ORIGINAL

In the

Supreme Court of the United States

EDWARD LEE McNEIL,

Petitioner,

vs.

DIRECTOR, PATUXENT INSTITUTION,

Respondent.

No. 71-5144

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Washington, D.C.

Thursday, April 20, 1972

The above-entitled matter came on for argument at 11:42 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:

E. BARRETT PRETTYMAN, JR., ESQ. 815 Connecticut Avenue, Washington, D. C. 20006
Attorney for the Petitioner appointed by the Supreme Court

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

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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 hear arguments next in No. 71-5144, McNeil against Patuxent.

Mr. Prettyman, we are going to let you gentlemen finish your case now before we take lunch. You may go right through.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR.

ATTORNEY FOR PETITIONER

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

I am Barry Prettyman, and I represent the Petitioner, Edward McNeil in this case, which is here on certiori to the Maryland Court of Special Appeals.

Mr. McNeil is an inmate at Patuxent Institution. He has been there almost six years. His minimum sentence for the crime of which he was convicted expired over four years ago. His maximum sentence for this crime expired almost a year ago. And yet he has never has a hearing on his incarceration at Patuxent. He has never been declared a defective delinquent.

Mr. McNeil was 19 when he was convicted in Baltimore of an assault on a police officer and of an assault with intent to rape.

At his trial, there was no plea, no evidence of insanity. The issue was never raised in any way. He had had no prior conviction and at the time of his offense, he was

employed. He was living with his parents, contributing to their means.

At the conclusion of the trial, after his conviction, the Court said as follows:

"While the Court records do not reflect a conviction on any previous charge, I feel from what I know about this young man that a psychiatric report is indicated. The matter will be held sub curia and referred to the medical department," that would be the medical department of the Baltimore Bench, "for a psychiatric evaluation."

Q Do we have any way of knowing, Mr. Prettyman, whether some of that information the judge was acting on came out of the so-called "probation report," the pre-sentence report?

A We do not know. I would guess that the probation report was not available at that time, but rather was available at the subsequent sentencing, which occurred later. But there is no way of knowing. There was an off-the-record conference at the bench after the conclusion of the trial and before the judge made that announcement. We have no idea what occurred then or what information he received. He did say, however, that there was no prior conviction.

Q Would it be reasonable to assume that, had he cooperated with the psychiatric people at Patuxent, that this determination could have been made in the ordinary course?

A You mean, after he reached Patuxent?

Q Right.

A And that if he had cooperated they could have discovered whether he was a defective delinquent? I think that they could have discovered, either way, that he was or was not. I think they could have discovered that six years ago without his talking to them -- probably. Possibly. We don't know.

Q Mr. Prettyman, didn't they examine him in Baltimore?

A Yes, I was about to say, six days later, there was a report submitted -- a medical report. It is a rather strange, self-contradictory report. It found no evidence of psychosis, distortion, hallucinations, illusions, but it said that he seemed to have a limited tolerance for stress. That seemed to be based on the fact that he flatly and vehemently denied ever having committed any crimes or conducted any anti-social conduct.

Q Was that Dr. Guttmacher still there?

A Unfortunately, sir, the report itself is not in the record. It was a Dr. Sheehan, but it was from the Baltimore Bench's Office. It was Dr. Sheehan who conducted the actual investigation.

He said that there was a possibility of a personality pattern disturbance, schizoid-type and he recommended

evaluation at Patuxent as a result. There was never a hearing -- I want to emphasize this -- there was never a hearing on that report or on the referral itself. Instead, at the sentencing, 10 days later, Mr. McNeil was sentenced to five years in prisonment on one count, one year imprisonment on the other, the two to run concurrently, and then he was referred to Patuxent for evaluation and, if necessary, for treatment.

Q By the sentencing judge?

A Yes, sir, by the sentencing judge. It was all done in the same paragraph. There was no mention of this report. There were no witnesses, no examination, no findings, the doctor didn't appear in court so far as we can tell. The record doesn't even reflect whether the report was shown to McNeil or not, or his attorney. We don't know that. The Court simply signed a form order deciding that there was reasonable cause to believe that Mr. McNeil may be a defective delinquent, and he was sent to Patuxent.

Now, at Patuxent, as you know from the Murel argument a week or so ago, when you arrive, you are placed on a receiving tier and as the Court also knows, this is a very vital, important part of the structure at Patuxent. The tier system is a way of advancing out of Patuxent. You go from one tier to the next, depending to the extent to which you cooperate and you progress and you show that you are no longer a threat to society and so forth and after you get beyond the

fourth tier, you move out. The difficulty is that there is no way of getting out of the receiving tier until there is a report on you and in this case they have never issued a report on him. The people on the receiving tier cannot advance. They cannot receive therapy. In effect, they are in limbo with little but limited exercise and television while they are there.

Mr. McNeil has been on the receiving tier for almost six years. During this period, on at least 15 different occasions -- the state says 18 but I think it is irrelevant -- he has refused to submit to interrogation by the staff. Patuxent apparently thinks that this is essential to its evaluation. He has refused to submit on Fifth Amendment grounds and so he has remained there.

Q Mr. Prettyman, I am surprised that you would press the point that psychiatric examination of any useful dimensions can be made if the subject, the patient, refuses to answer any questions. In the McKenzie case cited in our brief, your Honor, this same position was taken in regard to Mr. McKenzie -- he will not talk and therefore we cannot make a report. The Court said uh-uh, he has been there beyond his sentence, you make a report. They made a report and said he was a defective delinquent. The report was made without any communication with Mr. McKenzie.

Now, his hearing is still pending, at least it was the last I heard.

Q That is, his court hearing, Mr. Prettyman?

A The hearing at which -- yes, the court hearing which would proceed from that.

Q After he goes back for jury trial?

A That is correct.

Q Your answer goes to the judicial response to this problem, and not to the medical one that I am striving at. I had never thought anyone would seriously contend that you could make an adequate psychiatric examination, in every phase, of a patient who will not answer any questions. Now, I am not talking about a catatonic patient or some patient who needs no very sophisticated diagnosis.

A My answer is two-fold, Mr. Chief Justice. In the first place, this is not a completely normal psychiatric examination in the sense of someone being committed to an insane asylum because the standards are different under this particular statute.

Secondly, the testimony in the Murel case is clear that, while it is extremely difficult to find out whether someone is a defective delinquent without talking to him, and while, in many cases, you may not be able to do it, the testimony is also clear that it can be done in some circumstances.

Q In some cases.

A In some cases, yes. I do not for a moment claim that it can necessarily be done with him. I don't know. It

may be that they cannot make a finding that he is a defective delinquent.

Q Well, that clears the air --

A Without his cooperation.

Q -- for me.

A That is correct.

Now, our arguments, althoughwe list at least five different constitutional provisions, come down really to two points. First, no matter what his reasons for refusing to cooperate; no matter how quixotic they may be; no matter if there is no reason at all, the state cannot keep him confined indefinitely without a hearing, and particularly past the end of his criminal sentence. I don't care what his reasons are. If he doesn't like the color of the hair of the psychiatrist, he is entitled to go back to the court and have that issue determined as to whether they are entitled to keep him there. He has never has a hearing.

Q Well, I thought your position now was, now that the time of his sentence has elapsed, that he is entitled to his release, period.

A There is no question about it, but we claim that --

Q Not that he has, not to go back to the court, at this stage.

A Well, you are quite right. I am asking this Court to release him, now that his sentence is over, but I am

really addressing myself to the basic question of what happens when somebody gets there even during the first six months, and he refuses to cooperate. Can you keep him indefinitely there, which is what the state claims to be able to do, without any hearing? Or must they go back to the court to get some kind of determination of his and their rights are?

Q Well, what would the determination be, Mr. Prettyman? That, well, he will not -- I shouldn't say "avail himself of," but if he won't submit to the procedures at Patuxent, then if that is the finding, then send him to serve out his sentence at the State Prison?

A Yes. If they cannot find that he is a defective delinquent, then he goes back to prison under the normal course and he serves out his sentence and then he is free. Now --

Q What is the term? How long would you think they can keep him at Patuxent?

A I would think the system set up by the statute is a good one, which was not followed here, namely, they keep him for six months and then they are supposed to report back to the court. Now, at the end of six months, they have had six months to observe him, to gather all of this information that they say they get -- all of his past records. They are supposed to have talked to his friends and family and so forth. They are supposed to have this mass of evidence in his file. Then they go back to the court at the end of six months and

report. It may be that they can say, without talking to him, we can find he is or is not a defective delinquent, based upon six months of observation and his records.

Q Well, suppose I say we simply can't determine one way or the other?

A Then the court --

Q I am just wondering, what are the options open to the Court? The Court can't do any better, certainly.

A Well, your Honor, I am not sure about that, for this reason, that it is not Patuxent, after all, that makes the determination. It is the Court that makes the determination on the basis of the record and the recommendation.

Q Then let me add to my -- suppose, then, the Court said, "Well, I'm helpless, too," the judge said, "I don't know what we can do about it." Then, what disposition?

A Then he goes back to prison, because --

Q Well, is the option open for the judge to say, "well, I can't now, but I won't send him to prison, I'll let him serve out his sentence in Patuxent."

A Well, you Honor, I certainly don't think that he ought to be serving our his sentence in Patuxent if they cannot make a determination that he is, in fact, a defective delinquent. They are --

Q Well, that may be from the state's standpoint, but is your client prejudiced at all by serving his term out

at Patuxent?

A Oh, absolutely. If he were at where he had been sentenced, he would have been receiving therapy for six years. It is one of the ironies of this situation that he can't get therapy at Patuxent, where they are supposed to give it, and he could have gotten it if he had been sent to Hagerstown.

Q Maybe not, if he had remained quiet there.

A Pardon me?

Q Maybe not, if he had remained quiet there.

Q Oh, no, no, you are assuming they could give him therapy without talking to him.

A He might well talk if he didn't have to answer the kinds of questions that are going to be directed to him by Patuxent. He might well feel that he would participate in a group therapy or even a personal therapy if it wasn't the kind of thing that is designed here.

Now, let's focus on that for a moment.

Q That is really only speculation, though, isn't it?

A Well, I don't think so. If your Honor will look at our brief -- if your Honor will look at page 36 of our brief and look at footnote 43, now this is extracted from the report of the medical office and shows the interrogation that they made preliminarily, merely to find whether he should go to Patuxent. And let's look at some of the questions they were asking him to see why he wasn't answering questions.

"He adamantly and vehemently denies, despite the police reports, that he was involved in the offense. Further questioning revealed that he had stoled some shoes, but he insisted he didn't know they were stolen. In the tenth grade he got caught taking some milk and cookies."

Down a little further, "He was adamant in insisting on this version of the offense, despite the police report, which was in the brief and which I had available and discussed with him," and so forth.

Now, why were these questions asked, and why would similar questions be asked at Patuxent? The reason is, that in order for him to be declared a defective delinquent, they have to find that he has engaged in persistent criminal and anti-social conduct. Now, in this case, we only have one conviction. But apparently they had some things in his record that they wanted to question him about.

If they can get from his own lips that, yes, he stole the milk in school and, yes, he stole some shoes, and yes, he did some other things, they can make a finding based on his own admissions that he engaged in persistent criminal conduct.

Q And that shows he is a delinquent and then from then on, the only question is whether or not he is defective. Is that it?

A Well, no, as a matter of fact, your Honor, it goes to the entire definition. In order to be a defective

delinquent, you have to find that he has engaged in this.

Q He may be a very "effective" delinquent.

A That is very well put, your Honor. If your Honor will look at page 6, in footnote 6 --

Q Your brief, again?

A Yes. Footnote 6 on page 6, a "defective delinquent" is defined as "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior evidences a propensity toward criminal activity."

Q And.

A Yes. But then the rest of it is not "or," it is "and." You have to make both findings, you say.

Q That's right. A, that he is a delinquent and B, that he is a defective.

A Well, if it suits your Honor to divide it up, that's fine, but I submit to you that --

Q It seems to me that the statute does. Not that you have to find either, but you have to find both.

A Right. And once you find both, then he is a defective delinquent and then he gets an indeterminate sentence at Patuxent.

Q And if they show delinquency through his own answers --

A If they show persistent, chronic --

Q -- and if they show whther or not he is

intellectually defective, has intellectual deficiency or emotional unbalance.

A Right. Now, that is the reason that they are going to ask these questions and your Honor said that he wouldn't engage in therapy. We don't know that at all, because therapy, after all, would not be trying to prove that he had engaged in persistent criminal behavior, it would be trying to get to the essence of the man to try to help him so that he could -- when he got out of prison he would be a better man.

And it is one of the ironies, as I say, of this situation, he'd have six -- five years of therapy behind him if he'd simply gone to jail.

Q But you are assuming that the therapy would begin on a clean slate without knowing what diagnosis to make, Mr. Prettyman.

A The therapy at Hagerstown would begin, regardless. That is what the Attorney General --

Q Isn't therapy -- doesn't therapy first call for a diagnosis? How do they make a diagnosis without asking him questions about his past?

A I don't know the procedure that is engaged in in prison, but my understanding is that anybody in prison who either wants therapy or who the prison authorities feel would be helped by therapy, is allowed to have therapy. I don't think

they have to make a separate determination that he is, in fact, either a defective delinquent or that he is psychotic or anything else. It is available at prison.

Here, however, in order for him to get therapy, he has first got to be found to be a defective delinquent and get off that receiving tier into the first tier.

Q That goes to your point that after six months, in any event, he had to go back to the prison.

A Correct.

Q Under the Maryland statute, would the Maryland Court judge having that hearing, after the six months in Patuxent, have the power and authority to say, "Well, I think we will try this again so I can sent you back for another 90 days." Or is six months the outside limit?

A Your Honor, I think it would depend a lot upon the circumstances of the individual file. I think, for example, let's say "for example," the institution comes back and it says, "We haven't been able to talk to him, but on the other hand, we've been able to gain some valuable information by watching him. On the other hand, because of scarcity of personnel, we have only been able to watch him for a limited number of months. If we could have two more months to watch him, I think we will be able to come in with a recommendation.

It might well be that that would not be so unreasonable as to be a constitutional violation. I don't think you can

lay down a flat rule.

Q Does it violate the statute to do that?

A No, because if -- so long as they report back within six months. I think if the Court were to make a finding that they were entitled to look at him again, it could well be extended.

Q What if the judge just said, "Here," to this man, "You haven't cooperated. We can't help you until you do. I am going to send you back for another six months."

A Well, in this --

Q Let's say aside the Constitution for a minute. Does the Maryland statute permit that?

A Well, if the judge were to find that he was refusing to cooperate on purely arbitrary grounds, with no grounds at all, and he were so to inform the man so that the man would have a judicial finding that the grounds that he was asserting for refusing to cooperate were invalid, then it might well be that, in effect, they would be giving him a second chance to cooperate and he might, or might not.

But in this case -- in this case -- where the man is refusing to cooperate because of the questions that they are trying to ask him, where it would be violating the Fifth Amendment for him to do this, then I very respectfully submit that the court is not going to order him back to answer because the reason is the same. And I don't see how we can conceivably

get around the Fifth Amendment in this case.

Q Well, the facts of this case don't require you to rest on any exploration of a statutory period of time less than the period of his confinement under the criminal sentence, do they?

A I would be taking the position here, even if his criminal sentence had not expired, that he was entitled to a judicial hearing, when they refused to do anything with him except say that he can be kept indefinitely. But I think this, that once his sentence has been served, whatever excuse there may have been, up until that period, for keeping him, whether they want to look at him some more, or whether they want to give him more chances to talk or whatever, totally disappears, because at that point, he has served his debt to society, the period for them to report and hold a hearing is long since gone.

Let me show you why they don't have a hearing, Mr. Justice. They don't have a hearing because there is nothing they can get out of it. If they hold a hearing and he is said not to be a defective delinquent, he goes free.

If they hold a hearing and he is determined to be a defective delinquent, what does he get? He gets precisely the sentence he has got right now, which is an indefinite confinement. They claim they can keep him for life because he refuses to answer these incriminating questions, so why hold a hearing?

From their standpoint, the only way he can get out of the receiving tier and get a report is by saying, "Yes, I stole the cookies in highschool," and I might say parenthetically, it is rather odd, but in Maryland, there is no statute of limitations at all on any crime for which you can be sentenced to prison. They can go back with a man who is 80 years old and convict him for something he did when he was 25, so it is a very real and serious problem for this man where they are saying, "Didn't you really steal these shoes, and look at what the FBI report says, and we know you weren't convicted of this, but tell us, weren't you really?" and then they go in -- they actually go in to a defective delinquency hearing and testify about --

Q I am familiar that there is no statute of limitations for crimes like murder, but you mean that in Maryland, there is no statute of limitations on any crime?

A On any crime for which you can be sentenced to prison.

Q Mr. Prettyman, I think I understood you to say that you thought the system at Patuxent was essentially a good one, but assume for the moment that Mr. McNeil had cooperated and had gone right down the line with the system, including the final judicial hearing, and had been adjudged to be a defective delinquent, bringing into operation the indeterminent sentence. Would you be here today if you had that case?

A I would be a petitioner in Murel, probably, your Honor.

Q That's a case we had here --

A I would be adopting, probably, many of the objections to the system that Mr. Murel and the other petitioners had. But this, I want to emphasize, is a very, very different case. It was more like Avey, only Mr. Avey died and therefore that issue wasn't before you there, but it is more akin to that case.

Q But your position, as I understand it, is that a sure way to avoid the system at Patuxent is not to cooperate with it and if your term is one year or three years or five years, when that expires, you are out automatically.

A Not necessarily, because, as in the McKenzie case, they may find you to be a defective delinquent anyway, if they have a proper record and can uphold that. Now, I must say, in this case, they say in their brief that they do not have enough evidence to uphold him, to find him to be a defective delinquent. But let me point out to you, what do they say they have got? They don't even show that they talk to his family and friends and schoolmates, as all of the evidence in Murel that they gave that they went at some length about this extraordinary investigation that they conduct in order to get this full folder on somebody. They have had six years to get that kind of a folder on this man, and they don't

even show, in his file, that they have done what they have been so proud of elsewhere, and they say they cannot find him to be a defective delinquent on this record, and I say, all right, you've had your chance for six years, now he is entitled to release.

I did have more points, but, your Honor, I would like to save some time for rebuttal.

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

Q Just before you sit down, even though you won, couldn't it be sort of a Pyrrhic victory? Couldn't he be then civilly committed?

A Oh, he could be civilly committed, possibly, if he qualified.

Q That is to say, if we decided that he is now entitled to his release, then the very next day, couldn't he be civilly committed?

A Well, under the civil commitments, you would have different standards than you do here. I think the man --

Q It is not defective delinquency?

A No, it certainly isn't. He would have to be psychotic, and one of the interesting things is that the referral board here specifically said that they didn't think he was psychotic.

Q Didn't think he was psychotic, right.

A So, I don't think they could.

MR. CHIEF JUSTICE BURGER: Mr. Lord.

ORAL ARGUMENT OF HENRY R. LORD, ESQ.,

FOR THE RESPONDENT

MR. LORD: Thank you, your Honor.

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

The full text of the Statute, Article 31B, is set out in the Murel brief of the state and it has not been reprinted in these briefs, only those excerpts which are directly bearing on the outcome of the disposition of the particular arguments made by the petitioner.

Now, before I get to the question of whether or not there is a privilege against self-incrimination, which I think is a pivotal point in this argument of the petitioner.

I would like to emphasize that the transfer, in July of 1966, or August of 1966 of the petitioner to Patuxent was a valid transfer under any fair reading of the cases of this Court, where the case is of the Circuit Court's appeal.

Now, Mr. McNeil was convicted of committing two crimes, either one of which is a threshold crime under Section 6A of the defective delinquency statute. One, was assault upon a police officer which, under Section 6A, is a crime of violence, a threshold crime triggering the operation of the statute.

The second crime was attempted rape, under Section 6A(4), a sex crime involving physical force or violence.

Now, there was a conviction on both charges. The

sentence, it is true, was five years. The sentence, of course, was discretionary with thetrial judge. The case was heard non-jury and, on a point that I hope to return to later in argument, the sentence clearly could have been at least 25 years, if the maximum had been imposed and if the sentences had been in the two indictments to run consecutively rather than concurrently.

Q Do you agree with Mr. Prettyman there is nothing in the record to show why the judge insisted on the psychiatric examination?

A There is nothing in the record to demonstrate that, your Honor.

The next thing the judge did was based upon his personal observation of the defendant during the course of this trial. He felt that he had reasonable cause to believe a psychiatric examination was necessary. In fact, he ordered an immediate psychiatric examination by the medical officer, Dr. John Sheehan of the Supreme Bench of Baltimore City.

Now, Dr. Sheehan's report is very interesting because in three respects, it comports exactly with the definition of defective delinquency, and I don't think that this was a knowing or conscious effort on Dr. Sheehan's part, but if you will turn to page 23 of the respondent's brief, Dr. Sheehan's report is set out in full.

Q Page?

A 24, your Honor. Now, Dr. Sheehan found, after examination, that the petitioner had an unstable character structure. Compare Section 5 of the definition of defective delinquency, which talks in terms of emotional imbalance. He also found that there was a "rigidity of defenses" which was a pessimistic sign that further offenses may occur.

Compare the Statute, the definition, which talks in terms of whether the defendant evidences a propensity toward criminal activities.

And, finally, he said that the petitioner-defendant there was certainly a danger to society. Compare again the definition of defective delinquency which requires that the petitioner clearly demonstrate an actual danger to society. Now --

Q Mr. Lord, I'm sorry I can't agree with you that the Doctor did that without any consideration of the requirements for Patuxent, unless I am wrong. Am I correct that he was told to find out whether or not this man was subject to go to Patuxent?

A I don't think that is exactly right, but it is a point that is --

Q Well, it wasn't his right to stand trial. He had already been convicted.

A Correct.

Q So there would be some connection with Patuxent.

A He was asked to be psychiatrically examined and the recommendation of the psychiatrist was that he be transferred, and that is in the report, to Patuxent for evaluation.

Q And he knew what the requirements were?

A Very well.

Q Sure.

A He could very well have and I would certainly think that he would have.

Q Sure.

A But this was in the nature of presentence investigation and the court had perfectly adequate grounds for ordering it.

Now, after personal observation of the defendant, knowledge of his past activities, no criminal record, but some record of criminal involvement under a unique Maryland practice called "probation before verdict" for two charges, assault and robbery and rape, this was all before the court. The psychiatrist's report was before the court and at that point, the court found that he had reasonable cause to believe that the petitioner was a defective delinquent. He then ordered him, and the terms of the order are in the footnote on page 6 of the petitioner's brief, the white brief, he ordered that the petitioner be transferred to the custody of the director of the Patuxent Institution for observation, examination, and

evaluation for the purpose of determining whether or not he is a defective delinquent.

Now, I should say -- because this came up in the Murel argument -- that 98 percent of the referrals to Patuxent are court-initiated immediately after conviction of an offense and so this is not an unusual type of practice at all. The other two percent are initiated by the various other sources Mr. Justice Marshall mentioned in the last argument that the Department of Correction can initiate or suggest to the court that there be a transfer, but, of course, it is always done under court order.

Now, so we have a transfer by court order, unreasonable cause. Now, at Patuxent, there is, of course, evaluation. There are no cases, as I have suggested, not Lynch versus Overholser or Baxtrom or Specht or Humphrey or even, indeed, the District of Columbia Circuit case of Matthews which suggests that there was anything constitutionally improper about method used by the judge here to order the transfer for evaluation, in virtually all cases, a temporary transfer, of the petitioner here, and no shortcomings in the Maryland procedures there, or indication.

Q I don't think that's an issue. That is not an issue.

A It is raised here and it becomes important because if the transfer in the first instance was illegal or

unconstitutional, then other things may flow from that.

Well, I didn't understand that that was contested here, in this litigation.

A I think certain aspects of the petitioner's brief raise it, but I did want to just emphasize --

Q You mean, raise it in procedural due process terms?

A Yes, as to whether --

Q As to insufficient hearing --

A That's right, suggests that a full-dress adversary judicial hearing is necessary before there is even a transfer for evaluation, the court did.

Q Didn't we have that in Murel?

Q Yes. It is in Murel.

A Yes, that is one of the issues in Murel.

Now, there is also reference to the federal statutes, Section 42-41 of Title 18. I suggest, in passing, that the Maryland Statute on this point provides more due process protections than does that federal statute. Bear in mind that if a man has a 25-year sentence under the federal statute, he never has any judicially-supervised transfer or, indeed, a full-dress judicial hearing until the 25th year. He is transferred by, essentially, an administrative act, from a penitentiary to a hospital. There is no hearing and no court action even on the act of signing the court order.

Now, of course, we are not getting, in this case, to

the whole question of the due process surroundings of the subsequent hearing for defective delinquency because, for reasons which I will soon get into, there has not been one here.

Now, once at Patuxent, we now find that a sort of state of suspended animation has taken place with respect to this particular petition. He has been there for five years and eight months. He has never been evaluated. He has never had his defective delinquency hearing. He has never had any treatment because diagnosis has been impossible.

Q If he had been sent back at the end of the first six months with a report that he had refused to cooperate on five or seven occasions or whatever it might have been at that time, do you agree with Mr. Prettyman's analysis that the district judge would have the discretion to send him back for further examination at Patuxent?

A Yes, your Honor. The statute makes the assumption -- I think it just cries out from a fair reading of this statute -- that there would be cooperation. I don't really think the draftsman ever contemplated the kind of situation we are dealing with here and, hence, the requirement that a six-month's period must -- at the end of that there must be a report back to the court, contemplates that there can be diagnosis and a report made. I don't think there is any problem at all about the court extending that time further if

there is any reasonable chance that the result is going to be any different at the end of another fixed period, and that is what troubles me about your Honor's suggestion. There is no reason for the state to believe that if, at the end of six months, the petitioner has accomplished his purposes in not having a diagnosis, that he is suddenly going to have a change of heart in the second six months or the third six months.

Q Well, what about --

Q Well, you have no reason to believe that anything on it one way or the other -- isn't it a little -- isn't that speculating?

A I agree it is speculating, sir.

Q I mean, it gives a judicial audit of the custody every six months.

A That's true, and I agree that to put the state to the requirement of having an immediate hearing at that point would clearly be an unsatisfactory result of the state's standpoint.

Q Would it be speculative to assume what might happen if they didn't ask him how many crimes he committed?

A I'm not sure I understand you.

Q I mean, if the psychiatrist asked some other questions, other than what crimes he had committed?

A Well, bear in mind --

Q He might have agreed.

A Mr. Prettyman pointed out that the whole definition of defective delinquency is geared towards a propensity towards criminal activity. There may be other ways of identifying that other than asking specifically --

Q We might be interested in getting him into Patuxent because we are interested in getting him out.

A Right.

Q What you are talking about is what you need to get him in, but suppose the psychiatrist says, "Look, I want to help you and I'm not interested at all in the other crimes you've committed. We are going to look to the future." He might have cooperated.

A Of course.

Q But he has never had that opportunity.

A As far as the record indicates, no, I don't think there is anything in the record one way or another on what types of questions he has refused to answer. He simply has said, "I am not going to cooperate."

Q So as of now, as long as he refuses to answer incriminating questions, he is there until the end of his life.

A That's right.

Q Is that right?

A Now, let me come right to that point.

Q That's right.

A That is right. He -- on that basis --

Q You mentioned earlier that the judge could have given him 20 years. Well, what he has now been given is life.

A Not necessarily. He, tomorrow, may change his attitude on this same question.

Q It has to be on the state's terms.

A That's true.

Q As to what he says.

A Absolutely right, because the statute requires --

Q He has no Fifth Amendment right at all?

A The state contends he has no Fifth Amendment rights.

Q He lost that when he got convicted, or did he lose that when he went to Patuxent? When did he lose it?

A I wouldn't say that he lost it at all.

Q I thought you said he didn't have it.

A He had a Fifth Amendment right in the criminal proceeding. He does not have a Fifth Amendment right in the proceedings at Patuxent.

Q Mr. Lord, even if you are right that he doesn't have a Fifth Amendment right in his proceedings in the diagnostic stage of Patuxent, it seems to me you have got a much more difficult case to argue here than you argued in Murel because the petitioners in Murel, who were still in a diagnostic case, had not served out their sentences and there

was something to be said -- at least I felt from the argument that they are certainly no worse off in the diagnostic care at Patuxent than they are at some other prison. But if your man has served out his term, it seems to me there is quite a burden on you to justify the keeping of him on there.

A But, Mr. Justice, we have to ask ourselves the question of why has this happened? And it has happened because there has been an inability, because of the petitioner's actions, and I think all parties agree here, because of the petitioner's actions there has been an inability to carry out the statutory requirements.

Now, if you are suggesting to the state that by this lack of cooperation, conscious, planned, continuing lack of cooperation, the whole structure at Patuxent -- not just for the petitioner here, but for every person who is referred for evaluation, that this is an available remedy to frustrate the Patuxent proceeding, I suggest that the state strongly objects to that.

Q Well, your statutory scheme eventually contemplates a judicial hearing on the fact of defective delinquency and so I think it can be argued that a delay in that hearing and adjudication then, so long as the man is still under the sentence, may be justified on a number of grounds, but when you continue to detain him after the expiration of his sentence without any new judicial determination as to why he

he should be so treated. I think you have got a nul process.

A Well, I suggest that there are a number of solutions, I think most of which both have stated this Court would find to be unsatisfactory, which would require -- would break the circle here, I think.

Now, the most obvious one is that at that point in time, when a man's sentence is about to expire, or at that point in time at the end of six months when a report, because of non-cooperation, has been impossible, the petitioner is brought back before the court -- and bear in mind that the order transferring him runs to the institution -- he is put under a specific order directly in court to cooperate with the diagnostic procedures at Patuxent Institution and his failure subsequently to so cooperate would bring about a conviction for contempt of court, probably, direct criminal contempt of court.

Now, there is nothing in the Maryland Statute that would provide it, but the State suggests to this Court that there is nothing in the Constitution of the United States which would prevent it, either.

Q You don't think that might create a Pierce problem at all?

A Well, the problem, of course, is -- I must say, of course, it is a new subject and I don't think that I can point to any particular case.

Q But I just wondered -- don't you think, Mr. Lord, that might present a Pierce problem?

A Well, I don't think so because of the situation here that the statute is written for the protection of the petitioner and for reasons known only to him, he has elected not to allow that statute to operate.

Q May I ask, incidentally, I was surprised to hear Mr. Prettyman tell us that there are offenses other than capital offenses for which you have no statute of limitations at all?

A Well, I think I can clarify that. There is a statute of limitations for all misdemeanors in Maryland of one year. For all non-misdemeanors there is no statute. Well, for all felonies there is no statute of limitations. The business about imprisonment more accurately could be stated as follows, for felonies, as a general rule, the sentence upon conviction is to the Maryland Penitentiary. For all other offenses, they may go to other facilities in the state and so, for those offenses which can lead to incarceration at the Maryland Penitentiary, namely felonies -- all felonies -- there is no statute of limitations.

Q I didn't think that your response in your brief to the Fifth Amendment was quite in order, with all respect, because you said merely that Maryland had never used this evidence to convict a man of another offense, but the federal

standard of the Fifth Amendment has always been, since the days of John Marshall, the possibility of a criminal conviction, as you know.

A I think I can respond to that very quickly. It is covered in a number of pages of the brief and I think it could have been considerably shortened.

Miranda versus Arizona, plus the point of view of the staff at Patuxent, plus the guarntee that I herewith deliver to this Court, will bind the State of Maryland that evidence obtained during the course of psychiatric evaluation for diagnosis at Patuxent will not be used by the State of Maryland in any subsequent criminal proceedings and I think that the lower court's opinion -- Judge Watkin's opinion in the Sas case, which -- the record of which is part of the Murel record and hence part of this record -- also bears that point out. I just don't think it needs any further attention. It hasn't happened in 17 years and the state feels bound, under Miranda, the extension of Miranda, that it could not happen in the future.

Q Mr. Lord, how can you bind the county prosecutor in Maryland? You are with the Attorney General's staff, aren't you?

A That is correct.

Q You can't stop the county attorney from using that evidence.

A Well, it would be the state's attornies and we handle all appeals from convictions by state's attornies.

Q But you couldn't stop them from using it, could you?

A We could refuse to release the records of Patuxent Institution to the prosecutors and will do that. In fact, have done it, as a matter of fact.

Q Perhaps you could do it. I am just worrying about your binding the state's attorney.

A Well, if they can't have -- if they can't get to the records, they can't use the records.

Q Mr. Lord, why doesn't the possibility of civil commitment at the end of the sentence time adequately protect the state in every way?

A Because -- you mean, under Article 59 of the Maryland Code which provides for voluntary commitment to treatment --

Q Yes.

A Private mental and public mental institutions? The point -- the state's right here, the right is really the right asserted in Murel, the right to treat people who demonstrate criminal antisocial behavior, to be treated in a particular facility that has demonstrated an ability to solve this problem. I don't think it is any answer to the state to suggest that because of the whimsey of a trial judge he may

have sentenced a man to two years; another trial judge may have sentenced him to 15 or 20. But something magic happens at the end of that sentence and he suddenly becomes a free man because he has managed to fend off the operation of a valid state interest for the term of his sentence. I don't think it is any answer to say, well, then we can meet him at the gate of the Patuxent Institution and whisk him off to a state mental institution.

Q Does the state have the right to treat him indefinitely without any judicial determination that he ought to be treated?

A Well, of course, Mr. Justice Rehnquist, I am troubled by that very point and we are groping for an answer to that very question. The statute does not provide it. I don't think any of us would say that there is any case that provides a clear answer.

The state is perfectly prepared to have a proper hearing if also attendant to it is the right which the state feels it has to inquire into the mental state of this individual. The state has no interest in keeping a man indefinitely and not treating him. That is not the purpose of the institution at all.

Q No, but Counsel says that within the time of his sentence if you haven't made a determination, you have got to fish or cut bait, in effect. That doesn't seem unreasonable to me.

A Well, if this Court holds that, in this case, the petitioner is entitled to the right to be returned to court and the state, by a court proceeding, is given the right to examine this petitioner, and that this must be done, at the very latest, at the expiration of his sentence, that would be entirely a satisfactory result. What would not be satisfactory is simply to say, you must have the hearing and not give the state the tools to come up with the data at the hearing where it bears the burden of proving, by preponderance of the evidence, that this man is a defective delinquent.

Q Mr. Lord, as a practical consideration, what you are saying then is that he has just got to talk. That is really what you are saying then, isn't it?

A Absolutely.

Q Unless the state -- unless the court can say somewhere that you can compel him to talk and you feel that you are entitled to keep him there just as --

Q You mean you --

Q -- hearing or not?

A Yes. Now, the point is that the statute requires evaluation by a medical doctor, a psychiatrist, and a psychologist and I think that the record is clear -- whether you go to the affidavits in question or not -- the record -- my record in this case is absolutely clear that a personal interview and cooperation is necessary -- not necessarily trust,

but cooperation interaction so that you --

Q Well, answer questions.

A Right.

Q That's what we were talking about.

A Right. Exactly right.

Now, the state believes, and it is stated repeatedly and psychiatrists and psychologists of the institution believe that this kind of diagnosis simply cannot be made unless there is this cooperation.

Q Has there been any parallel experience of total commitments with people who were complained against refusing to submit to examination and interviews?

A Not to my knowledge and, nor, under the federal statute, to my knowledge, there has been no complaint. Now, the petitioner argues that the federal statute provides, mandates a hearing at the end of the man's sentence to require him to be kept beyond his sentence, and there it must be proven that there is some doubt as to whether he will be a threat to the state or to the federal government.

Q You say that the Fifth Amendment -- hold that Fifth Amendment rights McNeil has will be adequately satisfied and as long as they are, he can be made to talk?

A That's right. Now --

Q And if he won't talk, if he steadfastly refuses to talk, it is a civil contempt.

A That's right.

Q You want us to tell this man -- this Court to tell this man, "Give up your Fifth Amendment rights."

A I do not.

Q Well, isn't that what you just said?

A No.

Q You said that he has to answer these questions.

A That's true. And I said earlier in argument that there is no Fifth Amendment privilege for him not to answer those questions. Now, the --

Q And you want us to tell him that?

A That is correct.

Q Couldn't Maryland solve this problem with a statute like the District of Columbia Code? I don't think it is in the Federal Statute, as to the effect that nothing disclosed in the psychiatric examination may be used anywhere. Wouldn't that solve the problem?

A It would, but, your Honor, I don't think we have to wait for the Maryland Legislature to decide whether --

Q Well, no, you can't control the Legislature, but that would solve the problem?

A That would solve it, but I don't think that we have to go that far in order to solve it.

Q You say you got that rule.

A We say we have it. Now --

Q And you made that commitment to this Court.

A That's right. That's right.

Q And the Fifth Amendment would prevent the use of your leads anyway.

A That's correct.

Q But that still isn't going to guarantee your cooperation from everyone in this group for diagnosis.

A That certainly is not. Now, we are stripping away the reasons for non-cooperation.

Now, the other reasons for non-cooperation, I think, the only fair reason -- fairly debatable, arguable reason -- is that there may be a possibility of further commitment. This may give grounds to the psychiatrist for conclusion that the man's a defective delinquent and may also extend the time that he spends at Patuxent if at the hearing he is found to be a defective delinquent.

But these are not criminal ramifications. They involve some loss of liberty, surely, in that he may be kept beyond his sentence. But the state has a right to know the condition of this man's mind before he is released to society. A good example is right in the petitioner's brief. There is an example given by Dr. Guttmacher of a man who, upon cooperation with a psychiatrist had -- he'd been in for two convictions of perverted practices. He admitted to a psychiatrist that he had engaged in this act with young boys on 200 or more

occasions. Now, the state is not going to turn around and prosecute him for those 200 violations. But the state has a right to know that fact. And the state has a right to take that into consideration when deciding whether, in fact, he should be diagnosed as a defective delinquent and, in fact, he should be kept until some treatment has relieved him of this obsession which leads him to do this kind of thing. He is a danger to society at that point in time.

Now, aside from the suggestion of the Chief Justice that there be periodic review by a court, and my suggestion of the contempt, there are other alternatives, but I want to suggest to this Court that they are simply not satisfactory.

We can be put to the test of coming up with a diagnosis that is purely speculative, a blind -- so-called "blind diagnosis." That helps no one. It probably violates the vagueness rules of this Court with respect to standards or application of standards. If you can encourage trial courts, if something magic happens at the expiration of a five-year sentence, trial courts, simply to avoid the operation of this, will pose maximum sentences or longer sentences.

Q Well, don't you see at least a prophylactic value in requiring a judicial inquiry every six months under this statute? Which the statute seems to contemplate.

A Your Honor, I would go farther than that. I

would say that at the end of six months, the state should have a right to have the petitioner return to the court and advise that he had not cooperated during the six-month period and he must cooperate.

Q Under the statute, that could have been done every six months for the past six years, couldn't it?

A I think it could have, but if you know that the staff is operating, once again, in a grey area here, and I think they probably were very reluctant to go ahead and take definitive action with respect to a particular person until they had a properly framed case. We now have it and I think another ramification could be that we just repeal Article 31B and pass what this Court has upheld many times, an habitual criminal statute, automatic, knee-jerk reaction, third conviction, he gets the maximum.

Q Of course, this person --

A Fourth conviction he gets life.

Q -- this person wouldn't have been subject to any recidivous statute. This was his first offense.

A That's true. He was a young man.

Q Your point is that that would require you to sit back and wait for him to commit three or four crimes.

A That's right. That's right and it would not guarantee any treatment to the man. He would be subjected, upon multiple offenses, to life imprisonment without benefit

of parole, an ending that is no answer.

Q But how do any of those horrors come to fit this case which only asks that this man be given a one single court hearing?

A Your Honor, I think it really does not. In this case to say that if you planned to give --

Q Do you think that if you give this man a court hearing that all of the judges will give him maximum sentences after that? Do you?

A No. If we have a court hearing --

Q Of course you don't. Why don't you answer the one demand?

A All right. I have said that the state would be delighted, tomorrow, to provide a hearing to this petitioner if it could be given the tools to make the evaluation necessary under the statute.

Q Well, all the man is asking for is a hearing. Any kind of hearing.

A That's correct.

Q And you say you are not going to give him any kind of hearing except that he says he committed a crime.

Q Well, I thought Mr. Prettyman was asking that he be released tomorrow.

A That's true.

Q If he didn't get a hearing.

Q No, released.

Q No, without a hearing. Mr. Prettyman's point is that he now, having served the full five years, must be released forthwith, hearing or no hearing.

A That is correct, your Honor.

Q And without regard to his safety to society or anything else. That had to be Mr. Prettyman's position.

A That is his position and the state simply cannot accept it. I didn't get a chance to mention that there is excellent language in the Lipscomb case from California and in Judge Sobeloff's separate opinion in the Tippett case on the very subject of the state's right to inquire into this man's mind.

Q Lipscomb and Tippett.

A And finally, I am struck by a point from Mr. Justice Brandeis in the new state Ice versus Liebman case, in which he said, "It is one of the happy incidents of the federal system that a single courageous state can engage in innovative and humanitarian experimentation in the social and economic field. The State of Maryland is out front here."

And I think, I submit, that one pf the reasons that we have been before this Court twice in the last month is simply that, and I think we are in an area where new ground has to be broken for the benefit of everyone. Thank you.

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

Q Just before you sit down, is the Lipscomb case in your brief? I found the Tippett case.

A Yes, it is, your Honor. It is People versus Lipscomb.

Q People, all right -- against Lipscomb?

Q Lipscomb, it's here.

Q All right, thank you. Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Prettyman.

REBUTTAL ARGUMENT OF E. BARRETT PRETTYMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PRETTYMAN: May it please the Court:

In view of the concessions made by the state, let me just make one last point in regard to the remedy. The reason I indicated that I think the man ought to be ordered immediately released as opposed to just having a hearing at this point is this. In view of the fact that the state has said in their brief that they cannot find him to be a defective delinquent based on this record; in view of the fact that I as his attorney am not about to tell him that he should incriminate himself based on the state's assurance to this Court that they don't plan to convict him on the basis of what he is going to say, a hearing would be a wasted gesture. He has now served his full criminal term.

I could read you from cases where things that these fellows have said in the course of these interviews have then

been used in court to keep them in Patuxent indefinitely and, moreover, we have no idea how, in view of the fact that what he says goes right into his file, which is open to the prosecutor, the information that he gives couldn't be used as a link in the chain to prosecute him later. There are all kinds of holes in this.

Q Well, I take it you say that this information, since it would be used in connection with deciding whether he is a defective delinquent, which might result in extending his term, is itself incriminating?

A I say three things:

While his original sentence was still open, they could use it to reconvict him. That is no longer true here, but that is in other cases.

Number two, they could convict him now and at any time for anything that he confessed to in the course of this interrogation in which they would get evidence of in his file.

And number three, without any question, they would use it to keep him in Patuxent indefinitely because, just to read you a -- Daniel's case, very brief, this is a man convicted of housebreaking and larceny and when they tried to keep him in, they gave evidence of the sexual behavior of the inmate as a youth and the court said that was all right to use that as evidence to keep him indefinitely in Patuxent, without any relationship to his original crime.

Of course they are going to use it, and that is why I would never tell this man to talk and why, therefore, I think a hearing at this stage is a waste of gesture and why he is entitled to immediate release. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Prettyman, you acted at the Court's request and by the Court's appointment to this difficult problem. Thank you for your assistance to your client and your assistance to the Court.

MR. PRETTYMAN: Thank you.

MR. CHIEF JUSTICE BURGER: And thank you, Mr. Lord. The case is submitted.

(Whereupon, at 12:40 o'clock p.m., the case was submitted.)