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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 74-3436

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ALICIA MORALES, et al.,

Plaintiffs - Appellees

v.

JAMES A. TURMAN, et al.,

Defendants - Appellants

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On Appeal from the United States District Court
for the Eastern District of Texas

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# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

1. Whether the order of the district court is appealable.

2. Whether the district court was correct in ruling that the Eleventh Amendment to the United States Constitution does not bar this action.

3. Whether the district court was correct in concluding that this case did not require empanelling a three-judge court.

4. Whether the district court was correct in concluding that juveniles involuntarily confined as delinquents in Texas Youth Council institutions have a constitutional right to rehabilitative treatment.

5. Whether the district court was correct in concluding that juvenile delinquents confined in the institutions of the Texas Youth Council have been denied their constitutional right to rehabilitative treatment.

6. Whether the ultimate relief envisioned by the district court exceeds the court's power.

## INTEREST OF THE UNITED STATES

Following the district court's May 17, 1972 request to the Attorney General to assist the court in determining the facts in this complicated litigation

and in structuring appropriate relief, the United States participated at the trial level as an amicus curiae with the rights of a party. The United States conducted discovery, presented evidence at trial, and submitted post-trial briefs. Since entry of the August 30, 1974 Memorandum Opinion and Order of the district court, the United States has filed a Memorandum on the Question of Dismissing the Appeal in this Court and a Memorandum in Opposition to appellants' application for a stay in the Supreme Court of the United States, and we have participated in treatment plan negotiations.

Such participation in litigation involving the protection of juveniles' rights furthers the United States' interest in the fair and effective prevention and control of juvenile delinquency, as evidenced in the passage of the Juvenile Justice and Delinquency Prevention Act of 1974, Public Law 93-415; the Law Enforcement Assistance and Criminal Justice Act, 42 U.S.C. 3701,

et seq. (1968), as amended; and the Federal Youth Corrections Act, 18 U.S.C. 5004, et seq. (1950), as amended.

Several federal courts have now considered the question whether various categories of non-criminals who are involuntarily committed to state institutions have a constitutional right to rehabilitative treatment during the period of their confinement. See, e.g., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), cert. granted, October 21, 1974, No. 74-8, submitted, January 15, 1974; Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974); Martarella v. Kelley, 349 F. Supp. 575 (S.D. N.Y. 1972). The United States has brought, or participated in, nine suits which seek to secure that right for individuals confined in state mental institutions for mental illness[1/]

1/ See Wyatt v. Aderholt, supra [United States participated as amicus curiae in the court of appeals and as litigating amicus curiae in the district court sub nom. Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), enforced, 344 F. Supp. 373]. The following cases are currently pending in district courts: Alexander and United States v. Hall, No. 72-209 (D. S.C.) [United States is plaintiff-intervenor]; Davis v. Watkins, No. C-73-205 (N.D. Ohio) [United States is litigating amicus curiae].

and retardation.[2/] The very same issue of right to rehabilitative treatment, here with respect to juveniles involuntarily confined in state juvenile institutions, is presented in the instant case, and thus the United States has an interest in insuring that they, too, receive the rehabilitative treatment to which they are constitutionally entitled.

2/ See United States v. Solomon, No. N-74-181 (D. Md.); United States v. Kellner, No. 74-138 (D. Mont.); NYSARC and Parisi v. Carey, No. 72 Civ. 356 and 357 (E.D. N.Y.) [United States is litigating amicus curiae]; Wyatt v. Aderholt, No. 3195-N (M.D. Ala.) [United States is litigating amicus curiae]; Horacek v. Exon, No. 72-L-299 (D. Neb.) [United States is plaintiff-intervenor]; NCARC and United States v. North Carolina, No. 3050 (E.D. N.C.) [United States is plaintiff-intervenor]; Halderman v. Pennhurst, No. 74-1345 (E.D. Pa.) [United States is plaintiff-intervenor].

## STATEMENT

### A. PROCEDURAL HISTORY

This is a class action by minor children in the custody of the Texas Youth Council (TYC),[3] against officials of that agency, for injunctive relief restraining certain actions and inactions assertedly violative of the United States Constitution and the state statute creating the TYC.[4] It was commenced on February 12, 1971. Amended

3/ The class is comprised of all juveniles who are, have been, or may in the future be adjudicated delinquent in Texas courts and involuntarily committed to TYC facilities. August 30, 1974 Memorandum Opinion and Order at 2, 383 F. Supp. at 58. (Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974).)

4/ Article 5143d, Vernon's Ann. Tex. Stat. (the Texas Youth Council Act).

At the time the case was tried, commitment of juvenile delinquents in Texas was effected pursuant to Article 2338-1, Vernon's Ann. Tex. Stat., which defined a juvenile delinquent as a child over the age of 10 and under the age of 17 who violates a state penal law of the grade of felony; violates a state penal law, of the grade of misdemeanor, which prescribes confinement in jail as a punishment; habitually violates a state penal law, of the grade of misdemeanor, which prescribes only a monetary fine as punishment; habitually violates a local penal ordinance; habitually violates a state compulsory school attendance law; habitually comports himself in a manner injurious or dangerous to himself or other persons; or habitually associates with vicious and immoral persons. Art. 2338-1, Section 3. Though the statute provided that "the judge [of a juvenile court] may conduct the hearing of any case in an informal manner," Section 13(a), it did guarantee these juveniles representation of counsel. Sections 6(e) and 7-B(a) and (b).

In 1973, the state legislature enacted Title 3 of the Texas Family Code (Delinquent Children and Children in Need of Supervision). That Title, which replaced Article 2338-1, became effective on September 1, 1973--nearly a month after trial of this

(Cont'd on next page)

complaints were filed on April 16, 1971[5/] and May 17, 1972.[6/]

4/ (Footnote cont'd from preceding page)

case was concluded, but a year before the district court entered the order which is now on appeal. Title 3 defines a child as a person (1) 10 years of age, or older, and under the age of 17; or (2) 17 years of age, or older, and under the age of 18, who has engaged in delinquent conduct, or conduct indicating a need for supervision, before the age of 17. Section 51.02. It defines a delinquent child as a child who has engaged in conduct, other than a traffic offense, that violates any state penal law punishable by imprisonment or confinement in jail, Section 51.03(a), and it defines a child in need of supervision as a child who has (1) on three or more occasions engaged in conduct, other than a traffic offense, which violates either state penal laws, of the grade of misdemeanor, which prescribe only a fine as punishment, or local penal ordinances; (2) engaged in conduct violative of the state's compulsory school attendance laws; or (3) voluntary absented himself from his home, without his parent's or guardian's consent, for a substantial period of time or without the intention to return. Section 51.03(b). Title 3 expressly guarantees all these juveniles representation of counsel at every stage of the juvenile court proceedings, Sections 51.10 and 54.03, and, at the adjudication hearing, a jury trial, the right to confront witnesses, and the privilege against self-incrimination. Section 54.03. It also requires that, at that hearing, the judge inform the child and his parents or guardian of these rights; state the allegations against the child; and explain the nature and possible consequences of the proceeding. Section 54.03. Section 54.03(f) provides that, at the adjudication hearing, the state's burden is proof beyond a reasonable doubt.

5/ First Amended Complaint.

6/ Second Amended Complaint.

Also on May 17, 1972, the district court directed the United States to appear in the case as amicus curiae.

By motion dated September 15, 1972, the plaintiffs sought leave for designated experts in the fields of psychiatry, psychology, and social work to conduct "participant observation" studies of TYC institutions. The district court granted the motion, and, prior to trial, several experts visited, or lived in, both of the TYC's reception centers and five of its six institutions. They reported their findings and conclusions to the court in written reports[7/] and in testimony at trial.[8/]

7/ PA Exs. 15, 17, 18; U.S. Exs. 118, 119, 120, 121.

Throughout this brief and the attached Appendix, "PA Ex." is used to refer to Plaintiffs-Appellees' exhibits; "U.S. Ex." is used to refer to the United States' exhibits; "A Ex." is used to refer to the exhibits of the Amici other than the United States; and "DA Ex." is used to refer to Defendants-Appellants' exhibits.

8/ See Baxter Testimony (Tr. p. 31 et seq.); Pulliam Testimony (Tr. p. 769 et seq.); Blakeney Testimony (Tr. p. 923 et seq.); Ohmart Testimony (Tr. p. 1143 et seq.); Quay Testimony (Tr. p. 2047 et seq.); Breiteneicher Testimony (Tr. p. 2331 et seq.).

"Tr." is used, throughout this brief and the attached Appendix, to refer to the Reporter's Trial Transcript. There are no references herein to transcripts of preliminary or other hearings.

On June 14, 1973, the defendants filed a motion for appointment of a three-judge court. They contended that, under 28 U.S.C. 2281 and 2284, only a panel of three judges could adjudicate plaintiffs' attack on the constitutionality of the state statutory provision requiring regular church attendance by every TYC juvenile.[9/] They also contended that, insofar as the Second Amended Complaint alleged that plaintiffs had been subjected to involuntary servitude, the complaint could not be heard by a single judge because it constituted an attack on the constitutionality of the Texas Youth Council Act insofar as the act authorizes the TYC to establish work programs and forbids monetary renumeration for juvenile labor.

On June 29, 1973, the district court severed the issue of mandatory church attendance from the remaining issues in the case[10/] On July 2, 1973, it also severed the involuntary

9/ Article 5143d, Section 24, Vernon's Ann. Tex. Stat.

10/ See Tr. p. 21.

servitude issue.[11] On July 20, 1973 the court entered an order reiterating its severance of these two issues, and otherwise denying defendants' amended motion for appointment of a three-judge panel.

Trial of the remaining issues began on July 2, 1973, and lasted six weeks. On August 31, 1973, the district court entered an emergency interim order granting preliminary injunctive relief with respect to such matters as use of physical force and solitary confinement, racial segregation, censorship of mail, and visitation by family and friends.[12] On August 30, 1974, the court entered the Memorandum Opinion and Order which is the subject of the instant appeal. Although it found numerous constitutional violations, the court stated that it would not yet issue any injunctive relief beyond that awarded in its Emergency Interim Relief Order. Instead,

> [a]ll of the parties--plaintiffs, defendants, the United States, and amici--are directed to confer within thirty days of the entry of this memorandum opinion for the purpose of drafting a detailed plan for accomplishing a network of facilities for the treatment of delinquent youth that is consistent with this opinion. No party shall waive any objection or right of appeal by its participation.

383 F. Supp. at 126.

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11/ Id.

12/ The order is reported at 364 F. Supp. 166. It has never been appealed and is not challenged in the present appeal.

The defendants filed a general notice of appeal on September 9, 1974.[13/]

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13/ The district court denied defendants' motions for a stay pending appeal and for certification of an interlocutory appeal under 28 U.S.C. 1292(b) on September 18, 1974. On October 9, 1974, this Court denied defendants' motion for a stay and directed that plaintiffs' motion to dismiss the appeal be carried with the case. In a memorandum dated November 18, 1974, the United States urged the Court to reconsider the question of dismissing the appeal. To our knowledge, no further order on the matter has issued since submission of that memorandum.

On October 25, 1974, the appellants petitioned Mr. Justice Powell, as Circuit Justice, for a stay of the order of the district court. The application was denied on November 6, 1974.

## B. FACTS [14]

### Introduction and Student Population

The Texas Youth Council operates six institutional facilities for juvenile delinquents (App. 1). These facilities--Brownwood, Crockett, and Gainesville for girls; Giddings, Gatesville, and Mountain View for boys--are located in rural areas throughout the state (App. 1-2). Each institution functions as a substantially independent entity with little guidance from the TYC central office in Austin (App. 2-3). At the time of trial, 2036 children (1581 boys; 455 girls), between the ages of 10 and 19, were confined in TYC institutions (App. 15). Of these, 41.9% were Anglo; 34.1% were Black; and 23.9% were Mexican-American (App. 15). Most came from urban or semi-urban backgrounds (App. 16). Of the children admitted to the institutions between August, 1971 and August, 1972, nearly one-third (19% of the boys and 68% of the girls) were committed for disobedience or immoral conduct (App. 17). Only 5% of the commitments in that year were for violent behavior (App. 17). As of May 1, 1973, 209 TYC children had recorded

14/ With this brief, the United States filed a motion for leave to file, as an Appendix, a far more comprehensive statement of facts than is presented here. The citations supporting the facts herein refer to pages of the Appendix (App.) on which detailed statements and complete references to the Record will be found.

I.Q.'s below 70, and 372 had been diagnosed as seriously emotionally disturbed (App. 17).

Reception Centers

Upon commitment, children are sent to reception centers--the girls to Brownwood; the boys to Gatesville--for two to three weeks (App. 4). The stated purpose of the reception centers is the reception, orientation, evaluation, diagnosis, classification, and placement of all children committed to the TYC by Texas courts (App. 4).

At Brownwood, the girls are given physical, psychological, educational, and vocational tests (App. 5). Mexican-American girls are at a disadvantage in the testing process because some of the tests are based on Anglo norms and are therefore culturally biased (App. 6). Although girls are classified into four diagnostic categories--immature, neurotic, unsocialized, and subcultural delinquent--(App. 7), placement recommendations are not based upon these diagnoses but upon such factors as age, physical size, sophistication, and history of delinquency (App. 7). Younger girls are customarily sent to Brownwood; older girls considered to be sophisticated delinquents, to Gainesville; and the rest, to Crockett (App. 7). The girls do not attend the staff meetings at which placement decisions are made (App. 7-8).

No systematic attempt is made to determine whether, or how, the center's treatment recommendations are being carried out at Gainesville or Crockett (App. 8).

At the reception center for boys at Gatesville, sheer numbers of youngsters and insufficient staff make an in-depth analysis of each boy difficult or impossible (App. 10-12): not all boys receive a full battery of psychological tests or a psychiatric examination (App. 10); a personality profile is not prepared for all boys (App. 11); and no formal treatment plans are sent from the center to the institutions (App. 11). Although nearly 57% of the boys admitted to TYC institutions in fiscal year 1972 were Black or Mexican-American, the reception center's professional staff is entirely Anglo (App. 9). All testing is done in English; no attempt is made to adjust for the language deficiencies of Spanish-speaking youngsters (App. 12). Placement decisions are made at weekly meetings which neither the boy nor his caseworker necessarily attends (App. 12-13). The younger, smaller boys are customarily sent to Giddings or to the Valley subschool of the Gatesville complex; older boys deemed to be serious offenders normally go to Mountain View; the rest are divided among the remaining Gatesville subschools (App. 14). There are no formal criteria for assigning boys to any institution, and no attempt is made to review a boy's treatment progress once he has left the reception center (App. 14).

## Institutions

### Staff and Services

At the time this case was tried, the TYC had a total staff of 1447 persons, of whom 83.5% were Anglo; 13.7% were Black; and 2.5% were Mexican-American (App. 19). Because of the rural locations of the institutions, recruitment of adequately trained personnel, especially Blacks and Mexican-Americans, has been difficult (App. 20). Although TYC juveniles spend most of their time with their houseparents and correctional officers (App. 21),[15/] most of these employees have limited formal education, no prior experience working with adolescents, and no relevant training (App. 21-22). They are given no psychological tests to determine their emotional fitness for the work (App. 21); receive minimal, if any, training to enable them to cope with the emotional and psychological problems they may encounter (App. 23-25); and perform virtually no rehabilitative function but serve merely as guards or custodians (App. 26). High staff-student ratios and high annual staff turnover contribute to a lack of meaningful interaction between inmates and child care workers (App. 28).

15/ These daily living personnel are considered to be the backbone of any residential rehabilitative treatment program (App. 21).

Student-caseworker ratios are also high (App. 29). Despite a general lack of professional training (App. 30-31), caseworkers at most schools receive little direct supervision (App. 31). They meet with their children only occasionally; do not involve the students' families in the counselling process; and make little, if any, effort to implement the treatment recommendations of the reception centers (App. 31-36).

No TYC institution employs a full-time psychiatrist (App. 37), and the part-time psychiatrists who visit the institutions do not function as an integral part of a treatment team (App. 37-39). The institutions also lack adequate medical staffs and services (App. 40-44); none employs a full-time physician (App. 40-42).

Although TYC inmates have varied special educational needs (App. 17-18), Gatesville, Gainesville, and Crockett have no teachers certified in special education; Brownwood and Mountain View, only one; and Giddings, two (App. 45). Other academic deficiencies include a lack of bilingual-bicultural education, a lack of individualized instruction, and a lack of in-service training for teachers (App. 45-52).

The vocational expert who studied the vocational training courses and programs at Gatesville, Mountain View, Gainesville,

and Crockett found a total lack of employer or union input into course design and maintenance and a lack of any data retrieval or other mechanism for determining whether the offerings actually help students to secure post-confinement employment (App. 58). He found that vocational courses are not regularly evaluated to assess their effectiveness; that at no institution was there evidence of employability plans for students or vocational counselling; that the courses themselves were often repetitive, mislabelled, and made to sound more substantial than they were; that students received little "hands on" experience; and that instructors brought a variety of detrimental preconceptions to their work (App. 57-59).

Living Quarters and Daily Life

Experts who visited, or lived at, Gatesville, Gainesville, and Mountain View described the daily lives of the children confined in those institutions as lives of boredom, hopelessness, apathy, tension, frustration, rigidity, and regimentation, in which individual identity is not recognized and self-respect is violated (App. 61). The large amount of evidence supporting these conclusions is fully documented at App. 61-85.

Discipline and Punishment

Clear, specific rules of conduct are not provided for TYC juveniles (App. 86, 95, 106); disciplinary procedures vary from one staff member to another (App. 86, 95, 106); and such regulations as exist appear arbitrary, excessive, and arbitrarily enforced (App. 86-89, 96-99, 105, 107-109). Discipline may vary from "reports" and "restrictions" to secure confinement to "extra duty" and corporal punishment. At Gainesville, a girl may be placed in the so-called "Special Treatment Center" (STC) without being afforded either a hearing before the school's disciplinary committee or any other opportunity to tell her side of the story (App. 90).[16] At Gatesville, a boy may be subjected to "peels"--a procedure in which he bends over with his head between a staff member's legs and is slapped or struck on the back--(App. 104); he may be given "tights"--a punishment requiring him to bend forward and grip his ankles while a staff member strikes him on the behind with a broom--(App. 104); he may be placed "on crumb"--compelled to sit on a chair, face to the wall, whenever he is in the dormitory, and forbidden to speak or participate in activities (App. 104); he may be forced to

16/ Although the alleged purpose of Gainesville's STC is to offer a special environment to children who are having behavioral problems, the experts condemned it (App. 94).

place his head between a correctional officer's legs while the latter runs in place (App. 104); he may be kicked in the shins, picked up off the floor by the ears or sideburns, or required to perform pushups, upside down against a wall, for up to two hours (App. 105). His toes may be stepped on; his stomach may be stood on; his head may be shaved (App. 105).

Physical Abuse

Reports disclose that, in 1972, staff members used physical force on students once at Brownwood; five times at Giddings; eight times at Crockett; forty-five times at Gainesville; sixty-nine times at Gatesville; and ninety-eight times at Mountain View (App. 110). Gatesville students who had been the victims of physical violence testified, at trial, that they had not reported such incidents because they feared correctional officer retaliation against them; because no one had explained to them that they could file reports; because correctional officers had talked them out of doing so; and because they were afraid of being transferred to Mountain View (App. 110-111). The evidence showed that correctional officers at Mountain View do not always file reports after they beat students and that they sometimes falsify the reports they do file or direct students to file false reports (App. 111). Illustrative examples of physical abuse are set out at App. 111-118.

C. THE DISTRICT COURT'S AUGUST 30, 1974 MEMORANDUM OPINION AND ORDER

The district court held, inter alia, (1) that, under Edelman v. Jordan, 415 U.S. 651 (1974), this action was not barred by the Eleventh Amendment;[17/] (2) that the issues presented[18/] did not require adjudication by a three-judge court, since the plaintiffs did not challenge the constitutionality of any state statute of statewide applicability, and since the practices challenged by the plaintiffs were neither applied TYC regulations nor expressive of any systemwide policy because TYC policy "is close to undiscoverable" and "such rules and regulations as exist are local to single institutions or even subdivisions thereof";[19/] (3) that the Eighth Amendment's proscription against cruel and unusual punishments applies, not only to persons who have been convicted of crimes, but to non-criminals, such as juveniles involuntarily committed to state institutions, as well;[20/]

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17/ 383 F. Supp. at 59-60.

18/ As to the court's severance of two issues prior to trial, see pp. 9-10, supra, and 383 F. Supp. at 60.

19/ 383 F. Supp. at 60-64.

20/ 383 F. Supp. at 70.

and (4) that, under Donaldson v. O'Connor[21] and Jackson v. Indiana,[22] TYC juveniles have a constitutional right to receive rehabilitative treatment "designed to accomplish the stated objectives of . . . [the TYC's] authority - the rehabilitation of delinquent children and their reintegration into society." 383 F. Supp. at 70-71, 119.

The court concluded that the plaintiffs' right to treatment is a right to a program which will "aid the youth in achieving 'the tasks of adolescence' . . ., [that is] establishing sexual identity, developing intellectual and occupational skills, achieving independence from parental authority, developing a capacity for genuinely intimate relationships, and . . . evolving a moral code to govern future actions." Id. at 92

It found that among the important ingredients of such a program are the following: an individual assessment of each child, including a family history, a developmental history, a physical examination, psychological testing, and psychiatric, language, and educational evaluations (id. at 88); a psychological and social work staff with adequate training and small caseloads (ibid.); testing devices designed to

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21 / 493 F.2d 507 (5th Cir. 1974), cert. granted, October 21, 1974, No. 74-8, submitted, January 15, 1975.

22 / 406 U.S. 715 (1972).

alleviate discrimination (ibid.); special education teachers who receive regular in-service training (id.at 90); speech therapists and educational diagnosticians (ibid.); an employability plan for each child, based on vocational counselling (id. at 92); a physical environment designed to maximize the child's security, privacy, and dignity (id. at 100); opportunity for recreation and exercise (ibid); an adequate, well-prepared diet (ibid.); frequent and regular contacts with members of the opposite sex (id. at 101); personal freedom with respect to hairstyle, clothing, choice of friends, and the like (ibid.); adequate medical facilities and access to medical personnel without delay or interference (id. at 105); board-certified psychiatrists in sufficient number to assure treatment of children who need it);individual or group psychotherapy for each child for whom it is indicated; psychiatric nursing assistance; freedom from indiscriminate, unsupervised, unnecessary, or excessive medication (id. at 105); child care workers in numbers consistent with individual attention to each child and representaing a diversity of ages, sexes, and ethnic origins; psychological testing of such personnel to assure their fitness for the work (id. at 119); pre-employment and in-service training for all personnel; a social work staff large enough to provide personalized care to each child and to provide supervision for other staff members, diverse in age, sex, and ethnic origin, and properly trained; family

involvement in therapy in the form of visitations and contact with the professional staff; and a cohesive treatment strategy (id. at 120).

After reviewing the evidence in some detail (383 F. Supp. at 72-118), the court concluded that TYC institutions had "been the scenes of widespread physical and psychological brutality" (id. at 77) and that, to varying degrees, most failed to provide more than "a haphazard collection of so-called 'treatment' services" and did so "in environments seemingly calculated to insure the failure of a competent treatment program" (id. at 119). The court was particularly appalled by the conditions at Gatesville and Mountain View, which it described as "places where the delivery of effective rehabilitative treatment is impossible, ... ," and determined that these two institutions "must not be utilized any longer than is absolutely necessary as facilities for delinquent juveniles" (id. at 121). Finally, the court concluded that, although institutional confinement of juveniles in Texas is not cruel and unusual per se, "the continued incarceration of juveniles in large, rural institutions raises serious constitutional questions " (id. at 122), for "[a]n important incident of the right to treatment is the right of each individual to the least restrictive alternative treatment that is consistent with the purpose of his custody" (id. at 124).

Accordingly, the district court stated (383 F. Supp. at 125) that

> Gatesville and Mountain View must be abandoned as quickly as possible. ... [T]he defendants must cease to institutionalize any juveniles except those who are found by a responsible professional assessment to be unsuited for any less restrictive, alternative form of rehabilitative treatment. Additionally, the defendants must . . . create or discover a system of community-based treatment alternatives adequate to serve the needs of those juveniles for whom the institution is not appropriate.

The court did not actually order the taking of any of these or any other steps, however. Indeed, although it found numberous constitutional violations, the court expressly declined to issue any permanent injunctive relief but simply directed the parties to meet and negotiate a plan for future TYC operation "that is consistent with this opinion" (id. at 126).

## DISCUSSION

### I. THE ORDER OF THE DISTRICT COURT IS NOT APPEALABLE.

Appellants' opening argument (DA Brief at 5-13) is that the August 30, 1974 Memorandum Opinion and Order of the district court "is nothing less than a final, dispositive ruling on the entire case" (DA Brief at 6) and is therefore appealable.[23/] Inasmuch as the United States fully responded to this argument in its November 18, 1974 Memorandum on the Question of Dismissing the Appeal, a full recapitulation of our position seems unwarranted. We respectfully refer the Court to our memorandum and, more particularly, to Taylor v. Board of Education of the City of New Rochelle, 288 F.2d 600 (2d Cir. 1961), cited and discussed therein.

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23/ Throughout this brief, "DA Brief" is used to refer to the opening brief of the defendants-appellants.

II. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT BAR THIS ACTION.

In our view, the district court was correct in characterizing the appellants' contention that this action is barred by the Eleventh Amendment as "border[ing] on the frivolous." 383 F. Supp. at 59. To begin with, this is simply not a suit which "is in essence one for the recovery of money," Ford Motor Co. v. Indiana Department of Treasury, 323 U.S. 459, 464 (1945), much less one for retroactive monetary relief. The plaintiffs have not sought "to impose a liability which must be paid from public funds in the state treasury ...." Edelman v. Jordan, 415 U.S. 651, 663 (1974), citing Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944); Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946).[24/] Nor is this, as appellants contend (DA Brief at 59-60), an action to

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24/ Thus, the following cases discussed by appellants at pages 50-53 of their brief are inapposite, for each was an action in which a plaintiff sought a money judgment. In Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. den., 411 U.S. 921, reh. den. 411 U.S. 988 (DA Brief at 50), state welfare recipients sued for retroactive benefit payments; in Hamilton Manufacturing Co. v. Trustees of State Colleges, 356 F.2d 599 (10th Cir. 1966) (DA Brief at 51), assignees of a contract sued for proceeds due for equipment and supplies; in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (DA Brief at 51), a state prisoner sought money damages to compensate him for alleged deprivations of his civil rights; in Kirker v. Moore, 308 F. Supp. 615 (S.D. W.Va. 1970) (DA Brief at 52), former state employees sought monetary reparations for loss of income; and in Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968) (DA Brief at 53), residents and taxpayers of a city prayed for an order directing the state to restore, to the city school system, certain financial aid funds which had been withheld.

enforce a contract.[25] Instead, this case is a suit for equitable relief from violations of constitutional rights.

While it is true that compliance with whatever final judgment is entered may require the expenditure of state funds to correct the constitutional deficiencies of the TYC's programs, such expenditures would be neither the result of a direct claim against the state treasury--since no such claim has been made--nor the result of an order granting monetary relief, but merely an ancillary consequence of future compliance with a prospective injunction designed to protect constitutional rights. The Eleventh Amendment does not operate as a bar under such circumstances. Edelman v. Jordan, supra, 415 U.S. at 667-8. See, e.g., Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974). Where "fiscal consequences to state treasuries" are "the necessary result of compliance with [injunctive] decrees which by their terms... [are] prospective in nature," the Eleventh Amendment is no bar to the suit; "[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex Parte Young."[26] Edelman v. Jordan, supra, 415 U.S. at 667-8.

25/ Appellants theorize that the state has entered into an implied contract with TYC juveniles whereby the juvenile "forgoes some procedural due process safeguards during his adjudication in exchange for a rehabilitative program provided by the state." (DA Brief at 59.) But no such bargain has been struck: TYC juveniles are involuntarily committed and confined pursuant to procedures, and under conditions, over which they have no say. Moreover, this Court expressly rejected just such a theory as appellants now put forth in Donaldson v. O'Connor, supra, 493 F.2d at 522, n. 21.

26/ 209 U.S. 123 (1908).

statewide applicability. Board of Regents v. New Left Education Project, supra, 404 U.S. at 542; Moody v. Flowers, 387 U.S. 97, 101 (1967); Phillips v. United States, supra, 312 U.S. at 253; Rorick v. Board of Commissioners, 307 U.S. 208, 212-3 (1939).

The complaint in the instant case did seek injunctive relief, did raise substantial constitutional questions, and did name certain state officials as defendants. It did not, however, attack the constitutionality of any regulation or order--much less one of statewide applicability--or seek to have the enforcement of any regulation or order enjoined, in part because there are virtually no identifiable rules, regulations, or administrative orders applicable to all the institutions operated by the TYC.[27/]

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27/ On June 29 and July 2, 1973, the district court severed challenges to Article 5143d, Section 24, Vernon's Ann. Tex. Stat. (requiring regular church attendance by every TYC juvenile), and to the TYC's statutory authority to establish unremunerated work programs at the institutions. (Tr. p. 21.) (On July 20, 1973, the court entered a written order reitering its severance of these two issues.) No relief has been granted with respect to these matters.

(Cont'd on next page)

Similarly, this is not a suit to restrain the enforcement, operation, or execution of any state statute.[28] The only state statutory provisions pertinent to this case

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27/ (Footnote cont'd from preceding page)

The following exchange took place between one of the attorneys for the amici and the Executive Director of the TYC during the latter's deposition of May 1, 1973:

"Q [Mr. Schwartz] Do you have a manual -- Does the Texas Youth Council have a manual which regulates the conduct of the staff in the institutions which would include dealing with children, dealing with discipline, education, et cetera? Is there such an operating manual that the Texas Youth Council has?

A [Dr. Turman] For all institutions?

Q For the juvenile delinquency institutions.

A Broadly, yes; specifically in individual items, no.

Q When you say broadly, yes, what are you referring to?

A It's broad, general policy yes.

Q And what is that -- What is that manual or booklet or publication called?

A It's called state law .... [T]hen policy directives following this which are clearly definitive in this respect .... [T]hey're included in the minutes."

Turman Deposition p. 192, line 14-p. 193, line 10.

28/ See 383 F. Supp. at 61-64.

are those creating the Texas Youth Council[29] and authorizing commitments to the TYC,[30] and the plaintiffs--far from attacking either the state's right to establish such an agency or its right to commit juveniles to it--have invoked the policy and promise of rehabilitative treatment contained in the statutory scheme as one ground for their argument that various practices should be enjoined. That is, they have attacked actions which contravene the state statutory policy of rehabilitative treatment--not the statutory provisions themselves--and have sought an injunction compelling the TYC to comply with those provisions.[31] Moreover, the challenged practices vary from

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[29] The Texas Youth Council Act, Article 5143d, Vernon's Ann. Tex. Stat.

[30] Article 2338-1, Vernon's Tex. Civ. Stat., now repealed and replaced by Title 3 of the Texas Family Code. See note 4, supra.

[31] Where (as here) a challenge is levelled, not against a state statute, but merely against a state officer's actions under color of some general state constitutional or statutory authority, a three-judge court is not convened. See Phillips v. United States, supra, 312 U.S. at 253.

institution to institution.[32] In short, the actions which the plaintiffs have sought to enjoin are neither expressive of any state policy embodied in a statute, regulation, or order, nor statewide in nature. Thus, the instant case is distinguishable from this Court's decisions in the four cases decided sub nom. Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973 (en banc), cert. den. sub nom. Guajardo v. Estelle, 416 U.S. 992 (1974).

Appellants rely primarily on the second case in Sands, Baker v. Estelle (DA Brief at 18, 23-24) Like the other Sands cases, however, Baker--though the furthest reaching of the four--is distinguishable from the instant case. There, state prisoners sought to enjoin certain statewide administrative procedures, established by prison officials, in a complaint which made no mention of any regulations. Pertinent general regulations did exist, however. This Court--commenting that "[n]o party has contended that Texas prison officials are acting outside the scope of their statutory authority in carrying on these allegedly unconstitutional practices," 491 F.2d at 428--concluded that the practices were, in effect, applied statewide regulations. We repeat that no such rules or

[32] Indeed, "the rules that govern institutional life ... may vary from dormitory to dormitory or cottage to cottage within the same institution." 383 F. Supp. at 63 (emphasis in original).

regulations exist in the instant case, and the actions complained of here are not statewide in nature. Moreover, the appellees in this case have contended that the appellants "are acting outside the scope of their statutory authority" in failing to fulfill the state's statutory promise of rehabilitative treatment. Thus, Baker is not controlling here.

In its recent decision in Newman v. Alabama, 503 F. 2d 1320 (5th Cir. 1974)--a class action by Alabama state prisoners to compel officials of that state to remedy deficient medical conditions at the several facilities under the jurisdiction of the Alabama Penal System (APS)--this Court, distinguishing Baker v. Estelle, stated:

> [T]he import of our disposition of the claims presented by Baker is that the complaint's failure to explicitly challenge the constitutionality of a specific regulation will not vitiate the need to convene a three-judge court, where the relief sought, if granted, would inexorably condemn those promulgated rules and regulations not specifically challenged.

Id. at 1326-7. Like the instant case, Newman concerned assertedly unconstitutional practices,[33] not rules and

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[33] As in the case at bar, "[e]ach facility ... [was] beset by certain deficiencies, though to different degrees." 503 F.2d at 1322.

regulations, for there were no rules or regulations governing medical treatment of APS inmates.[34] Thus, the Court concluded that

> a decision granting the requested relief will not eviscerate any regulations governing medical care in the APS,

503 F.2d at 1327, and held that a three-judge panel did not have to be convened.[35] The same reasoning is equally applicable to the case at bar.[36] Accordingly, we believe that Newman is dispositive here.

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34/ Similarly, "the APS ... [was] not governed by any uniform practice or procedure in the administration of medical care, beyond the purported uniform practices of neglectful treatment dispensed at the various prison locations throughout the state." 503 F.2d at 1327. The same is true of the TYC generally.

35/ The district court has neither eviscerated the state statute nor, as appellants contend, dissolved state policy. (DA Brief at 25.) To the contrary, the court has directed the parties to develop a plan of future TYC operation which will implement the state's statutory policy, and the institutional right, of rehabilitative treatment.

36/ See also Leonard v. Mississippi State Probation and Parole Board, 509 F.2d 820 (5th Cir. 1975)

## IV. JUVENILES CONFINED, AS DELINQUENTS, IN TEXAS YOUTH COUNCIL INSTITUTIONS HAVE A CONSTITUTIONAL RIGHT TO REHABILITATIVE TREATMENT

### A. Introduction

The Supreme Court has not yet had occasion expressly to consider whether, or when, involuntarily confined juveniles have a constitutional right to rehabilitative treatment. Much less has it attempted to articulate a definition of such a right. In three recent decisions, however, the Court has assessed the procedural due process rights of juveniles accused of criminal violations in light of an implicit assumption that the confining authority's relationship to the juvenile is properly seen as a parens patriae relationship of beneficence and solicitousness, i.e. that rehabilitation, not punishment, is the raison d'etre of a separate system of juvenile justice. See McKeiver v. Pennsylvania, 403 U.S. 528 (1971); In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1967). See also Kent v. United States, 383 U.S. 541 (1966).[37] The Texas juvenile commitment and

37/ While the Court's expressed concern, in Kent, that "the child receives the worst of both worlds" (383 U.S. at 546), and its holdings in Gault and Winship, may be read as a reaction to the Court's recognition that the traditional parens patriae theory of juvenile justice has not always

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confinement statutes plainly disclose that Texas has adopted that assumption. The state has expressly chosen a parens patriae, rather than a punitive, role vis-a-vis its juvenile delinquents: by statute, the primary purpose of juvenile justice in Texas is rehabilitation; and Texas juvenile delinquents are not criminals.

In our view, children are legally and sociologically different from adults in at least three important, interrelated ways: First, they are not free agents but are subject to the supervision of parents or guardians; second, they are in their formative, growing years; and third, they are therefore not fully responsible for their behavior. It is, we suggest, essentially because of these fundamental differences--because they are children and not adults--that involuntarily confined juveniles have a

37/ (Footnote cont'd from preceding page)

been successfully translated into practice, McKeiver puts to rest the argument--advanced by the state of Texas (DA Brief at 26-32)--that the Court has begun to abandon the theory itself. See 403 U.S. at 547. The Texas Supreme Court has said that it reads the Gault opinion as expressing "...not a desire to abolish the attempt of the state to treat and rehabilitate the child...but...[a desire] to preserve the best of both worlds for the minor; ...." State v. Santana, 444 S.W. 2d 614, 617 (Tex. 1969)(emphasis in original).

Due Process right to be treated differently from adults. We believe that Gault and its progeny, and the Texas statutory scheme, proceed from such a premise. We further believe that, under Jackson v. Indiana,[38] the nature of a juvenile's confinement must bear some reasonable relation to the rehabilitative goal of juvenile justice; that when the state in effect takes the place of a child's parent, as it does in removing the child from his home and confining him involuntarily, it has a Due Process obligation to function in a parental way -- that is, to make a reasonable effort to provide the child an environment in which he has an opportunity to grow, positively and constructively, toward adulthood, an opportunity to achieve the "tasks of adolescence"; and that, in this case, the child's Due Process right to such efforts by the state may have Equal Protection underpinnings as well.

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38/ 406 U.S. 715 (1972).

B. The Existence of the Right

Although the Gault line of cases, supra,[39] did not require the Supreme Court to address the precise question presented here--whether juveniles who are involuntarily confined, as delinquents, have a Due Process right to the reasonable possibility of rehabilitation during the period of their confinement--, the Court has suggested the existence of a right to treatment in other, related, contexts. In Jackson v. Indiana, 406 U.S. 715 (1972), for example, it found the pretrial commitment of a mentally defective, illiterate deaf mute who had been charged with robbery, and committed until such time as the state's Department of Mental Health and Welfare could certify his competency to stand trial, violative of Due Process in the face of medical reports indicating that the defendant would never achieve that competency.[40] Moreover, the language of the Gault cases makes at least this much clear: the

39/ Kent v. United States; In re Gault; In re Winship; McKeiver v. Pennsylvania.

40/ Similarly, in Robinson v. California, 370 U.S. 660 (1972), the Court struck down a state statute which made addiction to narcotics a crime punishable by imprisonment. While it acknowledged that a state can "establish a program of compulsory treatment for those addicted to narcotics...[which] might require periods of involuntary confinement," 370 U.S. at 665, the Court noted that the statute in question was "not a law which even purport[ed] to provide or require medical treatment" for addicts, id. (Footnote cont'd on next page)

Supreme Court continues to view the states as functioning in a parens patriae capacity with respect to their misbehaving juveniles.[41]

[40] (Footnote cont'd from preceding page)

at 666, and it held that the statute violated the Fourteenth Amendment by "mak[ing] the 'status' of narcotics addiction a criminal offense." Id.

[41] In Kent, the Court expressed "concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitious care and regenerative treatment postulated for children." 383 U.S. at 556. In Gault, the Court recognized that the historical purpose of juvenile justice--"[t]he child was to be treated and rehabilitated and the procedures, from apprehension through institutionalization, were to be clinical rather than punitive," 387 U.S. at 15-16--had not been achieved. In Winship, the Court concluded that "the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment...[would] remain unimpaired" by its holding that the criminal proof-beyond-a-reasonable-doubt standard would be applicable to juvenile delinquency proceedings, 397 U.S. at 366; and Mr. Justice Harlan made the same point in his concurring opinion: "[T]he requirement of proof beyond a reasonable doubt...does not...interfere with the worthy goal of rehabilitating the juvenile, ...." Id. at 375. In McKeiver--where the Court refused to hold that Due Process demands a jury trial at the adjudicatory stage of a delinquency proceeding--Mr. Justice Blackmun stated, for a plurality: "The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say,..., that the system cannot accomplish its rehabilitative goals." 403 U.S. at 547. Mr. Justice White, in a separate concurrence, commented: "Supervision
(Footnote cont'd on next page)

We believe that these cases, read together with Jackson v. Indiana, supra, compel the conclusion that juveniles who are involuntarily confined, as delinquents, possess a right to the reasonable possibility of rehabilitation under the Due Process Clause of the Fourteenth Amendment. In Jackson, the Court stated:

> At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

406 U.S. at 738. In McKeiver, the Court's most recent case on the question of juvenile delinquents' rights, six Justices expressly adhered to the Kent-Gault-Winship assumption that the purpose of juvenile justice is rehabilitative care and treatment.[42] It follows that such treatment must, in fact, be provided, and four lower federal courts--apart from the district court in the instant case--have so held.[43]

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41/ (Footnote cont'd from preceding page)

or confinement [of juveniles] is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties." Id. at 552. And Mr. Justice Brennan observed that the "very existence [of the juvenile system] as an ostensibly beneficent and non-criminal process for the care and guidance of young persons demonstrates the existence of the community's sympathy and concern for the young." Id. at 555.

42/ See note 41, supra.

43/ Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972)
(Footnote cont'd on next page)

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42/ See note 41, supra.

43/ Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972)
(Footnote cont'd on next page)

In Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), cert. granted, October 21, 1974, No. 74-8, submitted, January 15, 1975--the first opinion by a federal court of appeals on the question whether non-criminals involuntarily confined in state mental institutions have a constitutional right to treatment--, this Court held that, under the Due Process Clause,

> a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition.

493 F.2d at 520. The holding rested upon a two-part theory. Postulating that state statutes typically advance three justifications for a state's authority civilly to commit an individual who has not voluntarily submitted to commitment--(1) that the individual is in need of treatment (or of care, custody, or super-

43/ (Footnote cont'd from preceding page)

(Supplemental Opinion, 1973), affirmed, 491 F.2d 352 (7th Cir. 1974); Martarella v. Kelley, 349 F. Supp. 575 (S.D. N.Y. 1972); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R. I. 1972).

vision);[44] (2) that the individual is a danger to others;[45] and (3) that the individual is a danger to himself[46], the Court concluded:

> [W]here,..., the rationale for confinement is the "parens patriae" rationale that the patient is in need of treatment, the due process clause requires that minimally adequate treatment be in fact provided...lest the involuntary commitment amount to an arbitrary exercise of government power proscribed by the due process clause.[47]

493 F.2d at 521.

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44/ A "parens patriae" rationale. 493 F.2d at 521.

45/ A "police power" rationale. Id.

46/ A rationale based upon "parens patriae" and "police power" authority. Id.

47/ This is the first part of the Donaldson theory. The second part of the theory--applicable both to "parens patriae" and "police power" commitments--was as follows:

> [W]hen the three central limitations on the government's power to detain--that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where fundamental procedural safeguards are observed--are absent, there must be a quid pro quo extended by the government to justify the confinement. And the quid pro quo most commonly recognized is the provision of rehabilitative treatment, ....

493 F.2d at 522.

Our understanding of the first part of the Donaldson theory is this: When the purpose of an individual's civil commitment is rehabilitation, the Due Process Clause requires that, during the period of his confinement, that individual receive treatment designed to provide him a reasonable opportunity to achieve that purpose, and this is so whether or not the duration of the confinement is indefinite; whether or not he has committed a specific offense; and whether or not fundamental procedural safeguards have been observed at the proceeding which led to the confinement. In our view, this theory is as apt with regard to juvenile delinquents involuntarily confined in state juvenile institutions as it is with regard to mentally ill and mentally retarded persons who are involuntarily confined in state mental institutions, for, as we have shown, the premise of juvenile justice is that children who perform anti-social acts need guidance, not punishment. It is particularly clear that juveniles confined to the institutions of the Texas Youth Council fall within the first part of the Donaldson theory: Texas has expressly declared, in

its statutes, that TYC juveniles are not criminals; has adopted a statutory scheme which makes rehabilitation the primary purpose of TYC commitment and confinement; and has, in essence, extended a statutory promise of efforts toward that end.

The Texas Youth Council Act[48] states that the purpose of the TYC is

> ...to provide a program of constructive training aimed at rehabilitation and re-establishment in society of children adjudged delinquent by the courts of this state and committed to the Texas Youth Council.[49]

The Act further provides that "the purpose...[of all TYC rules and regulations as may be established] and of all education, work, training, discipline, recreation, and other activities carried on in the schools...shall be to restore and build up the self-respect and self-reliance of the children and youth lodged therein and to qualify them for good citizenship and honorable employment," Section 21; that "[t]he superintendent [of the TYC] shall...have the ability

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48/ This Act, which governs confinement of Texas juvenile delinquents in TYC facilities, was in effect at the time of trial and is still in effect.

49/ Article 5143d, Section 1, Vernon's Ann. Tex. Stat.

to develop and recommend an aggressive program for youth rehabilitation," Section 22; and that "[t]he superintendent of each school...shall...be responsible for...carrying out the rehabilitation program prescribed by the Council.... [H]e shall seek to establish relationships and to organize a way of life that will meet the spiritual, moral, physical, emotional, intellectual and social needs of the children under his care as those needs would be met in an adequate home," Section 23.[50] Former Article 2338-1, Vernon's Ann. Tex. Stat.,[51] further confirmed the rehabilitative thrust of juvenile justice in Texas,[52] and Texas courts

50/ The TYC's Executive Director testified, on deposition:

> We're in this business for only one reason, and that's to rehabilitate kids...[to help the child] become a more productive citizen and more capable of dealing with the frustrations and anxieties of living so that he can live in harmony with the general society. Yes, that's our sole purpose.

Turman Deposition p. 133, lines 1-9.

51/ The juvenile commitment statute which was in effect at the time this case was tried.

52/ Article 2338-1 provided, for example, that "[i]t is the intent of the Legislature that in selecting a court to be the juvenile court of each county, such selection be made as far as practicable so that the court designated as the

(Footnote cont'd on next page)

have construed the Article 5143d-Article 2338-1 scheme as civil, not criminal, and rehabilitative, not punitive, in nature.[53]

52/ (Footnote cont'd from preceding page)

juvenile court will be one which is presided over by a judge who has a sympathetic understanding of the problems of child welfare...," Section 4; that formal jurisdiction over a child is obtained by the filing--by the County Attorney or any other attorney--of a "petition" rather than an indictment or information, Section 7; that a disposition of confinement is a commitment to a training school, an agency, or a family home, rather than a sentence to prison, Section 13(c); that "[n]o adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction...," Section 13(d); and that "[t]he disposition of the child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceeding in any court other than the juvenile court, nor shall such disposition or evidence operate to disqualify a child in any further civil service examination, appointment or application," Section 13(e).

53/ E.g. State v. Santana, 444 S.W. 2d 614 (Tex. 1969); State v. Thomasson, 275 S.W. 2d 463 (Tex. 1955); Joiner v. State, 494 S.W. 2d 598 (Tex. Civ. App. 1973); Lockamy v. State, 488 S.W. 2d 954 (Tex. Civ. App. 1972); Smith v. State, 444 S.W. 2d 941 (Tex. Civ. App. 1969); Solis v. State, 418 S.W. 2d 265 (Tex. Civ. App. 1967). See also Rivas v. State, 501 S.W. 2d 918 (Tex. Cr. App. 1973) (adjudication of juvenile delinquency does not constitute conviction of felony, or of misdemeanor involving moral turpitude, for purpose of rule that witness may be impeached by proof of such convictions).

Like former Article 2338-1, Title 3 of the Texas Family Code[54] allows a juvenile court to waive its exclusive original jurisdiction over a child and transfer that child's case to an adult court for criminal proceedings if the offense charged is a violation of a state penal law of the grade of felony and if the child was fifteen years of age or older at the time of the alleged offense. Section 54.02(a). It states, however, that such a transfer may be effected only if the juvenile court judge determines that, because of the seriousness of the offense or the background of the child, criminal proceedings are required to protect the welfare of the community. Id. Thus, Title 3 manifests a legislative determination that delinquent children under the age of fifteen are, by definition, children for whom rehabilitation, not punishment, is appropriate and, as to children fifteen years old, or older, allows the juvenile court judge to distinguish juvenile criminals requiring incarceration from juveniles requiring rehabilitative treatment. By doing so, Title 3 contemplates that the judge will retain jurisdiction over

54/ The juvenile commitment statute which has been in effect since September 1, 1973.

those juveniles--the vast majority--who should be afforded rehabilitative treatment.

Title 3 further provides that "[t]his title shall be construed to effectuate the following public purposes: ... consistent with the protection of the public interest, to remove from children committing unlawful acts the taint of criminality and the consequences of criminal behavior and to substitute a program of treatment, training, and rehabilitation," Section 51.01(3); that "[i]t is the intent of the legislature that in selecting a court to be the juvenile court of each county, the selection shall be made as far as practicable so that the court designated as the juvenile court will be one which is presided over by a judge who has a sympathetic understanding of the problems of child welfare...," Section 51.04(e); that "[a]n order of adjudication or disposition in a proceeding under this title is not a conviction of crime, and does not impose any civil disability ordinarily resulting from a conviction or operate to disquality the child in any civil service application or appointment," Section 51.13(a); that "[a]n appeal

from an order of a juvenile court is to the Texas Court of Civil Appeals and the case may be carried to the Texas Supreme Court by writ of error or upon certificate, as in civil cases generally," Section 56.01(a); and that "[t]he requirements governing an appeal are as in civil cases generally," Section 56.01(b). Other Title 3 provisions demonstrate that children over whom the juvenile court retains jurisdiction are not criminals and are to receive solicitous treatment by the state: Section 52.01(b) states that a child who is taken into custody is not deemed to be arrested; Section 53.04(a) provides that if, after a preliminary investigation, it is determined that further proceedings are warranted, a "petition for an adjudication" (not an indictment) is filed; and Section 54.02(g) provides that the child may not be criminally prosecuted for the act in question or for any other act which comes to the attention of the juvenile judge during the proceeding. Section 51.12(a) forbids detaining the child in, or committing him to, a portion of a jail in which adult offenders or alleged

adult offenders are being housed. Sections 51.14, 54.04(b), and 54.08 provide that files of juvenile court proceedings are not public records; that the juvenile judge may order counsel to keep silent as to any matter disclosure of which would harm the child's treatment and rehabilitation; and that the public may be barred from juvenile hearings. [55]

55/ Unlike former Article 2338-1, Title 3 expressly recognizes two justifications for juvenile court dispositions of those children over whom it retains jurisdiction--(1) rehabilitation and (2) protection of the public. Sections 51.01 and 54.04. But as with Article 2338-1, the primary purpose of all such dispositions under Title 3 is rehabilitation, for the Title states that the protection of the public interest is to be accomplished through programs of "treatment, training, and rehabilitation." Section 51.01(3). Moreover, though Title 3 (unlike Article 2338-1) divides those children over whom the juvenile court retains jurisdiction into two groups--delinquent children and children in need of supervision, Section 51.03--and provides that only delinquent children, as defined, may be sent to the Texas Youth Council, Sections 54.04(d)(2) and (g), this division should not be deemed to define two groups only one of which is to be afforded rehabilitative treatment (for all these children--those found to be delinquent as well as those found to be in need of supervision--are to receive that treatment). It simply defines two groups only one of which is to receive rehabilitative treatment at TYC institutions.

In our view, the foregoing provisions make it clear that, although Title 3 couples the rehabilitative purpose of former Article 2338-1 with the purpose of "protect[ing] the welfare of the community and...control[ling] the commission of unlawful acts by children," Section 51.01(2), the primary thrust of Title 3--and of the Article 5143d-Title 3 statutory scheme--is (1) that the state of Texas functions in a parens patriae relationship with its juvenile delinquents; and (2) that the aim of their confinement is rehabilitation in the form of restoration of self-respect and constructive reestablishment in society.[56] Accordingly, we believe that, under Jackson v. Indiana and the first part of the Donaldson theory, TYC juveniles have a Due Process right to efforts reasonably calculated to achieve that aim. Plain fairness (i.e. Due Process) requires that

[56] Appellants acknowledge (DA Brief at 36-37) that Title 3 and the TYC Act make it "obvious that the State of Texas through the Texas Youth Council is committed to rehabilitating the youth within its custody." (See also DA Reply Brief at 3, 8.)

the state not ignore its own promise.[57]

Appellants do not specifically contest the applicability of the first part of the Donaldson theory to involuntarily confined juvenile delinquents. What they do suggest (DA Brief at 32-36) is that Donaldson cannot be applied to TYC juveniles because Texas juvenile delinquents are different from persons involuntarily confined in mental institutions in two ways: (1) juveniles are committed to the TYC "because of some overt action on their part" (DA Brief at 34); and (2) "[t]he juvenile who is adjudicated delinquent in Texas is afforded a full gamut of procedural protections..." (DA Brief at 34). This is, however, merely an argument that TYC juveniles do not fall within the requirements of the second part of the Donaldson theory[58] and are not entitled to rehabilitative treatment for that reason.

We do not read the second part of the Donaldson theory as contemplating that persons who are involuntarily civilly committed

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57/ "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." Donaldson v. O'Connor, supra, 493 F.2d at 521, quoting Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971), affirmed sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

58/ See note 47, supra.

and confined have a constitutional right to rehabilitative treatment only if all three of the "central limitations on the government's power to detain" (493 F.2d at 522) are absent.[59] Since TYC juveniles are confined for indeterminate terms,[60] at least one "central limitation" is absent here, and that absence may entitle the plaintiffs to the quid pro quo of rehabilitative treatment.[61] Moreover, the indeterminate length of TYC confinements makes it possible for a child to be confined for a longer period than an adult serving a fixed jail term for the same offense.[62] We believe that, where (as here) the only rational justification for the state's

59/ The Donaldson case did not require this Court to reach the question whether the presence of one or two "central limitations" would preclude that right, because all three "central limitations" were, in fact, absent there.

60/ Section 54.05(b) of Title 3 of the Texas Family Code--the only statutory provision which places any limitation on the duration of confinement--merely provides that juvenile dispositions thereunder automatically terminate when the child reaches his eighteenth birthday.

61/ Inasmuch as the state statutory prupose for TYC confinement is rehabilitative, this Court need not rely upon the quid pro quo rationale in this case, however. Therefore, we do not address it further.

62/ Under Title 3 of the Texas Family Code, a child may be subject to TYC confinement if he violates a state penal law punishable by confinement in jail. Sections 51.03(a)(1) and 54.04(d)(2). Thus, commission of such "Class B misdemeanors" as "reckless conduct" (Texas Penal Code, Section 22.05), "criminal mischief"(Texas Penal Code, Sections 28.03(a)(1) and 28.03(b)(2)), or "theft" (Texas Penal Code, Sections 31.03(a)(1) and 31.03(d)(2)(A))--each punishable by a fine not in excess of one thousand dollars, confinement of up to 180 days in jail, or both--may result in a child's being confined in the TYC. Since children as young as ten years of age may be--and have been--so
(Footnote cont'd on next page)

imposing such longer confinements upon children than upon adults is that juvenile delinquents need, and are to be afforded, rehabilitative treatment, juvenile confinement absent treatment (i.e. adult incarceration), for such longer periods, violates Equal Protection by dealing dissimilarly with similarly situated juvenile delinquents and adult criminals for no rational reason. See, e.g., Reed v. Reed, 404 U.S. 71, 75-76 (1971); Levy v. Louisiana, 391 U.S. 68, 71 (1968); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974)[63] We would suggest

62/ (Footnote cont'd from preceding page)

confined (See Title 3, Section 51.02(1) and U.S. Ex. 89 at 78), it is thus possible for a child to spend as long as eight years in confinement after engaging in conduct which could result in a maximum jail term of only six months if he were an adult.

Furthermore, the record shows (U.S. Ex. 89 at 22) that, in 1971-72 (the latest year for which figures are available), the average length of confinement in TYC institutions varied from 10.1 to 17.8 months and that, at some institutions, children are required to remain for at least nine months before they even become eligible for release. (See, e.g., Tr. p. 3996, lines 19-21; p. 3997, lines 8-14 (Crockett).) Thus, it is not only possible, but highly probable that a child who is sent to the TYC after having engaged in "reckless conduct," for example, will be confined for at least three months longer than an adult jailed for that offense.

63/ Indeed, insofar as the length of his punitive incarceration exceeds that which he would have received if he were an adult, the juvenile is in effect punished for the "status" of being a child, in violation of the Eighth and Fourteenth Amendments. Robinson v. California, supra.

to the Court that, just as it is arbitrary, and thus a violation of Due Process, for the state to treat juvenile delinquents--who are different from adult criminals--the same as adult criminals, by subjecting them to adult incarceration, so it is arbitrary, and a violation of Equal Protection, for the state--having treated juvenile delinquents the same as adult criminals by incarcerating them as adults--then to treat them differently from adult criminals by subjecting them to longer periods of incarceration than an adult could receive for the same offense.

C. The Meaning of the Right

Appellants assert that there is "a conflicting and confusing array of professional opinion" as to what constitutes adequate treatment. (DA Brief at 44.) From this premise--and relying heavily on language from the district court opinion in Burnham v. Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972)--they draw two distinct, though related, conclusions: First, that no constitutional right to treatment should have been recognized by the district court in this case because "judicial definition of a 'right' to treatment is [im]possible" (DA Brief at 43); and second, that, if the right does exist, the selection of particular remedies to cure violations of the right is properly a legislative, rather than a judicial, function. (Id. at 45.) But this Court rejected just such an argument in Donaldson v. O'Connor, supra, and Wyatt v. Aderholt, supra. In Donaldson, the Court expressed disagreement with the Burnham court's conclusion (349 F. Supp. at 1342) that "the claimed 'duty' (i.e. to 'adequately' or 'constitutionally treat') defies judicial identity and therefore prohibits its breach from being judicially defined." See 493 F.2d at 525-526. Six months later, in Wyatt, the Court reaffirmed its view that "the right to treatment can be implemented through judicially manageable standards," 503 F.2d at 1314, and--on the basis of Donaldson and Wyatt--reversed the lower court decision in Burnham. Burnham v. Georgia, 503 F.2d 1319 (5th Cir. 1974) (per curiam).

We believe that implicit in appellants' argument are two erroneous assumptions: (1) That specific treatment ingredients (or "standards") suggested by experts as being minimally necessary to a program aimed at rehabilitation serve, not only a remedial, but a definitional function as well; that is, that these ingredients are, themselves, a constitutional treatment "standard" against which alleged violations are to be assessed; and (2) that the existence of a judicially ascertainable constitutional right to the reasonable possibility of rehabilitation therefore depends upon whether there is a consensus of professional opinion as to these specific ingredients.

In our view, both assumptions are fundamentally wrong. When experts speak of specific "standards" which they deem necessary to a rehabilitative treatment program, those "standards" do not, themselves, define a constitutional right; they are merely the means through which the right, once understood, may be realized; and they are therefore properly seen as equitable and remedial, not constitutional and definitional. By ignoring this distinction, appellants have, in effect, placed the Constitution exclusively in the hands of psychologists, psychiatrists, sociologists, educators, and physicians. The Constitution does not belong there. "It is emphatically the duty of the judicia[ry]...[not the rehabilitative professions] to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Moreover, to propose that, absent a

consensus of professional opinion as to the specific components of an adequate treatment program, there is no constitutional right to treatment is to suggest that the right can never exist so long as the rehabilitative arts continue to develop new insights and new approaches to treatment. This Court rejected that anomolous result in Donaldson v. O'Connor, supra, 493 F.2d at 526.

On the other hand, we believe that expert opinion as to the purpose, or goal, of juvenile treatment programs may be helpful in discerning the meaning of "rehabilitation." In the instant case, such expert opinion was abundant. One expert testified that any adolescent treatment program should be designed to help the child achieve the "tasks of adolescence"--a "positive self-concept," "intellectual skills," "sexual identity," a "capacity for intimacy," and a "moral value system." (Tr. pp. 926-927.) Another - concurring in this goal (Tr. p. 3057)--stated that such a program should create an environment in which the child can "adjust...at a level that is going to allow him to confortably relate and interact in his home community." (Tr. pp. 3061-3062.) A third expert described "a truly rehabilitative and therapeutic [juvenile] program" as one in which "a real attempt [is made] to re-integrate the...[child] in a positive, meaningful way with his family and with his community, his society,..." (Tr. p. 194.) A fourth defined the most important purpose of juvenile treatment as "enhancement of self-respect." (Tr. p. 2153.) These explanations comport with the statutory goals

articulated in the Texas Youth Council Act (Article 5143d, Vernon's Ann. Tex. Stat.): "...to provide a program...aimed at rehabilitation and reestablishment in society of children adjudged delinquent..." (Section 1); and "...to restore and build up the self-respect and self-reliance of the children and youth lodged...[in TYC institutions] and to qualify them for good citizenship and honorable employment" (Section 21).

The question remains, therefore, what it is that TYC juveniles are constitutionally entitled to. In our view, the TYC Act and the foregoing explanations of the experts answer the question: Juveniles who are involuntarily confined, as delinquents, have a constitutional right to an environment which will provide each of them a reasonable opportunity to grow, constructively, toward adulthood--that is, to achieve the "tasks of adolescence"--and to be positively and meaningfully reunited with his or her family and community. We do not see any particular ingredients of such an environment as constitutionally required in all circumstances. To the contrary, we believe that the question whether a particular ingredient should be implemented can only be answered on a case-by-case basis. A court's power to direct such implementation is a remedial power arising in Equity.

V.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT JUVENILES CONFINED IN THE INSTITUTIONS OF THE TEXAS YOUTH COUNCIL HAVE BEEN DENIED THEIR CONSTITUTIONAL RIGHT TO REHABILITATIVE TREATMENT.

Although our statement of facts, supra, does not purport to document all the relevant evidence - expert or otherwise - presented by this very large record, we believe that the facts and opinions which we have set forth, in some detail, in the attached Appendix, and which are outlined in our statement of facts, clearly support the conclusion that juveniles in the custody of the Texas Youth Council have been denied their constitutional right to such rehabilitative treatment as will give each of them a reasonable opportunity to achieve the "tasks of adolescence" and to be positively and meaningfully reunited with his or her family and community.[64/] The fact that programs, services, and climate vary from one

64/ Rather than attempting to review the record here, we respectfully refer the Court to our Statement, supra, and to the attached Appendix.

institution to another (and the fact that one school - Brownwood - is obviously considerably superior to the others in some ways) does not detract from the validity of this conclusion:[65] the evidence demonstrates that rehabilitative inadequacy is a systemic TYC phenomenon, and the Texas Legislature has apparently acknowledged as much.[66] Indeed, the record shows that the three largest TYC institutions (Gatesville, Gainesville, and Mountain View) - which, together, housed 85% of the state's institutionalized

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65/ See Newman v. Alabama, supra, 503 F.2d 1320 (5th Cir. 1974). We agree with appellants that this Court "should view the TYC as a whole." DA Brief at 95.

66/ "[W]e admit the existence of unacceptable conditions which have gone untouched and unimproved for years because we have been unwilling to expend the money or invest the time and concern necessary to implement sound remedial and preventative programs in this field. . . ."

DA Brief at 47.

juvenile delinquents at the time of trial[67] - are anti-rehabilitative in many respects.[68] It takes little expertise to recognize, for example, that the kind of physical brutality which has pervaded Gatesville and Mountain View is not only "cruel and unusual,"[69] but is ipso facto anti-rehabilitative as well. Nor are the deficiencies disclosed by this record concentrated in one, or a few, program areas. To the contrary, virtually every aspect of most TYC institutions is deficient from a rehabilitative point of view.

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67 / See U.S. Ex. 93.

68 / To a somewhat lesser degree, the same may be said of Crockett.

69 / The district court so found. See 364 F. Supp. at 173; 383 F. Supp. at 77.

Appellants contend that Martarella v. Kelley, supra, and Inmates v. Affleck, supra, are different from the instant case because they "dealt with institutions that were prisons as surely as any adult prison. ... This is certainly not the situation within the Texas Youth Council." DA Brief at 88. Yet Dr. Howard Ohmart, an expert who visited Mountain View, testified that he saw more tension, more rigidity, and more regimentation at that institution that he had seen at the Louisiana State Penitentiary at Angola. Tr. p. 1236, lines 7-21.

VI.

RELIEF

Throughout their brief, appellants repeatedly assert that the district court has ordered extensive injunctive relief in this case. The plain fact is that the court below has, as yet, issued no permanent injunction. Indeed, it has expressly declined to do so.[70] What the court has done is to direct the parties to meet and develop a plan for future TYC operation which will at least comport with the "standards" outlined in its opinion. That such a directive is not properly construed as a mandatory injunction is clear.[71] In our view, the order of the district court is "but [a] step . . . towards final judgment in which . . . [it] will merge."[72] Thus, we believe that the question of relief is not properly before this Court at this time.[73]

70/ See 383 F. Supp. at 126.

71/ Taylor v. Board of Education of the City of New Rochelle, 288 F.2d 600, 604 (2d Cir. 1961).

72/ Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

73/ See our November 18, 1974 Memorandum on the Question of Dismissing the Appeal.

(Footnote cont'd on following page)

Nevertheless, we offer a few comments with respect to the ultimate relief envisioned by the court below.

Systemic injunctive relief is appropriate here; given the magnitude and the severity of the violations disclosed by this record, the district court will have the power to order extensive relief, for

> . . . it is axiomatic that the remedial power of a district court is coterminous with the scope of the constitutional violation found to exist.

Newman v. Alabama, supra, 503 F.2d at 1332-1333.

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971); Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974).

Moreover, the court is following a permissible procedure as to relief. The directive to the parties to develop and submit a plan (or, if they cannot agree, plans) for the future operation of the TYC[74] is similar

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73/ (Footnote cont'd from preceding page)

The parties' court-ordered negotiations have been completed and remedial plans filed with the district court. The district court has, as yet, neither scheduled a hearing nor otherwise acted upon these submissions.

74/ See 383 F. Supp. at 126.

to those directives issued in a multitude of school desegregation cases. While the procedure being employed here differs from the standard school desegregation procedure in that the district court has, as to some matters, outlined, for the parties, detailed "standards" to which it expects their submission(s) at least to conform[75/] and, to that extent, is not deferring to the TYC in the first instance, we do not believe the court erred in informing the parties of a form of relief which it would accept. (It would, of course, be error for the district court to refuse to consider such alternatives as the State may propose as its preferred method of operation.) Thus, we do not believe that the court has abused its discretion. Although the order may present some close questions as to certain particulars of the relief envisioned,

> ...no litany of the prison deference rule can vitiate the district court's duty to fashion a remedy commensurate in scope with that of the infirmities discerned.

75/ As to other matters (vocational education, "institutional life," and medical and psychiatric care), however, the court's opinion gives the parties broad discretion in the development of "standards" of operation. See 383 F. Supp. at 92, 100-101, and 105.

Newman v. Alabama, supra, 503 F.2d at 1333.

We do want to reemphasize our view on one point: the treatment ingredients outlined by the district court are simply the ingredients which this record showed would be adequate to remedy the extensive deficiencies of the TYC. They are not, themselves, a constitutional standard, and they are not necessarily applicable to other states or in other cases. That the district court will ultimately have the power to direct the TYC to implement particular "standards" derives, not from the Constitution, but from the court's equity power to fashion an appropriate remedy.

## CONCLUSION

For the foregoing reasons, we urge the Court to dismiss this appeal[76/] or, in the alternative, to affirm the Judgment, Opinion and Order of the district court.

Respectfully submitted,

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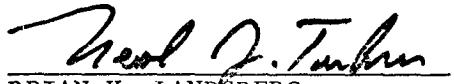

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76/ See p. 25, supra.

CERTIFICATE OF SERVICE

I, NEAL J. TONKEN, hereby certify that I have this day served the foregoing Brief for the United States as Amicus Curiae (including the Appendix attached thereto) on the parties to this action, and on the other amici, by mailing two copies to their respective counsel, first class, postage prepaid, at the addresses listed below:

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