OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LEONARD HELLER, SECRETARY, KENTUCKY CABINET FOR HUMAN RESOURCES, Petitioner

SAMUEL DOE, BY HIS MOTHER AND NEXT FRIEND, MARY DOE, ET AL.

CASE NO: 92-351

PLACE: Washington, D.C.

DATE: Monday, March 22, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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LEONARD HELLER, SECRETARY, :

KENTUCKY CABINET FOR HUMAN :

RESOURCES, :

Petitioner :

v. : No. 92-351

SAMUEL DOE, BY HIS MOTHER AND :

NEXT FRIEND, MARY DOE, ET AL. :

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Washington, D.C.

Monday, March 22, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 p.m.

APPEARANCES:

WILLIAM K. MOORE, ESQ., Midway, Kentucky; on behalf of the Petitioner.

KELLY MILLER, ESQ., Boise, Idaho; on behalf of the Respondents.

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P R O C E E D I N G S

(1:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 92-351, Leonard Heller v. Samuel Doe.

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

ORAL ARGUMENT OF WILLIAM K. MOORE

ON BEHALF OF THE PETITIONER

MR. MOORE: Thank you, Mr. Chief Justice. May it please the Court:

This is a civil rights action brought under 42 U.S.C., section 1983 by Respondents, who in this case are Sammy Doe and the class that he represents, to challenge the procedures utilized in the Commonwealth of Kentucky for admission of mentally retarded persons to the residential facilities operated by the State.

The record contains more than 10 years of history of the State's efforts to comply with the requirements established by the courts below for those admissions procedures. At the time the litigation began all admissions to the State's facilities were done on a voluntary basis. The applications for admission were made by the local community health centers who had certified to the State that there were no less restrictive provisions available for the mentally retarded person. There was

nothing that was available for them in the community, and the State reviewed those applications by and through a -- what they call a records review committee, which was a group of qualified mental health professionals or mental retardation professionals, to determine, in fact, whether or not the individual could best be served in one of the State's facilities.

If that committee determined that they could be so served to determine which facility the person would be placed in, the person was put on a waiting list, and when a space became available, they were then admitted to the facility on the application or signature of their guardian. The guardian provided the substituted informed consent for the admission, and the admission was treated as voluntary. The individual then had the right to be released at any time upon his or her request or upon the request of the guardian.

The initial decision of the district court reviewed those procedures, found that those procedures were in keeping with the procedures required by the Constitution except an additional procedure that the State had informally adopted which permitted the parents of mentally retarded children to essentially veto a decision or recommendation to place the children from a facility into a community setting.

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Upon reconsideration --

QUESTION: What does that mean, Mr. Moore, to say a decision to place the children from a facility into a community setting? What -- describe that in a little more detail, if you would.

MR. MOORE: The commonwealth's services for the mentally retarded are operated through the Cabinet for Human Resources. It's an umbrella agency. It has a division called the Division of Institutional Care which operates the State's residential facilities. There are four of those. They are intermediate care facilities for the mentally retarded, intermediate care being the Medicaid reference --

QUESTION: All I did was ask you to explain two phrases you used in an earlier statement. Can you do that a little more shortly than you're doing it?

MR. MOORE: Yes, Your Honor.

In addition to the residential facilities, there are also community facilities. The record describes that the community facilities were also developed by the Cabinet for Human Resources, under contract with the local community health agencies, to provide group home type placements, placements in what they call alternate living units, where someone could live outside of the community -- or outside of a residential facility in a more

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community like setting.

QUESTION: A more community like setting is where they would have more freedom than they have in the so-called facility?

MR. MOORE: That's an issue which is subject to debate, Your Honor. For many of the people that are subject to being admitted to the facility, their freedom is -- the idea of freedom or the idea of liberty is very limited. For some of those -- the people that are in the facilities, virtually any four walls will make a prison. For many of the people, they have no liberty like the people that are at Hazelwood who have no ability to move. They're nonambulatory. Many of them are deaf, blind. They're mostly severely and profoundly retarded. So, the matter of where they are placed as being more or less restricted is in some sense debatable, Your Honor.

QUESTION: Well, why don't you just somehow get to the heart of your case then?

MR. MOORE: If Your Honor please, based upon the decisions of the lower courts, the Kentucky legislature adopted a whole new set of procedures for the mentally retarded. After holding lengthy hearings concerning what the needs of that group of people were, they adopted what's called House bill 511, and it's printed in the appendix in this matter.

That new statute was challenged. Two parts of it were found to be unconstitutional, one dealing with the standard of proof, which would be required for the involuntary commitment of mentally retarded persons to the State's facilities; the other provisions dealing with the participation in the involuntary commitment proceedings of the parents, guardians, and immediate family members of the mentally retarded.

QUESTION: Did you say participation? Didn't it provide that they became parties or not?

MR. MOORE: It permits them to become parties, Your Honor. It does not require that they do so.

QUESTION: But that permits them.

MR. MOORE: Permits them --

QUESTION: And that provision was held a denial of equal protection or due process.

MR. MOORE: It was held to be both, Your Honor, denial of both. Yes, Your Honor.

The reason that the State adopted these procedures, one of the primary reasons, was because the courts had held that the State could no longer treat admissions through this record review process and upon the substituted consent of guardians as voluntary admissions. The lower courts held that there could be no more voluntary admissions, that all admissions to the State's

facility would have to be made utilizing the involuntary admissions procedures.

We submit that that was -- that's clear error, that that's a wrong decision. We ask that you reverse that decision, restore this case to the status of the initial decision of the district court which had held that those procedures were appropriate.

We also ask that you reverse the decisions below with regard to the standard of evidence and with regard to the participation of parents, family, and immediate family members.

QUESTION: Mr. Moore, if heightened scrutiny were applied, as was suggested by the plurality in that Foucha case, do you think you could prevail?

MR. MOORE: Your Honor, I think that we can and should prevail regardless of the --

QUESTION: How would you justify it then under any higher standard of --

MR. MOORE: Under any type of review, the issue for equal protection purposes is whether or not the legislature could first distinguish a group of people as a class, and this Court has held that that's clearly appropriate with regard to the mentally retarded. Whether or not the perceived benefits or detriments of any legislation are something that's permissible for the

legislature to do -- and there's no question that provision, in this case, of a safety net of services for the mentally retarded is a permissible thing for the legislature to do. That's the purpose of these facilities. They are described as providing developmental nursing services. They are the most basic level of service for persons for whom there is no other place where they can be cared for. That's not necessarily the situation with regard to the mentally ill, Your Honor.

Furthermore, the only way that the mentally retarded person can receive this type of service from the State is to go through the involuntary commitment process. A mentally ill person, who desires to be admitted to a State mental hospital, does not have to be involuntarily admitted. If they wish, they can consent and be admitted voluntarily without going through the involuntarily admissions process, and there is no requirement with a voluntary admission that they meet the criteria for involuntary admission. That is not available for the mentally retarded. For that reason, the two situations are sufficiently different.

QUESTION: Does Kentucky law require the parent of a mentally retarded child to continue to provide support after the age of majority?

MR. MOORE: There is a Kentucky statute which

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requires parental support for any child who is determined disabled beyond the age of majority, yes, Your Honor.

QUESTION: Beyond the age of majority. You have to continue to support the disabled child indefinitely.

MR. MOORE: You do, Your Honor. There is a statute which makes it a crime not to, and I believe that I have quoted that statute.

QUESTION: Even after the child is put in an institution.

MR. MOORE: That's correct. That's correct.

QUESTION: Now, does the Americans with Disabilities Act -- is that relevant here? Does that impact on what the State can do in terms of its involuntary admission procedures?

MR. MOORE: Your Honor, we believe that it does not.

QUESTION: That it does?

MR. MOORE: Does not.

QUESTION: Does not.

MR. MOORE: Does not, Your Honor.

That act is an act of Congress. It contains certain legislative findings explaining why Congress found it necessary to take certain actions. There are claims that can be made under that act. There are no claims made under that act in this litigation. The argument is made

in this litigation that by adopting that act, the legislature or Congress was requiring this Court to adopt a heightened or strict standard of review for equal protection purposes. We submit that that does not apply.

With regard to the ADA and its impact upon admissions to State facilities, that prohibits discrimination based on the disability alone. All persons who are admitted to the State's facilities would be disabled persons or have disabilities under the act all mentally retarded persons would have.

The issue could perhaps be made on behalf of the State, if it is to have any effect, that it should permit the State to go ahead and admit people without following through with the involuntary admission procedures, that the State should be able to admit the mentally retarded people, just as it admits mentally ill people voluntarily.

QUESTION: Did the court of appeals rely on anything other than the Equal Protection Clause?

MR. MOORE: The court of -- with regard to the participation of parents, guardians, and immediate family members, yes, Your Honor, the court of appeals said that that was also a violation of due process. It didn't refer to procedural due process or substantive due process. It just said due process.

QUESTION: Did it rely on any statutory basis?

MR. MOORE: No, Your Honor. No, Your Honor, it did not.

QUESTION: May I ask a question about -- while we're on the ability to appeal? Am I correct that there's a difference in the category of relatives that are permitted to appeal from the preliminary hearing and those that are permitted to appeal from the district court determination? One is section 15 of the House bill, 15(3), which is on page 128 of the joint appendix, and that says guardians and immediate family members shall have standing to appeal any adverse decision.

And then section 22, which is on page 132, says appeal from the final orders of judgments of the district court. It says that appeals may be taken by guardian, limited guardian, or other authorized representative. That's a different class, isn't it?

MR. MOORE: It is, Your Honor. It is.

QUESTION: And which class are we arguing about here? Both or either or --

MR. MOORE: Your Honor, we're describing the first class, the parents and immediate family members. The difference in the reference in the two sections -- immediate family would, obviously, include parents. Then we have the authorized representative.

We have in Kentucky a department who serves to

protect the interests of the mentally retarded. It's created under chapter 331 of the Kentucky Revised Statutes. They offer independent assistance, legal assistance included, to the people who are in State facilities who have some type of disability.

Jack Farley was in charge of that department at the time the action was brought. He was named as a party and was dismissed with an agreed order which -- by which he agreed to abide by any further orders of the court.

Mentally retarded persons can designate an authorized agent with that department who can pursue their legal remedies and can take action on their behalf in addition to actions that their guardians could well take.

QUESTION: Mr. Moore, I just want to be sure I understand one thing. I understood you earlier to say you wanted us to reverse the judgment insofar as it requires a procedure to be implemented before there is an involuntary commitment, that people should -- the guardian should be able to just voluntarily commit the mentally retarded. But is that issue before us at this time? I thought we had a question dealing with the procedures that should be followed in an involuntary commitment proceeding, rather than when should there be an involuntary commitment proceeding.

MR. MOORE: The issues that you've described are

the issues that are specified in the petition for writ of certiorari.

QUESTION: Right.

MR. MOORE: We believe that the other issue is an overriding issue which permeates the entire case, and it was also the result of a clear error below. And so, for that reason, this Court should address that issue as well under rule 24 of this Court's procedures. It's fully briefed in our brief and responded to in the respondents' brief.

QUESTION: And what provision is it of rule 24 that you think authorizes us to do that?

MR. MOORE: My understanding is that if there's a matter of clear error in the courts below, this Court can go ahead and address that as well.

QUESTION: Even if it's not presented in the petition for certiorari?

MR. MOORE: That's my understanding of rule 24, Your Honor. The issue is encompassed within all of the other issues in the case because the mentally retarded cannot avail themselves of the procedures that are available to the mentally ill under the State statutes. The mentally retarded do not have an opportunity to seek treatment other than by first going through this lengthy, expensive, and burdensome process, and for that reason,

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there are many that are likely or whose parents or guardians are likely not to seek that type of treatment that's available for them, which would and should be beneficial to them.

QUESTION: Your point is that some mentally ill people can be committed voluntarily, but that isn't true of mentally retarded.

But is there any reason for having a different procedure for those mentally ill persons who are being committed against their will? Why should they be subject to a different standard of proof than the mentally retired -- retarded who are being involuntarily committed?

MR. MOORE: Your Honor, the procedures that were in effect in Kentucky at the time the litigation began and weren't in effect until required otherwise by the court, were that the guardian of a mentally ill person could, as well, admit their ward on the guardian's substituted consent, provided there was a review by an independent physician at the facility, for treatment at a State mental hospital. The procedures were the same.

QUESTION: I'm not sure that answers my questions because today the procedures are different, as I understand it.

MR. MOORE: They're different because of --

QUESTION: The burden of proof is different in

the two. And the question I'm asking you is if you have one person who's being involuntarily committed because he's mentally retarded and another one because he's mentally ill, what is the State's reason for apply different standards of proof in those two cases. Isn't that the issue we're called upon to decide, whether there's a rational basis for that distinction?

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

QUESTION: I don't think you've really said very much about that issue.

MR. MOORE: If Your Honor please, in the Addington case, this Court held that the clear and convincing standard of evidence was the appropriate standard. It reviewed the other standards of evidence and held not that Addington was a floor, but that that was the appropriate standard. The State of --

QUESTION: Did the Court say that a higher standard could not be employed by the States?

MR. MOORE: It did not say that it could not, but it appeared to chastise the States who had the standard, and most of the States, except for Kentucky, with regard to admission of mentally ill persons, has reduced their standard to the clear and convincing standard.

QUESTION: Yes.

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Well, let me ask you this. In general terms, is mentally retardation, at least for adults -- and I guess that's who we're talking about here -- easier to diagnose than is mental illness?

MR. MOORE: As a general rule, Your Honor, it would appear that it would be easier to diagnose. There are still matters that have --

QUESTION: Would that justify a different standard for admission?

MR. MOORE: That could be a factor relied upon in justifying a different standard of admission, Your Honor.

QUESTION: You've made several claims of what the difference between the two groups were, and they were all rejected by the court of appeals.

MR. MOORE: They have been, Your Honor. They have been.

QUESTION: But you still stick by them I suppose.

MR. MOORE: That's correct, Your Honor. This Court has recognized that they're different. The court of appeals recognized that they're --

QUESTION: Well, tell us again how they are different or tell us -- finally.

MR. MOORE: Okay. If Your Honor please, perhaps

the easiest explanation of the difference came from Paul Mann who was the psychologist, whose testimony is reprinted in the record of the joint appendix at page 45.

He described that mentally ill people who -- they may be psychotic at times, but they also have a time when they are not psychotic. They have a base reference where, as a general rule, they are competent and they can act for themselves. Mentally retarded -- and they may come in and go out of being competent or having abilities and having -- and not having abilities.

The mentally retarded person does not change like that. The mentally retarded person's situation is more stable. The definition of mentally retarded requires that not only do you have significantly subaverage intellectual functioning, but also deficits in adaptive behavior. These things may change somewhat over long periods of time, but they don't change like a mentally ill person --

QUESTION: Does Kentucky law require parents to support the mentally ill past the age of majority, as well as the mentally retarded, or just the mentally retarded, or both?

MR. MOORE: The law does not refer to either one directly. It refers to persons who are adjudicated to be disabled.

QUESTION: Disabled. And would you interpret that to cover the mentally ill?

MR. MOORE: It would cover a small percentage of the mentally ill, Your Honor, but it would not cover the majority of the mentally ill persons.

QUESTION: And it would cover all of the mentally retarded at issue here.

MR. MOORE: Yes, it would, Your Honor. Yes, it would. There may be a very, very small percentage that are not covered, but for the most part, they are covered. I think in the testimony, it was in the area of in excess of 98 percent. There may be one or two persons at a State facility who has not been adjudicated to be disabled and has a guardian appointed for them. The vast, vast majority of them do have guardians appointed for them.

QUESTION: Mr. Moore, your argument -- if I understand your argument, it is that it is easier to make an accurate and sound determination of mental retardation than it is to make such a determination about mental illness. Is that correct?

MR. MOORE: Your Honor, it would appear that that is the case, that it --

QUESTION: Why then is that an argument for having a lower standard of commitment? I mean, you -- in effect, you've said, well, it's easier to meet the

standard of commitment. Why is that an argument for having a lower standard of commitment?

MR. MOORE: If Your Honor please, it was not my intention to argue necessarily that that supported the decision to have a lower standard for the mentally retarded. I was recognizing the fact that it would appear that they are different, although not necessarily in a material fashion. There are several factors that have to be taken into account in determining the level of retardation. The information that was submitted, and recognized by this Court, from the American Association for the Mentally Retarded describes the factors, the various factors, that are taken into account to determine the level and needs of the --

QUESTION: Well, I understand that, but it's still, as I understand it, your position that it is appropriate to have a lower standard.

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

QUESTION: All right. And your --

QUESTION: Mr. --

QUESTION: I'm sorry.

QUESTION: Go ahead.

QUESTION: No. I had a further question. And your authority for that is Addington?

MR. MOORE: That is one of our authorities for

that.

QUESTION: What does Addington got to do with an equal protection distinction?

MR. MOORE: Okay. Addington is not an equal protection case. Addington is a case where the State reads the Court has established what it determined to be the appropriate standard of proof in any type of civil commitment proceeding. Addington did not deal with the mentally retarded.

QUESTION: Okay, and the -- but the issue here is whether you have a difference which justifies a different standard for valuing human liberty and valuing the justification for limiting it, and I don't see what Addington has to do with that at all.

MR. MOORE: The Addington case determined that there was -- there were reasons why the clear and convincing standard should be utilized, that that was the best --

QUESTION: Okay, but Kentucky is not utilizing it for mental illness, and the issue here is whether you can utilize a different standard on an issue which deprives someone of liberty depending on the distinction between mental illness and mental retardation. And I just don't see the connection.

MR. MOORE: The connection, to the extent there

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is one, Your Honor, is that with regard to the mentally ill, Kentucky has made a mistake. Kentucky has put a higher standard --

QUESTION: And the Equal Protection Clause seems to say that unless you can justify that, either by a rational basis standard, perhaps as you would like it, or by a standard of higher scrutiny, that having made that election, you've got to live with it and you've got to apply it across the board.

MR. MOORE: It's the State's position that if you apply the Equal Protection Clause in that fashion, that it leads to a bad result in this case.

QUESTION: Well, it leads to a bad result in every case in which the Equal Protection Clause applies then, doesn't it? Isn't that what equal protection means?

MR. MOORE: My understanding of equal protection is that it does not require an additional burden on a party. It is intended to make sure that everyone receives the benefit of the law. In this case, the mentally ill are burdened to the extent that they cannot receive services involuntarily unless they meet the criteria of involuntarily admission.

QUESTION: Mr. Moore, several members of the Court have asked you to explain, as simply as you can, why Kentucky justifies one standard for the mentally ill and

another for the mentally retarded. Explain to us, just in two or three sentences, why you disagree with the court of appeals.

MR. MOORE: Thank you, Your Honor. The purpose of the legislation for the mentally retarded is to provide again that safety net, a base level of services for people who cannot be cared for anywhere else so that they don't fall through the --

QUESTION: That is not a reason for distinguishing the two classes. Why -- what justification is there for applying -- I ask you again -- for applying one standard of proof to one group and another standard of proof to another. What is the justification?

MR. MOORE: Your Honor, as I understand the Equal Protection Clause, the focus should be on the purpose, the reason for the legislation. The reason for this legislation is providing basic developmental nursing services for the mentally retarded so that they have a place to go if there's no place else in the community where they can go. The purpose for providing involuntary hospitalization of the mentally ill is not necessarily --

QUESTION: Yes, but what's that got to do with the standard of proof for involuntary commitment?

MR. MOORE: The purpose of the commitment is to

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make available to the respondent in that proceeding the services that the State is providing.

QUESTION: Mr. Moore, why do you insist on rejecting the distinction that Justice Souter suggested? Is it not the case that if it is easier to tell whether someone is mentally retarded -- he's always that way. He always needs that help. Whereas the person who's mentally -- what's the other?

QUESTION: Mentally ill?

QUESTION: Mentally ill comes in and out, there's less chance of making a mistake.

MR. MOORE: That's correct.

QUESTION: Isn't that right?

MR. MOORE: That's correct.

QUESTION: And, therefore, by having a lower burden of proof, you're not as likely to commit very many people who really aren't mentally retarded --

MR. MOORE: That's right.

QUESTION: -- because it's a lot easier to tell. How about that as a justification for the difference?

MR. MOORE: That is a justification, Your Honor.

Your Honor, at this point, I would like to reserve the balance of my time for rebuttal.

QUESTION: Very well. Thank you, Mr. Moore.

Ms. Miller, we'll hear from you.

ORAL ARGUMENT OF KELLY MILLER

ON BEHALF OF THE RESPONDENTS

MS. MILLER: Chief Justice Rehnquist, and may it please the Court:

The argument before the Court today is twofold that presents simply issues of equal protection and due process.

First, in looking at the equal protection argument, Kentucky would treat persons with mental retardation differently from the mentally ill in the involuntary commitment process without any constitutionally adequate reason for the differing treatment. They've had 11 years since this case was filed in 1982 to come up with a reason. They came here today. They still didn't have one.

QUESTION: What about the reason that Mr. Moore gave an answer to Justice Scalia's question, that if, in fact, it's easier to make a diagnosis of the mentally retarded than it is of the mentally ill, that justifies a difference in the burden of proof because you're less likely to make a mistake with one than you are with the other?

MS. MILLER: Chief Justice, in response to your question, we would agree that Justice Scalia presented a very good question, but what's here is not the case. This

case -- this Court recognized in Cleburne that mentally retarded persons are all not cut from the same pattern, that they have wide-ranging capabilities and abilities, that at one end of the spectrum, they need care and constant attention. At the other end, they're not easily distinguishable as being mentally retarded. So, in that regard, we would say mentally retarded as a group themselves are widely varied.

QUESTION: But all you need is a rational basis for distinguishing between one class and the other. The fact there may be overlap, the fact there may be variations within the class doesn't make any difference for equal protection.

MS. MILLER: We would submit that equal protection should be viewed under the case of Foucha which said that when something is at stake --

QUESTION: Are you referring to one of the opinions in Foucha?

MS. MILLER: The plurality opinion, Your Honor.

QUESTION: Why do you think it should be viewed in light of the plurality opinion in Foucha?

MS. MILLER: Because what Foucha was dealing with is exactly what we're dealing here, a fundamental interest at stake, a massive curtailment of liberty that this Court had recognized as early as Humphrey v. Cady and

in Addington and O'Connor, and most recently last year in the plurality opinion of Foucha.

So, given that we have a massive curtailment of liberty at stake -- and one thing I would like to correct is that we do have a liberty interest at stake here. There's nothing in the record to reflect that these institutions are not restrictive placements. In fact, in the joint appendix, Dr. Skarnulis, who's Director of Community Services for the mentally retarded, had said that these are restrictive placements.

QUESTION: Well, I would think the Due Process Clause would justify this Court's previous decisions that say to involuntarily commit, you need to have at least a clear and convincing evidence standard. The State has such a standard here. We have said that is a sufficient standard, have we not?

MS. MILLER: That's correct, and --

QUESTION: All right. So, what we now have to try to justify, if it can be, is whether the State can have a higher standard for the involuntary commitment of mentally ill as opposed to those who are mentally retarded and to explore whether there are, indeed, any differences in those two categories of people that would justify a different standard. Isn't that right?

MS. MILLER: That's correct.

QUESTION: We're not here to argue that it isn't a protected liberty interest and that they have to have a higher standard of proof. They have that.

MS. MILLER: That's correct. For purposes of the burden of proof argument -- there are two arguments here: the burden of proof and the injection of the third parties.

For purposes of the burden of proof, we have never argued that due process requires more than clear and convincing under Addington. But what we're saying and in looking at the cases of Baxtrom and Cleburne and the equal protection analysis, that there has to be a reason, and that reason is going to have to be more important as what's at stake is more important. And what we have here at stake is a massive curtailment of liberty.

The controlling factor in this case is that all these persons facing institutionalization are simply ordinary citizens. To make any presumptions on the fact that they are labeled mentally retarded before they come to the process to see if they even are mentally retarded --

QUESTION: -- that if you win this case on the standard of proof issue, that I'm not sure you've won very much because that will give the State the option of either raising the standard of proof in one case or lowering it

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in the other. And I can guess what they're going to do, can't you?

MS. MILLER: Well, Justice White, I would agree and disagree. I would agree that the State could certainly go back to the next legislative session and lower the burden of proof for the mentally ill. We have an argument --

QUESTION: Which a lot of States have done.

MS. MILLER: Well, the one thing -- two things I'd point out. One, in 1990 when they did lower the standard of proof for the mentally retarded, they in fact tried for the mentally ill and could not succeed, the reason being that Addington talks about burden of proof being more than an empty semantic exercise.

What it is is it's a value that society is placing on that person's individual liberty that's at risk, and if Kentucky is going to place that value, that high of a value, for the mentally ill, why should they not do it for the mentally retarded without some good reason -- a good reason? And under Foucha, we would say that they would have to have a particular convincing reason.

What the State is saying and has said in their brief is in their perspective, that these people are in need of treatment. We would dispute that overriding vision that they've given the Court today that this is why

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we're committing these people because the record reflects in Dr. Skarnulis' deposition that 1 person in an institution, no matter how profound or severe -- for that 1 person, there are 10 in Kentucky in the community living with the needed support services.

QUESTION: Why does the -- why do you object so much to the presence of the -- of family or guardians in the mentally retarded situation?

MS. MILLER: The injection of the third persons is simply a due process and an equal protection argument. Kentucky would inject into the involuntary commitment procedure a widely and vaguely defined group of persons, some with very little connection to the person. I did want to clarify --

QUESTION: Well, what kind of participation are you talking about that is so significant? Do they become parties to the case?

MS. MILLER: Exactly. Under the challenge statute --

QUESTION: And they have the right to appeal and that?

MS. MILLER: Exactly, Justice White.

What the State has done is they have given to these third persons -- and remembering that it's a wide-ranging group of persons, and we are challenging every

section, including the one --

QUESTION: But when -- if the parents are available in the mentally retarded case, do they also appoint a guardian?

MS. MILLER: Not always. The record does not reflect that every time that a parent comes that they are, in fact, a guardian or that a guardian is appointed in addition.

Now, we do not dispute a parent or a guardian or any caring person's ability to come to this involuntary commitment proceeding to present evidence, to testify, to say why they believe their adult son or daughter should be an institution.

QUESTION: So, you -- so, if the parents can't become parties, other than -- they can't do anything but witnesses, that means then there has to be a guardian appointed.

MS. MILLER: Well, in Kentucky under the involuntary statutory scheme, the mentally retarded, as well as the mentally ill, have a right to an attorney. There is not a guardian appointed, but they have a right to an attorney that's going to advocate vigorously the case for freedom, which is what the involuntary commitment proceeding is all about.

QUESTION: What do they have to prove for an

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involuntary commitment, that he's a danger to him or herself or others?

MS. MILLER: Exactly. It's twofold: first, that they're mentally retarded or mentally ill; second, that they're dangerous to themselves, the family, or others, that they're in need of treatment, and that this is the least restrictive placement available.

QUESTION: Well, excuse me. If the attorney is the advocate for freedom, sometimes what's better for the individual would not be freedom, but commitment I assume. Isn't that right?

MS. MILLER: That would be correct.

QUESTION: Okay. Now, who's advocating the commitment? You have the attorney advocating the freedom. The parents don't agree with that. The parents think that this child would be better in an institution. Who's advocating the other side?

The attorney wins below. He gets freedom, and the parents say this attorney is wrong. Is the child going to be the one to say, no, you're wrong? Of course not, because the child is incompetent. Is that fair?

MS. MILLER: First, Justice Scalia, we're talking about adults, and what we have here in Kentucky is an adversary proceeding.

QUESTION: Incompetent adults. Incompetent

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adults, and you're saying the attorney -- it's a one-way street. The attorney who's interested in freedom, if he loses freedom below, he can appeal. He can appeal the commitment, but if the attorney wins freedom below, nobody can appeal it because the child, of course, or the adult is incompetent.

MS. MILLER: I respectfully disagree on a couple counts.

QUESTION: Well, then who appeals it?

MS. MILLER: One is when you come to the involuntary commitment proceeding, there has been no adjudication of a guardian. There has been no adjudication that you're disabled or incompetent. You come there simply as an ordinary citizen to this hearing.

Secondly, it is the State that prosecutes this.

QUESTION: Why has an attorney been appointed then? Why has an attorney been appointed if the person is not incompetent?

MS. MILLER: The attorney --

QUESTION: Why don't the parents select the attorney or the incompetent person?

MS. MILLER: In Kentucky -- and we agree that it is unique, what they have done is they have set up basically a criminal proceeding, and in fact, the rules say this will function as a criminal proceeding. It is

the county attorney that prosecutes the case, the petition for commitment. It is the attorney for the mentally retarded adult that advocates for freedom. There are simply two interests at stake.

QUESTION: How does he get into the act?

MS. MILLER: The county attorney?

QUESTION: Yes.

MS. MILLER: By statute.

QUESTION: Well, I know, but when what happens does he get into the act? When the parents ask him to?

MS. MILLER: No, and all circumstances --

QUESTION: When? When then?

MS. MILLER: At the very beginning. Once a petition is taken --

QUESTION: I know, but how does the county attorney even know about this person?

MS. MILLER: In practicality, Justice White, what happens is a person can take the petition out to have an adult committed to one of these four institutions.

QUESTION: You mean any person.

MS. MILLER: Any person. It can be a family --

QUESTION: Any person. Any member of the public.

MS. MILLER: Exactly, family, guardian. And

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then what happens, it goes --

QUESTION: So that then there is a petition filed by somebody.

MS. MILLER: Exactly.

QUESTION: All right.

MS. MILLER: And that petition is prosecuted by the county attorney in the county in which the mentally retarded person resides, and it's held before a judge and, if the mentally retarded person requests it, a jury.

QUESTION: Does the prosecutor have to prosecute every single petition that's filed?

MS. MILLER: Yes.

QUESTION: He does not have a right to say there are just not sufficient grounds here. I'm not going to push it.

MS. MILLER: I frankly don't know the answer to that, but from the quarterly reports that we've gotten, since the hearings have been conducted since 1986, all cases have been prosecuted.

QUESTION: And how did you get into this case?

(Laughter.)

MS. MILLER: I filed the complaint in 1982.

QUESTION: Are you the -- oh, you filed the complaint?

MS. MILLER: Along with other co-counsel.

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QUESTION: Oh, yes.

MS. MILLER: And we represent Samuel Doe, not Sammy Doe, and he's an adult. And he was in an institution at the time that we filed.

QUESTION: And this is a class action.

MS. MILLER: This is a class action, and we represent all adults in Kentucky that are potentially facing involuntary confinement in a State institution.

QUESTION: Where is Samuel Doe now?

MS. MILLER: Samuel Doe, since the filing of the case, has been released and is in a small residential placement. He was a profound, severely retarded man in his 30's when we filed, and now is -- he's in a residential home.

QUESTION: And are there any named plaintiffs in the class that are presently institutionalized?

MS. MILLER: No, they're not. What we have is we represent a class that has been described by the district court as both those in the institution and those that may face institution. Samuel Doe we filed through his -- by and his next friend, his mother, who has concerns that after she dies, she wants to make sure that her adult son is given all the protections that all other ordinary citizens are under this Constitution.

QUESTION: I suppose you wouldn't be satisfied

if Kentucky applied the same rule about the presence of third parties to the mentally ill.

MS. MILLER: Well, we argue that it violates both equal protection and due process.

QUESTION: Well, I know. So, you wouldn't be satisfied.

MS. MILLER: Exactly, Justice White.

QUESTION: And so, you would say also I suppose that it violates the due process rights of the mentally ill.

MS. MILLER: That would be true, and the reason that we say that is that the involuntary commitment proceeding is a very narrowly defined procedure where what's at stake is the liberty interests of the individual adult facing commitment and the parens patriae interests of the State. Those are the interests and those are the parties. To allow any third persons, even this wide, varied, vaguely defined group that the statute has, would --

QUESTION: Well, how wide is it? It's parents and immediate family?

MS. MILLER: It changes in the statute according to a right the State wants to give persons. In -- excuse me -- in certain circumstances on joint appendix 127, it shows that if you want to retain an expert witness for the

jury trial or hearing procedure, that's given to parents and guardians. If you want to give third persons the right to act as if parties, that is given to immediate family members, not defined, and guardians. If you want to appeal an adverse decision, that role or that right is given to guardians, limited guardians, and other authorized representatives, again not defined by statute and unclear.

QUESTION: How are your clients hurt by allowing -- by Kentucky allowing certain parents or guardians to appeal?

MS. MILLER: First we would argue under equal protection, that the mentally ill are not similarly burdened in that they are not facing two prosecutors. Basically what we're saying is these third persons are standing alongside the State in this involuntary commitment proceeding arguing the case for commitment.

QUESTION: So, there are two appellants rather than one?

MS. MILLER: Yes.

QUESTION: How does that hurt your client? I mean, if there's going to be some sort of appeal, how does it hurt to have two people saying we want to challenge it rather than one?

MS. MILLER: Well, Chief Justice, in trying to

determine what does due process require if you look to the Mathews case, the first thing is what's the private interest at stake. We would argue the private interest --

QUESTION: I thought this was an equal protection argument you were making.

MS. MILLER: For the parents, it is both an equal protection and a due process.

QUESTION: And what -- to show that your clients are some way injured in order to raise either the due process or the equal protection claim, how are they hurt?

MS. MILLER: We are saying to inject these vaguely defined third parties into the process would upset the balance that Mathews envisions and that Vitek envisions in an involuntary commitment process because what's at stake is the liberty of the adult.

QUESTION: Ms. Miller, suppose all that happens, if this person steps in, is that you get an appeal. What would be wrong with a State system that says we're worried about too many people who are really mentally incompetent or even mentally ill being allowed out on the street. And, therefore, whenever there's a trial in which the court says the person is not mentally ill or not mentally incompetent, any citizen can ask for a retrial on appeal? Would that deprive anyone of due process? It just gives you another court. Why is that a deprivation of due

process? Maybe even a better judge. It will be an appellate judge.

MS. MILLER: Justice Scalia, we would argue that it's still a violation of due process because you're having the mentally retarded adult face another party, face another court.

QUESTION: No, but there's a lawyer representing the person.

MS. MILLER: That's true, but what we would say is that under Mathews, what interests do these --

QUESTION: Well, the lawyer isn't going to be -- I suppose if he's representing his or her client, he or she are not going to be put down by parents.

MS. MILLER: Again, what we would say is looking at the Mathews test -- and I'm trying to make sense of this for you -- what's at stake for the parents and other vaguely defined third persons, these other authorized representatives, the limited guardians, they have no liberty interest at stake.

QUESTION: No, but you're -- it seems to me you're now making a different argument. I thought you were making the argument that by giving the parents the right to appeal, it was somehow weighting the scales in favor of commitment. You're now giving an argument that the parents really do not have an interest subject to

being recognized. I'd like to go back to the first one.

Isn't the problem not how many parties may appeal, but what the standard for commitment is? And if the standard of commitment is sufficiently high -- and we will leave the equal protection issue aside and assume it's at least clear and convincing, why does it make any difference and why should it be cognizable under Mathews whether you have two potential appellants or one potential appellant?

MS. MILLER: We would argue that it violates due process because before you even come into the involuntary commitment process, it skews the balance in favor of commitment.

QUESTION: Well, but I thought the balance was reflected in the burden of proof, rather than the number of parties who may have the status as such.

MS. MILLER: I think an appropriate analogy here that might help the Court understand, that in the criminal proceeding --

QUESTION: Well, how about the point that I just made? Why isn't the so-called balance a function of the burden of proof? Isn't that what Mathews was getting at?

MS. MILLER: I think what Mathews was getting at in the second prong is what's the risk under the procedures used. And granted, here --

QUESTION: What's the risk and the risk is assessed in relationship to the burden of proof.

MS. MILLER: Well, we would say, Justice Souter, that the risk is that that it is tipping the scales in favor of confinement.

QUESTION: You think the burden of proof is in an de facto sense going to vary depending on whether only the county attorney can appeal or the parents can appeal? How does that affect the standard of proof?

MS. MILLER: I may be confused on this. Our burden of proof argument is simply under the equal protection analysis, and I'm trying to get back to --

QUESTION: But you would take -- as I understand it, you would take the position that even if the burden of proof for those mentally retarded were beyond a reasonable doubt, that there still would be a due process problem in giving the parents or certain family members party status with the right to appeal. Isn't that correct?

MS. MILLER: That's correct.

QUESTION: All right. Now, how -- why isn't the burden of proof a sufficient answer to that, that if the burden of proof is sufficiently high, it doesn't matter whether one person is appealing or another person is appealing? The protection for the liberty interest is going to be the same because it's going to be a function

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of the burden of proof.

MS. MILLER: Given that this is a judicial proceeding, and if the burden of proof were beyond a reasonable doubt, it is a much closer call.

But I think a close analogy would be in the criminal context, and the statute for the mentally retarded and the mentally ill in the involuntary commitment process is to be held as a criminal proceeding. It would be as allowing victims of crimes to come into a prosecutorial role during the criminal hearing. It's tipping the balance --

QUESTION: It would be perfectly good if there were no Double Jeopardy Clause, it seems to me, to say that whenever a criminal is acquitted, a member of the public who believes it wasn't a just verdict can ask for a retrial. If it weren't for the Double Jeopardy Clause, that would be fine, wouldn't it?

MS. MILLER: It's not an identical analogy. I'm just trying to assist the Court in trying to envision how it's upsetting the balance.

One thing that might be helpful, in looking at record 67 at pages 39, what happened was at one point a mentally retarded adult was in Hazelwood, one of the four facilities. He wanted out. What happened was is the parents said "Absolutely not, I don't want my adult son

out." He had an attorney. The attorney's deposition is from Patty Walker. She said that once the mother said "I don't want you out and if you step out of that institution, I'm not going to ever see you again," it was enough. It was enough for that adult to say "I'm not going to try and get out."

QUESTION: Yes, but couldn't -- that fact could have been brought out through testimony whether the parent were a party or just a witness, couldn't it? I mean, it's not as though you're saying these parents can't appear and testify. You wouldn't say -- that's not loading of the dice, is it?

MS. MILLER: No. We certainly think that anything --

QUESTION: Isn't it also possible there may be cases cases where the parents would sympathize with the mentally retarded person?

MS. MILLER: That is the truth, but one -- in Kentucky one of the things that we've seen in the record here is that parents often have an interest adverse to the liberty interest of the adults facing confinement. Certainly they have interests. No matter how well motivated, we're saying that they have no play in this procedure because what's at focus is that adult's liberty interest. And to take away from that by injecting this

wide-ranging third parties is to demean the due process that they're getting, putting aside all the equal protection arguments, because the mentally ill are not similarly burdened by these third persons.

QUESTION: Do you think the appointed attorney is more likely to have the interest of the person at heart than the parents?

MS. MILLER: We would not say that, but what we are saying is that the attorney in the role of an advocate is the advocate for freedom. The adversary proceedings set up by this Court in Vitek --

QUESTION: Well, at least the attorney is for the client. Right?

MS. MILLER: Exactly. That's their role as attorney.

QUESTION: He's not for the client. You told us he's for freedom. Freedom may not be in the interest of the client. That's the whole purpose of the proceeding, to decide whether that is in the interest of the client.

MS. MILLER: Justice Scalia, that may, in fact, be true in an individualized case, but the record shows in Dr. Skarnulis' deposition that 97 to 98 percent of the mentally retarded adults in Kentucky live outside the institution, and for every 1 person in, there's 10 adults out with equally severe handicaps and mental retardation.

And so, we would say that it can be a very close call as to whether or not these people meet the involuntary criteria.

And that's what Vitek said. When this massive curtailment of liberty is at stake, you're entitled to an adversary hearing where the adult gets to advocate vigorously for freedom.

One thing I think that is critical, in going to our equal protection argument, is the State has had 11 years to come up with a good reason, and under Foucha we would say a particularly convincing reason, to treat the mentally retarded differently from the mentally ill because under equal protection, we say that all persons in Kentucky facing involuntary confinement are simply civil commitment candidates. They're the ordinary citizens that are about to have their liberty deprived. To take the label of mental retardation and to make assumptions from that label as to their capabilities and their abilities is wrong. To make assumptions --

QUESTION: You're talking here severe mental retardation. We're not talking about just mental retardation. Right?

MS. MILLER: Justice --

QUESTION: What are the two categories? Severe, and what is the other one?

MS. MILLER: Justice Scalia, there are four categories: mild, moderate, profound, severe. The statute --

QUESTION: Profound and severe are the only two we're talking about here. Right?

MS. MILLER: Absolutely not. The statute makes no distinctions.

One correction, a factual correction. Counsel stated that there are no provisions for voluntary admission to a State institution. That's not correct. On page 120 of the joint appendix, one of the statutes that we actually challenged at the district court dealt with the mild and moderate being able to voluntarily admit themselves to one of these State institutions. The Sixth Circuit held that there was no case of controversy. So, that statute still in fact stands.

QUESTION: I don't understand.

MS. MILLER: What happens in Kentucky is there is an involuntary commitment procedure. It applies to the mild, moderate, profound, severe. The statute makes no distinctions. In other words, a parent could take a petition out on an adult son or daughter that was mildly retarded, go through the petition, go through the hearing process to determine whether or not that person was mentally retarded and dangerous to himself or others or

herself and others. The statute makes no distinctions. It's not a narrowly crafted statute that applies only to profound and severe and only let's --

QUESTION: Would other than profound and severe be a danger to himself or others?

MS. MILLER: We would argue that the subtleties and nuances of whether or not one --

QUESTION: It's not a subtlety or nuance. It seems to me there's no chance of commitment if the person is not a danger to himself and there's no chance of his being a danger to himself if he's mildly retarded.

MS. MILLER: Well, if you look at the institutional population, out of the 800, approximately 100 are mild or moderate. So, it is possible for those individuals to be committed.

I think what is more telling in the record, that for every 1 person in, again 10 are out. For the equally severe, the profound and severe can be served outside the institution. Dr. Skarnulis, who was the high ranking cabinet official for the State, said that the profound and severe can be served outside the institution and, in fact, are being served outside the institution today. This is what makes the question of dangerousness much more difficult.

In conclusion, if there are no further questions

from the Court, we would argue that what the State has said in their brief time and time again is that there's no liberty interest at stake. And they said that again here today because they view persons with mental retardation as perpetual children, as Peter Pan figures, as in need of constant care and support. This looks and feels wrong because the record doesn't reflect it.

And what we're saying is that the State has had 11 years under the equal protection analysis to come up with a reason for treating these two groups differently. Certainly a State could treat the two groups differently if they had a good reason that was related --

QUESTION: -- take 11 years?

MS. MILLER: I hope not.

QUESTION: Well, why did it take so long?

MS. MILLER: Well, what has happened in this case is when we first filed it, Justice White, there were statutory procedures on the books for the involuntary commitment process. Counsel for the State argued that they had an informal process whereby they considered all commitments voluntary. We challenged that. It was held to be unconstitutional, went to the Sixth Circuit, still held to be unconstitutional. And this case -- this Court denied cert.

The legislature came back in in 1988 and made

changes. So, it has been an ongoing series of the legislative body changing the statute, and we are back here on the statute that was rewritten in 1990.

But what we would say is that what Kentucky does is they base these changes, these statutory sections that we are challenging, on a stereotype, a stereotype of mentally retarded persons. That means if you're mentally retarded or allegedly mentally retarded, that you're dangerous, in need of commitment. We're saying that the Court should reject the stereotype and reject the statute on which it is challenged.

Thank you.

QUESTION: Thank you, Ms. Miller.

Mr. Moore, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM K. MOORE

ON BEHALF OF THE PETITIONER

MR. MOORE: Thank you, Your Honor.

I would like to cover a couple of points in rebuttal.

First, the question was asked who can initiate a petition to involuntarily commit a mentally retarded person. The statute relating to that is set forth at page 124 of the record. Basically it's not just anyone who desires to file such petition can. It has to be a police officer, county attorney, commonwealth attorney, spouse,

relative, friend, or guardian of the person for whom the petition is filed. It's not just anyone who can -- not a stranger who can initiate these proceedings.

Also, in the proceedings, they don't -- the mentally retarded person doesn't go through the matter as an ordinary person. They don't get to the hearing phase until first the petition is filed, the probable cause hearing is held by the court.

The court then appoints two qualified mental retardation professionals, one of whom must be a doctor. Those persons must evaluate, conduct an evaluation of the mentally retarded person immediately within 24 hours, and certify both of them to the court that the person is mentally retarded and that they do meet the criteria for involuntary admission. If those certifications are not filed, if the professionals do not agree, then the petition is dismissed.

QUESTION: Mr. Moore, I thought -- I don't know where I got the impression. I thought we were just dealing with severely and profoundly retarded. That is not the case?

MR. MOORE: The statute addresses all mentally retarded people. The statute for involuntary commitment does not limit itself to only that subgroup of the mentally retarded -- or those subgroups. The vast

majority of the mentally retarded persons in the State facilities fall into those two groups. There are only 770 beds or spaces available in the State facilities.

In its second memorandum opinion on the matter, the court described the number of people at State facilities who suffered from severe, profound, and then lumped together mild and moderate. The court made a finding of approximately 100. The number would be more in the range of 50.

There are some persons who may only be mildly or moderately retarded who nevertheless require that they receive services in one of these facilities because they may have things wrong with them other and in addition to mental retardation. They may be epileptic. They may have cerebral palsy. They may have any number of medical conditions which render them having acute medical care needs where they need to be taken care of essentially at a nursing home. And that's what an ICF/MR is. It's a nursing home with programs designed specifically for the mentally retarded. So, there would be a few individuals that do fall into those --

QUESTION: When is a lawyer appointed? You were describing the procedure. Is there a lawyer appointed for the --

MR. MOORE: Upon the filing of the petition,

Your Honor.

QUESTION: And the State pays for that?

MR. MOORE: Yes, and the State pays for the --

QUESTION: Well, after they -- when does it ever get to a hearing?

MR. MOORE: Well, we have a probable cause hearing where the judge interviews the person.

QUESTION: I got it.

MR. MOORE: We have a preliminary hearing.

QUESTION: Yes.

MR. MOORE: Then we have a final hearing or an adjudicative hearing.

QUESTION: That's where the clear and convincing standard has to be satisfied.

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

QUESTION: Is a guardian at litem appointed?

MR. MOORE: No. He's an attorney. It's not a guardian ad litem. It is an attorney to represent --

QUESTION: Is the attorney present at the two preliminary hearings, the probable cause hearing and the preliminary hearing?

MR. MOORE: He should be. As a practical matter, he may not be able to be present at the probable cause hearing because oftentimes that's conducted immediately upon the filing of the petition. But he would

be present at the preliminary hearing and most definitely at the final hearing, Your Honor.

QUESTION: Should we treat the attorney as, in effect, as a guardian ad litem since there's no determination made in the first instance, as I understand it, that the individual is confident to represent himself. Is the attorney, therefore, in effect, functioning as a guardian ad litem?

MR. MOORE: Your Honor, our statutes says you appoint an attorney, and the practice, as respondents' counsel described, is one where that person sees their role as advocating freedom.

QUESTION: He's a devil's advocate, in effect. He knows one side of the case to be on. Right?

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Moore. The case is submitted.

(Whereupon, at 2:57 p.m., the case in the above-entitled matter was submitted.)

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Leonard Heller, Secretary, Kentucky Cabinet for Human Resources

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Petitioner v. Samuel Doe, by his Mother and Next Friend,

Mary Doe, et al.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lynn M. May

(REPORTER)