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Supreme Court of Texas.
The State of Texas, Petitioner,
v.
K.E.W., Respondent.
Nos. 09-0236; 09-0243.
February 18, 2010.

Oral Argument

Appearances:Donald S. Glywasky, Galveston County Legal Department, Galveston, TX, for petitioner.

Thomas W. McQuage, Galveston, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett. Justice Eva Guzman did not participate.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the final matter 09-0236, the State of Texas vs. K.E.W.

MARSHALL: May it please the Court, Mr. Glywasky will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DONALD S. GLYWASKY ON BEHALF OF THE PETITIONER

ATTORNEY DONALD S. GLYWASKY: May it please the Court, we are here because of an error made by the San Antonio Court of Appeals 30 years ago in a case called State vs. Lodge. And I only realized this two, three days ago. The Court in the K.E.W. case -- and I'm just going to refer to him as KEW, because it's phonetic and it's easier to say -- the Court said that to support the commitment in this case, the State was required to show actual dangerous behavior manifested by some overt act. That is a quote from a case Taylor v. State. The First Court cited three cases, J.M., K.D.C. and Taylor for that proposition. J.M. just

cites K.D.C. K.D.C. just cites Taylor, and Taylor cites Lodge. Now you may recall that Lodge is the last mental health case brought before this Court, and it wasn't brought before this Court on this issue. The Lodge court 30 years ago said the mootness doctrine does not apply to these cases. That's why we're here. Well, what the Court of Appeals did say was we do not need to decide whether actual dangerous behavior is required to support commitment, but they did cite a case, Moss vs. State, for that proposition. Moss vs. State was a Dallas Court of Appeals case cited in 1976, and Moss --

JUSTICE DAVID M. MEDINA: What should have been done here?

ATTORNEY DONALD S. GLYWASKY: The commitment should have been affirmed.

JUSTICE DAVID M. MEDINA: And why is that?

ATTORNEY DONALD S. GLYWASKY: Because there was sufficient evidence.

JUSTICE DAVID M. MEDINA: And what is that evidence? Is it the fact that he was going around making threats that he's going to try to impregnate his step-sister and everyone else in the world, and where is the dangerous act involved? Those are just words.

ATTORNEY DONALD S. GLYWASKY: As with most things in this world, success is -- 90 percent of success is showing up, and he showed up. And what he said to a mental health worker, Dawn Roberts, and it's in the record, is he showed up to impregnate some women at the Gulf Coast Center. Doctors both testified as to his advanced delusional state and his absolute commitment, totally convinced that he had been visited by aliens, had a chip put in him and he was tasked to create a new alien hybrid race --

JUSTICE DAVID M. MEDINA: Well, there are --

ATTORNEY DONALD S. GLYWASKY: -- and he was to do that -- I'm sorry, Judge.

JUSTICE DAVID M. MEDINA: There are people that think they've been -- had a chip implanted in their bodies and they're not in mental health institutions for whatever reason. But what -- doesn't there have to be something more than mere words to subject any individual to confinement?

ATTORNEY DONALD S. GLYWASKY: What the Legislature has required is some overt act that would tend to support a finding that is a risk of serious harm.

JUSTICE DAVID M. MEDINA: What is the overt act here? I mean it's just words. He hasn't done anything, he hasn't harmed himself, he hasn't harmed others. Or do we have to wait until that overt act occurs?

ATTORNEY DONALD S. GLYWASKY: In the case of G.H. vs. State, a Fourteenth Court of Appeals case. That Court of Appeals observed that the state or relatives of an ill person is not required for a harm to actually occur before they intervene. If this man had threatened to shoot one of these staff persons and had gone down to Academy to buy a gun, under the test adopted by K -- the First Court of Appeals, buying a gun is a perfectly legal act. Nothing dangerous about that. Why should he be committed just because he threatened somebody and performed a legal act of buying a gun? Well, when you look at his mental illness, his serious state of delusion, his absolute commitment to his belief that he was to create a new alien race and he shows up looking for one of the women they identified him? I'm sorry, that's enough. Showing up is the overt act. There is nothing in the law except for a 30-year-old mistake that requires that overt act to be dangerous per se.

JUSTICE DAVID M. MEDINA: What happens if there's a hearing -- I think there should be -- probably is a hearing in these type of procedures.

ATTORNEY DONALD S. GLYWASKY: Absolutely.

JUSTICE DAVID M. MEDINA: And at the time of the hearing, the person who has exhibited psychotic behavior and has been put under meds, appears at the hearing and appears to be fine, what happens then?

ATTORNEY DONALD S. GLYWASKY: Well, that is not what we have here. What we have here is a person who is in an advanced agitated state.

JUSTICE DAVID M. MEDINA: Well, I'm asking you, what happens in that situation?

ATTORNEY DONALD S. GLYWASKY: Yes, sir, I understand.

JUSTICE DAVID M. MEDINA: Because many times that is the case. Someone can exhibit psychotic behavior, they are given medicine and if they take their medicine for a period of time, they go up in front of the Judge and the Judge says, “You look fine to me, you're out on the streets,” and yet the family or maybe some other potential victim has concerns. How does a judge, how is that evaluated? And if it's not done the way you think it should be or the State thinks it should be, how should it be done?

ATTORNEY DONALD S. GLYWASKY: Doesn't the success of that treatment verify that treatment is needed and would be successful? That is an ongoing theme in most of these cases. But it is a sad situation. You see, these people get out, they stop taking their meds, because from what I've heard, these meds make everybody feel terrible when they take it. They can't judge that when they stop taking them that their behavior declines, but in terms of a hearing where the person has just been medicated for three or four days, whatever it is before they get to the hearing, I don't think that is really evidence that the person has not committed an overt act and is a risk of serious harm. It may be indicative of the fact that --

JUSTICE NATHAN L. HECHT: I'm not clear whether you rely very heavily on A(2)C. Is most of your argument under A(2)B, the physical - the cause serious harm to others?

ATTORNEY DONALD S. GLYWASKY: Yes, sir.

JUSTICE NATHAN L. HECHT: The court of appeals dealt with both of them, but it seems to me that you're not stressing A(2)C.

ATTORNEY DONALD S. GLYWASKY: I really have not brought forward the other theory of the decline of behavior.

JUSTICE NATHAN L. HECHT: Right. So we're just focusing on B here now?

ATTORNEY DONALD S. GLYWASKY: Yes, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: Was there -- how old was this person?

ATTORNEY DONALD S. GLYWASKY: Oh, I have no earthly idea. I believe he was in his mid thirties.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, is that in the record or not?

ATTORNEY DONALD S. GLYWASKY: You would find it in the medical record, yes, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay. And did, was there a history of harmful conduct by this person in the past?

ATTORNEY DONALD S. GLYWASKY: The only history that we are aware of that we can glean from the record, which admittedly is not a model of custodial efficiency, is that he had had a prior commitment from Austin State Hospital, had apparently been receiving ongoing psychiatric care at the MHMR facility in Texas City, but from what I have seen, I could not glean any evidence of a prior violent act by this person.

CHIEF JUSTICE WALLACE B. JEFFERSON: And is there evidence of any specific threat to a specific person?

ATTORNEY DONALD S. GLYWASKY: Yes. Dawn Roberts -- well, threat gets to be a real elastic term. Dawn Roberts is the MHMR counselor who testified he showed up at the MHMR Center to impregnate some of the women there. The other evidence is that Michael Fields, a counselor there, saw him, met him at the door, saw his agitated state. All of the staff there were so concerned with the staff member's safety that they hid her in the back.

JUSTICE DALE WAINWRIGHT: Why did they hide her in particular?

ATTORNEY DONALD S. GLYWASKY: Because she was scared for her safety.

JUSTICE DALE WAINWRIGHT: Did the patient identify himself?

ATTORNEY DONALD S. GLYWASKY: He had been treated there and they recognized him.

CHIEF JUSTICE WALLACE B. JEFFERSON: This is obviously a serious case now, but if you look at it, you can look at it another way, that the State can commit somebody who has never harmed anybody, never had a history of violence with respect to anybody, makes no specific threat to a particular person. That's a pretty powerful tool that the State can use then, and now these aren't exactly the facts of your case, but what lifts this case from that rather benign set of facts to a situation where somebody against their will can be confined in a psychiatric facility?

ATTORNEY DONALD S. GLYWASKY: Confinement is one of the most serious deprivations we can have under the federal Constitution, and the procedures that we have in place here under these statutory guidelines, I believe, satisfy the Fourteenth Amendment requirements of substantive due process. But in terms of this case, what separates it is the fact that he showed up. He had a plan that was extremely detailed. and Dr. Stone testified in his direct that this young man, thirties -- you know, believe me, I'm there -- this young man had a very advanced detailed plan on, including a list of the women identified to him, and a firm, absolute conviction he was to impregnate them to create a new race, which --

JUSTICE DAVID M. MEDINA: The Chief raised a question about his age. What if it was an 80-year-old man, or someone who is not capable of doing or carrying out his threat? Does that matter?

ATTORNEY DONALD S. GLYWASKY: There was a case, and I think it was D.C., where an older man was kind of an old codger, I guess is a phrase, who threatened the Governor of the State of Texas, phoned in a threat that said he was going to kill him. There was no evidence in that record that showed that individual, that old man had ever harmed somebody, although he himself had said he had shot somebody on his property, because it was his right under the Texas Constitution to protect his property. But as far as I recall from that case, there was no independent verification that he had actually shot anybody. But he was mentally ill, he was angry, he was delusional, and just phoning in that threat to the Governor's office was enough to get him committed.

JUSTICE DAVID M. MEDINA: How long are these confinements for?

ATTORNEY DONALD S. GLYWASKY: Ninety days. We're talking about the short-term environment is up to 90 days. There is another set of statutes that go beyond that, but 90-day statutes are what we're concerned with.

JUSTICE DALE WAINWRIGHT: Counsel, let me be clear here. Your reply brief says on page 4 that it's the State's contention that K.E.W.'s trip to MHMR in search for one of the women identified to him?

ATTORNEY DONALD S. GLYWASKY: Yes.

JUSTICE DALE WAINWRIGHT: And you just said, I thought, a few minutes ago that the patient did not identify any particular woman, and you had mentioned a Dawn Roberts, who the counselors hid when the patient came. Did he -- and it's in the record, I suppose, and I'm sure we'll get to it as we dive further into the record, but did the patient identify Dawn Roberts when he went to MHMR?

ATTORNEY DONALD S. GLYWASKY: I probably misspoke when I answered your question, something I typically do. There is no direct evidence he has said, “I'm here to see Dawn Roberts to impregnate her to create a new alien hybrid race.” However, the inference is there. There are enough facts that we can glean he did identify her, because the staff had enough information to hide her. She had enough information to be in fear for her safety.

JUSTICE DAVID M. MEDINA: Isn't the test, though, clear and convincing evidence?

ATTORNEY DONALD S. GLYWASKY: Absolutely.

JUSTICE DAVID M. MEDINA: And you said there was enough evidence, so it seems that you're saying that there is circumstantial evidence that he will be able to carry out this act?

ATTORNEY DONALD S. GLYWASKY: Certainly enough to defeat a no evidence review, that the court of appeals said there was no evidence to support the commitment here. No evidence, a tiny little bit. I mean what they have said is there isn't enough evidence to create a surmise to support that he was at risk of serious harm. I don't think Dawn Roberts felt like that. She was the one hiding, she was the one afraid for her safety.

JUSTICE DALE WAINWRIGHT: And, Counsel, there were other women there but they, the staff didn't hide any of the other women --

ATTORNEY DONALD S. GLYWASKY: That's correct.

JUSTICE DALE WAINWRIGHT: -- just Dawn Roberts?

ATTORNEY DONALD S. GLYWASKY: It was her. She was, that one counselor was the one who was hidden in the back.

JUSTICE DON R. WILLETT: You say he had a list. A mental list, an actual list, a physical list?

ATTORNEY DONALD S. GLYWASKY: One of the doctors actually saw the list, but they were just first names. So he could not identify, they could not, you know, verify it by last names. It was just a list of first names.

JUSTICE PAUL W. GREEN: Now I understood the record also showed that he didn't intend to do this against anyone's will.

ATTORNEY DONALD S. GLYWASKY: You know --

JUSTICE PAUL W. GREEN: I understand. From their perspective, it may be, well, you know, they don't know, but is that correct that he didn't? Is that what the record shows?

ATTORNEY DONALD S. GLYWASKY: No. I'm appalled -- surprised that the First Court of Appeals found that so persuasive, but if you look in the record, I think it was Dr. Ortiz was asked, “Did he ever tell you he would impregnate them against his will -- their will?” And her response was “No.” It doesn't say that he actually came out and denied it, it doesn't say that Dr. Ortiz asked. All the evidence shows is that wasn't established by the Court. Judges, I see my red light is on.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counselor. The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. McQuage will present argument for the Respondent.

ORAL ARGUMENT OF THOMAS W. MCQUAGE ON BEHALF OF THE RESPONDENT

ATTORNEY THOMAS W. McQUAGE: May it please the Court, I thought I would maybe try to answer some of those direct questions and then talk a little bit about our record, because I think I can point out the very page where the State's case just kind of fell apart, and maybe talk about that formula or that template about what's an overt act and how do we know one when we see it, and when are we supposed to find them. For some reason, I happen to remember the medical records reporting Mr. W was 45 years-old. I do think he has a history with MHMR, I'm not sure how regular a customer he is.

JUSTICE NATHAN L. HECHT: You don't question, I take it, that he was mentally ill?

ATTORNEY THOMAS W. McQUAGE: Oh no, Your Honor, as a fruit cake, I think clearly.

JUSTICE NATHAN L. HECHT: All right.

ATTORNEY THOMAS W. McQUAGE: A delusional belief system about impregnating earth women, you know. Here, you know, you can put a little bracket and the Justices can put their favorite joke about impregnating earth women. Clearly mentally ill. But only -- and I think maybe a theme that goes through a lot of these, but only potentially dangerous in the sense that the psychiatrists all think, “This guy is potentially dangerous because of this delusional belief system.” Which that's what happens when you have those kind of belief systems. But the question about what is this overt act thing, and what do we have to prove to lock people up for what they think? It doesn't just come from Lodge against the State, it comes from the statute that talks about an overt act and the nexus between the overt act and the danger. I would suggest sounds more than just kind of merely corroborative, it not like a pretty strong nexus. It tends to confirm that the dangerous act, or the danger is likely.

JUSTICE DAVID M. MEDINA: You know -- I'm sorry, Justice Johnson.

JUSTICE PHIL JOHNSON: The Court of Appeals' opinion said that, it says, “The evidence in the record before us does not rise to the level of clear and convincing evidence that K.E.W. was likely to cause serious harm to others.” Now that sounds like they were requiring more proof than what the statute. The statute simply requires that there is evidence that tends to confirm the likelihood, and it seems like that moves the bar a little from what the Court of Appeals measured it by.

ATTORNEY THOMAS W. McQUAGE: Your Honor, what I was reading them to say was, where is this overt act, where is the statutory element of the overt act tending to confirm a likelihood of dangerousness?

JUSTICE PHIL JOHNSON: Okay. So would you agree that the proof standard is not that they must prove a

likelihood of serious harm to someone, but rather simply an act that tends to confirm that?

ATTORNEY THOMAS W. McQUAGE: Well, I would say I think there's two statutory elements now that are kind of the same conclusion. I think the expert has to opine to a serious likelihood of serious harm, because the statute requires harm to self or others as a condition of commitment, and this overt act --

JUSTICE PHIL JOHNSON: Well, the statute requires an overt act that tends to confirm the likelihood. It seems like it, what do those words mean?

ATTORNEY THOMAS W. McQUAGE: You know where I think they come from? I haven't read this anywhere. It kind of reminds me of conspiracy law. You know, how we could sit around and talk about committing a crime with each other all day long, but we're not really guilty of a criminal conspiracy until some one of us goes out and does something. And that something is an overt act in furtherance of the conspiracy, kind of in the --

JUSTICE HARRIET O'NEILL: But surely you don't have to wait until a woman is impregnated or a woman is accosted, and so how much deference do we have to give the doctors who examined him, and in their opinion there was an imminent danger?

ATTORNEY THOMAS W. McQUAGE: I think deference towards doctors is a good thing, Your Honor. But I think, first, these opinions expressed in this record I don't think were about imminent harm, I think they're about potential harm. And I tried to talk in the brief about that is a way to distinguish legally sufficient proof of some kind of serious harm, the imminence of harm that ties in with the statute, statutory phrase of likelihood.

JUSTICE HARRIET O'NEILL: But how --

ATTORNEY THOMAS W. McQUAGE: But these doctors didn't --

JUSTICE HARRIET O'NEILL: Let me just ask you. How can a lay person assess that, a lay person who doesn't understand the etiology of mental illness, and so if a doctor says they were agitated enough such that someone specifically felt unsafe, then why shouldn't we defer to the doctor's assessment?

ATTORNEY THOMAS W. McQUAGE: Not to sound flippant, my first thought of an answer is because they'd lock us all up if they had a chance. But the real genuine thing, I think if I can make a reference to that Moss against the State case that Mr. Glywasky talked about from back in the '70s. That was an opinion -- Justice Guittard is the author of that opinion and I think one of the giants of his era, and that was about a lot of things, and he talked about -- you know, in those days at least there was some serious question of psychiatric testimony being able to predict future dangerousness with any accuracy. So I think if you go look in the -- we can have a reported decision, but I feel the doc's, the psychiatrists aren't really that good at predicting future dangerousness either.

JUSTICE NATHAN L. HECHT: Well, I wonder if, if we're not sort of evolving a little bit since then though. How much of this is societal? You can't make an obstreperous comment to a flight attendant, you can't make any even a joking comment to a TSA official at an airport. Counsel referred to any kind of threat against a public official, thank goodness. You can't make -- we're going to treat all of these with sort of zero tolerance. Doesn't that mean that an overt act really sort of ratchets down, as we take it in the context of what's going on?

ATTORNEY THOMAS W. McQUAGE: Well, Your Honor, but I think the big picture of this thing, and maybe something probate judges and prosecutors and everybody need to stop and think about a little bit every once in a while, the big -- the Chief talked about this a little bit, semi, the kind of volcanic sort of power we're talking about here of locking up people for what they think. And the clear and convincing standard and the overt act thing, these are the walls we put around that to keep it kind of bottled up where

it's supposed to be.

JUSTICE NATHAN L. HECHT: But when you can lock someone up for making an obstreperous comment to a flight attendant, doesn't that put this sort of in another context?

ATTORNEY THOMAS W. McQUAGE: Well, okay, the flight attendant issue is kind of touchy, but I guess going to the MHMR facility is kind of touchy too.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY THOMAS W. McQUAGE: But I think -- you know, my answer to this is we have a statutory requirement for overt act. It's probably not that hard if you bring the right testimony to court with you, and that's what really happened in this case. And, you know, I think in this case and some of the cases where you -- well, my first point about the record in this case, it's on page 29, when Mr. Fields gets there and is asked “What did Mr. W say or do when he showed up at the MHMR facility?” That's kind of the testimony we're waiting for. Okay, here it comes, the overt act. Well, come to find out, he didn't personally know the answer to that question, he just heard about it when he was congregating with other staff members after the fact.

JUSTICE DAVID M. MEDINA: Well, I don't think the State wants to get in the business of locking people up that are sane.

ATTORNEY THOMAS W. McQUAGE: I'm sorry, Your Honor?

JUSTICE DAVID M. MEDINA: I don't think the State wants to get into the business of locking up people who don't have a mental incapacity, and I think mental illness is obviously a serious disease that's misunderstood in our society. And for you to cast light on your client as being a fruit cake, I think does a disservice to your client, because obviously he has serious mental issues. And it seems to me that the best individual, or the best group of individuals to make that decision are the doctors that have evaluated him and not lawyers who are advocating on his behalf for whatever reason, and that the overt act here is perhaps just showing up and making the threat. Because as Justice O'Neill has said, do you give someone a free pass to commit the act further? These aren't statements that are made by sane people, or perhaps you are insane if you're going to threaten a flight attendant. But this is a person, as you have said, who has a history of mental anguish, so maybe the test is different.

ATTORNEY THOMAS W. McQUAGE: Oh yes, Your Honor. Your Honor, I think all that's true, but I think there should -- I think we should be thinking about this too, that there's a framework overlying this, and if you go back maybe and read that, you know, Texas against -- the US Supreme Court case about, you know, we don't lock up the mentally ill for being inconvenient to us or embarrassing us, or, well, causing us a lot of trouble, and we don't want to do that, and that's why we have a clear and convincing standard. And certainly the statute and I think the history back when Moss against the State was written back in '76, there was a statute that required mental health experts, two of them, to opine to mental illness. And we've got more than that. Partly, I think the doctors are thinking about treatment and potential harm, and when they see a potential for harm, they think they should be doing something about that and treating the person that's mentally ill.

JUSTICE DALE WAINWRIGHT: Counsel, what's your position of, you started into this a minute ago, of what the record says about whether K.E.W. identified a particular person at MHMR?

ATTORNEY THOMAS W. McQUAGE: I didn't even know it was Ms. Roberts they were talking about that got whisked back to the back room until Mr. Glywasky mentioned it today.

JUSTICE DALE WAINWRIGHT: But you knew there was some woman who was secreted away and hidden, right?

ATTORNEY THOMAS W. McQUAGE: That's true, Your Honor.

JUSTICE DALE WAINWRIGHT: Did your client identify a particular person?

ATTORNEY THOMAS W. McQUAGE: I didn't know it was anybody in particular. Well, I knew there was an MHMR --

JUSTICE DALE WAINWRIGHT: I'm really not asking what you knew, I'm asking what the record shows.

ATTORNEY THOMAS W. McQUAGE: Okay, which is, which is only what the record tells me. It's the old Will Rogers thing, “All I know is what I read in the paper.” But what I read in the paper was he showed up, something was said, something happened, a female employee of MHMR was removed from that area.

CHIEF JUSTICE WALLACE B. JEFFERSON: Would it change your argument if he showed up and said, “I intend to impregnate many women here, and I in particular want to impregnate Ms. Roberts today”? Would that change your argument about --

ATTORNEY THOMAS W. McQUAGE: Not yet. I think there is one more thing it would take to change it.

CHIEF JUSTICE WALLACE B. JEFFERSON: What is that?

ATTORNEY THOMAS W. McQUAGE: And that's where we're, now we're getting kind of close to the spectrum or string or whatever, how close is that to an act of dangerousness?

CHIEF JUSTICE WALLACE B. JEFFERSON: Pretty close.

ATTORNEY THOMAS W. McQUAGE: I think I'd want to know what the psychiatrist thought about just how dangerous that statement was.

CHIEF JUSTICE WALLACE B. JEFFERSON: Uh-huh.

JUSTICE HARRIET O'NEILL: Well, I know, but --

JUSTICE DALE WAINWRIGHT: Well, let's put this in a different construct.

JUSTICE HARRIET O'NEILL: You talked a minute ago about a doctor maybe having different motivations to give this sort of testimony. What better evidence is there of imminent danger than the thought that people perceived it and hid?

ATTORNEY THOMAS W. McQUAGE: Okay. I'm suggesting -- well, that's evidence of the reaction that the people had to whatever was said or done, but still, they still don't know what was said or done so that the fact finder, in this case the probate judge, can evaluate exactly what that was. I still think -- you know, one of the -- the Chief raised a question about, well, some things are just inherently obviously real dangerous looking, and some of them are kind of innocuous, and some of them are kind of in the middle. The ones that are pretty close to the middle, maybe we need to get the psychiatrist to tell us what he thinks about how dangerous that is. You know, we had that -- Mr. Glywasky and I mentioned that J.J.K., I think it was, case in the briefs because there's some colorful facts, and with the lady that knocks the door off the hinges in the seclusion room, and talks about all the bodies that are going to be strewn around if she goes to the State Hospital. But then a psychiatrist talks about future dangerousness in terms of, well, yeah, she could hurt herself, or she could aggravate people so much and make them so angry they might hurt her. And that's a -- okay, so that doesn't have anything to do with bodies around the hospital, that's just one of those sort of generic potential harm kind of pieces of expert testimony.

JUSTICE DALE WAINWRIGHT: Counsel --

ATTORNEY THOMAS W. McQUAGE: If we've got testimony like that here, I'd be saying well, this, you know, talking about impregnating all the women here is going to be kind of like the lady telling, talking about the bodies if she goes to the State Hospital.

JUSTICE DALE WAINWRIGHT: You mentioned a, the criminal conspiracy analog, and I was thinking about that actually yesterday as well. Let's say there's two men are talking about kidnapping a woman, she works at MHMR, and they are involved in a criminal conspiracy, the agreement is proven. One of them then goes to MHMR where she works. Is that an overt act sufficient in the criminal conspiracy context in the example I've given you?

ATTORNEY THOMAS W. McQUAGE: Your Honor may have already kind of pushed the envelope of my expertise on conspiracy law.

JUSTICE DALE WAINWRIGHT: Well, let's answer my hypothetical, and then we'll see how it relates to this case.

ATTORNEY THOMAS W. McQUAGE: No, I'm not sure what that means in terms of criminal conspiracy. I think the answer would be it's got to be something, we still don't know that was in furtherance of the crimes. There's got to be something else, some other corroborative testimony, some evidence about why he was going to MHMR.

JUSTICE DALE WAINWRIGHT: Well, he --

ATTORNEY THOMAS W. McQUAGE: I think the answer -- that's probably pretty close.

JUSTICE DALE WAINWRIGHT: In my example, the two had agreed on a criminal conspiracy to kidnap this woman, one of them then goes where she works.

ATTORNEY THOMAS W. McQUAGE: Okay. I'm guessing, and the criminal conspiracy, the kidnapping case, I bet you that's sufficient corroboration.

JUSTICE DALE WAINWRIGHT: So if your client identified a woman that, because of this alien mission he's on, he wants to impregnate, and then goes to where she works, and the staff after dealing with him, talking with him, decide they need to hide this one woman, not the other however many that worked there, why is that not an overt act that shows that he was trying to execute his mission with her?

ATTORNEY THOMAS W. McQUAGE: I think what's troubling to me about that is it sort of sounds like the HMHR staff deciding the factual element of the State's case of an overt act.

JUSTICE DALE WAINWRIGHT: Let's assume they didn't hide her, let's assume he identifies her, but then goes to where she works because it's part of executing his mission. Take the step out of it if that bothers you. Why is that not an overt act?

ATTORNEY THOMAS W. McQUAGE: Well, I think that's -- I don't think we should worry about how the staff reacted.

JUSTICE DALE WAINWRIGHT: I've given you that one. Assume it's out.

ATTORNEY THOMAS W. McQUAGE: Okay. I think we should be worried about empirically or objectively how -- we've got some adjectives in the statute that are “likely” and “serious” that go along with

this word “harm,” and I think the State has a burden of proof, a clear and convincing burden of proof about something that is going to show a likelihood of serious harm.

JUSTICE PHIL JOHNSON: Well, but we talked about that a while ago. Something that tends to confirm the likelihood of serious harm. It doesn't say that they have to prove the likelihood of serious harm.

ATTORNEY THOMAS W. McQUAGE: Okay. That's right, Your Honor. And we are talking about -- well, but that's the, that's the other end of the bridge, of course, is some kind of harm that is likely to occur, and we know that it's likely to occur because of this overt act that takes place.

JUSTICE PHIL JOHNSON: Okay, now back to Justice Wainwright, you were discussing with him -- I'm sorry for interrupting.

ATTORNEY THOMAS W. McQUAGE: I think what we both -- you know, and I think that you know that just kind of you can sort of see an example at page 29 of our record, that some of those court of appeals opinions that you read where the expert testimony actually kind of sounds kind of silly. You know, like, “Well, she might be a danger to herself because she might leave the burners on the stove,” or this J.J.K. case we mentioned, where there didn't seem to be much to do with all the dead bodies around the State Hospital, and I think we know what happened. This is kind of a low-budget end of the -- you know, the State doesn't apply the resources and can't obviously to the mental health commitments like criminal cases. This doesn't have all the investigative powers of the DA's office to bear, you know, we've got contract prosecutors with a stack of files like this going to hearings. Maybe they don't woodshed their expert witnesses before trial, like they really ought to in terms of this nexus of likelihood of serious harm that we're talking about. I think another thing that happens from the bench, maybe, I've never heard any judge say this, but I think because of the practical mootness of these cases, not legal but practical --

JUSTICE NATHAN L. HECHT: What is the status of the case?

ATTORNEY THOMAS W. McQUAGE: Oh, I think 90 days expired a long time ago. I don't even know if Mr. W stayed the whole 90 days, because you know a lot of them don't.

JUSTICE NATHAN L. HECHT: It didn't, the appeal didn't suspend that?

ATTORNEY THOMAS W. McQUAGE: No. And so that's all, that's all done. And so part of my point here, a probate judge sitting there looking at a mentally ill person, thinking, “This guy needs to go to the hospital and get his meds straightened out.” I don't know how much that judge thinks about what the court of appeals is going to think about it next year or this Court the year after next. And maybe that's something that's okay, or something the Court doesn't really want to worry about, but I do think it might help if both the Judiciary and the State understood, when you lock -- there's a cost to locking people up, just like there is on the criminal side. And it involves due process and it involves satisfying burdens of proof, and maybe if this Court reminds us all of that, you know, then the State will understand -- I think that the bottom line of this case is the State didn't really have its case totally together and didn't really prove up the overt act because the wrong witness showed up. That's a fairly simplistic view of what happened in this particular case. And the lesson maybe is, if you want to lock people up, you've got to pay the cost that goes with that by proving your case and bringing the people to court that they need to testify to those things. I thank the Court for the honor to be here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you very much, Mr. McQuage. The Court will hear rebuttal.

JUSTICE DON R. WILLETT: The list that was found on this fellow, it was found on him at the facility, correct?

REBUTTAL ARGUMENT OF DONALD S. GLYWASKY ON BEHALF OF PETITIONER

ATTORNEY DONALD S. GLYWASKY: At the hospital, he carried it, yes.

JUSTICE DON R. WILLETT: And it was only first names you mentioned, but were they all names? Did they match up more or less to employees or women who worked there?

ATTORNEY DONALD S. GLYWASKY: Absolutely no evidence in the record on that issue.

JUSTICE DON R. WILLETT: Okay.

ATTORNEY DONALD S. GLYWASKY: Agreed, the record here isn't great, but I will say this. Judge, the answer to your criminal conspiracy question is yes. Showing up is enough, you need an act in furtherance of the conspiracy. That's what we have here.

JUSTICE NATHAN L. HECHT: Enough to charge?

ATTORNEY DONALD S. GLYWASKY: I'm sorry, Judge.

JUSTICE NATHAN L. HECHT: Enough to charge?

ATTORNEY DONALD S. GLYWASKY: Enough to charge.

JUSTICE NATHAN L. HECHT: But not necessarily enough to prove it.

ATTORNEY DONALD S. GLYWASKY: You had asked the question about TSA. That comes up under the Patriot Act, and I'd love to be talking to you here about the Constitutionality of the Patriot Act, but we're not here today on that.

JUSTICE DAVID M. MEDINA: We'll give you time after this is over.

ATTORNEY DONALD S. GLYWASKY: Can I have five minutes to brief it?

JUSTICE DAVID M. MEDINA: Are there other standards, other tests, as suggested by opposing counsel, that the State needs to fulfill if they're going to confine someone that appears to be mentally ill by a doctor's diagnosis so that we as, I guess, citizens of the State are making sure that those people that are confined are confined properly? To have the same type of standards that they do in criminal proceedings, I guess is my question.

ATTORNEY DONALD S. GLYWASKY: It's not the standard set out in criminal proceedings. That notion was rejected by this Court in Addington in the late '70s, the statute very clearly sets out the standard. After the Moss case indicated that it was misquoted by Lodge for the proposition that there has to be a specific overt act, the Legislature enacted a statutory scheme that we have today in the early 1980s, and I think it was the 1982 Legislature adopted the requirement that there be a specific overt act, and they did not require in that legislative standard that the overt act be dangerous per se. The court of appeals has misquoted that proposition for 30 years, and that's why we're here today. There is no requirement the overt act be dangerous per se. I'm concerned about the notion of having psychiatrists be the sole source of evidence to commit somebody. We don't have to go there today because we had other evidence. Mr. Fields testified how agitated K.E.W. was when he showed up at the facility. Dawn Roberts, page 23 of the record, testified the medical records showed that K.E.W. wanted to get some women pregnant. One of the things the court of appeals did here is they have mistakenly and erroneously discounted the acts, the overt acts as merely descriptions of mental illness, and, indeed, they are. There are just further indicia of how sick this poor man was, but there are also indicia of the fact that he was a risk of harm to these people. Just because the proposition establishes his mental illness does not mean it cannot be used to establish his risk of harm. And

it did, it did.

JUSTICE PHIL JOHNSON: You're here on the legal sufficiency issue, so if you prevail it goes back to the court of appeals for a factual sufficiency review?

ATTORNEY DONALD S. GLYWASKY: Yes, sir. They would have to conduct the factual sufficiency, and I'll talk to them later about that, because I'm sure the evidence will show if they use the correct standard, that the evidence was factually sufficient in this case. Again, and I'm hammering on this, but they seem to require a specific dangerous act.

JUSTICE DAVID M. MEDINA: What's the practical effect of that, that the individual here has since been treated and released? What's the practical effect of the case going back down?

ATTORNEY DONALD S. GLYWASKY: The practical effect is the probate courts of this State will have some real guidance as to what the law requires. One of the things Tom and I both agree on, and I think he did a heroic job trying to categorize and make sense of all the different results we have in these cases. You can't do it, they're totally irreconcilable. J.J.K., she is angry, she's threatened the staff. She tore the door off the hinges of a treatment room, and the court of appeals says that's not evidence of danger? Come on. Those doors are heavy. But the practical effect is that probate courts in this State are going to have some real guidance on how to apply this statute, and I'm sure, given wide varying results, that they are desperate for that guidance. Unless there's further questions, thank you for your time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. That concludes the arguments for this morning. The Court now wishes to thank the law school, the administration, the faculty, and particularly the students for your rapt attention to the arguments. That was observable even from here. You've treated us very well, and I think it's our second time for this university to hear arguments. The first time was before several of us came to the Court. Maybe Justice O'Neill and Justice Hecht were here, but everyone else is brand new. But they had good things to report, and this visit only confirms that. So thank you very much for your attention. We hope to see you back soon. Remember, our hearings are all open, so if you ever want to come and witness an argument in the courtroom itself, you are more than welcome. And if you can't make that, all of our arguments are streamed on line and they're archived. So you can actually watch, go back and watch this argument if you missed something important. Thank you very much. The Marshall will now adjourn the Court.

MARSHALL: All rise.

[End of proceedings.]

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