

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1976

STATE OF WISCONSIN ex rel.
DAVID MEMMEL and JUDITH PAGELS,
Individually and as representatives
of a class of persons similarly
situated,

Respondents,

v.

EDWIN A. MUNDY, Director of
Milwaukee County Institutions,

Appellant.

BRUEF OF AMICI CURIAE
AMERICAN ORTHOPSYCHIATRIC ASSOCIATION;
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS; NATIONAL ASSOCIATION OF SOCIAL
WORKERS; WISCONSIN CHAPTER, NATIONAL
ASSOCIATION OF SOCIAL WORKERS; NATIONAL LEGAL
AID AND DEFENDERS ASSOCIATION

Edward P. Scott
Jane Bloom Yohalem
Mental Health Law Project
1220 - 19th Street, N.W.
Washington, D.C. 20036

Counsel for Amici Curiae
Associations

10	CONCLUSION
7	MILWAUKEE COUNTY FUTURE COMMITMENT PROCEEDINGS IN LIVE ADVERSARY REPRESENTATION IN TO INSURE THE PROVISION OF EFFECT- TING JURISDICTION IS NECESSARY OF CON-
2	II. THE TRIAL COURT'S RETENTION OF CON- OF DEFENSE COUNSEL A DECLARATION OF THE RESPONSIBILITIES CIVIL COMMITMENT PROCEEDINGS REQUIRES REPRESENTATION BY ADVERSARY COUNSEL IN AND STATUTORY RIGHT TO DILIGENT REP- IMPLEMENTATION OF THE CONSTITUTIONAL
2	I. Introduction
2	ARGUMENT
1	INTEREST OF AMICI CURIAE
1	STATEMENT OF FACTS
1	QUESTIONS INVOLVED

Page

INDEX

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Argersinber v. Hamlin, 407 U.S. 25 (1972) . . .	6
Baker v. Carr, 369 U.S. 186, 206 F. Supp. 341 (M.D. Tenn. 1962)	8
Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974).	2
Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).	3
In re Gault, 387 U.S. 1 (1967).	7
Kent v. United States, 383 U.S. 541 (1966). . .	8
Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated, 421 U.S. 957 (1975), F. Supp. (E.D. Wis., May 28, 1976)	3
Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).	3
Powell v. Alabama, 287 U.S. 45 (1932)	6
Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568 (1973)	5, 6
State v. Harper, 57 Wisc. 2d 543, 205 N.W.2d 1 (1973)	5, 6
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1972).	8
Wallace v. Kern, 13 Crim. L. Rptr. 2243, <u>rev'd on ogher grounds</u> , 481 F.2d 621 (2d Cir. 1973).	6

	<u>Page</u>
Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)	2
Wyatt v. Stickney, 344 F. Supp. 372, 387 (M.D. Ala. 1972), <u>aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)</u>	8
<u>Wisconsin Statutes:</u>	
§ 51.20(1) (a)	6
§ 51.20(4).	
<u>Other Authorities:</u>	
American Bar Association, Code of Professional Responsibility.	4
American Bar Foundation, The Mentally Disabled and the Law (Brakel & Rock eds. 1971).	6
American Psychiatric Association, Position Paper on Involuntary Hospitalization of the Mentally Ill, 130 Am. J. Psychiatry 392 (March 1973).	3
American Psychiatric Association, Task Force No. 8, Clinical Aspects of the Violent Individual 25 (July 1974)	7
Andalman and Chambers, "Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal," 45 Miss. L.J. 43 (1974)	4, 6, 8 9, 10
Cohen, "The Function of the Attorney and the Commitment of the Mentally Ill," 44 Texas L. Rev. 424 (1956)	4, 8

	<u>Page</u>
Dix, "Hospitalization of the Mentally Ill in Wisconsin: A Need for a Reexamina- tion," 51 Marquette L. Rev. 1 (1967) . . .	8
Litwack, "Role of Counsel in Civil Com- mitment Proceedings," 62 Calif. L. Rev. 816 (1974)	4, 9
Note, "Developments in the Law: Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190 (1974)	2
Note, "The Role of Counsel in the Civil Commitment Process: A Theoretical Framework," 84 Yale L.J. 1540 (1975) . . .	7
Wexler and Scoville, "Administration of Psychiatric Justice: Theory and Practice in Arizona," 13 Ariz. L. Rev. 1 (1971)	4, 8

QUESTIONS INVOLVED

Amici accept Respondent's statement of questions involved.

STATEMENT OF FACTS

Amici accept Respondent's statement of facts.

INTEREST OF AMICI CURIAE

The American Orthopsychiatric Association is an interdisciplinary organization of 4,000 members including psychiatrists, social workers, educators and allied professionals concerned with the problems, causes and treatment of abnormal behavior. The National Association of Criminal Defense Lawyers is a professional organization of 1,500 attorneys, a principal purpose of which is to promote the proper administration of criminal justice. The National Association of Social Workers is an organization of 70,000 professional social workers devoted to the advancement of sound public policy for social work consumers as well as professionals. The Wisconsin Chapter has 1,800 members. The National Legal Aid and Defenders Association is an organization of legal services and public defenders programs which is dedicated to equal justice for all Americans.

Collectively, amici have a strong commitment to the welfare of mentally handicapped persons and to the upholding of their constitutional rights.

ARGUMENT

Introduction

Although the rights of persons facing civil commitment to full due process safeguards is not questioned in this case, equally vital issues have been raised as to the meaning of some of those rights and the means by which they should be secured. Amici attach particular significance in this case to the proper definition and implementation of the right to counsel. Courts are consistently recognizing the right to treatment of involuntarily confined non-criminals and the need for judicial action to assure the provision of quality treatment services. ^{1/} The weight of implementing these essential rights falls on mental institutions and members of the mental health professions. Responsibility for assuring adherence to due process safeguards and the provision of quality legal services rests upon legal institutions and members of the legal profession. Amici believe that the trial court in this case properly recognized the special responsibility of the Bench to guarantee mentally handicapped persons no less in the way of high standards for services from the legal profession than the law requires of the mental health professions in the provision of treatment services.

I. IMPLEMENTATION OF THE CONSTITUTIONAL AND STATUTORY RIGHT TO DILIGENT REPRESENTATION BY ADVERSARY COUNSEL IN CIVIL COMMITMENT PROCEEDINGS REQUIRES A DECLARATION OF THE RESPONSIBILITIES OF DEFENSE COUNSEL.

In light of the constitutionally protected rights at stake in civil commitment proceedings ^{2/}

^{1/} E.g., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974).

^{2/} As to the individual interests at stake in these proceedings, see Note, "Developments in the Law: Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190 (1974).

and the fact that civil commitment is a legal adversary proceeding, not a medical one, 3/ this appeal does not question the right to counsel of persons facing civil commitment. Likewise, given the factual record in this case, 4/ there is no dispute as to the pervasive deprivation of the right to counsel in Milwaukee County. Nor is there any substantial dispute that, under the due process clause of the fourteenth amendment and Wisconsin law, the right to counsel means the right to diligent adversary representation. 5/

3/ E.g., Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972), vacated, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated, 421 U.S. 957 (1975), on remand, ___ F. Supp. ___ (E.D. Wis., May 28, 1976); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974). The American Psychiatric Association agrees that "any form of involuntary hospitalization should provide full rights of due process...." American Psychiatric Association, Position Paper on Involuntary Hospitalization of the Mentally Ill, 130 Am. J. Psychiatry 392 (March 1973).

4/ Findings of Fact and Conclusions of Law, August 3, 1976.

5/ The new commitment statute at Section 51.20(4) of the Wisconsin Statute provides the right to "adversary counsel." That same term was used in Lessard v. Schmidt, 349 F. Supp. at 1097-1100, in establishing the right to a legal advocate as distinguished from a guardian ad litem. See also, e.g., Lynch, supra note 3; Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968). The anomalous suggestion that defense counsel has an obligation to advocate the state's interest in protecting society and in providing involuntary treatment to mentally ill persons would create flagrant conflict-of-interest situations. Petition for a Declaratory Judgment, Exs. A and B.

There is, however, a clear and urgent need for this Court to declare the responsibilities of defense counsel in civil commitment proceedings in order to implement that right. This necessity arises out of the absence of a tradition in the legal profession of providing effective legal services in commitment cases and extensive confusion in the profession as to the proper role of defense counsel in this context. 6/

This situation contrasts sharply with the clearly defined role and responsibilities of criminal defense lawyers. That this Court recently deemed it necessary and appropriate to promulgate standards for representation in the criminal area

6/ Wexler and Scoville, "Administration of Psychiatric Justice: Theory and Practice in Arizona," 13 Ariz. L. Rev. 1 (1971); Litwack, "Role of Counsel in Civil Commitment Proceedings," 62 Calif L. Rev. 816, 818 (1974); Cohen, "The Function of the Attorney and the Commitment of the Mentally Ill," 44 Texas L. Rev. 424 (1956); Andalman and Chambers, "Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic and a Proposal," 45 Miss. L.J. 43, 73 (1974). The Code of Professional Responsibility offers little guidance. Canon 7, E-C7-1 states that "The duty of a lawyer...is to represent his client zealously within the bounds of the law"; however, E-C7-12 states, "If the disability of a client...compel[s] the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client." Thus the professional standards are confusing, and fail to deal specifically with civil commitment. They may suggest to some lawyers that it is permissible to disregard the client's express wishes.

(State v. Harper, 57 Wis. 2d 543, 205 N.W.2d 1 (1973)) underscores the painfully clear need for similar standards in the field of civil commitment.

In the Court's deliberations on the substance of standards 7/ for civil commitment defense counsel, amici recommend consideration of the following minimum responsibilities:

(a) Client Interviews: Defense counsel should conduct an initial client interview promptly after appointment. It should be the lawyer's role to explain commitment law and procedures, including the consequences of commitment, to discuss the alternatives available to the client, especially the possibility of placement in a less restrictive setting in the community, to determine the client's version of the facts and to ascertain the client's wishes. Subsequent conferences should be held as often as necessary to explore all factors relevant to the client's defense. Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568, 577 (1973); State v. Harper, 57 Wis. at 552.

7/ Paragraph (B) of the prayer for relief in Respondents' Petition for a Declaratory Judgment indicates that counsel providing public representation should advocate the "right to treatment," thereby suggesting that defense counsel should not. Amici believe that this matter should be clarified to assure that counsel representing the public advocates the state's police power interests in public safety and its parens patriae interest in providing involuntary treatment to mentally ill persons who meet the criteria for commitment. Defense counsel may well advocate the client's right to treatment at the post-commitment stage.

(b) Thorough Investigations: Thorough factual investigations are essential to minimally acceptable representation. Powell v. Alabama, 287 U.S. 45, 58 (1932). Factual issues are commonly open to dispute at civil commitment hearings. Under Wisconsin law, commitment must be based, in part, on evidence of violent behavior or evidence of an attempt or threat physically to harm oneself or another. Wis. Stats. § 51.20 (1)(a). Independent investigation of the accuracy of the complaining witness' allegations is as necessary for the development of factual defenses here as it is in criminal cases. State v. Harper, 57 Wis. at 553.

A thorough investigation usually must also include interviews of the committing doctors and of family members. Hospital records should be examined and an independent expert examination sought. Quesnell v. State, 517 P.2d at 576. A full psychosocial evaluation should be obtained with a view toward assessing the feasibility of less restrictive alternatives to commitment and hospitalization; and all possible alternatives to commitment should be fully explored. American Bar Foundation, The Mentally Disabled and the Law at 62 (Brakel & Rock eds. 197;); Andelman and Chambers, supra note 6 at 57.

(c) Negotiations: Negotiations with hospital staff, the complainant, the client's family and the state's attorney should be pursued when and as appropriate. The attorney's role includes representation of his clients' interests whether or not the case goes to trial. Argersinger v. Hamilton, 407 U.S. 25 (1972); Wallace v. Kern, 13 Crim. L. Rep. 2243, rev'd on other grounds, 481 F.2d 621 (2d Cir. 1973).

(d) Protecting Procedural Rights: Defense counsel must safeguard the procedural rights of the client. He should, for example, challenge any commitment petition not in compliance with Wisconsin

law. The advice and advocacy of counsel with regard to pre-trial matters, e.g., whether to waive the right to a jury trial, are essential. In re Gault, 387 U.S. 1, 36 (1966).

(e) Effective Advocacy at Hearings: Representation at the hearing itself requires traditional advocate's skills. The lawyer should object to inadmissible evidence and cross-examine witnesses who favor commitment, including hospital psychiatrists. A primary area of dispute, in civil commitment hearings is the issue of mental condition. Often the basis of expert testimony, the procedures used to examine the client, or the bias of the expert witness are open to question. 8/ Also, civil commitment cases often turn on psychiatric predictions of future dangerous behavior to which objection should be made, and cross-examination of the testifying psychiatrist on this crucial point can bring out the uncertainty and unreliability of psychiatrists' predictions of dangerous behavior. 9/

II. THE TRIAL COURT'S RETENTION OF CONTINUING JURISDICTION IS NECESSARY TO INSURE THE PROVISION OF EFFECTIVE ADVERSARY REPRESENTATION IN FUTURE COMMITMENT PROCEEDINGS IN MILWAUKEE COUNTY.

As necessary and useful as a declaration of the responsibilities of counsel would be, however, that

8/ Note, "The Role of Counsel in the Civil Commitment Process: A Theoretical Framework," 84 Yale L. J. 1540 (1975). A psychiatrist involved in treating the client may want to keep the client hospitalized because he believes treatment to be desirable rather than because the client meets the legal commitment standards. Id. at 1559.

9/ Psychiatric overprediction of dangerousness is extremely well documented. See, e.g., American Psychiatric Association, Task Force Report No. 8, Clinical Aspects of the Violent Individual 25 (July 1974) ("psychiatrists...too often predict dangerousness....").

important step alone would not provide sufficient assurance that persons facing civil commitment proceedings in Milwaukee County would receive diligent adversary representation. For the factual record in this case does not present isolated instances of ineffective assistance of counsel. It shows that for a year and nine months there has been a consistent pattern of no more than ritualistic observance of the right to counsel. Kent v. United States, 383 U.S. 541, 563 (1966). Moreover, it appears that for several years the whole approach toward the provision of counsel in civil commitment proceedings in Milwaukee County has not been geared toward the provision of diligent adversary counsel. 10/

Nor are the blatant violations of due process which have been occurring in Milwaukee County by any means unique. As several recent studies have shown, they are typical of practices in civil commitment proceedings in many parts of the country. 11/

This massive and systematic deprivation of the constitutional right to counsel calls for the setting of standards of representation, the development of a plan for implementing the right to counsel and continuing judicial oversight to assure that the plan is effectively implemented. The retention of continuing jurisdiction to develop, monitor and enforce an award of systematic equitable relief is a well-established principle. 12/ The trial court in

10/ Dix, "Hospitalization of the Mentally Ill in Wisconsin: A Need for Reexamination," 41 Marquette L. Rev. 1 (1967).

11/ Wexler and Scoville, supra note 6 (Arizona); Cohen, supra note 6 (Texas); Andalman and Chambers, supra note 6 (Illinois, Tennessee, Iowa).

12/ Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1972); Baker v. Carr, 369 U.S. 186, on remand, 206 F. Supp. 341 (M.D. Tenn. 1962); Wyatt v. Stickney, 344 F. Supp. 372, 387 (M.D. Ala. 1972), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

this case was, therefore, unquestionably correct in deciding to retain jurisdiction.

In the exercise of continuing jurisdiction for the purpose of providing necessary relief, the trial court will have to assure that a satisfactory plan for the provision of competent counsel is adopted and guarantee that it is implemented effectively. Based on amici's study of the problems affecting the right to counsel in civil commitment proceedings, they believe that a satisfactory plan should include, at a minimum, the following elements:

1. Reasonable caseloads to make adequate representation possible. 13/
2. Training and specialization to assure prompt and effective legal services.
3. Adequate compensation to avoid a conflict between counsel's monetary interests and the client's right to diligent representation. 14/
4. Independence of counsel from the control by the judiciary and the providers of mental health services to avoid conflicts of interest. 15/
5. Adequate recourse to appropriate mental health professionals to prepare psychosocial evaluations needed to explore alternatives to hospitalization and commitment and to assist in the

13/ Unreasonable caseloads have been a problem in Milwaukee County (Findings of Fact and Conclusions of Law, ¶¶ 48, 49).

14/ Under the present Milwaukee County rate of \$25 per case (Findings of Fact and Conclusions of Law, ¶ 10), "the only way an attorney can break even is to do nothing and do it in volume." Andalman and Chambers, supra note 6 at 83. An hourly rate or a system where salaried attorneys handle cases would be more likely to insure effective representation. Id. at 83.

15/ Litwack, supra note 6 at 834.

preparation and presentation of the defense. 16/

6. Clear delineation of the role of counsel.
7. Monitoring to ensure effective implementation.

The adoption and implementation of such a plan is clearly necessary and obviously demands the retention of continuing jurisdiction.

CONCLUSION

For reasons set forth above, amici urge this Court to affirm the judgment of the court below and grant the petition for a declaratory judgment declaring standards for diligent adversary counsel in civil commitment proceedings.

Respectfully submitted,

Edward P. Scott

Jane Bloom Yohalem

Mental Health Law Project
1220 - 19th Street, N.W.
Washington, D.C. 20036

Counsel for Amici Curiae
Associations

16/ Andalman and Chambers, supra note 6 at 47; Litwack, supra note 6 at 824-25. This element may be effectively satisfied by the establishment of comprehensive standards for effective representation by this Court.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Amici Curiae was mailed, first-class postage prepaid, this 5th day of November, 1976, to the following:

Thomas Cannon, Esquire
1204 West Wisconsin Avenue
Milwaukee, Wisconsin 53233

Hon. Michael T. Sullivan
206 Courthouse
Milwaukee, Wisconsin 53233

Hon. John E. McCormick
Courthouse
Milwaukee, Wisconsin 53233

Gerald Paradowski, Esquire
Dean Horwitz, Esquire
Assistant Corporation Counsels
901 North 9th Street
Milwaukee, Wisconsin 53233

Stanley F. Hack, Esquire
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Mrs. Louise Trubek
520 University Avenue
Madison, Wisconsin 53703

Dianne Greenley, Esquire
Wisconsin Civil Liberties
520 University Avenue
Madison, Wisconsin 53703

Howard B. Eisenberg, Esquire
Office of State Public Defender

Broson C. La Follette
Attorney General
114 East, State Capitol
Madison, Wisconsin 53702

Aaron E. Goodstein, Esquire
740 North Plankinton Avenue
Milwaukee, Wisconsin 53202

Robert H. Blondis, Esquire
Milwaukee Legal Services, Inc.
211 West Kilbourn Avenue
Milwaukee, Wisconsin 53203

Patrick J. Devitt, Esq.
Milwaukee Legal Aid Society
1201 West Wisconsin Avenue
Milwaukee, Wisconsin 53233

Walther & Halling
222 East Mason Street
Milwaukee, Wisconsin

Lloyd A. Barbee, Esquire
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Edward P. Scott