STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DODGE

In the Matter of

WARREN LILLY, JR. #447655

DECISION AND ORDERS ON APPLICATION FOR STAY PENDING APPEAL

Case No. 07CV392

Appeal 2009 AP 1420

(Also **Appeal 2008 AP 228**)

This Court issued a Memorandum Decision and Orders dated May 19, 2009. On May 22, 2009, the Wisconsin Department of Corrections (DOC) filed a notice of appeal and obtained an ex parte order from the Court of Appeals staying the effect of this Court's orders.

On May 27, 2009, the Court of Appeals ordered the DOC to file a motion seeking a stay from the trial court. The DOC's motion was filed herein on May 29, 2009. This Court entered Revised Orders on June 2, 2009, and the Court heard the application for stay on June 15, 2009. DOC Attorney Gloria Thomas and Mr. Lilly both participated by speakerphone for that hearing. The Court ruled from the bench and elaborates on that decision herein and reduces its order to writing.

In its brief supporting its motion for stay pending appeal, the DOC relies heavily on the case *In the Matter of Guardianship of L.W.,* 167 Wis.2d 53 (1992). The context of that case (a guardian acting to pull the plug on behalf of a patient in a persistent vegetative state) was quite different than the context of the Lilly case. Nevertheless, many of the broad principles of law established by the Wisconsin Supreme Court in that case bolster Mr. Lilly's claim that his right to withhold informed consent is entitled to

significant constitutional protection, and that such protection requires recognition of the "compelling circumstance exception" to *Saenz* as suggested by this Court.

The Court therefore wants to leave the reader with the following quotes from the Wisconsin Supreme Court in *Guardianship of L.W.*, 167 Wis.2d 53 (1992), which the Court believes help to establish some context for the larger discussion necessary in the Lilly case.

> We conclude that an individual's right to refuse unwanted medical treatment emanates from the common law right of self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, section 1 of the Wisconsin Constitution. (Emphasis added.) *Id* at Pg 67
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> …..the Wisconsin legislature has declared that in this state competent persons have a legislatively sanctioned right to refuse unwanted life-sustaining medical treatment. *Id* at Pg. 70
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> > Whether or not the techniques used to pass food and water into the patient's alimentary tract are termed "medical treatment," it is clear they all involve some degree of intrusion and restraint. . Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water. (Quoting U.S. Supreme Court in *Cruzan* case). (Emphasis added.) *Id* at Pg 72.
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> Consistent with the implied holding of the United States Supreme Court, and the specific declaration of the Wisconsin legislature, we conclude that an individual's right to refuse unwanted life-sustaining medical treatment extends to artificial nutrition and hydration. (Emphasis added.) *Id* at Pg. 73
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> We further conclude that the right to refuse all unwanted life-sustaining medical treatment extends to incompetent as well as competent individuals. *Id* at Pg. 73
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> The right to refuse treatment, when exercised by a guardian, must be balanced against relevant state interests. *Cruzan*, ___ U.S. at ___, 110 S.Ct. at 2851-52. Courts have identified four relevant state interests: (1) preserving life; (2)

> safeguarding the integrity of the medical profession; (3) preventing suicide; and (4) protecting innocent third parties. *Conroy*, 98 N.J. at 348, 486 A.2d at 1223. *Id* at Pg. 90
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> The state's interest in protecting the integrity of the medical profession is not implicated in this case...a decision to withhold or withdraw treatment will not impugn the integrity of the profession. ..Indeed, the existence of a protected right to refuse treatment for all individuals competent or incompetent may in a sense protect the integrity of the medical profession. (Emphasis added.) *Id* at Pg 91
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> The third asserted state interest, preventing suicide, is also not implicated in this case. Refusing medical treatment is not suicide. (Emphasis added.) *Id* at Pg. 92
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> The fourth asserted state interest, protecting innocent third parties, is also not implicated on the record. L.W. had no children, no immediate family, and a decision to forego treatment would affect no innocent third parties. *Id* at Pg. 92

As one reads the *Guardianship of L.W.* case, one sees that the Wisconsin Supreme Court borrowed heavily from the logic of the New Jersey Supreme Court in *The Matter of Conroy*, 98 N.J. 321 (1985), citing it multiple times and quoting from it as well. In light of the fact that the controlling principles of Wisconsin jurisprudence in this area were largely based on *Conroy*, this Court also offers the following quotes from *Conroy* for greater perspective.

> The patient's ability to control his bodily integrity through informed consent is significant only when one recognizes that this right also encompasses a right to informed refusal. (Emphasis added.) *Id* at pg. 347.
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> Whether based on common-law doctrines or on constitutional theory, the right to decline life-sustaining medical treatment is not absolute. In some cases, it may yield to countervailing societal interests in sustaining the person's life. Courts and commentators have commonly identified four state interests that may limit a person's right to refuse medical treatment: preserving life, preventing suicide, safeguarding the integrity of the medical profession, and protecting innocent third parties. *Id* at 349-50.

> In cases that do not involve the protection of the actual or potential life of someone other than the decisionmaker, the state's indirect and abstract interest in preserving the life of the competent patient generally gives way to the patient's much stronger personal interest in directing the course of his own life. (Emphasis added.) *Id* at 350.
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> The third state interest that is frequently asserted as a limitation on a competent patient's right to refuse medical treatment is the interest in safeguarding the integrity of the medical profession. This interest, like the interest in preventing suicide, is not particularly threatened by permitting competent patients to refuse life-sustaining medical treatment. (Emphasis added.) *Id* at 351-52.
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> Moreover, even if doctors were exhorted to attempt to cure or sustain their patients under all circumstances, that moral and professional imperative, at least in cases of patients who were clearly competent, presumably would not require doctors to go beyond advising the patient of the risks of foregoing treatment and urging the patient to accept the medical intervention……..If the patient rejected the doctor's advice, the onus of that decision would rest on the patient, not the doctor. Indeed, if the patient's right to informed consent is to have any meaning at all, it must be accorded respect even when it conflicts with the advice of the doctor or the values of the medical profession as a whole. *Id* at 353-53.
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> On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death. (Emphasis added.) *Id* at 353.

As has been seen from both *The Guardianship of L.W.* and *The Matter of Conroy*, an individual's right to refuse unwanted medical care is a very important and highly protected right. In Wisconsin, it is protected both by the Federal and State Constitutions and, in part, by state statute. Artificial feeding is clearly recognized as a medical procedure. As noted by the United States Supreme Court quote within the *L.W*. case, a patient's right to informed consent includes the right not to consent. The forced provision of medical care over a competent patient's objection impugn the patient's liberty, dignity and freedom.

This Court would also comment on the State's inclusion in its brief a couple of references to a legitimate State interest of safeguarding the integrity of the medical profession. Certainly that factor has nothing to do with the Lilly case other than the fact that this Court's orders certainly safeguard the integrity of the medical profession much more than the status quo prior to the Court's orders of May 19, 2009. The entire discussion by the World Medical Association in the Declaration of Malta, and the medical journal articles and other resources cited in this Court's decision of May 19, 2009, indicate that a physician's highest loyalty and responsibility is directly to the patient. DOC physicians, however, are subjected to a dual loyalty posture which puts them at odds with the mainstream of medical ethics. As one of the cited articles described it, the force feeding of competent inmates represents nothing less than a medical ethics "black hole". See Exhibit 17.

It is clear to the Court that decisions have been made regarding the more recent provision of medical care to Mr. Lilly (e.g., the use of the restraint chair for extended two hour feedings in January and February, 2009) which have less to do with the provision of medical care than they do with punishment of Lilly for engaging in a hunger strike. It would appear to the undersigned that the long-term feeding of Mr. Lilly has had a corrosive effect on medical ethics within the DOC, and that it is precisely this Court's Orders of May 19th and June 2nd, 2009, which allow for the revival of medical ethics within the DOC as to patient Warren Lilly.[1]

Of the 18 pages in the State's brief supporting motion to stay, only one page was addressed at responding to the "compelling circumstances" found by this Court, and

[1] A five year course of force feeding over the objection of a competent person will tend to bring out the worst in any medical system. Other more everyday medical problems of inmates provide a much better opportunity for the DOC medical staff to live up to proper ethical standards and on those matters they tend to do so.

even that page was only limited to the aspect of the Court's finding that Mr. Lilly is very intelligent and competent. They didn't respond at all to the compelling circumstances consisting of the DOC's apparent inability to provide any consistent continuum of care for this patient, the physical pain and injuries occasioned by the extended use of the restraint chair and the apparent indifference of DOC staff to the same, the antagonistic relationship which has developed between the DOC and Lilly, the quarter million dollar a year staff cost associated with Lilly's feeding, or any of the host of other findings made by the Court. Make no mistake that that this Court is not saying that Mr. Lilly should be treated differently because of his clear intelligence and competency, but rather that they are the baseline, the *sine qua non*, upon which the rest of the case is built.

Nor does this Court take lightly the penological interests of the DOC. They are solely responsible for the housing, feeding and programming of some 22,000 prison inmates. On a daily basis, they need to make sure there is enough utility service, space, supplies, security and staffing to operate numerous prisons scattered across the state.

The DOC is entirely responsible for, and has power to regulate, the entirety of inmates' lives including, but not limited to:

(1) Determining their security status;

(2) Determining what institution they will be housed in;

(3) Determining what unit in which institution they will be housed in;

(4) Determining whether or not they are going to be allowed into any programming (education, therapy, job training, jobs, etc.);

(5) Determining what types of electronic devices an inmate may possess;

(6) Designating the supplier of such electronics, and even the manufacturer and how such electronics are constructed;

(7) Determining what amount of movement within institution each individual will be permitted;

(8) Determining when, in the course of particular movements within or without the institution, the inmate will be strip searched;

(9) Determining when the lights will be off and when all electronic devices need to be turned off;

(10) Determining what the inmates wear;

(11) Determining what the inmates eat;

(12) Determining how and when inmates can associate with each other;

(13) Determining how many books, pieces of paper, envelopes, and stamps an inmate may have in his possession;

(14) Determining what items can be bought at the prison canteen;

(15) Determining who can visit the inmate, when, and under what conditions;

(16) Determining whether the inmate will have access to any legal materials, and if so, when and how often; and

(17) Determining the quantity and the quality of health care services provided to the inmate population.

The DOC already has all of these powers, and more, as to all of the inmates under their control, including Warren G. Lilly, Jr. (but for his refusal to wear any clothing and his lack of informed consent as to the force feeding). Nevertheless, federal and state constitutional law principles require the DOC to obtain specific court approval

before it can strap Mr. Lilly down and stick an NG tube two feet up his nose and down into his stomach, three times a day, in order to forcibly provide him nutrition and hydration. These cases involve a careful balancing of the inmate's constitutional rights with the legitimate interests of the state: the basic question in this case is whether the particular circumstances which have ultimately developed with Mr. Lilly's force feeding have finally tipped this balance in favor of Lilly's right not to consent.

This Court doesn't want to see unrest or disturbances in the prisons, and in truth the real likelihood of the same due to this case is practically non-existent.[2] However, I have to observe insofar as Mr. Lilly and his captors are involved, by far the greatest source of disturbance occurred daily due solely to his forcible feeding. If my orders are affirmed herein, we'll probably never see or hear from Mr. Lilly again. The institutions where he is housed will be quieter[3], more calm, humane places to live and to work, and the State will save more than a quarter of a million dollars in the bargain. This is clearly a **win** (DOC staff) **–win** (Lilly) **–win** (taxpayers) **situation**, and these don't come along very often.

Let's now turn our attention to the specific orders which are subject to the stay motion and quickly work our way through them. This will not be difficult. In entering its revised orders of June 2, 2009, the Court clarified and expanded the orders as well as labeled each order with a letter for ease of reference during arguments as well as decision. It is clear that the State should have no interest in obtaining a stay of orders **A** (denying financial awards to Mr. Lilly) or **G** (in the event of any future force feeding, allowing it to take place 7 days a week instead of 6). Attorney Thomas agreed with that.

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[2] Little chance that he would die, and even less chance, if he did, that any other inmates would even care.

[3] Watch one of the forced feedings on either DVD Exhibit 1 or Exhibit 2 to see and hear what it was like for Mr. Lilly and staff alike.

As Attorney Thomas set forth at Page 6 of her brief of May 29, 2009, in order to obtain a stay pending appeal, the DOC must demonstrate that: (1) The DOC is likely to succeed on the merits of the appeal; (2) Unless a stay is granted, that the DOC will suffer irreparable injury; (3) That no substantial harm will come to Mr. Lilly; (4) A stay will not harm the public interest. There are orders which in and of themselves would not present the DOC with any particular difficulty and would not impede their ability to maintain Mr. Lilly's health in the event of any future force feeding. Those are orders **D** (denying the State's motion to allow the use of restraint chair for any time from 45 minutes up to 2 hours or more), **E** (enjoining the DOC from taking longer than 15 minutes to feed Mr. Lilly or requiring him to sit in the restraint chair for longer than 25 minutes total at any meal), and **F** (setting certain conditions regarding the specific force feeding procedures). Similarly, order **H** (requiring certain documentation to be presented to any court which the DOC is asking for further force feeding orders on Mr. Lilly) would not cause any irreparable injury to the DOC…..they have lots of copier machines.[4]

Certainly the orders just referenced by the Court could not seriously be claimed to cause the DOC "irreparable injury" such that it would be entitled to a stay thereof. And in regard to the third factor in considering a stay, the potential harm to the respondent, it would only be due to the existence of orders **D**, **E**, and **F** that Mr. Lilly would not be as substantially harmed if the force feeding were to be renewed.

The state's position on **D**, the time restriction on the feeding, is that Mr. Lilly lost significant weight and was in very poor shape earlier this year due to our having to follow Judge Bissonnette's orders. That is not really accurate. His weight declined as the result of a number of factors, including his usual winter weight decline (due to

[4] Attorney Thomas indicated at the June 15th, 2009, hearing on stay that the DOC would have no problem complying with order H requiring them to provide copies of my recent orders to any judge to whom they make application for a new *Saenz* order on the Lilly case.

shivering…he doesn't wear any clothes), but also due to the terrible processes the State was subjecting him to in their no-holds-barred effort to stop this hunger strike. He was being strapped naked into the restraint chair for more than 2 hours at a time, three times a day, with the NG tube up his nose almost that entire time. This was frequently in cold conditions, where he was probably shivering off a third of what they were trying to feed him. He felt like they were actually trying to kill him back then, and he vigorously protested by learning how to voluntarily purge himself, even while his hands were strapped behind him.[5] It was an extreme and very costly battle of wills, something the Court neither recommended or condoned. Lilly did not have these problems with the shorter feeding times that had been used by the DOC the first two or three years of his hunger strike, or more recently as ordered by this Court in 2008. The ultimate weight loss problem, according to Dr. Barnett's testimony in April, was due to only being allowed to feed him six days a week instead of seven.[6] The Court has now solved that problem. See order **G**, which permits feeding him seven days a week.

Turning the Court's attention to order **B** (the order terminating all prior force feeding orders), the Court cannot take seriously the State's attempt to obtain a stay of that particular order. As indicated in this Court's decision and orders of May 19, 2009, Mr. Lilly was not then, and is not now [7], in such a condition as would allow the DOC to obtain an order under *Saenz*, nor is he even in such a condition as would allow the State to obtain an extension order on the expanded criteria that this Court has

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[5] Vomiting up to another third of the nutrition overboard while strapped in the restraint chair for over two hours.

[6] I should add that the State's brief in support of the stay suggests that Dr. Barnett's testified at our hearings established that Mr. Lilly developed a heart problem due to his hunger strike. I agree with Mr. Lilly that there was no such testimony adduced. Rather he was identified as having more of a congenital heart condition that could make him more susceptible to injury by a hunger strike.

[7] At the June 15th, 2009, hearing on stay, Mr. Lilly said that he weighed in that morning at 167.8 pounds, up three or four pounds just since our last hearing and 40 pounds more than at the end of February.

suggested for such orders. Mr. Lilly is not now on an active hunger strike, although he continues to refuse the regular prison diet. Under a temporary agreement with infirmary staff, he still eats honey, peanut butter, graham crackers, and occasionally drinks cranberry juice. He is neither moderately nor severely malnourished, and is not dehydrated.

In the State's brief supporting stay, they repeatedly assert that "IF" Mr. Lilly resumes a total hunger strike, and "IF" the DOC is restrained from force feeding him, he could eventually become in imminent danger of suffering serious harm or death. Clearly those allegations don't meet the *Saenz* standards. Before *Saenz* could be applied again to Mr. Lilly, he would actually have to resume his hunger strike and maintain it for a sufficient length of time that he actually became either moderately or severely malnourished or dehydrated. Attorney Thomas admitted on June 15th that the DOC wants order **B** stayed so that it has an anticipatory order just in case Mr. Lilly resumes his hunger strike and becomes malnourished. However, this Court sees nothing in the *Saenz* decision allowing the DOC to obtain an anticipatory order based on an inmate's stated intention to renew his hunger strike at some point in the future.

This Court feels very confident in its observations regarding the lack of a basis for a stay pending appeal on all of the orders discussed above. What is left is order **C** (the injunction against obtaining any future force feeding orders of Mr. Lilly) and that is the only one where the Court believes the State can plausibly make a serious argument. Essentially, the State is arguing that if they cannot obtain a force feeding order in the event Mr. Lilly actually resumes his hunger strike, and if he becomes moderately or severely malnourished, then there is the potential that he might accidentally die before the issues have been determined by the Court of Appeals. They indicate that such

event would cause the DOC irreparable injury, presumably because they think there would be a mass riot throughout the state by DOC inmates (who currently couldn't care less regarding Mr. Lilly's hunger strike).

Again, going back to the criteria for obtaining a stay pending appeal, the first factor can be argued both ways. In other words, what is the likelihood of the DOC succeeding on the merits? It is hard to say. Obviously, this Court is asking for an extension and further development of the law laid down in *Saenz*. The Court is asking for the Court of Appeals to recognize a "compelling circumstance exception" to the *Saenz* rationale. This is a case of first impression and so this Court has no idea what the Court of Appeals will do. I would simply note that the 37 compelling circumstances identified by this Court are not insignificant. I am sure that they will be carefully considered by the Court of Appeals, and those circumstances do tend to support some further development of the law in this area.

As to whether the DOC will suffer irreparable injury, again, that is arguable. To be honest, the sense that I get from the DOC is that it wants to have its way with Mr. Lilly, and it will vigorously resist any effort to allow trial courts any meaningful oversight of DOC forced feeding operations.[8] This Court seriously questions, however, whether the DOC would, or even could, suffer "irreparable injury" as a result.

The DOC supplemented the record on appeal by filing a couple of affidavits in support of its ex parte application for stay on May 22, 2009. One of the affidavits was by Warden Timothy Lundquist, who took care to mention a riot at Waupun Correctional Institution following closely on the heels of an inmate suicide. Very little context was set forth in the affidavit. Therefore the Court, last week, reviewed the Dodge County

[8] Perhaps to test this view, the Court of Appeals should invite the DOC to describe what role, if any, trial courts should play in these cases.

criminal files resulting from that riot and issued some formal Comments, dated June 9, 2009, to provide the Court of Appeals with greater context.[9] The Court stands by those comments and suggests that whether the DOC would actually suffer from any injury, much less an irreparable injury, is questionable.[10]

On the other hand, if Mr. Lilly would resume his hunger strike and, contrary to his stated wishes, die unintentionally as the result of such hunger strike, it could render the appeal moot. This is a small and yet very important case. The DOC, inmates, and trial courts alike, deserve some further pronouncement of law in this area. Should the Court of Appeals ultimately agree with the DOC that its penological interests will always trump the facts of any given case, no matter what the circumstances, and that the premonition of some potential prison unrest outweighs the actual 37 compelling circumstances found by this Court to already exist in reality, then it may be inappropriate for the Court to allow Mr. Lilly to resume his hunger strike if there is a chance of his inadvertent death as a result.

Only because of the potential for the irreversible finality of Mr. Lilly's death, and not particularly because of the strength of the State's motion for stay, the Court is going to reluctantly grant a stay of the effect of this Court's order **(C)** enjoining the DOC from obtaining any force feeding orders as to Mr. Lilly in the future. What makes this stay somewhat palatable, or even possible, under the circumstances of this case, are the specific protections afforded Mr. Lilly by orders **D, E, F, G** and **H**. The Court is not staying any of the orders other than **C**, and I would urge the Court of Appeals to consider doing the same.

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[9] Otherwise the 1983 Waupun riot was like a loose cannon rolling around on the deck of this case ….it needed to be strapped down by its own particulars.

[10] Mr. Lilly's recent responsive brief included reference to DOC stats showing literally dozens on inmate suicides between 2001 and 2006, with no untoward or adverse consequences suffered by the DOC in terms of riots, prison takeovers, etc.

Mr. Lilly urged this Court in the June 15th hearing to require the DOC to give him notice of any such application for a new *Saenz* order, despite the fact that *Saenz* allows the initial order to be obtained *ex parte*. Given the case history here, and its current posture on two separate appeals. Mr. Lilly makes a good point. On the other hand, if his condition were in fact to deteriorate to the point of severe malnutrition and imminent danger of death or great bodily harm, a court may not be able to accommodate a preliminary hearing requirement in a sufficiently timely fashion.

I therefore invite the Court of Appeals to give this question thought, since they are the authors of the original *Saenz* standards. If the DOC were to seek a new *Saenz* order while this appeal is pending, what procedural protections should Mr. Lilly be provided, if any, beyond what *Saenz* already requires? Perhaps a requirement that the DOC provide Lilly with a copy of their application as it is happening in real time[11] and that a hearing being held on such application within so many hours or days of obtaining an *ex parte* order.

IT IS THEREFORE ORDERED that the DOC's motion for stay of the Court's orders pending appeal is denied as to orders **A, B, D, E, F, G, H,** and **I**.

IT IS FURTHER ORDERED that this Court is only granting a stay pending appeal of order **C**, the order enjoining the DOC from obtaining any future force feeding orders of Mr. Lilly.

The Court wants to remind the DOC that before it would be permitted to obtain any future force feeding order as to Mr. Lilly, the DOC would need to comply with the original *Saenz* standards. Allegations that Mr. Lilly intends to resume his hunger strike, and that he may do so someday, and that if he does, it may be a total hunger strike, and

[11] I have found that I can get documents immediately to both Mr. Lilly and to attorney Thomas by email or fax. The documents I send to Mr. Lilly are faxed or emailed to DOC staff in his unit.

if it is, that someday he may become moderately or severely dehydrated, doesn't cut it. He has been off of his hunger strike long enough that he has to resume his total hunger strike, and actually has to become moderately to severely malnourished or dehydrated before this Court, or any other Court, can even consider granting a new force feeding order.

Dated this 16th day of June, 2009.

BY ORDER OF THE COURT

/S/ Andrew P. Bissonnette

_____

ANDREW P. BISSONNETTE
CIRCUIT JUDGE, BRANCH 3
DODGE COUNTY, WISCONSIN

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