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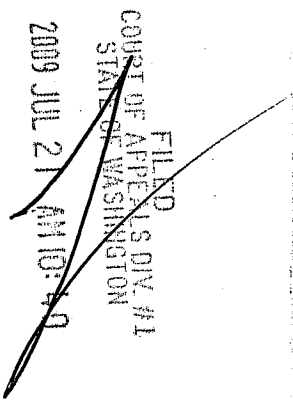
No. 61967-5-I

WASHINGTON COURT OF APPEALS, DIVISION ONE

In re the Detention of

ROBERT DANFORTH



STATE'S RESPONSE BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES 2

III. FACTS 2

IV. LEGAL ARGUMENT 11

A. STANDARD OF REVIEW 11

B. THE USE OF "THREATS" TO PROVE A RECENT OVERT ACT DOES NOT VIOLATE THE FIRST AMENDMENT 12

1. The Criteria for Civil Commitment Under RCW 71.09 13

2. Under the Plain Meaning of the Statute, Danforth's Actions and Statements Constituted a Recent Overt Act 16

3. The Defense Incorrectly Examines this As a "True Threat" Case 19

4. The Recent Overt Act Definition Is Not Overbroad 26

C. THE DEFINITION OF RECENT OVERT ACT DOES NOT VIOLATE DUE PROCESS 27

V. CONCLUSION 30

TABLE OF AUTHORITIES

Bd. of Directors v. Blume Dev. Co., 115 Wash.2d 506, 515-16, 799 P.2d 250 (1990) 12

Hayes v. City of Seattle, 131 Wn.2d 706, 711 (1997). 12

In re Anderson, ___ Wn.2d ___, ___ P.3d ___ (2009) 28

In re Brooks, 145 Wash.2d 275, 297, 36 P.3d 1034,1046 (2001) 15

In re Campbell, 139 Wash.2d 341, 348 (1999) 18

In re Detention of Albrecht, 129 Wash.App. 243, 252, 118 P.3d 909 (2005) 26

In re Detention of Wright 138 Wash.App. 582, 586, 155 P.3d 945, 947 (2007) 15

In re Estates of Hibbard, 118 Wn.2d 737, 744, 826 P.2d 690 (1992) .. 12

In re Harris, 98 Wn.2d. 276, 654 P.2d 109 (1982) 28

In re Thorell, 149 Wn.2d 724 (2003) 15

In re Young, 122 Wn.2d. 1, 49 (1993) 27, 28

Kansas v. Hendricks, 521 U.S. 346 (1997) 20

Nielson v. Spanaway Gen. Med. Clinic, 135 Wn.2d 255, 956 P.2d 312 (1998) 12

Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 12, 721 P.2d 1 (1986). 12

State v. CSG Job Center, 117 Wn.2d 493, 500 (1991) 17

State v. Halstien, 122 Wash.2d 109, 125, 857 P.2d 270 (1993) ... 20, 21

State v. Kilburn, 151 Wn.2d 36, 84 p.3d 1215 (2004) 20, 24, 25

State v. Monsche, 133 Wn.App. 313, 135 P.3d 966 (2006) 22

State v. Plowman, 314 Or. 157, 167, 838 P.2d 558 (1992), *cert. denied,* 508 U.S. 974, 113 S.Ct. 2967, 125 L.Ed.2d 666 (1993) 21

State v. Talley, 122 Wn.2d 192, 210, 858 P.2d 217 (1993) 26

State v. Tellez, 141 Wash.App. 479, 482, 170 P.3d 75 (2007) 23

U.S. v. Reiner, 468 F.Supp.2d 393, 399 (E.D.N.Y. 2006) 21

United States v. Williams, 553 U.S. ___, 128 S.Ct. 1830, 1842 (2008) 25, 26

Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) 13, 21, 22

I. INTRODUCTION

Through his stipulation to civil commitment, after competently waiving various trial rights, petitioner Robert Danforth admitted (1) that he "suffers from a mental abnormality as defined in RCW 71.09.020, namely Paraphilia Pedophilia (nonexclusive)," (2) that, "as a result of his mental abnormality, [he] has serious difficulty controlling his behavior such that he is more likely than not to commit further predatory acts of sexual violence if he is not confined in a secure facility," and (3) that he "has committed a recent overt act as that term is defined in RCW 71.09.020, namely through statements Danforth made to CDMHPs on October 25, 2006 and to the King County Sheriff on October 26, 2006." CP 289. All of these stipulations were adopted by the trial court in its order of commitment. CP 293-94. The sole issue preserved for appeal through the stipulation was "the right to appeal the respondent's Motion for Summary Judgment argued before the trial court on June 12, 2008." CP 288. Because the trial court properly denied Danforth's motion for summary judgment, Danforth's civil set forth in the stipulation and order of commitment should be affirmed.

II. ISSUES

A. Are Danforth's statements of intent to sexually assault boys properly construed as a recent overt act under RCW 71.09.020?

B. Does the First Amendment impose a true threat analysis when statements of intent to sexually assault boys are merely evidence supporting civil commitment elements, rather than a stand alone crime?

C. Does the recent overt act definition in RCW 71.09.020 satisfy due process?

III. FACTS

At the time of his stipulation to civil commitment, Robert Danforth was 63 years old.[1] He was raised in the Seattle area under undeniably cruel circumstances. According to Danforth, his mother had always wanted a girl and because of this she dressed young Robert in female clothing and called him "Roberta" and "DeeDee ". CP 355, 381. For several years he was confined to a basement except that he was allowed to go to school. CP 380. When he got home from school he was required to change out of his boy's clothes and made to wear dresses. CP 355. He was sometimes allowed to come out of the basement for meals. He was also

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[1] In order to provide factual support for the stipulation, the parties attached a number of reports and documents to the stipulation and order. The stipulation and order provides that these materials are "admitted only for purposes of this stipulation and any subsequent appeal." CP

severely beaten on a number of occasions by his father. CP 380.

Danforth was a behavioral problem in elementary school and he was also unable to keep up academically. CP 380-81. Danforth has been diagnosed as suffering from fetal alcohol effects (FAE) as a result of his alcoholic mother's excessive drinking during her pregnancy. CP 335, 381. At about the age of 14 he was sent away to a boarding school for wayward boys in South Carolina. CP 355, 381.

It was at the boarding school that he had his first sexual experiences. He allowed several boys to engage in anal sex with him, an experience that he says he enjoyed. He also performed oral sex on a number of the boys. CP 355, 376. Danforth was unable to keep pace academically at the boarding school and was dropped from the program. However, he was allowed to stay at the school and work in the laundry and do maintenance work for several years. He was ultimately asked to leave the school at the age of 18 after he threw a toxic substance in the eyes of a dog, blinding it. CP 326.

After leaving the boarding school, Danforth returned to the Northwest. CP 381. In 1970, at the age of 25 while working as a maintenance man in Cannon Beach, Oregon, Danforth had sexual conversations and sexual contact with at least four boys between the ages

of 7 and 13. Some of the boys he kissed and rubbed against and told them that he loved them. He took one boy by the hand and rubbed the boy's hand against his penis. He also rubbed his own hand around this boy's anus. When confronted by the police Danforth said he was "sick" and needed help because when he was around children he couldn't control himself sexually. A prosecution resulted from these offenses, but the case was dismissed because of an unknown violation of Danforth's right to a speedy trial. CP 352-53.

In 1971 in Colfax, Washington, Danforth approached 11 year old Devin C. in the dugout of a little league baseball field. He asked the boys present a number of questions, including who was the "coolest" among them. He then took Devin into a restroom and fondled the boy's genitals. Danforth then took out his own erect penis and rubbed it against the boy's genitals. Devin told his father what had happened and an investigation ensued. It was determined that Danforth had also been approaching other boys in the area while they waited for the school bus and at a swimming pool. Danforth was convicted of Indecent Liberties and was initially given a suspended sentence under the then existing sexual psychopathy statute. He was sent for treatment at Western State Hospital. After a short time, however, he was found not amenable to treatment and sent to prison. CP

349.

In August, 1987, at the age of 42, Danforth, in King County, engaged in communications with a 16 year old boy and a 17 year old boy in which he invited them both to participate in group sexual activity with him. Danforth was charged and convicted at trial of two counts of Communication With a Minor For Immoral Purposes. However, the court of appeals overturned the convictions, finding that the statute was unconstitutionally vague as applied to the facts of the cases. CP 352.

Also, during the summer of 1987 in King County, Danforth forcibly anally raped 12-year-old Adam B. Adam was participating in a summer play production in Issaquah and had stepped outside behind the theater during a rehearsal break. Danforth hit Adam over the head with a blunt object, believed to be a rock. He then pulled Adam's pants down so forcefully that it left a "rope burn" at Adam's waist. Danforth then anally raped Adam and eventually ejaculated on his back and kissed the back of his neck. Danforth then left Adam crying behind the theater. Adam experienced rectal bleeding for days after the attack. Adam was confused and ashamed after the incident and did not report the rape. Adam did not disclose the assault until 1992 when he was undergoing counseling for other issues. CP 347.

In 1993, Danforth was convicted by a King County jury of Rape in the Second Degree in King County Superior Court Cause No. 92-1-08218-3. Danforth was sentenced to 34 months in prison, the high end of the standard range sentence. Danforth denied his crime, and thus did not have sex offender treatment in prison. CP 151, 348-49. Danforth appealed his conviction, and the appeal was denied. Danforth has continued to deny his guilt in the rape of Adam B.

Between the Danforth's release from prison in 1996 and his detention pursuant to this petition in October 2006, there is no evidence that he sexually offended against minors in the community. However, he frequently engaged in behaviors that were a cause for concern. *See generally* CP 156-159.

Danforth, while in his late 50s and early 60s, repeatedly targeted and groomed for sexual contact young adult males, as young as 17 and sometimes developmentally disabled. Danforth employed a number of schemes designed to lead to sexual contact with these young adult males, including offering to "counsel" troubled, developmentally disabled young men at group homes and advertising for young men to work as drivers for him. The latter scheme involved Danforth posing as a man who wanted to see tourist locations before he lost his sight to diabetes, and repeatedly

soliciting numerous churches and colleges to provide young males to drive him to various locations. Danforth specifically solicited the youngest men possible and rejected female applicants, although one female applicant from a local church reported to police that Danforth had offered to masturbate on her if she drove him around. CP 159-61.

On October 25, 2006, Danforth presented himself at the King County Sheriff's Office at the Regional Justice Center and asked to talk to a detective. He told the detective that he had come to "turn himself in" because "I feel like reoffending." On his way in to the Sheriff's Office that day he stopped and gave up his beloved pets for adoption. He proceeded to give a lengthy statement in which he acknowledged that he had been having vibrant sexual fantasies involving boys between the ages of 13 and 14. He said that the previous night he had had a dream about having sex with a 13 year old boy and that he woke up and masturbated to the fantasy of sex with the boy. CP 66.

He stated that he believed he was going to reoffend against underage boys if he was not taken into custody. Danforth indicated that he had "a desire to, I want to, I have a driving need to do it." *Id.* Danforth declared that, "I don't trust myself." *Id.* He said that he was scared to be near kids and that he need to be in a facility permanently. CP 66.

The detective who interviewed Danforth immediately arranged for two King County mental health professionals to come to the office and assess Danforth. When the CDMHPs arrived, Danforth explained that he "desires, needs, wants to have sex with children." *Id.* He said that if he was not taken into custody, he would reoffend. He stated that he had come into the Sheriff's office because he feared for the safety of a minor child. CP 66. Danforth told them that he habitually masturbates to the thought of children. He plainly admitted that he has a need to molest a child. CP 67. When asked if he was hearing voices or experiencing delusions, Danforth denied any symptoms of a major mental illness necessary for civil commitment under RCW 71.05. CP 67.

The detective asked Danforth what actions he would take if he could not be taken into custody by the CDMHPs. *Id.* Danforth responded that he would walk to a bus stop with some boys at it or wait for some boys and then try to have sex with them. *Id.* at C67. He indicated that his preference was for boys ages 13-15. *Id.*

Danforth also divulged a more detailed plan where we travel to the video arcade at the Southcenter Mall and rub up against the back of a 13-15 year old boy for his sexual pleasure and gratification. CP 67, 83. He indicated that the taxi ride would cost him $15.00. *Id.* at 67. If he found a

boy who liked it, he "might pursue more." *Id.* at 67. At the time that Danforth made these statements to the detective, he had been living comfortably for several years in a Seattle home that had been left to him in trust by his father. CP 378. After he was arrested and placed in custody, Danforth thanked the detective for helping him. *Id.* at 67.

The following day, the detective took a detailed recorded statement from Danforth. Danforth confirmed his prior statements, noting that he would "be a serious danger to society if I was turned loose." CP 398. He clarified that his plan to "rub up against a boy" meant that he would rub his penis against "the back rectum of a boy" for Danforth's own "sexual gratification." CP 400. Danforth stated that "if it wasn't for the police that I can turn to, I'm about ready to reoffend." CP 406.

Based on Danforth's actions at the Sheriff's office, the State filed an RCW 71.09 petition to civilly commit Danforth as a sexually violent predator. CP 1. The State's petition was supported by a declaration authored by Dr. Charles Lund, a prominent expert on sex offender diagnosis and risk.[2] *See* CP 17. Dr. Lund opined that Danforth suffered from Pedophilia and was more likely than not to reoffend in a sexually

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[2] Dr. Lund had previously evaluated Danforth in 2002 after Danforth had called the prosecutor and made extremely vague threats to "reoffend" in an unspecified manner. At that time, Dr. Lund found that Danforth did not meet criteria for civil commitment under RCW 71.09. *See* CP 161-

violent manner. CP 16. With regard to Danforth's actions at the Sheriff's office, Dr. Lund opined that:

> The recent reports reviewed indicate that Mr. Danforth made explicit and specific statements of intent to commit sexual offenses against young boys. He has the ability to carry out the intervening actions to gain access to high risk situations where the offending would occur. The specificity of the treat is professionally speaking, quite alarming and there is imminently a high risk of sexual reoffending, given the threat. His history of committing sexual offenses, his current reports of subjective experiences related to ongoing sexual interest in young boys, masturbatory fantasies involving children, and his own self assessment of being at high risk would constitute a combination of historical and dynamic factors that are of extreme concern, in the absence of external constraints on opportunities to reoffend against a child.
>
> Thus, from a professional perspective, I would consider the recent incident to be not just the basis for apprehension of harm of a sexually violent nature, but the basis for outright alarm, and hold this opinion to a reasonable degree of psychological certainty.

CP 16.

In a July 2007 supplemental report that included an interview with Danforth, Dr. Lund later reaffirmed his opinion favoring civil commitment. CP 186. Dr. Lund stated that "[i]t is my continuing professional opinion, to a reasonable degree of psychological certainty, that the statement of intent to have sexual contact with a child is extremely alarming from a professional perspective, well beyond the threshold of apprehension, and would constitute a recent overt act, according to the

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statutory definition of a recent overt act." *Id.*

Prior to trial, Danforth brought a motion for summary judgment. CP 60-67. In the summary judgment motion, Danforth argued that the RCW 71.09 civil commitment petition should be dismissed because "no 'recent overt act' was committed in this case, and the statements which the State alleges as a 'recent overt act,' if held to be sufficient, would violate Due Process, be unconstitutionally vague, and not rise to the level of a constitutionally valid threat of danger to the community or an individual." CP 60. The trial court denied the motion for summary judgment, holding that "viewing the record before the court in the light most favorable to the non-moving party" a reasonable jury "could find that [Danforth's] acts as outlined in the evidence before the court constituted a Recent Overt Act." CP 423-44.

Trial commenced in June 2008. A few days into trial proceedings, Danforth stipulated to his civil commitment as a sexually violent predator, but reserved the right to appeal the trial court's denial of his summary judgment motion. CP 286-91.

IV. LEGAL ARGUMENT

A. STANDARD OF REVIEW

On review of summary judgment, an appellate court engages in

the same inquiry as the trial court. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.,* 115 Wash.2d 506, 515-16, 799 P.2d 250 (1990). The purpose of summary judgment is "to avoid a useless trial when no genuine issue of material fact remains to be decided." *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 956 P.2d 312 (1998); *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12, 721 P.2d 1 (1986).

Under CR 56(c), summary judgment will be ordered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts must be considered "in the light most favorable to the nonmoving party." *Hayes v. City of Seattle*, 131 Wn.2d 706, 711 (1997). "[S]ummary judgment should be granted only when it can be said that there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law." *Id. See also In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992).

B. THE USE OF "THREATS" TO PROVE A RECENT OVERT ACT DOES NOT VIOLATE THE FIRST AMENDMENT

Danforth complains that the State used speech protected under the First Amendment to civilly commit him as a sexually violent predator. He fails to acknowledge the U.S. Supreme Court decision in *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993), which holds that:

> *The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.* Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to the evidentiary rules dealing with evidence, reliability and the like.

(emphasis added). Indeed, if Danforth were correct that evidence of an SVP respondent's statements (or a criminal defendant's statements) are limited to "true threats" when the statement itself does not represent the entirety of the State's burden of proof, then nearly every admission of a party-opponent would be barred on First Amendment grounds. When the correct First Amendment case law is analyzed, Danforth's appellate argument is untenable.

1. The Criteria for Civil Commitment Under RCW 71.09

In order to civilly commit Danforth, the State is required to prove much more than the statements that Danforth made to police and mental health professionals. Because Danforth was in the community when the State initiated civil commitment proceedings, the State was required to prove the following elements:

(1) That respondent has been convicted of a crime of sexual violence;

(2) That respondent suffers from a mental abnormality and/or personality disorder which causes serious difficulty in controlling his sexually violent behavior; and

(3) That his mental abnormality and/or personality disorder make him likely to engage in predatory acts of sexual violence if not confined to a secure facility; and

(4) That respondent committed a recent overt act.

See WPI 365.10; *see also* RCW 71.09.060(1) (establishing elements to be determined by finder of fact). These elements reflect the statutory definition of "sexually violent predator," which "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(16).

With regard to the first element, Danforth had two qualifying "predicate" convictions, including Indecent Liberties and Rape in the Second Degree. The complete list of sexually violent acts, which is also relevant to Danforth's likelihood of future reoffense, is set forth in RCW 71.09.020(15).

The second element, which addresses Danforth's mental condition, is controlled by the statutory definition of mental abnormality.

Under the statute, a "mental abnormality" means "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020. Proof on this element included the reports of Dr. Charles Lund, Danforth's history of deviance, his prior crimes, his actions in the community, and his statements to others regarding his sexual deviance.

The third element involves an *assessment* of Danforth's relative risk to reoffend. *See In re Brooks*, 145 Wash.2d 275, 297, 36 P.3d 1034,1046 (2001) (More likely than means that "[o]f 100 similarly afflicted offenders, more than 50 would reoffend if not so confined."), *reversed on other grounds In re Thorell*, 149 Wn.2d 724 (2003). The risk assessment views actual behavior over the lifetime of the respondent, not merely detected recidivism over a shorter period. *In re Detention of Wright* 138 Wash.App. 582, 586, 155 P.3d 945, 947 (2007) (rejecting due process limitation to risk period). In addition, the State must show that Danforth's assessed risk is for "predatory" offenses as that term is defined in RCW 71.09.020(9).

Finally, the fourth statutory element that the State was required to

prove is that Danforth committed a "recent overt act," which 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. The State proved Danforth's recent overt act through the threats that he made to molest boys at the bus stop and at the Southcenter Mall, as well as Dr. Lund's report examining these statements in light of Danforth's history and mental condition (pedophilia). When combined with Danforth's history, this presented a "reasonable apprehension" of sexually violent harm.

2. Under the Plain Meaning of the Statute, Danforth's Actions and Statements Constituted a Recent Overt Act

Danforth argues that his statements do not constitute a "threat" within the meaning of the statute. The defense posits a "threat" as an "expression of an intention to inflict loss or harm on another." Opening Br. at 17. A similar definition is found in Webster's Ninth New Collegiate Dictionary at 1228-29: "an expression of intention to inflict evil, injury, or damage." He then argues that Danforth did not "intend" to harm anyone because "[h]e told the detective and mental health professionals

that he wanted their help *in order to avoid* harming others." Opening brief at 17.

This reading is overly pedantic and ignores the remainder of the "recent overt act" definition, namely that a recent overt act is present when the "threat . . . creates a 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." RCW 71.09.020. Under this language, the subjective intention of the speaker to carry through with his threat is not at issue. The question is whether Danforth's statement creates a reasonable apprehension in someone aware of his history and mental condition.

Moreover, Danforth's reading would create a classic *Catch-22* situation where Danforth is not making a threat because he is asking for help, but he cannot obtain the help (civil commitment) that is necessary to mitigate the threat. It is unlikely that the Legislature intended such a result. *See State v. CSG Job Center*, 117 Wn.2d 493, 500 (1991)("general rules of statutory construction instruct that . . . unlikely, absurd or strained results are to be avoided").

If nothing else, the trial court acted within the law by denying Danforth's motion for summary judgment because there was a clear issue of material fact on the question of Danforth's recent overt act. Danforth claims that he "did not express and intent to victimize another person," Opening Brief at 18, but the record is uncontroverted that Danforth threatened to have sexual contact with boys at the nearby bus stop, CP 67, or at the Southcenter Mall for his sexual gratification. CP 67, 83. Danforth stated that he would take these actions unless detained for civil commitment. CP 406. Viewing these statements in light of Danforth's history, Dr. Lund concluded that Danforth committed a recent overt act. CP 16.

Danforth may claim now that his stated intent to reoffend was not credible, but the State is not required to disregard words and actions that threaten further acts of sexual violent from a Level III sex offender.[3] Particularly in the context of summary

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[3] Danforth's claim that the State's actions in civilly committing Danforth where an inappropriate response to his "request for assistance" misconstrues public policy. In adopting RCW71.09, the Legislature determined "that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW." The very purpose of RCW 71.09 is to provide treatment and incapacitation to dangerous sex offenders like Danforth.

judgment with the evidence viewed in the light most favorable to the State, the record easily supports an issue of material fact on whether Danforth's statements caused "reasonable apprehension" in the mind of an objective person familiar with Danforth's history and mental. Dr. Lund, in his report, explained how Danforth comments were different from his prior 2002 contact with authorities and were the basis for "outright alarm." CP 16. The trial court's denial of summary judgment under these circumstances should be affirmed.[4]

3. The Defense Incorrectly Examines this As a "True Threat" Case

Because civil commitment is concerned with Danforth's *conduct* in the community due to his risk to reoffend in a sexually violent manner, Danforth *incorrectly* analyzes the current matter as a "true threat" case. The recent overt act element is but one

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See In re Campbell, 139 Wash.2d 341, 348 (1999) ("we have found it 'irrefutable that RCW 71.09, by treating the mentally ill and removing sexual predators from society, serves a compelling state interest.'")

[4] Danforth's claim the he was issuing a "cry for help," rather than a threat to reoffend cannot get him past the material issue prong of summary judgment. The facts are viewed in the light most favorable to the State, not in accord with Danforth's desired position. Ultimately, Danforth had the right to have the question of his recent overt act settled by the finder of fact, but he chose to enter a valid stipulation that he committed a recent overt act and that he is a sexually violent predator. CP 289.

element of an RCW 71.09 civil commitment case. Danforth's statements alone, without consideration of his history and mental condition, do not prove a recent overt act. Because the sex predator law is focused on the conduct of being a sex predator and does nothing to criminalize a threat based on pure speech, this case is not appropriately analyzed under the true threat doctrine.[5]

In *State v. Kilburn*, 151 Wn.2d 36, 84 p.3d 1215 (2004), the Washington Supreme Court correctly applied the "true threat" doctrine in order to analyze the constitutionally of the felony harassment statute. The court noted that felony harassment is a statute that "criminalizes pure speech" and therefore, it "must be interpreted with the commands of the First Amendment clearly in mind." *Id.* at 41.

In contrast, Danforth's stated intentions to sexually assault boys represent a *portion* of the recent overt act definition, which in itself, is only one element of a successful civil commitment case. In *State v.*

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[5] Unlike the cases cited by Danforth, civil commitment does not operate to criminalize any speech. A civil commitment statute is not criminal and does not "punish" a person for engaging in speech. *See Kansas v. Hendricks*, 521 U.S. 346 (1997)(holding that civil commitment scheme does not serve to punish respondents or hold them criminally accountable for prior actions).

Halstien, 122 Wash.2d 109, 125, 857 P.2d 270 (1993), the court noted the difference between when speech itself constitutes the crime versus when speech is used to prove an *element* of the crime:

> Halstien is correct that the State may focus on his speech and expressive conduct both during and before the burglary to prove his motive was sexual gratification. However, "there is a distinction between making speech the crime itself, or an element of the crime, and using speech to *prove* the crime". (Italics ours.) *State v. Plowman,* 314 Or. 157, 167, 838 P.2d 558 (1992), *cert. denied,* 508 U.S. 974, 113 S.Ct. 2967, 125 L.Ed.2d 666 (1993). "The First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Mitchell,* 508 U.S. at ----, 113 S.Ct. at 2201. *Thus, a defendant's words or expressive conduct may be used to prove the defendant's intent to commit the crime for sexual gratification. Such use does not run afoul of the First Amendment.*

(Emphasis added).

Because Danforth's statements represent only part of the civil commitment case against him, any First Amendment issues are more properly analyzed under the *Wisconsin v. Mitchell* line of cases. These cases allow speech as evidence "to establish the elements of a crime or to prove motive or intent" when the statute regulates conduct, rather than criminalizing the speech by itself. 508 U.S. at 489. This includes the use of speech to establish dangerousness. *See U.S. v. Reiner*, 468 F.Supp.2d 393, 399 (E.D.N.Y. 2006)("Even if that evidence is not charged as a crime or constitutes protected speech under the First

Amendment, it still may be considered by the Court on the issue of dangerousness as it relates to the crime charged-specifically, whether the defendant knowingly possessed the child pornography charged in the Indictment, the potential purpose or use of that pornography, and defendant's overall state of mind.").

In *Halstien*, the Washington Supreme Court determined whether Washington's sexual motivation statute violated the First Amendment. The defendant in *Halstien* argued that the sexual motivation statute violated his free speech rights because "the enhanced punishment under the statute is based solely on a defendant's speech or thoughts about sexual activity." 122 Wn.2d at 123. The court rejected this First Amendment claim, holding that:

> The sexual motivation statute is directed at the action or conduct of committing a crime because of the defendant's desire for sexual gratification. The statute does not punish a defendant for having sexual thoughts, but rather punishes the defendant for *acting* on those thoughts in a criminal manner.

Id. at 123. Relying on *Wisconsin v. Mitchell*, the court held that "a defendant's words or expressive conduct may be use to prove the defendant's intent to commit the crime for sexual gratification" and such use "does not run afoul of the First Amendment." *Id.* at 125. *See also State v. Monsche*, 133 Wn.App. 313, 135 P.3d 966 (2006) (noting the

distinction between making speech itself the crime and using speech to prove a crime).

Here, the true threat doctrine is not properly applied because RCW 71.09 does not make it a crime to issue threats to reoffend in a sexually violent manner, nor does it make such threats a stand-alone basis for civil commitment. The statute is concerned instead with Danforth's conduct in the community, including his mental condition and his dangerousness due to his mental condition. His threat to sexually assault boys created the possibility of a recent overt act, but only when it raises "reasonable apprehension" in an objective person who knows his history and mental condition. Even then, he is subject to civil commitment only when the other elements of RCW 71.09.060 are satisfied beyond a reasonable doubt. In this situation, the *Wisconsin v. Mitchell* analysis is properly applied because Danforth's statements are an element of the civil commitment and insufficient standing alone to support civil commitment.

Even if this case were properly reviewed under the "true threat" doctrine, the recent overt act definition complies with the notion of a "true threat." Danforth argues that his statements cannot constitute a "true threat" because "he did not express an intention to inflict bodily harm." Opening Brief at 23. He urges

this court to focus on his subjective intent not to reoffend despite his words to the contrary.

When a threat standing by itself is criminalized, it must be a true threat in order to avoid First Amendment problems. As explained in *State v. Tellez*, 141 Wash.App. 479, 482, 170 P.3d 75 (2007):

> Washington courts have consistently interpreted statutes criminalizing threatening language as proscribing only true threats, which are not protected by the First Amendment. 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 to take the life' of another person."

True threats are not protected speech "because there is an overriding governmental interest in the 'protection] of] individuals from the fear of violence, form the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Kilburn*, 151 Wn.2d at 43. Here, both the statutory definition and Dr. Lund's testimony satisfy the "true threat" definition.

The recent overt act definition allows the State to go forward with civil commitment when a "threat . . . creates a 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."

RCW 71.09.020. By its terms, this statute focuses on a statement that a reasonable person, knowing Danforth's history and mental condition, would take as a serious expression of intention to inflict bodily harm. In this context "serious expression" in the true threat definition is nearly synonymous with "reasonable apprehension." Because the recent overt act must be a threat that causes reasonable apprehension of sexual violence, there can be no doubt that it implicates an expression of "intention to inflict bodily harm."

Contrary to Danforth's arguments, his threat to sexually assault boys does not become protected speech due to his subjective belief that his threat was really a "cry for help." Our Supreme Court has already ruled that true threats do not depend on the subjective intent of the person making the threat. *Kilburn*, 151 Wn.2d at 45. "The requirement is that the words express the intent to inflict harm, not a requirement that the speaker actually intends to carry out the threat." *Id.* at 46.

Indeed, the U.S. Supreme Court recently explained that the speech of a "braggart, exaggerator, or outright liar" to engage in criminal acts is "doubly excluded from the First Amendment." *United States v. Williams*, 553 U.S. ___, 128 S.Ct. 1830, 1842 (2008). The

general rule remains that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *Id.*

Particularly in the context of summary judgment, Danforth cannot claim that the trial court (and the State) erred by taking him at his word. Danforth came into the police station having given up his animals for adoption and expressing his likelihood to reoffend in a sexually violent manner. Viewing these facts in a light most favorable to the State, the trial court committed no error by denying summary judgment. Indeed, given Danforth's eventual stipulation that he had committed a recent overt act through these statements, there can be no error in civilly committing him.

4. The Recent Overt Act Definition Is Not Overbroad

Danforth's First Amendment over breadth argument is really an alternative expression of his "true threats" claim. Because the true threat doctrine does not apply and the recent overt act definition satisfies the doctrine even if it does, there is no issue with over breadth. Indeed, the use of speech to prove an element in a crime, intent or motive presents, at most, an incidental impact on speech. *State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 217 (1993). It also does not impermissibly chill

speech. *Id.* at 212.

C. THE DEFINITION OF RECENT OVERT ACT DOES NOT VIOLATE DUE PROCESS

The respondent argues that the statutory definition of "recent overt act" is vague. As the U.S. Supreme Court noted in *Williams*, "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." 128 S.Ct. at 1846. The recent overt act definition was approved against a vagueness challenge by *In re Detention of Albrecht*, 129 Wash.App. 243, 252, 118 P.3d 909 (2005).

Danforth's claim that this the recent overt act definition is vague cannot prevail. The correct test for a vagueness challenge is found in *In re Young*, 122 Wn.2d. 1, 49 (1993). As *Young* holds, "[e]xact specificity is not required; rather the language used must be susceptible to understanding by persons of ordinary intelligence." Here, the definition of recent overt act establishes a standard that can be understood in light of the evidence that will be before the jury. As in *Young*, experts who testify are able to "adequately explain" and give meaning to the psychological concepts in the definition.

Importantly, the *Albrecht* case resolves this exact vagueness issue in the State's favor. After examining arguments identical to those made

by Danforth in the current case, the Court of Appeals concluded that:

> We conclude the statutory definition of recent overt act is not void for vagueness because it provides adequate notice of the proscribed conduct and possesses ascertainable standards to prevent arbitrary enforcement.

Albrecht, 129 Wash.App. at 246. Moreover, it is apparent that Danforth himself understood that his threats to sexually assault boys at the bus stop and Southcenter Mall would constitute grounds for civil commitment. "A defendant whose conduct clearly fits within the proscriptions of a statute does not have standing to challenge the constitutionality of that statute for vagueness." *Id.* at 254.

Finally, relying on Justice Sanders *Lewis* concurrence, Danforth argues that the inclusion of "threat" in the recent overt act definition renders it deficient under due process. Although Danforth fails to explain why this would be so, the recent Washington Supreme Court decision in *In re Anderson*, ___ Wn.2d ___, ___ P.3d ___ (2009) rejects Justice Sander's analysis.

In *Anderson*, Justice Sanders authored a lengthy and detailed dissent arguing that the current recent overt act definition violated the due process requirements of *In re Young*, 122 Wn.2d 1, 857 P.2d 989 (1993) and *In re Harris*, 98 Wn.2d. 276, 654 P.2d 109 (1982). The majority rejects Justice Sanders arguments, holding that Anderson's

conduct, if proven, would constitute a recent overt act. A separate dissent by Justice Fairhurst notes that it could not join Justice Sander's dissent because "it unnecessarily posits a new definition of a recent overt act." None of the justices joined Justice Sanders' dissent.

Danforth fails to explain his due process theories beyond a citation to Justice Sander's *Lewis* concurrence. Justice Sanders expansion of his *Lewis* concurrence through his *Anderson* dissent attracted no support from his fellow justices. As a result, there is no authority or argument for rejecting the current definition of recent overt act under Due Process.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that the court affirm the stipulation and order of commitment.

DATED this 17th day of July 2009.

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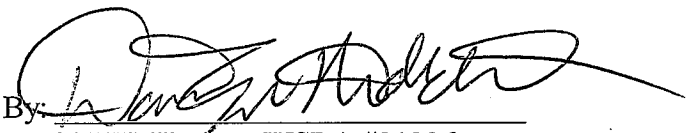

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