISSING IN PETITION

Under the liberal-construction standard of review, the essential-elements prong is the first prong that this court must consider by "look[ing] to the face of the charging document itself." *Kjorsvik*, 117 Wn.2d at 106. Citing *Hagner v. United States*,[15] the court in *Kjorsvik* expounded on this standard with respect to elements apparently missing from the charging document:

> [E]ven if there is an apparently missing element, it may be able to be fairly implied from language within the charging document. Many cases utilize the *Hagner* standard and hold that if the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal. Thus, when an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document.

Kjorsvik, 117 Wn.2d at 104 (citations omitted). Merely giving the name of the offense and citing to the proper statute, however, insufficiently charges an offense unless its name apprises the accused of all essential elements.[16] *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

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[14] Because we reverse on grounds that Leck's constitutional due process right to notice was violated, we do not address Leck's argument that his statutory right to notice was also violated when the trial court instructed the jury on a personality disorder not alleged in the petition. We note, however, that, as a non-constitutional issue, Leck may have waived this argument when he failed to object to this instruction at trial.

[15] 285 U.S. 427, 433, 52 S. Ct. 417, 76 L. Ed. 861 (1932).

[16] "[D]efendants should not have to search for the rules or regulations they are accused of violating." *City of Auburn v. Brooke*, 119 Wn.2d 623, 635, 836 P.2d 212 (1992).

With respect to the essential-elements prong here, the State made no explicit mention within the SVP petition of any personality disorder, alleging as the mental-illness element only Leck's mental abnormality (pedophilia). Where two alternative means of meeting the mental-illness element are available, but the State unequivocally alleges only one in the petition, the other simply cannot be read into the petition.

At the beginning of the petition, the State did allege that Leck was an SVP as defined in former RCW 71.09.020(16).[17] This definition does include the "mental abnormality or personality disorder" alternatives. But this definition is not included in the petition's text. And the petition goes on to specifically mention mental abnormality, clarifying that this abnormality is the sole allegation put forth to meet the mental-illness element. Nothing else in the petition even suggests using a personality disorder as grounds for committing Leck as an SVP. Because the petition fails under the essential-elements prong, we do not need to consider the actual-prejudice prong. We therefore reverse and remand. On remand, the State may either file a new SVP petition against Leck or amend the 2008 petition for a new commitment proceeding.

Penoyar, J.

We concur:

Worswick, C.J.

Bjorgen, J.

[17] This definition is now at RCW 71.09.020(18).

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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In re the Detention of:

JACK LECK, II,

Petitioner.

No. 42573-4-II

ORDER DIRECTING
ADDITIONAL BRIEFING

The State filed a motion for reconsideration of this court's September 4, 2013 opinion. After review of the motion for reconsideration and the files and records herein, we direct the Appellant and Respondent to file additional briefing. The additional briefing should address *In re Pers. Restraint of Brockie*, No. 86241-9 (filed September 26, 2013), and how this ruling affects this matter.

The parties have fourteen days from the date of this order to file their respective briefs.

PANEL: Penoyar, Worswick, Bjorgen.

Dated this 4th day of October, 2013.

FOR THE COURT:

Worswick, cj
Chief Judge

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APPENDIX E

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of: JACK LECK, II, Petitioner.	No. 42573-4-II ORDER GRANTING RECONSIDERATION; WITHDRAWING OPINION; AND SETTING AS A NON-ORAL ARGUMENT

After review of the records and files herein and in light of the recent Supreme Court ruling, *In re Personal Restraint of Brockie*, No. 86241-9 (filed September 26, 2013), we grant the State's motion for reconsideration.

We withdraw our September 4, 2013 published opinion and set this matter on the January 17, 2014 non-oral argument docket. A new opinion will be filed in due course.

Dated this 19TH day of NOVEMBER, 2013.

Panel: Jj. Penoyar, Worswick, Bjorgen.

FOR THE COURT:

Presiding Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 42573-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Sarah Sappington, AAG
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Office of the Attorney General – Criminal Justice Division

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 27, 2014

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