In the

Supreme Court of the United States

J. B. O'CONNER, M.D.,

Petitioner,

v.

KENNETH DONALDSON,

Respondent.

No. 74-8

Washington, D. C.
January 15, 1975

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Wednesday, January 15, 1975.

The above-entitled matter came on for argument at 10:09 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RAYMOND W. GEAREY, ESQ., Assistant Attorney General of Florida, the Capitol, Tallahassee, Florida 32304, [pro hac vice]; on behalf of the Petitioner.

BRUCE J. ENNIS, JR., ESQ., 84 Fifth Avenue, New York, New York 10011; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 74-8, O'Connor against Donaldson.

Mr. Gearey, you may proceed whenever you're ready.

ORAL ARGUMENT OF RAYMOND W. GEAREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GEAREY: Mr. Chief Justice, and may it please the Court:

I am Raymond Gearey, Assistant Attorney General of the State of Florida, representing the Petitioner, Dr. O'Connor.

We have here this morning the case of Kenneth Donaldson, the respondent, who was involuntarily civilly committed to the Florida State Hospital in early 1957. He was committed following a hearing before a County Court judge, where he was found to be mentally ill, a danger to himself and others, and at that point was committed to the hospital for care, maintenance, and treatment. That being the language of the Florida statute at that time.

QUESTION: Who initiated the commitment proceedings? I couldn't find it.

MR. GEAREY: It was initiated, I believe, by his family, his mother and father --

QUESTION: One of his parents, or both of his parents?

MR. GEAREY: -- who were resident of --

QUESTION: Florida?

MR. GEAREY: -- Pinellas County, Florida.

Now, at the time of his admission, among other things, he requested, due to his Christian Scientist beliefs, that he not be treated with drugs or shock therapy.

Now, throughout his hospitalization, those requests were periodically renewed, and at times he did actually refuse drug therapy.

In addition, he frequently refused offers of various other forms of therapy, when they were indeed offered. These were non-medical forms of therapy, such as group therapy, occupational therapy, et cetera.

QUESTION: The court found that he had not been offered, if I recall correctly, -- or the jury, the jury's finding is that he had not been offered occupational therapy. Is that not correct?

MR. GEAREY: Well, Mr. Chief Justice, I believe at one time --

QUESTION: The Court of Appeals of the Fifth Circuit seemed to focus on that.

MR. GEAREY: There was some question as to that. I believe that in actuality it was offered, he accepted for a time, and then refused to participate further.

And I believe on one other occasion when it was

offered, he said that he would not participate again.

Now, there is some question from time to time as to how he reacted when the therapy was offered, and whether the therapy was explained to him, in various forms.

But we believe that many forms of therapy were indeed offered and were knowingly refused by Mr. Donaldson, for various reasons.

QUESTION: As you read this record, what was the latest date -- just the year would be enough to aid me -- when he refused some form of therapy that was offered to him?

MR. GEAREY: Well, he was --

QUESTION: He was there fifteen years, wasn't he; fifteen years, more or less?

MR. GEAREY: Yes, sir, he was in about fourteen years in the hospital.

Now, I believe, right up to the end, he would have refused shock therapy. Towards the end of his confinement, the last two years, roughly, I believe, he did begin to agree to accept drug therapy from Dr. Gumanis, who is one of the defendants.

The drug therapy was tried. They felt it had little or no effect upon his illness, and it was discontinued. But it was not until the last, approximately, two years of his hospitalization that he accepted drug therapy at all.

Now, throughout his hospitalization he was tested and

examined several times by the staff psychiatrists, psychologists. At some occasions he would refuse to be examined. But each time, until the end, when it was agreed he should be released, the conclusion was always the same: that Mr. Donaldson was mentally ill, and his confinement should continue.

QUESTION: In that respect, Mr. Gearey, how did it come about that he was finally released after these many years?

MR. GEAREY: Well, he received a new attending physician late in 1970 or early 1971, and that attending physician determined that, in his judgment, Mr. Donaldson was indeed fit to be released from the hospital.

QUESTION: This is one who succeeded the doctor who is a party then, here?

MR. GEAREY: Yes. Dr. O'Connor, the petitioner, whom I represent, was Mr. Donaldson's attending physician very early in his confinement, up until about 1958 or '59. At that time, Dr. O'Connor became Clinical Director of the hospital, and another doctor took over Mr. Donaldson's care. And later Dr. O'Connor became Superintendent of the hospital.

And at the -- towards the end, the new attending physician determined that Mr. Donaldson had indeed improved to the point where he should be returned to society, and he was indeed released in mid-1971. I believe it was late July

or early August.

And at that time there had also been a change of administration in the hospital, and it was the opinion of the new Superintendent, based upon the reports given to him by the physicians, that Mr. Donaldson should be released.

QUESTION: I take it that Dr. O'Connor at all times had the power, in the Florida system, to release him?

MR. GEAREY: Yes, sir, he did. And the record reflects that at all times during his tenure as superintendent, based upon the advice given him by the attending physicians and the consensus of staff conferences, that Mr. Donaldson should not be released.

Now, at several staff conferences, --

QUESTION: But he didn't have the -- did he have the power to release him unless he arrived at the conclusion that he had progressed sufficiently to be released?

MR. GEAREY: No, Mr. Justice White, I believe Dr. O'Connor stated, and the record reflects, that he did not believe that he could release Mr. Donaldson until Mr. Donaldson was cured.

Now, there were certain temporary forms of release that were available. These were such things as trial visits. There was an out-of-State release procedure, whereby a man, although not restored to his competency and given a final discharge, could be released from the hospital for temporary

periods of time.

QUESTION: Was not that refused here? In this case.

MR. GEAREY: Yes, Mr. Justice Blackmun, it was. Towards the end, at one of the last staff conferences, the consensus was that perhaps Mr. Donaldson should be offered either a trial visit or an out-of-State release, I believe they called it.

They offered him a trial visit with his family, and he refused. And the record reflects that, quite accurately.

QUESTION: Of course, this fellow Lembcke,up in New York, tried for years to get him released.

MR. GEAREY: Yes, sir, there were two efforts to have Mr. Donaldson released: one, Mr. Lembcke; and one, the Helping Hands Organization in Minnesota.

Dr. O'Connor testified, and the other doctors, the record reflects, believed that it would have been a disservice to Mr. Donaldson to release him at that point; they felt him mentally ill, and felt that he could not receive adequate supervision from these organizations or from Mr. Lembcke, an individual.

Dr. O'Connor stated at one point that he felt that it would have been a disservice to Mr. Donaldson to have released him.

QUESTION: What do you mean by a "adequate supervision"? This record almost shows he didn't have any

supervision here at all, did he? Other than confinement.

MR. GEAREY: Well, he had -- he had the supervision and the treatment that was available at the hospital and to which he would submit.

They believed he did need supervision of the form offered at the hospital and not available from an individual on the outside.

Dr. O'Connor firmly believed that Mr. Donaldson remained mentally ill. That is really the basis of his refusals to --

QUESTION: Incidentally, is it agreed on the part of the State and the appellants here, that Mr. Donaldson was not dangerous, either to himself or to others?

MR. GEAREY: Well, there was some question as to that. Now, when he was committed, the forms stated that he was considered dangerous to himself and others. In 1965, Mr. Donaldson had been conducting a letter-writing campaign with public officials, protesting his hospitalization.

A Member of the Legislature became concerned, and requested an outside opinion. A doctor was brought in from Jacksonville, who had never met Mr. Donaldson before, had no contact with his case prior to that time, and his opinion was that Mr. Donaldson was mentally ill and indeed dangerous.

There were some on the staff who believed him dangerous; there were some who did not.

QUESTION: Aren't you bound by the jury's verdict to a certain extent on that? Didn't the district judge charge that in order for them to recover, they would have to find he was not dangerous?

MR. GEAREY: Yes, sir, to some extent we are. There was a charge to that --

QUESTION: Well, let me put another: To what extent aren't you bound by it?

MR. GEAREY: Well, I think we would have to say we were bound by the jury's findings in that regard. Because they were instructed to that effect.

Now, as I said, several times the matter was brought up to staff conference, and the consensus was -- and this is what Dr. O'Connor relied upon -- that Mr. Donaldson did remain mentally ill and should be hospitalized.

Now, throughout his hospitalization, Mr. Donaldson brought some 14 or 15 suits seeking release, challenging the quality of his treatment, and these were brought in the State courts and lower federal courts, and all were fairly summarily dismissed.

Four of them reached this Court, and certiorari was denied.

This particular suit --

QUESTION: Have you cited all those habeas applications, incidentally?

MR. GEAREY: The --

QUESTION: All of them?

MR. GEAREY: Not all of them are cited in the brief. We did mention the four that reached this Court, and I believe one or two that reached the Florida Supreme Court.

QUESTION: I, for one, would appreciate it if you could supply information as to those, their citations, at least their case numbers if they're not reported.

MR. GEAREY: Certainly, sir.

QUESTION: And submit those at your convenience.

QUESTION: Were there evidentiary hearings in any of those habeas corpus proceedings?

MR. GEAREY: Mr. Justice Powell, I'm not certain. We have very little knowledge of what did go on in those cases. I do not believe there were any substantial evidentiary hearings held in any of those cases.

But that would be -- that would have to be something we would have to further research. Information wasn't available to us at the time we submitted the case to you.

But I would -- I think I could safely say that the evidentiary hearings were not held.

QUESTION: Were there any opinions written by District judges in any of those cases?

MR. GEAREY: Not to my knowledge. I believe they were just summary dismissals, for lack of either case or

controversy, or lack of a cause of action.

QUESTION: While I have you interrupted, would you summarize briefly the procedure that took place at the time of respondent's commitment, what did Florida law then require?

MR. GEAREY: Okay. Under Florida law in 1957, the law required a petition on behalf of a number of citizens, that they felt a particular individual needed -- was mentally ill and needed care.

The due process procedures, which were present, were notice, a hearing, an opportunity to be heard at the hearing on all relevant evidence.

QUESTION: Hearing before whom?

MR. GEAREY: Before a County Court judge. It was a judicial hearing in all respects, and the subject, the patient -- the subject of the petition had the right to counsel or appointed counsel, and there were provisions in the statute for the indigents who could not supply witness fees or other related fees; the State would waive those.

And so we believe that there was a full hearing with full due process.

Now, that's one element of what really goes into this alleged right to treatment, which I will be getting to shortly.

But, to summarize it briefly, he received full due

process: notice, hearing, witnesses, counsel if desired; and there was expert testimony from two physicians.

QUESTION: Is the record of that hearing included in the record of this case?

MR. GEAREY: No, sir, it is not. The petitions that were filed at the time are part of the record. I don't believe that a transcript or copy of the hearing is part of the record in this case.

QUESTION: Just one more question along these lines: Has there been provision under Florida law that would have enabled the respondent to petition on his own motion within the State procedure for release, or was habeas his only legal remedy?

MR. GEAREY: I believe release was available on a petition from the patient.

QUESTION: And you say you believe -- is there --

MR. GEAREY: Yes, sir, I believe that under the statute at that time there were several ways the patient could receive release, and a petition from the patient was one of them.

If he felt he was cured, he could petition for a release, and a hearing would apparently have been held.

QUESTION: Would he petition the court?

MR. GEAREY: Yes, I believe he would have petitioned the court which had committed him originally.

QUESTION: Was any such petition filed by respondent?

MR. GEAREY: No, sir, not in this case that I'm aware of.

QUESTION: Would you say that in that petition he would have the burden of proving that he'd been cured? Before petition could prevail?

MR. GEAREY: Under the 1957 law, I feel the burden probably would have been on the patient, to have shown that he was cured.

QUESTION: To show that he was cured?

MR. GEAREY: Yes, sir.

QUESTION: And this is a situation where in fact he had no treatment, isn't it?

MR. GEAREY: Well, I -- that's really the question here, whether there had been treatment. And of course we submit that there was treatment.

QUESTION: Incidentally, due process hearing which you just described, was that at the time of the initial commitment?

MR. GEAREY: Yes, it was.

QUESTION: Unh-hunh, and there had been no other State proceeding, comparable State proceeding, since?

MR. GEAREY: No, there wasn't.

QUESTION: Unh-hunh.

QUESTION: According to your statement of the case,

on page 4 of your brief, he could have been released upon his application, if there were no objections from the head of the hospital. That's the way I read it.

MR. GEAREY: That's correct.

QUESTION: That is just his application, I suppose, to the hospital itself.

MR. GEAREY: Yes, and I expect --

QUESTION: And he would be released if there were no objection; that's the way you summarize the then law of Florida.

MR. GEAREY: Right.

QUESTION: And then an alternative way of release is even without a petition from anybody, if three members of the hospital certify that he -- to a restoration of mental competency.

MR. GEAREY: Yes, that's correct.

Now, this suit --

QUESTION: Then I take it -- if you will --

MR. GEAREY: Yes, sir?

QUESTION: Then I take it the issue of dangerousness would not be involved in that, except as it might bear indirectly on, and collaterally on, whether he had recovered.

MR. GEAREY: That's correct.

QUESTION: If he showed that he was not dangerous, that wouldn't be enough to bring about his release?

MR. GEAREY: I don't believe it would have been, under that procedure.

QUESTION: Yes.

MR. GEAREY: If it had been shown at that time, under the '57 statute, that he was still in need of treatment, with or without dangerousness, I believe he may have still been retained at the hospital.

Florida law has drastically changed since the '57 procedure, and I will mention briefly later that under our new law no patient is really kept more than six months without a repeat hearing, and that we do recognize now a statutory right to treatment.

QUESTION: Is that automatic? That is, without any initiation on his part for that hearing?

MR. GEAREY: That's correct. After six months, every patient is reviewed.

QUESTION: And where is that hearing?

MR. GEAREY: Pardon?

QUESTION: Where is that hearing?

MR. GEAREY: That's conducted at the hospital before a hearing examiner, and at that point, unless it can be shown that he's in need of further in-institution treatment, he must be released, either to a community program or released entirely.

QUESTION: And if he's not released, is that

determination subject to judicial review?

MR. GEAREY: Yes, sir, it would be. And, in addition, he would again be reviewed periodically. It's a periodic process, with regular review.

QUESTION: I see.

QUESTION: The hearing officer is a neutral officer from the outside, is he?

MR. GEAREY: Yes, sir, he is.

QUESTION: Something like the hearing examiners in the federal system?

MR. GEAREY: Yes. At this present time we have one hearing examiner who handles this particular institution. He is employed by the State, but --

QUESTION: He's not part of the hospital staff?

MR. GEAREY: Oh, no. No. Not at all.

QUESTION: To whom does he report?

MR. GEAREY: He reports to -- it's related to the Department of Health and Rehabilitative Services, that supervises the hospital. But it has proven to be very much of an adversary process. The hearing examiner has shown himself to be quite independent of the State.

Now, this suit was instituted somewhat before Mr. Donaldson was released. It originally sought release and damages for his confinement, allegedly without treatment.

After his release, the action was converted to a

civil rights suit, eventually seeking damages from several physicians who had treated him, or the ambisuperintendents of the hospital.

The case went to trial, and the jury returned a verdict of $38,000 against two of the physicians: Dr. O'Connor and Dr. Gumanis.

The Acourt of Appeals affirmed, and the petition for writ of certiorari was brought to this Court and granted.

Now, on the constitutional right to treatment, which is our first issue, we want -- the State of Florida wants to make it clear that we agree that persons involuntarily civilly committed to State mental institutions have a right to be treated. In Florida this is handled by statute.

However, we are concerned with the theory of a constitutional right. There is no expressed constitutional right to treatment, as such. We recognize that if there is one, it should flow from the due process clause of the Fourteenth Amendment.

Florida would not willingly transform hospitals into jails.

The Court of Appeals for the Fifth Circuit held that there is indeed a constitutional right to treatment flowing from the due process clause of the Fourteenth Amendment. The Court said that, and really nothing more.

There are no guidelines to guide the federal

judiciary in the enforcement of this right. And this is where we feel the important problem comes, and this is where the idea breaks down.

We accept and we agree with this Court's statement in Jackson vs. Indiana, that the nature and duration of confinement must bear some reasonable relationship to the purpose for which the person is committed.

Now, our problem with the constitutional right to treatment is what is treatment and how do we measure it?

Mr. Donaldson was committed for treatment. It was the State's position throughout this that he received such treatment as was available, and to which he would submit.

However, we do quarrel with the ruling of the Fifth Circuit, for what we consider to be important issues: examination of due process requires more than looking at the quality and quantity of treatment; you first have to examine the due process received in the commitment procedures, which we've just briefly outlined here.

And then you have to get to the important step of judging the quality and quantity of the treatment. And thus far we have a lack of meaningful guidelines to enforce this right; a right incapable of enforcement, to us, cannot truly be a right.

From 1957 to 1971, there were no judicial statements that a constitutional right to treatment existed. And there

were certainly no guidelines to measure that right. And there are none now.

We seriously question whether the federal judiciary is adequately equipped, without more in the way of guidelines, to sit down and examine a patient's treatment program and adequately pick and choose among dozens of treatment therapies and program plans.

Quite seriously, the State of Florida is --

QUESTION: As far as patients in the State of Florida are concerned, are there now guidelines, in your view, in the Florida statute, in the new statute?

MR. GEAREY: Under the review in the new statute, the hearing examiner examines to the extent of whether the treatment being received is reasonably designed to accomplish the purpose.

He doesn't get into the specifics that were implied in this case. It's a general review of the treatment being received. If he finds that no treatment is being received, the patient is no longer hospitalized, certainly.

QUESTION: But if the findings of the hearing examiner is adverse to the patient, he may then go to the Florida courts?

MR. GEAREY: The patient?

QUESTION: Yes.

MR. GEAREY: Yes, sir.

QUESTION: On appeal. He may ask for a review of the hearing examiner's determination; is that correct?

MR. GEAREY: Yes, Mr. Chief Justice, it is.

Now, the hearing examiner examines the treatment to the extent that whether the physicians have made a permissible decision in their treatment plans, he does not get to the specifics.

And now we're haunted by the specter of federal courts ordering a particular plan.

Now, as we stated in our brief, there have been cases that have been brought in the federal courts, criminal cases, where the judge has found a man to be possibly unfit to stand trial for reasons of insanity. He would have the man examined by two eminent and qualified psychiatrists, who would indeed agree this man should not stand trial at this time, he needs care and treatment.

The judge would then say, What treatment should he have?

One eminent psychiatrist would say, Well, he should be treated in a more physical way, a more medicinial way with drugs, various forms of medicinal therapy.

The other would say, No, no, he should be treated in a more psychiatric, psychological approach, without the drugs and medicinal therapies.

QUESTION: I can see why you can't really limit

your discussion of the case to the particular facts before us, there are obviously broader issues involved; but in a case like you mention, that man could reasonably be found dangerous, I would think.

MR. GEAREY: Yes, sir.

QUESTION: And therefore really not within the ambit of the Fifth Circuit's opinion in this case.

MR. GEAREY: Well, Mr. Justice Rehnquist, no, a criminal defendant would not be within the ambit of the Fifth Circuit's decision. But I think that's very -- the problem of the judge is very analogous, where he's presented with two psychiatrists who disagree on what the proposed treatment program should be, to insure that the man receives the treatment he deserves.

Now, this is what bothers us: Are we going to have the federal judiciary saying, Yes, there is a right to treatment, but not giving us the guidelines to enforce it.

Now, --

QUESTION: But, of course, the Florida -- Florida has apparently elected to say that a man who is competent, at least by this jury's definition, and not dangerous to himself and not dangerous to others, can, nonetheless, be virtually totally deprived of his liberty; and the expectation, I suppose, is that what he gets in return is some form of treatment.

Does it seem fair to you that the State should entirely renege on its side of the thing?

MR. GEAREY: No, sir, it doesn't, and we do believe that we are offering the treatment that we do indeed promise.

Now, the burning issue in this, as far as the guidelines, is that at the time of Mr. Donaldson's hospitalization there were no guidelines, there was no right; and yet in 1971 the right was enforced retroactively back to 1957, and resulted in personal liability.

Dr. O'Connor had before him a man judicially committed. His decision to release Mr. Donaldson is a quasi-judicial decision.

Now, we've skipped to the liability question here, but we don't believe that under those circumstances Dr. O'Connor should have been held liable for making that decision.

QUESTION: One could reach that result quite apart from the existence of a right to treatment or not. One could hold there was a right to treatment and still, because of some application of a privilege doctrine, say that this particular defendant shouldn't have been liable here, I suppose.

MR. GEAREY: Certainly. Certainly.

Our point is that as far as the right to treatment goes, that point -- to the State of Florida, not Dr. O'Connor -- is moot prospectively. If there is going to be a constitutional right to treatment, though, the States -- and this is a

broad issue among many States -- need some sort of guidelines. Without those guidelines, we deny the existence of the right, as unenforcible.

QUESTION: Well, as you representing the State here, or the hospital, or Dr. O'Connor? Who are you representing?

MR. GEAREY: Well, Mr. Justice White, I represent, in a way, both the State and Dr. O'Connor.

QUESTION: Well, does Dr. O'Connor have separate counsel?

MR. GEAREY: No, sir, he does not.

QUESTION: Is the State paying the bill for him?

MR. GEAREY: We're paying the bill for his representation, however, --

QUESTION: How about the damages?

MR. GEAREY: No, there's no provision under Florida law, at that time, for the payment of damages. These are personal damages, under the Civil Rights Act.

QUESTION: Did he have separate representation at the trial?

MR. GEAREY: No, he did not. He was represented by State counsel.

We represent Dr. O'Connor, and in his capacity as a former State employee.

QUESTION: But you -- I haven't seen anything in

your brief or haven't heard anything here as to whether, in this specific trial, Dr. O'Connor was properly charged with damages, even conceding some constitutional right for treatment.

For example, have you preserved any objections to the instructions the trial court gave?

Other than perhaps some blanket objection to an assertion that there's a constitutional right to damages?

MR. GEAREY: Yes, objections were made to the instructions. One, in particular, that troubles this --

QUESTION: Well, I ask you if you preserved it?

MR. GEAREY: Yes, we have. I believe we have.

QUESTION: Well, where is it in your -- where is it in your petition for certiorari or in your brief?

MR. GEAREY: Oh, I think it's implied in there that that's what we're arguing about, is the way this case was presented to the jury by the District Court.

A good-faith instruction was given that said good faith is a defense; but it is not a defense.

QUESTION: Well, what about the definition of the constitutional right to treatment that was given to the jury?

MR. GEAREY: Well, that's the point we've argued about, through the Fifth Circuit to this Court.

QUESTION: Well, you've argued about whether there is one, but how about: if there is one, what -- of what should it consist?

MR. GEAREY: Well, that's a point that we haven't raised, as to what it should consist of.

QUESTION: Well, that may very well -- that may -- if the Fifth Circuit or the District Court was wrong in defining it, it might -- Dr. O'Connor might not have to pay damages.

MR. GEAREY: That's correct.

Now, we don't know how it should be defined, and that's what --

QUESTION: Well, you must have some idea.

MR. GEAREY: Well, --

QUESTION: That's what this case is all about.

MR. GEAREY: Yes, sir, we do. We feel that the courts have given the States due process guidelines in areas such as parole revocation, criminal trials; and this is something similar. When the right is announced, guidelines should be announced at that time, in order to aid the States in the enforcement of the right.

We believe that, as the Fifth Circuit --

QUESTION: Well, that's sensible. I don't blame the State for being interested in futuro, but Dr. O'Connor has a particular problem here. He's got a -- it's this lawsuit, I would suppose, that interests him as much as any, and both of them are stuck with some damages.

MR. GEAREY: Yes, sir.

QUESTION: I suppose you would argue this case, and whether the award of damages was proper in this case.

MR. GEAREY: Well, we've argued that in this case it certainly was not. It results in a retroactive application of a brand new doctrine.

QUESTION: Well, can this kind of a case happen again in Florida, if Florida enforces its statute?

MR. GEAREY: I don't believe it could. No.

QUESTION: Did the trial judge here give an instruction in terms of the existence of the constitutional right, or did he instruct the jury merely that there was a right, without defining what kind of a right?

MR. GEAREY: No, he gave an instruction, stating that there was indeed a constitutional right. And this is the point that, to us, is basic, essential error.

QUESTION: Well, just let me ask you: Let's assume for the moment there is one -- assume you lose on your assertion that there is none. Then do you agree that with this instruction that the trial court gave; you're instructed that a person who is involtunarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as weill give him a realistic opportunity to be cured, or to improve his mental condition.

Now, that was the instruction. Assume there is a constitutional right. Do you agree with that version of it?

MR. GEAREY: We would agree with that. But our disagreement is that in this case --

QUESTION: Well, you assume, then, that a State violates its duty unless it offers treatment that will give him a realistic opportunity to be cured or to improve his mental condition?

MR. GEAREY: The State violates its duty if it doesn't give him such treatment as it has promised him, to make him well.

The problem in this case, however, --

QUESTION: Does that assume that in every case there is a realistic opportunity to be cured?

MR. GEAREY: Oh, no, no. Not at all.

QUESTION: Isn't it limited to --

QUESTION: Well, then, it --

QUESTION: -- equal cure?

QUESTION: That's the way it sounds, those instructions.

MR. GEAREY: It's limited to available cures, that are available within the State system. Certainly the State should make available all cures possible.

However, there are some illnesses which virtually cannot be cured. There are others which --

QUESTION: Well, then, how can you agree with this instruction?

MR. GEAREY: Well, we don't agree with it in this case.

We agree with it in the case where it has been shown that a man has a disorder that can be reasonably cured by therapy.

QUESTION: Well, this particular case happens to be the one in which this instruction was given.

MR. GEAREY: Yes, sir.

Now, the problem with it in this case is: that instruction assumes the existing -- the existence of the right to treatment. And our point is: Yes, there may be a right to treatment now, but in 1957 to '71, there was not. And so it's wrong.

QUESTION: I understand that. I want to find out if you agree with this version, this rendition of the right to treatment, if there is one, as this trial court instructed the jury.

MR. GEAREY: If there is one --

QUESTION: Do you agree with that or not?

MR. GEAREY: If there is one, prospectivelly I think we could agree with that; yes, sir.

QUESTION: Well, what about the case where -- where you -- in which, as you suggest, there might not be any relatistic opportunity to be cured?

MR. GEAREY: Well, that would raise a problem that

it's not considered by that instruction.

QUESTION: Well, do you -- do you think this case might be one of those or not?

MR. GEAREY: I don't think that on the record we could say there was no hope of curing Mr. Donaldson. There is some question, as far as his disease goes, as to whether even a one-to-one doctor-patient relationship would have any effect. The outcome seems to be more a disorder of the disease than the type or amount of treatment.

QUESTION: Well, if that's the case, what's the justification for Florida's confining him, if he wasn't dangerous to himself, wasn't dangerous to others, and was competent? If there's virtually no possibility of curing him.

MR. GEAREY: Well, the justification originally rested upon dangerousness. If he wasn't --

QUESTION: In this case --

MR. GEAREY: Excuse me?

QUESTION: In this case it did originally rest upon dangerousness?

MR. GEAREY: There was a finding in the commitment papers that he was dangerous to himself and others. There was conflicting testimony at trial as to the opinion of the psychiatrist as to whether he was indeed dangerous.

Now, in '65, the outside psychiatrist said, Yes, he is dangerous. Other doctors said, No, he isn't.

And of course that's a matter for psychiatric opinion.

Thank you.

QUESTION: Or in this case it was a matter for the jury, wasn't it?

MR. GEAREY: Well, in this case, yes, sir. The psychiatric opinion was conflicting, and it went to the jury. Apparently the jury resolved it in favor of Mr. Donaldson.

QUESTION: Not only apparently, they did, did they not?

MR. GEAREY: I think we'd have to assume that, yes.

QUESTION: They had to do it, or they couldn't have reached that verdict under these instructions.

MR. GEAREY: No, they couldn't have.

MR. CHIEF JUSTICE BURGER: All right.

Mr. Ennis.

ORAL ARGUMENT OF BRUCE J. ENNIS, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ENNIS: Mr. Chief Justice, and may it please the Court:

Petitioner's arguments largely ignore the narrow due process theory under which this case was tried and submitted to the jury.

This case involves only the application in a civil commitment context of the due process rule this Court applied

in Jackson vs. Indiana, that the nature and duration of a deprivation of liberty must bear a reasonable relation to the purpose for that deprivation.

Specifically, under the instructions in this case, Petitioner was not held liable, because he failed or was unable to treat respondent. He was held liable because he failed and refused to release respondent, even though he knew that respondent was confined expressly for the purpose of receiving treatment, and knew that respondent was receiving no treatment, and was receiving instead only the custodial care he would have received in a prison.

QUESTION: What is your view as to whether the new Florida statute would give to the patients all the protection they need -- assuming first that it's enforced and applied, not ignored?

MR. ENNIS: Mr. Chief Justice, I believe that the new Florida statute is, in many respects,more comprehensive than the constitutional right we are urging in this case. And I think properly so.

QUESTION: Because it's an automatic review every six months; is that correct?

MR. ENNIS: That is correct, Your Honor.

QUESTION: So that, at most, there is the opportunity to demonstrate capacity to be released, or the propriety of release, with great frequency?

MR. ENNIS: That is correct, Your Honor.

QUESTION: When you say that it's more comprehensive, I take it, then, you mean that it's better than the undefined constitutional right postulated by the Fifth Circuit?

MR. ENNIS: Your Honor, let me address that point.

If there is a right to treatment, surely there must be a right to something other than sham treatment. Hospitals could not simply chain patients to their beds and call that treatment.

Therefore, I think that the Fifth Circuit was quite correct, as a matter of law, in ruling that if there is a right to treatment it necessarily follows that the treatment provided must give a reasonable opportunity, as the Fifth Circuit phrased it, to cure or improve the patient's condition.

QUESTION: Well now, you might say that at least they ought to offer such treatment opportunities as are reasonably available within the art.

MR. ENNIS: That's correct, Your Honor.

QUESTION: But, even though that might not give a realistic opportunity to be cured, I take it there are some conditions that aren't thought to be curable.

MR. ENNIS: That may be, Your Honor.

Under the instructions in this case, however, this case was limited to the case of a person who was not dangerous, either to himself or others, --

QUESTION: Well, I understand that. I understand that.

MR. ENNIS: -- and therefore, if it turned out that, with the provision of whatever treatment could be provided, his condition could not be improved, then the question would arise, as Mr. Justice Rehnquist asked, --

QUESTION: The instructions didn't allow for any case like that. Apparently the State didn't object to that, those instructions, and apparently accepted this case as not being one where treatment wouldn't have any chance at all.

MR. ENNIS: That's correct, Your Honor. They did not contend, in this case, that treatment would be unavailing if offered.

QUESTION: Yes.

MR. ENNIS: Now, let me continue to point out that under the instructions in this particular case, --

QUESTION: So that if you ran into a case like that, perhaps this particular formulation of the right to treatment might have to be modified?

MR. ENNIS: That may be, Your Honor.

We try to stress in our brief that this is in fact a very narrow case, in very narrow circumstances. And those other, perhaps more difficult, questions are not presently before the Court.

I wish to point out also --

QUESTION: So you're suggesting, I take it, that this case should be narrowly decided?

MR. ENNIS: Yes, Your Honor, we are.

QUESTION: And that the Court should not try to range far afield in these other, what you call difficult, questions.

MR. ENNIS: I think that's correct, Your Honor.

In fact, I believe that what counsel for petitioner is asking for is in effect an advisory opinion from the Court to guide future cases. I do not think that is required here.

I think --

QUESTION: Well, if it has nothing to do with the Florida statute, he really doesn't need it, does he?

MR. ENNIS: That's right, Your Honor; absolutely right.

The Florida statute itself could give the content or the nature of the right to treatment in future cases.

But, more than that, let me point this out, I received only this morning a letter from the Solicitor General of the United States confirming that the United States takes the position that patients involuntarily confined do have a right to receive a reasonable opportunity for cure or improvement. That is the language from the Fifth Circuit's decision in Wyatt vs. Aderholt, which was recently decided.

QUESTION: Do you think that comports with the

instruction given by the trial judge here?

MR. ENNIS: Absolutely, Your Honor. Absolutely.

That is the position of the United States.

It is also the position of all of the relevant professional organizations.

QUESTION: First, did the Solicitor General say a constitutional right?

MR. ENNIS: Yes, Your Honor. Yes, he does.

QUESTION: And did he take into account the language of the charge that has to do with -- I've forgotten the precise words; Mr. Justice White focused on them a few moments ago -- all treatment, not treatment that's available. "You are instructed that a person who is involuntarily civilly committed does have a constitutional right to receive such treatment as will give him" -- as will give him -- "a realistic opportunity to be cured."

Now, does that take into account that instruction, that there may be no treatment then known that will give a realistic opportunity?

MR. ENNIS: Yes, it does, Your Honor.

QUESTION: If that's so --

MR. ENNIS: First, let me answer your specific question.

The letter I received this morning from the Solicitor General --

QUESTION: Well, what's that got to do with this case? Is it filed here?

MR. ENNIS: Yes, it was, Your Honor, as I understand it, submitted to the Clerk with the request that it be --

QUESTION: What is it, an amicus?

MR. ENNIS: It is, in effect, an amicus filed.

QUESTION: Well, then, was it --

QUESTION: Yes, we have it.

QUESTION: -- was there some request to file it?

MR. ENNIS: No, Your Honor.

The point is this: The United States is participating as plaintiff or as amicus in many so-called right to treatment cases.

QUESTION: Well, I know, but the Solicitor General says that he's filing it, inasmuch as your brief characterizes "the actions and position of the United States respecting involuntarily confined mental patients by treatment, I believe it appropriate to advise the Court more fully."

MR. ENNIS: That's correct. That's right.

QUESTION: It's prompted by what you said in your brief about the United States does.

MR. ENNIS: That's correct.

QUESTION: Yes.

MR. ENNIS: Let me point out one fact that I think is very important in this case.

The jury found that the petitioner continued to confine respondent, even though he knew that respondent was not dangerous to himself or to others, and even though he knew that respondent was not receiving any treatment.

Most important, the jury found that petitioner confined respondent even though he knew that continued confinement under those circumstances was not lawful.

Because of that jury finding, it seems to us that there is and can be no issue of retroactivity in this case. The jury found as a fact that the petitioner knew that his acts were unlawful.

QUESTION: Well, that doesn't -- he knew, perhaps, that they were unlawful under the statutory test then in effect in Florida; it doesn't mean he knew that he was depriving anybody of any federal rights.

MR. ENNIS: Well, Your Honor, I think the answer to that question can be found in Monroe vs. Pape, I believe, where this Court indicated that under Section 1983, proof of a specific intent to deprive a person of a constitutional right is not required; all that is required is proof to deprive a person of some liberty which in fact is an unconstitutional deprivation of liberty.

QUESTION: Which in fact is a violation of federal law, constitutional or statutory.

MR. ENNIS: That's right. In Monroe v. Pape,

this Court said that a man is held responsible for the natural consequences of his acts.

But in this case it's even easier than that. Because in this case the jury went further and expressly found that the acts of the petitioner were not only bad faith, but actually amounted to malice and wanton and oppressive conduct toward respondent.

QUESTION: Well, what instruction do you rely on for your statement that the jury must have found that he knew his acts were unlawful?

MR. ENNIS: Your Honor, I believe that that instruction is quoted at page 74 of our brief.

The judge instructed the jury that:

"If the jury should believe from a preponderance of the evidence that the defendants reasonably believed in good faith that detention of plaintiff was proper for the length of time he was so confined then a verdict for defendants should be entered even though the jury may find the detention to have been unlawful."

QUESTION: Unh-hunh.

MR. ENNIS: "However, mere good intentions which do not give rise to a reasonable belief that detention is lawfully required cannot justify plaintiff's confinement in the Florida State Hospital."

Read together, that instruction authorized the jury

to return a verdict for the petitioner, if they believed that the petitioner reasonably believed that respondent's continued confinement was legally proper, even if it --

QUESTION: But it doesn't say -- the instruction doesn't say "legally proper", it just says "proper"; so it doesn't really draw the distinction that they believed in good faith that it was lawful, but in fact it turned out not to have been lawful.

Maybe that's not preserved by the -- by objection.

MR. ENNIS: Yes, sir. I'm reading these two instructions together, the first of which says "proper" and the second of which, in elaboration, talks about"lawfully required"

QUESTION: And it also doesn't particularly refer to any federal unlawfulness.

MR. ENNIS: No, it does not, Your Honor. That's --

QUESTION: We're dealing here with a 1983 action, I take it.

MR. ENNIS: Yes, Your Honor, and that is contained in our brief at pages 39 and 40, the instructions --

QUESTION: Well, where is it in -- yeah, where is that?

MR. ENNIS: Pages 39 and 40 of respondent's brief contain the instructions relevant to that point.

There the judge instructed the jury that:

In order to prove his Civil Rights Act case under Section 1983, the plaintiff had to prove, by a preponderance of the evidence, that the petitioner confined plaintiff against his will, knowing that he was not mentally ill or dangerous, --

QUESTION: Yes?

MR. ENNIS: -- or knowing that if mentally ill he was not receiving treatment.

QUESTION: Now, you wouldn't defend that instruction standing by itself, would you?

MR. ENNIS: I'm sorry, I don't quite understand your question, Your Honor.

QUESTION: Well, do you think that was the proper instruction, standing by itself?

MR. ENNIS: I think this is certainly a proper instruction.

QUESTION: All right. Here's what the jury could have found -- could have based liability on: If the doctor simply knew that the patient was mentally ill and that he was not receiving treatment.

MR. ENNIS: Your Honor, I think --

QUESTION: Now, you wouldn't -- you wouldn't suggest that that is the definition of the constitutional right to treatment. Let's assume, for example, that he was dangerous.

MR. ENNIS: Yes.

Under the instructions in this case, which are later amplified by the judge, --

QUESTION: Well, I asked you about this instruction standing alone. That is not an adequate instruction, is it?

MR. ENNIS: I think this is -- there is nothing improper about this instruction.

QUESTION: Well, there is in -- the jury could have found simply, could have based liability simply on finding that he was ill and not receiving treatment, without regard to dangerousness, either to himself or others.

MR. ENNIS: If that instruction were read alone, you're correct, Your Honor.

QUESTION: Well, that's what I asked.

MR. ENNIS: I'm sorry, I didn't understand your question.

QUESTION: Well, where is it corrected?

MR. ENNIS: It is not -- it is then corrected, if you will look on the next page of respondent's brief, as the court elaborates, --

QUESTION: What page?

MR. ENNIS: Page 40 of respondent's brief.

The court goes on to say that:

"The purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not a danger to himself or others."

QUESTION: Right.

MR. ENNIS: And then says: "Without such treatment there is no justification from a constitutional standpoint for continued confinement unless you should also find that the plaintiff was dangerous either to himself or others."

QUESTION: Now, you don't -- you don't defend that prior instruction standing alone?

MR. ENNIS: I think all the instructions certainly have to be read together, Your Honor. I found nothing improper in the initial instruction, but I think as amplified in the later instructions, it is quite clear that --

QUESTION: Well, for example, assuming then that a patient is dangerous to himself or others, then what is your position with respect to the constitutional right to treatment?

MR. ENNIS: Your Honor, our position would be as follows:

Although that question does not arise in this case --

QUESTION: Because of the way he amplified his views.

MR. ENNIS: That's correct. That's correct, Your Honor.

But our position would be as follows:

We would contend that all persons confined under non-criminal standards and procedures, whether dangerous or not, would have a constitutional right to receive that treatment which would give them a reasonable opportunity to cure or

improve their mental condition.

QUESTION: You mean, if a man --

QUESTION: If there is such then available?

MR. ENNIS: That's correct, Your Honor.

QUESTION: Well, the --

QUESTION: You mean that if somebody is found not guilty of first-degree murder by reason of insanity, and that he can petition for a federal habeas corpus and be released if he can prove that he's not receiving satisfactory treatment?

MR. ENNIS: No, we're not talking about that case, Your Honor. We're talking solely about strictly civil confinement, which has no criminal or quasi-criminal overtones.

QUESTION: So you don't mean, then, that only somebody who was committed through the criminal process, by a criminal trial, is exempt from this requirement for treatment, you would extend it to something with a quasi-criminal overtone?

MR. ENNIS: No, we would not, Your Honor, not at this time.

QUESTION: Well, would you -- well, but, your underlying theory has to either embrace it or not embrace it, I would think.

MR. ENNIS: Well, the theory of this case is where the purpose for confinement is not a criminal law purpose,

then the patient confined would have an opportunity for a reasonable level of treatment.

Now, I wish to point out, though, that although we are not contending in this case that persons confined under the criminal law would have a right to treatment, that, in fact, question has been left expressly open by the United States Court of Appeals for the Second Circuit, in a case called United States ex rel Schuster vs. Herold, where the Second Circuit ruled that it may well be that even criminally confined persons have a right to treatment, in that the treatment might well promote their possibility of early parole.

But that is certainly a much, much more difficult question than the question raised by this case, or by other civil cases.

QUESTION: And when you talk about criminally confined persons, you include a person who is found not guilty by reason of insanity, and committed as a result of that?

MR. ENNIS: Yes, Your Honor.

QUESTION: But is it not true that in a good many jurisdictions now, a verdict of the jury, not guilty by reason of insanity, either by statute or by judicial decision, must be followed by the traditional civil commitment proceeding in order to confine him?

MR. ENNIS: Yes, Your Honor, that is certainly true.

QUESTION: Now, in that case, your statement of your underlying theory would reach it, because his confinement would have been pursuant, in those cases, to a civil commitment proceeding which was triggered by a jury verdict of not guilty by reason of insanity, when he was criminally prosecuted.

MR. ENNIS: Yes, Your Honor, that's correct.

I just want to say this: that that kind of case might well raise some very difficult issues of preventive detention, for example, which this Court and other courts have grappled with for decades.

We are not prepared at this time to argue those other and more difficult cases. I do not feel I have the authority to concede away or to support a right to treatment in those criminal law cases.

We really have only brought in this case the narrowest possible case, and that is the case of a person who is confined expressly for the purpose of treatment, who had never been charged with any crime.

QUESTION: Well, wasn't he found, in connection with his commitment, found to be dangerous to himself or others?

MR. ENNIS: Your Honor, the commitment papers are sketchy and inconsistent on that point. It was not --

QUESTION: Well, I read that in the brief somewhere,

and I just wondered what the truth of the matter was, since they are not part of the record here.

MR. ENNIS: Well, there was -- I can say this, Your Honor: there was no transcript of the trial, at the initial commitment proceeding. Mr. Donaldson testified about that trial, and that is in the record. He testified that though he asked to cross-examine the physicians who had examined him, he was not permitted to do so and the physicians did not testify.

He held a very brief hearing, and was thereupon committed. There was no evidence in the commitment papers of any dangerous act whatsoever.

However, the Florida commitment papers did have boilerplate language, and one of them said the patient may be a danger to himself or others. However, another commitment paper expressly said that he was confined to Florida State Hospital because he was mentally ill and dangerous to himself or others or in order to insure proper treatment.

So it may well be that he was confined not because the committing judge thought he was dangerous, but simply to insure proper treatment.

At any rate, that point was not litigated in this case, because under the instructions --

QUESTION: I thought it was agreed.

MR. ENNIS: It was agreed -- Your Honor, it was

litigated --

QUESTION: It was agreed that he was committed for two reasons, that he was a danger to himself and to others. There never was a dispute on that.

MR. ENNIS: Your Honor, we never conceded that he was dangerous at the time of commitment.

QUESTION: Well, did you ever dispute it?

MR. ENNIS: No, we didn't dispute it. It simply was not at issue in this trial. Because in this trial the petitioner expressly acknowledged that he had a duty upon receiving a patient under a judicial commitment order to make his own professionally independent determination, of whether that patient continued to require confinement.

QUESTION: Well, wasn't all of the tests made to find out whether or not he was a danger to others?

MR. ENNIS: The tests on that point are absolutely clear, Your Honor. Respondent's expert witnesses examined all of the tests that were given, all of the hospital record, and they said that there was no evidence in the hospital record that he was or ever would be a danger to himself or others. He had never injured himself or any other person. He had always been self-employed, a taxpayer, never taken welfare, and, furthermore, the test results of the psychological tests, according to a psychologist who testified, --

QUESTION: Well, how about this doctor from

Jacksonville? Did he say that?

MR. ENNIS: No, Your Honor. First of all, that was not a doctor --

QUESTION: I thought you said all of them did.

MR. ENNIS: Let me be clear.

QUESTION: Please.

MR. ENNIS: All of the employees at the staff of Florida State Hospital, with the exception of petitioner, said that in their opinion respondent was not dangerous. His co-defendant testified at trial that respondent was not dangerous. The director of the Psychology Department at Florida State Hospital testified that in his opinion respondent was not dangerous.

QUESTION: Well, all of this came about, about the simple question I asked: Didn't you agree that he was committed for the two reasons?

MR. ENNIS: No, Your Honor, we did not. We admitted that he was committed for the purpose of treatment. We never conceded that he was dangerous at the time of commitment. But that issue was not raised or litigated in this trial.

Under the instructions in this case, the jury had only to find that after his confinement there was no reasonable basis for the petitioner to believe that respondent was dangerous.

QUESTION: So it's not essential to your success here,

that you relitigate a finding of dangerousness that might have been made in the 1957 proceeding?

MR. ENNIS: That's correct, Your Honor.

QUESTION: Well, could I ask, to be clear about one thing:

I suppose, at the threshold of the case, you could win your case, at least in one way, if you -- if it were held that there was no, the State had no right to commit anybody just for treatment, if he was not dangerous to himself or others?

MR. ENNIS: That is correct, Your Honor.

QUESTION: How about that? Have you taken any position on that in this case?

MR. ENNIS: We do take a position on that in a footnote. Our position is essentially that that is a difficult question which this Court need not and probably should not address itself to in this case.

However, --

QUESTION: Well, it might avoid an awful lot -- it might avoid an awful lot of lawsuits around in future litigation about the definition of the right to treatment, if there was -- if the State couldn't confine people at all, unless they were found to be dangerous.

MR. ENNIS: That's right, Your Honor, and --

QUESTION: In which event, there might not be any

right to treatment.

MR. ENNIS: Simply a right to liberty.

QUESTION: Yes.

MR. ENNIS: That's right, Your Honor, we do take the position in a footnote in our brief, that if the Court reaches that question, it should rule that no person can be subjected to lengthy or indeterminate involuntary hospitalization unless that person is dangerous to himself or others, regardless of whether adequate treatment is or is not provided.

QUESTION: Did the Court of Appeals take a position on that?

MR. ENNIS: No, I don't think it --

QUESTION: Was the issue ever raised in this case?

MR. ENNIS: The issue was not specifically raised in this case, Your Honor.

I might say that briefs have been filed by various professional organizations, one of the briefs by several of the relevant organizations, the American Psychological Association, the American Orthopsychiatric Association, and so forth, takes precisely that position; that no person should be involuntarily confined solely for the purpose of treatment, unless that person is also a danger to self or others.

QUESTION: In terms of proper approach to constitu-

tional questions, what do you think we should do about that issue, just leave it alone, or what?

MR. ENNIS: Your Honor, I think the appropriate course for this Court to take on that issue in this case would be either expressly to reserve that decision or to indicate, as it has indicated in other cases, that if that question were squarely presented to the Court, it would probably rule as a matter of constitutional law that involuntary confinement of non-dangerous persons is not constitutionally justified.

QUESTION: Well, then, if we held that in this case, we wouldn't reach these other --

MR. ENNIS: You wouldn't reach the right to treatment issue at all, that's correct, Your Honor.

QUESTION: Well, -- thank you.

MR. ENNIS: Certainly the facts in this case are clear, and the instructions are clear enough, that that finding would be appropriate in the circumstances of this case, even though it was not the specific basis for decision below.

QUESTION: But you think the -- you think the jury had to have found that he was neither dangerous to himself or others?

MR. ENNIS: Under these instructions, yes, Your Honor.

QUESTION: Did the instructions of the trial court give any indication to the jury that they were to examine the entire fifteen years of confinement and consider whether there was one situation prevailing in part of that time and another at a different part? That is, having in mind that this man was a Christian Scientist, and that this record shows beyond any dispute that he had categorically refused certain treatments at certain times, did it give the jury a chance to treat that as a mitigating factor?

MR. ENNIS: Absolutely, Your Honor. In fact, the petitioner himself drafted and proposed an instruction specifically designed to cover that point. And that instruction was given.

The instruction advised the jury that if the jury found that respondent did not receive any treatment or any form of treatment because of his refusal or reluctance to have that form of treatment, then the jury could not find liability or award damages, based on that refusal.

QUESTION: Well, do you think the verdict is consistent with the undisputed evidence that he did consistently, over a long period of time, refuse any treatment whatever?

MR. ENNIS: Yes, it's quite consistent, Your Honor, because, first of all, the verdict is rather modest, I think, in this case for a fifteen-year deprivation of liberty.

But, second, I must respectfully advise the Court

that in fact there was evidence from which the jury could have found that Mr. Donaldson did not ever actually refuse any treatment; he did expressly say to the doctors, "I prefer not to have shock treatment."

But the doctor who was considering giving shock treatment testified at trial that he did not actually intend to give shock treatment, he only wanted to have that possibility available should respondent become a violent or disruptive patient.

That eventuality never occurred, and shock treatment was never given.

Similarly with respect to medication. I think it's in the Appendix, at page 52, the respondent testified that petitioner expressly told him that so long as he was not a management problem, he would not have to take medication.

He never was a management problem, and therefore he did not have to take medication.

However, when he came under the supervision of another physician, that physician did urge upon respondent that he take medication, and at that point respondent did take medication, when it was, for the first time, actually prescribed for him.

The physician tried the medication for a couple of weeks and then took respondent off the medication upon the physician's finding that the medication had absolutely no

effect, one way or the other.

QUESTION: Mr. Ennis, directing -- I've just been thinking about a problem, not of the emotionally ill who are -- some of whom, at least, are presumptively curable, some of whom are not; and with any of whom it's just a hope or presumption -- as contrasted with the mentally retarded, as a result of a congenital, serious brain damage, for example.

MR. ENNIS: Yes, Your Honor.

QUESTION: Surely, the -- would you quarrel with a State's constitutional power to enact a law or to have a program that would say we're going to institutionalize these people in order to take them out of the families of the impoverished and others, to give them the best custodial care we can, that is, decent and civilized care, but they're untreatable and we're just going to keep them in an institution indefinitely.

MR. ENNIS: Yes, Your Honor, I would quarrel with that. And for the following reason:

Despite very widespread popular assumption to the contrary, it is now quite clear that the mentally retarded, even severely and profoundly retarded persons, even autistic persons, Your Honor, --

QUESTION: Well, there are many varieties, but I premised this on people who had congenital brain damage, --

MR. ENNIS: Yes.

QUESTION: -- physical brain damage.

MR. ENNIS: Yes, Your Honor, there is now widespread professional consensus that even those persons are capable of a great deal of growth and improvement, even persons with IQ's below 19 --

QUESTION: I know, I know some of those --

MR. ENNIS: -- can be taught to toilet themselves, dress themselves.

QUESTION: -- I know some of these things, yes.

MR. ENNIS: That question, of course, is not raised in this case.

QUESTION: Well, it is, because, up until really very recently, as the history of western civilization goes, that was the whole concept of what, to use an old-fashioned phrase, but the phrase, the label indicates the theory, that's what an insane asylum was for. It was to, presumptively these people in the then state of the art were not curable, this was a permanent condition, or one of indefinite duration, and the idea was, as you well know, to provide decent custodial care and to relieve the families of the economic, social and psychological damage that would follow from the presence of those people in their families or households.

And institutions were set up to provide that service, and I wouldn't be surprised if in some States today the

commitment was not for treatment but the commitment was for custody.

MR. ENNIS: Your Honor, let me answer that --

QUESTION: So I think it is involved here.

MR. ENNIS: Let me answer that question in a few words.

QUESTION: But you say a State cannot constitutionally do that.

MR. ENNIS: Let me say two things.

First, we do not contend that the State cannot constitutionally provide a custodial facility for voluntary patients. The only point at issue in this case is whether a person can be involuntarily subjected to custodial care.

QUESTION: Well, by definition these people are lacking in competence to do anything voluntarily for themselves. We're talking about the members of their family, their fathers, their mothers, or --

MR. ENNIS: That's right. I just --

QUESTION: And that's involuntary, by your definition?

MR. ENNIS: That's correct, Your Honor.

QUESTION: Yes.

MR. ENNIS: I would just close by pointing out that there is a book cited in our brief, "The Discovery of the Asylum" by Professor David Rothman, which points out that actually asylums were first created in this country not for

the purpose of providing custodial care, but rather to treat and cure patients. That was the origin of the asylum in America.

Let me close, Your Honor, by saying that we have tried to show this is a narrow case and,properly understood, does not raise any novel rights. It involves only the right to be free from external restraint in all but the most compelling of circumstances. We do not believe those circumstances exist in this case, and the judgment should be affirmed.

QUESTION: Mr. Ennis, before you sit down, I want to return to a question I asked the Attorney General. Was any effort made by respondent to obtain his release under, what is it, Chapter 394 of the Florida law?

MR. ENNIS: Yes, Your Honor.

Let me answer that question by saying the following:

The petitioner has referred to various habeas corpus and other types of proceedings brought by respondent. I have examined all of the records of those proceedings I can find, and I can state to the Court that all of those proceedings were dismissed on procedural, jurisdictional and other non-constitutional grounds, not relevant to the issues before this Court.

There was testimony at trial by respondent that he did in fact attempt to use every conceivable statutory remedy

he could use to effect his release, but he never once got a hearing.

And the reason, in fact, he did not get a hearing is that petitioner opposed those hearings by supplying affidavits to the courts,stating that his confinement was proper.

QUESTION: And was upheld?

MR. ENNIS: Without a hearing, Your Honor. No hearing was --

QUESTION: Well, it was upheld, and that didn't -- sometimes you say on a procedural ground, or non-merit ground, but --

MR. ENNIS: Well, let me -- since the question has been raised again, let me read to you briefly, Your Honor, one such decision.

QUESTION: Is this habeas corpus or --

MR. ENNIS: On a habeas corpus decision.

This is the entire decision in one of those cases by a county judge, which said:

"Certainly the State Hospital authorities have no desire nor reason to detain you in the hospital any longer than your condition requires. In the event your condition is such as to justify it, the medical staff will give you a hearing."

That was a letter to respondent from the county judge. That assumed that petitioner was acting in good faith.

As it would be reasonable and responsible for a judge to assume.

But the jury found in this case that in fact that judicial assumption was unwarranted.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ennis.

The case is submitted.

[Whereupon, at 11:17 o'clock, a.m., the case in the above-entitled matter was submitted.]

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