In the

Supreme Court of the United States

DONALD GILBERT HUMPHREY,

Petitioner,

vs. No. 70-5004

ELMER O. CADY, Warden,

Respondent.

Washington, D. C.
December 7, 1971

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Tuesday, December 7, 1971.

The above-entitled matter came on for argument at 10:45 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

IRVIN B. CHARNE, ESQ., 211 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, for the Petitioner.

GEORGE L. FREDERICK, ESQ., Assistant Attorney General of Wisconsin, 114 East, State Capitol, Madison, Wisconsin 53702, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Humphrey against Cady, 5004.

Mr. Charne, you may proceed whenever you're ready.

ORAL ARGUMENT OF IRVIN B. CHARNE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CHARNE: Mr. Chief Justice, and may it please the Court:

This is here on writ of certiorari to the United States Court of Appeals for the Seventh Circuit. And I represent the petitioner, Donald Gilbert Humphrey, who presented, as the Court knows, his handwritten petition to this Court without the benefit of counsel.

Mr. Humphrey's case commenced -- started back in May of 1967. On May 30, 1967, he was arrested in the State of Wisconsin, Waukesha County, which is the county adjacent to Milwaukee County, and charged with the offense of contributing to the delinquency of a child.

This is a misdemeanor in the State of Wisconsin, carrying a maximum penalty of one year.

We don't have the record, Your Honor, of that initial proceeding here; however, in his petition to this Court for writ of certiorari, Mr. Humphrey said he was sitting in a car and drinking beer with a boy who was almost 14, he was 13 at the time.

And this is, I think, in Wisconsin a very frequent type of case, of contributing to the delinquency of a minor. It's against the law for a minor to drink beer, and if an adult gives him an alcoholic beverage, you are then contributing to the delinquency of a minor.

So that is, apparently, the offense for which he was arrested May 30, 1967.

The next day, May 31, 1967, he was in court; he pleaded guilty to the offense, and the court, under the Wisconsin Sex Crimes Act, committed him for a presentence examination.

Q But the conviction was not for a sexual offense?

MR. CHARNE: No, Your Honor, it was for contributing to the delinquency of a child.

Now, then -- pardon me. Yes?

Q I don't follow this. You mean that in Wisconsin, even though it's not a sexual offense --

MR. CHARNE: Well, Your Honor, I will explain what the Wisconsin Sex Crimes Act covers. In Wisconsin, under our Sex Crimes Act, there are two categories of sex crimes:

One category is that which calls for a mandatory sentence under the Sex Crimes Act, and that includes the offenses of rape, attempted rape, sexual intercourse without consent, and indecent liberties with a child. If you are convicted of those you automatically go in the system.

However, the Wisconsin statute provides that any

other offense except homicide or attempted homicide can also be a sex crime. It is a sex crime if the court finds that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime. If the court finds --

Q Well, this could be shoplifting or arson or --

MR. CHARNE: Yes. Yes, Your Honor, or sneaking into an X rated movie. If the court finds that the defendant was probably directly motivated by a desire for sexual excitement in the commission of the crime, this becomes a sex crime in the State of Wisconsin.

Q Well, what kind of evidence does the judge take to make that determination?

MR. CHARNE: Well, this is one of our complaints, Your Honor, because I don't think the statute requires any evidence. It does not require a hearing on that issue. And we don't have a record as to what happened. But we do have a record -- what's in the record shows that this man was arrested May 30th, he was convicted on his plea of guilty to the crime of contributing to the delinquency of a child on May 31st, and sent away for a presentence examination under the Sex Crimes Act.

Q Well, as you say, we don't have a record. We have his say-so that he was sitting in an automobile with a juvenile of the same sex drinking beer; but he doesn't say what

else was going on.

MR. CHARNE: Well, in his petition to this Court, Your Honor, he says that that's all that was going on, and he says that he and the boy were put under considerable pressure to testify that something else went on, and both of them denied it.

Q Yes.

MR. CHARNE: He also says the boy was sent to a hospital for medical examination, and that there was no evidence of any sexual molestation.

So, it's unfortunate that we don't have that record, but that is what the evidence is.

Now, we do have the court's order of commitment, which doesn't indicate any hearing on that particular issue. He was sent away on May 31st and on July 24th the report came back from the Department that had examined him, and that's found -- the order then, the court entered an order which is found in the Appendix, on page 11. That's part of the record.

And the court says nothing about the basis of its finding that this was a sex crime. It says that he was sent away, and the report of the Department came in, and, based upon that report, he sentenced him under the Wisconsin Sex Crimes Act.

He was sent to Waupun State Prison, which at that time was the facility designated for Sex Crimes Act people; it was

not a hospital, it's the Waupun State Prison.

Q Do we have the report?

MR. CHARNE: No, we do not have the report, Your Honor. That is not in the record.

Q We do know, do we, that it was the recommendation of the Department that your client was in need of specialized treatment for his mental aberrations -- and I'm reading from your brief. Do we know that?

MR. CHARNE: I believe so, yes. Yes, sir.

Q Yes.

MR. CHARNE: The judge says that in his order. Incidentally, the order of the judge also indicates that on the day when he was sent away, that there was no attorney present. It says that the report came back on July 24th, and the appearances were: the State of Wisconsin appearing by Robert Evans, Assistant District Attorney in and for Waukesha County, and the defendant appearing in person.

So that on that day when he commenced his sentence under the Sex Crimes Act, apparently there wasn't even a hearing on that day.

Now, then he went --

Q Now, what is the sentence under the Sex Crimes Act?

MR. CHARNE: Now, the sentence under the Sex Crimes Act is an indefinite period of time in these segments:

First, you go for the maximum period for which you could have been sentenced --

Q That's a year.

MR. CHARNE: Yes. -- under the offense.

Then the Department, if it believes that you are dangerous -- if there is danger to the public for releasing you -- orders you extended, and that order is subject to review of a court, and they can extend you in five-year increments without limit.

Q What happens, again?

MR. CHARNE: At the end of one year, or a little less than a year, in April of 1968 -- in other words, he had been sent away July 24th of '67, in April of 1968 the Department issued its order saying that this should be extended for another five-year period.

Q But you say a judge has to confirm that?

MR. CHARNE: Yes. Then the Department applied to the County Court of Waukesha County to confirm that order.

Q Same judge who issued the sentence?

MR. CHARNE: And it goes back before the same judge, but it turned out the judge wasn't there, and someone else was filling in for him. So another judge, then, heard the matter and there was a hearing on July 23 of 1968, on the order of the Department to extend him.

Q But by this time he had counsel, didn't he?

This is when he had the lady lawyer, is it not?

MR. CHARNE: Yes, he had the lady lawyer on July 23. Mrs. Neff, who --

Q Well, he had counsel when he pleaded guilty, didn't he?

MR. CHARNE: Yes, he did, Your Honor. He had counsel when he pleaded guilty to the original offense, and it doesn't -- the record doesn't indicate why that counsel wasn't called at the time he was actually sentenced.

Q But the hearing which came after the guilty plea, he was uncounseled, isn't that right?

MR. CHARNE: If there was a hearing, Your Honor, yes.

Q They refer to it sometimes as a hearing, but let's call it the occasion.

MR. CHARNE: Yes.

Q The occasion when he was informed where he was going to be sent, there was no counsel present?

MR. CHARNE: That is correct, Your Honor, according to the order of the court. That is, the only record we have of that is the court's order, and it doesn't recite the presence of any counsel for him. It says "the defendant appearing in person".

Q Now, then, I gather, he was extended for five years, until what date?

MR. CHARNE: Yes, Your Honor, he was extended for

five years, which would have made it 1973. However, he was paroled this year, earlier -- in March of this year he was paroled. So that at the present time he is on parole.

But at the time when he was brought back on this hearing to confirm the extension order of five years, he was there represented by Mrs. Neff.

Q May I just go over it once more?

MR. CHARNE: Yes, sir.

Q Did I understand you to say that at the end of his five years, suppose he was recalled from parole, might there be another five years?

MR. CHARNE: Oh, yes. It's very clear. He could spend the rest of his life. There is no time limit, except that there are five-year increments, and it must be confirmed by a court.

Q The extension requires a finding, I understand, that he would be a danger to society if released; is that it?

MR. CHARNE: Yes. Yes, Your Honor.

That in the opinion of the Department his release would be dangerous to the public.

Q If you know, in those extension proceedings, is the subject represented by counsel usually?

MR. CHARNE: I believe that he is, Your Honor. I know that the Wisconsin Supreme Court has said he should be.

There's a case in Wisconsin, the Huebner case, which

the court set out the procedural requirements and clearly indicated that a person is entitled to counsel and should be represented by counsel.

Q Is that Wisconsin case cited in your brief?

MR. CHARNE: Yes, it is, Your Honor.

Q Oh, yes, I see it, H-u-e-b-n-e-r.

MR. CHARNE: That's right, Your Honor.

Q Has the Supreme Court laid down any standards of proof?

MR. CHARNE: Well, they talk about dangerous in this, Your Honor, but they have not really, I think, explained what dangerous means, other than it does not necessarily mean physical harm. They pointed --

Q Well, would it have to be a danger because of sexual aberrations?

MR. CHARNE: I don't believe so, Your Honor. I don't believe that it's limited. The statute certainly doesn't say that, and I am not aware of any Wisconsin case that says that it must be limited to sexual problems.

Q Well, this hospital, which I think you said is a hospital, or at least an institution for deviates, sexual deviates?

MR. CHARNE: No. At the time when he was sent there, Wisconsin had no separate facility for sexual deviates. The Appendix to the Respondent's brief here points out one of the

problems in Wisconsin of getting money to build an appropriate facility. They didn't have it, and they --

Q Was there treatment of any kind there?

MR. CHARNE: Well, it's questionable. With the case history in Wisconsin, it would indicate that some of these people have had group therapy. And that was considered sufficient treatment.

The question of treatment for --

Q This is just a prison, is it?

MR. CHARNE: Yes, sir; it's a prison. It was the State Prison. And according --

Q Well, does that mean that nobody has ever been released as having recovered?

MR. CHARNE: I don't know, Your Honor. I know that our -- Mr. Humphrey was paroled. He's on parole at the present time, so apparently they thought it was all right to release him. Now, whether they would try to exercise continued control when his time's up, I don't know.

Q But this extension of one year is predicated upon the premise that the person has recovered?

MR. CHARNE: Yes. It's an extension of five years, Your Honor. In five-year increments.

Q Right. And when you say this is just a prison, does this mean that everybody just gets extended because there's no treatment and no recovery in this institution?

MR. CHARNE: No, I wouldn't say that's correct, Your Honor. Apparently, either the institutionalization itself or the group therapy sessions that are held, for some reason, persuades the officials, as to this man for example, that they could release him. So, in their minds, something happens. Whether it actually -- whether there's a difference or not, I am sure that Mr. Humphrey wouldn't agree that he received any treatment. I think in his papers that he filed in this and the lower courts --

Q Of course he would not agree that he needed any.

MR. CHARNE: That's right, Your Honor; I'm sure that's true.

Q Well, what would be the basis upon which they could terminate parole? Would it have to be a sexual offense?

MR. CHARNE: No.

Q Or could it be some other offense?

MR. CHARNE: I know that he -- his parole conditions, suppose he -- I know of a case now where a man was found on drunken driving. Now, it's -- you're not supposed to drink when you're on parole, and if you're found drunk, that they could --

Q In other words, the termination of parole is on the grounds that any prisoner on parole might be terminated?

MR. CHARNE: That's my understanding, Your Honor, yes.

Q Does this record -- I suspect it does not, but

you may know -- does it reflect whether there are psychiatric facilities or clinical psychologists at the Waupun Prison?

MR. CHARNE: I believe there are some psychiatrists on the staff and also some psychologists, social workers on the staff. There are, Your Honor. And Wisconsin now has recognized the need for additional treatment.

I think the Respondent's brief indicates that commencing in this year, in 1970, people are now being committed to what is called the Central State Hospital, which is an institution for the criminally insane in Wisconsin.

That is a change, and the Wisconsin Department recognizes the need for a special institution for these types of offenses, but they don't have it yet.

Q Well, does Wisconsin have a general State prison?

MR. CHARNE: Yes, it does.

Q And this is not it?

MR. CHARNE: That's it. The place where this man was sent was the maximum security institution of the State of Wisconsin. Waupun Prison is the place where felons go.

Q If his parole were to be revoked, do you have any idea where he would end up? Now?

MR. CHARNE: I don't know know, Your Honor. I know that the recommendations were that those people who were in Waupun at the time that they transferred the -- new commitments

went to the Central State Hospital, but they said that those who had started in one place would continue there.

Now, I don't know what would happen to him if he were sent back, where he would be sent. I believe that that is an administrative function by the Department.

I think I had gotten, in my chronology, to the point where the Department had asked to extend him for five years, and it came up for a hearing and he was then represented by Mrs. Neff, who was appointed by the court to represent him; he being indigent at the time.

Mrs. Neff advised him that he should not cooperate with court-appointed psychiatrists who were present in court on the day of the hearing, and said she intended to raise the constitutional issues.

The court asked for her to file briefs then, and it was agreed. A briefing schedule was set up. And then, apparently, nothing further was heard from Mrs. Neff. The court record indicates that the judge wrote a letter to her and said: If we don't hear from you, we're going to confirm this order.

And then, the next thing that happened is, in November the order was entered, November 20, 1968. Judge Bjork, who was the substitute judge, signed an order confirming the extension for five years. And in his order, which is found in the Appendix on page 14, he recites the fact that he had

expected to get briefs, and he says, "the matter having been adjourned for the purpose of filing briefs to support the respective positions of the State and the defendant; and no briefs having been filed; and the court having directed correspondence to Mrs. Alyce T. Neff, dated October 15th, 1968, advising Mrs. Neff that the absence of the filing of briefs and any affirmative acts for and on behalf of the defendant with regard to this matter, the court would presume that the defendant did not intend to offer any proof as to his condition, and the order ... would stand". And, accordingly, he confirmed the order.

So here you have a man represented by an attorney who didn't do anything at the hearing, no cross-examination -- there were no witnesses presented as to the State's position; and then she said, "I'm going to argue this on a constitutional basis", and then she didn't file any briefs.

So it is our position that that type of representation is equal to nothing.

Q Have you included in your claim of inadequate, ineffective assistance of counsel the advice given to your client not to cooperate with the doctors?

MR. CHARNE: No, I don't, Your Honor, because I think that that -- you know, that there may be a basis for -- to say, it is up to the State to show this man's condition. And according to the State order they claim that they had had a

previous psychiatric examination of him. They said that: on the records and files, based upon his commitment, they believe he's dangerous.

So I think that they could come into court, based upon what they have, and show the judge: "Judge, here's the reason that we think this man should be continued". And it is not incumbent upon the defendant to come into court on the day of the hearing, have two strange doctors brought in by the judge, and expect the doctors to do a good examination of him in, you know, in a short period of time while you're waiting for this case to be heard.

And I say that I don't think that -- the man has the right to have his own psychiatrist come in under the statute --

Q Didn't the judge offer him a psychiatrist of his own choice? I thought the record --

MR. CHARNE: The record really doesn't indicate that, Your Honor.

Q I thought that either your brief --

MR. CHARNE: The statute says that. The statute says that he is entitled to it. I'm not sure that he asked for that. The record says that there were two doctors there, who had been appointed by the court. Why they were there doesn't appear, and who they represented doesn't appear.

In any event, he did not see them, he didn't --

Q Is that a statute type provision, for the judge

appointing doctors?

MR. CHARNE: It says that the judge should appoint psychiatrists of the -- that the man has the right to be examined by a psychiatrist of his choice, and that the court will appoint him.

Q Does it say anything about the judge --

MR. CHARNE: No, I don't think it does, Your Honor. I don't know what the basis of having these two doctors there was, unless there was something in the record -- we don't have this -- that indicates somebody asked for them. I don't know what they were doing there.

Q Well, here, I'm just reading from your brief on page 5 --

MR. CHARNE: Yes.

Q -- there's a statement about the 12th line down: "On advice of his court-appointed counsel, the petitioner refused to submit to an examination by a doctor or psychiatrist of his own choosing prior to the hearing".

MR. CHARNE: Yes, Your Honor.

Q Prior to the hearing.

MR. CHARNE: Yes. In other words, he did not ask to have the judge appoint a doctor for him.

Q Well, it was more than just not asking, he refused to cooperate by selecting a psychiatrist of his own choice and submitting to examination. And apparently he was

doing that, not of his own choice but because his lawyer at that time --

MR. CHARNE: Yes.

Q -- advised that he do that.

MR. CHARNE: Yes. I think the language "refused to cooperate" is really the judicial language, when you are asking me, Your Honor, whether I consider that to be poor advice or whether I base my charge of lack of adequate representation on that, I wouldn't say that that was. Because I'm not sure that the lawyer was improper in directing him not to have a previous examination. I don't know what the result of that would have been. I am not claiming that that is that kind of error.

In any event, he was extended for five years, and then after that extension he then commenced the series of procedures which has brought him here.

He applied to the Wisconsin Supreme Court. In October of 1969 he filed a petition there for a writ of habeas corpus and it was denied -- without counsel, it was denied without hearing, and without even asking for a response.

And then he went to the United States District Court, and finally we have gotten now to this Court.

Now, what are the points that we wish to raise with regard to his treatment? I think the first thing I want to point out is the difference, the disparity between the treatment

of a man under the Wisconsin Sex Crimes Act, and especially, I say, those which are the -- not the mandatory, not rape; but any other crime where the judge finds it may be sexually motivated --

Q Did he have a hearing, then, on federal habeas in the District Court?

MR. CHARNE: No, he did not have a hearing, Your Honor. There was a response filed by the State, but it was denied without a hearing.

Q Just on the pleading?

MR. CHARNE: Yes, Your Honor.

Q And the absence of hearing, is that a question that was raised in the Court of Appeals?

MR. CHARNE: No, Your Honor. This case has a very peculiar posture. The trial court denied him a certificate of probable cause, so he couldn't appeal. Then he filed an application for a certificate of probable cause to the Court of Appeals for the Seventh Circuit, and that was denied. And then he filed a petition with this Court, and it was granted.

So that this case has never been heard by the Court of Appeals, and there was no hearing in the District Court.

Q Well, what would you -- as of now, what do you suggest is the most expeditious way of unraveling this?

MR. CHARNE: Well, if the Court please, it is my view that the Wisconsin statute on its face, which I think we

can look at without going into the factual thing, is improper. It's unconstitutional. And that the Wisconsin Supreme Court has so interpreted that statute as to be in conflict with this Court's decision in the Baxstrom case.

In the Baxstrom case, which was the case in New York where you had a person who had been sentenced on an assault charge, I think it was second-degree assault, so certainly you have some question of physical danger there, a man was sentenced, I think, to about two and a half years. And toward the end of his sentence, they filed a petition saying this man is insane, he requires mental treatment.

So then there was a proceeding and he was committed to, in effect, a criminal type facility for treatment. And it came to this Court, and this Court compared that treatment that he got with what a person under a civil commitment was entitled to in the State of New York, and said that the statute was unconstitutional because that person should have been entitled to the same treatment a person civilly committed got.

Now, I think that's very applicable to the State of Wisconsin. Here we have a person who -- our man, he gets sentenced on the crime of contributing to the delinquency of a child, and then, at the end of one year, which is the maximum for which he can be sentenced, he's again committed.

Now, there's a great difference between that and what

would happen if he were civilly committed, because he is not entitled to a jury trial, and under the Wisconsin Mental Health Act, which we set forth, every person in Wisconsin who is committed civilly is entitled to have that question determined by a jury.

Q And under the Mental Health Act would he be committed as a sex deviate?

MR. CHARNE: Under the Mental Health Act, he would be committed if he were: mentally ill, infirm, or deficient.

Now, mentally ill means a mental disease requiring care for the welfare of yourself or others or the community.

Q That might include sexual aberrations?

MR. CHARNE: Yes, I think it might include him.

Now, the Wisconsin --

Q And under that he'd have a jury trial?

MR. CHARNE: Yes, he would, Your Honor.

Q Whereas, under the Sex Crimes Act, he gets neither that nor any other process except that which you described here?

MR. CHARNE: Yes. He is entitled -- he's entitled to re-examination under both the Mental Health Act and the Sex Crimes Act,but even there there's a difference. Under the Sex Crimes Act, you are not entitled to ask for a re-examination until you have served the maximum period for which -- under the crime.

In other words, in our brief we say if you're sentenced for rape, for example, under the Sex Crimes Act, that's a 30-year maximum. You can't ask for a re-examination of your mental condition for 30 years.

Now, under the Mental Health Act in Wisconsin, when you are committed, you can ask for a re-examination at any time after recommitment, and you get a hearing and a jury, and then you can ask for re-examination but not -- you can't require it more frequently than once a year.

Now, under the Sex Crimes Act, you have to wait until you serve the maximum, and then you can ask for a re-examination, and at the re-examination you do not get a jury trial.

In addition --

Q Pardon me. Let me be sure of one thing, though. Had he pleaded not guilty to the original charge, he would have had a jury trial?

MR. CHARNE: Yes, Your Honor, on the criminal charge, there's no question, he would be entitled to a jury trial.

Q And then if he'd been found guilty by a jury, all of these procedures would have been -- could have been invoked, could they not?

MR. CHARNE: Yes, Your Honor. The thing, the jury, though, would not pass upon the question of whether he was sexually -- whether the offense was sexually motivated. In other words, this is something which the judge adds onto the

criminal proceeding. If you have a criminal charge levied against you, the issues are: did you commit that offense? Here the man says: Yes, I gave beer to a minor; I'm guilty.

Q Well, this, then, is just a matter of sentence for commitment, isn't it?

MR. CHARNE: So then you have the question of exposing him to this new proceeding.

Q That's in the sentencing procedure, isn't it?

MR. CHARNE: It is, it's in the sentencing part of it. But it is --

Q If he pleads guilty or is convicted by a jury, this process is applicable?

MR. CHARNE: Yes.

Q Was this Wisconsin statute passed about 30 years ago when we had the influx of sex psychopath statutes, do you happen to know?

MR. CHARNE: I don't know, Your Honor. I know it was one of the early statutes, it was --

Q It's of long standing, though?

MR. CHARNE: Yes, it is of long standing.

Your Honor, in connection with that, I am sorry that I didn't get ahold of this until just a few days ago, this is an excellent book, The Mentally Disabled and the Law, which is published by the American Law Foundation in Chicago, the University of Chicago Press, and has a very good discussion of

this whole area. I would have cited it more extensively in my brief if I had known about it. But I just got hold of it, and I think it --

MR. CHIEF JUSTICE BURGER: You may, if you wish, call our attention to that by a supplemental memorandum.

MR. CHARNE: I would appreciate doing that, Your Honor.

I think, Your Honor, if I have a few minutes, I'll reserve those.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Charne.

Mr. Frederick.

ORAL ARGUMENT OF GEORGE L. FREDERICK, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FREDERICK: Mr. Chief Justice, and may it please the Court:

I represent the respondent here, Warden Elmer Cady, Warden of the Wisconsin State Prison.

Perhaps it would be well to begin by dealing with some of the questions that were put to Mr. Charne.

The question on the section, as far as discretionary commitment is concerned, is dealt with in Section 975.02, which provides that if there -- a sex crime is defined there as one in which the desire for sexual excitement existed in the commission of the crime. And it provides that the court may

take testimony after conviction if necessary to determine that issue.

Q Let's assume --

Q Do you agree -- excuse me.

Q Go ahead.

Q Do you agree that that's not the crime he was charged with?

MR. FREDERICK: Well, let me clarify that, Mr. Chief Justice. The charge in -- the way the charge is booked is Section 947.15, subsection (1), subsection (a), which is contributing to the delinquency of a child.

The Sex Crimes Act then comes into play, Your Honor, just as -- or the closest analogy would be the Habitual Criminal Statutes, which we have in Wisconsin, Section 939.62, where the enhanced punishment as a repeater comes into operation not as an additional charge but as an enhancement of punishment. But there is a separate finding and the defendant is given notice before he pleads to the offense.

And of course this is our contention, precisely: that here -- I've got to stand here and I can't say anything outside the record, but it's an inference, I believe, Your Honor, from the Huebner case and the other cases I cite in my brief, such as Reppin, that the practice was, when this defendant entered his plea of guilty, that he was informed that he might be subjected to the disposition under the Sex

Crimes Act.

Now, the purpose for the discretionary element on these crimes other than the three mandatory ones is this: if you charge a man with incest, why is it necessary to take additional testimony on that to show that sexual excitement existed in the commission of the crime?

On the other hand, when you charge a man with contributing to the delinquency of a minor, then it is apropos to take the testimony, and --

Q Suppose he were charged with larceny of a watch? May this feature then be triggered?

MR. FREDERICK: In larceny of a watch, Your Honor, it would be treated like this: that would require a separate hearing to show that this particular individual was one of the small group that got sexual gratification from stealing the property of others, just as some people --

Q Am I to gather then, Mr. Frederick, this may be triggered by a conviction for any offense? Any crime, may it not?

MR. FREDERICK: Except that the courts, the Wisconsin Supreme Court, Your Honor, has given the -- what should I say -- telegraphed to prosecutors and judges that by the Huebner decision, that you're not going to be able to stray too far afield on this. They're going to require some direct substantiation that the crime involved was in fact motivated by

a desire for sexual gratification. I think as we get further and further afield it becomes harder to show.

Q Well, Mr.Frederick, Justice Brennan's question, however, so far as the statute goes, has to be answered yes --

MR. FREDERICK: Yes.

Q -- except for homicide and attempted homicide.

MR. FREDERICK: Yes, Your Honor.

Q Those are the exceptions made by the statute.

MR. FREDERICK: I agree. I feel --

Q And my question is, let's assume a prosecution for shoplifting, and the psychologists, psychiatrists tell us that often shoplifting is motivated on this statutory basis, or for arson, and let's assume a conviction for shoplifting. Then what is it that triggers this extra procedure? Does the -- the prosecuting attorney does it? Or does the judge do it on his own motion? Or what is it that gives the court the idea of the motivation that triggers this extra procedure in this particular shoplifting cases as against some other shoplifting case, that this one might come under this Wisconsin Sex Crimes Act?

MR. FREDERICK: All right, Your Honor, now --

Q What kind of offer, from either the statute or from what happened in this case?

MR. FREDERICK: Now, in 1967, Wisconsin adopted the manifest injustice test for acceptance of the plea of guilty.

At that time, of course, we began to attempt to comply with Federal Rule 11 in that the trial judge had to ascertain that the acts the person allegedly committed constituted the offense. So in the course of adducing that information on a guilty plea, this information might well come to the trial judge's attention or, you're quite correct, the district attorney could call it to the judge's attention; and, surprisingly enough, Your Honor, defense attorneys may well call this to the court's attention, because --

Q How about the probation report? Could that trigger it? The presentence report.

MR. FREDERICK: The presentence report could, and of course on a trial on the merits, then it would become, or might become quite obvious that --

Q Or it might not, at all. It might just be evidence that this particular person stole so much from a department store, period.

MR. FREDERICK: That's true. And before the disposition under the Sex Crimes Act could be sustained, Your Honor, there would have to be a finding made on these by the judge, on the record, that the necessary sexual gratification in connection with the crime was present.

Q Well, it's not clear to me, still, as to what the motivation, what the trigger is, what the source is of this extra hearing, after a plea of guilty or a conviction.

MR. FREDERICK: Well, let me be frank with you then, Your Honor --

Q I would appreciate it.

MR. FREDERICK: -- the same reason is why I always charge the repeater statute and the guys down the hall in the prosecutor's office never did. It was my unbridled discretion, in effect, whether to charge a repeater or not.

Q Well, then, you mean there are some prosecutors who charge this with respect to every offense?

MR. FREDERICK: No. No.

Q This person is guilty of stealing a horse and on top of that "I'm charging that he was sexually excited by stealing the horse"?

MR. FREDERICK: No, all the prosecutor can do in Wisconsin, Your Honor, is to charge the principal offense of, in this case, contributing; and then, if and only if the trial judge asks for some recommendation as to disposition is the defendant likely to be subjected to the Act.

And in Wisconsin we have the rule that the prosecutor's recommendations are not at all binding on the trial judge. Every defendant knows that. So we have very little, just as in the repeater statute, very seldom is the enhanced sentence given.

Q Well, with the repeater statute, you have an objective test: does this person have a record of prior

convictions? There's no such objectivity under this statute. I still don't understand what triggers this post-conviction procedure, if anything. Something must.

Q Let me be a little more specific, is it automatic almost, in practice, when there is a charge of contributing to the delinquency of a minor?

MR. FREDERICK: No, it isn't automatic, Your Honor. And what triggers it is best, I think, set out in the Torpy case, which I cite in my brief. The procedure is, in Wisconsin as in every place else in the Union, that you often charge less than the facts warrant. And this is a very good clue to the judge, of course, if the principal charge was in fact one of the mandatory offenses, and the prosecutor moves to amend it because he says, "Your Honor, I feel that I cannot maintain my burden of proof."

This would be a clear instance of when the judge would be alerted to take discretionary action under that provision 975.02 of the statute. So that, Justice Blackmun, is a frequent case, and was the situation in the Torpy case, actually, where the conviction was also contributing, that I am sure alerted the trial judge that this person should be considered for examination.

I want to emphasize this. The trial judge's determination at that point is merely to have this examination and then in the -- as I pointed out in my brief, in the Note in

1954 Wisconsin Law Review, even though the statute had been in operation only a couple of years, it was enacted in '51, --

Q This statute was in '51?

MR. FREDERICK: Yes, '51, sir.

Q Did you have something like it before 1951?

MR. FREDERICK: We had a statute on the books, Your Honor, from 1947, under which there was no commitment; it was the civil, sexual, psychopath statute.

So the --

Q And where is he sent for examination?

MR. FREDERICK: The examination, Your Honor, can be conducted at any one of several places. It can be conducted as an outpatient, while the man is at large; he can be sent to the sex deviate center which, up until January the 1st, 1970, was at the State Prison at Waupun. He may be examined at a facility in Milwaukee County that's been approved by the State Department of Health and Social Services, or he can also be examined at other various and sundry hospitals that have met the requirements of the State Department of --

Q Now, then, if I understand you, the judge decides he is going to find out.

MR. FREDERICK: Yes.

Q So he then orders --

MR. FREDERICK: The examination.

Q The first step is the examination?

MR. FREDERICK: Yes.

Q Now, after the examination has been completed, then what happens?

MR. FREDERICK: That is the point. The statistics since the program has been in operation show about a 50/50 breakdown. After the examination, about half the people are determined to be not in need of treatment and not suffering from the statutory phrase "aberrations", and are disposed of under the Criminal Code regular sentencing provisions.

Q That is, the judge then gets a report --

MR. FREDERICK; Right.

Q -- from wherever the institution is, and this says this fellow doesn't need treatment, and then the judge sentences him. In this case if that had happened, he'd have got up to a year and that would have been the end of it, the end of the case; is that it?

MR. FREDERICK: That's true.

Q Got it.

But now the report is you happen to think this fellow needs treatment; then what happens?

MR. FREDERICK: Then,at that point, Your Honor, there is triggered a second round in which the defendant has the right to counsel again. His own psychiatrist, not the State's now, all paid for by the State, and they have a hearing to determine if in fact the recommendation of the Department should be

followed. The burden is on the State to prove that by the civil burden, preponderance of the evidence --

Q Did it bring in the people who prepared the report?

MR. FREDERICK: Yes.

Q -- from the institution?

MR. FREDERICK: The judge takes their testimony.

Q I see. And then they are subjected to cross-examination.

MR. FREDERICK: That's true.

Q And then the accused then has -- he can put on his own witnesses, is that it?

MR. FREDERICK: He can put on his own experts.

Q And then the final determination of the judge is what? A guess that he doesn't need treatment, or know he doesn't?

MR. FREDERICK: Or know he doesn't.

Q But that didn't happen in this case. I'm reading from page 11, it says that after he pleaded guilty he was committed to the State Department of Public Welfare. What does that mean to you?

MR. FREDERICK: Your Honor, what happened here was he was using this form -- they have a standard form of the order that he had been using up until that time. Early in January 1967 the Huebner case was decided, and that put in this

requirement for a hearing. And, as I said, all I can do is make the inference that three months after this decision came down, the defendant either got a hearing or made a satisfactory waiver of his right to the hearing, and I don't think --

Q You mean after this July thing?

MR. FREDERICK: Yes. Not after it, Your Honor. At the time of this appearance for commitment, when the order -- the first order --

Q But these two pages here doesn't show -- I have nothing here that even suggests that there was a hearing.

MR. FREDERICK: That's true.

Q Well, was there or was there not a hearing?

MR. FREDERICK: Well, my -- do you want me to tell you --

Q The answer is no.

MR. FREDERICK: -- to go outside of the record and tell you?

Q I mean -- no. Do you have anything on the record that disputes this?

MR. FREDERICK: No, I have nothing on the record that disputes that.

Q Well, it seems to me that if the State Department had decided that he did not have mental aberrations, he would serve one year?

MR. FREDERICK: That's correct, Your Honor. We can --

we can perceive that much, that the Department did recommend treatment.

Q And neither you nor I knows who in the Department made that decision. It could have been an office clerk.

MR. FREDERICK: No. I can only tell you what the procedure is in the usual case, but I couldn't swear that it was followed in this case. That's true, Your Honor.

Incidentally, this statutory word that may have troubled you, "aberrations" was a word devised by the Department to make this sort of distinction, Your Honors. The Department has, of course, been studying this program since it began operation in '51, and they have gradually flushed out the criteria. So "aberrations" mean essentially this: those who have -- whose sexual offense, in the broad sense, stems from the -- what should I say -- their environment, for example, it's no secret that in certain areas of Wisconsin incest between father and daughter is not such a shocking thing, strangely enough; those cases would be not within the purview of the statute as the Department has interpreted their criteria.

What they are trying to do is to deal with the individual whose own psychological makeup, as best that can be determined, and as imprecise as it is, leads him to commit sex offenses.

Q Now, incidentally, I gather, as far as we know,

that this chap never had any -- the petitioner never had any treatment of any kind, did he?

MR. FREDERICK: There's no record, Your Honor, to show --

Q And yet he was released on parole.

MR. FREDERICK: Yes. All I can do is to cite to you the cases in my brief, Burbey vs. Burke, and there would be --

Q I gather you have a parole board, do you?

MR. FREDERICK: They have a special review board under this statute, Your Honor, who just -- deals specially with this class of persons.

Q Well, I wonder -- we have no idea of the basis on which he was paroled, do we? I mean, how does that special board determine that he's now cured of his aberrations, whatever that is?

MR. FREDERICK: No, Your Honor. The question is --

Q Even if he's not cured, he's still not a danger to the public?

MR. FREDERICK: Yes. The criteria for release is set out in Section 975.14, and it's "dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality", and that's been construed, those last three words relate back to the aberrations.

Q Well, the finding must have -- when he was extended, the finding must have been that he was dangerous.

MR. FREDERICK: Yes.

Q And now, during the extended period, there is now a finding that he's no longer dangerous.

MR. FREDERICK: That's true.

Q Now, on what is that predicated?

MR. FREDERICK: I would assume that is predicated, Your Honor, on the results of the tests that are maintained under the statute. Everyone has to be examined once a year, and,if he isn't examined, he goes before the court again; when he's been extended once like this petitioner, he goes before the court every six months, if he wishes, for an extension.

So I would assume that this petitioner, like everybody else similarly situated, was afforded the opportunity for treatment, and the Department felt that the things had progressed to the point that he was no longer dangerous.

Q Tell me, Mr. Frederick, did the State resist a hearing in the habeas corpus in the District Court? It seems to me if we had had a hearing in this case, we wouldn't be fishing in the dark the way we are.

MR. FREDERICK: Well, that's why I feel like I'm operating here with one hand tied behind my back.

Q Well, how do you think we feel?

MR. FREDERICK: We didn't resist it. What happened was this: when the man, or this lady attorney didn't file the brief, the judge apprized the man --

Q No, I'm speaking of -- she wasn't representing him in the Federal Court, was she?

MR. FREDERICK: No.

Q He filed a pro se petition for habeas corpus.

MR. FREDERICK: That's true.

Q And the State resisted it.

MR. FREDERICK: We did.

Q And it was dismissed.

MR. FREDERICK: That's true.

Q So there's never been a hearing.

MR. FREDERICK: There's never been an evidentiary hearing.

Q And many of the things that we're discussing this morning might have been flushed out, if there had been a hearing.

MR. FREDERICK: Yes. That's what I devoted the first part of my brief to, and of course I stand on those positions, but I won't burden you with them here now.

Q Let me see if I can clear up one thing. Did I understand you to say, in response to Justice Brennan's questions, that there is an examination every six months under the sex deviate statute?

MR. FREDERICK: After -- after the period --

Q After a five-year extension is started?

MR. FREDERICK: No, no. No, Your Honor. It's -- in this case, when the hearing was held at the end of the maximum

time he would have received had he been sentenced under the criminal code, and he was continued for five years, then every six months thereafter he has a right to have another hearing before the court and the Department must justify his continued control by the Department.

Q Now, you say thereafter, you mean during the five-year period?

MR. FREDERICK: Yes, Justice Blackmun, but I should point out this: You understand that every one under the -- who's handled under the Sex Crimes law has no minimum sentence, so to speak. In other words, if you go to the facility and they decide a week later that you're done, you go out, either on parole or final discharge. So they can do either one.

And your connection with the Department is ended, whereas, of course, everyone else who goes to State Prison is sent there for a year, and must stay half the maximum before they are eligible for parole; if you're sentenced for 30 years, you still come up for parole within a year, at the most, under Wisconsin law.

Incidentally, this maximum period is computed by -- much like they do in the Federal; you take the statutory good time and deduct it from the maximum sentence, so that on a rape charge of 30 years, you would do, at most, 16 years and three months. Now --

Q So that he'd have to wait for an examination for

that long under this statute, wouldn't he?

MR. FREDERICK: Of course, Your Honor, --

Q Except under special motion and special order of the court.

MR. FREDERICK: You have the same right, of course, as everybody does, to petition for a writ of habeas corpus, and I think that here it wouldn't be just like the usual sentence where your sentence hasn't expired yet, because if you could show that you had not been afforded treatment and so forth, the State would be in dereliction of its duties under the statute, and the writ would lie; just as -- very similar to the provision in 18 USC 4517.

If I could leave you with one thought, Your Honors, and that's this: what we've tried to do here under this Sex Crimes statute is to utilize psychiatric data, even though it isn't the best, we can't believe that there could be much worse than the existing system of incarceration, or you can put a man in prison and lock him up and leave him there. Here there is an obligation on both parties, the State to provide treatment, and the defendant to seek out treatment.

And I think this is important, because experience has shown that these men are often poorly motivated for treatment, and here they have a definite incentive to be treated, and I think that it's about as good a system as any for dealing with this sort of difficult problem, much as like faces us

with alcoholics and drug addicts and so forth, where there is no real question of insanity. It's at best a personality dysfunction that has justified the commitment.

The other difficult part of this problem, Your Honors, is the jury trial question, and I say it's difficult in the sense that if we require a jury trial for these proceedings, I wonder where it is we draw the line after that, because there are many statutes under which a man is deprived of his liberty without jury trial. For example, under Wisconsin statutes, one who has tuberculosis, one who has venereal disease, one who has typhoid fever, those who don't support their families may be incarcerated summarily for up to six month.

So I think it's a very real question as to what point we're going to extend the right to jury trial in these collateral proceedings. Wisconsin has never required that under the Constitution; it's always been a statutory right to have a jury trial in sanity proceedings.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Frederick.

Mr. Charne, you have one minute left.

REBUTTAL ARGUMENT OF IRVIN B. CHARNE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CHARNE: Yes, Your Honor. All right.

I just wanted to respond briefly to the question of

what triggered this proceeding. Because my belief and understanding is that nothing may trigger it other than the judge's own intuition or prior knowledge of this person, or the fact that the community is presently angry about a certain type of thing. So the statute doesn't require any basis, and I say the statute doesn't require a hearing on the question of whether the person is sexually motivated; and this record doesn't show any such hearing.

The Wisconsin Supreme Court, in the Buchanan case that we cite, I say has laid down --

Q Don't you think, Mr. Charne, it would be much easier to decide these very difficult questions if we had some kind of record of what went on in this case?

MR. CHARNE: Of course, Your Honor; yes. There's no question about that, and I -- but it's very difficult for the District Court, Your Honors, I was a law clerk in the Second District Court in Milwaukee, and I know how hard it is to examine all these things and pick out the good ones, and there was no lawyer who examined it, and the judge -- the judge, upon the issue that the petitioner himself set forth, the judge thought this wasn't required in this case.

Q I just wonder, before we try to grapple with it, whether we shouldn't have the District Court conduct a hearing. With or without a jury.

MR. CHARNE: It would be very much easier.

Q You say this petitioner is on parole now?

MR. CHARNE: Yes, he is, Your Honor.

Q And if he goes back to a commitment, will he return to the old prison or will he go to the mental health --

MR. CHARNE: Mr. Justice, I don't really know the answer to that, and I believe there's a good chance that he'd go back to the prison. And even --

Q The -- Wisconsin takes the other position. --

MR. CHARNE: Well, I don't know, then, Your Honor.

Q -- in its brief.

MR. CHARNE: They say that he would go to the -- well, the State Central Hospital, Your Honor, which is a -- it's an institution for the criminally insane; it is a penal mental institution, it is not, you know, where people go under civil commitment.

Q Well, was that in existence at the time he was sentenced in '67?

MR. CHARNE: Yes, it was.

Q But that is different from the institution to which civilly committed people are sent?

MR. CHARNE: Yes. I think we pointed out in our brief that a person who is civilly committed, there is no provision for sending them to that institution, they go to a hospital, for civil commitment.

Q Mr. Charne --

Q I suppose, technically, we have here the wrong respondent, then?

MR. CHARNE: Well, I think that may be true, although in the case of Jones vs. Cunningham, I think we cited, where that was before you and the man was out on parole; it was pointed out that the fact that he is out on parole would not make the case moot.

And I think really here the respondent is the State of Wisconsin. The Attorney General is appearing for the State of Wisconsin; the old prison system and the welfare is under one direction, so it is mostly a technicality.

It arises from the fact that he was paroled in March of this year, and the writ was granted in March, also.

Q Well, yes, but the petition had been filed here before --

MR. CHARNE: Oh, yes, the petition had been filed --

Q -- the parole.

MR. CHARNE: -- last year.

Q Well, I think we'd have a case, even under those circumstances, on that --

MR. CHARNE: Sure.

MR. CHIEF JUSTICE BURGER: Mr. Charne, you acted at our request and by the appointment of the Court in this case, and on behalf of the Court I want to thank you for your assistance not only to your client, but your very effective

assistance to the Court in the case today.

MR. CHARNE: Thank you, Your Honor; it's been an honor to be here.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:45 a.m., the case was submitted.)