No. 84152-7

WIGGINS, J. (dissenting)—"The thought police would get him just the same. He had committed—would still have committed, even if he had never set pen to paper—the essential crime that contained all others in itself. Thoughtcrime, they called it. Thoughtcrime was not a thing that could be concealed forever. You might dodge successfully for a while, even for years, but sooner or later they were bound to get you." George Orwell, *1984*, ch. 1.

The commitment and confinement of Robert Danforth as a sexually violent predator are reminiscent of Orwell's "Thoughtcrime." Fearing that he might commit a sexually violent crime, Danforth presented himself to the sheriff's office and asked to be locked up. The State filed a petition to confine Danforth as a sexually violent predator, not because he had committed a sexually violent act, but because he had allegedly threatened such an act. Danforth's statements were not a "threat" because he never expressed any intent to commit a sexually violent act, but sought help to prevent himself from committing an act. Without a recent overt act or a threat, the State cannot

petition to commit a person as a sexually violent predator. Accordingly, I dissent.

Facts

Robert Danforth, a 64-year-old, mildly retarded blind man, has lived crime-free in his community since 1996. He has a distant history of sex crimes, including indecent liberties in 1972. On August 5, 1987, Danforth went to the Issaquah police station and "reported that he wanted to confess to anything that the officer would write up so he would be incarcerated." Clerk's Papers (CP) at 36. He was convicted of second degree rape in 1993. Following his release in 1996, Danforth lived in his own home in the community.

In 2001, Danforth unsuccessfully attempted to commit himself to a psychiatric facility. Six months later in March 2002, Danforth called the King County prosecutor's office and asked to be civilly committed. He told the prosecutor and the State's psychologist, Dr. Lund, that he felt he was a danger, lacked control, and was afraid of victimizing someone if not committed. Lund noted that Danforth "functioned adequately in the community for a substantial period of time following his release from prison, and it would appear that he could function adequately again in the community with increased social and mental health supports, including provisions for *short term* psychiatric

hospitalization at times he is in crises." CP at 324 (emphasis added). Lund concluded that "the additional information about his functioning over the past year and his mental status at the time of [their] conversation would suggest that the act of requesting to be committed under chapter 71.09 RCW in and of itself does not create a reasonable apprehension of harm of a sexually violent nature." *Id*. Despite Danforth's pleas for help, the prosecutor's office did not assist him in obtaining short-term psychiatric hospitalization or voluntary inpatient treatment.

Danforth suffers some degree of ridicule and harassment. He reports that he had been verbally harassed two to three times a month and people would threaten to burn his house down. In early October 2006, Danforth's house was pelted with raw eggs and someone placed a bag containing feces on his doorstep, lit the bag on fire, knocked on his door, and ran away. On October 25, Danforth sought asylum from this harassment at the sheriff's office at the Kent Regional Justice Center. Danforth told the detective that he had a bad dream and twice stated that he "*feared* that he was going to re-offend." CP at 391, 394 (emphasis added). "Danforth said that he *fears* that he would walk to a bus stop with boys and try to have sex." *Id*. (emphasis added).

Two mental health professionals (MHP) spoke with Danforth who stated

that "he *fears* for the safety of a minor child." CP at 393 (emphasis added). When asked about his dream, Danforth said that "it was a red light for him" and "I have impulses that I want to do it, if not locked up, I could re-offend." *Id*. He also asserted that "he's fighting his best to *not* re-offend." *Id*. (emphasis added). Danforth further stated that "he *thought* of going by a school, but did *not* want to, for he did not trust himself." *Id.* (emphasis added). He told the MHPs that "he nearly went to Southcenter [Mall] to the arcade but came here for help instead." CP at 413. The MHPs concluded that they could not admit him for a 72-hour mental health evaluation because they did not have probable cause to believe he was mentally ill and dangerous. Nevertheless, these same statements were used to civilly commit Danforth as a "sexually violent predator" for life.

The following day, Danforth gave a recorded statement to the same detective. After describing the events in his *dream*, Danforth stated, "I gotta turn myself in to the police 'cause if I don't that's where I'm gonna be goin' – to the Southcenter Mall." CP at 398. He further stated that "I *feel* I'd be a serious danger to society if I was turned loose. *Someone please help me*." *Id*. (emphasis added).

The parties stipulated to the record and thus there is no dispute as to the content of Danforth's statements. We must decide whether, as a matter of law,

those statements constitute a "threat" for purposes of the "recent overt act" requirement of the sexually violent predator act (SVPA), chapter 71.09 RCW.[1]

ANALYSIS

"[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" *In re Det. of D.F.F.*, 172 Wn.2d 37, 40 n.2, 256 P.3d 357 (2011) (quoting *Application of Gault*, 387 U.S. 1, 50, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)). A law that abridges a fundamental right such as liberty comports with due process only if it furthers a compelling government interest and is narrowly tailored to further that interest. U.S. Const. amend. XIV; *In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002).

The history of the SVPA informs our interpretation. As originally enacted, there was no requirement of a recent overt act or threat. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 41-42, 857 P.2d 989 (1993). We held in *Young* that before the State can civilly commit sex offenders, due process requires that the offender must be found to be both mentally ill and dangerous.

[1] The majority asserts that "the question we address is not whether Danforth's statements to the King County Sheriff's Office were threats, but whether a reasonable jury could find that his statements, evaluated in the context of his conduct, history, and mental condition, constituted a recent overt act." Majority at 20 n.12. This analysis completely ignores the statutory requirements of former RCW 71.09.020(10) (2006). A recent overt act must either be an act or a threat. Because there was no "act," we must evaluate whether Danforth's statements were threats. Former RCW 71.09.020(10).

Id. at 27. For an offender who is not currently in custody, due process requires that dangerousness must be established by a recent overt act. *Id.* at 41-42.

The legislature added the requirement of proof of a recent overt act in 1995, but the statute required an act, not simply a threat. Laws of 1995, ch. 216, § 1 ("(5) 'Recent overt act' means any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm."). In 2001, the legislature added "threat" as a means of proving a recent overt act. Laws of 2001, ch. 286, § 4(5). The definition of "recent overt act," former RCW 71.09.020(10) (2006), *recodified as* RCW 71.09.020(12), now defines a "recent overt act" as "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."

Danforth's ability to control his behavior is thus not only relevant, it is dispositive; current dangerousness is the foundation of sexually violent predator commitment. *See In re Det. of Henrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000) ("The Washington sexually violent predator statute is premised on a finding of the present dangerousness of those subject to commitment."); *Foucha v. Louisiana*, 504 U.S. 71, 78, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)

(requiring the dual predicates of current mental illness and current dangerousness). Only if Danforth is currently dangerous does civil commitment satisfy due process.

We need only analyze "threat" here since Danforth did not perform any "acts." Furthermore, only if his statements were actual threats do we need to address whether they created a reasonable apprehension of harm.

Danforth's Requests for Help Were Not a Threat

"Threat" is not defined in the statute; the lead opinion appropriately approved the dictionary definition of "threat" as an "'expression of an intention to inflict loss or harm on another . . . .'" Lead opinion at 12 (quoting Webster's Third New International Dictionary 2382 (2002)). But the lead opinion's search for a definition stops too soon. In order to find a threat, Danforth's statements must express an objective intention to cause harm to another. "Intent" or "intention" is not defined in the statute. The dictionary definition of "intent" is "the design or purpose to commit any wrongful or criminal act that is the natural and probable consequence of other voluntary acts or conduct." Webster's, *supra*, at 1176; *see also* 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 13.2 n.4 (2006) (citing *Restatement (Second) on Torts* § 8A (1965)). Intent requires proof that one acts

with a purpose to achieve the result of his act. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.01 (3d ed. 2008); RCW 9A.08.010(1)(a) ("A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.").

Putting these concepts together, Danforth perpetrated a recent overt act if he expressed the objective or purpose to cause harm (i.e., threatened) of a sexually violent nature in a manner that would create a reasonable apprehension of such harm in the mind of an objective person who knows of his history and mental condition. What is glaringly absent in this case is the slightest evidence that Danforth ever harbored the objective or purpose to perpetrate any sexually violent act. His plea for assistance is the antithesis of a threat. Danforth's statements were not threats under the plain meaning of the word because he specifically intended *not* to harm anyone. He sought help in order to avoid harming others. Moreover, even the State's own MHPs and psychologist thought Danforth's statements were cries for help rather than threats. The MHPs did not consider Danforth dangerous and would not even commit him to a 72-hour psychiatric hold.

In interpreting the SVPA, we must remember that the predicate for

proceeding with a petition and for immediately confining the defendant is not a criminal act, but a recent overt act, even a threatened action. When the State relies on a threat to prove a recent overt act, construction of the SVPA requires us to construe the threat narrowly and consistently with the definition of a "threat," i.e., the expressed purpose or objective of causing harm or injury of a sexually violent nature. Under this narrow construction, I cannot agree that Danforth threatened sexually violent harm; to the contrary, he sought to avoid perpetrating harm or injury. Because Danforth's stated intention was to prevent harm, not cause it, his statements do not constitute a threat within the plain meaning of the statute.

The lead opinion mischaracterizes the facts when it states that Danforth "described to the detective at the King County Sheriff's Office his specific plan to molest boys and have intercourse with a child." Lead opinion at 14. The detective's report states in relevant part:

> Danforth explained to [the MHPs] that he needed to be committed. He explained that he has "desires, needs, wants to have sex with children." He told them that if he leaves today that he would re-offend. He explained that he'd come in today because he feared for the safety of a minor child.

CP at 66. When asked by the detective what he would do if the sheriff's office and the MHPs could not help him, Danforth said, "[H]e'd walk to a bus stop with some boys at it or wait for some boys and then try to have sex with them."

CP at 67. Danforth added that he would go to a video arcade and "rub himself" against a boy playing a video game. *Id.* None of these statements rises to the level of a "plan" or an "intention." Rather, Danforth expressed factually what would happen if he failed to receive help, not what he intended or threatened.

"The basis for involuntary civil commitment is the person's dangerousness." *In re Det. of Robinson*, 135 Wn. App. 772, 778, 146 P.3d 451 (2006). There is no danger in seeking help. In contrast, it is dangerous to increase the likelihood of reoffense by not seeking assistance. Danforth attempted to eliminate danger when he proactively asked the sheriff for refuge. To swallow one's pride and ask for help is noble, not criminal. Danforth should not be admonished for the honest recognition of his shortcomings; rather, he should be assisted with voluntary treatment, not incarcerated as a sexually violent predator.

The State has reacted in a perversely counterproductive manner by penalizing Danforth for seeking intervention to aid him in avoiding committing a sexually violent offense. If a person knows that the State will petition for his commitment as a sexually violent predator when he asks for help, then there is an incentive *not* to come forward and instead risk reoffending. As a society, we should encourage all former offenders, of any crime, to seek help if they fear they might commit new crimes. Accordingly, I would hold that Danforth's

statements were not threats, reverse the trial and appellate courts' decisions that summary judgment was not appropriate, and remand to permit Danforth to vacate his stipulation so that this matter can be dismissed.

If Not Limited to "True Threats," Former RCW 71.09.020(10) Is Overbroad

Having concluded that the evidence falls far short of a "threat," we need go no further. But even if Danforth's statements could be characterized as threats, which they cannot, former RCW 71.09.020(10) must still meet constitutional requirements. Danforth claims that unless limited to "true threats" the statute is overbroad. "'A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.'" *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001) (internal quotation marks omitted) (quoting *City of Bellevue v. Lorang*, 140 Wn.2d 19, 992 P.2d 496 (2000)). We must first determine whether the statute in question reaches a substantial amount of constitutionally protected free speech; "some burden on speech must exist before the protections of the First Amendment or article I, section 5 may be invoked." *State v. Immelt*, No. 83343-5, slip op. at 4 (Wash. Oct. 27, 2011).

Again, a "recent overt act" is defined as "any act or threat" creating a

reasonable apprehension of harm in the mind of an objective person knowing the history and mental condition of the person making the threat. Former RCW 71.09.020(10). On its face, this statute implicates a form of pure speech: threats. By its definition, a recent overt act can be speech, in the form of a threat, without any additional action or deeds.[2] The State argues that the First Amendment to the United States Constitution does not apply to former RCW 71.09.020(10) because additional proof of conduct is required to establish a recent overt act, i.e., "'reasonable apprehension' in an objective person who knows his history and mental condition."[3] State's Resp. Br. at 23. This argument fails. In *Kilburn*, we evaluated a similar statute where "threat" is only a portion of the required elements. *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d

[2] I note that the Court of Appeals found that "'[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection. Threats used to establish a recent overt act under chapter 71.09 RCW produce special harms and are therefore not entitled to First Amendment protection.'" *In re Det. of Danforth*, 153 Wn. App. 833, 844, 223 P.3d 1241 (2009) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)). This determination is made without any analysis as to why threats in the context of chapter 71.09 RCW are different from any other threats or identification of the "special harms" produced. *Compare* RCW 9A.46.020, *with* former RCW 71.09.020(10).

[3] The State wants to have its cake and eat it too. It specifically states that "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." State's Resp. Br. at 20 n.5. It then cites to no fewer than four criminal cases to support its proposition that speech is only one element of a successful commitment case. Citing to *United States v. Reiner*, 468 F. Supp. 2d 393, 399 (E.D.N.Y. 2006), the State posits that speech may be used as evidence of dangerousness as it relates to the crime charged. Here, however, speech is not being used as evidence to prove another crime—speech is the only "crime" charged.

1215 (2004).[4] Just like the "reasonable apprehension" prong here, which looks to past behavior, the harassment statute at issue in *Kilburn* includes a "reasonable fear" prong that also considers past conduct. *Id*. at 41; *see also 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). We found that the statute in *Kilburn* implicated pure speech and "'"must be interpreted with the commands of the First Amendment clearly in mind."'" *Kilburn*, 151 Wn.2d at 41 (quoting *Williams*, 144 Wn.2d at 206-07) (quoting *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969))). I see no reason why former RCW 71.09.020(10) should escape First Amendment review.

The First Amendment prohibits laws abridging the freedom of speech. U.S. Const. amend. 1. While most speech is protected, certain types of speech, including "true threats," fall outside the scope of protection. *Kilburn*, 151

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[4] "(1) 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]

. . . .

(ii) 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 (alterations in original) (quoting RCW 9A.46.020).

Wn.2d at 42. "With respect to threats, the Supreme Court has held '[w]hat is a threat must be distinguished from what is constitutionally protected speech.'" *Williams*, 144 Wn.2d at 207 (alteration in original) (quoting *Watts*, 394 U.S. at 707). This court has "adopted an objective test of what constitutes a 'true threat.'" *Kilburn*, 151 Wn.2d at 43. "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. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting *Williams*, 144 Wn.2d at 208-09). "Importantly, only threats that are 'true' may be proscribed. The First Amendment prohibits the State from *criminalizing* communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole." *Id.* at 283 (emphasis added). "Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker." *Kilburn*, 151 Wn.2d at 44.

The lead opinion argues that "chapter 71.09 RCW is not a criminal statute and does not implicate the First Amendment." Lead opinion at 17. Indeed, we have found that "[c]ommitments under Washington's sexually violent predators act are civil in nature." *In re Det. of Petersen*, 138 Wn.2d 70, 78, 980 P.2d 1204 (1999); *Young*, 122 Wn.2d at 23. First Amendment

protection, however, is not limited to the criminal arena. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (In a civil lawsuit seeking injunctive relief and monetary damages, defendants could not be held liable for their speech because the statements were not "true threats" or "fighting words."); *Brown v. Entm't Merchs. Ass'n*, __ U.S. __, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (California cannot impose a civil fine on the sale or rental of violent video games to children because this law violates the First Amendment.). Thus, the First Amendment protects speakers from both criminal and civil sanctions for their statements. *Claiborne Hardware Co.*, 458 U.S. at 928. The question is whether the SVPA impermissibly burdens protected speech.

In *Kilburn* we held that threats may not be sanctioned unless they are "true threats." *Kilburn*, 151 Wn.2d at 43. To avoid unconstitutional infringement of protected speech, former RCW 71.09.020(10) must be read as clearly prohibiting only "true threats." *Id*. Otherwise, the State could commit individuals to indefinite confinement based on their utterance of protected speech.

An analysis of Danforth's "threats" in the context of a recent overt act must necessarily satisfy the definition of a true threat. Whether a statement is a true threat "is determined in light of the entire context, and the relevant

question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat . . . ." *Id.* at 46. As discussed above, Danforth's "threats" were not a serious expression of an intention to inflict bodily harm upon another, just the opposite. Danforth sought professional help to prevent himself from inflicting harm; he did not want to injure anyone. He described events that he *feared* would occur if he did not get help. The MHPs, reasonable people with knowledge of Danforth's history and mental condition evaluating his "threats," concluded that he was not dangerous but rather "lonely" and "isolated." CP at 394.

Danforth's history and mental condition also indicate his statements were not true threats. On at least three previous occasions, Danforth attempted to commit himself for fear of reoffending. During times of crises, Danforth has a history of seeking help. Danforth has a constitutionally guaranteed right to seek assistance for his troubling desires and describe his upsetting dreams, even to make threatening statements, as long as his words do not rise to the level of a "true threat." Because Danforth's "threats" do not rise to the level of a "true threat," as a matter of law the jury could not have found a recent overt act. Accordingly, I would reverse.

If Requests for Help Are Threats, Former RCW 71.09.020(10) Is Unconstitutionally Vague

"'Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed"; or (2) the statute "does not provide ascertainable standards of guilt to protect against arbitrary enforcement."'" *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30, 992 P.2d 496 (2000) (quoting *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990))). Danforth argues that the definition of recent overt act in former RCW 71.09.020(10) is vague because it fails to give notice that requests for help could "constitute grounds for an SVP commitment petition." Suppl. Br. of Pet'r at 17-18. He specifically asserts that "the word 'threat' is vague if it can be applied to his statements." *Id*. at 19. The State argues that the recent overt act requirement does not implicate due process because we previously held that "RCW 71.09, satisfies [the required] level of substantive due process." State's Suppl. Br. at 18 (citing *Young*, 122 Wn.2d at 26). After we decided *Young*, the legislature amended the statute, expanding the definition of "recent overt act" to include not only acts, but also "threats." Laws of 2001, ch. 286, § 4; former RCW 71.09.020(10). We have

not reviewed former RCW 71.09.020(10) for vagueness. *In re Det. of Lewis*, 163 Wn.2d 188, 203, 177 P.3d 708 (2008) (Sanders, J., concurring).

Prior to involuntary commitment, due process requires that the State prove an individual is both mentally ill and dangerous. "[T]here must be proof of serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). Because speech alone is alleged as the recent overt act, due process requires that Danforth's statements evince a lack of control. But Danforth's "threats" indicate that he had a handle on controlling his behavior. He did not act upon his dreams and thoughts of reoffending, rather he sought assistance. *Before* losing control, Danforth requested help. If asking for help is synonymous with "an expression of intent to inflict loss or harm on another," lead opinion at 19, threat is not sufficiently defined. Former RCW 71.09.020(10) does not provide adequate notice that an individual may be subject to indefinite confinement as a sexually violent predator if he seeks help to avoid reoffending. Therefore, it is unconstitutionally vague and violative of due process.

CONCLUSION

In the movie *Minority Report* (Twentieth Century Fox et al. 2002), based on the short story of the same name by Philip K. Dick, "PreCrime" police act on

premonitions of psychics to arrest perpetrators before they commit their crimes. Fortunately, we will never have PreCrime police so long as our courts require the State to confine state action to due process of law, requiring a present showing of dangerousness before a suspect can be civilly committed for crimes not yet committed.

We recognize that there is a risk that Danforth might perpetrate a sexually violent crime. But Danforth is not alone in presenting such a risk. We cannot lock up every person who presents a risk of future violent crime. Indeed, we recoil from the thought of confining innocent men and women simply because a knowledgeable objective observer is reasonably apprehensive that man or woman will commit a crime. The State failed to show that Robert Danforth committed any recent act; to the contrary, Danforth sought help to avoid committing any crime. We should assist Danforth's efforts to control his urges instead of imprisoning him.

Accordingly, I dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:

Justice Mary E. Fairhurst

Justice Gerry L. Alexander

Justice Debra L. Stephens