

Nos. 09-0236 and 09-243

IN THE  
SUPREME COURT  
OF TEXAS

---

THE STATE OF TEXAS,  
Petitioner  
v.  
K.E. W.,  
Respondent

---

On Petition for Review from the First Court of Appeals at Houston, Texas

---

BRIEF FOR RESPONDENT

---

Richard Branson  
P.O. Box 1534  
League City, TX 77574  
(281) 316-2233  
State Bar No. 02899200

Thomas W. McQuage  
Post Office Box 16894  
Galveston, Texas 77552-6894  
(409) 762-1104  
(409) 762-4005(FAX)  
State Bar No. 13849400  
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS ..... ii

INDEX OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... iv

ISSUE PRESENTED ..... v  
    Did the Court of Appeals significantly depart from the statutory requirement of clear  
    and convincing evidence of a likelihood of serious harm to others, established by a  
    recent overt act or continuing pattern of behavior?

STATEMENT OF FACTS ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

    I. Constitutional and Statutory Context ..... 4

    II. Standard of Review ..... 5

    III. Clear and Convincing Proof of a Dangerous Overt Act ..... 6

        A. Per Se Overt Acts of Dangerousness ..... 8

        B. No Substantial Dangerous Conduct ..... 10

        C. Ambiguous Conduct ..... 15

    IV. The Jurisprudence of the State ..... 18

STATEMENT REGARDING ORDER TO ADMINISTER  
PSYCHOACTIVE MEDICATIONS. .... 19

PRAYER FOR RELIEF ..... 19

CERTIFICATE OF SERVICE ..... 20

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Addington v. Texas, 441 U.S. 418 (1979) .....	4
Brandenburg v. Ohio, 395 U.S. 444 (1969) .....	7
Broussard v. State, 827 S.W.2d 619 (Tex. App.—Corpus Christi 1992, no writ) .....	7, 8, 10, 11
D.J. v. State, 59 S.W.3d 352 (Tex. App.-Dallas 2001, no pet.) .....	10, 11
Goldwait v. State, 961 S.W.2d 432 (Tex. App.-Houston [1st Dist.] 1997, no writ) ...	10
House v. State, 222 S.W.3d 497 (Tex. App. – Houston [14th Dist.] 2007, pet. denied)	7
In re S.E.W., 2002 WL 31599910 (Tex. App.-Houston [14th Dist.] Nov. 21, 2002, no pet.) .....	9
In re J.F.C., A.B.C., and M.B.C., 96 S.W.3d 256 (Tex. 2002) .....	5
In the Matter of K.S., 2004 WL 254267(Tex. App. -- Fort Worth 2004 , no pet.) .....	9
In re J.S.C., 812 S.W.2d 92 (Tex. App.-San Antonio 1991, no writ) .....	10
In re G. H., 96 S.W.3d 629 (Tex. App. -- Houston 1st [Dist] 2002, no pet.) .....	16
In re C.O., 65 S.W.3d 175 (Tex. App.-Tyler 2001, no pet.) .....	12, 16
In re L.H., 183 S.W.3d 905 (Tex. App.-Texarkana 2006, no pet.) .....	10
In re K.D.C., 78 S.W.3d 543 (Tex. App.-Amarillo 2002, no pet.) .....	10
In re: P. W., 801 S.W.2d 1 ( Tex. App.-- Fort Worth 1990, writ denied) .....	17
J.J.K. v. State, Nos. 14-03-00379 & 14-03-00380, 2003 WL 22996950 (Tex. App.—Houston [14th Dist.] 2003, no pet.) .....	15, 17
Johnstone v. State, 961 S.W.2d 385 (Tex. App.-Houston [1st Dist.] 1997, no writ) .....	10, 11

K.L.M. v. State of Texas, 735 S.W.2d 324 (Tex. App. -- Fort Worth 1987, no writ) . . .	9
K.T. v. State, 68 S.W.3d 887 (Tex. App.-Houston [1st Dist.] 2002, no pet.) . . . . .	11
L.S. v. State, 867 S.W.2d 838 (Tex. App.-Austin 1993, no writ) . . . . .	8
O'Connor v. Donaldson, 422 U.S. 563 (1975) . . . . .	4
Schenck v. United States , 249 U.S. 47 (1919) . . . . .	7
Southwestern Bell Telephone Co. v. Garza, 164 S.W.3d 607 (Tex. 2004) . . . . .	5, 6
State ex rel E.E., 224 S.W.3d 791(Tex. App. -- Texarkana 2007, no pet.) . . . . .	10
T.G. v. State, 7 S.W.3d 248 (Tex. App.-Dallas 1999, no pet) . . . . .	11
Terminiello v. Chicago, 337 U.S. 1 (1949) . . . . .	7
The State of Texas For the Best Interested Protection of D. C., 2005 WL 3725079 (Tex. App. -- Tyler 2006 , no pet.) . . . . .	9
W.L.v.State of Texas, 698 S.W.2d 782 (Tex. App.-- Fort Worth 1985, no writ) . . . . .	9
 STATUTES	
Texas Health and Safety Code §574.034(d) . . . . .	5, 8

## STATEMENT OF THE CASE

Nature of the Case: Commitment for involuntary temporary inpatient mental health services, and to administer psychoactive medications.

Trial Court: The Probate Court of Galveston County Texas, the Honorable Gladys Burwell, presiding.

Trial Court's disposition:

(1) Order for commitment to a mental-health facility for temporary mental health services, upon the findings that the patient was mentally ill, and, as a result of that mental illness, was likely to cause serious harm to others, and (2) Order to administer psychoactive medications, based on findings that the patient's mental illness rendered him incapable of making medical treatment decisions, and that such treatments would be in the patient's best interest.

Parties to appeal: K.E.W., Patient and Appellee, and the State of Texas, Appellant.

Court of Appeals: First Court of Appeals, Justices Taft, Keyes and Alcalá.

Court of Appeals' Disposition:

Reversed and rendered, per opinion by Taft.

## ISSUE PRESENTED

Did the Court of Appeals significantly depart from the statutory requirement of clear and convincing evidence of a likelihood of serious harm to others, established by a recent overt act or continuing pattern of behavior?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent, K.E.W., submits this his brief on this Petition for Review of the decision of the First Court of Appeals sitting at Houston, which reversed the trial court's judgment committing Respondent for temporary inpatient mental health services and for the administration of psychoactive medications, and rendered judgment for K.E.W.

STATEMENT OF FACTS

The majority opinion of the Court of Appeals correctly states the nature of the case, as well as the facts and procedural background pertinent to the issue presented. Because the State's brief omits certain of the significant facts pertinent to the issue presented, Respondent provides the following statement of the additional facts supporting the judgment of the Court of Appeals:

Dr. Michael Stone, a physician who performed a psychological evaluation of K.E.W. at the University of Texas Medical Branch hospital, testified that K.E.W. was suffering from schizophrenia, and constituted a danger to others. Dr. Stone's opinion of K.E.W.'s dangerousness derived from the patient's elaborate delusional system, by which extraterrestrial beings had directed K.E.W. to impregnate human women. (R.R. 1-4).

On cross-examination, however, Dr. Stone admitted that K.E.W. had not taken any concrete steps to locate the designated women, or to verify their very existence. K.E.W. had not admitted any intention to impregnate anyone against her will. (R.R. 8-9). Dr. Stone knew of no threatening behavior exhibited by K.E.W. while on the hospital unit, or any untoward groping of any of the women there. (R.R. 10, 31).

Likewise, Dr. Waleska Ortiz had seen K.E.W. on a daily basis while he was in the hospital. Although K.E.W. had been agitated in the emergency room because he felt there was a conspiracy to keep him from the women he was destined to impregnate, Dr. Ortiz knew of no sexual advances made toward the UTMB staff or other patients, or of any groping or touching of any women at the hospital. (R.R. 20, 22). Dr. Ortiz also admitted that the doctors had no evidence that K.E.W. would actually act on his desire to impregnate women. (R.R. 21).

Hearsay testimony of some allegedly inappropriate comments made toward one female was held inadmissible, and stricken. (R.R. 27-29). Consequently, the testimony to which the Petitioner's brief makes reference, to the effect that K.E.W had sought out an employee of the Gulf Coast MHMR Center, and had been removed from the building by the police for that reason, does not include any description of the specific behavior, event or act which brought about that reaction. The employee of the Gulf Coast Center MHMR who actually testified was asked why the MHMR staff felt it necessary to protect one of their female members, but whatever he said was stricken, and does not appear in the record. (R.R. 28). The allegedly dangerous behaviors actually observed by that witness consisted only of K.E.W. pacing and smoking cigarettes. (R.R. 29-30).

The Court of Appeals reversed the judgment of the trial court for want of legally sufficient evidence of the statutory elements a recent overt act or a continuing pattern of behavior tending to confirm the likelihood of serious harm to others.

## SUMMARY OF THE ARGUMENT

The Court of Appeals correctly measured the statutory elements required for an involuntary commitment against the clear and convincing burden of proof, to find no legally sufficient record evidence of a recent overt act confirming the likelihood of serious harm to others. The Court below did not apply an improper standard, or one incompatible with the existing intermediate appellate jurisprudence on this issue. Rather, the decision of the Court of Appeals properly applied to the specific record before it that standard of review dictated by the applicable burden of proof, which in turn is dictated by the protection of the right of individuals to be free from imprisonment for their thoughts alone.

Toward that end, the intermediate jurisprudence has evolved across a broad range of factual scenarios. Certainly, some of the cases present examples of conduct which might be deemed dangerous per se. Other cases present facts not nearly so inherently unambiguous. In some of those instances, the expert testimony may provide a critical piece of the clear and convincing evidentiary puzzle, either by the power of its conviction, or by its ambivalence. The disposition of other of those cases should be grounded in a careful observance of the distinction between an imminent danger of harm which justifies commitment, and the potential for harm. Here, the expert testimony did not convincingly endorse the State's hypothesis that K.E.W had behaved in a manner to create an imminent danger of harm to others.

This case presents an instance of the scenario in which the State seeks a commitment based more on what was said, than what was done. In such cases, just as in those cases where

government seeks to regulate or suppress the speech of any person, the law certainly should require some significant nexus between the person's speech and some "clear and present danger" of imminent harm. The State offered no clear and convincing evidence that K.E.W. said or did something that created such a danger. At most, this record establishes only that something happened (or something was said) which caused the local police to confine the Respondent in a police car until he was transported to the hospital. No evidence was admitted describing the particular conduct which amounted to an overt act exhibiting dangerousness. Accordingly, and ultimately, the decision below stands merely for the settled proposition that a commitment judgment cannot stand in the absence of evidence of such an overt act.

### ARGUMENT

Did the Court of Appeals significantly depart from the statutory requirement of clear and convincing evidence of a likelihood of serious harm to others, established by a recent overt act or continuing pattern of behavior?

#### I. Constitutional and Statutory Context

The United States Constitution forbids the confinement of mentally ill persons if "they are dangerous to no one and can live safely in freedom." O'Connor v. Donaldson, 422 U.S. 563, 575, 95 S. Ct. 2486, 2494 (1975). Thus, to detain a proposed patient against his will, the evidence must show that he has deteriorated to such a degree that he is dangerous. As part and parcel of the protection of mentally ill persons from the tyranny of unnecessary confinement, that fact must be shown by clear and convincing evidence. Addington v. Texas, 441 U.S. 418, 427, 99 S. Ct. 1804 (1979).

Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. Due process, in turn, requires the State to justify confinement by proof more substantial than a mere preponderance of the evidence. *Id.* The Legislature has added to its own refinement to this policy by requiring clear and convincing proof of a recent overt act or a continuing pattern of behavior that tends to confirm either (a) the likelihood of serious harm to the proposed patient or others, or (b) the proposed patient's distress and the deterioration of ability to function. Texas Health and Safety Code §574.034(d).

## II. Standard of Review

Contrary to the State's assertion here, the burden of proof at trial necessarily affects appellate review of the evidence. In re J.F.C., A.B.C., and M.B.C., 96 S.W.3d 256, 264 (Tex. 2002). "As a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance." *Id.*, at 264. Rather, when a fact must be proved by clear and convincing evidence, the standard for legally sufficient evidence will be correspondingly heightened. Southwestern Bell Telephone Co. v. Garza, 164 S.W.3d 607, 627 (Tex. 2004). "The same logic dictates the conclusion that our traditional legal sufficiency standard, which upholds a finding supported by '[a]nything more than a scintilla of evidence,' is inadequate when the United States Constitution requires proof by clear and convincing evidence. Requiring only '[a]nything more than' a mere scintilla of evidence does not equate to clear and convincing evidence." In re J.F.C., A.B.C., and M.B.C., *supra*, at 264-655.

Accordingly, genuine legal sufficiency review must take into consideration whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof. Id., at 265-66. If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form such a firm belief or conviction, then that court must conclude that the evidence is legally insufficient. Southwestern Bell Telephone Co. v. Garza, supra, at 626. The procedure this Court has established for that process of legal sufficiency review is,

a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard all evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.

Id., at 627. The Court below aptly applied these principles in this case.

### III. Clear and Convincing Proof of a Dangerous Overt Act

As recently observed in House v. State, 222 S.W.3d 497, 503 (Tex. App. – Houston [14th Dist.] 2007, pet. denied), the Courts of Appeals which have affirmed commitment orders finding a “recent overt act or a continuing pattern of behavior” have tended to focus on identifiable, observable, physical acts. In the often cited case of Broussard v. State, 827 S.W.2d 619, 622 (Tex. App.—Corpus Christi 1992, no writ), the Court articulated the nexus between such a physical act and the supposed danger as “a clear imminent risk.” Id., at 622. This phrasing echoes that of the federal jurisprudence which has evolved to locate the balance between constitutionally protected speech and government regulation of dangerous conduct. Ninety years ago, Justice Holmes articulated that boundary to the permissible limitations on free speech based upon “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Schenck v. United States, 249 U.S. 47, 52 (1919). See also, Terminiello v. Chicago, 337 U.S. 1, 4 (1949)(“Speech is often provocative and challenging ...[But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”). In Brandenburg v. Ohio, 395 U.S. 444 (1969), this recognition of the First Amendment strict limitations on the government’s ability to suppress speech on the ground that it presents a threat of violence gave rise to this principle:

The constitutional guarantees of free speech and free press do not permit a State to

forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id., at 447.

Powerfully analogous concerns percolate through the constitutional and statutory limitations on mental-health commitments. See Broussard v. State, supra, at 622, holding, “bare psychiatric expert opinion of a ‘potential danger’ to others is insufficient to support a commitment.” The evil which a mental health commitment seeks to prevent is the harm to the patient or to other persons which the patient may cause. Otherwise, depriving the patient of his freedom cannot be constitutionally tolerated. Just as the sane person may say and do the most outlandish things, unless those things produce a clear and present danger of inciting or producing imminent lawless action, the mentally ill person should have the right to do likewise, unless his condition produces a clear and present danger of imminent harm to himself or others. Proof of that threat of harm, in the form of a recent overt act demonstrating that danger, is the statutory device for assuring freedom from unlawful imprisonment of the mentally ill.

#### A. Per Se Overt Acts of Dangerousness

The easy cases present examples of conduct which might be deemed dangerous per se. In those instances, the inference of a clear and present danger of imminent harm is readily drawn from the overt act or course of conduct. Those cases include L.S. v. State, 867 S.W.2d 838, 842 (Tex. App.-Austin 1993, no writ), where the patient ritualistically burned

the skin on his fingers with cigarettes, drank so much water as to gain ten pounds within an eight-hour period, and left the hospital without authorization for six days. In D.M. v. State, 181 S.W.3d 903, 904 (Tex. App.-Dallas 2006, no pet.), the patient had pushed a male patient, hidden contraband in her locker, and attacked the staff when they confiscated the contraband, requiring three people to subdue her. Likewise, in In re S.E.W., 2002 WL 31599910 (Tex. App.-Houston [14th Dist.] Nov. 21, 2002, no pet.)(mem.op.), the patient had been found wandering in a church, and told the church workers that her father was trying to kill her. The patient did not know where she was, her age, whom she lived with, or how she came to be in the church.

The State also cites the case of W.L.v.State of Texas, 698 S.W.2d 782 (Tex. App.-- Fort Worth 1985, no writ), where the patient threatened to kill or harm family members, including his sister, and appeared at her house in a “wild and hyper state.” The expert witness testified that she had never known the patient to hurt anyone, but noted that the medical records reflected that he had assaulted a staff member. The commitment was affirmed. In the Matter of K.S., 2004 WL 254267 (Tex. App. -- Fort Worth 2004 , no pet.), involved a juvenile who took his brother’s car and almost ran over his sister and her daughter. That commitment was affirmed. In K.L.M. v. State of Texas, 735 S.W.2d 324 (Tex. App. -- Fort Worth 1987, no writ) , the patient had pointed a firearm at her head, and had once jumped from a boat in Lake Travis. In The State of Texas For the Best Interested Protection of D. C., 2005 WL 3725079 (Tex. App. -- Tyler 2006 , no pet.), the patient had not only threatened to shoot the governor of Texas, but had called the governor's office and

threatened to kill him. The patient in State ex rel E.E., 224 S.W.3d 791(Tex. App. -- Texarkana 2007 , no pet.), had been found in her home dehydrated and fasting, the voice of Jesus telling her not to eat, and she persisted in refusing food or liquid or medications at the hospital emergency room. In Goldwait v. State, 961 S.W.2d 432 (Tex. App.-Houston [1st Dist.] 1997, no writ), the testimony not only included patient’s bizarrely delusional ideas, but the fact that he had jumped from a moving bus because he feared that the bus driver was intentionally going to kill everyone.

B. No Substantial Dangerous Conduct

The equally easy cases at the opposite end of the analytical spectrum have reversed commitment orders in the absence of any such identifiable, observable physical acts. Those decisions include cases announcing the obvious holding that evidence showing only that an individual is mentally ill and in need of hospitalization does not meet the statutory requirements for confinement, such as In re L.H., 183 S.W.3d 905, 911 (Tex. App.-Texarkana 2006, no pet.); In re K.D.C., 78 S.W.3d 543, 551 (Tex. App.-Amarillo 2002, no pet.); D.J. v. State, 59 S.W.3d 352, 355 (Tex. App.-Dallas 2001, no pet.); Johnstone v. State, 961 S.W.2d 385, 389-90 (Tex. App.-Houston [1st Dist.] 1997, no writ); Broussard v. State, 827 S.W.2d 619, 622 (Tex. App.-Corpus Christi 1992, no pet.); and In re J.S.C., 812 S.W.2d 92, 95 (Tex. App.-San Antonio 1991, no writ). Broussard v. State, and In re J.S.C., supra, are also often cited for the manifest proposition that “bare psychiatric expert opinion of a ‘potential danger’ to others is insufficient to support a commitment,” Broussard v. State, 827 S.W.2d at 622, and that an expert's opinions must be supported by a showing of the

factual basis for it. Id., and In re J.S.C., 812 S.W.2d at 95.

The case of K.T. v. State, 68 S.W.3d 887, 893 (Tex. App.-Houston [1st Dist.] 2002, no pet.), is also regularly cited for the straightforward proposition that the expert's conclusions cannot merely mirror the statutory standards for commitment without a factual basis. That case, also reversing a commitment order because of legally insufficient evidence of an overt act of dangerousness, similarly cataloged reported holdings that an expert diagnosis of mental illness, standing alone, is not sufficient to confine a patient for compulsory treatment. Those citations include T.G. v. State, 7 S.W.3d 248, 251 (Tex. App.-Dallas 1999, no pet), Broussard v. State, *supra*, Johnstone v. State, *supra*, and In re Breeden, 4 S.W.3d 782, 788-89 (Tex. App.-San Antonio 1999, no pet.).

In K.T. v. State, *supra*, the commitment order was reversed even though the evidence showed that K.T. suffered from a delusion that she was pregnant and had vaginal sutures, became verbally abusive to hospital staff, refused to eat while in hospital for fear that staff was putting medication in her food, and tried to escape from hospital. Apparently, however, the only purported evidence of actual dangerousness was K.T.'s refusal to leave the examination room at the hospital, and the fact that she had previously been to a number of hospitals complaining about non-existent sutures. Id., at 893.

Many of these decisions present examples of quite severe mental illness. At least one of them presented facts rather analogous to this case. See D.J. v. State, 59 S.W.3d 352, 357 (Tex. App.-Dallas 2001, no pet) (holding that psychotic behavior, such as D.J.'s belief she had experienced a "dehumanizing" process that included undergoing laser surgery by

satellite, being implanted with electronics, and being used as a guinea pig by an unknown force was not alone sufficient to justify involuntary commitment). Another remarkable example is presented by In re C.O., 65 S.W.3d 175, 183 (Tex. App.-Tyler 2001, no pet.). No medical records were introduced in that case. However, the medical expert testified that the patient suffered from schizophrenia, justifying temporary court-ordered mental health services. As the basis for his opinion, the physician described the patient's assertions that he was an angel, and that he had been "visited by covert beings who talk to me" and that he "had been victimized by Communists, Germans, possibly Catholics, and Jews." however, the sole "overt act" cited by position what is the patient's letter to country western singer Trisha Yearwood, in which he claimed to be the father of her child. The doctor testified that C.O.'s delusions consisted of "numerous bizarre ideas, themes of persecution by government, police, and church, and electronic surveillance," but also testified he had no knowledge of any overt act that showed C.O. was likely to cause serious harm to himself or anyone else. Rather, the expert identified danger to self and others as a "target issue." In substance, the doctor testified that the letter to the singer merely raised a concern about a potential danger, and that he would be unable to opine to the likelihood of danger without further evaluation. The Court of Appeals observed, "[a]lthough no bright-line test has been formulated for determining what evidence will establish the requisite overt act or continuing pattern of behavior, Texas courts universally hold that the State must show more than delusions, angry or psychotic behavior, or other facts that merely confirm mental illness." Accordingly, the Court reversed and rendered the commitment order. Id., at 182.

T.G. v. State, 7 S.W.3d 248, 251-52 (Tex. App.-Dallas 1999, no pet.), reviewed evidence of the patient's delusion that she was in the military and that a mail carrier was responsible for her welfare. A doctor testified that T.G. suffered from psychosis, and that T.G. acted “bizarrely.” However, the expert’s testimony regarding imminent harm amounted only to his suggestion that the patient might harm herself, because she sometimes forgot to turn off her stove's gas burners. The Dallas Court reversed that commitment order, finding that there was no evidence of an overt act or pattern of behavior to show that T.G. was likely to cause harm to herself or others. Id., at 250.

M.S. v. State, 137 S.W.3d 131 (Tex. App. -- Houston [1st Dist] 2004, no pet.), provides another example of the case in which the expert actually testified to the absence of any overt act of dangerousness. The expert noted that the patient had to be restrained in the emergency room and was suffering severe abnormal mentally emotional or physical distress. However, the only recent overt act cited was the fact that M.S. had become “combative” and “remains intrusive,” and “has poor boundaries with others.” The Court of Appeals concluded that this evidence constituted nothing more than evidence of mental illness and did not amount to any evidence tending to confirm that appellant was a danger to others. Id., at 137.

In a number of those cases, the patient histories evoked a virtually self-evident picture of *potential* danger, either to themselves or others. However, an inference of potential danger from the proposed patient’s history or condition does not provide the statutorily required, clear and convincing evidentiary basis for confinement, so those commitments were properly reversed on appeal. Otherwise, the distinct statutory element of an overt act for a continuing

pattern of behavior tending to show dangerousness would be stripped of any independent meaning beyond the readily available to expert testimony which could infer a potential for danger from the very fact of mental illness.

Here, the State cannot identify that overt act which justified K.E.W.'s commitment. Dr. Stone's opinion of K.E.W.'s dangerousness derived from the patient's mental illness. Dr. Stone knew of no concrete steps to locate or even identify the women who had been designated for impregnation, nor any admitted intention to impregnate anyone against her will, nor any threatening or untoward behavior exhibited by K.E.W. toward any women. Likewise, Dr. Ortiz observed that K.E.W. had been agitated, but knew of no sexual advances made toward hospital staff or other patients, or of any groping or touching of any women at the hospital. Dr. Ortiz also admitted that the doctors had no evidence that K.E.W. would actually act on his desire to impregnate women.

Testimony was received to the effect that something happened at the Gulf Coast MHMR Center which caused one of its female employees to be removed to a location inaccessible to the proposed patient, and which prompted the police to confine K.E.W. in a police car until he was transported to the hospital. However, this record does not reveal what specific overt act was committed to bring about those consequences. The allegedly dangerous behaviors actually observed by the employee of the Gulf Coast Center MHMR who actually testified consisted only of K.E.W. pacing and smoking cigarettes. Whatever the witness may have had to say about why the MHMR staff felt it necessary to protect one of their female members was stricken, and does not appear in the record. This evidence places

this case squarely within the parameters of the jurisprudence addressing cases where the testimony presented, at most, can constitute only evidence of mental illness which *might* give rise to some *potential* danger.

C. Ambiguous Conduct

The middle of the analytical spectrum may be represented by J.J.K. v. State, Nos. 14-03-00379 & 14-03-00380, 2003 WL 22996950 (Tex. App.—Houston [14th Dist.] 2003, no pet.), exemplifying those situations where the patient has engaged in some act or course of conduct which could be deemed to logically support an inference of danger. In those instances, the expert testimony may provide a critical piece of the clear and convincing evidentiary distinction between potential harm and imminent harm, even if merely by its ambivalence.

J.J.K. v. State, supra, presents somewhat unusual features because of the conduct of the patient which could certainly have given rise to an inference of dangerousness; at least to inanimate objects, if not to other humans. There, the patient knocked the door of a “seclusion room” off its hinges after being confined at the hospital. The doctor also testified that the proposed patient had told him that there would be a lot of dead bodies if she were sent to the State hospital. However, the doctor acknowledged that the patient had never directly threatened anyone. The expert believes that the patient “*could end up* causing harm to others or herself by heeding herself or by making another person angry to the point where they would cause harm to her.(emphasis added)” However, he admitted, the patient had never struck anyone or her herself while hospitalized. The Court of Appeals concluded that

this testimony merely reflected the patient's mental illness, which could not satisfy the State's burden of proof. Id., at 5. See also, In re C.O., 65 S.W.3d 175, 183 (Tex. App.-Tyler 2001, no pet.), where the doctor testified that C.O.'s delusions consisted of "numerous bizarre ideas, themes of persecution by government, police, and church, and electronic surveillance," but that he had no knowledge of any overt act that showed C.O. was likely to cause serious harm to himself or anyone else. Rather, the expert testified that C.O.'s conduct, such as his letter to singer Trisha Yearwood, merely raised a concern about a potential danger, and that he would be unable to opine to the likelihood of danger without further evaluation.

Certainly, the patient's actions in J.J.K. v. State were colorful, even dramatic. Nevertheless, the Court of Appeals quite properly concluded that these events could not measure up to the clear and convincing burden of proof, because the State's own expert could draw no inference from them which would confirm the existence of an imminent threat or a clear and present danger of harm. The doctor's extrapolation from these facts regarding the threat of harm was in fact remarkably conjectural. The expert, with all the colorful facts before him, could only opine to a potential danger ("could end up causing harm"), rather than an imminent one. Since the expert could draw no more powerful inference from the patient's behavior and threatening remarks, the clear and convincing burden of proof should not permit the factfinder to go further by finding the requisite imminent danger of harm. Similarly, as noted by the Petitioner's Brief on the Merits in this case, In re G. H., 96 S.W.3d 629 (Tex. App. -- Houston 1st [Dist] 2002, no pet.), addressed a record in which the expert witness testifies that the patient was *not* a danger to herself or others, notwithstanding her

"inappropriate behavior."

The facts presented in In re: P. W., 801 S.W.2d 1, 3 ( Tex. App.-- Fort Worth 1990, writ denied), are also remarkably suggestive of potential danger, but the order for commitment was reversed. There, the patient believed that everyone she knew was an agent for her ex-husband, and that he was tapping her phone. P.W. called her cousin, a police investigator, and asked him "where would be the best place to hold [a] pistol to kill herself without causing a lot of pain." P.W.'s son testified that his mother had broken the back window in her car with a steel bar, that she had burned clothes and picture frames in her fireplace, and that she had attempted to throw away valuable items in the garbage. Neighbors also testified about these instances, and that on another occasion P.W. had broken boxes of dishes on her driveway. The State's expert testified that P.W. was mentally ill, and likely to cause serious harm to herself or others. Nevertheless, the Court of Appeals held that this evidence could support only an inference of potential harm, not serious enough to warrant depriving her of her liberty. *Id.*, at 3.

A measure of ambivalence similar to that expressed in J.J.K. v. State, *supra*, was exhibited in the case at bar. Here, the expert testimony ultimately did not endorse the State's hypothesis that K.E.W had behaved dangerously. Dr. Stone knew of no concrete steps K.E.W. took to locate or even identify the women who had been designated for impregnation, nor any admission by K.E.W. that he actually intended to impregnate anyone against her will, nor any threatening or untoward behavior toward any women. Likewise, Dr. Ortiz knew of no sexual advances made toward hospital staff or other patients, or of any

groping or touching of any women at the hospital. Dr. Ortiz also admitted that the doctors had no evidence that K.E.W. would actually act on his desire to impregnate women. Consequently, these experts' testimonial admissions present only and at most evidence of *potential* harm. Whether an inference of even that potential harm may have been proper, in light of the clear and convincing burden of proof, is questionable. Certainly, that evidence could not have supplied a firm belief for conviction in the mind of a reasonable factfinder of imminent harm.

#### IV. The Jurisprudence of the State

A canvas of the decisions of the Courts of Appeals in this area suggests that these decisions can, with few exceptions, be consistently divided into several discrete categories, based upon the evidence presented. As categorized in that fashion, some of these decisions exemplify those situations where the mental-health patient has engaged in acts or courses of conduct so obviously dangerous as to clearly and convincingly satisfy that statutory requirement. In other instances, the cases present factual scenarios in which the patient was certainly mentally ill, but in which the patient's specific conduct did not command an inference of imminent dangerousness. By the scrupulous adherence to the distinction between potential danger and a clear and present danger of imminent harm, our courts of appeals have preserved the constitution prohibition against confinement of mentally ill persons if "they are dangerous to no one and can live safely in freedom." In those situations, orders for commitment and medication have been reversed on records which did not clearly establish something more than merely symptoms of mental illness or its almost certain

corollary, a potential for danger. Especially in those instances where the expert testimony declined to opine to an inference of imminent danger, or was ambivalent in that respect, the patient's inherently ambiguous acts or courses of conduct were deemed insufficient to constitute clear and convincing evidence of imminent danger. The decision of the Court of Appeals in this case is precisely and correctly aligned with that jurisprudence.

STATEMENT REGARDING ORDER TO ADMINISTER  
PSYCHOACTIVE MEDICATIONS

A trial court may issue an order authorizing the administration of psychoactive medications only if the proposed patient is under an order for involuntary mental health Services. Tex. Health & Safety Code §574.106(a)(1). Therefore, Respondent agrees that the disposition of the order of commitment must control the order to administer psychoactive medications.

PRAYER

For the reasons stated, Respondent, K.E.W., prays that the Supreme Court deny the Petition for Review, or, if the Petition for Review is granted, that the Supreme Court affirm the judgment of the First Court of Appeals.

Respectfully submitted,

\_\_\_\_\_  
Thomas W. McQuage  
Post Office Box 16894  
Galveston, Texas 77552-6894  
(409) 762-1104  
(409)762-4005(FAX)  
State Bar No. 13849400

Richard Branson  
P.O. Box 1534  
League City, TX 77574  
(281) 316-2233  
State Bar No. 02899200  
ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Response to Petition for Review was served on November \_\_\_, 2009, on Donald S. Glywasky, Galveston County Legal Department, 722 Moody, 5th floor, Galveston, TX 77550, via hand delivery.

---

Thomas W. McQuage