STATE OF WISCONSIN
SUPREME COURT

No. 01-0374

IN RE THE COMMITMENT OF DENNIS H.

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DENNIS H.,

Respondent-Appellant.

BRIEF OF KENNETH J. KRESS, AMICUS CURIAE

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STATEMENT OF INTEREST

Kenneth J. Kress is a professor of law and is the Chair of the Association of American Law Schools' Section on Law and Mental Disability. He has drafted or contributed to civil commitment legislation in several states. He has published scholarship about standards similar to Wisconsin's Fifth Standard.

ARGUMENT

THE FIFTH STANDARD COMPLIES WITH THE REQUIREMENTS OF SUBSTANTIVE DUE PROCESS

A. *Parens Patriae* Commitments are Constitutional if Mental Illness and Incapacity to Make Informed Treatment Decisions are Proven, and Beneficial Treatment is Provided.

The United States Supreme Court has unwaveringly affirmed the *parens patriae* power of the state, *see, e.g., Addington v. Texas*, 441 U.S. 418, 426 (1979), with good reason. If there were no *parens patriae* power, guardianship, conservatorship, protective placement, mental challenge commitment, care of persons with dementia, and other noble state activities would be impermissible. Moreover, if commitments require physical dangerousness, then sexual predator commitments of persons who entice children by exposing themselves would be unconstitutional. Wis. Stat. Ann. §§ 980.02, 948.07(3) (2001). If all civil commitments require imminence, Wisconsin will be unable to commit most sexual predators and treat them for their welfare and the safety of children and other victims because they are not imminently dangerous.

Case law reveals a vital *parens patriae* power permitting government to care for citizens unable to provide for themselves, without demonstrating dangerousness, if incompetence in the relevant respect is proven. *See, e.g., In the Matter of Maricopa County*, 840 P.2d 1042, 1044-45, 1047-51 (Ariz. App. 1992) (upholding constitutionality of commitment

and coerced treatment with medication of mentally ill person with schizophrenia who was "persistently or acutely disabled," defined almost identically to the Fifth Standard with an explicit requirement that treatment has a reasonable prospect of success) (striking resemblance to the instant case); *Winters v. Miller*, 446 F.2d 65, 70-71 (2d Cir. 1971) (incapacity justifies coerced treatment under *parens patriae* doctrine) ; *People v. Medina*, 705 P.2d 961, 973 (Colo. 1985) (permitting coercive administration of antipsychotic medication if patient is incapable of making treatment decisions and likely to deteriorate without treatment).

Scholarly opinion recognizes the *parens patriae* power to constitutionally commit and require coerced medication under three conditions:

(1) mental illness;
(2) incapacity to make informed treatment decisions; and
(3) treatment is provided.

Wisconsin's Fifth Standard meets these requirements.

The principal drafter of the Iowa Civil Commitment Code notes: "[T]he *parens patriae* doctrine would permit treatment without a showing of dangerousness," if "the patient is incapable of making such a decision independently." Randall P. Bezanson, *Involuntary Treatment of the Mentally Ill in Iowa: The 1975 Legislation*, 61 Iowa L. Rev. 261, 314 (1975). Even radical civil libertarians reluctantly conclude that incapacity justifies civil commitment and coerced treatment. Bruce J. Winick, The Right to Refuse Mental Health Treatment, 289-91 (1977); Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 Psychol., Pub. Pol'y, & L., 534, 587 (1995). One of the most profound scholars of mental health law maintains that incompetence constitutionally justifies commitment and coerced treatment. Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 Psychol. Pub. Pol'y & L. 323, 332, 337-39, 345-54 (1998).

Nonetheless, Dennis H. (Appellant) claims that Wisconsin's Fifth Standard is unconstitutional because the Fourteenth Amendment precludes Appellant's commitment and treatment with antipsychotic medications absent proof of imminent dangerousness. (App-Brief 10).

Before refuting that claim, it will prove beneficial to examine the ramifications of requiring imminent dangerousness in civil commitments. The Fifth Standard's purpose in minimizing the devastating revolving-door syndrome that afflicts many persons with serious mental illness would be thwarted. Darold A. Treffert, *The MacArthur Coercion Studies: A Wisconsin Perspective*, 82 Marq. L. Rev. 759, 780 (1999). The Fifth Standard is the only Wisconsin provision permitting commitment without imminent dangerousness, as it must to accomplish its preventive purpose of treating people in the community before they harm, perhaps irreparably, themselves or others, or require inpatient commitment under one of the first four standards. *The Fifth Standard is also the only Wisconsin provision permitting* preventive *outpatient commitment*. Wis. Stat. Ann. § 51.20(13)(a)3 (2001). *If civil commitment, including outpatient commitment, requires imminent dangerousness, it will be impossible to provide preventive mandatory treatment in the community because persons who are imminently dangerous cannot be permitted to injure members of the community.*

Invalidation of the Fifth Standard will reduce the quality of life and standard of living of many Wisconsin citizens with severe mental illness caught in the revolving door who cease treatment after hospital release and deteriorate until they are re-hospitalized, only to repeat the cycle over and over again, barring commission of a violent act and incarceration. *In re LaBelle,* 728 P.2d 138, 145 (Wash. 1986); Ken Kress, *An Argument for Assisted Outpatient Treatment for Persons with Serious Mental Illness Illustrated with Reference to a Proposed Statute for Iowa*, 85 Iowa L. Rev. 1269, 1293-99 (2000) (revolving-door syndrome); *id.* at 1358-59 (quality of life). Imprisonment and hospitalization decrease autonomy, and quality of life.

Without Fifth Standard preventive treatment, revolving-door consumers will be hospitalized and imprisoned more frequently. *Id.* at 1342-48 (analyzing empirical studies finding up to an 86% reduction in inpatient hospital days from outpatient treatment); *id.* at 1353-55 (Justice Department findings that 16% of incarcerated persons have mental illness, and that incarceration costs $50,000 per inmate per year).

Without Fifth Standard treatment, Wisconsin citizens will more frequently be victims of violence by persons with untreated mental illness. Swanson et al., *Involuntary Out-Patient Commitment and Reduction of Violent Behaviour in Persons with Severe Mental Illness*, 176 Brit. J. Psychiatry 324, 327 (2000) (finding a 35% reduction in violent behavior by persons released from inpatient treatment to outpatient commitment).

Roughly 51 out of 100 persons committed as inpatients fight during the four months preceding inpatient commitment, and 18 out of 100 engage in serious violence, employing a weapon or injuring another. Jeffrey Swanson et al., *Violent Behavior Preceding Hospitalization Among Persons With Severe Mental Illness*, 23 Law & Hum. Behav. 185, 200 (1999). The Fifth Standard treats persons with mental illness who are deteriorating to prevent these violent acts, rehospitalizations, and commitment under the first four standards.

Placing revolving-door patients on outpatient commitment saves Iowa taxpayers approximately $16,000 per year for each person placed on outpatient commitment, Kress, 85 Iowa L. Rev. at 1349 & tbl.1., North Carolina taxpayers at least $5 million, and New York taxpayers roughly $15 million, Ken Kress, *Empirical Results on Outpatient Treatment and Their Moral Consequences* (forthcoming in *Psychology, Public Policy & Law*).

The Fifth Standard also reduces interactions between police and persons with mental illness, freeing police time for other matters, homelessness, stigma, suicides, welfare costs, and victimization of persons with mental illness. The Fifth Standard also distributes scarce mental health resources more equally and

increases mental health consumers' overall autonomy. Kress, 85 Iowa L. Rev. at 1353-64.

B. No Binding Precedent Requires Dangerousness in *Parens Patriae* Commitments.

The United States Supreme Court has *never* held that dangerousness is constitutionally required in civil commitments. *A fortiori*, dangerousness is not required in *parens patriae* commitments, such as Appellant's.

In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), a non-dangerous person with schizophrenia suffered 15 years' commitment without treatment. *Id.* at 569. The Court's conclusions are phrased in terms of non-dangerous persons, and accordingly the Court's opinion does not support any conclusions about the constitutional necessity or sufficiency of dangerousness in civil commitments.

Moreover, the Supreme Court intentionally left open whether dangerousness is required by due process:

> We need not decide whether . . . a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person--*to prevent injury to the public, to ensure his own survival or safety,* or to alleviate or cure his illness.

O'Connor at 573-74 (footnote omitted; emphasis added).

Nevertheless, Dennis H. (Appellant) claims that *O'Connor* requires dangerousness. Appellant claims that he is not dangerous and therefore cannot be involuntarily committed or treated. (App-Brief 10).

The Court's holding was specific to Donaldson's circumstances: "a State cannot constitutionally confine *without more* a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and

responsible family members or friends." *O'Connor* at 576 (emphasis added). Courts and commentators have disputed whether the phrase "without more" means "without dangerousness," or "without treatment." One method designed to help settle this dispute would replace the crucial word "more" in the Court's holding first with "dangerousness," and then with "treatment," and evaluate which is more grammatical and meaningful.

When "dangerousness" is substituted for "without more" in the Court's holding, the result is: "a State cannot constitutionally confine *without dangerousness a* nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends," a result that is contradictory and barely grammatical. Moreover, the resulting holding is inconsistent with the rest of the opinion. Schopp, 4 Psychol. Pub. Pol'y & L. at 330.

Substituting "*treatment*," however, is both grammatical, and makes perfect sense: "a State cannot constitutionally confine *without treatment* a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."

The phrase "without more" signifies the *O'Connor* Court's view that beneficial treatment would (or might) justify commitment, and the Court's virtuous restraint in not deciding an issue not before it. "There is, accordingly, no occasion in this case to decide whether the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much or what kind of treatment would suffice for that purpose." *O'Connor,* 422 U.S. at 574 n.10.

In fact, what the Court is doing in those pages cited by Appellant as demonstrating that dangerousness is required is asserting: (1) that mental illness alone is not sufficient for commitment; (2) that protecting society from eccentric or bizarre behavior is not sufficient for commitment; and (3) that raising the standard of living of persons with mental illness is not sufficient to justify commitment. *Id.* at 575.

Noticeably absent from the list of justifications inadequate for commitment is beneficial treatment. If the *O'Connor* Court thought that beneficial treatment could not constitutionally justify commitment under any circumstances, the Court would have included treatment with other inadequate justifications. This consideration supports the conclusion that the *O'Connor* Court thought that beneficial treatment might justify commitment. Perhaps the best way to understand *O'Connor* is that the Court is asserting that the only possible justificatory purpose for committing a non-dangerous person with mental illness who can survive safely in the community is by providing *treatment*. The *rational relation test* is not met because Donaldson received no treatment.

The *O'Connor* Court does not decide whether beneficial treatment of non-dangerous persons satisfies due process. The Court signaled that treatment might justify the demands of due process, but did not signal that commitment requires dangerousness. Stephen H. Behnke, O'Connor v. Donaldson: *Retelling a Classic and Finding Some Revisionist History*, 27 J. Am. Acad. Psychiatry & L. 115, 125 (1999).

In *Addington*, 441 U.S. at 433, the Court held that procedural due process mandates that each element required to civilly commit someone be proven by "clear and convincing evidence." The substantive requirements for commitment were not before the Court, only the standard of proof. *Regrettably, some interpret the Court's discussion of Texas's statutory requirements as constitutional mandates*. For example, Appellant's Brief at 14, claims that "the Court noted that a state has no interest in confining people involuntarily…if they 'do not pose some danger to themselves or others.'" (quoting *Addington*). In fuller context the quote is:

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves . . . *Under the Texas Mental Health Code*, however, the state has no interest in

> confining individuals involuntarily . . . if they do not pose some danger to themselves or others.

Addington, 441 U.S. at 426 (emphasis added). In summary, the *Addington* Court examines procedural due process, not substantive due process and discusses the Texas requirements for civil commitment, not constitutional mandates. Far from restricting commitments to those who are dangerous, the *Addington* Court recognized the traditional constitutional *parens patriae* power of the state to care for citizens with mental illness who are unable to care for basic needs, including nourishment.

In *Jones v. United States*, 463 U.S. 354 (1983), the issues raised were procedural about the burdens and standards of proof. The issue of the substantive requirements for civil commitment, or release, were not before the Court, *Jones*, 463 U.S. at 363 n.11. Moreover, the case involved a police power insanity commitment, not a *parens patriae* commitment.

Nonetheless, *Jones* has been cited by Appellant for the claim that *Jones* requires dangerousness: "Petitioner's argument rests principally upon *Addington v. Texas* … in which the Court held that the Due Process Clause requires the Government in a civil commitment proceeding to demonstrate by *clear and convincing evidence* that the individual is mentally ill and dangerous." *Jones*, 463 U.S. at 362 (emphasis added). Appellant's Brief at 15 quotes that part of the above excerpt beginning with "the Due Process Clause," bolding the words "and dangerous." However, the reference to *Addington* makes clear, as does the issue in the case, that the phrase to be emphasized is "clear and convincing." The reference to dangerousness is to statutory requirements, not constitutional ones. Finally, the holding in the case is that lesser statutory proof requirements for criminal, as opposed to, civil commitments are rationally related to the purpose for insanity acquittal commitments, and are therefore constitutional. *Jones*, 463 U.S. at 363-66.

In *Foucha v. Louisiana*, 504 U.S. 71, 73 (1992), language in the plurality opinion asserts that the Constitution requires both mental illness and dangerousness, but the Court's

statements about dangerousness are both dicta and based upon a misunderstanding of the Court's prior opinions in *Jones* and *O'Connor*. Whether substantive due process requires dangerousness was not before the Court. Moreover, as Justice Thomas noted in his dissent, *Jones* held that mental illness and dangerousness was constitutionally *sufficient* for commitment, whereas the plurality of the Court misstated *Jones* as holding that mental illness and dangerousness were *necessary* for a commitment that is constitutional. *Id*. at 120. More importantly, the plurality had only four votes. Justice O'Connor made it crystal clear that her fifth and deciding vote was premised upon the opinion applying only to Louisiana's criminal commitment statute, and does not apply to other more narrowly drawn criminal commitment statutes. *A fortiori*, the opinion does not apply to civil commitment statutes, including Wisconsin' s Fifth Standard: "I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities." *Id.* at 86-87 (O'Connor, J., concurring in part).

Moreover, Justice O'Connor reiterated that *Jones* had noted that psychiatry is an inexact science, and that for that reason, "'courts should pay particular deference to reasonable legislative judgments' about the relationship between dangerous behavior and mental illness," such as those embodied in Wisconsin's Fifth Standard. *Id*. at 87 (quoting *Jones*, 463 U.S. at 364, 365 & n.13).

Close attention to arguments that dangerousness is required by Supreme Court precedent has disclosed two pervasive sins: (1) misreading the Court's discussion of a statutory dangerousness requirement as a constitutional requirement; or (2) improperly importing a requirement of dangerousness appropriate to a police power case into the *parens patriae* framework.

Moreover, because the substantive issue of the necessary or sufficient conditions for commitment were neither briefed nor argued in any of the above Supreme Court case*s*, the claim that these cases require dangerousness is implausible. Additionally,

because none of these opinions provide a justification for dangerousness or an analytical structure for determining when a person is dangerous, these opinions provide no guidance to lower courts. For example, these opinions do not provide assistance in determining whether the Fifth Standard requires dangerousness, nor whether mental or emotional harm is encompassed within the meaning of dangerousness. Taking these decisions as establishing a dangerousness requirement would wreck havoc in lower courts. This is further evidence that no Supreme Court decision holds that the due process requires dangerousness in commitments.

In 1972, a federal district court held that the Wisconsin commitment statute required dangerousness to self or others. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), vacated and remanded multiple times. *Lessard* was mooted, however, when the legislature adopted 1975 Wis. Laws, ch. 430, and is not binding on this Court either in its interpretation of Wisconsin law or the Federal Constitution. *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 844 (Wis.1998); *State v. Hajicek*, 620 N.W.2d 781 (Wis. 2001); *Arizonians for Official v. Arizona*, 520 U.S. 43, 58 n.11 (1997). Moreover, the decision is thirty years old and is based upon outdated science. Kress, 85 Iowa L. Rev. at 1318-21. Because *Lessard* created more substantive rights than any prior or subsequent case, some civil libertarians perpetuate the hopeful myth that *Lessard* is still authoritative, and woefully miscited it in this action supporting imminent dangerousness. However, no current court would so promiscuously create law permitting persons with serious mental illness to "rot with their rights on." Kress, 85 Iowa L. Rev. 1315(quoting Treffert). It is time for the myth to die:

> It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 609-10 (1999) (Kennedy, J., concurring).

CONCLUSION

For the above reasons, the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is approximately 2,989 words.

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Kenneth J. Kress