

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
Docket No. 91-2267

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In re Commitment of)
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MARY C.)
)
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BRIEF OF THE MENTAL HEALTH LEGAL ADVOCACY
PROJECT OF THE COMMITTEE FOR PUBLIC
COUNSEL SERVICES, AMICUS CURIAE

INTERESTS OF AMICUS CURIAE

Established by St. 1983, c. 673, § 1, and
codified at G.L. c. 211D, the Committee for
Public Counsel Services (Committee) is a state
agency created to "establish, supervise and
maintain a system for the appointment or
assignment of counsel" for indigent persons
involved in criminal and certain noncriminal
judicial proceedings in which the right to
counsel has been established. G.L. c. 211D, § 5.

Among such noncriminal proceedings are those
in which highly restrictive or highly intrusive

actions (e.g., commitment to a psychiatric facility; administration of antipsychotic medications) are sought to be imposed upon or to be taken against putatively mentally disabled persons.

In recognition of the highly complex and specialized nature of such "mental health" proceedings, the Committee has established the Mental Health Legal Advocacy Project (Project). Among the Project's responsibilities is the training and supervision of counsel appointed or assigned in mental health proceedings in order to ensure that its clients are afforded the effective assistance of counsel to which they are entitled.

The Project asserts a special interest in the instant matter in that this Court is called upon to determine whether an indigent putatively mentally ill person has a right to the services of an independent mental health clinician, at the Commonwealth's expense, in a judicial proceeding in which her commitment to a psychiatric facility is sought.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as appearing in Appellant's Brief, at pp. 1-2.

SUMMARY OF ARGUMENT

An indigent, putatively mentally disabled person has a right, under both the United States Constitution and the Massachusetts Constitution, to the services, at the Commonwealth's expense, of an independent clinical "expert" in a judicial proceeding in which her involuntary commitment to a psychiatric facility is sought by the state, her mental status being the very gravamen of the action.

Even were the Court to find that no such right exists, the expenses incurred in securing the services of an independent clinical expert are among the normal costs of a person's defense in such a proceeding or, in the alternative, are always reasonably necessary to assure an indigent person as effective a defense as would be available to a person of means. Therefore, an indigent person's motion for the appointment of an independent expert at the Commonwealth's expense, pursuant to G.L. c. 261, § 27C, must

always be allowed.

ARGUMENT

I. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PART I, ARTICLE XII OF THE MASSACHUSETTS CONSTITUTION VEST IN AN INDIGENT PERSON THE RIGHT TO AN INDEPENDENT CLINICAL EXPERT WHERE THE PERSON'S COMMITMENT TO A PSYCHIATRIC FACILITY IS SOUGHT IN A JUDICIAL PROCEEDING.

It is well established that the involuntary commitment of a person to a psychiatric facility implicates a substantial liberty interest. *E.g.*, *Zinermon v. Burch*, ___ U.S. ___ (1990), 58 LW 4223, 4228; *Addington v. Texas*, 441 U.S. 418, 425 (1979). *Accord*, *Thompson v. Commonwealth*, 386 Mass. 811 (1982); *Commonwealth v. Nassar*, 380 Mass. 908 (1980). Where such commitment is sought, therefore, both the Fourteenth Amendment to the United States Constitution and Part I, Article XII of the Massachusetts Constitution require that the person be afforded the full panoply of due process protections. *Vitek v. Jones*, 445 U.S. 480, 491-492 (1980); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Baxtrom v. Herold*, 383 U.S. 107 (1966). *Accord*, *Nassar*, 380 Mass. 908; *Commonwealth v. Druken*, 356 Mass. 503 (1969).

In determining the process that is due an indigent person whose liberty is in jeopardy, courts have traditionally demanded that judicial proceedings be fundamentally fair. Such fairness is lacking where, "simply as a result of his poverty, a (person) is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

The Court's analysis and ruling in *Ake* are applicable to, if not dispositive of, the instant matter. Asked to determine, *inter alia*, whether an indigent criminal defendant must be afforded access to an independent expert where an insanity defense has been raised, the Court framed the issue concisely. It must, it wrote, determine

whether, and under what conditions, the participation of a psychiatrist is important enough to (the) preparation of a defense to require the state to provide an indigent defendant with access to competent psychiatric assistance ...

470 U.S. at 77.

After a lengthy review of traditional due process analysis, the Court held that

when a defendant demonstrates ... that his sanity ... is to be a

significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake, 470 U.S. at 83.¹

Although denoted "civil" in nature, the procedural requisites applicable in psychiatric commitment proceedings are virtually identical to those in criminal proceedings. Thus, for example, commitment hearings are to be full evidentiary, adversarial proceedings. See, e.g., *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), rev'd on other grounds, 414 U.S. 473 (1974). Counsel must be appointed to represent indigent respondents. G.L. c. 123, § 5. The petitioner, typically the state, bears the burden of proof. *Thompson v. Commonwealth*, 386 Mass. at 814. All elements of the petitioner's case must be proved beyond a reasonable doubt. *Worcester State Hospital v. Hagberg*, 374 Mass. 271, 275-277 (1978); *Commonwealth v. Nassar*, 380 Mass. at 916. Hearings must be held expeditiously (seven

¹ Implementation of this right to psychiatric assistance is left to the states, however. Thus, a defendant need not necessarily be afforded the psychiatrist of her choice or the funds to hire her own expert. 470 U.S. at 83.

days). G.L. c. 123, § 7; *Hashimi v. Kalil*, 388 Mass. 607 (1983).

Given the clear correlation between psychiatric commitment proceedings and criminal proceedings, the applicability of the standard established in *Ake*, *supra* at page 5, cannot reasonably be gainsaid. Thus, an indigent respondent in a commitment proceeding is to be afforded access to a clinical expert whenever her sanity (*i.e.*, her mental status) is to be a "significant factor at trial." *Ake*, 470 U.S. at 83.

In order for a court to commit an individual to a psychiatric facility it must find, beyond a reasonable doubt, that three criteria obtain. First, the person must be mentally ill, as defined by the Department of Mental Health, at 104 CMR 3.01. G.L. c. 123, § 8. Second, the failure to admit or retain her at such a facility must create a likelihood of serious harm to herself or others. G.L. c. 123, § 8. Finally, there must be no less restrictive setting in which to appropriately and safely treat the person. *Commonwealth v. Nassar*, 380 Mass. at 917.

That the person's mental status is a "significant factor" at a commitment hearing is obvious. Indeed, it is the very gravamen of the action. Equally obvious is that a person in jeopardy of losing her liberty as a result of her mental status must have access to an independent clinician to assist in the "evaluation, preparation, and presentation of (her) defense." *Ake*, 470 U.S. at 83.

Therefore, where the involuntary commitment of an indigent person to a psychiatric facility is sought in a judicial proceeding, both the Fourteenth Amendment to the United States Constitution and Part I, Article XII of the Massachusetts Constitution vest in such person the right to the services of an independent clinical expert, at the Commonwealth's expense.²

II. ACCESS TO AN INDEPENDENT CLINICAL EXPERT IS MANDATED UNDER G.L. c. 123, § 5.

G.L. c. 123, § 5 provides, in pertinent part, that "(t)he court may provide an independent medical examination for (an) indigent person upon request of his counsel or upon his request if he

² The facts known to and opinions formed by an independent expert, and the use to which such facts and opinions are put, if any, are entirely within the discretion of the respondent. *Thompson v. Commonwealth*, 386 Mass. at 819.

is not represented by counsel." Thus, while access to an independent expert under § 5 appears to be discretionary, closer scrutiny leads to a different conclusion.

Section 5 further provides that a person against whom a commitment petition is filed has "the right to present independent testimony" at hearing. This right is, of course, meaningless to an indigent person unless access to a clinical expert is available to her at the Commonwealth's expense. "The purpose of this provision is to afford indigent persons the same benefits of an independent medical examination that are available to wealthier persons." *Thompson v. Commonwealth*, 386 Mass. at 819.

Thus, access to an independent clinical expert is statutorily mandated where the commitment of an indigent person to a psychiatric facility is sought.

III. AN INDIGENT PERSON'S MOTION FOR THE APPOINTMENT OF AN INDEPENDENT EXPERT AT THE COMMONWEALTH'S EXPENSE, PURSUANT TO G.L. c. 261, § 27C, MUST ALWAYS BE ALLOWED.

A. The Expenses Incurred for the Services of a Clinical Expert in Psychiatric Commitment Proceedings Are "Normal Fees and Costs" for Purposes of G.L. c. 261.

Upon a finding of indigency, a court may not deny the indigent person's request for the payment of expenses normally associated with the proceeding. G.L. c. 261, § 27C, ¶ (4). Such "normal fees and costs" are defined as those a party "normally is required to pay in order to ... defend the particular type of proceeding in which he is involved." G.L. c. 261, § 27A.³

Where the involuntary commitment of a person to a psychiatric facility is sought, clinical evidence is essential to the person's defense. Indeed, without such evidence no defense is typically available. Thus, the costs incurred in securing such evidence must be seen as necessary to the defense of such proceedings and, therefore, a court lacks the discretion to deny a request for such expenses brought under G.L. c. 261, § 27C.

³ The expenses associated with "expert assistance" are among those denoted as "extra fees and costs" in G.L. c. 261, § 27A. However, in the unique circumstances of psychiatric commitment proceedings, and given the mandate of G.L. c. 123, § 5, as discussed above, such costs must be seen as "normal fees and costs" as the term is defined in said section.

B. If Not "Normal Fees and Costs" for Purposes of G.L. c. 261, Such Expenses Are Always Reasonably Necessary to Assure an Indigent Person As Effective a Defense As Would Be Available to a Person of Means.

Even were this Court to find that expenses incurred for the services of a clinical expert in psychiatric commitment proceedings are not "normal fees and costs" as defined in G.L. c. 261, § 27A, the Court should nevertheless find that such expenditures must always be permitted under G.L. c. 261, § 27C.

A court must grant a request for "extra fees and costs" whenever the service sought is "reasonably necessary to assure (an indigent person) as effective a ... defense ... as he would have if he were financially able to pay." G.L. c. 261, § 27C, ¶ (4). In determining whether to grant such a request

(the) standard is one of reasonableness, and looks to whether a (litigant) who was able to pay ... would consider the ... service ... sufficiently important that he would choose to obtain it in preparation for his trial. ... The test is whether the item is reasonably necessary to prevent the (litigant) from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires. ... In

making this determination ... the judge may look at such factors as the cost of the item requested, the uses to which it may be put at trial, the potential value of the item to the litigant(,) ... and to such other factors as the judge may deem relevant

Commonwealth v. Lockley, 381 Mass. 156, 161 (1980).

The potential value of an independent clinical expert to a person facing involuntary psychiatric commitment is obvious. Indeed, it cannot be reasonably argued that a person of means, facing such a possibility, would ever knowingly choose not to expend her funds to secure the assistance of an independent clinical expert. See, e.g., *Ake*, 470 U.S. at 80 (when a state has made a person's mental condition relevant to his liberty interest, "the assistance of a psychiatrist may well be crucial to the (person's) ability to marshal his defense." (emphasis added)). Accord, *Commonwealth v. Bolduc*, 10 Mass. App. Ct.634, 638 (1980), aff'd on this point at 383 Mass. 744, 749 (1981).

As to the cost involved in providing access to an independent clinical expert, *Ake* is again instructive. Where a person's mental condition is likely to be a significant factor in her

defense, "the need for the assistance of a psychiatrist is readily apparent. ... In such a circumstance, ... the state's interest in its fisc must yield." 470 U.S. at 83.

In 1985, a Single Justice of the Massachusetts Appeals Court had occasion to review a Probate Court's denial of a request for extra costs for expert assistance in a proceeding in which the authority to administer antipsychotic medication to an incompetent person was sought (a so-called "Rogers" case).

Guardianship of a Mentally Ill Person, Mass. App. Ct. No. 85-0018 Civ. (Dreben, J.- 1/28/85).

Applying the standards established in *Lockley, supra*, and considering "the nature and purpose of the proceedings" (Order, page 1), the Single Justice found the Probate Court's denial to be in error.

The Single Justice noted that three of the six factors to be considered in determining a person's "substituted judgment" in a "Rogers" proceeding involve "medical questions." Thus, she wrote, "(w)ithout an expert, the patient is certainly at a disadvantage in countering medical evidence on these factors." Order page 3. All

of the criteria necessary to establish a person's "commitability" involve psychiatric (*i.e.*, "medical") questions. *Supra*, pages 6-7.

One ground for the Probate Court's denial of the request for costs was that the person's counsel would have access to the person's medical record and would have the opportunity to examine petitioner's experts at trial. In finding this ground to be untenable, the Single Justice wrote,

(w)e know ... that these persons are the ones who are proposing the ... drugs. Not only will these persons be unlikely to present the opposing viewpoint, but unless counsel for the applicant has the assistance of a competent expert, counsel will not be able to examine effectively the ... experts who are recommending ... the drugs and may even be unable to understand the medical terms these experts use.

Order, pages 3-4. She went on to conclude that

"The judge does not appear to have considered the likelihood that a solvent [patient], able to finance his own defense, would prefer to select and employ a competent expert of demonstrated credibility rather than rely on the testimony" and cross-examination of (petitioner's) clinicians "who might well be ... hostile witness[es]."

Order, page 3; quoting from *Commonwealth v.*

Bolduc, 10 Mass. App. Ct. at 638. Clearly, these considerations are equally pertinent and

applicable to a psychiatric commitment proceeding.

Despite a cautionary note to the contrary,⁴ the Single Justice's analysis and conclusion must be read as virtually mandating the allowance of a request for extra costs for expert assistance in such proceedings. The same conclusion must be drawn in the instant action.

CONCLUSION

For the reasons set forth above, *Amicus* urges this Court to:

1. Find that an indigent, putatively mentally disabled person has a right to the services, at the Commonwealth's expense, of an independent clinical "expert" in a judicial proceeding in which her involuntary commitment to a psychiatric facility is sought.

⁴ "It is not here implied that the costs of such experts will always have to be supplied in a case of this kind. Conceivably, there may be circumstances where credible expert testimony opposed to the administration of the drugs is already available to the patient or where other factors may make such testimony not required within the principles expressed in ... *Lockley* ..." (emphasis added). Order, page 5, note 2. *Amicus* asserts that while such circumstances may be "conceivable" in so-called "*Rogers*" cases, they are all but precluded by the very nature of psychiatric commitment proceedings.

2. Find that, in the alternative, such services are mandated under G.L. c. 123, § 5.
3. Find that the expenses incurred in securing the services of an independent clinical expert are among the normal costs of a person's defense in such a proceeding.
4. Find that, in the alternative, such expenses are always reasonably necessary to assure an indigent person as effective a defense as would be available to a person of means.
5. Find that an indigent person's request for funds to secure the services of an independent expert, pursuant to G.L. c. 261, § 27C, must always be granted.

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Respectfully submitted,
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