

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEROME KRASKEY,

Petitioner,

v.

N. GROSCHEN, ON BEHALF OF MERCY HOSPITAL,

Respondent.

On Petition For Writ of Certiorari
To The Minnesota Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the complete abrogation of the hearsay rule in Minnesota's civil commitment statute, Minn. Stat. § 253B.08 subd. 7, violate Petitioner's Fourteenth Amendment rights to Due Process and Equal Protection of the laws?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Minnesota trial and appellate courts included the certiorari petitioner, Jerome Kraskey (respondent in the trial court), and the trial court civil commitment petitioner N. Groschen, on behalf of Mercy Hospital, a private hospital.

In all proceedings below, the hospital petitioner (respondent to this certiorari petition) has been represented by the Hennepin County Attorney, a public prosecutor.

28 U. S. C. §2403(b) may apply, and therefore this petition and related documents are served on the Minnesota Attorney General. The Minnesota Attorney General received notice of the state court proceedings raising constitutional challenges to a state statute, but she entered no appearance.

There are no parties to the current proceedings other than those named in the petition. A list of counsel for all parties follows the Conclusion.

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(A list of counsel for all parties follows the Conclusion.)

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On Petition For Writ of Certiorari
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The petitioner, Jerome Kraskey, respectfully petitions this Court for a writ of certiorari to review the unpublished opinion of the Minnesota Court of Appeals filed on January 16, 2018.

The Minnesota Supreme Court denied further review of this decision on March 28, 2018. The entire Minnesota appellate file is designated as Minnesota Appellate Case No. A17-1243.

OPINIONS BELOW

The unreported opinion of the Minnesota Court of Appeals to which this petition relates was filed on January 16, 2018, and is attached as Appendix pages 14-26.¹

JURISDICTION

Before filing this petition, the Petitioner timely requested the Minnesota Supreme Court to review the decision of the Minnesota Court of Appeals. The Minnesota Supreme Court denied review on March 28, 2018 (Appendix at 27). This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). The Minnesota state courts have interpreted a state statute in a manner that grossly departs from established Due Process standards and violates Petitioner's right to Equal Protection of the Laws. In so doing, they have upheld the constitutionality of a statute as they have interpreted it.

¹ The decision also is available at 2018 WL 414380.

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

This case is based on the Fourteenth Amendment Due Process and Equal Protection clauses:

U.S. Constitution: Amend. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The state statute at issue reads as follows:

Minn. Stat. § 253B.08 subd. 7

253B.08 JUDICIAL COMMITMENT; HEARING PROCEDURES..

Subd. 7.Evidence. The court shall admit all relevant evidence at the hearing. The court shall make its determination upon the entire record pursuant to the Rules of Evidence.²

The Minnesota Court of Appeals has bindingly interpreted this provision, as follows:

Although the statute requires the district court to determine relevancy in accordance with the rules of evidence, the statute does not require application of other rules of evidence.

² This subdivision contains an additional paragraph, not at issue under the facts of the Petitioner's case.

In re Civil Commitment of Williams, 735 N.W.2d 727, 731 (Minn. Ct. App. 2007), *review denied* (Minn. Sept. 26, 2007).

STATEMENT OF THE CASE

Procedural history

A Minnesota District Court, Fourth Judicial District, Probate/Mental Health Division (located in Minneapolis) committed the Petitioner as a person who is mentally ill. Court File No. 27-MH-PR-17-237 (Referee Order, March 27, 2017, Appendix at 1). Petitioner timely sought review before a district judge, who denied review (Order, June 15, 2017, Appendix at 7). In the course of that review, Petitioner gave notice to the Minnesota Attorney General that he was challenging the constitutionality of a statute (Notice, excerpt, April 6, 2017).

As previously indicated, the Minnesota Court of Appeals affirmed, and the Minnesota Supreme Court denied further review.

Facts

The Petitioner has an undisputed traumatic brain injury as a result of an assault. The assault itself was not related to any mental illness of the Petitioner. His commitment depended on whether he met the behavioral (danger or self-neglect) criteria to be a “person who is mentally ill” under Minn. Stat. § 253B.02 subd. 13(a)(1-4); and whether his mother’s and brother’s guardianship over him was a less restrictive alternative.³

³ In this Petition, Petitioner does not raise any issue regarding the guardianship as a less restrictive alternative.

While living in a vehicle, Petitioner allegedly displayed or brandished a knife in the presence of others. Someone told someone else about that, and in an unquantified chain of hearsay it came to the attention of the police. There is no police evidence in the record. The allegation was asserted via hospital records.

Petitioner objected to these records as hearsay to the extent they described events occurring outside of the treatment facilities making the records. Tr. 4:12-21. The referee received the records, “with the exception of any hearsay that the Court finds is not reliable.” Tr. 6:5-7. The referee credited the outside hearsay based on threats the Petitioner was recorded as making to staff inside Mercy Hospital.

After his initial hospitalization for the assault, Petitioner received treatment at a rehabilitation center in Red Wing. Tr. 8:9-10:2 (no Red Wing records were offered into evidence). The Red Wing facility discharged him, allegedly for noncooperation, and Petitioner briefly lived with others before residing in his vehicle. Tr. 10:3-12:6.

Petitioner’s mother testified that his “confrontational” behavior is verbal, not physical, Tr. 13:10-15:15; that he was difficult to manage, Tr. 15:16-25, but took direction from her, Tr. 17:24-19:4; and that Petitioner was unharmed despite living in a car. Tr. 19:5-16.

Petitioner’s most recent hospitalization resulted from his own call to the police. Tr. 22:12-23:11, 24:10-25:1. He acknowledged owning a utility

knife but denied threatening anyone with it. Tr. 23:13-23. He also agreed that he may have been loud and obscene with police and ambulance personnel, but he had no intention of hurting them. Tr. 23:24-24:6, 25:14-20.

The trial court examiner's principal concern was that the Petitioner might provoke injurious retaliation from others. Tr. 28:14-29:15. She acknowledged that except for hearsay that he had possessed a knife, Petitioner had not been physically violent toward anyone. Tr. 28:21-22, 30:18-22, 36:16-17, 37:8-18, 40:24-41:2. The word "retaliation" did not appear in her report. Tr. 37:19-38:4.

REASONS TO GRANT THE PETITION

I. Statement of Reasons

- A. A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
- B. A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This case represents at least the second time the Minnesota Supreme Court has declined to review a Minnesota Court of Appeals holding that the hearsay rule does not apply at all in

civil commitment cases. The abrogation of the hearsay rule on these cases involving personal liberty, while retaining it for the benefit of all other civil litigants, violates both the Due Process and Equal Protection rights of the Petitioner.

II. Argument

The Minnesota Commitment and Treatment Act, Minn. Stat. Ch. 253B (the “Act”), was enacted in 1982 to bring Minnesota’s civil commitment processes into compliance with the due process liberty protections this Court enunciated in *O’Connor v. Donaldson*, 422 U.S. 563 (1975), and previously in *Jackson v. Indiana*, 406 U.S. 715 (1972) and *Humphrey v. Cady*, 405 U.S. 504 (1972). *O’Connor v. Donaldson* held that, “a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” 422 U.S. at 576.

Over the course of nearly four decades, actual practices under the Act have gradually eroded the protections of liberty in deference to the infant sciences of psychology and psychiatry; by a sense that involuntary confinement is offset by the benevolent motivations for treatment; and by political pressure to eliminate nearly all possible risk to the public.

This case presents just one example of that erosion. As a result of others, not specifically raised by this petition, a British court has refused to

extradite an accused sex offender to Minnesota, opining that subjecting him to the Act would be a "flagrant denial of his rights" under European law;⁴ The Minnesota U.S. District Court and the Eighth Circuit have been obliged to grapple with an aspect of the hospital system in which several go in but few ever come out, despite arguably satisfying the criteria for release.⁵

The hearsay issue in the present case raises the abrogation of a fundamental civil procedural protection, prejudicing all civil commitment patients, whether they might be committed for a fixed but indefinitely renewable⁶ duration (such as Mr. Kraskey) or be facing an indeterminate commitment, such as the *Karsjens* plaintiffs.

⁴ "Britain balks at extradition in Minnesota sex case," StarTribune (Minneapolis), June 20, 2012, available at <http://www.startribune.com/britain-balks-at-extradition-in-minnesota-sex-case/159711685/>. The British court decision, *Sullivan v. United States et al.*, [2012] EWHC 1680 (Q.B. Admin 2012), is available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2012/1680.html&query=shawn&method=boolean>.

⁵ *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017), *reversing* judgment for the Plaintiffs, 109 F.Supp.3d 1139 (D. Minn. 2015).

⁶ Even the least intrusive commitments are subject to potentially limitless renewals, with to a lower bar for the renewal petitions than applied to the initial commitment petition. Minn. Stat. §§ 253B.12, 253B.13 (extensions and recommitments); *compare* §§ 253B.02 subd. 2 and 13, and 253B.09 (initial commitments for persons who are either chemically dependent or mentally ill and not dangerous to the public in general). Mr. Kraskey was committed as a person who is mentally ill (but not dangerous to the public), § 253B.02 subd. 13, and so far his initial six-month commitment has been extended for one additional year.

Initially, the Minnesota Court of Appeals attempted to guard commitment patients against the erosion of the hearsay rule. *In re Siegel*, No. C3-99-1155, 1999 WL 1100937, at *3 (Minn. Ct. App. Nov. 30, 1999), further discussed *infra*. Later, however, it interpreted the statute presently in issue, Minn. Stat. § 253B.08 subd. 7, to completely abrogate the hearsay rule. *Williams, supra.*⁷ As demonstrated herein, this violates the due process and equal protection rights of persons who are subject to civil commitment petitions in Minnesota.

“[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” *Application of Gault*, 387 U.S. 1, 18 (1967). As construed, Minn. Stat. § 253B.08 subd. 7 violates fundamental constitutional principles of Due Process, for two reasons, and of Equal Protection.

A. The statute violates the constitutional clear and convincing evidentiary standard.

⁷ The statute may be susceptible to a more limited and less problematic interpretation, as seemingly implemented by the Minnesota Supreme Court in a special commitment rule:

The court may admit all relevant, reliable evidence, including but not limited to the respondent's medical records, *without requiring foundation witnesses*.

Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Acts, Rule 15, Evidence (emphasis added), available at https://www.revisor.mn.gov/court_rules/rule.php?type=ms&subtype=spec&id=15. However, to date the Minnesota Supreme Court has declined, at least twice, to review the Minnesota Court of Appeals' *Williams* holding.

To satisfy Due Process, a commitment petitioner bears a clear and convincing burden of proof. *Addington v. Texas*, 441 U.S. 418, 432-33 (1979). As the present case illustrates, abrogating the hearsay rule effectively abrogates the clear and convincing evidence standard. Before *Williams*, the Court of Appeals acknowledged that, “An inference drawn from unattributed hearsay is speculative and may not be sufficient to meet the clear and convincing standard of the Commitment Act.” *In re Siegel*, No. C3-99-1155, 1999 WL 1100937, at *3 (Minn. Ct. App. Nov. 30, 1999). It also shifts the burden of production to the trial court respondent, to track down and produce the sources of the petitioner’s hearsay evidence. In a fast-track commitment case,⁸ that is impossible.

B. The statute violates Due Process generally.

The use of hearsay may violate due process, depending on the gravity of the underlying subject matter and the degree of reliance on hearsay. Here, it violated due process.

“State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence.” *Michigan v. Bryant*,

⁸ The Kraskey commitment petition was filed on March 9, 2017, and tried on March 17.

562 U.S. 344, 371 n.13 (2011).⁹ *See also Dutton v. Evans*, 400 U.S. 74, 96–97 (1970) (Harlan, J., concurring) (“[T]he Fifth and Fourteenth [Amendments command] that federal and state trials, respectively, must be conducted in accordance with due process of law. It is by this standard that I would test federal and state rules of evidence.”).

Minnesota recognizes, in other contexts, that the use of hearsay can violate due process. *See, e.g., In re Expulsion of E.J.W.*, 632 N.W.2d 775, 780 (Minn. Ct. App. 2001) (school expulsion); *accord, Matter of Welfare of J.M.G.*, 360 N.W.2d 403, 406–07 (Minn. Ct. App. 1985) (juvenile dependency proceeding); *Matter of Wang*, 441 N.W.2d 488, 495 (Minn. 1989) (professional licensing), *citing Morey v. School Bd. of Independent School Dist No. 492*, 271 Minn. 445, 448-49, 136 N.W.2d 105, 107-08 (1965) (teacher termination). Similar concerns determined the outcomes in *Whisman v. Rinehart*, 119 F.3d 1303, 1310 (8th Cir. 1997) (alleged child abuse); *see also Banat v. Holder*, 557 F.3d 886, 892–93 (8th Cir. 2009) (an immigration case noting that “highly unreliable hearsay might raise due process problems”); *Helms v. Hewitt*, 655 F.2d 487, 503 (3rd Cir. 1981), *rev’d on other grounds*, 459 U.S. 460 (1983) (prison discipline).

⁹ In an unreported decision the Minnesota Court of Appeals gave a nod to a reliability standard, without citing due process; but as the present case demonstrates, Minnesota caselaw puts very little teeth into the reliability requirement. *In re Civil Commitment of Blaylock*, No. A09-0153, 2009 WL 2151301, at *3 (Minn. Ct. App. July 21, 2009).

Cases permitting hearsay typically identify the declarant and provide an opportunity for cross examination. *E.g. Richardson v. Perales*, 402 U.S. 389, 409–10 (1971); *Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 122–23 (Minn. Ct. App. 2008); *compare Solis v. Mukasey*, 515 F.3d 832, 835–36 (8th Cir. 2008).

Because commitment cases involve involuntary confinement, Due Process limits the use of hearsay to generally recognized exceptions.

C. Petitioner was denied Equal Protection of the Laws.

Minn. Stat. § 253B.08 subd. 7, as construed by *Williams*, classifies civil commitment litigants separately from other civil litigants, by abrogating the hearsay rule.

Under any equal protection scrutiny, this classification is not justified. Outside of Minnesota, no precedent known to the Petitioner abrogates the hearsay rule in a final adjudication allowing confinement. For example, “fairness requires that no distinction be made between adults and juveniles in evidentiary matters.”¹⁰ A narrow exception, closely related to collateral estoppel, sometimes permits a known and identified victim’s prior courtroom testimony to be used against a commitment respondent who was convicted of that crime. *See, e.g., People v. Green*, 79 Cal. App. 4th 921, 926, 94 Cal.

¹⁰ *People ex rel. Guggenheim v. Mucci*, 77 Misc. 2d 41, 44, 352 N.Y.S.2d 561, 565 (Sup. Ct.), *aff’d*, 46 A.D.2d 683, 360 N.Y.S.2d 71 (1974).

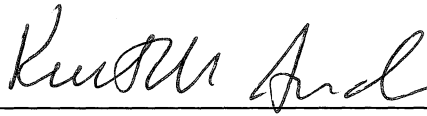
Rptr. 2d 355, 358 (2000). Otherwise, a commitment patient's interest in liberty should be given at least the same weight as another litigant's interest in getting paid for a carload of widgets.

CONCLUSION

The Court's previous teachings on the Due Process implications of the hearsay rule have gone unheeded in the gradual devolution of Minnesota's commitment procedures. A complete abrogation of the rule is an obvious violation of the Court's mandated clear and convincing evidence standard in commitment cases; and it also violates due process generally.

Invoking the Equal Protection clause, the Court also should take this opportunity to hold that the states cannot redline a class of litigants out of the protections of the hearsay and other evidentiary rules that protect their liberty, while continuing to afford those protections to civil litigants whose interests are entitled to no greater weight than those of civil commitment patients.

Dated: June 21, 2018.



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