In the

Supreme Court of the United States

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THEON JACKSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

No. 70-5009

Washington, D. C.
November 18, 1971

Pages 1 thru 52

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STATE OF INDIANA,

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Thursday, November 18, 1971.

The above-entitled matter came on for argument at 1:45 o'clock, p.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:

FRANK E. SPENCER, ESQ., 1444 Consolidated Building, Indianapolis, Indiana 46204, for the Petitioner.

SHELDON A. BRESKOW, ESQ., Office of the Attorney General of Indiana, 219 State House, Indianapolis, Indiana 46204, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 5009, Jackson against Indiana.

Mr. Spencer.

ORAL ARGUMENT OF FRANK E. SPENCER, ESQ.,

ON BEHALF OF THE PETITIONER

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

I hope you won't consider my comment too dramatic under the circumstances, if I respectfully call to the Court's attention, at the outset, that at this time the petitioner here is confined in the Central State Hospital for the Insane in Indianapolis because of two charges which were filed against him in May of '68 charging the commission of two robberies ten months before that, in 1967.

That there has been no hearing in respect to probable cause. That the petitioner is a deaf mute, neither able to hear nor to speak, having a mental age of a three or four-year-old child. And that the prognosis --

Q You mean a four-year-old deaf child, don't you?

MR. SPENCER: Yes, sir. I say he is deaf, he is unable to speak --

Q Well, I just thought it was the mental age of a three or four-year-old deaf child.

MR. SPENCER: The witness at that instance emphasized

that, and I appreciate your calling that to my attention.

And he will be confined, unless this Court sees fit to do something about it, for the rest of his life.

I depreciate the contention of the State of Indiana in this cause, that it makes no difference, that there is no difference between a civil or criminal commitment in this proceeding, and that he may recover, flying in the face of the evidence which was heard by the trial court.

Q Mr. Spencer, --

MR. SPENCER: Yes, sir?

Q -- if he had been civilly committed, where would he be confined today?

MR. SPENCER: He would be at Muscatatuck, Your Honor. There are two institutions in Indiana, one at Fort Wayne and one at Muscatatuck. With his age and the area of the State which he's from he would be at Muscatatuck.

The Supreme --

Q Is this conceded by your opposition that he definitely would be there?

MR. SPENCER: I don't -- well, they dispute it to the extent that with a veil of words they say that he couldn't get there. I don't think that they dispute that if he were in fact committed a feeble-minded person that he would be at Muscatatuck.

They also repeat the statement of the Supreme Court

of Indiana, a very superficial statement that: there's nothing to worry about, anyway, because as a charge of the Department of Mental Health he could be transferred to Muscatatuck.

It is our position that there is a great difference, and that by the holding of our court for the first time that Muscatatuck is, by definition, under our statute, a psychiatric institution and therefore that a transfer could be made from the psychiatric institution at Central State Hospital to Muscatatuck.does not answer the problem.

He is not at Muscatatuck, and if he were at Muscatatuck, under a transfer, he would still be held by reason of the commitment of the criminal court.

Q Didn't your Supreme Court say, however, that, irrespective of the route, he would be at the same place?

MR. SPENCER: They didn't say he would be, they said he could.

Q And you're asking us not to accept that statement?

MR. SPENCER: For practical purposes, I think there's a world of difference, and it does not answer the problem, Your Honor.

The fact that they now hold, and this was a holding for the first instance, and as far as I know there never has been such a transfer. They hold, as a matter of law now, in this case, that the department, through the Commissioner, would have the power to transfer him to Muscatatuck. But

that doesn't answer the problem because arriving at Muscatatuck under a transfer does not change the nature of his commitment. And he has been committed as a person found to be insane under an Indiana statute designed for the use in instances in which persons insane have been charged with crimes.

And under the judgment of the Criminal Court of Marion County, he cannot be released until he has recovered his sanity.

Q Now, I have two subordinate questions here.

MR. SPENCER: Yes, sir.

Q When you use the word "insane" in the context of that statute, what it means -- well, I'm asking: does it mean that he is incompetent to stand trial?

MR. SPENCER: Well, under the statute, and I dispute it, the position of the Indiana court in this regard, the statute speaks in terms of insanity. The determinative principle as to whether or not he will be committed on the one hand, or held for trial on the other and go to trial, is the determination of his comprehension or lack of comprehension to understand the nature of the proceedings and to assist his counsel in defense.

The State of Indiana, through the Attorney General, has taken the position that that is insanity; and not only that, but that is the same insanity, to use that word, as contemplated in the section of the statute in regard to what I refer to as

a civil commitment, which requires, as a condition precedent, that a physician certify that the person for whom application is made is not insane.

I don't see any great difficulty involved in differentiating between the two. The statute in respect to a person charged with crime contemplates that some persons, not all, who are insane will be found to lack comprehension, to understand the nature of the proceedings, and to assist in their defense. And those persons, not only the one who is insane but those persons who are found to lack comprehension shall be committed.

On the other hand, there is no standard in respect to the civil commitment of a feeble-minded person to Muscatatuck, except that which I respectfully submit is now generally considered and denominated a minor illness. The statute -- excuse me.

Q Now, right there is my second question, and then I'll let you proceed.

I've read both briefs, and they seem to speak of this feeble-minded commitment procedure you have and also the one in the criminal context. Does Indiana also have a third procedure for the commitment of the mentally ill?

MR. SPENCER: Yes, sir.

Q I find this unmentioned in either brief.

MR. SPENCER: That is correct.

Q And this is because it is of no significance here?

MR. SPENCER: I do not think it is of any significance, except to render questionable, or at least indicate question in regard to the State's position that insanity, in the statute for commitment, has reference to the same insanity and the same concept of insanity in the provision in the criminal proceedings.

There is a difference. Persons who are insane may be committed under an entirely separate procedure. Persons -- we're speaking now of persons who are mentally ill. Persons who are committed to Muscatatuck and the school at Fort Wayne are committed because they are feeble-minded, and the Legislature for a long period of time has determined, as a matter of policy, that those persons who are mentally ill should not be so committed, that they go some place else. And therefore has provided this condition precedent that a physician certify that they are not insane.

The provision in regard to the person charged with crime, dealing with persons who are insane, is only concerned with the one aspect of mental illness: whether or not there is such mental illness there that the effective result is that they lack the comprehension to understand the nature of the proceedings and to assist in their defense.

To me that does not equate the terminology of

insanity in the one statute with the terminology of insanity as negative, as a condition precedent, in the other statute. We're talking about two different things.

And I think that the existence of the separate procedure for feeble-minded persons emphasizes what I'm talking about, even though both statutes have existed for a long time in Indiana.

If it has come up before, I'm not aware of it. This is the first instance that I know of in Indiana where a feeble-minded person has been committed under this statute designed to take care of the person with a mental illness who lacks comprehension to understand the nature of the charges against him, and who, therefore, is committed until "he shall become sane". Until he shall regain that much comprehension in spite of his prior existing mental illness.

I'd like to call -- I'd like to invite your attention to some statements made by the State of Indiana -- excuse me, I'd better go back for just a moment in regard to how this developed.

It is very clear in the transcript, and I have set out in the Appendix, at the conclusion of the hearing held in the trial court. This contemplates the appointment of two physicians, and these two physicians were appointed and testified, Dr. Nie and Dr. Schuster, also the superintendent who had worked with this man, who had experience and background

at the deaf school, had worked with this man in attempting to communicate, and was available to the two physicians who examined him; and there is no dispute in the testimony before the court that this is a condition that will remain, that we're not talking about a mental illness, we're talking about a retardation.

It is a condition that does exist and has existed. A retardation. And the fact that this man is even unable to understand and comprehend the usual sign language of the deaf mutes. Just a very, very small amount of that can he even comprehend.

To emphasize the limitations of his comprehension, in his testimony, this supervisor informed the court that the man has no comprehension of time, he has no comprehension of when, he has no comprehension of how.

And then, as I state, the --

Q Well, would you say -- let's suppose the State had proceeded to commit your client as a feeble-minded person under -- what is it, Section 1907?

MR. SPENCER: Yes, sir.

Q -- and they committed him in accordance with the procedure outlined by the statute and put him in the institution, Muscatacat, or whatever it is, and that he was there now. Would you say the State could keep him there for as long as his condition didn't improve?

MR. SPENCER: Well, at the conclusion of your question you used the word which the State has used, which I dispute. It is not a matter as to whether or not he improves, as contended by the State.

Q Well, I just wanted to know whether your contention is that before the State may restrain a person for as long as this young man has been restrained or will be restrained, there must be some finding that, in the proceedings somewhere, he is dangerous to himself or others.

MR. SPENCER: No, that is not a necessity, and that's not my contention. The determination must be made --

Q So you are saying that the State may take custody of the feeble-minded person, even though he is not dangerous to himself or others, and keep him?

MR. SPENCER: Whether or not he is dangerous is not a sole determination. That may be a determination.

Q Well, you say that without that kind of finding --

MR. SPENCER: Yes, sir.

Q -- they may take custody of the feeble-minded person and keep him --

MR. SPENCER: Yes, sir.

Q -- in custody.

MR. SPENCER: If he needs treatment, if the interest of society -- as he is in fact feeble-minded, and if the interest is there, he can be --

Q All right. If he needs treatment, the State may keep him in custody while they're giving it to him?

MR. SPENCER: Absolutely. There's no question about that.

Q What if it's just custodial care and not treatment?

MR. SPENCER: Well, I'm not going to take the position that the care offered by the State of Indiana at Muscatatuck is merely custodial. And, as far as I'm concerned, if he were committed on a civil commitment of this fashion, he would be receiving more than custodial care. They have a good setup.

The difference lies not in how he's being treated, but in how, when, and under what circumstances he is able to be released, and what the attitude is.

There is no chance, the way he has been committed, in the criminal proceedings, merely because of the pendancy of two criminal charges, for which there's never even been a hearing as to probable cause.

Q Well, does he --

MR. SPENCER: There is no chance he will ever be released.

Q Does the existence of the criminal bar now prevent a commitment under the feeble-mindedness statute?

MR. SPENCER: No, sir. But it is a moot question.

Because he is --

Q Would you --

MR. SPENCER: -- he is in fact in the custody of the State.

Q Would you resist such a procedure?

MR. SPENCER: No, sir.

Q If one were instituted?

MR. SPENCER: No, sir. But I would resist doing anything that would not also include the dismissal of the criminal charges.

Q Why is that?

MR. SPENCER: Because he cannot be released under any circumstances as long as the present commitment stands, based upon the existence of the two criminal charges. He cannot be released until he recovers his sanity.

Q Well, why don't --

MR. SPENCER: Something that he never lost, except in terms of comprehension.

Q I sort of thought you were claiming that if a person is charged with a crime and he can't stand trial because he's incompetent to understand the proceeding, that the State, while they may keep their criminal charges pending, can't just leave him in jail forever unless he represents a danger to himself --

MR. SPENCER: No, sir, that is not my position. There

are persons who are --

Q Well, it must be --

MR. SPENCER: -- taking the position.

Q -- it must be in effect your position, because you say the criminal charges must be dismissed.

MR. SPENCER: No. I -- let me say this: Because of the aspects in this case, he is not only a deaf mute unable to communicate, but he has a mental age of three or four --

Q I understand that.

MR. SPENCER: -- and in these circumstances he is feeble-minded. He should be in Muscatatuck. There is no basis for the existence of the criminal charges, as a matter of fairness and justice. These prevent his civil commitment because they are the basis of his criminal commitment.

Q Well, yes, but the department of mental health apparently can transfer him right now to Muscatatuck, or whatever that name is.

MR. SPENCER: That's what the Supreme Court says.

Q It seems to me like the State court has addressed itself to many of the State law issues that you are bringing before us now.

MR. SPENCER: If the Court please, the State court did not address itself to the basic issue involved, as to the applicability of the statute and the result. They related at the outset what the --

Q Well, in any event, isn't that a State law question?

MR. SPENCER: No, sir. Absolutely not. This man may be in prison for life, and he has never had a trial, and cannot get out under any procedure.

Q I know, but they -- concededly, he can be placed in the institution you want him placed in.

MR. SPENCER: And can never get out.

And on a civil commitment he can get out merely on the determination of the superintendent that it is in his interest, and that it's okay, in effect.

Q So you are claiming -- you are claiming that the State may not charge a person with crime and then keep him in jail forever, just because he's incompetent to stand trial?

You say it's unconstitutional to --

MR. SPENCER: No, I think this case is broader than that. I think this case is broader than that.

Q Well, that's pretty broad.

But you are -- you do -- well, anyway, whatever your broad claim is, it includes that one?

MR. SPENCER: That is a part of it. That is correct. But only on the facts of this case.

I am not going to contend before you that all of the law should be changed so there should be a tremendous upheaval. Maybe yes; maybe no. But under these circumstances, even the

State of Indiana concedes that there was no -- that there is no criminal responsibility here. And yet the basis for his being maintained is the existence of the criminal charge.

I invite your attention --

Q What would happen if you instituted feeble-minded commitment proceedings, and he were so committed today? Would the State dismiss its criminal charges out of hand?

MR. SPENCER: There is nothing that the State can do at this point, as far as I can see, because the commitment, unless you do something about it, is a final judgment. At any given point along the way, the State could have dismissed the criminal charges. But there is a judgment rendered, and except for the disposition in this Court, it has become vital. And he will be held until he is certified sane, and that he will never be.

Q Mr. Spencer, let me try one hypothetical now.

MR. SPENCER: Yes, sir.

Q Purely hypothetical. Suppose we held that there is a violation of due process in these circumstances, that holds such a person as your client in confinement in an institution for more than whatever reasonable time is required to determine his capacity to stand trial, and that at the expiration of that reasonable time he must be civilly committed, if he is to be confined at all. Would that satisfy your problems?

MR. SPENCER: Well, it would certainly be a better help to the problem.

Q Well, what more would you want than that?

MR. SPENCER: As far as I'm concerned, the judgment of the lower court should be reversed.

Q Well, just take the things I posed. That we said after a reasonable time -- assume also, add to the hypothetical, that we would say that nine years is obviously a reasonable time, and that they must now begin proceedings to commit him civilly within 90 days or discharge him from custody. Would that give you all the relief you wanted?

MR. SPENCER: No.

Q What else would you want?

MR. SPENCER: The man has already been in there for three years --

Q But he's going out in 90 days unless, on this hypothetical, unless civil proceedings are commenced.

MR. SPENCER: Well, if this Court would determine that as of the time of your decision that the State must take such action, that would be the relief. If it's that you will keep him there for another seven or eight years --

Q No. Ninety days I've said. Ninety days; they must commence the civil proceeding within 90 days or discharge him from custody. Haven't you got then all the relief you want?

MR. SPENCER: If I understand you correctly, yes. The thing that I strenuously object to is the prospective application of the judgment throughout the life of the man who has been charged. There is no possibility of release.

Q There is no judgment in the hypothetical I have given you.

MR. SPENCER: Yes, sir.

Q It's merely a proceeding, and if they can't sustain the burden of proving that he must be committed civilly, then he would not be confined.

Now, I don't know what your standards are for civil commitment in detail, or what the practice is. But you don't insist that they dismiss the criminal charges as part of this process if he got the relief I'm talking about, do you?

MR. SPENCER: If there was nothing further done on the criminal charges, and if he were civilly committed, no, I wouldn't care.

What would happen as far as the charges, that would take care of itself. But they have proceeded by reason of those charges. The way things stand now. So that he is committed merely by reason of the existence of those charges.

If he were civilly committed, so that he could be released just on the basis of the determination of the superintendent at Muscatatuck, that under the circumstances

that's what should be done, that's what the statute amounts to.

I don't think that two, three, four, or five years from the time that he goes in, that the State is going to be interested in proceeding in respect of the criminal charges.

I invite the Court's attention to the statement made by the State of Indiana at page 4 of the brief of the respondent, stating that: "Should Jackson recover, ... his present incompetency could effectively absolve Jackson of all criminal responsibility for the acts of robbery themselves, even though there has been no trial on the merits to determine whether Jackson committed the acts charged and if so whether he was criminally responsible at the time they were committed."

But what the State is asking is that you postpone that determination, or that that determination be postponed until he has recovered his sanity, which will never be.

And this is what they refer to in their brief as "the Indiana solution".

And they additionally point out for the edification of this Court that his incompetency does not bar the State from charging robbery, even though no further proceedings may be had.

In this situation it is the same as if they were charging a three-year-old child, and, in essence, they are griping about the power that the State has to bring the charge, to cause a life commitment, because of the existence of the

charge, when they in fact admit that under these circumstances when they get along to determining it, after infinity, that there wasn't and never has been any criminal responsibility.

I started to mention a few minutes ago, and I want to point that out, that the court, the trial court, even though the Supreme Court, three judges of it, didn't appear to be particularly bought, the trial court was concerned about the result that was impending in these proceedings.

He made the comment at the conclusion, inquiring as to whether the attorney then representing the defendant felt that any other statute could be used. And then he directed that attorney -- who, by the way, was a pauper counsel -- directed that attorney to file a motion for a new trial; agreeing with him that this determination was an appealable determination. And he has maintained his interest that this matter be pursued for final solution.

Q "He" being the judge or --

MR. SPENCER: The judge. The judge was very much disturbed by what appeared to be the necessary result in the application of this statute, and I respectfully submit that on its face this statute was designed for an entirely different circumstance, and it is an aberration to apply to a situation like this. And I respectfully submit that the only solution, as a matter of due process, is that the State be allowed an opportunity to obtain civil commitment, and the

criminal charges be dismissed, or even if they're going to pend, at least that no further proceedings be had and that this commitment until he recovers his sanity be vacated.

Q Let's come back to your Indiana procedure. May only the State institute a proceeding for commitment for feeble-mindedness?

MR. SPENCER: Yes, Your Honor, --

Q A relative could not? You could not?

MR. SPENCER: Differentiating between the court and the State, no. The court can initiate it, when anything comes to his attention which raises a question as to the comprehensive ability of the defendant. The defendant's counsel can do it, the prosecuting attorney can do it, the court, the judge in open court --

Q Well, precisely. In other words, you could do it if you wanted to, by a petition?

Q Not on civil commitment.

MR. SPENCER: You're talking about under the criminal statute?

Q Under civil commitment for feeble-mindedness. Who may institute that proceeding under Indiana law?

MR. SPENCER: Any resident in the county.

Q Any representative --

Q Well, then, I go back to, of course, what I asked a long time ago.

MR. SPENCER: Reputable, yes, sir.

Q What's the barrier to doing this and thereby unraveling this procedural semantic difficulty in your State?

MR. SPENCER: Because of the outstanding commitment from which we're appealing.

Q How do you know that? Have you tried that remedy, as Justice Blackmun has suggested?

MR. SPENCER: Judge, Your Honor, I know of no precedent anywhere in the law that the persons involved in a litigation as against whom a final judgment has been rendered, particularly coercive, in commitment can at any given point merely ignore it. It's there, and he is in fact being held in custody by reason of this.

Now, if we add another civil commitment to it, or ten commitments, it will not erase or change the fact that until the judgment of the trial court is set aside committing him under the statute designed for the insane person, until he shall recover his sanity, he cannot be released.

Q Well, isn't that part of your application for relief, in your feeble-mindedness procedure, to ask that the other judgment be set aside?

MR. SPENCER: That could not be done, no.

Q Why?

MR. SPENCER: That would be a collateral attack on a judgment in an entirely separate case.

Q Isn't it in the same court?

MR. SPENCER: Beg pardon?

Q Isn't it in the same court?

MR. SPENCER: No, sir. No, sir. The court in which these proceedings were had has criminal jurisdiction only. The civil commitment would be in our Superior or Criminal Court. And, as the State has also pointed out, as long as the present commitment stands, we have a judicial determination, res adjudicata, as between the State of Indiana and this defendant, that he is insane. And they contend it's the same concept of insanity, and until this is set aside and vacated, it would be a complete bar to a determination in the civil proceedings that he is not insane.

Q Well, what about State habeas?

Do you have habeas corpus in Indiana?

MR. SPENCER: Yes, sir.

Q Does it lie to relieve one from a claimed illegal custody pursuant to a criminal proceeding?

MR. SPENCER: Well, whether or not it would in some instance, where no appeal had been pursued, I don't know. It could not lie here.

Q Because you've already --

MR. SPENCER: An appeal was pursued, and the highest court in the State of Indiana has affirmed the commitment.

Q Well, did you raise in that court all of the

grounds you're raising here?

MR. SPENCER: Yes, sir.

Q Well, how about federal habeas?

MR. SPENCER: If you had denied certiorari, I would try it. You accepted certiorari, and it's your baby, and I'm very happy to be here now.

Q I know, but it seems to me there are a few factual -- a lot of factual differences in this situation. Everybody --

MR. SPENCER: The State contends that; I see none. I don't see the necessity --

Q You have some major differences between the two of you --

MR. SPENCER: Yes, sir.

Q -- for example, on whether or not this person was committed as an insane person, whether this person is a feeble-minded person, whether commitment under the 1907 is available to this particular person under the Indiana law; all of them are argued here before us in the briefs. You have major differences between you, that rests on State law.

MR. SPENCER: Well, the major difference -- major in the nature of the conclusion, not major in the nature of the basis.

I submit that it's a veil of words as far as the Attorney General is concerned. That there are no major differ-

ences in terms of the facts.

I think their concession here in regard to incompetence is in direct conflict with many of the other assertions which they make.

Thank you, gentlemen.

Q Your basic constitutional argument closely parallels the dissenting opinion of Justice DeBruler of Indiana Supreme Court?

MR. SPENCER: Absolutely. Yes, sir.

Q Trial counsel is, you say, is assigned counsel? Because Jackson is an indigent. Trial counsel was assigned by the court?

MR. SPENCER: Yes, sir. As are we. Pauper counsel all the way.

Q What explains the change in counsel?

MR. SPENCER: No change. We are pauper counsel.

Q But you said you didn't represent him at the trial.

MR. SPENCER: Oh, I'm sorry, I misunderstood you. As a matter of procedure, with which I certainly approve, and it's been a custom for some time, our two criminal courts in Marion County do not appoint the same attorney to proceed on appeal as was in the trial. We have the benefit of everything they did there. They're to confer with. But over a long period of time, as a matter of practice, they appoint another

attorney to proceed with the appeal in any criminal case.

There is nothing there than the matter of custom and determination of policy. There's nothing in this case that called for that.

Q That leaves counsel on appeal free to make the claim that there was ineffective assistance of counsel at the trial?

MR. SPENCER: Occasionally. Occasionally.

Q Do they get paid in the State system?

MR. SPENCER: Yes, sir.

Q Under a State counterpart of the Criminal Justice Act?

MR. SPENCER: Pretty much case law, Your Honor.

Q Beg pardon?

MR. SPENCER: Pretty much case law in Indiana.

Q It's paid by the State?

MR. SPENCER: The County Treasurer, yes, sir.

But it is not a statutory procedure set up.

Thank you, sir.

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

Mr. Breskow.

ORAL ARGUMENT OF SHELDON A. BRESKOW, ESQ.,

ON BEHALF OF THE RESPONDENT

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

May I present my associate at the counsel table with me, Professor James Beavers of the Indiana University Law School, and Assistant Attorney General Robert Colper.

May it please the Court:

Faced with the dilemma concerning Jackson's condition as described by petitioner in his argument, just what was Indiana to do? Indiana had three alternatives:

Indiana could try Jackson anyway. Indiana could discharge him by dismissing the criminal charges against him. Or Indiana could do what it did, and that is commitment to an appropriate psychiatric and rehabilitative institution until Jackson gained the necessary comprehension to be tried.

In order to make its choice, Indiana looked to the decisions of this Court, and found that in Pate vs. Robinson it would have been a Fourteenth Amendment violation to try Jackson.

It was conceded by the State in that court, in that decision, that the defendant in that case would have been -- it would have been a Fourteenth Amendment violation to try him, but the court went on to say, in its opinion, that it was error, and a Fourteenth Amendment violation for the court not to give the defendant in that case a competency hearing on his own motion, even when it was not specifically requested by counsel in Pate vs. Robinson.

So the Fourteenth Amendment precluded Indiana

from trying Jackson.

The second alternative, that Jackson be released on a dismissal of the criminal charges, was not appealing or appropriate to Indiana. It was not constitutionally required, respondent submits, certainly not by the equal protection argument and the cruel and unusual punishment argument that petitioner makes to this Court by its brief. And it was that the peace and dignity of Indiana was offended by the commission of the two robberies, with which Jackson was charged.

To release him and discharge him would have further offended the State, and would have offended Mrs. Farley and Mrs. Lyons, the alleged victims of those robberies.

Q What about civil commitment?

MR. BRESKOW: Pardon, Your Honor?

Q Civil commitment.

MR. BRESKOW: Your Honor, the State's position is essentially this, and it was the position of Judge Artebern in the Supreme Court of Indiana's decision: The commitments in Indiana are all the same, there is no criminal commitment as such. Jackson, by his commitment --

Q Do you call this a civil commitment?

MR. BRESKOW: I do, Your Honor. I do. I --

Q A civil commitment for life?

MR. BRESKOW: It is not. It would be for life if he were committed under any statute, Your Honor, if he is not

going to recover.

Q But there are different standards.

MR. BRESKOW: It's non-comprehension in the case of 19-1706a, Your Honor. Non-comprehension.

In the case of the commitment statute to which petitioner would have us commit, the standard is --

Q I'm not interested in -- personally, I'm not interested in the standard of commitment. I'm interested in the standard of getting out.

MR. BRESKOW: The discharge provisions are essentially the same, Your Honor. Jackson, as a practical matter, would be in as good a position to be released under what has been described as the Criminal Commitment statute, 9-1706a, when he gains comprehension --

Q Who decides whether he gains it or not?

MR. BRESKOW: The superintendent of the institution, Your Honor.

Q In each one?

MR. BRESKOW: In each instance. And the superintendent of the -- and the institution, Your Honor, is determined on the basis of where the man is held --

Q But this man, if he were picked up, without these criminal charges, and was civilly committed -- right?

MR. BRESKOW: Yes, sir.

Q How long would he stay?

MR. BRESKOW: He would stay until he had sufficient --

Q Until the superintendent said that he was no longer necessarily to be confined?

MR. BRESKOW: Until -- the test is, Your Honor, when he has sufficient mental and physical capacities, to the satisfaction of the superintendent -- that's a paraphrase -- would he be released.

Q Now, what has to be determined, that he is competent to stand trial. Am I right or wrong?

MR. BRESKOW: No, sir, that he have the sufficient comprehension to understand the nature of a criminal proceeding, to understand the charges, and assist in his defense.

Q Well, what was it I just said? I said competent to stand trial.

MR. BRESKOW: Your Honor, let me submit to you that --

Q You're not going to tangle me up with those words.

MR. BRESKOW: Your Honor, let me submit to you that Jackson --

Q Well, if Jackson were sane, how long would he possibly be put in the penitentiary?

MR. BRESKOW: If Jackson were sane and tried for robbery, robbery carries a 10 to 25-year sentence in Indiana, and he's charged with two charges of robbery.

Under the New York test, that he be --

Q Well, under any statute, you mean to tell me a man can be put in jail for 25 years for stealing four bucks?

MR. BRESKOW: By force and violence --

Q Both of them.

MR. BRESKOW: -- or by fear, Your Honor, which makes it robbery. The stealing of the four dollars is not --

Q Well, then, I can understand why, instead of putting him in for 50 years, you put him in for life. I don't see much difference. In Indiana.

MR. BRESKOW: Your Honor, in Indiana --

(Laughter.)

-- if a man, by force and violence, takes 25 cents, by force and violence, robbery being the crime against the person not against the property, he's subject to the robbery penalty of 10 to 25 years.

No matter the amount of money or the value of the property involved.

Not so for larceny in Indiana. Indiana has $100 limit on felony larceny. Anything under $100 is petit larceny. But not so with robbery.

Robbery doesn't relate to the value of the taking.

So that we see that Pate vs. Robinson would not let Indiana try. It would not be constitutionally required that Indiana release Jackson. And the third proposition that he be

committed is completely within the decisions of this Court so far.

Baxstrom vs. Herold has said to New York, with respect to the commitment of Baxstrom, that you cannot procedurally handle Baxstrom any different from any other potential civil committee in New York. Baxstrom, nearing the end of a criminal penal sentence, had to be afforded the same jury trial that other potential civil committees were afforded in New York.

In Indiana, Jackson -- Jackson is given the same due process hearing with respect to his failure to have comprehension, that he would have gotten with respect to 22-1907, feeble-mindedness commitment --

Q I take it, one of your -- as I read your brief, you suggest that under Indiana law he could not have been committed under 1907.

MR. BRESKOW: No, Your Honor, it's an alternative I'm giving. We're saying if insane means something the same as 9-1706a, non-comprehension, then he wouldn't have been committed of feeble-mindedness. But it is equally arguable that insane does not mean that, that insane in the non-comprehension statute merely means that you don't know anything about a criminal case, you don't understand, as Mr. Justice Marshall pointed out, the nature of a criminal case.

So that it would test --

Q Do you argue that's what your Supreme Court decided in this case?

MR. BRESKOW: No, sir. No, sir. Our Supreme Court said quite the opposite. Our Supreme Court said that Jackson could go to Muscatatuck School for feeble-minded.

Q Well, he could be placed there by the department.

MR. BRESKOW: By the department. And the vehicle by which he gets there is precisely what Mr. Justice Blackmun was pointing out to counsel for the petitioner. That some responsible citizen in the county in which Jackson resides files a petition for civil commitment.

Q Could that be done now?

MR. BRESKOW: Yes, Your Honor. But I submit you'd have this very same result by taking that tack as you do in the instant case, because he's committed under either statute to the Department of Mental Health at the discretion of the Commissioner for placement. He is in precisely the --

Q Is that to say if he had a civil commitment, and where -- what do you call this place, I can't quite get it --

MR. BRESKOW: Muscatatuck.

Q -- Muscatatuck, and he were committed there, that the authority of the Commissioner to transfer would have permitted the Commissioner to transfer him right where he is now?

MR. BRESKOW: Yes, sir. Absolutely.

Absolutely. The Indiana Supreme Court decision, which this Court certainly wants to pay attention to, says: in interpreting the Indiana State law, that Jackson can go anywhere, any mental institution is the language, at the discretion of the Commissioner of Correction. And he says to Jackson, "It's not for you to say, Mr. Jackson" --

Q Now, is -- how can there be a proceeding initiated, whether it's under this commitment or under a civil commitment, to get the due process hearing that he now can comprehend things? How does that come about?

MR. BRESKOW: It comes -- if I understand your question, Mr. Justice --

Q Well, I thought you said earlier that under either this commitment or a civil commitment, it's possible to have a due process hearing --

MR. BRESKOW: Yes, sir.

Q -- at which it shall be determined whether he is to remain committed or to be released or --

MR. BRESKOW: Yes, sir.

Q Is that right?

MR. BRESKOW: That is true. Let me --

Q How is that initiated?

MR. BRESKOW: Let me give you -- there are two separate procedures. In the case of a non-comprehension

commitment, as we have in the instant case, the court, on the suggestion that he may not have sufficient comprehension, appoints two physicians to examine the petitioner and report to the court. There is a full-blown hearing, with rights of petitioner to be present, cross-examined, call his own witnesses, which he did in this case by his counsel; and at the conclusion the commitment order is reviewable by the appellate court in Indiana.

Now, compare, if you will, Your Honor, --

Q Well, my question goes to how now can there be a hearing to determine whether he ought to be released or stand trial? That's what I'm asking.

MR. BRESKOW: Well, first of all -- how could there be a hearing? He has habeas corpus available to him. Presumably, if his treatment is not right, and we have a Nason type situation, he can file a --

Q Well, let me put it this way: Suppose there had never been any criminal charges here at all --

MR. BRESKOW: Yes.

Q -- but someone had initiated a civil commitment, and he were now in either place under civil commitment, and he wanted out. How could he initiate a proceeding to get out?

MR. BRESKOW: He could file a habeas corpus, Your Honor.

Q Only by a habeas?

MR. BRESKOW: He could file a habeas corpus. I presume that he would also have the opportunity to petition the court, to claim that he is now sane. He could do it better --

Q Well, you don't know, you just say you assume that?

MR. BRESKOW: Yes. But he could do it better, because he attacks the discretion of the superintendent in saying that he is not, and therefore he is being illegally detained by habeas corpus, Your Honor. That's the appropriate remedy that he would have.

Q You mean Jackson's remedy is only habeas corpus?

MR. BRESKOW: Jackson's remedy is habeas corpus, if Jackson is sane.

Q That is competent, can comprehend?

MR. BRESKOW: Yes, sir.

Q Well, if he files habeas corpus, would he have a full-scale due process hearing?

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

Q On the question whether he's now sane?

MR. BRESKOW: Yes, he would, Your Honor. Both in State court and in federal court.

Q Well, Jackson is not eligible now for any furloughs?

MR. BRESKOW: Let me say this, Your Honor --

Q Well, is he or isn't he?

MR. BRESKOW: Yes. Jackson --

Q At this place?

MR. BRESKOW: No. Not where he is now.

Q All right. That's what I want. At this place he is not eligible for any furloughs?

MR. BRESKOW: That is right.

Q If he had been committed civilly as a feeble-minded person, and had been placed in this particular prison, or hospital --

MR. BRESKOW: Not where he is now, Your Honor.

Q Well, let's assume he had been placed -- you say that he could have been.

MR. BRESKOW: He could not have been placed in Central State Hospital, Your Honor. That is not for feeble-minded.

Q Well, you told me just a while ago, or told Justice Brennan, that if this man -- if Jackson had been committed as a feeble-minded person, the Department of Mental Health could still have placed him in the very institution where he is now.

MR. BRESKOW: Yes.

Q Well, let's assume he had been placed in that institution.

MR. BRESKOW: All right. All right.

Q After a commitment for feeble-mindedness. Would he then be eligible for furloughs?

MR. BRESKOW: No, probably not, because it isn't the institution that carries a furlough proposition.

Q All right. So he would have to be put in Musc- --

MR. BRESKOW: Muscatatuck.

Q -- Muscatatuck in order to be eligible for furloughs?

MR. BRESKOW: Yes.

Q And he would be placed there now?

MR. BRESKOW: Yes.

Q And until he is placed there at the discretion, no furloughs?

MR. BRESKOW: Yes, that's precisely it, Your Honor. But because of the nature of the institution, not the nature of the commitment.

Q Well, why no furlough at the Central State Hospital?

MR. BRESKOW: I don't know. Classically, and historically, Central State Hospital was for more serious cases.

Q Well, have you ever known a person committed under the feeble-minded, Section 1907, to have been placed in the facility that Jackson is in?

MR. BRESKOW: No, I don't.

This is a case of first impression, as petitioner would have you say -- have you understand. There has never been a decision in Indiana that someone committed for non-comprehension is able to be sent to Muscatatuck. But it's reasonable to say that, with the '67 amendment of the Indiana statute that equates mental institution with psychiatric institution, and makes no distinction, and allows the Commissioner to have discretion in the matter.

Q But even so, as I understand it, other than the differences in furloughs, no matter where Jackson is confined, that if he's to have any release, he has to initiate a habeas proceeding under your practice to get it?

MR. BRESKOW: That would be my understanding. Together with -- I'll have to equivocate, Your Honor. I would think he would be in a position to petition the court, the committing court, and claim his sanity.

There are nine ways to get into mental institutions, nine vehicles by the Indiana statutory scheme. They overlap, they repeal by implication, they supersede in part, but in spite of all that, our position is that all the statutes procedurally treat the committee alike, procedurally. Certainly the criteria might be different, as Mr. Justice Marshall pointed out to me. Non-comprehension in the one instance against mentally feeble-minded and needing care because you can't take care of yourself.

Q Well, now, in this instance, I guess it is a practical fact, that this being a non-comprehension commitment, Jackson, who's now 27, is he?

MR. BRESKOW: He must be about 30 now, Your Honor. He was 27 at the time of the case.

Q Thirty. Well, he's there for the rest of his life unless he can establish that comprehension has been restored. Is that right?

MR. BRESKOW: Yes. Now, let me take the edge off that a little bit, Mr. Justice.

He has two pending criminal cases. They are presently pending in the Marion Criminal Court in Indiana. Presumably the Marion Criminal Court judge would inquire periodically as to the welfare of Jackson.

Particularly in light of recent history, in the need to dispose of cases, to move cases --

Q But I gather, on those offenses, from what you've told us, that it's possible that under consecutive sentences a conviction for those two four-dollar robberies, he could get 50 years, couldn't he?

MR. BRESKOW: Yes, sir.

Q So that means that he'd be there at least 50 years before he'll have served the possible time he could serve for those robberies?

MR. BRESKOW: Yes, sir.

And it's interesting to note that the New York statute, that attempts to handle a problem of this kind, says that the criminal charges must be dismissed if the length of time in commitment is more than two-thirds of the sentence. In this case, it would be something like 32 to 37 years.

Q But you don't even have that much in the statute, do you, in Indiana?

MR. BRESKOW: We have more, Your Honor. We have more. We have the opportunity for Jackson to periodically petition and file habeas corpus --

Q But I mean if he fails to establish comprehension.

MR. BRESKOW: Yes. Yes.

Q He'll lose all those applications, wouldn't he?

MR. BRESKOW: Yes.

Q And so he stays there for the rest of his life on commitment.

MR. BRESKOW: But he would anyway, Your Honor, that's our point. He would, anyway, under the civil commitment statute. And he would go to the mental health department under those statutes.

Q Well, he spent the first 27 years of his life, apparently, with his mother. He had two jobs, one in Mississippi and one in Indiana. Wouldn't he, under your statute, had he been civilly committed to this unpronounciable name place, had perhaps been dischargable under your Indiana

Code 1971, 16-15-4-12, that says he can be discharged from the said colony when, in the judgment of the superintendent, the mental and physical condition of the patient justifies it? He was, as I say, not in custody for 27 years, and he apparently, until this case arose, had never been the subject of difficulty.

MR. BRESKOW: Yes, Your Honor, but I might point out that it only came to the attention of the government, the State Government, by the criminal charges.

I would submit, too, Your Honor, that --

Q I was addressing my question only to your statement that he very clearly could never be released if he were civilly committed, for the rest of his life.

MR. BRESKOW: Very possibly. Very possibly. I believe he --

Q I was just wondering how they would go about --

MR. BRESKOW: --asserts in his own case that his condition is such that he'll never recover.

Q Well, it doesn't require that a person recover in this language I just read to you. Not at all.

MR. BRESKOW: Your Honor, it requires that he at least be able to communicate with the superintendent, or some way give the superintendent reason to know that he has the sufficient mental and physical ability that he can be released.

Q I must point out to you that for 27 years he

was not in an institution.

MR. BRESKOW: But that isn't to say --

Q And he had two jobs.

MR. BRESKOW: But that isn't to say that he should not have been, Your Honor.

That isn't to say that he should not have been. He has the intellect of a three or four-year-old child.

Q Well, not -- most three and four-year-old children are not in institutions, are they?

(Laughter.)

MR. BRESKOW: He has the intellect of -- I would be derelict in my responsibility to my young daughter if I placed her on the streets of Indianapolis, Your Honor. The same way as the State would be derelict to this person who has the intellect of a three-year-old, four-year-old child.

Q Is his mother still living?

MR. BRESKOW: Yes. I assume so. She testified in the case.

Q But Indiana, I don't -- if there had never been any criminal charges here, it may be that Indiana could have committed this young man, this man as a feeble-minded person, but it's certain that they couldn't have committed him for his inability to understand criminal charges, or to aid in the defense of a criminal case. That wouldn't have been an adequate reason for committing him?

MR. BRESKOW: No, sir, Your Honor.

Q Well, that's all Indiana now has against him, isn't it, in terms of --

MR. BRESKOW: That might be a very significant argument. I think probably that's what this case is all about, Your Honor.

In some other case other than Jackson.

Q Yes.

MR. BRESKOW: Where someone just didn't know about a criminal case, and was all right in every other respect. But in Jackson's case, Jackson would have been committed anyway.

Q Well, I know, but we don't -- I just don't understand, then, why the State doesn't attempt to commit him civilly, instead of saying because he's been charged with a crime, for which he can't be tried, we're entitled to hold him for the rest of his life.

Why don't you -- why doesn't the State commit him civilly and then let the civil statutes operate in their full course?

MR. BRESKOW: Because it would be redundant, Your Honor. He is in -- under the same sort of procedure that he would be under civil commitment.

Q Well, there's never been -- there's never been any -- it's never been established in Indiana yet that he's

feeble-minded.

MR. BRESKOW: That's true. That's true.

Q Well, I don't see why you would think it's redundant.

MR. BRESKOW: The Commissioner of Mental Health, I submit to you, Your Honor, could make that determination unilaterally, without a court, and could transfer Jackson to Muscatatuck.

Q Well, maybe he could, but I thought maybe -- I thought maybe Jackson had the right to a hearing on whether he's feeble-minded or not.

MR. BRESKOW: The criteria, Your Honor, the criteria in order to meet one institution or another is determined by the Mental Health Commissioner.

Q Well, I know, but -- I know, but that's all on the assumption that the State is entitled to hold him just because he can't understand the criminal charges.

MR. BRESKOW: As I say to you, Your Honor, that would be significant but in Jackson's case.

With the condition of Jackson, as it's been described here.

Q Mr. Breskow, I wonder if you could address yourself to the hypothetical question I put to your friend, namely: What would the State of Indiana do now if, hypothetically, this Court said due process requires that he

can be held as he's now being held only for a period reasonably long enough to determine whether he is competent to stand trial or whether, foreseeably, will be competent to stand trial; and then, after that, he must be released unless a civil commitment is started within 90 days.

What would you do, in fact, as counsel for the State, what would you recommend?

MR. BRESKOW: I would have to recommend a civil commitment proceeding be started, Your Honor.

Q Well, if the civil commitment proceeding had been started, let's say, six months ago or a year ago, you wouldn't be here perhaps.

MR. BRESKOW: If he were transferred to Muscatatuck, we probably wouldn't be here, either, Your Honor.

Q Well, --

MR. BRESKOW: But that is probably true --

Q -- that's up to the administrator, that's administrative --

MR. BRESKOW: That's probably true, Your Honor. But I want to re-emphasize, Your Honor, that it would be redundant, because it doesn't matter under which statute he goes ultimately to the Commissioner of Mental Health in Indiana.

Q Well, it may be redundant as an administrative matter, but perhaps not as a constitutional problem. And

that's what I was addressing myself to, and you've answered the question.

MR. BRESKOW: Thank you, Your Honor.

Q But didn't you say that you know of no other case where a feeble-minded had ended up in the Central State Hospital?

MR. BRESKOW: I don't know of a case personally, Your Honor. And, as I say, --

Q What is this Court to decide?

MR. BRESKOW: -- the Jackson case, decided in '71, was a case of first impression with respect to sending people to Muscatatuck under the non-comprehension proviso.

Q Certainly where he is now he has no furlough possibility; he would have it in Muscatatuck?

MR. BRESKOW: Yes, sir. Because of the nature of the institution, not the nature of the commitment.

Q Yes, but there just isn't any practical possibility for a person charged with crime to get into Muscatatuck. Have you ever heard of one, a person who's been committed for his inability to understand a criminal charge and to stand trial of being transferred to Muscatatuck?

MR. BRESKOW: No, I don't. No, I haven't, Your Honor.

Q Yes.

MR. BRESKOW: The decision -- I refer you to the

Appendix at page 26, of Judge Artebern. He says that he can be, though, Your Honor.

Q Yes.

MR. BRESKOW: He can be so transferred to Muscatatuck.

Q Yes.

MR. BRESKOW: This 9-1706a non-comprehension committee.

Q Yes.

MR. BRESKOW: Now, we've already discussed, then, Greenwood, Baxstrom, Weems, if you will, and Weems and Robinson vs. California, the classic cruel and unusual punishment cases, would not preclude Indiana from taking alternative 3, the commitment alternative, that it does now. Because, as was pointed out by Mr. Justice Douglas, in the Robinson vs. California, in his concurring opinion, it is not the confinement which amounts to cruel and unusual punishment, it's the confinement together with the conviction of a crime.

We don't have that in this situation.

In closing, let me submit to the Court that Indiana treats procedurally all potential committees alike, whether they be civil committees or criminal committees, as designated by the petitioner.

Procedurally alike, admittedly the criteria is different. Baxstrom does not require that the criteria be

the same.

For this Court to say so would be for this Court to establish a test for insanity, albeit non-comprehension in Indiana, different from the Indiana Legislature's definition of insanity for purposes of non-comprehension, and classically the sovereign -- the sovereignty of Indiana, the State necessarily treats and handles their insane the same as they do with respect to other cases that are strictly the State's: divorce, marriage, title to real estate, and insane.

And the Indiana Legislature has adopted the non-comprehension test. For this Court to say there has to be the non-comprehension test plus something or, would be to establish a different test.

Q Well, that's -- the non-comprehension test was for not trying him. It wasn't -- I didn't know -- isn't there some case that says that if a fellow doesn't understand the charges, he can be held forever?

MR. BRESKOW: Only if there are charges pending against him.

Q Then he can be held forever, as long as the charges are pending? Has any court ever decided that?

MR. BRESKOW: No, no court has ever decided that.

Q Were it not for these two charges, he would be at Musca- -- whatever it is.

MR. BRESKOW: Your Honor, either way. That doesn't

bear on his being able to go to Muscatatuck. The charges, that's Judge Arteberm's point.

Q But my question was: But for the two charges, where would he be as between Central Hospital and Muscatatuck?

MR. BRESKOW: I have to assume, Your Honor, that the Commissioner acted regularly, and he'd still be at Central State, no matter --

Q Feeble-mind?

MR. BRESKOW: No matter whether --

Q Feeble-minded person? I thought you said feeble-minded didn't go there.

MR. BRESKOW: Yes, sir. And after the Jackson --

Q But for the two charges, he would have been found to be feeble-minded, and would have been at the civil place.

MR. BRESKOW: After the Jackson decision in this case by the Indiana Court, he could have very well gone to Central State.

Q But you wouldn't have had the Jackson decision in this case if it weren't for the charges. Solely because of these charges, he ends up in the hospital for the criminally insane. Solely because of the charges.

MR. BRESKOW: I submit to you, Mr. Justice Marshall, that we're not saying here that Jackson had to go to Central State because he was insane under 9-1706a, and then, therefore,

he becomes feeble-minded under the other statute.

Q To the contrary, he went there because criminal charges were pending against him.

MR. BRESKOW: I don't take that position.

Q Well, what if --

MR. BRESKOW: He was sent there because the Mental Health Commissioner decided that was the best place for him. Who had the alternative to send him to Muscatatuck.

Q But that's not what you just said. You told me that feeble-minded people didn't go to Central -- you said that.

MR. BRESKOW: I said I didn't know of any case where a feeble-minded was sent to Muscatatuck, and when asked why, I said because that's -- to Central State, because, historically, Central State has been for more serious --

Q Criminally insane.

MR. BRESKOW: Serious offenses.

Q Would they be criminally insane? Is that a good phrase?

MR. BRESKOW: That isn't necessary to have them go to Central State.

Q But it's pretty accurate, isn't it?

MR. BRESKOW: We don't make the distinction in Indiana, Your Honor, between criminally insane and civilly insane.

Q Well, I think all my -- my one question -- I guess the facts will bear it out, that if he didn't have these two charges, if anything else had been filed against him, he would have ended up in civil?

MR. BRESKOW: He wouldn't. That is not the case. He would not have been in Muscatatuck absent the charges. He would have ended up where the Mental Health Commissioner sent him, which may have well been Central State.

That discretion is with the Mental Health Commissioner.

And as Justice Artebern said in his opinion, that's his expertise, not Jackson's.

Thank you, Your Honor.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:46 p.m., the case was submitted.)