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DIVISION II

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NO. 39454-5

STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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In re the Detention of:

DAVID DURBIN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**RESPONDENT'S OPENING BRIEF**

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ROBERT M. MCKENNA  
*Attorney General*

SARAH B. SAPPINGTON  
*Senior Counsel*  
WSBA No. 14514  
Attorney General's Office  
Criminal Justice Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2019

pm 4-16-10

**ORIGINAL**

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## I. ISSUE PRESENTED

1. **Where the trial court has determined that Durbin committed a recent overt act in Clark County, is the State's filing of a sexually violent predator petition in that county proper?**
2. **Where a "recent overt act" was committed by Durbin one year prior to a sexually violent predator petition's initial filing and where Durbin has been in continual confinement since that act, is that act sufficiently "recent" for due process purposes?**

## II. STATEMENT OF THE CASE

### A. Procedural History

On June 14, 2004, the State filed a petition alleging that Durbin met the criteria for civil commitment as a sexually violent predator (SVP) under RCW 71.09. CP at 63, 306. At that time, he was about to be released from prison where he had been serving a sentence for Attempted Residential Burglary and Assault in the 3rd Degree, both of which acts had occurred in Clark County. CP at 63, 306. He had been continually confined for that crime since his arrest on the day of the offense. CP at 306.

Upon an ex parte finding of probable cause, Durbin was transferred to the Thurston County jail, and on September 30, 2004, Durbin stipulated that the Petition and the Certification for Determination of Probable Cause, filed on June 14, 2004, established probable cause to believe that Durbin is a sexually violent predator. CP at 63-64. Durbin was transported to the Special Commitment Center (SCC) on McNeil Island, where persons

detained under RCW 71.09 are housed. CP at 64. Durbin was detained at the SCC awaiting his initial commitment trial.

On May 1, 2008, prior to his scheduled commitment trial, the Washington Supreme Court issued *In re the Detention of Martin*, 163 Wn.2d 501, 182 P.3d 951 (2008). The *Martin* Court held that sexually violent predator actions in which an offender's sexually violent offense<sup>1</sup> conviction occurred outside of Washington State are not properly filed in Thurston County. *Id.* 163 Wn.2d. at 955-57. On July 22, 2008, consistent with that decision and at the request of the Clark County prosecutor the State filed this case against Durbin in Clark County, Washington where Durbin had been convicted of Attempted Residential Burglary and Third Degree Assault. CP at 3, 79. The state subsequently dismissed its petition in Thurston County without prejudice. CP at 307.

**B. Factual Background**

**1. 1987: Louis and Clark County, Montana: Sexual Assault**

David Durbin was born on July 16, 1962, and is now 47 years old. On July 19, 1987, Durbin, then 25, was inside the Mormon Church in Helena, Montana. Five-year-old S.E had gone to use the bathroom while her brother waited outside the door. 1RP at 27. When she came out of the

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<sup>1</sup> At the time of the *Martin* decision, sexually violent offenses were defined in RCW 71.09.020(15). The definition can now be found at RCW 71.09.020(17).

stall, there was a man whom she had never seen before in the bathroom waiting. *Id.* at 28. He picked her up, asked her name as well as some other questions, and then carried her out of the bathroom through a different door. *Id.* at 27-28. He lifted up the child's dress and began touching her. *Id.* at 29. S.E. testified that she felt uncomfortable, and "either screamed or—or did something frantic." *Id.* at 29. (Durbin testified that she began to cry. 1RP at 37). Durbin fled. *Id.* at 29. After he was apprehended, Durbin wrote, in his statement, that he "didn't actually think of [the assault on S.E] as a crime when I committed it. I just wanted to be close with somebody." 3RP at 252.

Durbin was subsequently convicted of Sexual Assault for this offense, and was sentenced to twelve years confinement. CP at 306; 2RP at 170-71, Exs. 1 and 2. .

**2. 1989: Sheridan County, Wyoming: Sexual Assault Third Degree**

A year before the incident with S.E, in approximately November 1986, Durbin, 24, had been staying with his brother and sister-in-law in Sheridan, Wyoming. Durbin's brother's 10-year-old stepdaughter, L.B., lived with them. 3RP at 235. According to an interview with L.B. in 1988, Durbin began to sexually abuse her almost immediately after he moved in with the family. 3RP at 238-39. Durbin fondled L.B.'s

breasts and pubic area on numerous separate occasions. At trial, L.B. testified that, the first time it occurred, she awoke to him "poking around, trying to get under my underwear with his hands." 1RP at 9. When she realized what was happening, she got up and went to sleep between her mother and step-father for the rest of the night. *Id.* She testified that there were other times when she "would wake up and he was touching me in various ways." *Id.* at 10. One time, she locked herself in the bathroom "to keep him away from me; on another occasion, she locked herself in a closet. *Id.* More than once, Durbin woke her up to tell her "to take my clothes off and to get into bed with him." *Id.* He would tell her that she couldn't tell, that it was okay, that it was normal, and that he would hurt L.B.'s mother if she told. *Id.* at 11, 15. At times, to prevent her from screaming, Durbin would cover L.B.'s mouth with his hand, and she was made to feel that force would be used if she did not comply. 3RP at 238-40. At one point L.B. asked Durbin why he was doing these things to her, to which he replied, "[b]ecause I want to." 3RP at 242.

The assaults against L.B. were not uncovered until 1987 when Durbin, during an evaluation performed after his conviction for the sexual assault of S.E., disclosed the abuse of L.B. to an evaluator, telling the evaluator that he had had a strong sexual desire for L.B. and had penetrated her vagina with his finger. 3RP at 236-37. In a deposition played at trial,

Durbin testified that he had continued to fantasize about his niece after having "cuddled" with her, and had masturbated to those thoughts. 1RP at 21.

In May 1989, Durbin was charged for his conduct against L.B. On June 26, 1989, Durbin pled guilty to Sexual Assault in Third Degree and was sentenced to a period of not less than three years and not more than five years. Exs. 3-6; 2RP at 171.

### **3. 2003: Clark County: Attempted Residential Burglary**

On June 3, 2002, Durbin was released from confinement for his sexually violent offense against S.E. Slightly more than one year later, on June 15, 2003, in Clark County, Washington, Durbin was arrested outside of the home of Eduvigis Villa Chavez of Vancouver Washington.

On the evening of the June 15, 2003, Ms. Villa Chavez was in her apartment where she lived with her husband and their four children—three boys and one girl. 1RP at 57, 60. The children ranged in age from one to ten. *Id.* Ms. Villa Chavez's apartment was on the ground floor, next to a field and a church. *Id.* at 58-59. Her husband was not home. Ms. Villa Chavez was ironing clothes in her bedroom while her three boys played in the living room, where she would check on them periodically. *Id.* at 60. Her oldest son called to her, saying that there was a man outside, "playing on the grass," and that he had been watching the boys for 20 to 30 minutes. *Id.* Ms. Villa Chavez looked out, and saw the man—later identified as

Durbin—kneeling down outside the sliding glass door and watching her and the boys intently. *Id.* at 60-61. She immediately turned off the lights in the apartment and went to call her sister, who lived nearby. *Id.* at 61. As she made the call, he continued to sit against a pine tree outside the door. *Id.* When her sister arrived, the two of them approached him, asking him to leave, which he did. *Id.* at 63.

About 15 minutes after he had left, while Ms. Villa Chavez was on the phone with a friend, she looked up and again saw Durbin standing outside her apartment, roughly five to six feet away, looking in. *Id.* at 64, 79. Frightened, she called her sister again, woke her daughter, and gathered the other children into the hallway where she could "keep them safe." *Id.* at 65-66. As she was gathering the children, she saw Durbin going toward the back of the building, and suddenly thought about the windows. *Id.* at 66. She ran into the back rooms, closed the blinds and made sure that the windows were also closed. *Id.* As she was closing the blinds in her room and her boys' room, Durbin was behind every window: "Every time I went to a window to close the blinds, he was touching the windows as if to see if they were open." *Id.* As she closed the blinds, she and Durbin made eye contact. *Id.* at 67.

Her sister and niece arrived shortly thereafter, as did the police. When Officer Robert O'Meara of the Vancouver Police Department arrived,

he saw Durbin sitting on a park bench in a children's play area next to the church. 2RP at 121-22. Durbin was sitting on the bench with a "jacket or something" over his hands, which were "kind of moving around." *Id.* at 123. When apprehended, Durbin was resistant, swearing, hitting and kicking the officers. 1RP at 69; 2RP at 129. One of the detectives opened the suitcase Durbin had been wheeling behind him, which contained, *inter alia*, toys, candy, and condoms. 2RP at 143-44; CP at 309. Police also found a church ID in his backpack or in his wallet that said "volunteer" with the name David Durbin. 2RP at 130. When Officer O'Meara went to the jail later that evening to see Durbin, he observed him in the holding cell, having removed his pants and lying in a fetal position, masturbating. 2RP at 146-48.

Durbin was subsequently charged. On August 11, 2003, he pled guilty to Attempted Residential Burglary and Assault in the 3rd Degree and was sentenced to one year and one day in prison. CP at 306, 2RP at 168, 171-72. Exs. 7-10.

#### **4. Durbin's Disclosures**

At trial, the State played portions of Durbin's videotaped deposition. He testified that he had first found that he had an attraction to little girls when he was 23 or 24 years old. 1RP at 22. He testified that he had had sexual contact with roughly five female children. He testified that his first

sexual contact had been with his ten-year-old niece, and that, after her, his next four victims were all in Montana. 1RP at 20, 32. All of the Montana victims were associated with the Mormon Church, and all occurred during a two-month period. *Id.* at 33-34. All of the victims were girls between five and ten years old. *Id.* at 33. Although he testified that his purpose in attending the church was not to have access to children, he testified that there were "times when I became aroused by kids and then it kind of turned into kind of an obsession." *Id.* at 35. Asked how he felt when having sexual contact with these children, Durbin responded that he was both aroused and frightened. *Id.* at 39-40. After the incidents, he would masturbate to thoughts of the victims. *Id.* at 42. Durbin testified that, although he knew was wrong, it was not until the Montana incident in the Mormon Church that he actually realized that his behavior might be hurting anyone. *Id.* at 42-43.

Durbin admitted that he had used things like diapers and baby blankets, which he referred to as "feel good items," (1RP at 49-50) to masturbate. *Id.* at 48. He also testified in his deposition that he had gone into school bathrooms to masturbate because he had been aroused to children. *Id.* at 48-49. In an interview with an evaluator in 1987, Durbin admitted that he had a deviant fantasy in which he removed a child's clothing, hugged the child, and whispered into the child's ear, "I love you,"

or "I want to have sex with you." CP at 309. He would then remove his own clothing, feel the child's body, "snuggle" up to the child, and insert his penis into the child's anus. *Id.* In 2003, after participating in in-patient and out-patient sex offender treatment, Durbin admitted to an evaluator that possibly 40 percent of his sexual fantasies included children. *Id.* In 2007, he admitted to masturbating three to four times per week to thoughts of "all kinds of girls." *Id.* Durbin admitted that he did not try to stop sexually offending until he was arrested for his last contact offense, and that he stopped sexually offending against children because he was arrested. *Id.*

### III. ARGUMENT

#### A. *Martin* Does Not Require Dismissal Of The State's Clark County Proceeding Against Durbin

Durbin argues that "the express language of RCW 71.09.030 and the Supreme Court's decision in *Martin* demands [sic] reversal of the civil commitment proceeding because the State lacked the statutory authority to file the petition." App. Br. at 6. Durbin is incorrect. *Martin* may have applied to Durbin's case when the petition against him was pending in Thurston County, in that, as in *Martin*, he had neither been charged nor convicted in that county. Once the *Martin* decision was issued, however, the State timely re-filed in Clark County where Durbin had in fact been "convicted or charged," and dismissed the Thurston County action.

The problem identified in *Martin* has thus been eliminated here, in that there is a county prosecutor with appropriate statutory authority to initiate SVP proceedings in a county where Durbin has been convicted. This conclusion is supported by the express language of RCW 71.09.030. Nor does this conclusion depend upon retroactive application of amended RCW 71.09.030, in that the clear language of the pre-amendment version of the statute supports such a result.

**1. *Martin* permits the petition's re-filing in Clark County**

Sheldon Martin was convicted in Clark County, Washington, of Burglary in the Second Degree with Sexual Motivation and Indecent Exposure, two sexual offenses that do not qualify as sexually violent offenses. *Martin*, 163 Wn.2d at 505. Martin fled to Oregon pending sentencing where he committed (and was subsequently convicted of) Kidnapping in the Second Degree and Attempted Sexual Abuse in the First Degree, both of which are sexually violent offenses. *Id.* He was sentenced to 120 months, and then returned to Washington for sentencing. He was then sentenced to 30 months to be served consecutively after his Oregon sentence. *Id.*

When Martin was about to be released on the sentence for his Clark County convictions, the Thurston County Prosecuting Attorney's Office was notified, and subsequently asked that the Attorney General

initiate SVP proceedings against Martin on its behalf. 163 Wn.2d at 505. The *Martin* Court subsequently determined that, because the Thurston County prosecutor had neither charged nor convicted Martin of anything, the Thurston County prosecutor had no statutory authority to initiate SVP proceedings. *Id.* at 508-09. In so ruling, the *Martin* Court closely scrutinized the language of RCW 71.09.030 to determine the legislature's intent with regard to the initiation of SVP proceedings. The Court concluded that SVP actions must be filed in a county where the alleged SVP was convicted of "some offense." *Id.* at 512. Specifically, the Court wrote,

Here, authorizing only the county prosecutor who convicted or charged the alleged sexually violent predator reflects the legislature's perceived limits of its personal jurisdiction over alleged sexually violent predators outside Washington. With limited exception inapplicable here, Washington's criminal or civil authority does not extend beyond its borders. Commonsense dictates when an alleged sexually violent predator enters our State, he or she simultaneously enters a county of our State. When an alleged sexually violent predator is about to be released from confinement, he or she is about to be released **after being convicted of some offense in a county of our State.** Authorizing only those prosecutors who convicted or charged the alleged sexually violent predator is understandable; "prosecutors are elected by and answerable to their ... constituents." Accordingly, since this omission of filing authority is understandable, we do not correct it.

*Id.* (internal citations omitted; emphasis added).

Here, the filing of a petition in Clark County satisfies the

requirements both of the statute and of *Martin*. Durbin had been convicted of not one but two offenses—Attempted Residential Burglary and Third Degree Assault—in Clark County, satisfying the court's apparent concern that the offender have some connection to the jurisdiction in which the sex predator petition is filed.

**2. RCW 71.09.030 Authorizes The Petition's Re-Filing In Clark County**

Durbin argues that, under the law in effect in 2008, the State did not have authority to file a sexually violent predator petition against Durbin, and that retroactive application of amended RCW 71.09.030, which explicitly allows for such filing, would violate his rights to due process.

Durbin's argument is without merit. The State concedes that, pursuant to our Supreme Court's 2008 decision in *Martin*, there was no authority to file the initial 2004 petition against Durbin in Thurston County. The State, however, properly dismissed the Thurston County case without prejudice and, at the request of the Clark County prosecutor, re-filed in Clark County, where Durbin was determined to have committed a recent overt act. CP at 79, 306-07, 311.

Retroactive application of amended RCW 71.09.030 is not required to reach this result, and Durbin's rights to due process under that

amended statute are not implicated. The State re-filed Durbin's petition in Clark County under the pre-amendment version of RCW 71.09.030, and does not now rely upon the amended statute. The Legislature's subsequent modification of the Statute, however, makes abundantly clear that the Legislature both intends and has always intended to allow for such filings in the county where the alleged recent overt act was committed. There is no legal impediment to pursuing Martin's civil commitment in that county. The trial court properly dismissed the petition without prejudice.

In order to prove that a person is an SVP, the State must prove that:

- 1) the person has been convicted of or charged with a crime of sexual violence;
- 2) he/she suffers from a mental abnormality or personality disorder; and
- 3) the mental abnormality or personality disorder makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

RCW 71.09.020(18).<sup>2</sup> The Washington State Supreme Court has held that, if the person is not confined for a sexually violent offense or an act "that would constitute a recent overt act" at the time the SVP petition was

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<sup>2</sup> The definition of "sexually violent predator" was, at the time of the petition's filing, found at RCW 71.09.020(16). The substantive definition has not changed since that time.

filed, the State will be required to prove a recent overt act<sup>3</sup> at the time of trial. *In re the Detention of Henrickson*, 140 Wn.2d 686, 697, 2 P.3d 473 (2000). The determination as to whether something "would constitute a recent overt act" is a mixed question of law and fact, to be determined by the trial court prior to trial. *In the Matter of the Detention of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005).

At the time of the Petition's initial filing in 2004, Durbin was confined based on a 2003 conviction for Attempted Residential Burglary and Assault Third Degree. CP at 306. Because neither of these is a sexually violent offense under the statute, the State made a pre-trial motion asking the trial court to determine, as a matter of law, that Durbin's 2003 conviction for Attempted Residential Burglary "constituted" a recent overt act pursuant to *Marshall*, (CP at 271), which was granted. CP at 292. That this conviction constituted a recent overt act was reiterated in the trial court's Conclusions of Law following trial. CP at 311.

As such, the State's re-filing of its petition against Durbin in Clark County was authorized by the express language of former, pre-amendment RCW 71.09.030(5), which read in pertinent part as follows:

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<sup>3</sup> A recent overt act is defined as "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 the history and mental condition of the person engaging in the act or behaviors. RCW 71.09.020(17).

When it appears that: ... (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).<sup>4</sup> The unambiguous language of RCW 71.09.030 permits filing of a petition in a county "where the person was convicted or charged." This phrase, the *Martin* Court determined, "cannot be interpreted to mean anything but exactly what it says. This language is not ambiguous, and we assume the legislature means exactly what it says." 163 Wn.2d at 508 (citing *W. Telepage, Inc., v. City of Seattle*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000)). Because Durbin was both charged and convicted in Clark County, the clear language of the statute permits filing under such circumstances, and no retroactive application of the amended statute is necessary to achieve that result.

Nor is there anything in *Martin* that contradicts this interpretation. The *Martin* Court, while rejecting the State's filing of Martin's case in Thurston County, clearly left open the option of re-filing the petition in an appropriate county. 163 Wn.2d at 506 ("Which prosecutor could

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<sup>4</sup> The statutory amendments in question were enacted in May of 2009, after Durbin's case had been re-filed in Clark County.

appropriately take such an action we do not decide."). The State's re-filing in Clark County was proper.

**B. Durbin's Commitment Comports With Due Process**

Durbin argues that, because the recent overt act proved by the state at trial occurred five years prior to his commitment trial, it cannot be said to be "recent" for purposes of due process. This argument lacks merit.

Durbin offers no legal authority for the proposition that an event that occurred only one year prior to his initial detention on the sex predator petition, and where he has been in continuous confinement since that time is not, as a matter of law, "recent" enough to constitute a recent overt act.<sup>5</sup> First, there is nothing in the statutory language defining a recent overt act that limits the time frame within which such an act must have occurred. RCW 71.09.020(17). Moreover, this argument is contrary to settled law. The appellate courts of this state have repeatedly held that, in determining whether something can be said to constitute a recent overt act, the key is not some arbitrary time limit, but rather whether the acts alleged are "still probative of the subject's present sense of dangerousness." *In re the Detention of Pugh*, 68 Wn. App. 687, 694-95, 845 P.2d 1034 (1993). In *Pugh*, a case brought pursuant to RCW 71.05,

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<sup>5</sup> Nor does Durbin assign error to any of the trial court's Findings of Fact. As such, the findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

the general civil commitment statute, the Court of Appeals found that acts committed five, eleven, and even thirteen years before qualified, under the circumstances, as sufficiently "recent" to satisfy the recent overt act requirement:

in considering whether an overt act, evidencing dangerousness, satisfies the recentness requirement, it is appropriate to consider the time span in the context of all the surrounding relevant circumstances. Here, the record shows that Pugh was unable to make a choice to control his pedophilia; and that there is a substantial likelihood that in the future he would act out against children, causing serious physical harm because of his sexual obsessions. The absence of overt acts in the last 5 years might be sufficient to discount the diagnosis and prediction of dangerousness were Pugh then living in the typical community. Pugh, however, has been institutionalized since 1986; isolated from children towards whom he has a predilection to cause harm. The absence of more recent overt acts during confinement is readily explainable as a lack of opportunity to offend rather than a demonstration of improvement so as to negate the showing that he presents a substantial risk of physical harm. We are satisfied that his earlier offenses resulting in convictions when considered with his confinement and current diagnosis satisfy the requirement that his future dangerousness be evidenced by a recent overt act.

*Id.*, 68 Wn. App. at 695-96. Likewise, in *Henrickson*, the Washington State Supreme Court determined that convictions for Attempted Kidnapping and Communicating with a Minor for Immoral Purposes that had occurred six years before the SVP petition's filing constituted recent overt acts. 140 Wn.2d at 698. *See also Marshall*, 156 Wn.2d at 153 (overt acts

occurring up to five years before the petition's filing may constitute recent overt acts). More recently, Division I, citing *Pugh*, re-affirmed that, for purposes of determining whether an individual facing commitment has committed a recent overt act, whether an act is "recent" must be considered in the context of all relevant circumstances. *In re the Detention of Robinson*, 135 Wn. App. 772, 780, 146 P.3d 451 (2006).

Durbin appears to attempt to distinguish his case from *Marshall* by stating that Marshall had been lawfully confined, whereas he—because the Thurston County prosecutor lacked authority to file the initial petition against him—was not. He offers no argument in support of this contention, and in fact, this is a distinction without a difference. First, he offers no authority for the proposition that his confinement under the initial petition was unlawful. It has long been the rule in Washington that, where a case has not been decided on its merits, a dismissal without prejudice is proper. *Lawrence v. Department of Health*, 133 Wn. App. 665, 679, 138 P.3d 124 (2006) (citing *Parker v. Theubet*, 1 Wn. App. 285, 291, 461 P.2d 9 (1969)). Here, the State's initial petition was, under *Martin*, an improper pleading because it was filed in the wrong county. The proper remedy was thus dismissal without prejudice and refiling in the correct

county, which is precisely what occurred here.<sup>6</sup> Likewise, in a criminal case, the remedy for an improper information is dismissal without prejudice to file a proper information. *State v. Vangerpen*, 125 Wn.2d 782, 793, 888 P.2d 1177 (1995); *See also State v. Warfield*, 119 Wn. App. 871, 884, 80 P.3d 625 (2003) (citing *State v. Johnson*, 119 Wn.2d 143, 829 P.2d 1078 (1992)).

Moreover, appellate courts of this state have repeatedly rejected arguments that allegedly unlawful confinement undermines the commitment. In *In re the Detention of Keeney*, 141 Wn. App. 318, 169 P.3d 852 (2007), the Court of Appeals rejected the SVP's argument that his allegedly illegal confinement by the Department of Corrections at the time of the SVP petition's filing deprived the trial court of jurisdiction to hear his subsequent SVP commitment, noting that "there is no precedent in Washington that an unlawful detention of an inmate removes jurisdiction and precludes the State from obtaining subsequent civil commitment of that individual as an SVP." *Id.* 141 Wn. App. at 329. "'Lawful custody'" is not a jurisdictional prerequisite to a valid petition for civil commitment as a SVP." *Id.* at 330.

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<sup>6</sup> The same holds true in other types of dismissals not resulting in an adjudication on the merits. *State v. Carter*, 138 Wn. App. 350, 368, 157 P.3d 420 (2007) (dismissal without prejudice proper where *Knapstad* motion is granted); *Lanning v. Poulsbo Rural Tel. Ass'n*, 8 Wn. App. 402, 406-07, 507 P.2d 1218 (1973) (dismissal without prejudice proper where necessary party not joined); *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 488, 200 P.3d 683 (2009) (dismissal without prejudice proper for voluntary dismissals under CR 41(a)(1)(B)).

*See also In re the Detention of Dudgeon*, 146 Wn. App. 216, 189 P.3d 240 (2008), *rev. den.* 165 Wn.2d 1028, 203 P.3d 378 (2009) (allegedly illegal detention does not create due process requirement that State plead and prove recent overt act).

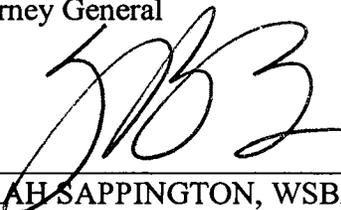
The decision of the trial court was consistent with all relevant legal precedent. Durbin engaged in behavior demonstrating his sexual dangerousness in 2003, only one year before the initial SVP petition's filing in 2004. As found by the trial judge, these behaviors create a reasonable apprehension of harm of a sexually violent nature. The trial court properly found that the behavior underlying Durbin's 2003 conviction constituted a recent overt act.

#### IV. CONCLUSION

For the foregoing reasons, the trial court's order committing David Durbin should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of April, 2010.

ROBERT M. MCKENNA  
Attorney General



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SARAH SAPPINGTON, WSBA No. 14514  
Senior Counsel  
Attorneys for Respondent

NO. 39454-5-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

DAVID DURBIN,

Appellant.

DECLARATION OF  
SERVICE

I, Jennifer Dugar, declare as follows:

On this 16th day of April 16, 2010, I sent via email and deposited in the United States mail true and correct cop(ies) of Respondent's Opening Brief and Declaration of Service, postage affixed, addressed as follows:

Carolyn Morikawa  
Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

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

DATED this 16th day of April, 2010, at Seattle, Washington.

JENNIFER DUGAR

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