No. 84152-7

CHAMBERS, J. (concurring in part/dissenting in part) — I completely agree with the dissent on key principles of law, but because I would hold the petitioner to his stipulation, I concur with the lead opinion in result.

The record suggests that Robert Danforth was physically and emotionally abused by his parents and suffers from a borderline developmental disability. He has a long history of inappropriate sexual contact with children, for which he has spent time both in prison and in a mental hospital. About five years after he was last released from prison, concerned that he might again commit sex crimes, Danforth went to the authorities and asked to be committed. The State obliged by filing a petition to civilly commit Danforth as a sexually violent predator. Danforth had second thoughts and defended against the sexually violent predator petition.

Our United States Supreme Court has articulated minimum constitutional requirements before a State may effectively incarcerate someone for what that person might do as opposed to what that person has done. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). Specifically, the State may civilly deprive a person of liberty as a sexually violent predator only if the State can show the person is both mentally ill and currently dangerous. *In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (citing *Addington v. Texas*, 441 U.S.

418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). If the State seeks to confine a person as a sexually violent predator, with the exception of those in custody when the sexually violent predator petition is filed, due process requires the State to show, at least, that the person committed a "recent overt act" in order to establish dangerousness. *Albrecht*, 147 Wn.2d at 8 (citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 41-42, 857 P.2d 989 (1993)). "Recent overt act," in our current statute, "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(12).

I wholly agree with the dissent that civil commitment as a sexually violent predator is a deprivation of liberty that has significant constitutional implications and that the constitution applies. Dissent at 5. When the State proposes to deprive a person of liberty in significant part because of speech, particularly pure speech, not only is that person afforded the protection of due process but also the protections provided by the First Amendment to the United States Constitution. The lead opinion suggests otherwise because detention as a sexually violent predator is civil rather than criminal. In my view, it is of little consequence to the constitution, the government, or the person whose liberty is in jeopardy that the mechanism of the deprivation of liberty is civil rather than criminal. I wholly agree with the dissent that before the State may deprive a person of physical liberty, perhaps for the rest of his life, as a sexually violent predator because of a threat, the threat must be a true

threat. Neither due process nor the First Amendment allows less.

Whether or not a threat amounts to a true threat is by its very nature a fact intensive question that should normally be determined by the trier of fact. *E.g.*, *State v. Schaler*, 169 Wn.2d 274, 291, 236 P.3d 858 (2010); *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). I cannot join the dissent in concluding that the alarming statements made by Danforth when he sought help are, as a matter of law, not true threats. Similarly, I cannot join the lead opinion in essentially concluding that they were. Lead opinion at 12, 14; dissent at 15-16. 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 individual].'"" *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (alterations in original) (quoting *State v. Knowles*, 91 Wn. App. 367, 373, 957 P.2d 797 (1998) (quoting *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990))). "It is enough that a reasonable speaker would foresee that the threat would be considered serious." *Schaler*, 169 Wn.2d at 283. Like the trial judge, I would leave the question to the trier of fact.

That said, because of the procedure posture of this case, I would affirm the trial court. Danforth filed a motion for summary judgment claiming that, as a matter of law, his statements did not raise to the level of a threat and therefore he did not commit a recent overt act. Given Danforth's mental condition and history, the trial court was correct in concluding that "a reasonable jury could find that [Danforth's]

acts . . . constituted a Recent Overt Act" and in denying summary judgment. Clerk's Papers at 420-21. Danforth chose to stipulate to the existence of a recent overt act, pending the result of this appeal of the trial court's denial of summary judgment. Lead opinion at 8. Since the trial court properly denied summary judgment, his stipulation stands. I therefore concur in result with the lead opinion.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson