

**NO. 09- 0236; 09-0243  
(Consolidated)**

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**IN THE  
SUPREME COURT OF TEXAS**

\*\*\*\*\*

**THE STATE OF TEXAS**

**Petitioner**

**VS.**

**K.E.W.**

**Respondent**

\*\*\*\*\*

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

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**PETITIONER'S POST SUBMISSION BRIEF**

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**NO. 09-0236, 09-0243  
(Consolidated)**

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**IN THE SUPREME COURT OF TEXAS  
AUSTIN, TEXAS**

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**THE STATE OF TEXAS**

**Petitioner**

**VS.**

**K.E.W.**

**Respondent**

**TO THE HONORABLE SUPREME COURT OF TEXAS:**

The Petitioner State of Texas presents this Post Submission Brief for the consideration of the Court relating to two items discussed in Oral Argument.

- 1) The precise identity of the woman sought by K.E.W. is not found in the record. But the record supports the inference that K.E.W. identified her by name upon his arrival at the Texas City MHMR.
- 2) The point of law relied on by the First Court of Appeals is a thirty year old misstatement of the law which requires correction by this Court.

**ARGUMENT**

- 1) The precise identity of the woman sought by K.E.W. is not found in the record. But the record supports the inference that K.E.W. identified her by name upon his arrival at the Texas City MHMR.

During oral argument counsel for the Court inquired if K.E.W. had identified the woman he was looking for at the Texas City MHMR Office.

Counsel for the petitioner at one point mistakenly identified the woman as Dawn Roberts. Although it was corrected in rebuttal, any haziness needs to be addresses.

The precise identity of the woman sought by K.E.W. is not in the record; however it can be inferred that K.E.W. had identified the woman he was looking for by name and purpose.

MHMR counselor Dawn Roberts testified from her review of the medical records that there were statements made that “[K.E.W.] made that he wanted to get some Gulf Coast Center women staff pregnant.” Roberts did not know how specific the statement was. RR 23/3-23.<sup>1</sup>

Dr. Ortiz testified that “some of the papers I have on the chart were from papers he himself wanted me to share with the Court. And so I made copies of that for the record which has several of the names of the women he is searching for. One is his step daughter”. RR 18/24 to 19/5.

Dr. Stone testified there was a list of the names of the women K.E.W. had identified as having been identified to him, the list consisted only of first names. RR7/18 to 8/10.

Michael Fields was a worker at the Gulf Coast Center MHMR. He was present when K.E.W. came into the office on April 17, 2008. He was paranoid and pacing and asked for a certain female staff that worked there and ‘we ended up having to place her in the back behind a closed door until we were able to have

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<sup>1</sup> References are to the Reporters Record (RR)

[K.E.W.] escorted off...” RR 26/9 to 27/25. She was in fear of her safety. RR 28/6-12.

So the record itself does not explicitly reveal the identity of the woman K.E.W. went to see on that April afternoon in 2008. But the testimony showed that K.E.W. did ask the staff for a certain female, the staff felt it necessary to place her in a back room behind a closed door, and the woman herself was concerned for her safety, so it is apparent that K.E.W. identified the woman he was looking for at the Texas City MHMR by name.

- 2) The point of law relied on by the First Court of Appeals is a misstatement of the law first made some thirty years ago which requires correction by the Court.

As noted in oral argument, the First Court of Appeals had stated...”There must be a substantial threat of harm, *based on actual dangerous* behavior, manifested by some overt act or threat in the past. *See J.M.* 178 S.W.3d at 547, *K.D.C.* 78 S.W.3d at 547, *Taylor v. State* 671 S.W.2d 535, 538 (Tex.App. Houston [1<sup>st</sup> Dist.] 1983 no writ).” *K.E.W. v. State of Texas*, 276 S.W.3d 686, 695 (Tex.App. Houston [1<sup>st</sup> Dist.] 2009 pet. granted) *Emphasis added.*

Examination shows that *J.M.* cites *K.D.C.* for that proposition; *K.D.C.* merely cites to *Taylor*.

*Taylor* states at 695 “...a person may not be deprived of his liberty...unless there is a showing of substantial threat of future harm to himself or others. This showing must be based upon actual dangerous behavior manifested by some overt act or threat in the past.” *Lodge v. State*, 597 S.W.2d 773 (Tex.Civ.App.-San

Antonio) *aff'd on other grounds* 608 S.W.2d 910 (Tex. 1980); *Seekins v. State* 626 S.W.2d 97 (Tex.App.-Corpus Christi, 1981 no writ).

*Seekins* merely cites to *Lodge* for that proposition of law. But *Lodge* does not stand for that proposition at all; rather it has been erroneously attributed for establishing a standard it does not. For although the Lodge Court did observe at 779 that...

[I]n *Moss v. State*, 539 S.W.2d 936, 947-50 (Tex.Civ.App. Dallas 1976, no writ), the court held that a mentally ill person could not be deprived of his liberty without a strong showing of a substantial threat of future harm founded on actual dangerous behavior manifested by some overt threat or act in the recent past; and that absent such evidence of “dangerousness,” the fundamental right of the individual to be free of confinement outweighs the State's interest in forced commitment.

The *Lodge* Court further went on to say they did not need to address whether it should adopt such a standard...

We need not decide here whether proof that an individual requires hospitalization “for his own welfare and protection or the protection of others” requires evidence of dangerousness, since in this case, as already mentioned, there is no testimony which even tends to indicate that hospitalization of appellant is required for her own welfare and protection or the protection of others.

Going back one step further to examine the holding in *Moss* shows that the *Moss* Court never held that there must be a showing of “actual dangerous behavior manifested by some overt threat or act in the recent past

Expert testimony that a person's condition has been diagnosed as ‘chronic schizophrenia’ or ‘paranoid state’ does not advise the jury whether hospitalization is necessary. Neither does an opinion that a person is ‘potentially dangerous,’ without more, warrant confinement, if that person has never done violence to himself or anyone else. Unless opinions such as these are supported by statements of the behavior on which they are based,

the court does not have sufficient information to make a proper legal determination of whether the potential harm is great enough to justify depriving the person of his liberty.

We conclude that when an application for temporary hospitalization is opposed by the prospective patient, the order of commitment must be supported by the recommendation of a physician and a showing of the factual information on which that recommendation is based.

*Moss v. State*, 539 S.W.2d at 950.

So the principle relied on in *K.E.W.* by the First Court of Appeals that “[T]here must be a substantial threat of harm, *based on actual dangerous* behavior, manifested by some overt act or threat in the past” was never enunciated by any of the Courts that purportedly established that principle; instead it exists today due to a misreading of the law thirty years ago by the San Antonio Court of Appeals when deciding the Lodge case.

Even had the *Moss* and *Lodge* Courts established a standard requiring a showing of actual dangerous behavior to support a commitment, such a standard would have been eclipsed by subsequent Legislative action. For after the *Moss* and *Lodge* decisions were issued, the Legislature statutorily mandated the clear and convincing standard of proof in commitment cases, and included the requirement that “The clear and convincing evidence must include expert testimony and, unless waived, evidence of either a recent overt act or a continuing pattern of behavior in either case tending to confirm the likelihood of serious harm to the person or others...” *Acts 68<sup>th</sup> Legislature Ch. 47, 1983*. The Legislature

did not include a requirement that the overt act itself be dangerous, .and if the *Moss* and *Lodge* Court s had created such a standard, the Legislature rejected it.

### ***CONCLUSION***

The Court of Appeals decision below that “(t)here must be a substantial threat of harm, *based on actual dangerous* behavior” is, as shown above, misstatement of the law that has endured for the last thirty years. This error requires correction by this Honorable Court. The standard adopted by the Legislature does not require that the overt act be dangerous per se; rather that overt act must merely tend to confirm the likelihood of harm to the person or others.

Because the evidence before the trial court was legally sufficient to support the order of commitment, the Petitioner requests that this Court reverse the decision of the Court of Appeals and remand this case to that Court for further proceedings.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with TRAP Rule 9.5, I certify a true and correct copy of the foregoing has been sent certified mail, return receipt requested, to opposing counsel at the following address:

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On this the 24th day of February, 2010.

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