ORIGINAL

In the

Supreme Court of the United States

ALBERT DELANOR MUREL, et al.,

Petitioners,

v. No. 70-5276

BALTIMORE CITY CRIMINAL COURT, et al.,

Respondents.

Washington, D. C.
March 28 & 29, 1972

Pages 1 thru 61

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
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Tuesday, March 28, 1972.

The above-entitled matter came on for argument at 2:15 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KARL G. FEISSNER, ESQ., and ANDREW E. GREENWALD, ESQ., 6401 New Hampshire Avenue, Hyattsville, Maryland 20783; for the Petitioners.

HENRY R. LORD, ESQ., Deputy Attorney General of Maryland, One South Calvert Street, Baltimore, Maryland 21202; for the Respondents.

C O N T E N T S

[Second day -pg. 41]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-5276, Murel and others against Baltimore City Criminal Court.

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

ORAL ARGUMENT OF KARL G. FEISSNER, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The petitioners will reserve ten minutes for rebuttal, if we may.

Your Honors, grievous and manifest error was committed in the court below when the Fourth Circuit Court of Appeals affirmed the Maryland defective delinquent law at its Patuxent Institution in meaning and application.

If I may, I would first invite Your Honors' learned attention to page 7a of our brief in the rear, which sets forth the definition of a defective delinquent.

As can be observed, a defective delinquent or one who is claimed to be a defective delinquent requires a new finding of fact in our State courts of four critical elements.

Firstly, that the individual has persistent, aggravated, anti-social or criminal behavior; secondly, that he has a propensity towards this criminal activity; thirdly, that he is found to have intellectual deficiency or emotional

imbalance; and fourthly, that he demonstrates an actual danger to society.

This particular definition, Your Honors, is triggered by the provisions of 6(d) of the Act, which are on the very next page. A request for an examination of a supposed defective delinquent is initiated with a request from almost any persons wherein it would state that the individual suspects or supposes that the individual might have defective delinquency.

Now, we suggest firstly, in our first position, that the legislative food for thought of "supposition" or "suspecting" that someone has a particular condition will give one constitutional indigestion.

We bring that to the Court's attention for this reason: first of all, the lower court has relied, and our learned Attorney General has relied on this Court's earlier decision in Minnesota ex rel Pearson v. Probate Court. We think that that reliance is grossly misplaced for these three reasons:

No. 1, the Minnesota statute which was before this Court, and the Court only considered the matter on the basis of, so to speak, a demurrer at that time, there was no procedural hearing such as we had in this case. The statute in Minnesota, Your Honors, required three things before you could indicate or begin this sexual psychopath statute is what they call it in Minnesota. No. 1, that the facts must first be submitted to the county attorney. Secondly, that he must make a finding

of good cause; and thirdly, that he then prepares a petition to be executed by a person having knowledge of the facts.

Now, Your Honors, on the basis of that, as construed and limited by the Minnesota Court, held that Minnesota ex rel. Pearson v. Probate Court was constitutional. And we set that next to the Maryland defective delinquency act, which merely says that a request for examination may be filed by anyone who suspects or supposes.

In this regard, it is enlightened to examine very briefly the -- the learned Attorney General of California has seen fit to file a brief amicus curiae, and we noted with interest in the back of his brief, in the Appendix section, where he referred to the particular California law, and that law says if it appears to the courts --

Q What page are you on?

MR. FEISSNER: Page 1 in his Appendix in the back.

Q Page 1 of the Appendix?

MR. FEISSNER: Yes, sir.

Q Thank you.

MR. FEISSNER: It's under subparagraph (a), Mr. Chief Justice, it states, in the sixth line down: "if it appears to the satisfaction of the court that there is probable cause" -- and I think there is a major difference, sirs, between probable cause and suspecting or supposing.

Secondly, note, to turn to page 2 of the brief of

the learned Attorney General of California, you will find that the California statute requires a finding that the person could benefit from treatment -- that the person could benefit from treatment.

The Maryland law, which we think was designed to rid us, perhaps, of the socially obnoxious, has no requirement of treatment. There is no necessity that there be treatment, there's no finding that the individual is susceptible of treatment.

We will come to that momentarily.

Q Mr. Feissner.

MR. FEISSNER: Yes, Your Honor.

Q Before you do, it's difficult enough for me to follow the Maryland statute without going also to read the California one, but --

MR. FEISSNER: Yes, sir.

Q -- how does this actually work in fact? This is only after somebody is convicted?

MR. FEISSNER: Yes, Your Honor, it is --

Q And cannot be done unless -- after he's been released from confinement after conviction. Is this normally done at the request of the warden of the prison?

MR. FEISSNER: Sir, it's rarely done -- well, you really can't say normally, sir, because they have referrals go from the warden of the prison and from the State's Attorney who

tried the case. There are four classes of people that can refer one for defective delinquency examination. It can be the State's Attorney who tried the case; Interestingly enough, the petitioner's own attorney; the petitioner himself; or the warden ofthe correctional institute where he finds himself.

I believe there's a fifth one, but that escapes me at the moment.

Yes, the court on its own motion.

Q The court on its own motion?

MR. FEISSNER: Yes, sir.

Q And where does that appear in these --

MR. FEISSNER: In paragraph 6, Your Honor, (b) on page --

Q What page now?

MR. FEISSNER: Page 7a of the Appendix.

Q (d) How requests made?

MR. FEISSNER: Under that, who may make requests, sir. Page 7a of the appendix.

Q Oh, 7a, I see.

Q Does this have a parallelism to the federal system, 4244?

MR. FEISSNER: I'm not competent to comment on that, sir. I do not know the federal system 4244 that well.

Q Incidentally, now that I've interrupted you,

how many of your petitioners are still at Patuxent?

MR. FEISSNER: At last report, Your Honor, we understand that three still are; one, I believe, is on parole.

Q Some are out?

MR. FEISSNER: They're not out, sir, they get released on parole for extended periods of time.

Q Is it Hayes and Avey and perhaps Creswell?

MR. FEISSNER: Hayes, Avey and Creswell are still among those present. It's my understanding that Mr. Murel, in between the Fourth Circuit and here, has gotten a cure and has been released on probation.

Q Then, secondly, I take it you're raising no equal protection issue here, as compared with commitment civilly?

MR. FEISSNER: We raise a substantial equal protection argument that we'll get to momentarily, Mr. Justice Blackmun; very substantial.

Q Are you relying on Baxtrom v. Herold?

MR. FEISSNER: Yes, sir, we are.

Your Honors, --

Q Just to -- so this request can be made any time after conviction and before he's released from custody resulting from that conviction?

MR. FEISSNER: Yes, sir.

Q And when a request is made, then what happens?

MR. FEISSNER: That's my second point, sir. He goes for examination.

Q He goes to Patuxent?

MR. FEISSNER: For examination.

Q Always to Patuxent?

MR. FEISSNER: Yes, sir.

But if I may just cover that bridge across -- or cross that bridge momentarily, with your permission.

Q All right.

MR. FEISSNER: The last point I would invite your attention to is the fact that this definition of a defective delinquent is extremely broad and covers all.

Now, under the Maryland law, when one is referred to Patuxent, he is referred without notice, without hearing, without the benefit of counsel and, believe it or not, no right to appeal the fact that he is sent to Patuxent on the basis of suspicion or supposition. The Maryland law allows only an appeal after you are in fact determined to be a defective delinquent.

So we have then, sir, once the request is made on the basis of suspicion or supposition, that the individual then goes to Patuxent, he has no notice, no hearing, no counsel, and after a period of nine months to one year the institution then makes its return to the court.

If the institution finds that he is a defective

delinquent, then there is a hearing in court. If they find he is not a defective delinquent, there is no appeal allowed by public authority or otherwise, and the individual serves out his criminal term or criminal sentence.

Q During that nine-month to one-year period, is he physically in Patuxent itself?

MR. FEISSNER: He is. On the receiving tier.

Q And is the nine months to one year something in the statute, or is that just by experience?

MR. FEISSNER: By experience, sir, the way it works. It just takes that period of time, it's an administrative situation.

Q No statutory limit on the time he can be confined there on the first referral?

MR. FEISSNER: Well, in this respect there is not, sir, because the statute indicates a period of ninety days, but, as the Director testified in the courts below, lamentably it takes nine months to a year. He laments the fact, but that is the case.

Of course there --

Q That's simply an administrative problem of staff shortage and facilities, is it?

MR. FEISSNER: Indeed, Mr. Chief Justice; and getting back to the court and getting a hearing, and their information gathering process; it takes a period of time.

Q In your view, how does this process of getting in after conviction compare in the due process sense with -- or in any other sense, with the reference before trial of the person to determine his condition, either for purposes of trial or his general mental condition?

MR. FEISSNER: Well, sir, if an individual pleads insanity, he must submit to an examination by the State psychiatrist.

Q Suppose he does not, but the prosecutor requests. That often happens, does it not? An examination is ordered at the request of the prosecution.

MR. FEISSNER: Yes, sir; that's correct. Well, of course, it's the burden under the Maryland law for the accused and it's also the burden under the federal law for the accused to offer some evidence of his insanity, and until he does offer that evidence, the State does not have any duty to go forward.

But I don't see --

Q No, I'm speaking of the pretrial period.

MR. FEISSNER: Yes, sir.

Q After the arraignment, if it were in federal court, --

MR. FEISSNER: Yes, sir.

Q -- for example, the prosecutor comes to the court and says he would like to have this defendant examined to

determine his condition, his competency to stand trial or possibly anticipating a surprise defense of the claim of lack of responsibility. Now, do you see a difference -- what differences would you point out between the two processes here?

MR. PEISSNER: I really don't see that material a difference, sir, except it is a different standard; one is mental disease or defect under the Maryland law to relieve someone from criminal responsibility, where, under the defective delinquent law, it's far broader; in fact, under the defective delinquent law you can catch anybody in the net, if you wish, because the terms are so vague.

For example, intellectual deficiency, Mr. Chief Justice; I think that that, as testified in the court below, is someone who our Creator did not endow with the accouterments that perhaps the rest of us have. Emotional unbalance is a question of degree as was described.

I think there is more precision in the criminal test, indeed, than there is in the defective delinquent test. More precision, sir.

Q Mr. Peissner, I take it under Maryland procedure that if your client weren't at Patuxent during this period and he would be in prison?

MR. PEISSNER: Perhaps, sir. There are many men at Patuxent, and we will come to this momentarily, whose terms have expired and are still at Patuxent. Patuxent is an

indeterminate sentence. Your original criminal sentence is suspended.

Q But do they become an indeterminate sentence before the determination of them?

MR. FEISSNER: No, sir; after the determination.

Q We're talking about the original referral?

Q I was talking about the referral period of time.

MR. FEISSNER: I beg your pardon. No, sir. To answer your question.

However, there are individuals at Patuxent, I believe the record indicates 50 or 60, who have seen fit to rely upon the Bill of Rights and have refused to discuss their condition with the psychiatrist, and the State of Maryland, in a case called Musgrove, which is cited and well-discussed, I believe, in our brief, has held that if you rely upon the Fifth Amendment you will have to stay at Patuxent until you do talk, even though your criminal sentence has expired.

Your Honors, --

Q Have any of them been in fact held beyond the expiration of their criminal sentence?

MR. FEISSNER: Oh, yes, sir. Yes, sir, there are some in this record, and I believe you have certiorari in another case called McNeal, where the same situation, the man was there eleven years on a five-year sentence.

Q Without any determination ever having been made?

MR. FEISSNER: That's correct, sir; that's correct. Now, if --

Q You wouldn't object if the prison sets up its own Little Patuxent, would you?

MR. FEISSNER: I'm sorry, sir, I didn't get that.

Q If you put a Little Patuxent in the middle of the jail, while the man is serving his time, and they say, "We think you better be examined"; would you have any objection?

MR. FEISSNER: No, sir. If we had a Little Patuxent, which had treatment, or if we had a Big Patuxent which had treatment, I think we'd have different issues here.

Q All right, but that wasn't my question. If you had a place where they want to find out if the man is insane --

MR. FEISSNER: Yes, sir.

Q -- would you object to that?

MR. FEISSNER: No, sir. I think that the State has a right to determine if someone is insane.

Q Well, then, you don't have objection to the original commitment to Patuxent?

MR. FEISSNER: Yes, sir, we do. Because he --

Q Well, you're objecting to what happens to him after he gets there --

MR. FEISSNER: Sir, we object to both. Mr. Justice Marshall, we object to the original part, because the individual

is shunted off without notice of what's happening, without hearing --

Q Well, he transfers from one place of business to another place of business.

MR. FEISSNER: Yes, sir; but there is going to be a second consequence of his being transferred.

Q Well, that's what I'm saying. I'm just trying to find out. Isn't really -- your real problem is after he gets to Patuxent?

MR. FEISSNER: Yes, sir, the fact that there is going to be a major consequence --

Q I was just suggesting you might be wanting to get to that point.

MR. FEISSNER: Yes, sir.

For example, to follow your point through, sir, in the original case which brought this matter to the attention of the courts, we had a young man who received an 18-month sentence and was there for seven years. And eventually was released because it was found he should never have gone there in the first place.

Q Well, let's just find out what happens after he gets there.

MR. FEISSNER: All right, sir. That's where we're coming to, the examination stage. As we have indicated to you, the individual goes to Patuxent, having been triggered by a

criminal situation, although it's not criminal misbehavior that is the entrance requirement to be an alumni of Patuxent Institution. He can have aggravated anti-social behavior, aggravated anti-social behavior. Then when he gets to Patuxent Institute, three things occur which we find somewhat difficult to reconcile with constitutional law.

No. 1, during the period of time that he is in Patuxent and being examined, his is not allowed to have the benefit of counsel or benefit of his own position.

No. 2, if he relies upon the Fifth Amendment, as we have indicated, the Court of Appeals of Maryland, in a case called McDonough, at 183 Atl.2d 368, has said that this is evidence of a hostile nature and they determined that because of his hostility in citing the Fifth Amendment that this would be grounds for finding him a defective delinquent.

Thirdly, under the Musgrove case, as we have already brought to your attention, if an individual in fact takes advantage of the Fifth Amendment to the Constitution of the United States, then he stays there until he does decide to talk. So the examination stage then goes to where the prisoner is called in and is given a battery of psychological and psychiatric tests. He is confronted with information that the State has as to his past.

Unfortunately, he is not given an opportunity to refute the information that the State has against him. For

example, the very learned and distinguished Director of Patuxent, in Maryland cases, and it's found at page 623 of the Maryland Appendix, J.A. Md. 623, stated that the individual can challenge only what we bring up.

So here you have an individual, sir, who's hurt: he's a criminal and he's trying to pay his debt; secondly, he is now accused of one of two things, either being a dummy, in a sense, being intellectually deficient or emotionally unbalanced, mentally unwell. He's here before these doctors, he has no counsel, no doctor, no notice, no hearing, no right of appeal, no nothing; and then they say to him: Here's what you did, we have all this background information. Now, you can comment on A, B, and C.

He gets no opportunity, sir, to refute what the institution has. And this becomes painfully critical, sir, painfully critical, for this reason. You will find, in the case that brought this whole matter up, called Director vs. Daniels, in the first trial of this young man we were appointed to him back in 1964. J.A. 4 at page 403.

The institution submitted a report to the court, and their procedure, the Patuxent procedure is that just a report goes to the court, and the report is read, and then this is the State's case. This report is the reason that we'll get to discuss hearsay on a lawyerlike basis with you in just a moment.

But the report goes to the court and it is then read to the jury.

Now, --

Q Mr. Feissner, I go back.

MR. FEISSNER: Yes, sir.

Q I'm mildly surprised you haven't drawn some parallel to the federal system, after all we deal with that day by day, and perhaps after the argument you could submit something. In a way some of your arguments seem to be antagonistic to the federal system also, which I think has been upheld.

MR. FEISSNER: It would be my pleasure to do that, sir.

Q And I'd appreciate whatever help you can give us on that.

MR. FEISSNER: I appreciate your asking me, sir.

Now, as we indicated, the individual having little chance to refute, and why this is so painfully critical. You will find that the first inmate that brought this case forward, the Daniels case, the inmate, in the report that was submitted to the court, it said that this 15-year-old Negro lad attempted to entice an 8-year-old white girl into sexual activity but was frightened away by her mother.

This is read into the trial, and the individual has no opportunity. The people who make these claims are not present, and there is no right to cross-examination.

Q But this particular incident didn't happen to any of your clients, did it?

MR. FEISSNER: Yes, it did, sir. It's at J.A. 4, page 403.

Q It did happen to one of your clients here?

MR. FEISSNER: Yes, sir. Yes, sir.

It's at -- on appendix for it, page 403, where the report came in.

When we had the redetermination hearing allowed by the Court of Appeals of Maryland, we were able to summon the mother in, and this was the testimony at J.A. Md. 61, where the mother said this didn't happen; that the little girl was on her way to school. The fellow asked her, "Do you want to Play?" She said, "No, I've got to go to school", and he went on to school and there was no enticement of sexual activity and no effort by the mother to frighten this young man away.

So you have the situation, sir, where you have a new finding of fact has to be made in four respects. A new finding of fact in four respects, by a trial court. A court which has before it a statute which is broad enough to ensnare anyone and then you have trial procedures, trial procedures which allow the most blatant form of hearsay, the Patuxent report which is just read to the jury, and then, now, it's up to the defendant to overcome it.

The man who is in custody, having the least oppor-

tunity, then must face this rambling sea of four or five pages of information that the Patuxent Institution has gotten on him, and he has not had the opportunity to refute it. He can only refute that which was brought up.

Lastly, we'd like to save these few minutes, but we would want to bring to your attention the fact that under the Maryland law we think this is critical, sir, that under the Maryland law there is no requirement that treatment be given. We think the very basis for such a law such as this, so-called indeterminate confinement to get the socially undesirable off the street, should have a requirement that the individual be given treatment of some sort. You just can't house people out there. But our Court of Appeals, in its wisdom, in several cases -- the main one, Shields vs. Director, which we have cited in our brief, states on an appeal that the inmate made that he was not given any treatment.

The appellant's fourth contention is without merit, since there is no requirement that an inmate be given treatment unless the same is appropriate.

One of the petitioners in this case, sir, who was there for 13 years because he stuttered, 13 years because he stuttered; they didn't have a stuttering teacher or a speech teacher for ten years. This was what the Court of Appeals set on his appeal, it's at page 15 of our reply brief:

"As to the stuttering there is no claim and no showing

that it could be helped or cured by treatment and, in any event, a claim of denial of proper medical treatment has been held to be irrelevant."

Q Well, are you suggesting on that particular case that that was the only reason he was sent there in the first place?

MR. FEISSNER: Oh, no, sir. The jury had to make these other determinations, but at least --

Q But he wasn't sent there because he had a speech impediment, was he?

MR. FEISSNER: No, sir. No, sir. He was sent there because there was a finding of these other things. But, as we have set forth in the beginning of our brief, under the subject of trial procedures, --

Q Then just focus on just what is the significance of not having a speech teacher. Suppose he had allergies, hayfever, something of that kind, they might not have any cures for that. But how would that be relevant to this problem?

MR. FEISSNER: I think, Mr. Chief Justice, that the very basis upon which this law is created, and the only basis that this law could be sustained is the fact that there should be recognizable medical treatment, in other words, a finding that --

Q Medical treatment for the --

MR. FEISSNER: Defective delinquent.

Q -- problem for which he was sent there.

MR. FEISSNER: Agreed.

Q Not necessarily for all the other ailments he may have.

MR. FEISSNER: No question about it, sir, but the Court of Appeals of Maryland, our point is, sir, has held that the individual cannot bring up the question, that it is irrelevant as to whether treatment is available for his defective delinquency. There is no requirement under the Maryland law is our point, sir; no requirement under the Maryland law that a committed inmate be given treatment.

We would like to save the rest of our time, with your permission, sir.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lord.

ORAL ARGUMENT OF HENRY R. LORD, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Several points were raised by Mr. Justice Stewart, before I get into my argument I'd like to quickly respond to those.

If the members of the Court will take a look at page 19 of the blue Respondent's brief, there is a list at pages 19 and 20 of the procedural safeguards that surround a convicted

person before he may be adjudicated as a defective delinquent. These are some 14 in number, and are, I think the Court will agree, elaborate. I think it was Judge Bell in the Fourth Circuit, in the first Sas case in 1964, who said that these trial and hearing procedures place around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the courts against an attack of this sort.

The Fourth Circuit went on to say in that case, in a unanimous opinion, that the draftsmen of the statute were obviously careful to conform to the definition approved by this Court in Minnesota ex rel. Pearson vs. Probate Court.

Q Now, focusing at page 20 on No. 11 --

MR. LORD: Correct.

Q -- he's entitled to counsel of his choice; at what stage does he get that? Before he goes to Patuxent?

MR. LORD: Your Honor, what happens is that --

Q Or is this in the criminal proceeding that that's --

MR. LORD: No, the course will have to be, and this is counter, I think, to a statement, an indication from Mr. Feissner, there must be a conviction of one of the categories of crime enumerated in the statute before a person may be sent to Patuxent. It's not just anti-social activity, whatever that might be in the broad sense; there must be a conviction also.

Now, when he goes to Patuxent for a determination, and this is the second point that Mr. Justice Stewart raised, and I'll touch on this in answer to your question, there must be a report made on whether or not he's a defective delinquent within six months of the time he is sent to Patuxent. He then must have a hearing within three months, after the determination is made.

And it is at that hearing, which is a civil in nature hearing, on whether or not in fact this particular individual is a defective delinquent, that he is entitled to counsel.

He is of course entitled to counsel at his criminal trial, and throughout that; but this is the proceeding that does not commence until after there has been a criminal conviction and a sentence.

Q Does he have counsel before the examination?

MR. LORD: At the examination?

Q Or before?

MR. LORD: He has counsel at his trial for the criminal offense.

Q My question was, at the examination.

MR. LORD: At the examination, he does not. The examination is --

Q Is anything he says there available to be used against him?

MR. LORD: Well, the State's position --

Q Is it or not? Yes or no?

MR. LORD: Yes, it is.

Q And he doesn't have counsel?

MR. LORD: He does not have counsel at Patuxent, no.

Q And he has no way of preventing that?

MR. LORD: I missed your question.

Q If one of the persons in this list says he should go to Patuxent for examination, he can't question that at all?

MR. LORD: He is sent, if he meets the requirements, which we believe meet the requirements of due process, if he meets those, he must then be transferred to Patuxent for evaluation.

Q Well, as I understand,your requirements of due process is that some official says He should go to Patuxent, period.

MR. LORD: Well, as a practical matter, and I think the record will bear this out, in the overwhelming majority of cases this happens immediately after the court has sentenced the man after conviction. He then recommends --

Q Well, under this procedure, can anybody in the penitentiary sign a piece of paper and send that man to Patuxent, period?

MR. LORD: No. Absolutely not.

Q Well, what in the statute prevents that?

MR. LORD: It says that the Department of Corrections may -- but that would be a ranking --

Q Well, that could be the third assistant water boy in the Department of Corrections.

MR. LORD: No.

Q I thought there had to be an order of the judge to send him to Patuxent?

MR. LORD: Well, that's right. But, I mean, the initiation --

Q Well, I know, but no one can order anybody to go to Patuxent except the judge.

MR. LORD: No. The point made is this. There are five categories of people who can initiate a request to send a person to Patuxent. He then is transferred by a court order to Patuxent.

Q Well, I know, but he doesn't go to Patuxent until the court orders it.

MR. LORD: That's right.

Q And the court doesn't need to sign the order just because somebody requests it.

MR. LORD: Oh, absolutely not. The point I'm making is that it does comply with the statute.

Q Well, what does the court do? Does he hold a hearing?

MR. LORD: The court?

Q Yes, sir.

MR. LORD: At the first stage?

Q Yes, sir.

MR. LORD: No. Does not. He examines the request for transfer, to see that it comports with the statute. And then, if it does, he will sign an order transferring him.

Q And he doesn't get a lawyer until after he has gone to Patuxent -- well, does he know about what's going on before the judge?

MR. LORD: Does he? Yes, he is brought before the judge.

Q But does he give him a copy of what's written against him?

MR. LORD: I believe it's in his record, yes, sir.

Q You believe it?

MR. LORD: Yes, sir.

Q It's not required?

MR. LORD: It is. It is.

Q It is required?

MR. LORD: Yes.

Q And then he goes to Patuxent.

MR. LORD: Correct.

Q Can his lawyer go along with him?

MR. LORD: No.

Q Can his lawyer go with him while he's being

examined by the psychiatrist?

MR. LORD: No.

Q Is the lawyer present when the report is prepared?

MR. LORD: Absolutely not.

Q When does the lawyer get his crack at it?

MR. LORD: When the report is returned to the court, in the nature of a presentence report, when it's returned to the court, the court must hold a hearing immediately; and at that point he appoints counsel. There's been no determination made until there is a jury trial or a court trial, at the election of the petitioner, --

Q But my question -- I didn't say appointed counsel, I'm assuming he's got counsel; but counsel can't do anything.

MR. LORD: Counsel cannot involve himself in the proceedings at Patuxent until the matter is returned to court. It must be returned to court within six months of the time of his transfer.

Q Are you familiar with the federal system of assignments statute?

MR. LORD: I'm generally familiar, Your Honor.

Q Well, in the federal system, as of now, may an assignment be made from a conventional penal institution to Springfield or to St. Elizabeth's Hospital if there's some

mental aberrations that show up after the man is assigned to a penal institution?

MR. LORD: I believe so, Your Honor.

Q Is there any hearing in that process at all?

MR. LORD: Yes, there's a hearing as to whether or not he should be permanently sent there. It's just as in the nature of the hearing in this case.

Q Is it an administrative or a judicial hearing?

MR. LORD: Judicial, Your Honor.

But the point is, at the hearing stage, and this is the point that I think the State presses, is before there is any permanent commitment to Patuxent Institution there is a hearing in court at which the petitioner has a right to summons witnesses, he has the availability of the file from Patuxent, he has a right to counsel, he has a right to jury trial, he has a right to cross-examine; and it is only then, after the court or the jury, at his selection, has made a determination that he is in fact a defective delinquent, with those due process protections, that he is then sent and committed to Patuxent Institution.

Which is the point that I think was overlooked in the statements made by Mr. Feissner.

Now --

Q Even the first referral cannot take place, Colonel Lord, can it, until after conviction and sentence?

MR. LORD: That's correct.

Q And must it be a prison sentence? It has to be --

MR. LORD: Yes.

Q -- found punishable by imprisonment in the penitentiary, but what if the sentence is not a prison sentence, what if it is a suspended sentence?

MR. LORD: Yes, he must be serving an actual sentence.

Q Must be sentenced if he's to serve a- actual sentence, then?

MR. LORD: Yes, correct.

Q Well, the Fourth Circuit made the comments that it has to be an active prison sentence.

MR. LORD: That's right.

And I think when reading a definition of defective delinquent, the Court should also read along with it the threshold crimes which can trigger a certification to Patuxent or an order transferring to Patuxent. And that's again why I believe that the statement that a simple, undifferentiated anti-social behavior can somehow end you up in Patuxent; that's simply not true. There must be a conviction of a certain category of crime, a sentence. And then a court order. And then subsequent proceedings.

Now, Patuxent --

Q In this respect, would you say that there are more or less safeguards than were decided by the Minnesota statute that the Court was concerned with?

MR. LORD: Your Honor, I firmly believe there are more safeguards, and that has been the finding of the Court of Appeals of Maryland, its highest court, and a finding on two occasions in the Fourth Circuit, unanimously.

Now, the point that I'll be coming to shortly is other aspects, not just the hearing on defective delinquents. That's only part of the arguments that are being raised by petitioners. There are also arguments similar to the questions that have been forthcoming from Mr. Justice Marshall, about the nature of the examination at Patuxent Institution.

Now, I would like to quickly give the Court a thumbnail sketch of the background of the institution. The statute, incidentally, was drafted in 1950 and '51 by the professor of constitutional law at the University of Maryland Law School, and, as the Fourth Circuit has indicated, in strict conformity with the Minnesota ex rel. Pearson case.

This is a statement from a group of six psychiatrists who worked with this statute in the preparation stage in the late 1940's. And I think it's essential to understand what Maryland is trying to do at Patuxent to get a grasp of what these psychiatrists are concerned with.

This was in Research Report 29, which is in the record

in this case, dated 1950.

The problem is more important and more difficult with those criminals who have deficient emotional balance and control, or the so-called psychopath. These are not merely the habitual offenders but the offenders who, on the basis of their serious little distorted emotional makeup persist in carrying out serious deprivations against society. Examination and observation by competent and experienced psychiatrists, together with recently devised projective psychological tests, is able to separate these offenders from the rest of the criminal group.

However, recommendation in nearly every instance would have to be based, in part at least, on antecedent behavior.

And then it goes on to say:

When Maryland has an institution of the proposed type, many of the most serious crimes can be prevented. Had Eugene James been observed in such a diagnostic clinic ten years before the murder of Marcia Brill, when he was found guilty of two unmotivated stabbings of white women on the streets of Baltimore, that little girl would still be alive. Herman Duker would never have had an opportunity to callously murder his milkman; Dowfy Sallinger, who was recently tried in our criminal courts for a series of armed robberies, would not have been at large in the community had we had such a facility in 1947.

Q As of what date are they speaking? 1950?

MR. LORD: 1950.

Q That's what I thought.

MR. LORD: And then they --

Q That's when it was built, wasn't it?

MR.LORD: Right. In '55 it opened, Your Honor.

And in closing, they say in many ways the Maryland plan for handling this complicated problem is the best that has yet been projected. If put into effect, it will bring the State into the forefront of penological advance, with the possibility of calling on Johns Hopkins University and the University of Maryland for cooperation, there is a real opportunity for scientific knowledge to be advanced in a field comparable to the scourge of cancer, so far as its effect upon the welfare of society is concerned.

Now, one of the signers of that report was Dr. Manfrey Gutenmacher,who many of you may have heard of, who's one --

Q I know Dr. Gutenmacher very well, but, since you've given me that report, can I read some of the recent stuff I'm reading about Patuxent?

MR. LORD: Yes, indeed. Yes, indeed. I was just trying to show, Your Honor, the origin and theory of Patuxent when it began.

Q I'm not -- my only problem with it is

constitutional.

MR. LORD: Right.

Q The next point is, is it true that he can be held there longer than his original sentence?

MR. LORD: That is true. It's an indeterminate sentence, Your Honor. And let me point out --

Q Is that after -- after the judicial --

MR. LORD: Yes.

Q -- hearing following the report?

MR. LORD: Yes. After the finding of defective delinquency, he is sentenced to an indeterminate sentence, and, once again, this is something that the enormous record in this case will bear out, I think, as being --

Q And which is not appealable except by consent?

MR. LORD: That's right. It's appealable by request for leave to appeal to the appellate court.

Q So it's not appealable as a matter of right.

MR. LORD: Now, you may be interested in knowing that the mean sentence of people sent to Patuxent is ten years, and the mean time served before parole at Patuxent is five years. So, from the way the statute is administered, certainly if you have a short sentence, it's unlikely that you will then spend much longer than your sentence --

Q Well, wouldn't you agree that if a man is sentenced unconstitutionally for one day, that's bad?

MR. LORD: I agree, Your Honor.

Q Well, I just --

MR. LORD: But bear in mind that --

Q Well, what is the standard of proof: preponderance, isn't it?

MR. LORD: That's correct. At the hearing on whether or not he's a defective delinquent, the standard if preponderance of the evidence. And the findings of this Court, the courts below, it's a joint record from the Court of Appeals and the Fourth Circuit Court of Appeals, overwhelmingly support the fact that this proceeding is civil in nature and is subsequent and completely unrelated to a criminal conviction and sentence.

Now, some of Your Honors may take the position that well, labels are not that important. That's what the Winship case said, and we agree entirely. In fact, the Fourth Circuit made the statement that labels are not particularly helpful, and it's a futile tool exercised in semantics to argue criminal versus civil.

The point is that the Court of Appeals of Maryland and the Fourth Circuit have both held that this is civil in nature. Now, certainly there are safeguards that have to be provided in the law. And the point that the State urged today is that these safeguards do exist sufficiently to protect the interest of the petitioners here, and also the interests

of the State of Maryland in rehabilitating these --

Q Including the fact that he has full pretrial depositions, et cetera, which he doesn't have in criminal?

MR. LORD: Well, that's right. That is -- that, in fact, of course, is the reverse side of the coin. That is an additional right in the civil right that does not exist in the criminal area. And this is provided for, if Your Honor will consider the statute. These discovery rights in the defective delinquent statute are provided for explicitly, the right to interrogatories and depositions, the full right to access to the file and summons witnesses and cross-examine witnesses.

While I'm on this point of civil versus criminal, I would like to allude to a statement that was made in the concurring opinion by Mr. Justice Harlan in the Winship case, because it really is this point, I think, that many of these questions that are before the Court today can be decided upon.

Mr. Justice Harlan said, there is no automatic congruents between procedural requirements imposed by due process in criminal cases and those imposed by due process in juvenile cases. It is of great importance, in my view, that procedural strictures not be constitutionally imposed that jeopardize the essential elements of the State's purpose in creating juvenile courts.

Now, if you substitute for juvenile courts in that

statement this whole business of the treatment of defective delinquents, recognizable, identifiable group of people in society, that is the State's position in essence.

You can call it civil or you can call it criminal. But you must recognize that the State has a legitimate interest in carrying out its programs, as Mr. Justice Harlan recognized in his concurrence, and that there may be certain constitutional rights, and Mr. Justice Marshall has alluded to one or two of them, that simply, from a standpoint of medical treatment, cannot be imposed on the State of Maryland in an institution of this type.

This is an institution which treats patients that are committed there, the population of the whole prison system of Maryland is over 5,000 people, and there are less than 500 at Patuxent. It's a small, single-cell institution, where people are sent for psychiatric examination.

I think the Fourth Circuit made the point more cogently than I can do it in my own language, when it said that: it is difficult to imagine anything more stultifying to a psychiatrist, as dependent as he is upon the cooperation of his patient, than the produce of a lawyer objecting to the psychiatrist questioning, and advising his client not to answer this question and that.

The injection of broad legal restraints into the diagnostic and treatment procedures that would deny Patuxent

substantial prospect for improvement over our earlier practices might well restrain most other experimentation looking toward conversion of our correctional institutions and to effective rehabilitating agencies.

I would urge that this Court take exactly the same position. One of the courts in the D. C. Circuit, in a case called Thornton several years ago, indicated that perhaps there should be a right to counsel at the psychiatric examination stage. As far as I know, no other circuit has adopted that, and there was a vigorous dissent in that case.

Here we have a case on a full record, where the Court of Appeals of Maryland and the Fourth Circuit, including all of its members, and the separate opinion of Senior Judge Sobeloff, came to the conclusion that it would be unduly disruptive and that there was no constitutional right to counsel at a psychiatric examination.

Now, a point that I want to make here, because statistics of this sort have only recently been available, since Patuxent has only been open since 1955, is that this concept that was quoted earlier from the research report as to what Patuxent was trying to do with this category of people actually works, and the statistics have demonstrated it, and I address Your Honors to the Appendix of Appellees brief and the article from the American Journal of Psychiatry of September 1971, which is reprinted therein. Dr. -- yes,

page 126, I believe, of the blue brief.

Dr. Emory Hodges, a psychiatrist from Washington, on his own, conducted an evaluation because a proposed statute of this type had been discussed in the Commonwealth of Virginia, and he evaluated the Patuxent experience, based on its first 11 years.

He found that the national rate of recividism for people convicted of crime had been that they would commit their next offense within three years from the time of their released, and that 65 to 70 percent of people so released would commit their next crime within three years.

The record at Patuxent is that those released on parole from Patuxent by the institutional board of review was exactly half, 37 percent rate of recividism; half of the national average.

Q How many peopl, what are the numbers involved?

MR. LORD: There they are in the report, Your Honor, there are hundreds of people, and it's a large enough sample to be representative, yes.

Q And over a period of how many years?

MR. LORD: This is the first eleven years of Patuxent's experience. And bear in mind, he was using a leadtime of three years to see what happened. So he stopped his statistics in 1966 and wrote his report in '70 and delivered his paper in 1971.

This paper had not been released at the time of the Fourth Circuit's opinion, nonetheless upholding this statute; but I'm sure would have been of interest to that court.

Now, there's another statistic in the Hodges' report that I think is terribly important, and that is this: of the untreated group, namely those where there had been a recommendation that they be committed to Patuxent by a court or a jury under the civil rights which each petitioner has, found to the contrary and did not send that particular person to Patuxent, there was an 81 percent rate of recividism. So that is more than double, and it is over the national average by 11 per cent.

MR. CHIEF JUSTICE BURGER: We'll continue in the morning at that point.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, March 29, 1972.]

IN THE SUPREME COURT OF THE UNITED STATES

ALBERT DELANOR MUREL, et al.,

Petitioners,

v. No. 70-5276

BALTIMORE CITY CRIMINAL COURT, et al.,

Respondents.

Washington, D. C.

Wednesday, March 29, 1972

The above-entitled matter came on for argument at 10:09 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HENRY R. LORD, ESQ., Deputy Attorney General of Maryland, Baltimore, Maryland, for Respondents.

ANDREW E. GREENWALD, ESQ., Ryattsville, Maryland, for Petitioners.

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 will resume arguments in Murel against the Baltimore City Court. Mr. Lord, you have eight minutes remaining I presume you're saving for rebuttal; and there are eight minutes remaining for Mr. Greenwald for rebuttal. You have minutes of your argument in chief left, Mr. Lord, excuse me.

You may proceed.

ORAL ARGUMENT OF HENRY R. LORD, ESQ., ON BEHALF OF THE RESPONDENTS (RESUMING)

MR. LORD: Thank you.

Q Mr. Lord, I'm still a little bit confused about the status of the particular petitioners before this Court. As I understand it, at least from your brief, Murel has been released, has he not?

MR. LORD: That's correct. That's an outright release, incidentally, on a redetermination hearing.

Q And Hays was sentenced to eight years in prison in 1965. He has been referred to Patuxent but there has been no adjudication.

MR. LORD: That's correct.

Q Creswell, there has been an order committing him to Patuxent.

MR. LORD: Correct.

Q And Avey, there was an order committing him

to Patuxent.

MR. LORD: Yes, as I recall it in Avey's and Creswell's case there has been judicial determination of defective delinquency. In the case of Hays, I don't believe there has. At least--

Q The prison term would not have expired.

MR. LORD: Has not expired as of yet. Does that answer your question?

Q Yes, it does.

Q Could I ask you, is it only people who have been convicted of a crime of the specified nature that may be committed as defective delinquents?

MR. LORD: That's correct. That's spelled out in the statutes, sir.

Q On what grounds may people normally be civilly committed?

MR. LORD: There is a civil commitment procedure in Article 59 of the Maryland Code which is on the certificate of two doctors that--

Q The procedures there available give no more protections than the procedures here, I take it?

MR. LORD: Considerably less.

Q How about the grounds for commitment?

MR. LORD: In civil commitment the provision is only that two doctors are satisfied that the person in

question has a mental disorder and that treatment is necessary to cure this disorder.

Q Mental disorder and treatment is necessary, and it's an indeterminate commitment?

MR. LORD: That's correct. And there is no hearing at the time of commitment.

Q No necessity to find dangerousness.

MR. LORD: No.

Q And how often does he get review? Is this habeas corpus or what?

MR. LORD: I would doubt that he would have a right to habeas corpus in view of the fact that it's purely civil in nature. But he can of course--

Q Apply?

MR. LORD: --apply for review.

Q He can get into court anyway.

MR. LORD: Yes.

Q Mr. Lord, is it still true that they need one of the doctors (inaudible)?

MR. LORD: That's true. I might say that statute is being reconsidered and worked on by commission now, and I would hope that perhaps even at this session of the General Assembly that a considerable number of due process protections will be added to that civil commitment statute.

Q As I understand the old Maryland law, two

obstetricians could put you in.

MR. LORD: Almost two veterinarians unfortunately.

Q The other thing, does Patuxent take civil commitment?

MR. LORD: No, absolutely not.

Q Civil commitment would be one of the civil institutions.

MR. LORD: When you say civil, you mean purely civil?

Q Yes.

MR. LORD: No, it only takes commitments arising after a criminal conviction. At the adjournment yesterday--

Q What about a prisoner who is already in jail and he develops some mental disorders and needs treatment. Does he go to Patuxent?

MR. LORD: He may be referred to Patuxent on a judge's order.

Q But that's only, I gather, if he has been convicted of one of these--

MR. LORD: Absolutely.

Q --categories.

MR. LORD: Correct. And then there may be a recommendation from the correction department to the court that he be transferred. The court will then decide whether he should be transferred.

Q Would you say that is more protection or less protection than the federal statute is in transfers from an ordinary penal institution to Springfield or Saint Elizabeth?

MR. LORD: It's more protection. The hearing under the federal statute--and, incidentally, two questions were raised by Mr. Justice Blackmun and by yourself on this point--the statute is 18 U.S.C., Section 4241, and that provides for no hearing at the time of transfer. The only time the hearing arises is at the time of the expiration of the sentence to determine whether he can be held past his sentence. There is then a provision in the federal statute for a court trial.

At the adjournment yesterday I made the point that statistics analyzed demonstrate the system at Patuxent works, that there is an identifiable group that can be recognized by medical examination. One of the reasons for this is the size of the staff at Patuxent. They're budgeted for ten psychiatrists and 11 psychologists and a total professional staff of nearly 75 people, including social workers, medical doctors, vocational, educational instructors, and this is, bear in mind, for a population of patients there of only 492. And so the ratio is very high. At Patuxent annually the State of Maryland spends almost exactly twice as much per patient at Patuxent as it spends per inmate at the rest of the penitentiary system or prison system, the figures

being $7994 per patient at Patuxent and $4043 for the general inmate population of the prisons.

Now, a question I think in the back of the minds of some of the Members of the Court was that this may be almost automatic process for the determination. It's absolutely not the case. The figures in the record will indicate that only 66 percent of those people sent to Patuxent for evaluation are determined by the staff at Patuxent to be defective delinquent; and then when that 66 percent returns to court in a court trial, the statistics indicate that 87 percent are found to be defective delinquents and in a jury trial 80 percent. So, you have an effective rate of about 50 percent of the people who are actually referred for determination actually being committed to Patuxent. The other 50 percent would be returned to the normal prison population and would be found not to be qualified.

Q Do you know the statistics as to the number who remain at Patuxent after completion of these procedures beyond the expiration of their prison terms?

MR. LORD: No, I don't have any. There is a case, as I'm sure you know, that is set down for argument in about a month that will deal with that question.

Q Is that that two-judge--

MR. LORD: No, it's not. That case is still at the

trial level and it's going up through the state appeal process. This is a case called McNeill.

Q Oh, that's here.

MR. LORD: Which is coming here. All I can say is that I agree with Mr. Fleissner that there are such people. But then again under the federal statute there certainly are such people also.

Q Do you suppose that, even though it's not perhaps here, the burden of proof, the standard of preponderance as opposed to beyond a reasonable doubt, becomes relevant in those cases?

MR. LORD: I suppose it's relevant in this case. It's certainly an issue in this case. The state takes the position that your opinion in the Windship case does not necessarily follow that it should be extended to a proceeding of this type.

Q Incidentally, is this the point on which Judge Sobeloff dissented?

MR. LORD: Judge Sobeloff dissented in part, and I think he--no, he did not on this point. He agreed that the preponderance test was correct because it was basically a fact-finding process, the state of a man's mind; it's almost impossible to prove beyond a reasonable doubt. If I could just finish with one quote. The Hodge's Report ends with this statement: "If the statute is again upheld, and since

the effectiveness of the law has now been demonstrated, I predict that most states will enact a similar statute within the next five to eight years. I further predict that 20 years hence psychiatric historians will regard this statute as one of the major accomplishments in the middle third of the 20th century."

Q Mr. Lord, do you think that any of these or a major part of these so-called defective delinquents could be committed civilly as having a mental defect?

MR. LORD: I would say that virtually all of them could, because the test is much more flexible for civil commitment.

Q Mental disorder.

MR. LORD: That's right.

Q To be a mental defective under this statute, one need only have a limited intellectual capacity and not have a mental disorder at all.

MR. LORD: He has to demonstrate a persistent and aggravated anti-social or criminal behavior.

Q But he need not be disturbed. He can be of only limited intelligence.

MR. LORD: Yes.

Q He has to be a danger though, doesn't he?

MR. LORD: Yes, he does.

Q There has to be a finding that he's dangerous.

MR. LORD: Yes. And, of course, the criminal convictions are the prerequisite threshold points.

Q That's not true in the civil commitment,is it? There is no finding of dangerousness.

MR. LORD: I am not absolutely positive, but as I recall it, there is only a requirement that there be found to be a mental disorder and that the treatment is necessary for that disorder. My recollection is in Article 59 there is no requirement of dangerousness.

Q Are there any Maryland cases which indicate that in civil commitment proceedings proof like is used against these so-called mental defective delinquents would be adequate to prove a mental disorder?

MR. LORD: No, I do not, but there is not a hearing procedure under the civil commitment. So, it's unlikely there would be such a case.

Q As I recall Judge Sobeloff's very narrow dissent, he took the position that an adversary proceeding was not what he was advocating.

MR. LORD: Absolutely not. The point he went off on was part of a self-incrimination point. He felt that possibly under some circumstances there could be self-incrimination, as I recall.

Q He was somewhat concerned about the hearsay aspects of reliance by the psychiatrist and other experts

on what was told them by the patient and by staff reports.

MR. LORD: Of course, the state's answer to that is that record is fully available to petitioner and his counsel way in advance of hearing. If he sees things in there that he would like to rebut, he has the full right to subpoena any witness into court. So, there need not be hearsay if the petitioner would like to bring that person into court.

Q In the trial of the criminal case determining guilt or innocence, when there is a claim of absence of criminal responsibility, hearsay of that kind is admissible as it comes through the psychiatrist, is it not?

MR. LORD: I believe so, yes, it is.

Q It is not admissible to prove the truth of the statement, that to prove this is the information on which the psychiatrist relied.

MR. LORD: In order to determine the state of the mind of the defendant.

MR. CHIEF JUSTICE BURGER: Very well.

MR. LORD: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Greenwald. You have eight minutes, Mr. Greenwald.

ORAL ARGUMENT OF ANDREW E. GREENWALD, ESQ.,

IN REBUTTAL

MR. GREENWALD: Mr. Chief Justice, and may it

please the Court:

There are three factors that I would like to very briefly mention to the Court. In a case called Anderson v. Solomon which was reported at 315 Federal Supplement 1192, a three-judge panel of the District Court declared that as written the Maryland Civil Commitment statute was unconstitutional. That is why it is being revised at the present time.

Point No. 2, Judge Sobeloff in the Fourth Circuit was very much bothered by the question of reasonable doubt and preponderance of the evidence. And he stated in his concurring and dissenting opinion, "I cannot agree that the Constitution tolerates an indeterminate confinement at Patuxent on no higher level of proof than applied in the civil proceeding for money damages," and that's critical and was critical to Judge Sobeloff in his dissenting and concurring opinion.

What we are trying to say in this case, what we are trying to say and bring to the attention of this Court is not that the Patuxent institution as formulated in the period of penal reform is bad because it's not. No one is arguing and disputing the question that we need to do something about our prisons and we need to do something about rehabilitation. We all agree with that. What we are saying is that in this statute, as forward and in the future

as it may be, it has problems and those problems can't be ignored in a run to try to correct the system. We must look at the flaws and we must say, "These things can be corrected." We can't sacrifice a great experiment and sacrifice human lives as well. That's not the real question. And that's why we have raised these points, and we consider them to be critical, number one.

The statute, is it civil or criminal? A man may be the subject of involuntary confinement indeterminately. Does he have a right when he faces that prospect? We believe most definitely he does. A case that we have reviewed recently that is not in our brief which we would like to call to the Court's attention is Harry Furd v. Parker, reported at 396 Fed. 2nd, at page 393. The Court in that case said it much better than I am able to say it, and I am quoting: "It matters not whether the proceedings are labeled civil or criminal or the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarcerstion, whether for punishment, rehabilitation or for treatment, that's what's important"--

Q What circuit is that?

MR. GREENWALD: The Tenth Circuit.

What we are saying is, we agree that there is a group of criminals or those who have engaged in criminal activity who need certain forms of treatment, and we are

saying that it is a good idea and it is a forward idea to give treatment to these people, but we are saying that when you take a man out of Group A from the criminal population and you put him in Group B, you've got to have a rational basis for doing it. There has got to be a reason for segregating him and treating him different, and that reason could be treated, and that reason is a good reason if in fact there was treatment. The Attorney General tells you that practically speaking--

Q Is there anything in this record that shows that Patuxent is worse than the state penitentiary?

MR. GREENWALD: Yes, sir, there is the testimony of Commissioner Papusek, which is found in the Maryland Court of Appeals, Volume No. 1, at page 520, where he states that only one out of every four come back to the penitentiary. The records from the Hodge Report of which--

Q That wasn't my question. My question was: Are the facilities at Patuxent worse than the facilities at the penitentiary?

MR. GREENWALD: No, sir. The facilities themselves are not worse.

Q What is your complaint?

MR. GREENWALD: The problem, sir, is--

Q The case I'm talking about is where a man is in for 20 years.

MR. GREENWALD: Yes, sir.

Q And at the end of his second year, he goes to Patuxent. What's your complaint?

MR. GREENWALD: The complaint is, sir, that he would be eligible for parole in a certain period of time in the 20-year sentence. If he goes to Patuxent because it has been determined that he has a particular mental problem which needs to be corrected, then the problem is that that problem should be seen to. The record indicates, for example, on page--Volume One of the Maryland report at page 533, that inmate Elwood Towers was in Patuxent for nine years and received no treatment. In the same volume at page--

Q How much treatment did he receive at the penitentiary?

MR. GREENWALD: He didn't receive any at the penitentiary, sir, but what we're saying is that if you change the stay from 20 years to indeterminate, there has got to be a reason. He has got to have something different.

Q If a man is in for life, are you still making a complaint?

MR. GREENWALD: He is still eligible for parole.

Q At what stage?

MR. GREENWALD: I believe in Maryland it's after 12-1/2 years.

Q At ten years, does he have a complaint?

MR. GREENWALD: I think he has a complaint any time hope is gone and he is cast aside into this type of a situation for an indeterminate period of time. I think he has a complaint.

Q Again we determine that he should be released.

MR. GREENWALD: But he has nothing, sir, at this point--he has nothing to strive for, in a sense. The state has pointed out to the Hodge Report which on its face appears to be somewhat significant. However, in answering this question, Mr. Justice Marshall, I would like to call the Court's attention to Appendix 1A of the reply brief.

Q I haven't relied on that report. I am just trying to get a simple answer to my question.

MR. GREENWALD: Yes, sir.

Q The man is in the penitentiary for 40 years, and at the end of two years he is transferred to Patuxent. At that stage, what is your complaint?

MR. GREENWALD: My complaint is that he has now had a sentence which was fixed and is now indeterminate, and he is getting nothing different from in the penitentiary, from when he was in the penitentiary, now that he's at Patuxent.

Q What's his complaint?

MR. GREENWALD: His complaint is that in the

penitentiary--

Q His complaint is that he might be kept there more than 40 years.

MR. GREENWALD: Yes, sir, that's right.

Q I asked you, What is his complaint in the second year?

MR. GREENWALD: I'm sorry, I didn't hear that.

Q What is his complaint in the second year?

MR. GREENWALD: That he may be kept there for a longer period.

Q Oh, that he may be kept there for a longer period, that's your complaint.

MR. GREENWALD: Yes, sir.

Q Mr. Greenwald, you said that he had no hope or any other remedy. What about Section 10 which allows him to have a rehearing, a redetermination at the end of two years?

MR. GREENWALD: There have been cases, and I don't have them right at my command at this moment, that are in our brief, where at the redetermination hearing the evidence that was necessary for the state to prevail is the same that was at his original hearing. What we're saying is that the man who doesn't even examine this petitioner or this suspected defective delinquent reads to the court the staff report. The state rests in many cases. And the burden then shifts to

the defendant to cross-examine what? To present what? To question who? Those are part of the problems that we--

Q He can draw in everybody, can't he?. Call in all the records, he can call in the psychiatrists and cross-examine them.

MR. GREENWALD: As a technical matter, he possibly could subpoena everyone from the institution; as a practical matter it doesn't usually work that way.

Q The statute permits it. How do you suggest that it can't be done?

MR. GREENWALD: The statute permits it, sir, but in many cases it doesn't work out that way due to the shortages of staff at Patuxent, due to the administrative conflict. May I in closing--

Q The statute provides that he has access to process to subpoena witnesses.

MR. GREENWALD: Yes, sir, but he has no help and no counsel and no right until the determination is made that he is a defective delinquent by the staff at Patuxent. And it's at that point when the hearing is set that all his rights come into play that we have been discussing. That is not, we contend, the proper time for this man to be aware.

May I conclude--

Q Do you think it's likely that if the facts exist to justify a commitment to Patuxent as provided in the

statute that the parole board would parole the man?

MR. GREENWALD: No, sir. I am not contending that a dangerous man in any respect should be free. I am only saying that this is a different situation.

May I close with one sentence from the reply brief, sir? In the report that refutes the Hodge Report that the state has mentioned, Dr. Stone of the American Psychiatric Association and Professor at Harvard University had this to say--

Q Appendix A of the reply brief?

MR. GREENWALD: Appendix A, sir, on page 3A I'm reading.

Q I was going to ask you, this is Dr. Stone?

MR. GREENWALD: Dr. Stone.

Q This was published somewhere, is an excerpt from a publication?

MR. GREENWALD: Yes, sir.

He said, "Until we can demonstrate that treatment for defective delinquents in fact exists and that the capacity to predict dangerousness exists as well, we cannot encourage government to create more Patuxents."

Q The doctor there is expressing a belief on a broad social and legal issue. He is not expressing a psychiatric opinion, is he?

MR. GREENWALD: It is, sir, because he also went

over the statistics or purported statistics used by Dr. Haas (?).

Yesterday questions were asked regarding the federal statute. If the Court desires, Mr. Feissner has those answers, if the Court pleases. Thank you.

MR. CHIEF JUSTICE BURGER: If you have any comment on those items, you may submit them in a memorandum and send them to Mr. Lord.

Thank you, gentlemen, the case is submitted.

[Whereupon, at 10:29 o'clock a.m. the case was submitted.]

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