No. 21-5034

IN THE

Supreme Court of the United States

K.E.K.,

Petitioner,

v.

WAUPACA COUNTY, WISCONSIN

Respondent.

On Petition for a Writ of Certiorari
to the Court Of Appeals of Wisconsin

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent misstates the question presented. Everyone agrees that §51.20(1)(am) requires the government to prove that a mentally ill person is dangerous before it may continue an involuntary civil commitment. The issue is whether the 14th Amendment allows the government to continue a commitment without evidence of ***recent*** conduct indicating that the person is dangerous. Courts are divided over of this issue.

This question is vitally important to the estimated 9.8 million adults who experience serious mental illness.[1] A commitment violates their right to freedom from the government's control over where they live, what they do, and treatment decisions. As this case shows, Wisconsin allows the government to recommit a patient even when she takes her medication, wants to continue medication, and currently poses no danger to herself or others. No wonder Wisconsin, which has a comparatively low rate of serious mental illness, also has the highest commitment rate in the country—almost 5 times the national average and 190 times Hawaii's rate.[2] The Court should address this disparity.

I. This Question Presented Is Not Moot.

Although the challenged recommitment expired months before the court of appeals decided this case, Respondent now—for the first time—argues that the

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[1] Rachel N. Lipari, et al, *State and Substate Estimates of Serious Mental Illness from the 2012-2014 National Surveys on Drug Use and Health* available at https://www.samhsa.gov/data/sites/default/files/report_3190/ShortReport-3190.html (last visited 11/8/21).

[2] *See supra* note 1 for rates of serious mental illness and Pet. 3, note 1 for rates of commitment.

question presented is moot. Respondent is wrong. Wisconsin's 12-month limit on recommitment orders will always thwart review of the question presented. A person's ***stipulation*** to commitment is irrelevant to whether she may be ***involuntarily*** recommitted without evidence of ***recent*** conduct indicating dangerousness. And Petitioner has a personal stake in obtaining reversal of the challenged order due to its collateral consequences.

A. The question presented will recur and evade review.

In Wisconsin, a recommitment cannot exceed 12 months. Wis. Stat. §51.20(13)(g)(1). The Wisconsin Supreme Court acknowledges that "a recommitment order will likely expire before appellate proceedings conclude . . ." *Portage County v. J.W.K.*, 2019 WI 54, ¶29, 386 Wis. 2d 672, 927 N.W.2d 509. That occurred in this case, yet the Wisconsin Supreme Court decided the question presented without mentioning mootness.

This Court will address an otherwise moot issue if it can recur but evade review. *Weinstein v. Bradford,* 423 U.S. 147, 148-149 (1975). *Weinstein* declined to apply this exception where a defendant challenged a state's parole procedures after his release because "there was no demonstrated probability" that the defendant would again be on parole. *Id.* at 149.

A commitment is not parole. The controlling case is *Washington v. Harper*, 494 U.S. 210 (1990) where a prisoner with schizophrenia challenged a policy authorizing the transfer of inmates to a facility for the diagnosis and treatment of mental illness, including the involuntary administration of antipsychotic medication. The prisoner argued that the policy violated 14th Amendment substantive due process.

During his appeal, the government stopped medicating him and returned him to prison. This Court held that the case was not moot even though he sometimes consented to antipsychotic medication. *Id*. at 213, 214 (noting consent). He had been treated and committed on and off for years. There was no evidence that he had recovered from schizophrenia. Plus, he was still in prison, so the prison could invoke its policy and subject him to medication again. Because the alleged injury was likely to recur, the case was not moot. *Id*. at 219 (citing *Vitek v. Jones*, 445 U.S. 480, 486-487 (1980)).

This case is like *Harper*. Petitioner was diagnosed with paranoid schizophrenia. (App.74a). According to the American Psychiatric Association, schizophrenia has no cure.[3] Respondent's own expert testified that "[s]he has a history of being noncompliant with psychotropics." (App.78a). In his opinion, when treatment is withdrawn there is a "substantial likelihood" that she will again become a proper subject for commitment. (App.76a). Thus, according to Respondent's expert, there is a substantial likelihood that Petitioner could again be committed and recommitted pursuant to a statute that violates 14th Amendment substantive due process. Under *Harper*, this case is not moot.

B. The expired recommitment order carries collateral consequences.

This Court will not dismiss a case as moot where the challenged decision has collateral consequences that could be redressed by a favorable decision. *Sibron v. New York*, 392 U.S. 40, 53. (1968). *Sibron* involved two criminal

[3] American Psychiatric Association, *What Is Schizophrenia?* available at https://www.psychiatry.org/patients-families/schizophrenia/what-is-schizophrenia (last visited 10/29/2021).

defendants who pursued appeals from their convictions even though they had completed their six-month sentences. The government argued that their appeals were moot.

Sibron recognized that most criminal convictions entail "adverse legal consequences." *Id*. at 55 (quoted source omitted). A conviction may be used to impeach a defendant's character in future legal proceedings. It may be considered at a future sentencing if the defendant is convicted again. A judge or jury might forgive a limited number of minor convictions from the distant past. So *Sibron* found it impossible to "say at what point the number of convictions on a man's record renders his reputation irredeemable." *Id.* at 56.

Sibron also held that the defendant does not bear the burden of proving collateral consequences. "[A] criminal case is moot only ***if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction***." *Id.* at 57-58. *See also U.S. v. Juvenile Male*, 564 U.S. 932, 936 (2011)("When the defendant challenges his underlying ***conviction***, this court's cases have long ***presumed*** the existence of collateral consequences")(citing *Sibron*). (Emphasis on "conviction" in original, on "presumed" supplied).

The Wisconsin Supreme Court, citing *Sibron*, holds that an involuntary commitment can have collateral consequences even after it expires. *Marathon County v. D.K.*, 2020 WI 8, ¶23, 390 Wis. 2d 50, 937 N.W.2d 901

(noting the firearm ban resulting from a civil commitment).[4]

The challenged recommitment order has potential collateral consequences for Petitioner. (Pet. 24-27). For example, when a commitment order is reversed, the Department of Health Services cannot collect the cost of care from the committed person or her family. Wis. Stat. §46.10(2)-(3). *See Jankowski v. Milwaukee County*, 104 Wis. 2d 431, 440, 312 N.W.2d 45 (1981). Respondent does not deny this fact.

Like a conviction, an involuntary commitment causes reputational damage. Adjudications of mental illness and dangerous are stigmatizing and can have a "very significant impact on the individual." *Addington v. Texas*, 441 U.S. 418, 426 (1979); *Vitek*, 445 U.S. at 492 (same). It does not matter whether a person has been committed multiple times. Family, friends, and a future judge or jury could view one initial 6-month involuntary commitment followed by stability differently than a 6-month involuntary commitment followed by a 12-month involuntary recommitment. Respondent fails to refute this point.

Respondent notes that Wisconsin commitment proceedings are confidential. Wis. Stat. §51.30(3)(a). (BIO 16). But it completely ignores all the exceptions allowing corporation counsels, prosecutors, the department of justice, and the department of corrections to use

[4] Numerous federal and state courts, citing *Sibron*, hold that an appeal from an expired commitment is not moot due to its stigma and collateral effects. *See e.g. In re Ballay*, 482 F.2d 648, 651-652 (D.C. Cir. 1973); *Lodge v. State*, 597 S.W.2d 773, 776 (Tex. Ct. app. 1980); *In re Hatley*, 291 N.C. 693, 231 S.E.2d 633, 634-635 (1997).

commitment records without the person's consent. Wis. Stat. §51.30(3)(b), (bm) and (d).

Finally, a person automatically loses her 2nd Amendment rights the first time she is committed. Wis. Stat. §51.20(13)(cv)1. They cannot be restored unless she petitions the court, which must determine her "record and reputation" for dangerousness. Wis. Stat. §51.20(13)(cv)1m.b. Respondent does not deny that the court's determination will be affected by the number of times the person has been involuntarily committed.

Under *Sibron*, Petitioner has a legally cognizable interest in obtaining reversal of the expired recommitment order due to its collateral consequences.

II. The Constitutional Standard.

Three cases hold that the 14th Amendment requires the government to prove continuing dangerousness in order to extend an involuntary commitment. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jones v. United States*, 463 U.S. 354 (1983); and *Foucha v. Louisiana*, 504 U.S. 71 (1992).

O'Connor established that the government may not confine a person for mental illness alone. He must also be "dangerous." Even if his initial commitment was based on mental illness and dangerousness, "***it could not constitutionally continue after that basis no longer existed***." *O'Connor*, 422 U.S. at 575. Respondent concedes this holding. (BIO at 3).

Jones, citing *O'Connor*, held that a committed insanity acquittee "is entitled to release when he has recovered his sanity or ***is no longer dangerous***." *Jones*, 463 U.S. at 368. (Emphasis supplied). Respondent completely ignores *Jones*.

Foucha held that 14th Amendment substantive due process protects a person's freedom from bodily restraint. *Foucha*, 504 U.S. at 80. Applying *O'Connor* and *Jones*, *Foucha* held that keeping an insanity acquittee "against his will in a mental institution is improper absent a determination in civil commitment proceedings of ***current*** mental illness ***and dangerousness***." *Id*. at 79. (Emphasis supplied). Respondent concedes that *Foucha* requires evidence of current dangerousness, but not evidence of "recent acts." (BIO at 22).

Respondent counters these holdings with a footnote to *O'Connor*, which states: "Of course, even if there is no foreseeable risk of self-injury or suicide, a person is literally 'dangerous to himself' if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends." (BIO 16-17, 20-22)(citing *O'Connor*, 422 U.S. at 574 n.9.) This footnote simply highlights one definition of dangerousness. It does not authorize the government to declare someone "helpless to avoid the hazards of freedom" without pointing to any current or recent conduct indicating that the person is, in fact, helpless. That would gut *O'Connor*'s holding.

III. Courts Are Divided Over the Question Presented.

State supreme courts and federal courts of appeal are split over whether the 14th Amendment requires the government to show recent acts in order to prove that a mentally ill person is currently dangerous.

Iowa. Two Iowa Supreme Court cases require evidence of current dangerous behavior to continue a commitment: *B.A.A. v. Chief Medical Officer, Univ. of Iowa Hospitals*, 421 N.W.2d 118 (IA 1988); *State v. Huss*, 666 N.W.2d 152 (IA 2003). *B.A.A.*, citing *O'Connor* and the 14th

Amendment, holds that "persons who have been committed because they were dangerous must be released once that condition passes." *B.A.A.*, 421 N.W.2d at 124. Further, the government cannot constitutionally confine a person solely to continue treating him. *Id. Huss*, citing *Jones* and *Foucha*, ruled that "to meet constitutional muster in the civil commitment context, we have long held that the threat the patient poses to himself or others be evidenced by a '***recent overt act, attempt or threat.***'" *Id.* at 161. (Emphasis supplied).

Respondent ignores *B.A.A.* and then contends that *Huss* does not reflect Iowa's current law because in 2018 the legislature added a fourth standard of dangerousness, which does not require recent acts. (BIO 19)(citing Iowa Code §229.1(20)(d). Iowa's first three standards of dangerousness do not specify "recent" acts either. *See* Iowa Code §229.1(20)(a)-(c)). Yet in 2020, the court of appeals, citing *B.A.A.*, held that under §229.1(20)(a) the government must still prove "a recent overt act, attempt, or threat." *See Matter of L.M.*, 2020 WL 1310354 at *3 (Ia. Ct. App. 2020)(unpublished). *B.A.A.* and *Huss* have never been overturned. Whatever the legislature enacts, they remain the Iowa Supreme Court's view on what the 14th Amendment requires.

9th Circuit. The 9th Circuit Court of Appeals holds that it is unconstitutional to commit a person who does not poses an imminent danger as evidenced by a recent overt act, attempt or threat. *Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980). *Suzuki* has never been overturned. Respondent ignores this point.

Hawaii. Respondent notes that after *Suzuki*, Hawaii added two new dangerousness standards—"gravely disabled" and "obviously ill"—which do not specify proof of recent or imminent dangerousness. (BIO 20)(citing

In re Doe, 78 P.3d 341 (Haw. Ct. App. 2003)). *Doe* exhaustively reviewed *O'Connor*, *Jones*, *Foucha* and the *Suzuki* decisions. But it also observed that "due to constitutional concerns," the government declined to seek Doe's commitment based on those standards. *Doe*, 78 P.3d at 368. It therefore reversed Doe's successive commitments due to insufficient evidence of her imminent dangerousness. *Id.* at 343.

Wyoming. Citing *Jones* and *Vitek*, the Wyoming Supreme Court reviewed the constitutional limits on commitments in *In re R.B.*, 2013 WY 15, 294 P.3d 24 (2013). *R.B.* stated:

> [T]here is no legal basis for continuing involuntary hospitalization based on a possibility that a patient who is ***not currently mentally ill as that term is defined by statute will in the future become ill again based on his past behavior***. If further episodes occur, the patient's liberty may be restrained through involuntary hospitalization only upon proof of mental illness by clear and convincing evidence, not on the basis of speculation.

Id., ¶37. (Emphasis supplied). Wyoming defines "mental illness" as a disorder that causes a person to be dangerous to self or others. *Id.*, ¶21

The paragraph above is not dicta. (BIO 18). It is the court's rationale for why county attorneys do not have standing to object to a patient's discharge. Unlike medical professionals at the patient's treating institution, county attorneys are not qualified to assess the patient's current "mental illness" and suitability for discharge. *Id.*, ¶43.

Vermont. Vermont authorizes a nonhospitalized commitment for persons or patients who, without treatment, will deteriorate and again become "a person in

need of treatment." The Vermont Supreme Court held that the government need not show an "overt" act in order to prove that without treatment, a patient will again become a "person in need of treatment." *In re P.S.*, 167 Vt. 63, 702 A.2d 98, 105 (1997).

More recently, it clarified that the commitment court cannot simply find that the patient will become a "person in need of treatment" at some point in the future. That would "present serious constitutional concerns." *In re T.S.S.,* 2015 VT 55, ¶26, 199 Vt. 157, 121 A.3d 1184. The court must find that this deterioration will occur "in the near future." *Id.,* ¶¶29-31. It must consider the person's pattern of deteriorating without treatment and returning to "person in need of treatment" status. It must also consider the "recency" of that pattern." *Id.* ¶32. *T.S.S.* reversed a continued commitment because the government did not show a recent pattern of the patient deteriorating and becoming dangerous without treatment. *Id.* ¶31.

2nd Circuit. In stark contrast to the cases above, the Second Circuit Court of Appeals holds that the 14th Amendment does not require the government to show a recent overt act of dangerousness in order to commit a mentally ill person. *Project Release v. Prevost*, 722 F.2d 960, 973 (2d Cir. 1983).

Wisconsin. The Wisconsin Supreme Court adopts an even more extreme position. Like Vermont's statute, §51.20(1)(am) allows the government to commit a person based on a prediction that, without treatment, she will become a proper subject for commitment. It requires the court to consider her "treatment history" but not her recent treatment history. It explicitly eliminates the proof of recent conduct required for an initial commitment. Then, without evidence of recent conduct, it allows the government to continue a commitment because—at some

unspecified point in the future—the person could stop treatment and become dangerous.

The Wisconsin Supreme Court holds that §51.20(1)(am) satisfies 14th Amendment substantive due process because, while *Foucha* requires proof of current mental illness and dangerousness, it does not require proof of recent acts or omissions indicating that a person is demonstrably dangerousness. (App.16a-17a).

IV. The Wisconsin Supreme Court's Decision is Wrong.

The Wisconsin Supreme Court has redefined the term "current dangerousness." It holds that the 14th Amendment allows the government to continue a commitment of a mentally ill person without evidence that she is now, or was recently, behaving dangerously. This holding conflicts with *O'Connor*'s holding that a commitment cannot continue after the initial basis for it no longer exists. *O'Connor*, 422 U.S. at 575. It conflicts with *Jones*' holding that a committed person "is entitled to release when he has recovered his sanity or ***is*** no longer dangerous." *Jones*, 463 U.S. at 368. It conflicts with *Foucha*'s holding that an insanity acquittee is entitled to release unless there is evidence of "***current*** mental illness ***and dangerousness***." *Foucha*, 504 U.S. at 79.

Respondent analogizes §51.20(1)(am) to §51.20(1)(a)2.e., the 5th standard of dangerousness, which the Wisconsin Supreme Court upheld in *State v. Dennis H.*, 2002 WI 104, ¶37, 255 Wis. 2d 359, 647 N.W.2d 851. (BIO 17-17). The 5th standard allows the government to commit a mentally ill person before he becomes dangerous to himself or others, but it requires evidence of "***both*** the individual's treatment history ***and his recent acts or omissions."*** Wis. Stat. §51.20(1)(a)2.e. (Emphasis supplied). *Dennis H.* twice noted this fact when it held that

the 5th standard satisfies *O'Connor*. *Dennis H.*, ¶¶39, 41. In contrast, §51.20(1)(am) authorizes a commitment without evidence of any recent conduct. Respondent ignores the critical distinction between these commitment standards.

To be clear, Petitioner does not ask this Court to define dangerousness. A state may adopt one or multiple standards of dangerousness. Petitioner contends that the government cannot, consistent with the 14th Amendment, continue a commitment without evidence of recent conduct indicating that a mentally ill person "***is*** dangerous" under whatever standard a state has adopted.

Section 51.20(1)(am) allows the government to recommit mentally ill people every 12 months even when they are complying with treatment, maintaining appropriate behavior, and planning to continue treatment—simply based on speculation that they will one day stop treatment and then become dangerous. The statute blatantly violates the 14th Amendment, *O'Connor*, *Jones,* and *Foucha*.

CONCLUSION

For the forgoing reasons, the Court should grant this petition for writ of certiorari.

Dated this 9th day of November, 2021.

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