

No. 841527

WASHINGTON SUPREME COURT

---

In re the Detention of  
ROBERT DANFORTH

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2010 SEP 15 AM 8:09  
BY RONALD R. CHASE  
CLERK

---

STATE'S SUPPLEMENTAL BRIEF

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

David J. Hackett  
Senior Deputy Prosecuting Attorney

W554 King County Courthouse  
Seattle, Washington 98104  
(206) 205-0580

ORIGINAL

**TABLE OF CONTENTS**

**I. INTRODUCTION .....1**

**II. FACTS .....2**

**III. ISSUES .....8**

**A. DANFORTH'S COMMITMENT SHOULD BE AFFIRMED BECAUSE A MATERIAL ISSUE OF FACT CREATED BY DANFORTH PRECLUDED HIS OWN REQUEST FOR SUMMARY JUDGMENT .....9**

**B. DANFORTH COMMITTED A RECENT OVERT ACT UNDER THE TERMS OF RCW 71.09.020 ..... 12**

**C. THE FIRST AMENDMENT DOES NOT PROSCRIBE THE USE OF DANFORTH'S STATEMENTS ..... 15**

**D. SUBSTANTIVE DUE PROCESS HAS NO APPLICATION ..... 17**

**V. CONCLUSION ..... 20**

## TABLE OF AUTHORITIES

<i>Amant v. Pacific Power &amp; Light Co.</i> , 10 Wash.App. 785, 786, 520 P.2d 181, 182 (1974).....	11
<i>Biggers v. City of Bainbridge Island</i> , 162 Wash.2d 683, 693, 169 P.3d 14 (2007).....	11
<i>Bradley v. Donovan-Pattison Realty Co.</i> , 84 Wash. 654, 659, 147 P. 421, 423 (1915).....	10
<i>Briggs v. Nova Servs.</i> , 166 Wash.2d 794, 801, 213 P.3d 910 (2009) ..	10
<i>Colyar v. Third Judicial District Court for Salt Lake County</i> , 469 F.Supp. 424, 434-35 (D.Utah 1979).....	19
<i>In re Danforth</i> , 153 Wn.App. 833, 223 P.3d 1241 (2009).....	7
<i>In re Detention of Anderson</i> , 166 Wash.2d 543, 545, 211 P.3d 994, 994 - 995 (2009) .....	19
<i>In re Detention of Lewis</i> , 163 Wash.2d 188, 202-203, 177 P.3d 708, 715 (2008) .....	18
<i>In re L.R.</i> , 497 A.2d 753, 756 (Ver.S.Ct. 1985) .....	20
<i>In re McCuiston</i> , ___ Wn.2d ___, ___ P.3d ___ (September 2, 2010) .	18
<i>In re Slabaugh</i> , 475 N.E.2d 497, 500 (OhioCt.App. 1984) .....	20
<i>In re Young</i> , 122 Wn.2d 1, 24-25, 857 P.2d 989 (1993).....	2, 16, 17
<i>In the Matter of Salem</i> , 228 S.E.2d 649, 652 (N.C.App. 1976) .....	20
<i>Kansas v. Hendricks</i> , 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).....	16, 20
<i>Matter of Albright</i> , 836 P.2d 1, 5-6 (Kan.Ct.App. 1992) .....	19
<i>Matter of Giles</i> , 657 P.2d 285, 287-88 (UtahS.Ct. 1982).....	20
<i>Matter of Maricopa County Cause No. MH-90-00566</i> , 840 P.2d 1042, 1049 (Ariz.Ct.App. 1992) .....	19
<i>Matter of Mohr</i> , 383 N.W.2d 539 (IowaS.Ct. 1986) .....	20
<i>Matter of Snowden</i> , 423 A.2d 188, 192 (D.C. 1980); <i>People v. Sansone</i> ,	

309 N.E.2d 733, 739 (Ill.App. 1974) .....	19
<i>Matter of Sonsteng</i> , 573 P.2d 1149, 1155 (Mont.S.Ct. 1977).....	19
<i>People v. Stevens</i> , 761 P.2d 768, 771-774 (Colo.S.Ct. 1988) .....	19
<i>Project Release v. Prevost</i> , 722 F.2d 960, 972-75 (2 <sup>nd</sup> Cir. 1983) .....	19
<i>Scopes v. Shah</i> , 398 N.Y.S.2d 911, 913 (1977) .....	19
<i>State v. Dyson</i> , 74 Wn. App. 237, 243, 872 P.2d 1115, <i>rev. denied</i> , 125 Wn.2d 1005 (1994) .....	16
<i>State v. Ermels</i> , 156 Wash.2d 528, 541-542, 131 P.3d 299, 304 - 305 (2006) .....	10
<i>State v. Kilburn</i> , 151 Wn.2d 36, 41, 84 p.3d 1215 (2004) .....	1, 15
<i>State v. Perkins</i> , 108 Wn.2d 212, 215, 737 P.2d 250 (1987) .....	10
<i>State v. Robb</i> , 484 A.2d 1130, 1134 (N.H.S.Ct. 1984); <i>Commonwealth v. Rosenberg</i> , 573 N.E.2d 949, 958-59 (Mass.Sup.Jud.Ct. 1991) ...	19
<i>State v. Schaler</i> , --- Wn.2d ---, 236 P.3d 858 (2010) .....	14
<i>State v. Smith</i> , 117 Wn.2d 263, 270-71 (1991) .....	13
<i>State v. Talley</i> , 122 Wn.2d 192, 210, 858 P.2d 217 (1993) .....	16
<i>State v. Tellez</i> , 141 Wn. App. 479, 170 P.3d 75 (2007) .....	15
<i>United States ex rel. Mathew v. Nelson</i> , 461 F.Supp. 707, 709-12 (N.D.Ill. 1978).....	19
<i>United States v. Sahhar</i> , 917 F.2d 1197 (9 <sup>th</sup> Cir. 1990).....	19
<i>Wisconsin v. Mitchell</i> , 508 U.S. 476, 489 (1993) .....	1, 17

## I. INTRODUCTION

On a daily basis, in court rooms throughout the United States, constitutionally protected speech is regularly used to prove civil and criminal matters. Although an employer has an absolute First Amendment right to disparage minorities, evidence of such statements is routinely used to prove employment discrimination. In contract disputes, First Amendment protected speech in the form of a contract is frequently used to determine liability. Similarly, while a murderer has an absolute First Amendment right to tell his victim, "you deserve to die," the statement is nonetheless freely admissible to prove motive and intent. In short, our First Amendment rights do not translate into a general evidentiary privilege against having the content of our protected speech used in a later court proceeding. *See generally Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech . . .").

The sole and narrow exception to the general rule allowing the unfettered use of speech to prove a criminal or civil matter is where the government attempts to *punish* speech itself. *State v. Kilburn*, 151 Wn.2d 36, 41, 84 p.3d 1215 (2004) (recognizing special constitutional protections where statute "criminalizes pure speech"). In this narrow situation, this court has adopted the "true threat" doctrine to ensure that protected speech is never subject to criminal punishment or civil sanction. *Id.*

Without citation to any cases involving civil commitment, petitioner Danforth claims that his statements evidencing an intent to molest children cannot be used to civilly commit him unless they amount to "true threats." Pet. Rev. at 18. However, this court has made it clear beyond cavil that RCW 71.09 civil commitments represent neither a sanction, nor a criminal punishment. *In re Young*, 122 Wn.2d 1, 24-25, 857 P.2d 989 (1993). The State is unconcerned with *punishing* Danforth for his statements. *Id.* Instead, the State's compelling interests are to provide Danforth with treatment and to incapacitate him pending successful treatment in order to protect children. *Id.* Because the true threat doctrine does not apply to statements or "threats" made in a civil commitment case, the Court of Appeals decision should be affirmed. In order to serve the compelling interests of treatment and incapacitation, the State must be allowed to act whenever a long-time, Level III sex offender states that he will molest a child absent being taken into civil commitment custody.

## II. FACTS

Robert Danforth has a long history of molesting and raping children. Throughout his troubled and sometimes bizarre life, a consistent theme has been Danforth's sexually deviant interest in children.

As early as age fourteen, he was shipped off to a school for "wayward boys." CP 355, 381. After being removed from the school, he

returned to the pacific northwest in 1970, where he worked at a church camp on the Oregon coast. CP 326, 381. He left the camp after facing criminal charges for molesting four boys, ages 7-13. CP 352-53. The next year he landed in Colfax, Washington where he earned his first conviction for Indecent Liberties against an 11 year old boy. CP 349. After failing treatment, he went to prison for this crime. CP 349.

In 1987, at age 42, Danforth again came to the attention of authorities for his deviant interests toward minors. CP 352. Danforth was caught engaging in sexual communications with a 16 year old boy and a 17 year old boy. *Id.* Although the facts were not in serious dispute, his conviction was later overturned due to problems with the communicating statute. *Id.*

During the summer of 1987, Danforth assaulted a 12 year-old boy by first hitting him over the head with a rock and then anally raping him in an alley behind the Issaquah theatre. CP 347. The crime was not immediately reported, but Danforth was convicted by jury trial in 1993 of Rape in the Second Degree. *Id.* He again went to prison. *Id.* Following his release in 1996, Danforth was a constant source of concern for authorities due to his repeated deviant actions in the community. CP 159-61.

Against this backdrop, on October 25, 2006, King County authorities took decisive action to initiate civil commitment proceedings

when Level III sex offender Robert Danforth showed up at the police station stating that he would molest A child unless he was civilly committed. On that day, Danforth told the detective that he had come to "turn himself in" because "I feel like reoffending." CP 66. 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 vivid 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 needed 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 for civil commitment under the Involuntary Treatment Act, RCW 71.05. 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 he would 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 and his sexually deviant history, 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. *See* CP 17. Dr. Lund opined that Danforth suffered from Pedophilia and was more likely than not to reoffend in a sexually 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 threat 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 statutory definition of a recent overt act." *Id.*

Prior to trial, Danforth brought a motion for summary judgment claiming that his statements and actions in October 2006 were not "recent overt acts." CP 60-67. 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. 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.

The Court of Appeals, Division One, affirmed Danforth's civil commitment in a published decision. *In re Danforth*, 153 Wn.App. 833, 223 P.3d 1241 (2009). The court explained that the trial court properly

denied summary judgment:

Viewed in the light most favorable to the nonmoving party (the State), the evidence is sufficient to establish that Danforth expressed an intent to inflict harm. Danforth described a specific plan to molest minor boys and told authorities he would carry out the plan if not committed. Danforth contends that these statements established only an intent to prevent harm, not inflict it. But this does not change the fact that he did express his intent to inflict the harm. This expressed intent alone established the threat, regardless of whether he wished to prevent it from being carried out. The trial court therefore properly denied the summary judgment motion and concluded that there was sufficient evidence to submit to the jury on the issue of whether he committed a recent overt act.

153 Wash.App. at 842 (footnotes omitted). In response to Danforth's claim that a "threat" under the recent overt act statute must be a "true threat" for First Amendment purposes, the appellate court held that the RCW 71.09 does not regulate pure speech and the true threat analysis therefore does not apply. *Id.* at 843-44. Alternatively, the court held that Danforth's statements fell within the true threat doctrine when the evidence was viewed in the light most favorable to the nonmoving party (the State). *Id.* at 845. Indeed, the trial court correctly denied summary judgment because Danforth's later claim that he "made up his story" created a material issue of fact that precluded any grant of summary judgment. *Id.* at 845 n.19. As such, the appellate court affirmed the trial court and Danforth's stipulation to civil commitment under RCW 71.09.

### **III. ISSUES**

A. As a matter of law, did the trial court correctly deny

Danforth's motion for summary judgment when Danforth's claim that he "made up his story" created a material issue of fact contrary to the inference that would be drawn if the evidence were viewed in the light most favorable to the non-moving party? Yes.

B. When viewed in the light most favorable to the non-moving party, did Danforth words and actions constitute a "recent overt act" under RCW 71.09.020? Yes.

C. Does the First Amendment allow the use of a person's statements of intent to harm children to be used as part of the State's civil commitment proof without regard to the "true threat" doctrine? Yes.

D. Does "substantive due process" allow the use of a person's overt statements of intent to harm children to support civil commitment even though the person has not yet molested a child? Yes.

#### **IV. LEGAL ARGUMENT**

##### **A. DANFORTH'S COMMITMENT SHOULD BE AFFIRMED BECAUSE A MATERIAL ISSUE OF FACT CREATED BY DANFORTH PRECLUDED HIS OWN REQUEST FOR SUMMARY JUDGMENT**

The sweeping arguments that Danforth makes before this court must be read in the context of the narrow issue he reserved for appeal in the valid stipulation to his own civil commitment as a sexually violent predator. Under the terms of the stipulation, he waived all rights to appeal (CP 287), excepting the question of whether the trial court properly denied

his motion for summary judgment. CP 288. Thus, any reason supporting the trial court's denial of Danforth's motion for summary judgment dictates affirmation of the Court of Appeals under the stipulation.

A stipulation is binding on review and this court will not review matters outside the stipulation. *See Bradley v. Donovan-Pattison Realty Co.*, 84 Wash. 654, 659, 147 P. 421, 423 (1915) (rejecting consideration of fee issue that was the subject of a stipulation before the trial court). Washington law is clear that a defendant "may waive his or her right to appeal a conviction as long as the waiver is done intelligently, voluntarily and with an understanding of the consequences." *State v. Perkins*, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). There is " a strong public interest" in enforcing the terms of such plea agreements. *Id.* at 216. A defendant "cannot challenge the appeal waiver without challenging the validity of the entire agreement." *State v. Ermels*, 156 Wash.2d 528, 541-542, 131 P.3d 299, 304 - 305 (2006).

Here, the narrow question reserved for review is whether the trial court properly denied Danforth's motion for summary judgment. Under CR 56, a motion for summary judgment is properly denied when there exists a material issue of fact. *Briggs v. Nova Servs.*, 166 Wash.2d 794, 801, 213 P.3d 910 (2009). Danforth's appellate argument that he really didn't intend a threat to molest children raises a material issue of fact justifying denial of his motion for summary judgment because a finder of

fact would be free to disbelieve his claim.

As the Court of Appeals pointed out: "Danforth's reliance on evidence suggesting that he made up his story because he wanted to escape his neighbor's harassment simply raises a disputed issue of fact, precluding summary judgment." Slip op. at 11 n. 19. Danforth cannot prevail on summary judgment by arguing for the most beneficial inference from the evidence when other reasonable inferences contradict his position. *See Amant v. Pacific Power & Light Co.*, 10 Wash.App. 785, 786, 520 P.2d 181, 182 (1974) (summary judgment must be denied when various reasonable conclusions possible). Indeed, when considering entry of summary judgment, a court must consider the evidence in the light most favorable to the non-moving party, which in the current case, is the State. *Biggers v. City of Bainbridge Island*, 162 Wash.2d 683, 693, 169 P.3d 14 (2007).

Because Danforth's "I made it up" argument necessarily creates a material issue of fact regarding the proper inference to be drawn from the evidence, the trial court appropriately denied his summary judgment motion. The appellate court should be affirmed on this point alone because the proper denial of summary judgment mandates affirmation of the civil commitment under the terms of Danforth's stipulation. CP 288.

**B. DANFORTH COMMITTED A RECENT OVERT ACT UNDER THE TERMS OF RCW 71.09.020**

Focusing exclusively on his statements, Danforth claims (without record support) that he is the "first and only person in Washington to have been committed indefinitely based on speech alone under the new 'threat' prong of [former] RCW 71.09.020(10)." Pet. Rev. at 1. However, Danforth's recent overt act did not rely on his statements alone. Instead, all his actions, including the statements he made to police, when viewed in the light of his background, satisfied the statutory recent overt act requirement. *See also* State's Response Brief at 16-19.

Under former RCW 71.09.020, a "recent overt act" is "*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." (Emphasis added). In the current case, Danforth certainly made a number of statements to both police and mental health professionals expressing his intent to inflict harm on young boys by sexually molesting them. *See* above.

His statements were accompanied by various "acts" that justified a denial of summary judgment on their own. Even if Danforth had failed to voice a single threat to molest children, his acts alone were sufficient to raise reasonable apprehension given his history. On or around October 26,

2006, Danforth engaged in a number of dramatic "acts:"

- He traveled to the police station to make his statements to police and mental health authorities. CP 66-67
- On the way to the police station, he gave his beloved pets up for adoption. *Id.*
- He had recently masturbated to his deviant thoughts of children. *Id.*
- He had a physical need to molest a child. *Id.*
- He had woken up sweaty, dreaming of molesting a child. *Id.*
- He had formulated a plan to molest children at the bus stop. *Id.*
- He had formulated a plan, including the determination of taxi fare, to facilitate his molestation of children at the Southcenter Mall video arcade.

Given his statement, actions, and history, Dr. Lund easily concluded that Danforth caused not just reasonable apprehension of a sexually violent harm, but "outright alarm." CP 16.

Danforth's urging that this court immunize his actions from the recent overt act doctrine for "policy considerations" is puzzling. First, his actions and statements fall squarely within the recent overt act doctrine so this court has no need to look beyond the statutory definition of the "recent overt act" term in RCW 71.09.020 to divine Legislative policies. *E.g.* *State v. Smith*, 117 Wn.2d 263, 270-71 (1991)(meaning must be derived from actual language).

Second, it is difficult to imagine a world were the Legislature would create a statute that precludes civilly committing an individual who says he will molest a child unless he is civilly committed. Although

Danforth deserves significant credit for bringing his substantial problems to the attention of authorities, he also deserves to be taken seriously as a threat to sexually molest children. The statute cannot be read to require Danforth to molest a child before his threats and actions to molest children can be acted upon by civil commitment authorities.<sup>1</sup> Danforth should not be left in a position to prove wrong prosecutors, police and courts who failed to take his threats and actions seriously. When a person is making threats to harm others, "there is a legal mechanism . . . where a person can be civilly confined involuntarily." *State v. Schaler*, --- Wn.2d ---, 236 P.3d 858 (2010)(Sanders, J concurring in part and dissenting in part).

In short, Danforth's statements and actions placed him squarely within the statutory definition of a recent overt act. When viewing the facts in a light most favorable to the non-moving party, the Court of Appeals correctly held that the trial court correctly denied Danforth's summary judgment motion.<sup>2</sup>

---

<sup>1</sup> Danforth's claim in his petition for review that he should be civilly committed under RCW 71.05.050 or somehow placed in a group home without legal authority ignores the record. Danforth was evaluated for civil commitment under RCW 71.05 and did not qualify for commitment under this statute. CP 66-67. The purpose of RCW 71.09 is to allow for the civil commitment of highly dangerous and mentally abnormal sex offenders who are not subject to civil commitment under the Involuntary Treatment Act. *See* RCW 71.09.010.

<sup>2</sup> Danforth's vagueness argument is addressed in the State's response brief at pages 27-30. Danforth fails to explain how he could have standing to raise this argument when his challenge is to facial validity and the vagueness arise from the Fifth Amendment, not the First Amendment. *Id.*

**C. THE FIRST AMENDMENT DOES NOT PROSCRIBE THE USE OF DANFORTH'S STATEMENTS**

Danforth's argument for application of the "true threat doctrine" proceeds from the premise that civil commitment represents a "sanction" for Danforth's speech. Pet. Rev. at 18. However, RCW 71.09 makes no effort to criminalize or sanction speech. Instead, Danforth's statements serve only as evidence toward a portion of the State's civil commitment proof. *See* State's Resp. at 19-26. The Court of Appeals correctly refused application of the true threat doctrine to preclude Danforth's civil commitment.

A "true threat" is merely a term of art used to delineate the permissible scope of certain threat statutes for First Amendment purposes. *State v. Tellez*, 141 Wn. App. 479, 170 P.3d 75 (2007).<sup>3</sup> Danforth fails to cite a single case where a civil commitment statute was limited by First Amendment true threat concerns. There are several reasons why the First Amendment does not operate to immunize Danforth from civil commitment.

First, civil commitment is concerned with Danforth's behavior, namely his mental condition and the resulting dangerousness. Statutes that

---

<sup>3</sup> 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." *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

regulate conduct, rather than speech, do not implicate the same First Amendment concerns. See *State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 217 (1993) ("hate crimes statute" regulates conduct, not pure speech); *State v. Dyson*, 74 Wn. App. 237, 243, 872 P.2d 1115 (telephone harassment has a speech component, but the statute is directed against specific conduct), *rev. denied*, 125 Wn.2d 1005 (1994).

Second, contrary to Danforth's assertion, RCW 71.09 makes no effort to criminalize, penalize, or sanction pure speech. This court has repeatedly emphasized that the sole purpose of civil commitment is to provide treatment and to protect the public. *Young*, 122 Wn. at 24-25. In affirming the Kansas statute that was patterned on RCW 71.09, the United States Supreme Court noted the non-punitive purpose behind committing sexually violent predators. *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). "[C]ommitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." 521 U.S. at 361-62. The court specifically rejected the notion that confinement equated with punishment. *Id.* at 363. The court rejected Hendricks *ex post facto* and double jeopardy claims because the SVP civil commitment law "does not establish criminal proceedings" and "involuntary confinement pursuant to the Act is not punitive." With no criminal or civil sanction attached to civil

---

commitment, the First Amendment true threat doctrine is without application.

Finally, Danforth's statements go to only a portion of the recent over act definition and the civil commitment definition, not the entirety of the State's proof. See State's Response Brief at 21. Under *Wisconsin v. Mitchell*, speech may be used 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 itself." 508 U.S. at 489. Because Danforth fails to provide any authority for precluding civil commitment on First Amendment grounds, this court should affirm the stipulated order of commitment.

**D. SUBSTANTIVE DUE PROCESS HAS NO APPLICATION**

Danforth seems to argue in his petition that it would somehow violate substantive due process to civilly commit him under the facts of this case. His argument is not clear, but it is apparent that Washington's definition of recent overt act satisfies any so-called "substantive" due process concerns.

In *Young*, this court perceived two layers of substantive due process applicable to civil commitment schemes. First, the court held that a civil commitment scheme would need to be "narrowly tailored" due to the deprivation of liberty. 122 Wn.2d at 26. This means that the

commitment must serve a compelling interest and that the "nature and duration" of the commitment must be narrowly drawn. *Id.* This court held that RCW 71.09 satisfies this level of substantive due process. The proof that is used to satisfy the statutory recent overt act requirement does not implicate any further substantive due process doctrine.<sup>4</sup>

The second prong of substantive due process applicable to civil commitment requires proof of a mental condition and dangerousness. 122 Wn.2d at 27. The current case does not implicate this prong of substantive due process because it goes only to the evidence that is used to prove Danforth's mental condition and dangerousness, not the existence of these factors as a basis for civil commitment. It is certainly more likely that Danforth suffers from a mental condition that renders him dangerous due to his statements and actions in October 2006.

Ultimately, Danforth appears to be arguing for an expansion of the recent overt act doctrine under the guise of substantive due process in accord with theories raised by Justice Sanders in his concurrence in *In re Detention of Lewis*, 163 Wash.2d 188, 202-203, 177 P.3d 708, 715 (2008). However, as explained in the State's response brief, those

---

<sup>4</sup> In *In re McCuiston*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (September 2, 2010), a 5-4 majority of this court struck down statutory annual review amendments under substantive due process. This case did not create any new substantive due process requirements applicable to civil commitment, but merely held that the amendments unconstitutionally expanded the nature and duration of civil commitment under RCW 71.09.

theories were implicitly rejected by the majority in *In re Detention of Anderson*, 166 Wash.2d 543, 545, 211 P.3d 994, 994 - 995 (2009). The additional dissent by Justice Fairhurst also rejected Justice Sander's theories because his dissent "unnecessarily posits a new definition of a recent overt act and implies the statutory definition is unconstitutional." *Anderson*, 166 Wash.2d at 568 (Fairhurst, J. dissenting).

Because the constitutional underpinnings of the recent overt act doctrine are dubious and seldom recognized outside our jurisdiction, this court should reject Danforth's invitation to expand this doctrine by invalidating the former (and current) statutory definition of recent overt act. A substantial number of courts have rejected any due process doctrine requiring proof of a recent overt act.<sup>5</sup> In accord with this precedent, the

---

<sup>5</sup> Cases rejecting a recent overt act requirement as a matter of due process include *Project Release v. Prevost*, 722 F.2d 960, 972-75 (2<sup>nd</sup> Cir. 1983) (proof of recent overt act is not constitutionally required because, *inter alia*, "we are not convinced that, as a practical matter, the addition of a recent overt act requirement would serve to reduce erroneous commitments."); *United States v. Sahhar*, 917 F.2d 1197 (9<sup>th</sup> Cir. 1990); *Colyar v. Third Judicial District Court for Salt Lake County*, 469 F.Supp. 424, 434-35 (D.Utah 1979); *United States ex rel. Mathew v. Nelson*, 461 F.Supp. 707, 709-12 (N.D.Ill. 1978); *Matter of Maricopa County Cause No. MH-90-00566*, 840 P.2d 1042, 1049 (Ariz.Ct.App. 1992); *People v. Stevens*, 761 P.2d 768, 771-774 (Colo.S.Ct. 1988); *Matter of Snowden*, 423 A.2d 188, 192 (D.C. 1980); *People v. Sansone*, 309 N.E.2d 733, 739 (Ill.App. 1974); *Matter of Albright*, 836 P.2d 1, 5-6 (Kan.Ct.App. 1992); *State v. Robb*, 484 A.2d 1130, 1134 (N.H.S.Ct. 1984); *Commonwealth v. Rosenberg*, 573 N.E.2d 949, 958-59 (Mass.Sup.Jud.Ct. 1991); *Matter of Sonsteng*, 573 P.2d 1149, 1155 (Mont.S.Ct. 1977); *Scopes v. Shah*, 398 N.Y.S.2d 911, 913 (1977) (proof of a recent overt act is "too restrictive and not necessitated by substantive due process. The lack of any evidence

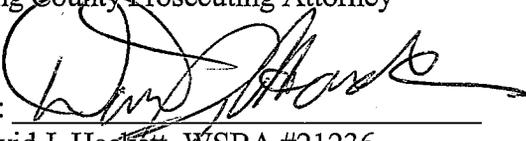
United States Supreme Court decision in *Kansas v. Hendricks* does not identify proof of a recent overt act as a constitutionally relevant consideration when evaluating substantive due process. Although the statutory recent overt act requirement precludes any need for this court to revisit its overt act precedent, this court should be hesitant to expand this doctrine in the manner suggested by Danforth.

**V. CONCLUSION**

For the foregoing reasons, this court should affirm the Court of Appeals. The trial court correctly denied Danforth's motion for summary judgment.

DATED this 14th day of September, 2010.

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
David J. Hackett, WSBA #21236  
Senior Deputy Prosecuting Attorney

---

of a recent overt act . . . does not necessarily diminish the likelihood that the individual poses a threat of substantial harm to himself or others.”); *In the Matter of Salem*, 228 S.E.2d 649, 652 (N.C.App. 1976); *In re Slabaugh*, 475 N.E.2d 497, 500 (OhioCt.App. 1984) (“we do not believe, as contended by appellant, that a mentally ill person can be said to be dangerous only if there is evidence that the person recently committed a dangerous overt act or threatened one.”); *Matter of Giles*, 657 P.2d 285, 287-88 (UtahS.Ct. 1982); *In re L.R.*, 497 A.2d 753, 756 (Ver.S.Ct. 1985); *but see, Matter of Mohr*, 383 N.W.2d 539 (IowaS.Ct. 1986).