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NO. 619<sup>6</sup>7-5-I

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

IN RE THE DETENTION OF ROBERT DANFORTH

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DANFORTH,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 AUG 20 PM 4:20

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY  
The Honorable Charles Mertel, Judge

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

AS A MATTER OF LAW, MR. DANFORTH DID NOT  
COMMIT A RECENT OVERT ACT.

Robert Danforth, a 63-year-old man who has lived for 10 years in the community crime-free, walked into the King County Sheriff's Office and asked for help. CP 71, 310-11. He stated that he had a dream the previous night wherein he was 13 years old and had sex with another 13-year-old, and that the dream scared him. He asked to be placed in a mental health facility. CP 310-11. When asked what he would do if mental health professionals could not help him, Mr. Danforth said he would "rub up against" teenage boys at an arcade. CP 392.

The mental health professionals that were called declined to help Mr. Danforth. CP 394. Instead, Mr. Danforth was thrown in jail, and the prosecutor's office petitioned for his commitment as a sexually violent predator, alleging that Mr. Danforth's request for help constituted a recent overt act. CP 1-46, 311, 394. The trial court denied Mr. Danforth's motion for summary judgment, ruling that his statements satisfied the "recent overt act" definition. CP 293, 420-21.

In his opening brief, Mr. Danforth argued that as a matter of law, his requests for help do not constitute a “recent overt act.” Indeed, there are several independent bases for reversal in this case: (1) the statements were not “threats” under the plain language of the statute; (2) construing Mr. Danforth’s statements as a recent over act would violate the narrow-tailoring requirement of the due process clause; (3) construing the statute to encompass statements like Mr. Danforth’s would render the statute overbroad in violation of the First Amendment because Mr. Danforth’s statements were not true threats; and (4) construing the statute to encompass statements like Mr. Danforth’s would render the statute void for vagueness because the statute does not provide adequate notice that an individual may be subject to commitment as a sexually violent predator if he seeks help to avoid reoffending.

In response, the State reads the word “threat” out of the statute, falsely claims there is an issue of fact, and misapplies First Amendment caselaw. The State’s arguments should be rejected.

1. Mr. Danforth’s statements seeking help do not constitute a “threat” within the meaning of the statute. As amended in 2001, the Sexually Violent Predator Act provides, in relevant part:

“Recent overt act” means any act or threat 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.

RCW 71.09.020 (10) (emphasis added). The State alleged that Mr. Danforth’s statements were threats. As explained in Mr. Danforth’s opening brief, the word “threat” is not defined in the statute, and therefore the common dictionary definition applies. The dictionary defines “threat” as an “expression of an intention to inflict loss or harm on another.” Webster’s Third New International Dictionary at 2382 (2002). Because Mr. Danforth did not express an intention to harm another – indeed he expressed precisely the opposite intention – his statement is not a threat under the plain meaning of the term.<sup>1</sup>

In response, the State reads the word “threat” out of the statute. Br. of Resp’t at 17. The State argues that Mr. Danforth’s statements satisfy a separate clause of the “recent overt act”

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<sup>1</sup> While at the Sheriff’s office, Mr. Danforth requested help to avoid offending against teenaged boys. Subsequently, when interviewed at the Special Commitment Center, Mr. Danforth indicated he really wanted refuge from the neighborhood harassment to which he had been subjected, and his history bears out this later representation. But it does not matter which set of statements one believes. Whether Mr. Danforth sought help to avoid reoffending or sought protection from his harassers, his expressed intent was to seek help, not to harm anyone. Therefore, his statements – both those at the sheriff’s office and those at the commitment center – do not constitute threats.

definition, and implies that because that clause is satisfied the “threat” clause does not also have to be satisfied.<sup>2</sup> That separate clause is the requirement of a creation of “reasonable apprehension of [sexually violent] harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” Br. of Resp’t at 17 (quoting RCW 71.09.020). But the State ignores the fact that the thing creating the reasonable apprehension must be an act or threat. RCW 71.09.020(10).

Statutes must be construed to give all language effect with no portion rendered meaningless or superfluous. State v. Torres, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 2226453 (2009) (citing State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001)).

Therefore, the State is wrong when it declares that “the question is whether Danforth’s statement creates a reasonable apprehension.” Br. of Resp’t at 17 (emphasis added). The words “act or threat” must be given effect, not rendered superfluous. Under the statute, a mere statement that creates apprehension is not a recent overt act; only an “act or threat” that creates apprehension can be a recent overt act. RCW 71.09.020(10). Because there was no act

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<sup>2</sup> Mr. Danforth does not concede that the second clause is satisfied. The second clause is not at issue in this appeal because the statements must be “threats” before one even reaches the second clause.

or threat in this case, the order denying summary judgment should be reversed.

2. Because the parties stipulated to the record, there is no genuine issue of material fact, and summary judgment should have been granted as a matter of law. The State then attempts to argue that summary judgment was properly denied because there was a genuine issue of material fact. Br. of Resp't at 18. This claim is patently false. The parties stipulated to the record, including the record of Mr. Danforth's statements. CP 286-419. The parties' briefs in the trial court reveal no dispute as to the facts. CP 60-77, 138-86. Mr. Danforth did not assign error to any factual findings on appeal, only to the legal conclusion regarding the recent overt act. App. Br. at 3. There is no dispute about what the statements were. The question is purely legal: do those statements constitute a "threat" for purposes of the "recent overt act" requirement of the SVPA? Because the answer is no, summary judgment should be granted in Mr. Danforth's favor.

3. Unless limited to true threats, the statutory amendment extending the definition of "recent overt act" to encompass threats is unconstitutionally overbroad. As explained in Mr. Danforth's opening brief, because the statements were not threats under the

plain meaning of the statute, the order denying summary judgment should be reversed on that ground with no need to reach the First Amendment arguments. Nevertheless, it is worth noting that the trial court's construction of the statute is unconstitutional.

Because individuals have the right to freedom of speech under the First Amendment, threats may not be sanctioned or prohibited unless they are "true threats". U.S. Const. amend. I; State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or take the life of another individual." State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001). Contrary to the State's argument, whether a true threat has been made is determined under an objective standard that focuses on the speaker, not the listener. State v. Johnston, 156 Wn.2d 355, 361, 127 P.3d 707 (2006). As explained above, Mr. Danforth did not express an intention to inflict bodily harm, and therefore his statements were protected speech, not true threats.

The State suggests that the First Amendment limits only criminal statutes, and wrongly states that Mr. Danforth cited only

criminal cases to support his overbreadth argument. Br. of Resp't at 20 n.5. The State ignores one of the seminal First Amendment cases, NAACP v. Claiborne Hardware, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (quoted in App. Br. at 24). In that case, black citizens held a rally at which they urged a boycott of white-owned business. The white merchants filed a civil lawsuit seeking injunctive relief and damages for the loss of sales. Id. at 890. The Supreme Court held that the defendants could not be held liable for their speech because the statements were not "fighting words" or "true threats", even though the speakers issued warnings like "if we catch any of you going in any of them racist stores, we're gonna break your damn neck." Id. at 902, 928.

Thus, the First Amendment protects speakers from both criminal and civil sanctions for their statements. Unless a threat is a true threat, neither civil nor criminal liability may attach. Id. at 928; Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). Accordingly, the fact that Mr. Danforth is technically suffering civil confinement as opposed to criminal incarceration is beside the point. He may not be sanctioned for his speech, because it does not fall within one of the narrow exceptions to First Amendment protection.

The State then argues that the First Amendment does not apply because “threat” is only “a portion of the recent overt act definition.” Br. of Resp’t at 20. This argument is without merit, as the word “threat” is only a portion of the statutes at issue in other First Amendment cases as well. Kilburn, for instance, which the State agrees represents a proper application of the doctrine, evaluated a statute with the following elements:

A person is guilty of harassment if:

- (a) Without lawful authority, the person knowingly threatens:
  - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person ... [and]
- (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out....

Kilburn, 151 Wn.2d at 41 (citing RCW 9A.46.020).

Thus, just as the statute at issue in this case has a “reasonable apprehension” prong, the statute at issue in Kilburn had a “reasonable fear” prong. And just as past conduct goes to the “reasonable apprehension” prong in SVP cases, Br. of Resp’t at 23, past conduct goes to the “reasonable fear” prong of the harassment statute. State v. Ragin, 94 Wn. App. 407, 409-12, 972 P.2d 519 (1999) (evidence of prior bad acts necessary to prove reasonableness of victim’s fear when defendant threatened him).

But the existence of additional conduct requirements does not cure the First Amendment problem with the “threat” portion of the relevant statutes; the threat portion itself must be limited to true threats to pass First Amendment muster. Kilburn, 151 Wn.2d at 43.

The State incorrectly argues that this case is like State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993) and Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). Br. of Resp’t at 20-21. Halstien held that the “sexual motivation” criminal enhancement statute was not overbroad, because “[t]he statute does not punish a defendant for having sexual thoughts, but rather punishes the defendant for acting on those thoughts in a criminal manner.” Halstien, 122 Wn. At 123 (emphasis in original). Like Halstien, Mitchell dealt with a sentence enhancement for committing a crime with a particular motive (in that case, racial animus). The Supreme Court upheld the statute, contrasting it with an unconstitutional ordinance in another case: “whereas the ordinance struck down in R.A.V. was explicitly directed at expression (i.e. “speech” or “messages”), the statute in this case is aimed at conduct unprotected by the First Amendment.” Mitchell, 508 U.S. at 487 (citing R.A.V. v. St. Paul, 505 U.S. 377, 392, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)) (emphasis added).

The SVPA, as amended in 2001, is like the laws at issue in Kilburn and R.A.V., not Halstien and Mitchell. The statute explicitly sanctions threats, not just conduct. RCW 71.09.020(10). Contrary to the State's argument, Mr. Danforth's statements are not mere "evidence" of a threat; they are the alleged threat. Threats may not be sanctioned unless they are true threats. Because Mr. Danforth's statements were not true threats, the summary judgment motion should have been granted.

Finally, the State argues that Mr. Danforth's statements are true threats because "[t]he requirement is that the words express the intent to inflict harm, not a requirement that the speaker actually intends to carry out the threat." Br. of Resp't at 25 (citing Kilburn, 151 Wn.2d at 46). The State's argument fails by its own terms. As explained in section (1) above, Mr. Danforth's words did not express an intent to inflict harm. They expressed exactly the opposite. Mr. Danforth expressed to the detective his intent to seek help to avoid inflicting harm. Indeed, both the trial court and the prosecutor appeared to acknowledge this:

THE COURT: There is an irony in all of this,  
and that is that this man is at least from one vantage  
point asking for help.

MR. HACKETT: Yes.

THE COURT: And -- yeah.

MR. HACKETT: We would give him full credit for that, but at some point he decided that this [commitment as a sexually violent predator] was not the help he wanted.

1 RP 62-63.

In sum, Mr. Danforth's statements do not constitute true threats. For this reason, too, the order denying summary judgment should be reversed.

4. If the "threat" prong of the recent overt act statute can be applied to Mr. Danforth's statements, the statute is unconstitutionally vague. Finally, as Mr. Danforth explained in his opening brief, if the definition of "recent overt act" can be applied to Mr. Danforth's request for help, then it is unconstitutionally vague because the word "threat" does not give notice that requests for help will constitute grounds for an SVP commitment petition.

The State incorrectly contends that "the Albrecht case resolves this exact vagueness issue in the State's favor." Br. of Resp't at 27 (citing In re Detention of Albrecht, 129 Wn. App. 243, 252, 118 P.3d 909 (2005)). As already explained in Mr. Danforth's opening brief, Albrecht supports Mr. Danforth's argument, not the State's. App. Br. at 25-26. In Albrecht, the State alleged that the respondent committed a recent overt act when he grabbed a 13-

year-old boy and offered him 50 cents to follow him. Id. at 249-50. The respondent argued that the words “reasonable apprehension” were vague and violated due process. Id. at 253. Division Three rejected that argument, because the language came directly from In re Harris, 98 Wn.2d 276, 654 P.2d 109 (1982) and In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993). Id.

In Harris and Young, the supreme court defined what type of “recent overt act” the State must prove in order to subject an individual to civil commitment consistent with due process. The Court held the State must prove an “act” which “has caused harm or creates a reasonable apprehension of dangerousness.” Harris, 98 Wn.2d at 284-85; Young, 122 Wn.2d at 40. The Legislature subsequently amended the relevant statutes to conform to this definition, requiring the State to prove “any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm.” Laws of 1995, ch. 216, § 1. Accordingly, the Albrecht court held the phrase “reasonable apprehension” was not void for vagueness. Albrecht, 129 Wn. App. at 253.

But Mr. Danforth does not argue that the words “reasonable apprehension” are vague; he argues that the word “threat” is vague

if it can be applied to his statements. Unlike the phrase “reasonable apprehension,” the word “threat” did not come from Harris and Young. It was added later, and has not yet been reviewed for vagueness – in Albrecht or in any other case. Additionally, unlike the argument in Albrecht, Mr. Danforth’s vagueness challenge implicates both due process and the First Amendment, and is therefore subject to greater scrutiny. Bellevue v. Lorang, 140 Wn.2d 19, 31, 992 P.2d 496 (2000). As explained in his opening brief, the word “threat” does not survive this scrutiny if it can be applied to Mr. Danforth’s statements.

The State also cites Anderson for the proposition that the term “threat” as applied to Mr. Danforth is not unconstitutionally vague. Br. of Resp’t at 28 (citing In re Anderson, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 1956996 (2009)). Anderson is not on point – like Albrecht, it had nothing to do with statements or threats. Rather, the respondent in that case “engaged in sexual activity with vulnerable patients” who were incapable of consent. Anderson at 3 (emphasis added). The supreme court held that “Anderson’s sexual activities could constitute overt acts.” Id. The supreme court did not hold that statements seeking help could constitute

recent over acts, or that the word "threat" in the SVPA was not unconstitutionally vague.

In sum, the statute as amended in 2001 does not provide adequate notice that an individual may be subject to commitment as a sexually violent predator if he seeks help to avoid reoffending. Thus, if the new definition of "recent overt act" extends to Mr. Danforth's statements, it is unconstitutionally vague. For this reason, too, the order denying summary judgment should be reversed.

**B. CONCLUSION**

For the reasons set forth above and in his opening brief, Mr. Danforth respectfully requests that this Court reverse the trial court order denying summary judgment and dismiss the petition with prejudice.

DATED this 20th day of August, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", written over a horizontal line.

Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 61967-5-I
	)	
ROBERT DANFORTH,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, SIMON ADRIANE ELLIS, STATE THAT ON THE 20<sup>TH</sup> DAY OF AUGUST, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <p>[X] ROBERT DANFORTH<br/>SPECIAL COMMITMENT CENTER<br/>PO BOX 88-600<br/>STEILACOOM, WA 98388-0647</p>                                    | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF AUGUST, 2009.

x 

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