IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant,

v.

THE STATE OF TEXAS,

Appellee

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR THE APPELLANT

MARTHA L. BOSTON
109 East Tenth Street
Austin, Texas 78701
(Court-appointed)
512/472-0144

ROBERT PLOTKIN
PAUL R. FRIEDMAN
Mental Health Law Project
1220 - 19th Street, N.W.
Washington, D.C. 20036
202/467-5730

Counsel for Appellant

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: *Page*

Statutes:

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,

Appellant

v.

THE STATE OF TEXAS,

Appellee

ON APPEAL FROM THE SUPREME COURT OF TEXAS

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the Supreme Court of Texas is unreported. It is reproduced in Appendix A to Appellant's Jurisdictional Statement, at A-1. The opinion of the Civil Court of Appeals of the Ninth Superior Judicial District of Texas is reported at 546 S.W.2d 105. The trial court rendered no opinion.

QUESTION PRESENTED

Whether a state statute providing for indefinite commitment to a mental hospital, which has been construed to permit a state to prove the criteria for

ommitment by a standard of proof of less than beyond reasonable doubt, is violative of the fifth and ourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

On or about December 18, 1975, Appellant Frank)'Neal Addington and his mother argued, and his nother called the local sheriff. Appellant was arrested ınd jailed on a charge of "assault by threat," Tex. Penal Code Ann. tit. 5, §22.01(a)(2) (Vernon 1974), a Class 'C" misdemeanor carrying a maximum punishment of ı $200 fine with no provision for imprisonment. Tex. Penal Code Ann. tit. 3, §12.23 (Vernon 1974). Statement of Facts 484, 487-88, Supp. Transcript 19)[1] Appellant was interviewed by the County's psychiatric examiner, who recommended that Appellant be committed. (Tr. 3) The criminal charges were dismissed and the State filed its petition for Appellant's indefinite commitment. (Appendix 3)

In accordance with the Texas Mental Health Code, the State was required to prove that Appellant was "mentally ill" and that he required hospitalization "for his own welfare and protection or the protection of others." Tex. Rev. Civ. Stat. Ann. art. 5547-52 (Vernon 1958) (Hereafter references to the Texas Mental Health Code will be cited as art. 5547-[appropriate section])

[1]In Texas the verbatim transcript of the trial is known as the "Statement of Facts." (Hereafter references to the verbatim record will be cited as "S.F.") The formal papers filed in Texas cases are compiled in the "Transcript." (Hereafter references to the formal papers are cited as "Tr.")

However, the petition for commitment did not specify whether commitment was sought for Appellant's own welfare or for the protection of others, or both.

Trial on the petition for Appellant's indefinite commitment was had before a six-person jury and lasted for five days. According to the evidence presented at the trial, Appellant had lived at home with his parents and two brothers until about the age of 20, when he left and served two years in the army. (S.F. at 63-64, 169-70) Following his discharge, about 1968, Appellant once again lived in the family home.

Appellant's mother and father testified for the State that, during the previous five or six years, Appellant had on occasion broken windows and china dishes, and had threatened "to get" his parents and to withhold support for them in their old age. (S.F. 62-106, 169-70) They also testified, however, that he had never followed through on these threats and that neither they nor others had been seriously injured by Appellant's actions. (S.F. 133, 212-13)

The State also presented testimony from two psychiatrists, including the County psychiatric consultant. They testified that the events leading to the instant commitment proceeding were part of a repeating pattern usually initiated by an argument between Appellant and his parents. The parents would then call the County sheriff, who would take Appellant to the County jail and file minor criminal charges—ranging from destruction of property to assault by threat—against him. Next the County psychiatric consultant would usually recommend Appellant's commitment (S.F. 472-73), the outstanding criminal charges would be dismissed, and commitment proceedings would be instituted in their place. (S.F. 581). The two psychia-

trists had similar diagnostic evaluations of Appellant—variations on the theme of schizophrenia— and stated that, in their opinion, Appellant was a danger to himself and others. (S.F. 352-97, 466-504)

Appellant presented a number of witnesses who vigorously opposed the State's position that Appellant was dangerous and required commitment for his own welfare and protection or the protection of others. He called several mental health professionals who had been working with Appellant and his family over the past several years. They testified that all of Appellant's alleged acts had arisen either within the context of a disturbed family, every member of which needed help, or while Appellant was in confinement. They testified that their efforts had been directed at helping Appellant to develop job skills, to break away from the family home, and to develop improved methods of communicating with his family. They testified that new programs, formerly non-existent, were available to Appellant which might ameliorate his condition and reduce his anti-social behavior. In any event, they testified, institutionalization of Appellant was not required because he was not dangerous to himself or others. (S.F. 664-905, 914-1000)

At the close of the evidence, the jury was instructed, over Appellant's objections (Appendix 8-9), to make its finding by "clear, unequivocal and convincing evidence." (Appendix 11-12) After four hours of deliberation, the jury emerged with a non-unanimous verdict, five of the six jurors concluding that Appellant required commitment. The Court entered an order committing Appellant for an indefinite period to Austin State Hospital in Austin, Texas, where he has remained since February 6, 1976, deprived of his

liberty, stigmatized as a "mentally ill" person, and suffering physical and psychological harm as a result of his confinement. He will remain in the institution until the "head of the hospital" determines that he "no longer requires hospitalization." Art. 5547-80. He bears the burden of challenging and proving the impropriety of such a determination. Art. 5547-82.

Had Appellant remained in the criminal justice system, the State would have been required to prove its case beyond a reasonable doubt to a unanimous jury and, if convicted, Appellant would have been subject only to a $200 fine. By instituting commitment proceedings, the State was able to prove the same set of facts by a lower standard of proof to a non-unanimous jury, placing Appellant in jeopardy of losing his liberty for the rest of his life.

Appellant appealed the trial court's decision to the Texas Court of Civil Appeals on the ground that he had been denied due process of law by, *inter alia*, the Court's failure to instruct the jury that the State must prove its case for commitment beyond a reasonable doubt. (Jurisdictional Statement D-10)[2] The Court of Civil Appeals reversed the trial court, holding that due process requires the State to prove its case beyond a reasonable doubt in indefinite commitment proceedings, and remanding the case for a new trial. (Appendix

[2]Appellant also urged in the Court of Civil Appeals that he had been denied due process by the trial court's failure to apply the right against self-incrimination and to instruct the jury that a decision to commit required finding (1) that Appellant posed "a real and substantial risk of immediate and serious bodily injury" and (2) that no less restrictive alternative to hospitalization existed.

18-20)[3]

The State then filed an Application for Writ of Error to the Texas Supreme Court, urging that the judgment in the Court of Civil Appeals be reversed. (Jurisdictional Statement D-19) While that Application was pending, the Texas Supreme Court decided the same issue in *State v. Turner,* 556 S.W.2d 563 (Tex. 1977), holding that due process does not require proof beyond a reasonable doubt, and that a mere preponderance of the evidence is a sufficient standard in involuntary commitment cases. The Texas Supreme Court simultaneously granted the State's application in the instant case and, without oral argument or briefs, reversed the judgment of the Court of Civil Appeals, affirming the trial court's judgment of commitment. (Jurisdictional Statement A1-2)[4]

Because the highest State court construed and applied a State statute to require only proof by a preponderance of the evidence in the face of Appellant's constitutional challenge to the statute, Appellant brought his appeal to this Court pursuant to 28 U.S.C. §1257(2). Probable jurisdiction was noted on April 17, 1978. 98 S. Ct. 1604 (1978).

---

[3]The Court of Civil Appeals deemed it unnecessary to rule on the remaining issues presented by Appellant because it was able to decide the case on the standard of proof issue. (Jurisdictional Statement A-5)

[4]The other issues raised by Appellant in the Court of Civil Appeals were not presented in the Texas Supreme Court. In reversing the Court of Civil Appeals, and affirming the judgment of the trial court, the Texas Supreme Court has issued a judgment which is final for purposes of this Court's jurisdiction pursuant to 28 U.S.C. §1257. In the alternative, the Court can decide the instant appeal under the exceptions to §1257 enumerated in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

SUMMARY OF THE ARGUMENT

This appeal requires the Court to decide whether persons may be involuntarily committed to a mental institution for an indefinite period where the criteria for confinement have not been established by proof beyond a reasonable doubt.

The test for determining when the Constitution requires proof beyond a reasonable doubt is contained in *In re Winship,* 397 U.S. 358 (1970). There the Court examined the impact of the consequences of the particular proceeding to the individual. It concluded that where, as a result of the proceeding, a person may lose his unconditional liberty through state-imposed confinement and be stigmatized, proof beyond a reasonable doubt is required. Thus, for purposes of determining the standard of proof where such drastic consequences are involved, the state's motives for instituting the process are irrelevant.

The individual consequences of involuntary commitment to a mental hospital more than satisfy the *Winship* test. Commitment is a massive curtailment of unconditional liberty. *See, e.g., Humphrey v. Cady,* 405 U.S. 504, 509 (1972). Confined mental patients suffer at least the same deprivation of rights and liberties as do prisoners. Indefinite commitment to a mental institution, like incarceration in a prison, restricts the individual's freedom of movement, privacy and autonomy, right to association and right to travel. Even though involuntary confinement is premised upon a treatment rationale, it may still result in serious harm to the institutionalized inmates. In many jurisdictions, confined mental patients are exposed to brutal, overcrowded, unsanitary and understaffed facilities

providing little more than custodial services while posing danger to life and limb. There is also the well-documented risk that patients will suffer deterioration of their intellectual, social and physical functioning as a direct result of confinement.

In addition to this total loss of unconditional liberty, involuntarily committed patients are severely stigmatized as a result of the commitment adjudication. As the recent report by the President's Commission on Mental Health stresses, the general public continues to be frightened and repelled by persons labeled "mentally ill." Upon discharge, former patients continue to face discrimination in housing, employment and education. Scientific surveys indicate that among the various disability groups, the mentally ill usually rank lowest in social acceptability—below ex-convicts.

Because involuntary commitment results in the deprivation of unconditional liberty and in severe social stigma, the due process test set forth in *Winship* is met. Proof beyond a reasonable doubt is therefore constitutionally required in commitment cases.

Notwithstanding this compelling analysis, the Texas Supreme Court, relying upon its recent decision in *State v. Turner*, 556 S.W.2d 563 (Tex. 1977), concluded that a mere preponderance of the evidence was sufficient to justify indefinite commitment. This conclusion has been unanimously rejected by every court that has considered the question, as well as by an increasing number of state legislatures. Indeed, although *Winship* made it clear that civil labels, difficulties with the proof, or the state's benevolent motives were insufficient reasons for excluding proceedings from the application of the beyond a reasonable doubt standard, the Texas Supreme Court nonetheless relied

precisely upon these arguments to justify its decision.

However, even if Texas properly considered such interests—a point not conceded by Appellant—it is manifest that legitimate State interests are not subverted by application of the beyond a reasonable doubt standard. *First*, requiring proof beyond a reasonable doubt in commitment cases will not adversely affect the informality, flexibility or speed of the adjudication because Texas law already requires a number of formal procedural safeguards. *Second*, there is no valid reason to believe that juries, perhaps aided by expert testimony, are less able to render appropriate verdicts in commitment cases than in criminal cases. This Court has already recognized that evidence of past conduct pointing to probable consequences—the same type of evidence necessary for proving the need for indefinite commitment—is susceptible to proof. *See Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940). *Third*, the alleged impracticality of the reasonable doubt standard is belied by its present use in a growing number of jurisdictions. *Fourth*, the Texas legislature itself has statutorily required proof beyond a resonable doubt before mentally retarded persons may be involuntarily committed. Certainly the legislature would not have required application of an "unworkable" standard of proof that would "thwart" its interest in committing persons in such closely analogous proceedings.

Thus, under either the *Winship* analysis or an alternative analysis which allows the State's interest to be balanced against the individual interest in determining the appropriate standard of proof, the conclusion is the same—Appellant was entitled to have the necessity of his involuntary commitment determined by proof beyond a reasonable doubt.

ARGUMENT

I. INTRODUCTION

This case presents the question whether persons may constitutionally be involuntarily committed to an institution for an indefinite period where the criteria for confinement have not been established by proof beyond a reasonable doubt.[5]

In deciding this single, narrow issue, the Court is not required to consider the substantive criteria upon which commitment decisions are based,[6] or the necessity for the application of procedural due process

[5]The precise question is a matter of first impression in this Court. *But see Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 356 (1972), which presented a similar issue in the context of "defective delinquent" proceedings; the writ was dismissed as improvidently granted. *See also United States ex rel. Stachulak v. Coughlin*, 424 U.S. 947 (1976).

[6]For purposes of this appeal Appellant assumes, without conceding, that the substantive criteria required by Texas, art. 5547-51, are constitutional. This Court has yet to rule on the constitutionality of the substantive standards for involuntary commitment; *cf. Jackson v. Indiana*, 406 U.S. 715, 728 (1972); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). The grounds generally advanced to justify involuntary commitment vary widely among states. *See Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1201-07 (1974) [hereinafter cited as "*Developments—Civil Commitment*"]. The appropriateness of the Texas standards is not before the Court in this appeal.

to involuntary commitment proceedings.[7] Nor is this case concerned with temporary or emergency commitments.[8]

The Texas Supreme Court summarily rejected Appellant's contention that the Constitution requires the State to prove beyond a reasonable doubt the need for confinement in involuntary commitment proceedings. The Texas court relied upon its recent decision in *State v. Turner*, 556 S.W.2d 563 (Tex. 1977), and concluded that a mere preponderance of the evidence was sufficient to justify indefinite confinement.[9]

In *Turner* the appellant had argued that because indefinite commitment to a mental hospital results in substantially the same deprivation of liberty as in criminal or juvenile commitments, the same standard of proof required in those cases by *In re Winship*, 397

[7]Texas has legislatively determined that respondents in involuntary commitment procedures are entitled to such safeguards as notice, counsel and trial by jury. Art. 5547-42 through -57. While this Court has never specifically addressed the need for procedural safeguards in involuntary commitments, it seems beyond question that due process requires at least these procedural protections. *Cf. In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967). According to the Chief Justice, "There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) (citations omitted).

[8]Most states permit the temporary or emergency detention of persons for whom there exists probable cause to believe that the standards for involuntary commitment are satisfied. *See Developments—Civil Commitment, supra* note 6, at 1202. Such statutes permit detention pursuant to summary procedures for a time-limited period, at the end of which the person is either released or given a formal hearing. Texas, for example, permits both "emergency" and "temporary" hospitalization. Art. 5547-27 to -39.

[9]The statute involved, art. 5547-51(a), is silent as to the required standard of proof. In such situations determination of the appropriate standard is a task traditionally performed by the judiciary. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966).

U.S. 358 (1970), should apply. In support of its determination in *Turner*, however, the Texas court identified "several distinctions" between involuntary commitment and the "criminal proceedings" involved in *In re Winship*, and reasoned that such distinctions "justify the lesser standard." *Id.* at 566. The court held that the "mental patient's loss of liberty . . . is less severe than that suffered by the convicted criminal" because the involuntary mental patient is "entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others." *Id.* Moreover, even though personal liberty is at stake, that court held that "due process does not require, *ipso facto*, the highest standard of proof" because involuntary commitment furthers valid State objections "which should not be thwarted by application of a too strict burden of proof." *Id.* The court believed the reasonable doubt standard too strict because, given the inexact level of medical science, the State's ability to provide necessary treatment to persons in need would be unreasonably impaired. *Id.*

Basing its decision upon this attempt to distinguish involuntary commitment proceedings from criminal and juvenile cases, the Texas Supreme Court ruled that indefinite confinement could be constitutionally accomplished upon a simple preponderance of the evidence.[10] In mistakenly drawing these distinctions,

[10]The Texas Supreme Court explained in *Turner* that the standard of "clear, unequivocal and convincing evidence" does not exist in Texas jurisprudence as an intermediate standard of proof for the factfinder. 556 S.W.2d at 565. Inasmuch as the trial court applied the standard of "clear, unequivocal and convincing evidence" in this case, a ruling by this Court that requires a higher standard of proof than a preponderance of the evidence, but which does not specifically require proof beyond a reasonable doubt, would necessitate a remand to the Texas Supreme Court for clarification of the appropriate standard of proof within the guidelines to be established by this Court.

the Texas court has misinterpreted this Court's prior rulings and has relied upon reasoning specifically rejected by this Court in other cases concerning the process that is due where unconditional personal liberty and stigma have been at stake.

II. INVOLUNTARY COMMITMENT RESULTS IN THE COMPLETE LOSS OF CONSTITUTIONALLY PROTECTED LIBERTY AND IN SOCIAL STIGMATIZATION.

In *In re Winship*, 397 U.S. 358 (1970), this Court, in determining the standard of proof constitutionally required in a juvenile case, examined the impact of the consequences of the proceeding on the individual. It concluded that because the individual is exposed "to a complete loss of his personal liberty through a state-imposed confinement," and because a delinquency adjudication is a state-imposed label of stigma, the highest standard of proof must be applied. 397 U.S. at 363-64, 374. Thus the Court held that where these factors are present the criminal standard of proof beyond a reasonable doubt is applicable to proceedings otherwise labeled as "civil."

The Texas Supreme Court recognized that Appellant's unconditional liberty would be lost as a result of his involuntary confinement. It reasoned in *Turner* that because Texas statutorily accords its patients post-confinement rights to treatment, periodic review of their conditions, and release when the commitment criteria are no longer satisfied, their loss of liberty is "less severe" than that of persons convicted of adult or

juvenile offenses. *State v. Turner*, 556 S.W.2d 563, 566 (Tex. 1977). The Texas court did not address the social stigma that attaches to a determination of involuntary commitment. As will be demonstrated, however, the *Winship* principles may not be so easily discarded.

A. Involuntary Commitment Results in the Complete Loss of Personal Liberty.

The purported distinction between penal confinement and confinement pursuant to involuntary hospitalization pales beside one central common fact: the result of each process is the total denial of unconditional liberty. The liberty at risk is freedom from physical restraint, and its loss occurs upon any involuntary confinement in an institution. *In re Gault*, 387 U.S. 1, 50 (1967).

Just as confinement in a modern, physically attractive institution is as much a deprivation of liberty as incarceration in an antiquated facility—be it a hospital, prison or juvenile facility—the availability of post-confinement rights does not diminish the total restraint upon individual liberty suffered by persons who are confined. Stretched to its illogical extreme, the Texas Supreme Court's distinction would suggest that prisoners have not lost their unconditional liberty because this Court has held them constitutionally entitled to certain post-conviction rights, or because legislatures have generally statutorily provided them with rehabilitation programs or means for parole and/or early release. *Winship* does not turn on the subtle analysis of post-deprivation rights. The constitutional right to freedom is too precious to demean by such a test. As this Court has held,

> Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken.

Breed v. Jones, 421 U.S. 519, 530 n.12 (1975).

Moreover, even if the post-confinement rights of the incarcerated were relevant to the standard of proof, a realistic comparison shows that confined mental patients have no greater rights than prisoners.[12] Indefinite commitment to a mental institution—like a prison—restricts the individual's freedom of movement and severely limits the exercise of an array of fundamental rights, such as the right to privacy and autonomy, *Roe v. Wade*, 410 U.S. 113 (1973); the right to association, *Shelton v. Tucker*, 364 U.S. 479 (1960); and the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969).[13]

Similarly, the exercise of a patient's basic rights—to communicate, to practice his religion, to keep confidential his hospital records or to receive visitors—is subject, like that of prisoners, to the regulation of

---

[12]In Texas even the purposes of criminal and involuntary commitment are strikingly similar. Mental patients are institutionalized to obtain "needed care, treatment and rehabilitation." Art. 5547-21. Juveniles are to receive "a program of treatment, training, and rehabilitation . . ." Tex. Fam. Code Ann. tit. 3, §51.01(3) (Vernon 1975), while one of the primary goals of the adult corrections system is "the rehabilitation of those convicted of violations of this code." Tex. Penal Code Ann. tit. 3, §1.02(1)(B) (Vernon 1974).

[13]The constitutionality of the deprivations discussed in this section is *not* before the Court in this case. They are identified here only to demonstrate the total deprivation of liberty that results from commitment.

treatment personnel. Art. 5547-86, -87. *Cf. Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974). Like prisoners, *cf. Meachum v. Fano*, 427 U.S. 215 (1976), patients may be summarily transferred without their consent to any other state hospital for any reason. Art. 5547-73(a). Like prisoners, should patients leave the institution without authority, any health or peace officer may detain them. Art. 5547-72(b). Committed persons who are not Texas residents may be summarily returned, without their consent, to their original state of residence. Art. 5547-16(a).

Like prisoners, committed persons may be conditionally released from the institution. Art. 5547-79. However, unlike prisoners, their furloughs are statutorily subject to revocation by the head of the hospital without notice or hearing. *Id. Cf. Morrissey v. Brewer*, 408 U.S. 471 (1972).

Daily life in a mental hospital is not dissimilar from life in a prison. Both prisons and mental hospitals are usually large institutions concerned with custody and security. Indeed, in Texas, prisoners who are transferred to mental hospitals for treatment are given full credit on their sentences for the time spent there. Tex. Code Crim. Proc. Ann. art. 46.01(8) (Vernon Supp. 1966-67). Both prisons and hospitals are governed by the same immense discretion of the institutional staff, including non-professional attendants who generally have the most direct contact with the inmates. Patients and prisoners are dependent upon this staff for such simple amenities as cigarettes, toiletries or access to a television, and these privileges may be withdrawn without notice. Their living areas may be searched without warrant for contraband. They may be required

to perform institution-maintaining labor without compensation. Violations of institutional rules and policies—which themselves are often vague, inconsistent and unevenly applied—may result in placement in seclusion rooms, or in the use of physical or chemical restraints. Art. 5547-71. *See, e.g.*, Ferleger, *Loosing The Chains: In-Hospital Civil Liberties of Mental Patients*, 13 Santa Clara Law. 447 (1973); E. Goffman, *Asylums* (1961).

In some instances confined mental patients may have *fewer* rights than prisoners. Commitment impairs the patient's legal right to make decisions about personal medical care while in the facility. The head of the hospital is statutorily authorized to provide psychiatric treatment to committed patients. Art. 5547-70. This treatment is permitted even in the absence of consent. Tex. Rev. Civ. Stat. Ann. art. 3174b-2 (Vernon 1968). Furthermore, while confined, patients may be forced to take drugs or to undergo other types of treatments that produce harmful side effects. *See* Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right To Refuse Treatment*, 72 Nw. U.L. Rev. 461, 474-79 (1978).

Moreover, although involuntary confinement is premised upon the assumption that benevolent institutions will provide treatment, it may actually result in serious harm to individuals. In too many jurisdictions people are exposed to brutal, overcrowded, unsanitary and understaffed facilities which provide, at best, little more than custodial services. As the President's Commission on Mental Health recently reported, "We are keenly aware that even the best intentioned efforts to deliver services to mentally disabled persons have historically resulted in well-documented cases of

exploitation and abuse." 1 President's Commission on Mental Health, Report to the President 42 (1978). One federal court considering conditions in state institutions has written that "[t]he gravity and immediacy of the situation cannot be overemphasized. At stake is the very preservation of human life and dignity." *Wyatt v. Stickney*, 344 F. Supp. 387, 394 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). Another federal court observed that the "failure to protect the physical safety" of residents in a state institution resulted in "the loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident, and frequent bruises and scalp wounds . . . ." *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973).[14]

---

[14]Conditions in large state mental hospitals have historically been inadequate at best. *Jackson v. Indiana*, 406 U.S. 715, 734-35 & n.17 (1972). There are "substantial doubts about whether the rationale for pretrial commitment—that care or treatment will aid the accused in attaining competency—is empirically valid given the state of most of our mental institutions." *Id. See O'Connor v. Donaldson*, 422 U.S. 563, 569 (1975); American Bar Foundation, The Mentally Disabled and the Law 417-18 (S. Brakel & R. Rock eds., rev. ed. 1971); American Psychiatric Association, Task Force on the Right to Care and Treatment, The Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded 1 (Final Draft, May 1975); A. Deutsch, The Mentally Ill in America (2d ed. 1949); A. Deutsch, The Shame of the States (1948); E. Goffman, Asylums (1961); Joint Commission on Mental Illness and Health, Action for Mental Health (1961); Joint Information Service of the American Psychiatric Association and the National Association for Mental Health, Fifteen Indices: An Aid in Reviewing State and Local Mental Health and Hospital Programs 6 (1966); Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 Am. J. Psych. 1 (1958).

There is also a real potential that patients, even in humane institutions, will actually suffer deterioration of their intellectual, social and physical functioning as a direct result of confinement. This deterioration results from patients being treated in routinized, impersonal ways. Because they are economically unproductive, their job skills decline. The longer these patients remain in the institution, the more dependent on the institution they become, exhibiting flatness of response, withdrawal, muteness and loss of motivation. This phenomenon—known as "institutionalization"—has been widely documented in medical and social science literature.[15]

As has been demonstrated above, the liberty interests at risk for a person about to be involuntarily committed are at least equivalent to those lost by penal

---

[15]*See, e.g.*, R. Barton, Institutional Neurosis (1966); I. Belknap, Human Problems of State Mental Hospitals (1956); E. Goffman, Asylums (1961); Gruenberg, *The Social Breakdown Syndrome—Some Origins*, 123 Am. J. Psych. 1481 (1967); Kantor & Gelineau, *Making Chronic Schizophrenics*, 53 Mental Hygiene 54 (1969); M. Schwartz & C. Schwartz, Social Approaches to Mental Patient Care (1964); Smith, ***Experiencing Dehumanization in the Role of a Patient,*** Mental Hugiene, Winter 1972, at 75; Wing, *Institutionalism in Mental Hospitals*, 1 Brit. J. Soc. & Clinical Psych. 38 (1962); and J. Wing & G. Brown, Institutionalism and Schizophrenia: A Comparative Study of Three Hospitals (1970). *See also* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1108, 1126-29 (1972); Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. 18, 43-44, 124, 637 (1961).

or juvenile incarceration.[16] These interests are not diminished by the state's benevolent intent to provide care and treatment—particularly where that "treatment" is itself of questionable value.

B. Involuntary Commitment as a "Mentally Ill" Person Results in Social Stigmatization.

In addition to the complete loss of liberty resulting from involuntary commitment, a decision to commit infringes a second constitutionally protected liberty—the individual's interest in his reputation and standing in society. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). In its conclusions below, however, the Texas Supreme Court failed to recognize the substantial stigma that accompanies involuntary commitment.

"Stigma" is a token of infamy, disgrace or reproach that "might seriously damage [a person's] standing and associations in [his] community." *Board of Regents v. Roth, supra*, 408 U.S. at 573. Committed persons "may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more

[16]In Texas the total deprivation of one's liberty is compounded because the jury is also permitted to find proposed patients legally incompetent, rendering them civilly "dead." Art. 5547-51(c). Persons adjudicated incompetent are not permitted to vote, Tex. Const. art. 6, §1; to serve on juries or testify as witnesses, Tex. Code Crim. Proc. Ann. art. 35.16(a), 38.06(1) (Vernon 1966); or to initiate certain types of civil actions, *Clarady v. Mills*, 431 S.W.2d 63 (Tex. Civ. App. 1968) (divorce). In this case the State failed to plead this Appellant's incompetence. Thus the trial court properly excluded evidence, and did not instruct the jury, on this issue. However, because the actual order of commitment filed by the trial court indicates that Appellant was nonetheless adjudged incompetent (*see* Appendix 20), there exists some confusion with regard to Appellnat's legal competence. This clerical error should be corrected upon remand to the State courts.

severe consequences than do the formally imposed disabilities." *Developments-Civil Commitment, supra* note 6, at 1200. The recent Report to the President from the President's Commission on Mental Health found the general public frightened and repelled by the term "mental illness." 1 Report to the President, *supra*, at 55. The Commission specifically noted that fears about people who have been confined in state hospitals still abound, and that, upon discharge, former patients continue to face discrimination in housing, employment and education. *Id.*[17]

The Commission's Task Panel on Public Attitudes and Use of Media for Promotion of Mental Health (Appendix-Vol. IV at 1867), reported that "ignorance, prejudice, and fear of 'mental illness' and the 'mentally ill' remain widespread throughout America." It attributed much of this stigma to the continuing uncertainty about the causes and cures of mental illness. It found that the general public, often influenced by news accounts in the popular media, equates mental illness with violent and anti-social behavior. *Id.*[18]

The American Psychiatric Association has identified fear of this stigma as a significant barrier to treatment for people who might otherwise seek necessary services. According to its official *Position Statement*

[17]*See also* Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness*, 35 J. Consulting & Clinical Psych. 159 (1970); Fracchia, *et al., Public Views of Ex—Mental Patients: A Note on Perceived Dangerousness and Unpredictability*, 38 Psych. Rep. 495 (1976).

[18]This negative public attitude is likewise reflected in the broad range of civil disabilities legislatively imposed upon persons labeled "mentally ill." *See* Section II.A, note 16, *supra*; Note, *Mental Illness: A Suspect Classification?*, 83 Yale L.J. 1237 (1974).

on Discrimination Against Persons with Previous Psychiatric Treatment, 135 Am. J. Psych. 643, 643 (1978), "[k]nowledge of previous psychiatric treatment and/or the possession of a psychiatric label is . . . used prejudiciously to exclude individuals, as if society's institutions were attempting to protect themselves against what is felt to be a threat."[19]

The degree of stigmatization increases proportionately with the level of treatment and official intervention. Thus, while social stigma attaches even to voluntary patients who privately consult therapists, inpatient hospitalization for mental disorder results in a correspondingly higher stigma.[20] Moreover, there is evidence to indicate that doctors are more likely to rehospitalize a former patient than they are to hospitalize a person who has not previously been an inpatient.[21]

[19]Third-party knowledge of previous treatment emanates from a variety of sources. Computers store vast amounts of personal data. Applications for jobs, loans, scholarships, insurance, licenses, and government benefits routinely request information about mental hospitalization. Even where such questions are not directly asked, applicants are at a loss to explain away large gaps in their employment or educational histories. In Texas, the head of the hospital is statutorily authorized to release patients' records without need for the consent of the affected individual. Art. 5547-87(a)(4). *See generally* American Psychiatric Association, Task Force Report 9, Confidentiality and Third Parties (1975); N. Spingarn, Confidentiality: A Report of the 1974 Conference on Confidentiality of Health Records (1975); *Whalen v. Roe*, 429 U.S. 589 (1977); *Anonymous v. Kissinger*, 499 F.2d 1098 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *Spencer v. Toussaint*, 408 F. Supp. 1067 (E.D. Mich. 1976).

[20]Bord, *Rejection of the Mentally Ill: Continuities and Further Developments*, 18 Soc. Prob. 496 (1971).

[21]Mendel & Rapport, *Determinants of the Decision for Psychiatric Hospitalization*, 20 Archives Gen. Psych. 321 (1969).

Institutionalization of a mentally ill person often produces negative expectations in those with whom the person later comes into contact. For example, studies indicate that potential employers are reluctant to hire former patients because they believe that such employees cause problems, require increased supervision and are able to accept fewer employment responsibilities.[22] The general social relations of many recently discharged patients "are often characterized by social distance, distrust, or denial of employment."[23]

Although some progress in public awareness has been made,

> it is quite insufficient, and arbitrary discrimination in the main continues. For example, it remains difficult for former patients of public mental hospitals everywhere to obtain employment. Scapegoating and discrimination have psychological, social, and cultural impacts on family, individuals, and institutions.

APA Statement on Discrimination, supra, at 643. The ex-patient's experiences result in a negative self-concept and a loss of self-confidence and esteem. Society's expectations become self-fulfilling prophecies. E. Goffman, *Asylums* 354-56 (1961).

The stigma which attaches to formerly committed patients is certainly as great as that associated with the ex-offender—both have been officially labeled societal

[22]Howard, *The Ex-Mental Patient as an Employee*, 45 Am. J. Orthopsych. 479, 479-80 (1975).

[23]Whatley, *Social Attitudes Toward Discharged Mental Patients*, in The Mental Patient: Studies in the Sociology of Deviance 401 (S. Spitzer & N. Denzin eds. 1968). *See also* Phillips, *Rejection: Possible Consequence of Seeking Help for Mental Disorders*, in Mental Illness and Social Processes (T. Scheff ed. 1967).

deviants in need of institutionalization.[24] In fact, scientific surveys indicate that among the various disability groups, the mentally ill usually rank the lowest in social acceptability—even *below* ex-convicts.[25]

III. BECAUSE INVOLUTARY COMMITMENT RESULTS IN THE TOTAL DEPRIVATION OF LIBERTY AND IN SEVERE SOCIETAL STIGMA, THE DUE PROCESS TEST SET FORTH IN *WINSHIP* REQUIRES APPLICATION OF THE HIGHEST STANDARD OF PROOF.

In every trial there exists a potential for error in the fact-finding process. *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). The standard of proof by which the parties must establish their cases reflects the risk of error that society is willing to tolerate in that given proceeding. As the seriousness of the consequences

[24]In Texas many of the civil disabilities imposed against mental patients closely parallel those applicable to persons convicted of felonies. *See, e.g.*, Tex. Const. art. 6, §1 (prohibits "idiots," "lunatics," and "persons convicted of any felony" from voting); Tex. Code Crim. Proc. Ann. art. 35.16(a)(4) (Vernon Supp. 1978) (persons convicted of felony and persons who are "insane" or have "mental defects" may not serve on juries).

[25]Harasymiw, *et al., A Longitudinal Study of Disability Group Acceptance*, 37 Rehabilitation Literature 98 (1976). *See also* Brand & Claiborn, *Two Studies of Comparative Stigma: Employer Attitudes and Practices Toward Rehabilitated Convicts, Mental and Tuberculosis Patients*, 12 Community Mental Health J. 168 (1976) (no significant difference between ex-convict and ex-patient); Tringo, *The Hierarchy of Preference Toward Disability Groups*, 4 J. of Special Educ. 295 (1970).

resulting from an erroneous judgment increases for the person subject to loss of liberty or property interests, a higher standard of proof is required to guard against the potential error.[26]

Where an individual's unconditional liberty is at stake—a personal interest of "transcending value," *In re Winship*, 397 U.S. at 364—the risk of an erroneous judgment is so great for the individual that this Court has required the State, as a matter of due process, to bear the consequences of an error by proving its case beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364, 368.[27] This conclusion reflects a fundamental philosophy of our legal system that, because wrongful confinement is so abhorrent, it is preferable to allow a

[26]At common law the need for a higher standard of proof has been recognized in cases where there was thought to be a special danger of deception, or a special need to protect favored social policies. *See* C. McCormick, Handbook on the Law of Evidence §321, at 681 (1954). This Court has applied a similar rule. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958), in which the Court held that when noncriminal tax assessment procedures deterred the constitutional right to free speech, due process required the State to justify its action with "sufficient proof." *Id.* at 529. Likewise a plurality of the Court believed the risk of error in libel cases threatened first amendment interests, justifying a standard greater than preponderance of the evidence. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In cases arising under federal statutes the Court has rejected preponderance of the evidence where government actions had a significant impact on important individual interests. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966); *United Mine Workers v. Gibbs*, 383 U.S. 715, 739 (1966).

[27]*Patterson v. New York*, 432 U.S. 197 (1977), did not change this rule, and is not applicable here. *Patterson* upheld the constitutionality of the state's shifting to a criminal defendant the burden of proving his affirmative defense. *Cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975). It did not disturb the *Winship-Mullaney* requirement that the state bear the burden of proving its original allegations beyond a reasonable doubt.

number of guilty people to go free rather than to confine erroneously a single innocent individual. That same tenet governs decisions to involuntarily commit persons to mental institutions. A distinguished commentator has written that the plight "of one who is falsely found insane and relegated to life imprisonment is beyond conception. No greater cruelty can be committed in the name of the law." 5 Wigmore, Evidence §1400 (3d ed. 1940).

In *Winship* the state argued that juvenile proceedings should be exempt from the higher standard of proof because they were noncriminal matters intended for the benefit of the youth involved. According to the state, guilt or innocence was not the point. Rather the central issue was the juvenile's need for treatment and rehabilitation. Proof beyond a reasonable doubt, the state concluded, would destroy the juvenile system's legitimate and beneficial purposes. 397 U.S. at 365-66.

The Court held, however, that where individuals are threatened with the complete loss of their unconditional liberty and exposed to accompanying stigma, the highest standard of proof is constitutionally "indispensible." 397 U.S. at 364. In rejecting the state's arguments for a lower standard, the Court adhered to its conclusions in *In re Gault*, 387 U.S. 1, 37 (1967), that lesser standards cannot be justified simply because the proceeding is labeled noncriminal, or because its purposes are beneficent. 397 U.S. at 365-66. What matters constitutionally is the potential result—loss of liberty and stigma—and not the benevolent motivations of the state.

The same reasoning which was rejected by this Court in *Winship* is the essence of the Texas Supreme Court's

decision in the *Turner* case. Under the *Winship* analysis it is irrelevant that the state acts with paternalistic intent, or that the state's case may be difficult to prove beyond a reasonable doubt, or that the particular proceeding is labeled civil rather than criminal. The only question a court need answer is whether the individual is threatened with the total loss of his unconditional liberty and an accompanying social stigma. Where these interests are at stake, as here they most certainly are, due process requires proof beyond a reasonable doubt.

The Texas Supreme Court's conclusion that evidence beyond a reasonable doubt is not required to justify involuntary commitment is clearly untenable after *Winship*. It is also contrary to the great weight of the decisional law.[28] Moreover, eight states have

[28]Numerous courts have required proof beyond a reasonable doubt in involuntary commitment proceedings. *See In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Hawaii 1976); *Davis v. Watkins*, 384 F. Supp. 1196, 1199 (N.D. Ohio 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473, *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975) *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); *In re Hodges*, 325 A.2d 605 (D.C. 1974); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964); *Superintendent of Worcester State Hospital v. Hagberg*, 372 N.E.2d 242 (Mass. 1978); *Lausche v. Commissioner of Public Welfare*, 225 N.W.2d 366 (Minn. 1974) (proof beyond a reasonable doubt for initial commitment); *Proctor v. Butler*, 380 A.2d 673 (N.H. 1977); *In re Heukelekian*, 94 A.2d 501 (N.J. Super. Ct. App. Div. 1953); *State v. O'Neill*, 545 P.2d 97 (Or. 1976); *In re Alexander*, 554 P.2d 524 (Or. Ct. App. 1976); *In re Levias*, 517 P.2d 588, 590 (Wash. 1973) (clear, cogent and convincing evidence is the civil analogue to beyond a reasonable doubt). Other courts have required proof beyond a reasonable doubt in related proceedings: *United States ex rel. Stachulak v. Coughlin*, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976) (reasonable doubt for commitment under Sexually Dangerous Persons Act where state seeks

(continued)

statutorily adopted beyond a reasonable doubt as the proper standard.[29]

(footnote continued from preceding page)
an indeterminate sentence in lieu of a criminal prosecution if the person is charged with a criminal offense and is believed to be sexually dangerous); *People v. Burnick*, 535 P.2d 352, 121 Cal. Rptr. 488 (1975) (reasonable doubt for indeterminate confinement of "mentally disordered sex-offender"); *People v. Pembrock*, 320 N.E.2d 470 (Ill. Ct. App. 1974) (reasonable doubt for commitment of person as sexually dangerous); *In re Andrews*, 334 N.E.2d 15 (Mass. 1975) (reasonable doubt for person committed for indeterminate period as a sexually dangerous person). *But see Sabon v. People*, 350 P.2d 576 (Colo. 1960) (preponderance approved in dicta); *Fhagen v. Miller*, 317 N.Y.S.2d 128 (Sup. Ct. 1970), *aff'd*, 321 N.Y.S.2d 61 (App. Div. 1971) (preponderance standard acceptable in *temporary* commitment).

State and federal courts have unanimously rejected the preponderance rule, although some have adopted the intermediate standard of proof by clear and convincing evidence. *See Stamus v. Leonhardt*, 414 F. Supp. 439 (S.D. Iowa 1976); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Dixon v. Attorney Gen.*, 325 F. Supp. 966 (M.D. Pa. 1971); *In re Beverly*, 342 So. 2d 481 (Fla. 1977); *In re Stephenson*, 367 N.E.2d 1273 (Ill. 1977); *People v. Sansone*, 309 N.E.2d 733 (Ill. Ct. App. 1974); *In re Hatley*, 231 S.Ed.2d 633 (N.C. 1977); *State v. Valdez*, 540 P.2d 818 (N.M. 1975); *Commonwealth ex rel. Finken v. Roop*, 339 A.2d 764 (Pa. Super. Ct. 1975); *In re Ward M.*, 533 P.2d 896 (Utah 1975); *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109 (W. Va. 1974). According to the Texas Supreme Court, however, this alternative is unavailable in Texas, because "Texas Courts review evidence by but two standards"—preponderance of the evidence or beyond a reasonable doubt. *State v. Turner*, 556 S.W.2d 563, 565 (Tex. 1977). Ironically, that court, in renouncing the highest standard in favor of the preponderance rule, relied exclusively upon the decisions of two jurisdictions which advocate the clear and convincing standard. 556 S.W.2d at 566.

[29]At least eight states statutorily provide for proof beyond a reasonable doubt in involuntary commitment: Hawaii (Haw. Rev. Stat. §334-60(b)(4)(I) (Supp. 1977)); Idaho (Idaho Code §66-329 (1973 & Cum. Supp. 1977)); Kansas (Kan. Stat. Ann. §59-2917 (1976)); Montana (Mont. Rev. Codes Ann. §38-1305(7) (Cum. Supp. 1977)); Oklahoma (Okla. Stat. Ann. tit. 43A, §54.1(C) (West Cum. Supp. 1977)); Oregon (Or. Rev. Stat. §526.130 (1977)); Utah (Utah Code Ann. §64-7-36(6) (1978)); and Wisconsin (Wis. Stat. Ann. §51.20 (West Supp. 1977)).

The State, in indefinitely depriving this Appellant of his unconditional liberty and imposing upon him a life-long badge of infamy, may not escape the necessity for proving its case by proof beyond a reasonable doubt simply by posting a "hospital" sign atop its institution.

IV. EVEN IF A BALANCING OF THE COMPETING INTERESTS IS CONSTITUTIONALLY PERMISSIBLE, THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT WILL NOT "THWART" LEGITIMATE STATE OBJECTIVES.

The Texas Supreme Court, in refusing to apply the reasonable doubt standard to involuntary commitments, blatantly ignored this Court's analysis in *Winship*. It justified its decision on the grounds that the highest standard of proof would thwart legitimate state objectives. But, as explained in the preceding section, the State's alleged interests in a lower evidentiary standard are simply irrelevant under the *Winship* test.[30]

[30]The Texas court's reasoning is also inconsistent with the alternative analysis proposed by Justice Harlan in his concurring opinion in *Winship*. He believed that applicable standards of proof should not be determined solely by individual liberty interests, but rather by reference to the "comparative social costs of erroneous factual determinations" to the state as well as to the individual. 397 U.S. at 370. His balancing of the interests there led Justice Harlan to agree with the majority that the consequences to an erroneously committed juvenile far outweigh the costs to the state in permitting a juvenile delinquent to go free. *Id.* at 374. Appellant believes that this case is controlled by the majority decision in *Winship*. But, as will be demonstrated in this section, both Justice Harlan's analysis and the balancing of competing interests analysis subsequently employed by this Court in making procedural

(continued)

Even if the State's interests are relevant, however, the Texas court's conclusion that the State's interests would be impermissibly thwarted is clearly erroneous. *First*, application of the beyond a reasonable doubt standard will have no "discernable effect upon the [commitment] proceedings themselves." *In re Ballay*, 482 F.2d 648, 663 (D.C. Cir. 1973). Use of the standard will not "remake" the process, *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971), because the Texas legislature has already determined that persons subject to commitment are entitled to such procedural safeguards as a hearing, representation by counsel, and trial by jury. The addition of the beyond a reasonable doubt standard will have no "effect on the informality, flexibility, or speed of the hearing at which the fact-finding takes place." *In re Winship*, 397 U.S. at 366.[31]

(footnote continued from preceding page)
due process determinations, *see, e.g., Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Morrissey v. Brewer*, 408 U.S. 471 (1972), lead to the conclusion that proof beyond a reasonable doubt is required in involuntary commitment cases. The Texas Supreme Court overweighted the State's interests and failed to adequately consider the individual interests in its decision.

[31]The requirement of proof beyond a reasonable doubt does not impede the State's ability to exercise its emergency police powers *prior* to a hearing, art. 5547-38, nor will it interfere with the State's interest in providing individualized treatment *after* adjudication, art. 5547-70, because the standard of proof is applicable only to the actual adjudication of mental illness and the need for hospitalization. Further, in those instances in which the need for immediate care or restraint before or during the hearing is warranted, Texas statutorily permits such interim custody and treatment. Art. 5547-67.

The argument that the person undergoing commitment will suffer "trauma" which will "aggravate" his or her condition is also inapplicable, for any potential "trauma" would be "wholly unaffected by the burden of proof." *In re Ballay, supra*, 482 F.2d at 663. The Texas legislature, by providing a full hearing process, has already made a *(continued)*

Second, the primary concern of the court below was that the State's interests in protecting and treating its citizens through involuntary commitment would be thwarted because the inexactitudes of medical knowledge render it impossible for a jury to make the required judgment beyond a reasonable doubt. It noted what it termed a "significant difference" between a jury's ability to make a "retrospective assessment" of facts in a criminal case as opposed to the determination of mental illness and "future conduct and future need" to be made at a commitment hearing. *State v. Turner, supra*, 556 S.W.2d at 566. These "problems inherent in methods of proof" were used to justify the "alteration" of "rules of law." *Id.*

Constitutional "rules of law" may not be so easily "altered." Under *Winship* a state cannot relax the standard of proof simply because the proof is difficult. The standard is *designed* to be difficult. "[T]he reasonable doubt standard is designed particularly to partially offset [infirmities in the substantive proof] by reducing the risk of factual error." *In re Ballay, supra*, 482 F.2d at 667. *United States ex rel. Stachulak v. Coughlin, supra*, 520 F.2d at 936. Consequently, if the unreliability of psychiatric diagnoses and predictions has any relevance to the standard of proof, it is in requiring the state to satisfy the highest standard before basing deprivations of liberty on such speculative information.

(footnote continued from preceding page)
determination in favor of procedural protection over the risk of "trauma." In addition, Texas law minimizes any supposed "harmful effect" resulting from the hearing by permitting it to be held in suitable physical locations and by permitting proposed patients to voluntarily absent themselves. Art. 5547-49. The proposed patient may also act to minimize any potential "trauma" by waiving a jury trial, art. 5547-48, by stipulating to certain factual matters, and by agreeing voluntarily to enter the hospital.

Moreover, the supposed "problems inherent in methods of proof" in commitment cases may be more imaginary than real. The evidence actually considered is not exclusively limited to experts' speculative predictions.[32] At Appellant's trial in this case, for example, there was extensive testimony adduced by both parties from both lay and expert witnesses about his past behavior, his family relationships, and his mental state. With reference to an analogous "psychopathic personality" statute, this Court has already upheld a standard which required proof of a "habitual course of misconduct in sexual matters" such that the person is likely to injure others. According to the Court, that statute called for "*evidence of past conduct* pointing to probable consequences," which was "as *susceptible of proof as many of the criteria constantly applied in prosecutions for crime.*" *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940) (emphasis supplied). There is simply no valid reason to believe that juries, using such evidence and perhaps aided by expert testimony, are less able to render appropriate verdicts in commitment cases than in criminal or quasi-criminal cases.

[32]Even the information that typically forms the basis for experts' opinions is familiar to, and capable of being understood by, a lay judge or jury. The psychiatrist typically utilizes "[a]ll material available in making any kind of evaluation . . . . These sources include relations, spouse, people close at hand at the scene, any police reports and interviews with police officers who made up the reports." R. Sadoff, Forensic Psychiatry 104 (1975); *see also* Rubin, *The Psychiatric Report*, in Readings in Law and Psychiatry 125 (Allen, Ferster & Rubin eds. 1975). In addition, each of these persons and reports—the "collateral sources"—may be called as witnesses or introduced into evidence. *See, e.g.*, Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 Wis. L. Rev. 503, 524-26.

Third, the alleged impracticality of the reasonable doubt standard is further belied by the fact that it is presently in operation in at least thirteen jurisdictions, eight as the result of statutory enactments.[33] Appellant has been unable to find a single report documenting an adverse impact on state interests in any of these jurisdictions.

In Wisconsin, for example, the beyond a reasonable doubt standard was initially required by court decision in *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1974), *vacated*, 414 U.S. 473 (remanded for more specific order), *more specific order entered*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975) (remanded for reconsideration of the abstention principle), *order reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976); and later codified by the legislature, Wis. Stat. Ann. §51.20. A study of *Lessard*'s actual implementation reports that although the decision was initially "criticized as unworkable by some [*Lessard*'s mandates, including the reasonable doubt standard] are feasible and manageable." Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 Wis. L. Rev. 503, 508. "The dire prediction that [the extensive safeguards required by *Lessard*] would lead to hundreds of mentally ill persons 'dying with their rights on' has not come to pass [in Wisconsin]." *Id.* at 559.

Statistics from Hawaii, which amended its code to require evidence beyond a reasonable doubt in accord with the decision in *Suzuki v. Quisenbury*, 411 F. Supp. 1113 (D. Hawaii 1976), indicate that between May 1976 and March 1978 there were 251 petitions filed for

[33]*See* notes 28 and 29 *supra*.

involuntary commitment to the Hawaii State Hospital. Of that number, hearings were actually held in 167 cases, resulting in the commitment of 126 persons. In other words the state prevailed in 75 percent of the hearings held under the reasonable doubt standard. Mental Health Division, Hawaii State Dep't of Health, *A Review of Admissions to Hawaii State Hospital*, report prepared for Third Conference on the Law, Honolulu, Hawaii, May 15-16, 1978, at 4.

Fourth, and finally, the *Texas legislature has statutorily required proof beyond a reasonable doubt* before a mentally retarded person may be involuntarily committed. Art. 5547-300, §37(m)(6). In these closely analogous proceedings the petitioner must prove to a judge or jury that the person subject to commitment is "mentally retarded" and "represents a substantial risk of physical impairment or injury to himself or others, or he is unable to provide for and is not providing for his most basic physical needs." Art. 5547-300, §37(b)(1), (2). The legislature would not have required application of an "unworkable" standard of proof that would "thwart" its interests in committing mentally retarded persons. Because the State's interests in the commitment of mentally retarded persons and mentally ill persons are the same, the State has effectively conceded that proof beyond a reasonable doubt is not an unworkable standard.

Thus, the Texas Supreme Court's reasoning that the "inherent problems of proof" in commitment cases necessitate rejection of the proof beyond a reasonable doubt standard is without any basis in fact or law. In fact, it is contradicted by actual experience in those jurisdictions requiring proof beyond a reasonable doubt, and by the judgment of the Texas legislature in a

closely analogous situation. Even if state interests are relevant to determining the standard of proof, the speculative interests identified by the court below are insufficient to outweigh Appellant's constitutional right to liberty and reputation.

CONCLUSION

The Texas court has equated the risk of an erroneous deprivation of liberty with the risk in an ordinary automobile negligence dispute. But where unconditional liberty and stigma are at stake their deprivation must be justified by proof beyond a reasonable doubt.

For this reason, the judgment of the Texas Supreme Court should be reversed and the case remanded for further proceedings consistent with this Court's order.

Respectfully submitted,

Martha L. Boston

Robert Plotkin
Paul R. Friedman

Counsel for Appellant