ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

FRANK O'NEAL ADDINGTON,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 77-5992
	)	
THE STATE OF TEXAS,	)	
	)	
Appellee.	)	

Washington, D. C.
November 28, 1978

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Washington, D. C.
Tuesday, November 28, 1978

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

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MARTHA L. BOSTON, ESQ., 109 East Tenth Street, Austin, Texas 78701, on behalf of the Appellant.

JAMES F. HURY, JR., ESQ., Criminal District Attorney, Galveston County Courthouse, Galveston, Texas 77550, on behalf of the Appellee.

JOEL I. KLEIN, ESQ., Rogovin, Stern & Huge, 1730 Rhode Island Avenue, N.W., Washington, D. C. 20036, for American Psychiatric Association as Amicus Curiae.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 77-5992, Addington against Texas.

Miss Boston, you may proceed.

ORAL ARGUMENT OF MARTHA L. BOSTON, ESQ.,

ON BEHALF OF THE APPELLANT

MISS BOSTON: Mr. Chief Justice, and may it please the Court:

The Appellant in this case is confined in Austin State Hospital, as a result of an order of indefinite commitment. The Appellant came from a disturbed family. In December of 1975, following a family argument, he was taken to jail and minor criminal charges were filed against him. Those charges were subsequently dismissed and in their place the state instituted indefinite commitment proceedings. The commitment trial lasted for five days, during which time the jury heard conflicting testimony as to the need to commit the Appellant.

The Appellant urged that the standard of proof in his case should be beyond a reasonable doubt, but the jury was instructed to make its findings on clear, unequivocal and convincing evidence.

QUESTION: The Appellant is an adult, is he not?

MISS BOSTON: He is. He is approximately 31.

QUESTION: He has been in mental institutions on how many occasions before this?

MISS BOSTON: The record isn't clear on exactly how many occasions. There have been several.

QUESTION: Somewhere in the record it suggests that he has been in ten times in the last five years.

MISS BOSTON: I believe it was something like eight or nine within the last five years.

The Appellant had urged that beyond a reasonable doubt be required, but that was overruled and the court instructed clear and convincing evidence, or clear, unequivocal and convincing evidence.

The jury found that he was to be comitted for an indefinite period of time, and the Appellant filed his appeal in the intermediate state appellate court, on the basis that proof beyond a reasonable doubt is required by the Due Process Clause. That court agreed with Appellant and reversed the order of commitment, but on appeal to the State Supreme Court, that court found that a mere preponderance of the evidence was all that was necessary to indefinitely confine a person in a mental hospital. That court, therefore, reversed the Court of Civil Appeals and affirmed the order of commitment from the trial court.

As a result of this order of commitment, the Appellant has been confined behind the locked doors of Austin State Hospital for almost three years. He can't leave the facility. His movements, his activities, his visotors within the hospital

are all restricted, subject to supervision by the staff. He has been subjected to chemical therapy and to twenty-two electro-shock treatments. He faces the very real possibility that he may never leave the walls of Austin State Hospital.

QUESTION: Let me go back to the standard. What was required to be proved to bring about a commitment in the jury trial that you say lasted five days?

MISS BOSTON: The substance of standard in Texas is two issues. The first is that the person is mentally ill and, second, that the person requires hospitalization for his own welfare and protection or for the protection of others. It is possible, under the statute -- It is actually required under the statute to reach a third issue regarding mental incompetency, but the state failed to plead that, so it was not submitted to the jury.

QUESTION: And there was psychiatric testimony on both sides?

MISS BOSTON: There was psychiatric testimony on the state side. On the Appellant's side, there was social worker and psychological testimony, and our psychologist was stipulated to be an expert.

QUESTION: And the psychiatric testimony was to the effect that he was a schizophrenic; is that correct?

MISS BOSTON: A schizophrenic, yes. There were -- Some said he was chronic schizophrenic,and it was said he was

schizophrenic paranoid type, paranoid-schizophrenic, variations of schizophrenia, yes, Your Honor.

The Appellant has been confined for three years, but in addition to the confinement the Appellant also has been stigmatized. The state, by labeling him a mentally ill person has labeled him a social deviant. And if he ever leaves the hospital, he will be a former mental patient. Studies are replete with evidence that this is a form of social deviancy that is most feared and rejected in our society.

QUESTION: Does Texas provide any periodic review?

MISS BOSTON: Texas has a requirement that each patient be examined at least every six months. There is a provision whereby he, the patient, may petition for reexamination. He is limited to doing that,the first time, a year from his commitment, and then after that he can only do it every two years.

QUESTION: Has Appellant sought that review?

MISS BOSTON: He has not.

QUESTION: But there have been six-month reviews, have there?

MISS BOSTON: There had been, but this appeal has been pending all of that time.

The interests that are at stake for Appellant in this case, and indeed for anyone facing an indefinite commitment, are very much the same interests that were at stake in Winship.

Those are the interests of the juvenile delinquent or a criminal defendant. The interests are that of the total loss of his unconditional liberty and freedom from being stigmatized. The interests were found by this Court in that case to be of such transcending value that proof beyond a reasonable doubt would be required of the state before those interests would be sacrificed. That decision was made, regardless of the fact that the state's motives in juvenile delinquency proceedings were benevolent and very worthwhile motives. The motives, in fact, are very similar here, those of protecting and those of giving treatment.

The Court's reasoning was very clear in Winship, that the reason for requiring the higher standard of proof is that the interests for the individual at stake are so great that the risk of erroneous confinement cannot be any higher than that.

The Texas Supreme Court in its decision totally ignored the teaching of Winship. In fact, it relied on the very reasoning that was rejected in Winship, that is, that the benevolent state motivations would justify a lower standard of proof.

As I said, the state's motivations are almost identical and there seems to be no real justification for using a lower standard of proof based on that and based on Winship.

QUESTION: Miss Boston, am I right in thinking that you do not here press the contention that although the reasonable -- beyond a reasonable doubt requirement might not be

required by the Fourteenth Amendment, there is a requirement that proof be at least by a clear and convincing evidence?

MISS BOSTON: Well, Your Honor, it is my position that proof beyond a reasonable doubt is required. I recognize that there is a very real possibility that this Court would consider clear and convincing as an intermediate ground, and, indeed, that was the instruction below.

QUESTION: What makes you think that?

MISS BOSTON: Well, there is a number of states that use clear and convincing and that has been argued in the briefs on the other side. The amicae briefs have suggested clear and convincing might be an alternative.

QUESTION: Don't you think, though, that the rule of proof beyond the reasonable doubt, which was applied in Winship, had great historical roots in the Common Law as proof for a criminal case? Whereas, clear and convincing evidence simply comes over from the fraud type of case in a civil action. It is of fairly recent origin and so far as I know hasn't been implanted in the Constitution historically.

MISS BOSTON: I think you are right, although, of course, this Court has recognized clear and convincing as the standard in some cases, deportation, for instance.

The beyond a reasonable doubt standard, as it comes down through the Common Law and as it was stated in Winship, the purposes of that standard are to reduce the risk of an

erroneous confinement. And that's exactly what's at stake here, regardless of the fact that this is labeled -- as in Gault we found -- a civil proceeding.

QUESTION: Miss Boston, assuming a case in Texas and you have three equivalent psychiatrists -- of equivalent standing. I recognize the fact that there are no two that are exactly alike. But there are three of equivalent standing on each side. Three who say yes and three who say no. How in the world will a layman find beyond a reasonable doubt?

MISS BOSTON: Well, I believe, Your Honor, that -- Well, first of all, the jury's function, of course, is to weigh the believability of each of those three -- or six -- equivalent psychiatrists.

QUESTION: They would have to do it if it were a criminal case.

MISS BOSTON: That's right.

QUESTION: But this is not.

MISS BOSTON: That's right, but very much the same thing is at stake. But additionally, I don't believe that the state has to rely solely on psychiatric testimony in a vacuum. I think psychiatric testimony or psychiatric assessments are based upon observations, history -- They are based upon facts. It is an opinion drawn from facts.

QUESTION: Could a layman do that without help?

MISS BOSTON: I would suggest that the state bring in

witnesses, perhaps eyewitnesses, to acts of dangerous conduct or continuing history of self-neglect. It seems to me that it would be quite easy to buttress the psychiatrist's opinion by bringing in the evidence that the psychiatrist is basing his opinion on.

QUESTION: The average person, without more, could find out that this is a schizophrenic person?

MISS BOSTON: Well, that is --

QUESTION: You would at lesst have to tell him what a schizophrenic person was.

MISS BOSTON: That's true. But being a schizophrenic person alone is not sufficient, under the standard, to lock a person in a mental hospital.

QUESTION: Would you tell us again what the standard is in Texas.

MISS BOSTON: It is "requires hospitalization for his own welfare and protection or the protection of others."

QUESTION: So, that's a predictive opinion, rather than any factual determination; isn't it?

MISS BOSTON: It is really hard to distinguish what is predictive, what's historical, what's factual. It is all very much tied in together. But it seems to me that the assessment comes from a factual basis.

QUESTION: Did this jury hear from some witnesses that there had been ten episodes which previously led to his

confinement in a mental institution over a period of five years?

MISS BOSTON: Yes, it did.

QUESTION: So, that would be a basis on which they could draw some inferences about the future.

MISS BOSTON: That's right. There were also factual witnesses there.

This Court recognized in Minnesota ex rel. Pearson, which was a sex offender statute, I believe, which is not exactly in point, but the language of the Court recognized the ability of the jury, or fact finder, to look at acts of past conduct as pointing to probabilities of future conduct.

QUESTION: The reason I asked my question, Miss Boston, is that it occurs to me that what standard of proof may be required is inevitably connected with what the standards are for involuntary commitment in any particular state. If they are historic factual standards, it may be one thing. If they are opinion standards by experts, it might be something else. If it is a very strict standard, substantively, before a person can be involuntarily committed, it may be one thing. If it is very loose, low-threshold, it may be something else, as a matter of the substantive criteria for involuntary commitment. And each state, of course, I suppose, is different.

MISS BOSTON: I would think that that would be the area where we would allow the states their flexibility in drafting, within, of course, guidelines of broadness and

vagueness, allow the states the flexibility of creating, writing out their substantive criteria.

QUESTION: But isn't that where, perhaps, the real constitutional vice might lie? Certainly, there are meets and bounds, constitutional meets and bounds, I would suppose, which a state could not exceed. It couldn't say that anybody with hair of a certain color should be involuntarily committed.

MISS BOSTON: Certainly, that's true, but the vice, it seems to me, is in the basic question of how much proof, regardless of what we are proving, how much proof are we going to have? And that's what was addressed in Winship.

QUESTION: Wouldn't that depend on what it is necessary to show, before somebody can be involuntarily committed? Aren't the two just inevitably connected? Can one say for the nation of fifty states, fifty individual states, each with different standards for involuntary commitment, that the Constitution requires a certain level of proof? Because doesn't the level of proof -- Isn't it, as I say, inexorably connected with what the substantive criteria are for involuntary commitment?

MISS BOSTON: Your Honor, it is connected, but in the same sense, in the criminal context we don't vary the quantum of proof based on the elements of the offense.

QUESTION: But generally those are historic facts we are talking about in a criminal prosecution, plus mens rea

and other things.

MISS BOSTON: Certainly, but again the predictive nature of these hearings -- of this evidence -- as has been cast is not solely predictive. There is very much factual evidence there. As I said, the psychiatrists' assessments are based on factual evidence.

QUESTION: But they are giving their expert opinions.

MISS BOSTON: That's true, but the fact finder does not have to rely on that in a vacuum, if the state or the respondent brings forward other factual evidence. I would think that that would be the most responsible way to conduct a commitment hearing for the state, to rely not just on psychiatric testimony, but to bring in as much evidence --

QUESTION: What if a state said that anybody can be involuntarily committed in our state if, in the opinion of two qualified psychiatrists, he should be, and those were the substantive standards for involuntary commitment. Where is your burden of proof there? If two qualified psychiatrists simply testify, "In our opinion, he should be involuntarily committed."

MISS BOSTON: I think those are two separate questions.

QUESTION: Well, what if a state did do that, as a matter of its substantive law of involuntary commitment?

MISS BOSTON: Are you asking me, if beyond a reasonable doubt could be met?

QUESTION: Then there would be no question of burden

of proof. The question would be: Are those substantive standards constitutionally permissible?

MISS BOSTON: That's right, but the substantive standards aren't in question here. The only issue --

QUESTION: But I suggest though that what is in question is the burden of proof. What does the Constitution require by way of a burden of proof? And my suggestion and my question is that there may be no one answer applicable to fifty different states, because each state has differing criteria for involuntary commitment.

MISS BOSTON: I understand.

QUESTION: Are there not some states where the statute provides precisely what Mr. Justice Stewart has just outlined, that a commitment involuntarily may be made on the testimony of two physicians?

MISS BOSTON: I am not aware of there being any states that don't require other criteria. I am not aware of any states that will allow commitment based just upon mental illness. It is mental illness plus something. It may be cast in terms of welfare and protection, as Texas is. Some other states cast it in very distinct, very orderly requirements. But, whatever the state is requiring to be proved --

QUESTION: Are there not some jurisdictions which provide that after -- that a return of a verdict of not guilty by reason of insanity, that commitment to a mental institution

may be had simply on a preponderance of evidence? --

MISS BOSTON: Yes.

QUESTION: -- Federal statutes -- at least in the District of Columbia Code -- and many states; is that not so?

MISS BOSTON: I believe it is. I am not a criminal law practicioner and I am not familiar with the statutes all across the line.

QUESTION: But, don't you think that's relevant?

MISS BOSTON: Well, the question of the insanity defense, it seems to me, is that the state -- My understanding of Leland v. Oregon is that the state can require proof of the insanity defense beyond a reasonable doubt, and therefore the imbalance --

QUESTION: You don't mean the state can commit without a trial?

MISS BOSTON: Do I believe the state can commit without a trial?

QUESTION: Yes.

MISS BOSTON: No, I do not. I believe that would be a clear violation --

QUESTION: Would it be anything to you if there are many state that still do it?

MISS BOSTON: That commit without a trial?

QUESTION: Yes. On the written statement of two members of the medical profession, even if they are obstetricians

or eye specialists.

MISS BOSTON: In Texas, for instance, there does have to be that there, but a hearing is required. Unless you are talking about commitment pending --

QUESTION: My point is I don't think you should take on the other states, you ought to stick with Texas.

MISS BOSTON: Well, I think if a state is going to commit somebody without a hearing, just on the basis of that, I think that's a clear violation.

QUESTION: Well, now, in many states, while they may have a hearing, they don't have a jury trial.

MISS BOSTON: That's true, but that's a very different analysis. This Court has considered the issue of a jury trial or right to counsel separately from the situations in which it has considered this standard of proof.

QUESTION: This question is somewhat similar to Justice Stewart's question. Supposing you had a statute that required proof beyond a reasonable doubt of three facts, one, mental illness; two, some past act of violence; and thirdly, say, that commitment would be in the best interest of the patient. I assume that would be a perfectly constitutional statute, in your view, if those were the three substantive requirements.

MISS BOSTON: Accepting the notion that that is -- Yes, I mean in terms --

QUESTION: Supposing that after that statute was enacted constitutionally the legislature said, "We are going to add a fourth requirement that there be a prediction of future dangerousness, either to the person himself or others, but that fourth requirement shall only be required to be proved by clear and convincing evidence." The statute has now become unconstitutional by your analysis, even though it is more protective of the person.

MISS BOSTON: Well, all the state has to do is change the last criteria.

QUESTION: But it cannot include the last criteria under your analysis, unless it requires proof beyond a reasonable doubt of that element of the determination?

MISS BOSTON: That's right. I think any element that is going to result in total confinement, total deprivation of liberty, has to be proved beyond a reasonable doubt.

I have reserved ten minutes for rebuttal. If there are any questions, I would be glad to answer them.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hury.

ORAL ARGUMENT OF JAMES F. HURY, JR., ESQ.,

ON BEHALF OF THE APPELLEE

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

It is the position of the State of Texas, that I

humbly represent here concerning a due process question -- We feel that the question involving the statute are the provisions as recognized by the State of Texas, concerning reasonable doubt or preponderance, does not exist in a vacuum. The due process that is followed by the State of Texas does not hinge on the question of whether it should be preponderance of the evidence or beyond reasonable doubt. It hinges, we feel, on the other necessities of due process which are granted in this particular case, and indeed every case of someone who is to be committed in the State of Texas.

The whole procedure does not begin merely from the question of indefinite commitment. The procedure begins, basically, with the question of whether or not a temporary commitment should be allowed and that, indeed, it is necessary for a temporary commitment before an indefinite commitment. A person or a physician must notify a court. That physician or person must be recognized by that court and that court then sets aside two physicians who are responsible for evaluating the condition of the person who is to be evaluated. They then give notice, have a hearing before a judge and may be committed for some 90 days in a Texas mental health hospital.

The judge is able to stop this proceeding at any point, up until the time the person is entered into the procedure and, indeed, upon entering the particular mental institution, he could be discharged immediately. In the event

that a person is discharged and comes before a judge again concerning his mental capacity, there is no guarantee that the temporary commitment will not be tried again,and, indeed, it has; in this particular case, there were some eight temporary commitments.

QUESTION: Can you tell us a little bit, at some point, about the review procedures, the periodic reviews? Do that at your own convenience.

MR. HURY: My understanding, Mr. Chief Justice, is that there is a minimum requirement of two mandatory reviews -- or one mandatory review every six months or two per year. I do believe, in just my own knowledge, that there is considerably more than that. I do not believe that the State of Texas allows someone to languish in a building somewhere and only see them once every six months. I am prepared to represent that I believe we provide them with competent psychiatric evaluation as much as possible or as much as the facilities allow, that they are under psychiatric evaluation and, indeed, that the drugs and the treatment which are recognized by the medical society as trying to help these people.

The indefinite commitment which -- there were two in this case -- follows a sworn petition which is presented by the judge. Again, two psychiatrists -- in this case two psychiatrists and I believe it is required that at least one be a psychiatrist -- must evaluate this person within 15 days of a

hearing of this particular type. An attorney can and is almost -- and I believe is always provided. That 7 days before the particular hearing notice must be given again a jury is available and, indeed, at the end of that particular procedure if after a jury verdict a judge does not agree with that verdict, he may order the return of the lawsuit to another jury and order a new trial.

This particular procedure, it is the hope of the State of Texas, forms the basis for an entire evaluation of some possibility of whether or not this person does represent a danger to himself or others and, indeed, try in some way to make this person available once again to society.

There can be no doubt that the question involved here does involve some loss of liberty. The idea is whether or not this loss of liberty is analogous to a penal institution and that loss of liberty being a total and complete deprivation of liberty for a specified period of time. It is only pointed out that we do feel that the procedures whereby the commitment or the committed person is evaluated and, indeed, the very possibility that upon the day of his admission that he could be released points to the idea, among other things, that this is not analogous to a prison, it is not analogous to a set period of time in which a person must languish in prison before his release, even considering parole.

The provisions of the Mental Health Codes and the

mental health provisions of these hospitals do not render this a prison. It renders it a place where we hope, with some small success, to be able to help people.

I think there is another basic problem here as to whether or not the person who is considered for both procedures, criminal procedure and the civil commitment procedure, whether or not that person is of a mind to be able to adequately decide what is best for that person. The thought or idea of a culpable defendant in a criminal matter conspicuously concerns someone who is available to input by counsel, by other persons who are trying to represent that person before a court of law. His ability to evaluate his position and his possibilities while confronted with the State are available to a person who the system assumes is culpable if there is no question of psychiatric problem raised.

The problem, I think, is particularly available as to what in the world are we going to do with someone who does not completely understand what's going on about him. As to someone whose ability -- to evaluate his ability to proceed in life, his ability to understand what the people around him need, in addition to his own needs.

I think the particular problem here is that if a person does not wish to seek help that the first problem in effective treatment is getting that person in the position where he acknowledges he does have a problem and that he is

suffering from some abnormal condition.

If this particular provision can be met than it is the hope that after a person realizes that he has a problem that then the procedures under which this State of Texas proceeds is of a hopeful nature that it would return this person to some sort of useful place in society.

QUESTION: Is to change it to beyond reasonable doubt intolerant for the State of Texas?

MR. HURY: As a question of whether it is intolerant or not, the problem, I think, pointed out by the State of Texas, and once again, just pointing to Turner, it is one of the inexact nature of psychiatric testimony, the inability of certain forms of the medical profession to predict what is going to happen in the future, and as to whether or not that particular ability to predict is available to the question of beyond a reasonable doubt.

I think that what it certainly will do, sir, is to reduce the number of people who are committed to treatment because of the ability of counsel to cross-examine a psychiatrist and to have him admit that not all psychiatrists agree on what is to happen in a particular case.

QUESTION: That's also true in a criminal case, but you have to do it.

MR. HURY: Yes, sir, without a doubt.

QUESTION: And in this, it is your position that you

can't do it?

MR. HURY: It is our position that in denying certain abilities to prove certain things, that is, that there are certain standards that would be much more difficult to meet, that there are people who would be excluded from that process.

QUESTION: But it is not impossible, it could be done?

MR. HURY: It is being done. It is already the standard in several states.

QUESTION: That's what I mean.

MR. HURY: Yes, sir.

QUESTION: Mr. Hury, one of the amicus briefs, the one for the National Center for Law on the Handicapped, makes the argument that the unreliability of predictions cuts the other way, that if you have a low standard of proof it means that there will be a lot of people committed who really should not be committed, because psychiatrists tend to over-predict dangerousness and the like, in order to be conservative.

I am just wondering, isn't there some force to that suggestion that the whole fact that it is quite an unreliable and uncertain area is a reason for not depriving people of their liberty on doubtful evidence?

MR. HURY: The opposite argument is, of course, as valid. The only thing that I would like to point to is that this question does not exist in a vacuum, that there are other things which are available to be proved, there are certain

concrete things that can be proved concerning a person's past history. It is particularly the problem of predicting future problems that come within the psychiatric province that you are talking about, Your Honor.

QUESTION: This problem would be avoided if you adopted a system such as Wisconsin has, relying on past acts, rather than opinions as to what might happen in the future. I guess part of it really relates to the substantive standards, doesn't it?

MR. HURY: I believe it does, sir.

QUESTION: Is this, fundamentally, very much different from the kind of predictive analysis which a parole board makes when it considers whether it should release a convicted prisoner half-way or one-third the way through his commitment?

MR. HURY: There is some analogy there and we have pointed out in our brief that we believe that there is some ability to predict some types of future behavior. The parole situation does, in effect, place some very serious limitations on a person's movements upon their release from the penitentiary, and I would say that would be the only difference.

QUESTION: Well, perhaps, reporting requirements, but they can't monitor a parolee twenty-four hours a day or even once a day. They report, perhaps, once a week or perhaps once a month, depending on the nature of the background of the person. But the predictive element is quite similar, you agree?

MR. HURY: I agree that there is some similarity, but I think the difference here is that psychiatric testimony in the form of the mentally committed person is much less predictable than a mere idea of whether or not a person is going to go back into a situation where they have committed crimes before.

QUESTION: The Parole Board, in releasing a prisoner, is making a decision that on balance he is more likely not to engage in anti-social conduct than that he will do so. That's the decision, isn't it? Now, frequently they are wrong, of course. We know that.

MR. HURY: I definitely agree with you.

QUESTION: Are you defending the standard of proof that the Texas Court thought should obtain?

MR. HURY: Yes, sir, I am.

QUESTION: The preponderance would be all right with you?

MR. HURY: Having taken part in these particular procedures, I guess, of course, I am skewed in one direction or another, but there is another side to some of these procedures which --

QUESTION: What about the preponderance standard? That's constitutional in your --

MR. HURY: Yes, sir, I believe so, providing the other safeguards that we provide. It does satisfy due process.

QUESTION: Although clear and convincing has been

adopted by many states, I take it?

MR. HURY: Some of the states, even Illinois, suggest that clear and convincing is the same thing as beyond a reasonable doubt, only in the civil sector. I am not too sure whether or not there is an absolute definition of what clear and convincing is, but --

QUESTION: Or a preponderance?

MR. HURY: I think that there is a historical useage of preponderance, and we would ask to be able to rely on that.

QUESTION: Well, there comes a point, doesn't there, when the jury's eyes just glaze, even on charges on substantive issues, if the judge goes on for 20 or 25 minutes, as he usually does. And the difference between clear and convincing evidence and preponderance of the evidence is often lost on juries.

MR. HURY: I agree with the Court, yes, sir.

QUESTION: Well, I'm not the Court. I am one of nine members of the Court.

MR. HURY: I beg your pardon.

QUESTION: Here, of course, the trial judge gave a much stronger instruction than the one that Mr. Justice White alluded to as being required in some states.

If you know, is that the general practice of trial judges in these hearings, or do they stay to the traditional preponderance test of civil cases?

MR. HURY: I believe that, so far as the State of

Texas is concerned, that it has been a useage to use the clear, unequivocal and convincing, and, indeed --

QUESTION: Even though the Supreme Court of the state says they don't need to do it?

MR. HURY: Yes, sir.

QUESTION: Mr. Hury, I notice you are from Galveston. You are local. Can you speak for El Paso or any place else in Texas?

MR. HURY: Only by hoping that we all act under the same Mental Health Code that is enacted by the Legislature. But, in particular, the two cases which were decided in this question by the Supreme Court of the State of Texas, Turner and Addington, were both --

QUESTION: Those are the two in your brief?

MR. HURY: Yes, sir. Those were decided on clear and convincing in the lower court, and the short sentence at the end of the --

QUESTION: I assume what you are saying now is that you don't have to use the words "beyond a reasonable doubt." Do you go that far? Because I agree with the Chief Justice about the judge's instructions. It seemed he went a little further than preponderance, but they didn't go to reasonable doubt.

MR. HURY: No, sir, they did not. Here again, just as a person who has taken part in it, we would ask to be able to prove

that preponderance.

QUESTION: You are telling us that the state courts say -- the only ones you know, the two -- say that that's okay, and that's what expected, a little bit more than preponderance?

MR. HURY: That's what was submitted by the lower court, but the Supreme Court said that in the future they direct those courts to have a preponderance of evidence as the criteria from there on, as mentioned in virtually the last paragraph of the Supreme Court of the State of Texas' opinion.

If it please the Court, I wish to reserve time for an amicus.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Klein.

ORAL ARGUMENT OF JOEL I. KLEIN, ESQ.,

ON BEHALF OF AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

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

I am here today representing the American Psychiatric Association as amicus curiae.

This Court is well aware it is psychiatrists who play a critical role in the actual civil commitment proceedings. Based on the experience of the Association and its members, we would urge the Court not to constitutionalize the burden of proof in civil commitment. We do so, largely, for the reasons that, I think, were being suggested by Mr. Justice Stevens when

he asked about the relationship between criteria and substantive burden of proof. That is the second criteria under burden of proof.

It seems to me, as the Court recognized in Patterson v. New York, only the term before last, that if you lock in a burden of proof, you in many ways limit the discretion of the state in terms of its criteria from liberalizing, from changing, from beginning to cope with new and different ways to deal with difficult and intractable problems such as mental health and involuntary commitment.

Now, as Mr. Hury has made claim from the State of Texas, this is not a Gault type case. Texas gives civil commitees a great deal of due process, including a jury trial. In this particular case, this patient had a 5-day jury trial, with, I think, as many as twelve to fourteen witnesses.

The single question is whether one procedure should be mandated to cut across-the-board in all fifty states in civil commitment.

Now, there is the simple analogy to Winship and juvenile proceedings that Appellant relies on. I think the analogy doesn't hold water, and I think so for the following reasons. After Gault, the juvenile proceeding was in fact formalized. You than had the issue of the burden of proof. That wasn't going to change the proceeding, by and large; that was simply going to require more evidence to protect against an

erroneous conviction of a criminal charge.

However, when you go to McKeiver, the Court would not constitutionalize the jury trial requirement. And it didn't do so because it was concerned that a jury trial would affect the juvenile justice system in a way, perhaps, that the burden of proof would not. And that was because it would strip the juvenile judge of his role.

Now, if we turn to civil commitment, I think the same thing applies when we are talking about burden of proof. That is, I think it is much more analogous to a jury trial requirement. And the reason I say that is as follows. It seems to me, unlike a juvenile delinquency determination, a civil commitment spans a host of different criteria. Juvenile delinquency deals with the commission of a criminal act. The burden of proof beyond a reasonable doubt is well suited to prove past acts. Civil commitment deals with a variety of things in a variety of states, some of which do focus quite strongly on dangerousness and actually require, as Wisconsin does, proof of past overt acts. That, it seems to me, is a legislative decision and perhaps one that the legislature can responsibly make, based on its experience. But I don't think this Court should lock that process in by mandating a high burden of proof.

QUESTION: Suppose the substantive standard does depend, in part, on a past act, a historical fact, which way would your running argument -- a lower or a higher standard of

proof should be required? You say if it's a past act --

MR. KLEIN: If you extend it to past act, it is certainly more feasible to prove by a higher standard of proof, there is no doubt. My argument would be that the Constitution shouldn't require that because the state can then address its standard of proof to the given criteria.

QUESTION: Your argument, in a way, is that the standard of proof should depend to some extent on the substantive standard?

MR. KLEIN: I think the standard of proof affects it, not that it depends upon it. I think it is a matter of constitutional law.

QUESTION: Which way do you run it? The looser the standard, what should happen to the burden of proof then -- or the standard of proof -- go up or down?

MR. KLEIN: As a matter of constitutional law, I think it should be unaffected.

QUESTION: So that the standard you choose really doesn't depend on the substantive standard?

MR. KLEIN: The standard of proof will affect the substantive standard, I am arguing, because if you choose a high --

QUESTION: Yes, but the substantive standard shouldn't affect the standard of proof.

MR. KLEIN: I think that's right, as a matter of

constitutional law. Now, as a matter of policy, I think it is appropriate. For example, if you look at the states that have looked and taken a prior act standard, like Wisconsin. They have used, as a matter of legislative policy, proof beyond a reasonable doubt.

QUESTION: Because some of the arguments in the brief filed are that the looser the standard the higher -- the looser the substantive grounds, the higher the standard of proof, because the more margin for error.

MR. KLEIN: Well, there is more margin for error, but it depends what you mean by error, Mr. Justice. Here, I think, it is very different from the criminal process. I think we have to get away from that kind of thinking. Unless we are going to take the position -- or this Court is going to rule that the parens patria power of the state is nonexistent and that all state efforts in hospitalizing somebody are police power efforts, it seems to me what the difference of an erroneous commitment is that in the criminal area there is a lucky guy, the guy who should be convicted and is acquitted. He walks away and he got a real windfall. If he commits another crime, the state suffers the burden, the loss. In civil commitment, that's not the case.

QUESTION: Mr. Klein, he does that, I take it, whether the offense with which he is charged is subject to a six months penalty or death penalty.

MR. KLEIN: That's correct. But in civil commitment that's not the case. The person who is allowed to go free --

QUESTION: So if the lower standard of proof means the possibility of more error, we ought to just put up with it, because the consequences of error are not as disagreeable as in the criminal?

MR. KLEIN: They are far different.

QUESTION: And the consequences of error in erroneously sentencing somebody to a six-month sentence are considerably different than the consequences of error in sentencing someone to death, are they not?

MR. KLEIN: They are, but there is no higher standard of proof than proof beyond a reasonable doubt, but even in the six-month case, Mr. Justice Rehnquist, if he goes free, if the criminal walks out, he gets the windfall if he did it. Whereas, if the patient walks out because society or psychiatry cannot adduce enough evidence to satisfy an unduly high burden, the patient is not helped. We do no favor to let somebody walk out of an arena and return to freedom who is very, very ill.

Now, if you look at the facts of this particular case. This particular gentleman engaged repeatedly in more and more serious behavior. Now, I assume we can wait, as a society, until somebody commits the ultimate act and proceed under the criminal law, but we can try and intervene --

QUESTION: If you keep developing this, then you can

prove it beyond a reasonable doubt, if you say this man is so violent.

MR. KLEIN: This particular gentleman, that's right. That's the problem with the process. We don't want to reserve civil commitment for the violent people. I agree if you turn the system toward the violent --

QUESTION: Then it is your submission that in this case Texas could, without any problem, have proved beyond reasonable doubt?

MR. KLEIN: Could prove the fact that this gentleman engaged in past threats and acts, that is true. They could not prove beyond a reasonable doubt, it seems to me, that his mental illness was so severe or that the effects of not treating him would be to have his condition deteriorate and his violence to increase in the future.

QUESTION: Well, do we set a standard, ordinarily, in the law because of the potential of being able to meet a high standard? That is, simply because Texas could prove, beyond a reasonable doubt, as they might well have been able to do here, is that a constitutional reason for requiring that standard?

MR. KLEIN: Absolutely not, Your Honor. It seems to me that is a legislative determination which legislatures have and can make, but that's not a determination that this Court, as a matter of constitutional law, should make.

QUESTION: Mr. Klein, you are arguing, as I understand

it, that unless we lower the standard, have a relatively low standard, there are people who will go free who ought to be committed.

MR. KLEIN: Right.

QUESTION: Isn't the obverse also true, that if you have a low standard, there will be people who will be committed who should not be committed?

MR. KLEIN: I think that's right.

QUESTION: And what you are saying is it is better to accept the risk of a significant number of people being erroneously committed than the other side.

MR. KLEIN: Well, it depends again what an erroneous commitment is. This is a little different than the criminal law.

QUESTION: Well, one that does not, in fact, satisfy the standard of danger to himself or others or being mentally ill. I suppose you can be wrong about the mental illness.

MR. KLEIN: That is correct. And it does seem to me there is a potential for that erroneous commitment, and it increases as you lower the standard.

QUESTION: Do you disagree with the essence of the statistical material in the brief I referred to earlier about the probabilities? Are you familiar with what I am talking about?

MR. KLEIN: Well, I certainly disagree with the issue

on probabilities about mental illness. I think there are two issues; that is, there are numerous specific diagnoses and there is a great deal of disagreement about that. There is not a great deal of disagreement about severe mental illness in terms of psychosis.

QUESTION: In your judgment, or the judgment of your client, what is the probability that a prediction of dangerousness to one's self or to others by a psychiatrist will be accurate?

MR. KLEIN: If by dangerous you mean physical --

QUESTION: Within the meaning of the Texas standard, how reliably can you predict that?

MR. KLEIN: It is very hard to say, Your Honor. It depends on each individual case. Long-term dangerous -- if you are talking about in the next five to 10 years, very low reliability. If you are talking about in the short-term, reasonably high reliability.

QUESTION: Then, it seems to me, you are necessarily conceding that if you have a low standard of proof there may be 30 or 40% of the people that are committed that should not be committed.

MR. KLEIN: If, in fact, your standard is dangerousness in the sense of acting physical violence. But those are people who may be very ill and desperately needed help.

QUESTION: But, then, if the dangerousness is not

critical, you are really saying you are acting for the benefit of the patient. You need a low standard of proof because he doesn't know what's good for him, for himself.

MR. KLEIN: I think the states are entitled to that option, that's all I am saying. I think the states have gone the gamut. I think there are statutes that go very much in the dangerousness direction, and I think they are entitled to it. What I am saying is that this issue should be left for the fair play of political forces.

In McKeiver, where the Court did not constitutionalize a jury trial, it didn't say the jury trial was a bad thing in juvenile cases. What it said was, "We are not ready for finality on that issue." I think that's the same thing when it comes to burden of proof.

In some states the APA has argued in the state legislature for a lower burden of proof and for broad substantive criteria. Frankly, we have lost in some states. I assume, no matter what this Court does, we will continue to lose some of those fights. But I think society is entitled to that diversement.

QUESTION: Do you support commitment without trial?

MR. KLEIN: Not long-term commitment, no. There may be emergency situations, Your Honor, but not long-term commitment, absolutely not.

QUESTION: By trial, do you mean jury trial?

MR. KLEIN: No, sir, we don't think that the Constitution requires a jury trial. We think there are a lot of serious detriments to the process.

QUESTION: How many states have a jury trial, about, do you know?

MR. KLEIN: I think approximately half have it by statutes.

QUESTION: You just want to leave it to the states?

MR. KLEIN: I think that's right, because I think this is a terribly difficult --

QUESTION: What are we going to do with the Due Process Clause?

MR. KLEIN: The Due Process Clause, as the Court realized, I think, in Patterson and numerous cases, is well satisfied when you have the basis of due process. And Texas, certainly, and I think all states now for long-term commitment --

QUESTION: Including Maryland?

MR. KLEIN: Including Maryland for long-term commitment.

QUESTION: When did Maryland change?

MR. KLEIN: I think Maryland changed in '76, Your Honor. Don't hold me to the date, but it has been --

QUESTION: It hadn't changed the last time it was in this Court.

MR. KLEIN: I think that's a different problem. If a state were to come in here and have a long-term commitment statute, with no due process, I think that would raise another issue. Fortunately, I think that's not the issue that we have here.

QUESTION: That's the claim here. It's a due process claim.

MR. KLEIN: Yes, but that this particular procedure -- Mr. Justice Marshall was saying if they had no trial whatsoever.

QUESTION: No, but the claim is a due process claim.

MR. KLEIN: I understand.

QUESTION: That is the case here.

MR. KLEIN: Absolutely. But I think this particular procedure is not mandated by the Due Process clause.

QUESTION: Well, that's the issue in the case.

MR. KLEIN: I would just close in urging the Court to take a look at the argument in the briefs that Appellant makes. What they are saying is, "Don't worry about proof beyond a reasonable doubt. We can do it because we can show past dangerous acts." And that's what we will turn civil commitment into if we lock in a high standard of proof. The focus of the inquiry will become past dangerous acts.

I would submit, on behalf of my client, that there are a large number of Americans who are very seriously mentally

ill, who are destroying their lives and their families' lives, but who have not acted violent, who nevertheless under the standard set down in the O'Connor v. Donaldson case, Humphrey v. Cady, Jackson v. Indiana, the states have the right to commit, in their role as parens patriae to protect its citizenry.

I would hope that this Court not take an isolated procedure and undermine the states' power in that regard.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Miss Boston?

REBUTTAL ORAL ARGUMENT OF MARTHA L. BOSTON, ESQ.,

ON BEHALF OF THE APPELLANT

MISS BOSTON: I would like to respond to Mr. Klein's statement about his parens patriae commitments. He seems to presuppose the very thing that we are there to decide, that is -- or an element of what we are there to decide, and that is whether or not this person is mentally ill. Mr. Klein seems to assume that he is and that's why he is not seeking hospitalization on his own. If that's the case, then there is no need for a hearing. Indeed, that is a purpose of the hearing, and that's what we are there to decide.

QUESTION: I understood him to say there are a lot of mentally ill people who have not committed acts of violence and that the state has an interest in seeing that they get help.

MISS BOSTON: I believe he said both, Your Honor, and

in relation to that latter statement, I think my statements earlier about proving a past act don't go just to proving the past act of violence. A person who is severely mentally ill, to the extent that he is self-neglectful, surely there are family members or neighbors who have seen this sort of conduct and can testify to it. It seems to me that that's not that difficult to establish.

QUESTION: But you are not saying that a past act is constitutionally required as a substantive element.

MISS BOSTON: No, I'm not. I am saying that that is a way of buttressing psychiatric testimony, so that you don't have to rely just on the anamnesis.

QUESTION: Wouldn't it become pretty much mandatory if your view is adopted, in order to get anybody committed?

MISS BOSTON: I don't believe it would become mandatory. I think predictions are relied on in several contexts, and I can point to two specific legislative similar situations in Texas where proof beyond a reasonable doubt was required for predicting, if you will, future conduct, not the least of which is the punishment phase of a capital felony trial in which the jury is required to answer yes or no,beyond a reasonable doubt, the question of whether there is a probability that the defendant will engage in criminal violence so as to constitute a continuing threat to society.

QUESTION: But a defendant convicted under that system

doesn't get a one-year reevaluation, does he?

MISS KLEIN: No, he doesn't. But I bring that up not to say that because it is required in that situation it should be required here, but to show that the legislature recognized in that situation that it is possible. And that is virtually the same thing that we are trying to prove here. And, additionally, the Mentally Retarded Persons Act in Texas which was passed since the time that this suit began, requires proof beyond a reasonable doubt.

QUESTION: You are emphasizing, and understandably so, the paralellism to the criminal system. But in the administration of criminal justice, we have in the country thousands, literally thousands of law enforcements officers who are roaming, looking for criminal conduct and then arresting people and probably thousands, but fewer prosecutors who are constantly alerted to or charged with the duty of prosecuting. We don't have any such mechanism set up to look around for mentally ill people, do we, in society?

MISS KLEIN: Not that I am aware of, although we have certainly a --

QUESTION: Well, the police may bring it to the attention of hospitals, incidentally, but there is no comparable structure. I get, reading some of these briefs, an impression that there is an attitude of some elements of society to try to do-in mentally ill people and lock them up and keep them there.

And, of course, we know that it costs vastly more to keep people in mental institutions than it does in prisons. Is there any basis for thinking that the Government, in one way or another, or others not in Government, are trying to commit a lot of people unnecessarily?

MISS BOSTON: I don't think it is as insidious as a doing-in. I think what it reflects is the severe lack of understanding about and knowledge about mental illness in our society. And this goes to the question of stigma, that people don't understand mental illness and consequently --

QUESTION: Psychiatrists admit that they don't understand it very well.

MISS BOSTON: Certainly. And Mr. Klein's -- the American Psychiatric Association's brief is full of references, as is Appellant's, to the kinds of problems that people face, that mental patients and former mental patients are feared and loathed in our society, because people don't understand. It is -- In the first place, it is sort of easy --

QUESTION: How is the change to the maximum burden of proof -- the criminal burden of proof -- going to help that situation?

MISS BOSTON: Well, what it is going to do is keep those people who are not proper subjects of commitment from being committed, therefore stigmatized and deprived of their liberty.

Certainly, we are not just trying to set up a hurdle to make psychiatrists in the state jump over for no reason. We want to increase the sureness of those assessments that result in commitment. We want to reduce the number of people who are erroneously locked in mental hospitals.

QUESTION: Do you think someone who has gone through a five-day jury trial, as your client did here, and has been acquitted after all the testimony and the evidence and is found not mentally ill, would be welcomed back into the bosom of society, so to speak?

MISS BOSTON: Well, of course, the society in which he was living was very aware of all of that and clearly he has been stigmatized to begin with. But the more -- Well, there is one study in our brief -- I believe it is on page 24 -- that says that the level of stigma increases with the level of state intervention. So that the more one is committed, the longer one is committed for the greater the stigma. And certainly that can be seen clearly in employment applications. If you have to try to explain away a three-year gap in your employment history, you are going to have a big problem.

QUESTION: Miss Boston, what is it that has to be proved beyond a reasonable doubt, under your new mentally retarded statute?

MISS BOSTON: The exact -- "because of the retardation the person represents the substantial risk of physical impairment

or injury to himself or others, or is unable to provide for and is not providing for his most basic physical needs."

QUESTION: That's predictive, isn't it? And that has to be proved beyond a reasonable doubt?

MISS BOSTON: That's right.

QUESTION: How does that differ from the issue we have here?

MISS BOSTON: Mental retardation is just about the only difference. The State of Texas passed this statute only in its last legislative session, which I believe was '77, and this proceeding was instituted in '76.

QUESTION: What's the nature of the trial under that statute, jury or non-jury?

MISS BOSTON: They are entitled to a jury.

QUESTION: Do you think Texas, or any state, is constitutionally required to have the same standard for retardation as they do for commitments for schizophrenia?

MISS BOSTON: I think there are some very different considerations that go into them. This proceeding of commitment to a mental retardation facility is very similar in what it seeks to do. I am not presenting any protection claim at all, but just saying that's another area in which it has been recognized that that sort of thing --

QUESTION: As you just read it to us, that's a wholly predictive element, isn't it, nothing else?

MISS BOSTON: Well, in the same way that we are talking about prediction before. It is prediction based on retardation and acts, and so on.

QUESTION: But there has to be a determination of mental retardation.

MISS BOSTON: Of mental retardation. In the same way that the Mental Health Code requires a determination of mental illness.

In terms of the necessity of psychiatrists being very sure about their predictions, their assessments, again, I would just like to stress that -- and I believe that Mr. Justice Stevens brought this up -- there is the inaccuracy of those assessments that is so concerning in this situation. If we believe the statistics that are in the brief for amicus National Center for Law on the Handicapped, the incidence of error due to over-prediction and over-diagnosis -- over-prediction of dangerous and over-diagnosis of mental illness -- the error is going to occur more in committing someone erroneously than in failing to commit someone erroneously. That's what the concern is.

QUESTION: Can you get a psychiatrist to testify and say, in these words, that "I make this diagnosis beyond a reasonable doubt." Have you ever heard a psychiatrist say anything close to that? They always say, "But, on the other hand," don't they?

MISS BOSTON: Reasonable medical certainty. But the question of burden of proof --

QUESTION: Back to my original point, how does a jury get with this?

MISS BOSTON: I don't believe the jury has to apply that standard to each witness. We don't qualify the witnesses on how sure they are of the testimony they are about to give. The jury takes the whole picture. That's why I keep stressing the other things that can be brought in.

QUESTION: But the jury can reject any particular witness, or an individual juror can, on the grounds that he doesn't believe him or doesn't think he is very reliable or very sound. That's the credibility factor, isn't it?

MISS BOSTON: Certainly.

My point is that the credibility factor goes into the jury room. It doesn't happen when we bring -- We don't require a psychiatrist to be sure beyond a reasonable doubt, obviously. The jury takes it all into the jury room with them.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

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